NEW JERSEY DEVELOPMENTS

THE RUTGERS CASES AND THE STATE OF THE LAW OF STATE LAW SCHOOL CLINICAL PROGRAMS

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"[N]ot even the University, let alone any government agency, controls the manner in which clinical professors and their students practice law."

- Chief Justice Stuart Rabner, Supreme Court of New Jersey Sussex Commons Assocs., LLC v. Rutgers, 46 A.3d 537, 546 (N.J. 2012).

I. INTRODUCTION

In 1655, Louis XIV was reputed to have imperiously declared "L'État c'est moi" ("I am the state").[1] In a contemporary series of legal cases, the Rutgers School of Law—Newark clinical program's faculty and students have been declaring to the contrary—that we are not the "state" or a typical state actor, at

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1. THE OXFORD DICTIONARY OF QUOTATIONS 475 (Elizabeth Knowles ed., 5th ed. 1999).

least when representing private citizens or groups. The distinction is an important one because there are situations where the attribution of state status to clinical functions would interfere with and hinder the clinic's representation of clients or accomplishment of core educational goals.

This series of contemporary cases culminated in the New Jersey Supreme Court's opinion last summer in *Sussex Commons Associates, v. Rutgers.*[2] In that case, the court reversed a decision of the Appellate Division and ruled that Rutgers legal clinics' case files and related materials are not public records subject to disclosure under the New Jersey Open Public Record Act ("OPRA") or the common law right to know. The court's holding had particular impact with respect to clinical case file materials not otherwise protected under the narrow and disputed boundaries of attorney-client privilege or perhaps as attorney work product in statutory exemptions to OPRA.[3] The court's reasoning highlighted a number of factors, such as the failure to further OPRA's government transparency objectives through disclosure of materials related to private clients' cases,[4] the absence of a state or public function associated with or state control over Rutgers law school clinical lawyering,[5] and the disadvantageous educational consequences of subjecting Rutgers clinical case materials to OPRA.[6] The court also reinforced a guiding interpretive principle that "State involvement in [higher] education should never be a disadvantage."[7]

Law school clinical programs, such as those at public universities like Rutgers, have provided valuable hands-on experiential education and service-learning opportunities for thousands of students and legal services for thousands of clients for many years.[8] Much has been written about the legal and ethical

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2. 46 A.3d 536 (N.J. 2012).

3. *See infra* note 96 (describing the express exemption from OPRA for documents protected by the attorney-client privilege and arguments for an OPRA exemption for work product documents based on OPRA's "catch-all" privilege provision); *see also infra* note 122 (describing the broader range of client documents that are protected by client confidentiality ethical rules pursuant to N.J. Rules of Professional Conduct 1.6(a) but not privileged and thus potentially disclosable under OPRA and the exception to the duty of confidentiality in order "to comply with other law" in N.J. Rules of Professional Conduct 1.6(d)(4)).

4. *See infra* text accompanying note 140.

5. *See infra* text accompanying note 140.

6. *See infra* text accompanying notes 141-50.

7. *Sussex Commons*, 46 A.3d at 543 (quoting *In re* Exec. Comm'n on Ethical Standards Re: Appearance of Rutgers Attorneys, 561 A.2d 542, 546 (N.J. 1989)).

8. *See generally* "YOU CAN TELL IT TO THE JUDGE" AND OTHER TRUE TALES OF LAW SCHOOL LAWYERING (Frank Askin ed., 2009) (detailing work of Rutgers—Newark law school clinical programs over four decades); *see also* Douglas A. Blaze, *Déjà Vu All Over Again: Reflections on Fifty Years of Clinical Education*, 64 TENN. L. REV. 939 (1997) (describing clinical programs at the University of Tennessee over five decades). The Center for the Study of Applied Legal Education ("CSALE") has recently surveyed and quantified the amount of legal services provided by law school clinical legal education programs as follows:

> [267] clinics reported a total of 789,361 estimated hours of *civil* legal services provided by the students in the clinic during the 2009-10 academic year, or about 2,956 hours per clinic. Extrapolating to all law clinics at all ABA-accredited law

restrictions under which law school clinical programs operate,[9] and potential First Amendment and other constitutional challenges to governmental content or viewpoint-based restrictions on clinical case selection.[10] Considerably less attention has been focused on the range of additional and unique legal restrictions confronting law school clinical programs at public universities based on their state affiliation and the manner in which the courts construct the legal status of state university law clinics.[11] When the clinical law office is arguably "the state," it sometimes must confront a range of legal restrictions and obligations applicable to state actors, which private law school clinics and other private nonprofit or for-profit counsel fully elude.[12] Although public universities are properly construed as "the state" for many legal purposes, they are not "the state" for all purposes. More specifically, with respect to state university law school clinical programs, a body of jurisprudence is emerging to help distinguish when a state university law clinic should more properly be treated

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> schools, the estimated total amount of free *civil* legal services delivered by the students in law clinics during the 2009-10 academic year is over 1.38 million hours.

DAVID A. SANTACROCE & ROBERT R. KUEHN, CTR. FOR THE STUDY OF APPLIED LEGAL EDUC., THE 2010-11 SURVEY OF APPLIED LEGAL EDUCATION 20 (2011), *available at* http://www.csale.org/files/CSALE.Report.on.2010-11.Survey.5.16.12.Revised.pdf.

9. *See, e.g.*, Peter A. Joy, *The Law School Clinic as a Model Ethical Law Office*, 30 WM. MITCHELL L. Rev. 35 (2003); James E. Moliterno, *In-House Live-Client Clinical Programs: Some Ethical Issues*, 67 FORDHAM L. REV. 2377 (1999); George Critchlow, *Professional Responsibility, Student Practice, and the Clinical Teacher's Duty to Intervene*, 26 GONZ. L. REV. 415 (1991).

10. *See* Jonathan L. Entin, *Law School Clinics and the First Amendment*, 61 CASE W. RES. L. REV. 1153 (2011); Peter A. Joy, *Government Interference with Law School Clinics and Access to Justice: When Is There a Legal Remedy?*, 61 CASE W. RES. L. REV. 1087 (2011); Adam Babich, *Can Preemption Protect Public Participation?*, 61 CASE W. RES. L. REV. 1109, 1110 (2011) (suggesting state governmental restrictions on clinical environmental lawyering violates the Supremacy Clause and preemption doctrine by undermining federal environmental law's promotion of public participation); Jason A. Kempf, Note, *Viewpoint Discrimination in Law School Clinics: Teaching Students When and How to "Just Say No",* 72 MO. L. REV. 247, 250-63 (2007) (analyzing potential First Amendments restrictions on state university law clinics in denying representation to clients based principally upon the client's viewpoint after *Wishnatsky v. Rovner*, 433 F.3d 608 (8th Cir. 2006)).

11. Professors Peter Joy and Robert Kuehn are currently writing an article that includes discussion of *Sussex Commons* and political interference with state university law school clinical programs. Professors Joy and Kuehn have written extensively about political interference with clinical programs at public and private universities alike. *See, e.g.*, Joy, *supra* note 10; Robert R. Kuehn & Peter A. Joy, *An Ethics Critique of Interference in Law School Clinics*, 71 FORDHAM L. REV. 1971 (2003); Peter A. Joy, *Political Interference with Clinical Legal Education: Denying Access to Justice*, 74 TUL. L. REV. 235 (1999) [hereinafter Joy, *Denying Access to Justice*]; Robert R. Kuehn & Bridget M. McCormack, *Lessons from Forty Years of Interference in Law School Clinics*, 24 GEO. J. LEGAL ETHICS 59, 59 (2011) (analyzing the effects of interference with legal clinics and providing reasons why this interference should stop); Peter A. Joy & Charles D. Weisselberg, *Access to Justice, Academic Freedom, and Political Interference: A Clinical Program Under Siege*, 4 CLINICAL L. REV. 531 (1998) (examining various instances of political interference with Law School clinics).

12. Joy, *supra* note 10, at 1093-94.

like a private law office representing private clients than as a typical arm of the state with respect to laws generally applicable to state or public agencies.

Perhaps no law school's clinical program has experienced more judicial constructions of its status and interpretations of the legal significance of its state affiliation than that at Rutgers School of Law—Newark. This is likely attributable to the clinics' origins, founded to serve experiential education, law reform, and community service objectives after African American student protests demanding clinical educational experiences in the aftermath of the Newark civil disturbances of the 1960s.[13] These efforts were spurred on by Rutgers—Newark law faculty engaged in some of the greatest civil rights and public interest struggles of the day, such as Arthur Kinoy, Ruth Bader Ginsburg, and Frank Askin.[14] An extensive program committed to engaging students in far-reaching and novel issues of human rights and community need would certainly be more likely than most to confront challenges to its status and limits based on its state affiliation over time.[15]

This Article situates this past summer's *Sussex Commons* decision in a line of other New Jersey Supreme Court and other judicial decisions interpreting the significance of Rutgers and other public universities' status in evaluating whether a clinical program should be subject to a restriction or burden on the practice of law applicable to more typical state entities. This includes cases on access to attorney's fees against the state and its subdivisions pursuant to fee-shifting statutes, potential conflicts of interest in appearing before state administrative tribunals or against the interests of the state, allegations of improper donation or loans of state funding or resources through clinical pro bono representation of nonprofit organizations, and the most recent controversy over the applicability of open public records statutory and common law to clinical case files. This Article will conclude by drawing common threads from this line of Rutgers-generated jurisprudence and offering a

13. *See generally The Rutgers Report: The White Law School and the Black Liberation Struggle*, *in* LAW AGAINST THE PEOPLE 232, 244-50 (Robert Lefcourt ed., 1971) (discussing these developments and the Association of Black Law Students' organized protest seeking an extensive clinical program in this period in Rutgers School of Law—Newark's history).

14. *See, e.g.*, Arthur Kinoy, *The Present Crisis in American Legal Education*, 24 RUTGERS L. REV. 1, 1-3 (1970) (advocating for clinical legal education programs and underscoring their educational and social importance); *see also* Frank Askin, *A Law School Where Students Don't Just Learn the Law: They Help Make the Law*, 51 RUTGERS L. REV. 855 (1999) (describing the law reform focus of some of the Rutgers—Newark law clinics from their inception in 1968 and later years and some of the groundbreaking civil rights litigation initiated by Arthur Kinoy and Frank Askin in which Rutgers students participated); Ruth Bader Ginsburg, Remarks at the Rededication Ceremony, University of Illinois College of Law (Sept. 8, 1994), *in* U. ILL. L. REV. 11, 14 (1995) (describing how Justice Ginsburg, then a professor, initiated a Women and the Law course at Rutgers—Newark in 1970, which helped "arm" her landmark U.S. Supreme Court gender discrimination litigation which followed).

15. *See generally* Adam Babich, *Controversy, Conflicts, and Law School Clinics*, 17 CLINICAL L. REV. 469, 469-71 (2011) (noting "inherent" risk of challenges to or retaliation against law school clinical programs based on a clinic's "decision to help clients express views that influential members of society may find controversial").

framework for discerning when public law school clinical programs should be treated less like typical state actors and more like private law offices in future issues. At a minimum, based on this framework and on analogies to the status of state public defenders, public law school clinical personnel should never be deemed state agents or actors when lawyering for private clients.

II. PUBLIC UNIVERSITIES AND LEGAL STATUS AS "THE STATE"

The U.S. Supreme Court has declared that a "state university without question is a state actor."[16] However, courts have not uniformly treated all public universities as the state or as a typical state actor for all purposes. For example, based on a noncategorical, case-by-case evaluation of factors such as the degree of state funding, state control, and state constitutional involvement in a public university's charter or origins, many public universities have been deemed the state for the purposes of the Eleventh Amendment immunity from suit in federal courts, but some have not.[17]

Rutgers provides a lucid example of the varying judicial construction of a public university as a state entity. Courts have construed Rutgers as the state for purposes of immunity from local land use regulations,[18] venue,[19] liability under the state Tort Claims Act,[20] and payment in lieu of property taxes applicable to state land as applied to Rutgers-owned land.[21] However, other courts have found that Rutgers did not sufficiently qualify as the state so as to claim Eleventh Amendment immunity from suit in federal court,[22] or to serve as a

16. Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 192 (1988).

17. *See* Frank H. Julian, *The Promise and Perils of Eleventh Amendment Immunity in Suits Against Public Colleges and Universities*, 36 S. TEX. L. REV. 85, 103 (1995) (noting that, while a majority of courts have found that various state universities are entitled to Eleventh Amendment immunity as arms of the state, "federal courts in five states — New Jersey, Delaware, Pennsylvania, Virginia, and Missouri — have conducted [multifactor] analyses . . . and have concluded that certain universities are not arms, agents, or instrumentalities of the state . . . Rutgers University has been exposed to this type of scrutiny three times, and the outcome has changed over time"); Kelly Knivila, Note, *Public Universities and the Eleventh Amendment*, 78 GEO. L.J. 1723, 1733-42 (1990) (collecting cases and noting judicial reliance on the status of the institution under state law and on multifactor tests that include degree of independence from state authority and financing, and performance of state functions in ascertaining a university's state status for the purposes of receiving immunity from suit under the Eleventh Amendment); *see also* Joseph Beckham, *The Eleventh Amendment Revisited: Implications of Recent Supreme Court Interpretations on the Immunity of Public Colleges and Universities*, 27 STETSON L. REV. 141, 147-48 (1997) (analyzing the impact of more recent Supreme Court Eleventh Amendment decisions on relevant issues, including the application of a multifactor test to determine if a public university is an arm of the state and, thus, entitled to immunity, and then the assessment of whether the state has waived immunity or whether Congress has lawfully abrogated the state's collective Eleventh Amendment immunity).

18. Rutgers v. Piluso, 286 A.2d 697, 705 (N.J. 1972).

19. Fine v. Rutgers, 750 A.2d 68, 72 (N.J. 2000).

20. *Id.* at 70.

21. Rutgers v. Piscataway Twp., 1 N.J. Tax 164, 169-71 (N.J. Tax Ct. 1980).

22. Kovats v. Rutgers, 822 F.2d 1303, 1312 (3d Cir. 1987). In *Kovats*, the Third Circuit found that Rutgers University was still a state actor and therefore subject to suit under 42 U.S.C. § 1983

state or public agency under the federal Privacy Act[23] or New Jersey Contractual Liability Act.[24] In many of these cases, the courts recited Rutgers's history and its hybrid nature as a state institution with a significant degree of independence and some of the characteristics of a private university, as justifying a careful contextual analysis before reaching an ultimate conclusion.[25]

III. THE RUTGERS CLINIC CASES AND STATE STATUS

Even when a state university is properly deemed an arm of the state for many purposes, the question of whether a state university law school clinical program representing private clients should be legally constructed in the same manner as other more typical state-controlled entities compels further

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(2006), which provides that every person who, under color of any statute, ordinance, regulation, custom, or usage of any State subjects, or causes to be subjected, any person to the deprivation of any federally protected rights, privileges, or immunities shall be civilly liable to the injured party. *See id.* at 1312 n.10. Rutgers School of Law—Newark has been subject to civil rights suit multiple times for alleged constitutional violations without extended discussion of its state status. *See, e.g.*, Doherty v. Rutgers School of Law—Newark, 651 F.2d 893, 902 (3d Cir. 1981) (dismissing a reverse discrimination suit under the Fourteenth Amendment Equal Protection Clause and civil rights statutes by an applicant challenging the law school's minority student admissions program for lack of standing because he did not possess sufficient qualifications to have been admitted to the school); Avins v. Rutgers, 385 F.2d 151, 153-54 (3d Cir. 1967) (holding that the *Rutgers Law Review*'s rejection of an article based on the review's alleged "liberal ideology" did not violate the author's First Amendment rights because broad editorial discretion is a necessary component of publishing a journal). The Rutgers law clinics are arguably not acting under color of law and thus not state actors subject to suit under the Constitution or § 1983 for work in the course of representing private clients because in that capacity, clinical faculty and students must exercise professional judgment completely independent from, and sometimes, both predictably and unpredictably, in opposition to the state. As the U.S. Supreme Court has explained in construing the analogous status of state public defenders for the purpose of suit under the Constitution and § 1983:

> "[A] public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." . . . [A] public defender differs from the typical government employee and state actor. While performing his duties, the public defender retains all of the essential attributes of a private attorney, including, most importantly, his "professional independence," which the State is constitutionally obliged to respect. A criminal lawyer's professional and ethical obligations require him to act in a role independent of and in opposition to the State. . . . [A]ccordingly . . . when representing an indigent defendant in a state criminal proceeding, the public defender does not act under color of state law for purposes of § 1983 because he "is not acting on behalf of the State; he is the State's adversary."

West v. Atkins, 487 U.S. 42, 50 (1988) (citations omitted) (quoting Polk Cnty. v. Dodson, 454 U.S. 312, 318-25 (1981)).

23. Krebs v. Rutgers, 797 F. Supp. 1246, 1252-56 (D.N.J. 1992).

24. Frank Briscoe Co. v. Rutgers, 327 A.2d 687, 693-94 (N.J. Super. Ct. Law Div. 1974).

25. *See supra* notes 18-24. *See generally* Trs. of Rutgers Coll. in N.J. v. Richman, 125 A.2d 10, 13-22 (N.J. Super. Ct. Ch. Div. 1956) (detailing Rutgers' history from its founding in 1766 by King George III of Great Britain as "Queens College" to its renaming as "Rutgers College in New Jersey" after American revolutionary colonel and generous benefactor, Henry Rutgers, in 1825, to its reorganization as Rutgers, the State University of New Jersey in 1956). *See also* PAUL TRACTENBERG, A CENTENNIAL HISTORY OF RUTGERS LAW SCHOOL IN NEWARK: OPENING A THOUSAND DOORS (2010) (detailing the history of Rutgers Law School).

contextual analysis and examination.

A. The Attorney's Fees Cases

In the early 1980s, courts had to determine whether Rutgers clinics could seek and recover attorney's fees under federal fee-shifting attorney fee statutes for successful representation in actions against New Jersey and other government entities. In *Right to Choose v. Byrne*[26] —a successful challenge to the application of state conforming amendments to the federal Hyde Amendment prohibiting New Jersey from supplying state Medicaid funding for medically necessary abortions for low-income women—the New Jersey Superior Court Chancery Division awarded fees to the Rutgers clinics.[27] In its opposition to a fee award to the Rutgers Women's Rights Litigation Clinic and Urban Legal Clinic, the state asserted, among other arguments, that attorney's fees should not be available to a state university clinical program because this would merely shift a state appropriation from one state department to another without the appropriate constitutional authorization.[28]

After rejecting claims that publicly funded or other pro bonononprofit legal service providers could not receive attorney's fees under the federal Civil Rights Attorney's Fees Act,[29] the court proceeded to the narrower question of whether a state clinical program could recover fees against the state.[30] It stated:

> Under New Jersey constitutional law a court lacks authority to order a state appropriation. That constitutional limitation is subject to the Supremacy Clause of the Federal Constitution, Art. VI. The Civil Rights Attorney's Fees Awards Act of 1976 is controlling and vests authority in this court to award an attorney's fee against the State in favor of Essex-Newark Legal Services.
>
> Rutgers Law School and its Wom[e]n's Rights Litigation Clinic are subdivisions of the State, not separate entities as are legal services corporations. Law school expenditures are pursuant to and limited by legislative appropriations in accordance with the State Constitution, Art. VIII, § II, par. 2. The law school in turn allocates funds to the clinic.
>
> The State argues that any attorney's fee award to Rutgers Law School or the Wom[e]n's Rights Litigation Clinic would be drawn from and reduce to that extent the appropriation determined by the Legislature and approved by the Governor for the Department of Human Services, which administers Medicaid, presumptively defeating in whole or in part a purpose sanctioned by two branches of Government.
>
> The broad legislative intent of § 1988 is to promote enforcement of civil rights. Upon an attorney's fee award to the Wom[e]n's Rights Litigation Clinic, the clinic would have an incentive to pursue further civil rights

26. 413 A.2d 366 (N.J. Super. Ct. Ch. Div. 1980), *rev'd on other grounds*, 450 A.2d 925 (N.J. 1982).

27. *Id.* at 370.

28. *Id.* at 369.

29. 42 U.S.C. § 1988 (2006).

30. *Right to Choose*, 413 A.2d at 369-70.

> enforcement litigation. The constitutional considerations are parallel to those bearing on the eligibility of Essex-Newark Legal Services for an attorney's fee award. A subdivision of the State has represented litigants against the State in civil rights litigation. The State is not shielded from an attorney's fee award against it because of the circumstance that one subdivision of the State would benefit at the expense of another subdivision or of the general treasury. The Civil Rights Attorneys' Fees Awards Act of 1976 is paramount over conflicting state constitutional limitations under the Supremacy Clause.
>
> A determination is reached that the Wom[e]n's Rights Litigation Clinic is eligible for an attorney's fee award against the State under § 1988.[31]

Thus, even though the court found that the Rutgers clinic was a state actor and even "a subdivision of the State," this status did not preclude an award of fees against another component of the state.[32] A few years later, the New Jersey Appellate Division essentially reaffirmed this holding in *Brown v. City of Newark*, a Rutgers Urban Legal Clinic case successfully challenging various Newark municipal restrictions on peddling as unconstitutionally overbroad and vague.[33] In *Brown*, the court found "no impediment to the award of an attorney's fee under 42 U.S.C.A. § 1988 to [the] Rutgers Urban Legal Clinic, an arm of the State."[34]

Courts in other states have similarly held that state university law clinics can recover attorney's fees against the state or other governmental subdivisions. In *Loney v. Scurr*, a federal district court granted an award of civil rights attorney's fees in a case handled by the University of Iowa College of Law's Prisoner Assistance Clinic.[35] While also rejecting the more general argument that fee eligibility should be unavailable for publicly supported or pro bono legal entities,[36] the court dismissed a more specific contention based on the Iowa clinic's state status, that such a fee award would run afoul of a state law that prohibited state employees from receiving compensation in any case or proceeding against the interest of the State of Iowa.[37] Because the fee award would be placed into a special fund to support clinical work at the law school and would not be awarded to the clinical professor herself, the court found that the state law was inapposite.[38] In *NAACP, Frederick County v. Thompson*[39]—a successful racial discrimination civil rights action against the county—a federal district court rejected arguments that an award of fees to the University of

31. *Id*. at 369-70 (citations omitted).

32. *Id*. at 369.

33. 493 A.2d 1255, 1259 (N.J. Super. Ct. App. Div. 1985), *aff'd in part and rev'd in part on other grounds*, 552 A.2d 125 (N.J. 1989).

34. *Id*. at 1260.

35. 494 F. Supp. 928, 930-31 (S.D. Iowa 1980).

36. *Id*. at 929-31.

37. *Id*. at 930 & n.4 (citing IOWA CODE § 68B.6 (1979)); *see infra* note 82 and accompanying text (providing the language of IOWA CODE § 68B.6).

38. *Id*. at 930 & n.5.

39. 671 F. Supp. 1051 (D. Md. 1987).

Maryland law clinics should be reduced because the clinic was "supported at least in part by taxpayers."[40] The court treated the contention as the same as broader objections to fee eligibility for publicly supported nonprofit, pro bono legal service providers, which have been uniformly rejected by the courts.[41]

Due to their broader holdings that state university law school clinical programs could pursue and recover fees if the purposes of the fee statutes were otherwise satisfied, the courts in the above cases were not required to directly address the more vexing question of whether a state university clinic should truly be deemed a typical state actor in this context, or whether an exemption from a generally applicable law restricting state entities from some intended action or benefit was appropriate.[42] A few years later the New Jersey courts took up such a question.

B. The Conflict of Interest Case—Appearance of Rutgers Attorneys

In *In re Executive Commission on Ethical Standards re: Appearance of*

40. *Id.* at 1054.

41. *Id.*; *see also* Washington v. Seattle School Dist. No.1, 458 U.S. 457, 487 n.31 (1982) ("[T]he Courts of Appeals have held with substantial unanimity that publicly funded legal services organizations may be awarded fees."); N.Y. Gaslight Club, Inc. v. Carey, 447 U.S. 54, 70-71 n.9 (1980) ("We also reject petitioners' argument . . . that respondent's representation by a public interest group is a 'special circumstance' that should result in denial of counsel fees. Federal Courts of Appeals' decisions are to the contrary. Congress endorsed such decisions allowing fees to public interest groups when it was considering, and passed, the Civil Rights Attorney's Fees Awards Act . . . ." (citation omitted)); *cf.* Blum v. Stenson, 465 U.S. 886, 894-96 (1984) (holding that courts should use prevailing market rates in awarding attorney's fees to nonprofit legal services organizations).

42. The courts have placed some restrictions on the award of attorney's fees to states in *parens patriae* actions by state attorneys general, such as relaxing the presumption in favor of eligibility and requiring consideration of several additional factors before approving such awards. *See, e.g.*, New York v. 11 Cornwell Co., 718 F.2d 22, 24-25 (2d Cir. 1983) (en banc). State law school clinical programs representing private parties, as opposed to representing the state's own interests, have not and should not be subject to such restrictions, as fee recoveries in such cases provide resources and incentives for advancing justice in future similar cases, thereby furthering a primary purpose of the fee-shifting legislation. *See, e.g.*, *NAACP, Frederick Cnty.*, 671 F. Supp. at 1054 (rejecting proposed limitations on a state law clinic's fee eligibility based on state status and factors such as the defendant's ability to pay); *cf.* Alexander H. Schmidt, *The Second Circuit Permits States to Recover Attorney's Fees When Prevailing As Plaintiffs in Civil Rights Actions:* New York v. 11 Cornwell Co., 50 BROOK. L. REV. 685, 714-20 (1984) (reviewing the Second Circuit's suggested restrictions and factors in *11 Cornwell* and proposing that the only restriction on awards of attorney's fees to state entities in civil rights litigation should be demonstration that the fees will not simply be absorbed into the general state treasury but will be used to advance and satisfy the public interest purposes of the civil rights fee-shifting statutes). Since the Supreme Court's recent holding in *Astrue v. Ratliff*, 130 S. Ct. 2521, 2524 (2010), that fee awards accrue to plaintiffs and not their counsel, many of these arguments about the potential impropriety of state clinical programs serving as the direct recipients of these fee awards are no longer apposite. Despite *Ratliff*, clinical programs may still recover such awards but, as with all counsel, they must now execute assignments of the fee awards with their clients. *See* Chonko v. Comm'r of Soc. Sec. Admin., 624 F. Supp. 2d 357, 367 (D.N.J. 2008) (finding no legal obstacle to the execution of an assignment of attorney's fees from plaintiff-client to pro bono law school clinical program at Rutgers—Newark, ensuring receipt of fees by clinic and not a windfall for free representation to pro bono client).

Rutgers Attorneys,[43] the New Jersey courts were required to determine

> whether a Rutgers law professor conducting a clinical teaching program is to be regarded as a "State employee" for purposes of the New Jersey Conflicts of Interest Law, N.J.S.A. 52:13D-12 to -27. Specifically, the question [was] whether the clinical teaching program [was] prohibited from carrying out its legal mission before a State administrative agency.[44]

Because the conflicts statute barred "state employees" from representing private clients before state agencies, a law professor considered a state employee would be barred from representing private clients before an agency such as the Council on Affordable Housing ("COAH").[45]

The case arose from the Constitutional Litigation Clinic's involvement in the historic challenge to exclusionary zoning and the pursuit of access to affordable housing in the *Mount Laurel* litigation.[46] In 1985, the New Jersey Legislature created COAH as a state administrative agency to implement and oversee an administrative process governing municipal compliance with "fair share" obligations for affordable housing creation pursuant to *Mount Laurel*.[47] The creation of COAH shifted much of the clinic's *Mount Laurel* enforcement work from the courts to this new state administrative agency. Because the clinic would now be required to enforce aspects of the *Mount Laurel* decrees before COAH, rather than the courts, the Civic League requested an advisory opinion from the Executive Commission on Ethical Standards about whether Rutgers professors could continue their clinical work on the League's behalf in *Mount Laurel* matters before the state agency consistent with the state conflicts of interest statute.[48] The Commission had earlier ruled that Rutgers faculty could

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43. What the author refers to herein as "*Appearance of Rutgers Attorneys*," the courts reference as *In Re: Exec. Comm'n on Ethical Standards*.

44. 561 A.2d 542, 543 (N.J. 1989).

45. *See id.* at 544-45.

46. *In re* Exec. Comm'n on Ethical Standards Re: Appearance of Rutgers Attorneys, 537 A.2d 713, 714-15 (N.J. Super. Ct. App. Div. 1988), *rev'd on other grounds*, 561 A.2d 542 (N.J. 1989). The Rutgers clinics represented the Civic League (formerly the Urban League) since 1983 in various aspects of the *Mount Laurel* litigation. *Id.* As the appellate division explained: "The *Mt. Laurel* designation refers generally to cases relating to the issue of affordable houses." *Id.* at 714 n.2 (citing S. Burlington Cnty. NAACP v. Mount Laurel, 336 A.2d 713 (N.J. 1975) (*Mt. Laurel I*); S. Burlington Cnty. NAACP v. Mount Laurel, 456 A.2d 390 (N.J. 1983) (*Mt. Laurel II*); Hills Dev. Co. v. Bernard Twp. in Somerset Cnty., 510 A.2d 621 (N.J. 1986) (*Mt. Laurel III*)).

47. *See Hills Dev. Co.*, 510 A.2d 621 at 631; *Appearance of Rutgers Attorneys*, 537 A.2d at 714.

48. *Appearance of Rutgers Attorneys*, 537 A.2d at 715. The relevant provisions of the conflicts law at issue provide that

> "[n]o State officer or employee . . . shall represent, appear for, or negotiate on behalf of, . . . any person or party other than the State in connection with *any* cause, proceeding, application or other matter pending before any State agency . . . ." Section 16(c) of the conflicts law exempts certain agencies from the foregoing provision, but the COAH is not listed among them. Further, the statute broadly defines "State officer or employee" as, in relevant part, "any person . . . holding an office or employment in a State agency . . . ." "State

represent parties in court when the State is or might be an adverse party consistent with the conflicts law, "subject, however, to any specific conflict that might otherwise be involved."[49]

In its advisory opinion, the Commission applied the plain language of the conflicts statute along with a 1972 advisory opinion in which it had concluded that Rutgers is an "'independent state instrumentality' and thus within the Conflicts [Law] definition of 'State agency'"[50] to conclude that the Rutgers professors' continued work before COAH would violate the law.[51] The appellate division affirmed the Commission's opinion, also applying a textual, plain language statutory analysis.[52] It noted that the legislature's capacious language targeted the mere appearance of conflicts, as well as actual pecuniary conflicts and sought to preserve public confidence in government "however slight the public perception."[53]

The appellate division also downplayed the impact on Rutgers clinical students and clients from its action, suggesting that the client Civic League could simply hire a non-Rutgers attorney who could step in and supervise the students, and the students could continue their work because they present no conflicts of interest as Rutgers employees.[54] The court also noted that students could assist the New Jersey Public Advocate and that a nonprofit organization that had already been co-counseling in the *Mount Laurel* matters now before COAH could continue that work for the client.[55] In the text of the opinion, the court concluded that "[i]t is conceivable, but hardly likely, that complying with the Conflicts Law may result in some loss to the University's educational program insofar as actual representation by Rutgers' employees before agencies in the Executive Branch of State government is concerned."[56] However, later on in a footnote, that court conceded that it was possible that the legislature might not have intended to create "anomalous" disadvantages for the Rutgers clinical program through burdens on clinical course prerogatives and client

> agency" similarly is defined broadly as "any of the principal departments in the Executive Branch of the State Government, and any division, board, bureau, office, commission or other instrumentality within or created by such department, the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch, . . . and any independent State authority, commission, instrumentality or agency. A county or municipality shall not be deemed an agency or instrumentality of the State."

Appearance of Rutgers Attorneys, 561 A.2d at 544-45 (emphasis added) (quoting N.J. STAT. ANN. § 52:13D-16(b), -13(b) and -13(a) (West 2012)).

49. *Id*. at 549 (citing Exec. Comm'n on Ethical Standards, Advisory Opinion No. 38, 105 N.J.L.J. 18 (Feb. 14, 1980)).

50. *Appearance of Rutgers Attorneys*, 537 A.2d at 715-16.

51. *See id.*

52. *Id*. at 716-22.

53. *Id*. at 719-20.

54. *Id*. at 718.

55. *Id*. at 721.

56. *Id*. at 719.

representation constricting "the full panoply of clinical experience" not borne by private law school clinical programs.[57] Thus, the failure to provide an appropriate exemption from the conflicts law for Rutgers clinical professors may have been inadvertent.[58] However, the court suggested that any remedy for this potential oversight must be directed to the legislature, not the courts.[59]

The New Jersey Supreme Court granted certification and a bare 4-3 majority of the court reversed the appellate division's decision.[60] In so doing, the court also provided the foundations of a framework for evaluating future issues involving the application to the Rutgers law clinics of certain generalized state law restrictions on the practice of law applicable to state entities. In contrast to the primacy of plain language statutory textualism in the appellate division's analysis, the Supreme Court majority assembled a series of statutory maxims that compelled a more searching analysis of legislative purpose to ascertain whether state university clinical professors should be deemed state employees under the conflict of interest law in this context.

First, the court announced that the legislature should not be deemed to "have intended to disable a clinical education program at our State University."[61] Later in the opinion, it elaborated on this interpretive assumption by announcing that "[t]he fact that there is State involvement in education should never be a disadvantage."[62] Next, in sharp contrast to the appellate division's casual dismissal of claims of significant educational and representational disadvantage from the inability of clinical professors to continue to represent clinic clients before state agencies,[63] the New Jersey Supreme Court majority evinced a deeper understanding of the nature and value of clinical education and the far-reaching deleterious implications of the Commission's ruling.[64] After pointing out that private law school clinical

57. *Id.* at 719 n.8.

58. *See id.*

59. *Id.* at 720, 722 n.10.

60. *In re* Exec. Comm'n on Ethical Standards Re: Appearance of Rutgers Attorneys, 561 A.2d 542, 549 (N.J. 1989).

61. *Id.* at 543.

62. *Id*. at 546.

63. For example, the appellate division's suggestion that clinic clients who lose their Rutgers clinic counsel due to the conflicts law could simply hire another non-Rutgers lawyer who could then step in to supervise clinical law students—without apparent educational preparation, teaching experience, or dedicated educational time outside of a fulltime practice—reflects fundamental misperceptions about the nature of clinical education, the availability of alternative counsel for typically indigent or otherwise under-served clinic clients and client groups, and the manner in which law schools screen and select nonuniversity affiliated personnel to teach credit-bearing educational enterprises. *See generally* Margaret M. Jackson & Daniel M. Schaffzin, *Preaching to the Trier: Why Judicial Understanding of Law School Clinics Is Essential to Continued Progress in Legal Education*, 17 CLINICAL L. REV. 515, 517-19 (2011) (describing how judicial misconceptions about clinical educational goals and the manner in which clinics strive to educate while simultaneously providing live-client representation "imperil[] student learning, client interests, and the [law schools'] educational goals").

64. *See Appearance of Rutgers Attorneys*, 561 A.2d at 543-45.

programs would not suffer any such educational or representational restrictions in appearing before state agencies,[65] the court essentially took judicial notice of the obvious attendant harms and disadvantages. It stated:

> Clinical training is one of the most significant developments in legal education. Generations of law students, trained on the case method, were believed to be skilled in analysis but unskilled in serving client needs. The response has been for law schools to afford students "hands-on" experience in representing clients. That means participating in client interviews, investigations, preparation of pleadings, and, in permitted circumstances, appearing in court. We have changed our Court Rules to permit the supervised practice of law by third-year law students and recent graduates who are not yet admitted to the bar while participating in approved programs. See *R.* 1:21-3(b).
>
> As noted, the Rule permits students, under the supervision of a member of the bar, to represent clients in need of legal services. For example, the Rutgers Environmental Law Clinic's mission is to provide students with an introduction to the nature of environmental law practice. To do so, it must interact with the Department of Environmental Protection as well as other State administrative agencies. In order to accept the Commission's ruling, we would have to assume that an environmental-law clinic at a State University (unlike one at a privately-funded university) would not be able to interact with any of the agencies essential to such practice. Nor would the Women's Rights Litigation Clinic of Rutgers University be able to represent women subjected to sexual harassment in related employment hearings or to act in child-advocacy issues before the Division of Youth and Family Services, the State agency that provides protective services for children. Nor would the Urban Law Clinic at Rutgers be able to handle its clients' housing, employment, and income-assistance claims when they must go before the operative State agencies. Nor, finally, would the Rutgers University School of Legal [sic] Constitutional Litigation Clinic (Clinic) be able to appear before COAH. We cannot attribute such an intention to the Legislature.[66]

Second, the court articulated a two-factor approach and applied an additional interpretive axiom to guide its analysis.[67] It observed that the state "courts have resolved the question of whether general state statutes apply to Rutgers by considering both the purposes of the general program and the purposes of the Rutgers legislative charter."[68] In furtherance of that two-factor approach, the court applied the "venerable principle that a law will not be interpreted to produce absurd results."[69] Thus, while apparently conceding that Rutgers professors fell within the letter of the conflict law's plain language and

65. *Id.* at 543.

66. *Id.* at 543-44.

67. *Id.* at 545.

68. *Id.*

69. *Id.* (quoting K-Mart Corp. v. Cartier, Inc., 486 U.S. 281, 324 n.2 (1988) (Scalia, J., concurring in part and dissenting in part)).

text,[70] the Court referenced Justice Field's oft-cited illustration of the above venerable interpretive principle:

> The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted "that whoever drew blood in the streets should be punished with the utmost severity," did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire—"for he is not to be hanged because he would not stay to be burnt."[71]

Next, the Court surveyed the purposes underlying the conflicts law and concluded that the law's purposes would not be served through application to Rutgers professors representing clinic clients before state agencies. The conflicts law "was primarily enacted to meet the ethical issues that arise in connection with the off-hours or 'moonlighting' activities of legislators and other State officers and employees who exert undue influence by trading on their prestige or contacts."[72] While the law's purposes included averting not only actual conflicts, but also the appearance of impropriety,[73] the court ultimately concluded that "there is no risk of undue influence or appearance of undue influence posed by a university professor conducting a teaching program whose mission extends to such a State agency."[74]

Finally, the Court also found that application of the conflicts law to Rutgers professors would thwart an important legislative purpose underlying Rutgers's establishment as the state university of New Jersey. In recounting Rutgers's history and the varying judicial constructions of Rutgers's state status, the majority observed that "the absorption of Rutgers University within the framework of State-supported education has been marked by an overriding concern for the academic freedom of one of the nation's oldest and greatest universities."[75] It further noted that "'[t]he four essential freedoms' of a university' have been said to include the freedom 'to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'"[76] After underscoring the related or

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70. *See id.* at 545 ("We will enforce the legislative will even when the language of the statute is in conflict therewith. *New Jersey Builders, Owners and Managers Ass'n v. Blair*, 60 N.J. 330, 338, 288 A.2d 855 (1972) ('Where a literal rendering will lead to a result not in accord with the essential purpose and design of the act, the spirit of the law will control the letter.').").

71. *Id.* at 545 n.1 (quoting K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 324 n.2 (1988) (Scalia, J., concurring in part and dissenting in part)).

72. *Id.* at 547.

73. *Id.* at 544.

74. *Id.* at 547.

75. *Id.* at 546.

76. *Id.* at 547 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).

concomitant "idea of a university as [a] 'guild of scholars . . . responsible only to themselves,'"[77] the court concluded that "[t]o characterize one of these scholars, for all purposes, as the equivalent of a 'State employee' is to misperceive history and to traduce legislative purpose."[78]

Despite the court's heightened solicitude for protection of the university's and faculty members' academic freedom, it expressly eschewed the suggestion that if the legislature were to statutorily affirm the appellate division's holding, such legislative action would necessarily reflect an infringement on these important First Amendment-based interests.[79] However, the court opined that in crafting any such follow-up legislation, it was "certain that the Legislature would place the highest premium on academic freedom, as it has done invariably in the past, and would carefully balance the State and academic interests in the process."[80] In short, despite largely unquestioned recognition that Rutgers University is an instrumentality of the state and that Rutgers law faculty are ordinarily state employees, the court employed a series of common sense maxims and assumptions to conclude that Rutgers clinical professors representing private clients before state agencies cannot be deemed state employees for the purpose of the state conflicts of interest law.

At least one other public law school clinical program has succeeded against a similar challenge. In *Triplett v. Azordegan*,[81] a federal court in Iowa held that law professors working in the University of Iowa law school's prisoner assistance clinic may represent parties against the state without violating a state law providing that

> [n]o official, employee, or legislative employee shall receive, directly or indirectly, or enter into any agreement, express or implied, for any compensation, in whatever form, for the appearance or rendition of services by himself or another against the interest of the state in relation to any case, proceeding, application, or other matter before any state agency, any court of the state of Iowa, any federal court, or any federal bureau, agency,

77. *Id.* at 546 (quoting Snitow v. Rutgers Univ., 510 A.2d 1118 (1986)).

78. *Id.* at 547.

79. *See id.* at 549. The court had earlier observed that "[t]he concept of 'academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.'" *Id.* at 546-47 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978)). *See generally* Joy, *Denying Access to Justice*, *supra* note 11, at 262 ("Courts have long recognized that the First Amendment protects a teacher's selection of course material and pedagogy, [and] . . . [i]n clinical legal education courses, the clinic law office, client meetings, courtrooms, and administrative hearings are the classrooms . . . [and for] clinical faculty, the selection of clients' cases for clinical students is as important as the faculty's selection of course materials . . . ."). For discussion of the ambiguous and uncertain origins and scope of a First Amendment based right of academic freedom pertaining to institutional or individual clinical faculty members' decisions regarding clinical program design or pedagogy, see Joy, *supra* note 10, at 1093-98.

80. *Appearance of Rutgers Attorneys*, 561 A.2d at 549.

81. 421 F. Supp. 998 (N.D. Iowa 1976).

commission or department.[82]

The court found that "the state of Iowa [was] paying [the professors'] salaries in return for legal instruction in a clinical setting, not in return for representing parties with claims deemed against the interests of the state."[83] Therefore, even "[t]hough some part of [the professors'] salaries [were] *in actuality* going toward the instant action, in no sense could it be considered in return for representation against the interest of the state within the meaning of [the state law]."[84]

C. The Unlawful Donation of State Funding Case

In 1999, the Rutgers Environmental Law Clinic confronted a challenge to its representation of nonprofit organizations based on the assertion that its work reflected an improper or unconstitutional donation or loan of state or taxpayer funds or resources to a private party. In *State of New Jersey, Department of Environmental Protection v. City of Bayonne*,[85] the Rutgers Environmental Law Clinic represented three nonprofit, environmental organizations led by the American Littoral Society as intervenors. In an action initially brought by the New Jersey Department of Environmental Protection ("NJDEP") against the City of Bayonne for a violation of the city's combined sewer overflow permit,[86] the intervenors sought greater penalties against the City than had been sought and ultimately agreed upon by the NJDEP.[87] After the intervenors filed their notice of claim, the City cross-claimed against them asserting that the Rutgers Environmental Law Clinic's pro bono representation of these nonprofits violated Article VIII, Section 3, Paragraph 3 of the New Jersey Constitution, which provides that "[n]o donation of land or appropriation of money shall be made by the State or any county or municipal corporation to or for the use of any society, association or corporation whatever," and Article VIII, Section 2, Paragraph 1, which provides that "[t]he credit of the State shall not be directly or indirectly loaned in any case."[88]

In dismissing the City's effort to disqualify the Rutgers clinic on state constitutional grounds, the trial court pursued reasoning similar to the New Jersey Supreme Court's in *Appearance of Rutgers Attorneys*. First, the trial

82. *Id.* at 1000 n.2 (quoting IOWA CODE § 68B.6 (1975)).

83. *Id.* at 1002.

84. *Id.*

85. Transcript of Motion, N.J. Dep't of Envtl. Prot. v. City of Bayonne, No. C-118-97 (N.J. Super. Ct. Ch. Div. June 11, 1999) (on file with author).

86. *See* E-mail from Edward Lloyd, Clinical Professor of Law and Dir. of Envtl. Law Clinic, Columbia Univ., to Jon Dubin (Dec. 28, 2012, 4:29PM EST) (on file with the author). Edward Lloyd previously served as the Director of the Rutgers Environmental Law Clinic and counsel for plaintiff-intervenors American Littoral Society et al. in *NJDEP v. City of Bayonne*.

87. *See id.*

88. N.J. CONST. art. VIII, §§ 2, ¶1, 3, ¶ 3; *see also* Transcript of Motion at 5-6, 11, 31, N.J. Dep't of Envtl. Prot. v. City of Bayonne, No. C-118-97 (N.J. Super. Ct. Ch. Div. June 11, 1999) (on file with author).

court found that even where constitutional language is "clear and unambiguous," if the provision's intent and purposes are inconsistent with "the ostensibly clear language, then the language should be read and applied in accordance with such intent and purpose."[89] Next, the court found that the cited state constitutional "provisions were adopted in the 19th century . . . to eliminate graft and corruption" endemic with giveaways of "public lands to private railroads"—a purpose not served by preventing public law school clinical programs from representing nonprofit organizations.[90] Accordingly, the court held that "the clinic itself is not the State of New Jersey for purposes of th[ese] constitutional provision[s]."[91]

Finally, the court found that even if the asserted state constitutional provisions were applicable to the clinic, the City's disqualification effort would still fail.[92] The state constitutional provisions at issue "permit 'activity which serves as a benefit to the community as a whole . . .' even though it benefits private individuals as well."[93] The clinic's activity furthered two important and valid public and beneficial purposes—the hands-on education of law students and environmental law enforcement.[94] Law school clinical programs at other public universities, such as the University of Oregon and University of North Dakota, have confronted similar state constitutional challenges, which were rejected in state attorney general opinions authorizing the clinics' work.[95]

D. The Open Public Records Case—Sussex Commons

Most recently, the Rutgers clinical program has been confronted with requests by adversaries in some of its cases to turn over documents related to clinical case work and advocacy, not otherwise protected under the disputed boundaries of the attorney-client privilege and perhaps the attorney work product privilege,[96] pursuant to OPRA. One of those series of OPRA requests

89. *Id*. at 35 (quoting State v. Apportionment Comm'n, 593 A.2d 710, 713 (N.J. 1991)).

90. *Id*. at 21-22 (citing Roe v. Kervick, 199 A.2d 834, 842 (N.J. 1964)).

91. *Id*. at 36; *see also id.* at 34-35 (stating *In re* Exec. Comm'n on Ethical Standards Re: Appearance of Rutgers Attorneys, 561 A.2d 542, was "the clearest demonstration of" the principle that Rutgers's unique status mandates that it not "be viewed as synonymous with the State" in construing the status of a Rutgers clinical program).

92. *Id*. at 36.

93. *Id.* at 36 (citing *Kervick*, 199 A.2d at 842).

94. *Id.* at 23, 32, 36-37 (citing Mount Laurel Twp. v. Dep't of Pub. Advocate, 416 A.2d 886, 892-93 (N.J. 1980). *Mount Laurel Township v. Department of Public Advocate* found that the N.J. Public Advocate's efforts to enforce the *Mt. Laurel I* decision, while benefitting the private party plaintiffs, also served valid and beneficial public purposes and therefore did not violate N.J. CONST. art. VIII, § 3, ¶ 3.

95. *See* Kuehn & McCormack, *supra* note 11, at 66-68.

96. Apart from the usual disputes about limits on the attorney-client and work product privileges, it is not even clear whether OPRA exempts documents protected under the work product privilege, and opposing counsel and OPRA requesters in Rutgers cases have not unambiguously conceded this point. While OPRA expressly exempts documents otherwise protected under the attorney-client privilege, *see* N.J. STAT. ANN. § 47:1A-1.1 (West 2012), the argument for exempting work product documents depends on an expansive interpretation of one of OPRA's "catchall" exceptions, which provides that OPRA "shall not abrogate or erode any *executive or legislative*

spurred five years of litigation culminating in a New Jersey Supreme Court decision this past summer in *Sussex Commons Associates v. Rutgers, The State University*.[97] The *Sussex Commons* OPRA requests emanated from advocacy pursued by the Rutgers Environmental Law Clinic ("RELC") on behalf of two nonprofit organizations, the Coalition to Protect Our Land, Lakes and Watersheds ("Coalition") and Citizens for Responsible Development at Ross' Corner ("CRDRC"), opposed to the proposed construction by a developer, Sussex Commons Associates, LLC ("Sussex"), of a large outlet mall at Ross' Corner in Frankford Township, New Jersey.[98] As legal representative for the Coalition and CRDRC, the RELC "presented evidence in opposition to [Sussex's] application at all permit and development hearings, intervened and filed cross-claims in at least two lawsuits between Sussex . . . and the Township and directly appealed the Township's development approval."[99]

Sussex filed several lawsuits connected with its proposed mall development including an action for tortious interference with business and unfair competition against a competing developer, Chelsea Property Group.[100] Later, Sussex attempted to join officials of the Coalition and CRDRC as coconspirators in the tort action it filed against Chelsea, and it also sought to obtain disclosure of communications between Chelsea's counsel and the RELC through civil discovery requests in the case to further its conspiracy allegations.[101] The court dismissed the attempt to amend to add the nonprofit organizations' officials in the tort action, finding that Sussex was "using the threat of legal action to chill the exercise of First Amendment rights by citizens opposed to the outlet mall."[102] The court also denied the discovery of the contents of communications between the RELC and Chelsea's counsel as protected by attorney-client and work product privileges.[103]

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privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law." *Id.* § 47:1A-9(b) (emphasis added). The appellate division, reading the phrase "grant of confidentiality" as an independent clause applicable to pre-existing "privileges," has provided such an expansive construction to incorporate the attorney work product privilege as an OPRA exemption. *See* Gannett N.J. Partners, LP v. Cnty. of Middlesex, 877 A.2d 330, 337-38 (N.J. Super Ct. App. Div. 2005). It is conceivable that a court could alternatively find that the "privileges" or "grants" exempted under this catchall exception are limited only to "executive or legislative" ones as those concepts were understood at the time of OPRA's enactment. In *Sussex Commons*, the New Jersey Supreme Court hedged this question, noting that "[d]ocuments covered by the work-product privilege are exempt *to the extent they are protected by N.J.S.A.* 47:1A–9." Sussex Commons Assocs. v. Rutgers, 46 A.3d 536, 543 (N.J. 2012) (emphasis added). The court has recently granted certification to resolve this still disputed issue. O'Boyle v. Borough of Longport, 54 A.3d 811 (N.J. 2012) (granting certification); *see also A-16-12 Martin O'Boyle v. Borough of Longport (070999), Appeals Added in the New Jersey Supreme Court*, N.J. JUDICIARY, http://www.judiciary.state.nj.us/ calendars/sc-appeal.htm (last visited May 21, 2013) (describing the issues upon which the court granted certification).

97. 46 A.3d 536 (N.J. 2012).

98. *Id.* at 538-39.

99. Sussex Commons Assocs. v. Rutgers, 6 A.3d 983, 985 (N.J. Super. Ct. App. Div. 2010).

100. *Sussex Commons*, 46 A.3d at 542-43.

101. *Id.* at 542.

102. *Id.* at 536.

103. *Id.*

Thwarted in civil discovery, Sussex next attempted to use OPRA as an alternative vehicle ostensibly to gain access to information from the RELC linking the nonprofits to Chelsea.[104] The New Jersey Legislature enacted OPRA in 2001 to promote transparency in government by making government records accessible to the public subject to a series of statutory exceptions.[105] The Act "defines 'government records' broadly" as

> [any record] made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof . . . or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof." [106]

Among eighteen initial categories of OPRA requests to Rutgers, Sussex sought the time records of all RELC staff, minutes of RELC staff meetings, and documents received by the RELC from any members of the nonprofit organizations, or from Chelsea's counsel, or from Frankford Township or its

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104. An issue raised, but not decided in the *Sussex Commons* litigation, was whether a party's attempt to utilize OPRA as a "second bite of the apple" to obtain documents that courts had ruled otherwise unavailable in litigation pursuant to civil discovery rules would violate state constitutional separation of powers principles by infringing on the judiciary's exclusive province to adopt rules governing the administration of all state courts. *See Sussex Commons*, 6 A.3d at 984-85 (identifying but not deciding the issue); *see also* Michelle D. Carter, Comment, *Conflict of Interest—State Employees—Rutgers Law Professors May Continue Representation Before State Agencies in the Exercise of the University's Clinical Education Program*, 22 RUTGERS L.J. 231, 245-51 (1990) (arguing that the New Jersey Supreme Court, in *Appearance of Rutgers Attorneys*, should have determined that the application of the state conflict of interest statute to Rutgers clinical professors would violate the court's exclusive rule making authority to regulate practice pursuant to article VI, section 2, paragraph 3 of the New Jersey Constitution, since it would be inconsistent with the court's promulgation of a student practice rule, N.J. CT. R. 1:21-3(b), authorizing third-year law students from court-approved clinical programs at ABA-accredited law schools, such as those at Rutgers—Newark, to practice before New Jersey's state agencies); *cf.* Triplett v. Azordegan, 421 F. Supp. 998, 1002-03 (N.D. Iowa 1976) (identifying but not deciding whether the application of Iowa's conflict of interest law to disqualify Iowa clinic professors from a case against the state would violate Iowa state constitutional separation of powers principles through legislative encroachment on the judicial regulation of the practice of law). *See generally* Winberry v. Salisbury, 74 A.2d 406, 414 (N.J. 1950) (stating that the New Jersey Supreme Court's exclusive rule making authority pursuant to article VI, section 2, paragraph 3 of the New Jersey Constitution "is not subject to overriding legislation, but that it is confined to practice, procedure and administration"). Apart from the uncertainty of the work product privilege's application to OPRA, *see supra* note 96 and accompanying text, there is no statutory obstacle to obtaining documents through OPRA as an end run around the provisions in New Jersey's civil discovery rules, which provide contextual and balancing justifications against disclosure. For example, these rules include the requirement that discovery be calculated to lead to relevant evidence and that requests not be burdensome, duplicative, cumulative, or available from a superior source. *See* N.J. CT. R. 4:10-2. OPRA contains no such limitations. Thus, if OPRA were deemed applicable to Rutgers clinical case files and related materials, the Rutgers clinics would be the only law offices in the state that would be burdened with the need to fight additional and collateral battles with court adversaries over the disclosability of documents that the courts have expressly deemed nondisclosable under Rule 4:10-2 in the litigation-in-chief. *See* John J. Farmer Jr. & Frank Askin, Commentary, *Its Déjà Vu All Over Again for Rutgers' Legal Clinics*, 202 N.J.L.J. 691 (2010). This would arguably represent a legislative amendment to the Court's discovery rules applicable to Rutgers' cases in violation of article VI, section 2, paragraph 3 of the New Jersey Constitution.

105. *Sussex Commons*, 46 A.3d at 542.

106. *Id.* at 542-43 (quoting N.J. STAT. ANN. § 47:1A–1.1 (West 2004 & Supp. 2012)).

land use board.[107] When the Rutgers custodian of records declined to disclose much of the requested material, Sussex filed suit against the RELC to compel disclosure "under OPRA and the common law right of access."[108]

After a hearing, the trial court dismissed Sussex's action finding that the Rutgers clinics were exempt from OPRA.[109] First, the trial court recounted Rutgers history and varying constructions of its state status and hybrid characteristics.[110] Next, it noted that this history has led courts to "consistently carve[] out exceptions" for Rutgers and its law clinics from laws or restrictions generally applicable to state entities.[111] It cited *Appearance of Rutgers Attorneys* and the clinic's previously discussed attorney's fees cases (*Right to Choose* and *Brown*) as examples of decisions that "in effect establish the clinic as a subdivision of the state that is not subject to many of the normal restrictions [and] are again evidence of the clinic's unique hybrid nature as a state subdivision, an academic institution, and as a practicing legal entity which represents clients."[112] Then it drew further comparisons with *Appearance of Rutgers Attorneys*, reasoning that just as the New Jersey Supreme Court found that the legislature would not have wanted to "disable" or "disadvantage" the state's law school clinical programs by restricting "a major part of the legal practice field" through a literal application of the conflict of interests law, so too the legislature would not have wanted to undermine Rutgers clinics through a formalistic interpretation of OPRA.[113] The court found that Rutgers clinics would be disadvantaged by having to confront OPRA burdens, which both private law clinics and private law firms could elude, and since "[i]t is likely that clients would be more hesitant to enlist the services of the [Rutgers] clinic knowing that their case files and/or their attorney's other files may be subject to non-discovery disclosure."[114]

On appeal, the appellate division reversed in a decision reminiscent of the appellate division's plain language textual analysis in its opinion in *Appearance*

107. *Id.* at 539-40.

108. *Id.* at 540*; see also infra* notes 151-53 and accompanying text (describing the common law right of access).

109. Sussex Commons Assocs. v. Rutgers, No. L-8465-06, slip op. at 25 (N.J. Super. Ct. Law Div. October 7, 2008).

110. *Id.* at 14-17.

111. *Id.* at 18.

112. *Id.* at 18-20. The trial court also cited attorney's fees cases involving public university law school clinics from other states. *Id.* at 22 (citing and describing Loney v. Scurr, 494 F. Supp. 928 (S.D. Iowa 1980) and NAACP, Frederick Cnty. Chapter v. Thompson, 671 F. Supp. 1051, 1055 (D. Md. 1987). It pointed out that while "the exact nature of a law school affiliated legal clinic has never been fully decided," *id.* at 21, these additional cases found that other state university law clinics have "the ability to collect attorney's fees as would a private legal office." *Id.* at 22. These cases, therefore, also supported the "hybrid" legal construction of such clinics that can neither "be treated in the same manner as other public institutions . . . [n]or . . . as entirely private legal entities." *Id.* at 23.

113. *Id.* at 20-21.

114. *Id.* at 21.

of Rutgers Attorneys.[115] Indeed, the appellate division's decision scarcely mentioned the Supreme Court's reasoning employed to reverse that earlier decision.[116] The appellate division focused largely on the trial court's holding that the clinical programs are categorically exempt from OPRA and not its reasoning about the unlikelihood that the legislature sought to disadvantage state university clinical programs by extending OPRA to private clients' case files. To the appellate division, the appeal could be resolved largely through resort to a straight forward syllogism: (1) the University is a public agency subject to OPRA; (2) the law clinics are a department within the University; (3) therefore, the clinics are subject to and not exempt from OPRA.[117]

As in its decision in *Appearance of Rutgers Attorneys*, the appellate division in *Sussex Commons* downplayed the potential negative impact of its holding on the clinical programs' operations. The court found that much important clinical client file material would still be protected by OPRA statutory exceptions such as the attorney-client privilege and that other OPRA disclosure disadvantages would be "offset by the advantage the Clinic receives in the form of public funding."[118] In the court's view, these disadvantages reflected "a reasonable burden to bear to advance a policy of accountability and transparency."[119] In addition, the court noted that any judicially created exemption to OPRA would be "illusory" because parties could still seek these clinic documents under the common law right of access, which is independent from and utilizes a broader definition of public record than OPRA.[120] Finally, as in its *Appearance of Rutgers Attorneys* opinion, the appellate division also concluded that any exemption from the statute's plain language for the benefit of state clinical programs must come from the legislature, not the courts.[121]

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115. *Compare* Sussex Commons Assocs. v. Rutgers, 6 A.3d 983, 983-95 (N.J. Super. Ct. App. Div. 2010) (declining to interpret OPRA's plain language to permit an additional exemption), *with* Appearance of Rutgers Attorneys, 537 A.2d 713, 716-22 (N.J. Super. Ct. App. Div. 1988) (declining to interpret conflict of interest law's plain language to permit an exception).

116. *See Sussex Commons*, 6 A.3d at 989, 992.

117. *Id.* at 990. The appellate division noted that "[i]t is uncontested that the Clinic . . . is part of the Law School," *id.* (citing Brown v. City of Newark, 493 A.2d 1255 (1985); Right to Choose v. Byrne, 413 A.2d 366 (1980)), and that state law "makes all 'departments, colleges, schools, centers, branches, educational and other units and extensions thereof' a part of the University." *Id.* (citing N.J. STAT. ANN. § 18A:65-3 (West 1999)). Thus, because the University is unquestionably a public agency under OPRA, so too are the law school and the law school's clinical programs because the definition of public agency includes any "other instrumentality within or created by such department" or public agency. *Id.* (citing N.J. STAT. ANN. § 47:1A-1.1 (West 2003 & Supp. 2012)). It concluded: "[d]espite its hybrid status as recognized by the courts in fee-shifting cases, the Clinic operates as an integral part of the Law School's academic mission. For purposes of OPRA, the Clinic is indistinguishable from any other academic program offered by the Law School." *Id.* at 991.

118. *Id.* at 993.

119. *Id.*

120. *Id.*

121. *Id.* The New Jersey Legislature had provided such an express exemption from OPRA for the benefit of the New Jersey Public Defender's office in the statute. *See* N.J. STAT. ANN. § 47:1A-5(k) (West 2012) (exempting all public defender documents from OPRA "that relate to the handling of any case [which] shall be considered confidential and shall not be open to inspection by any person unless authorized by law").

After the appellate division's decision, the Rutgers—Newark clinical program sought an advisory opinion from the New Jersey Supreme Court's Advisory Committee on Professional Ethics about whether the New Jersey Rules of Professional Conduct require that an attorney/clinical professor with one of the clinics inform a prospective client that material in clinic files related to the client's representation may be subject to public disclosure under OPRA in light of *Sussex Commons*.[122] Under the *Sussex Commons* trial court's interpretation of OPRA, the clinics presumably possessed no such OPRA disclosure counseling obligations since the trial court held that Rutgers clinics, and thus all clinical case file material, was exempt from OPRA.[123] The Advisory Committee's response underscored the confusion and uncertainty in clinical operations occasioned by the appellate division's reversal of the trial court.

The Advisory Committee noted that while it viewed the appellate division's *Sussex Commons* decision as "not alter[ing] the preexisting obligations of the attorney in this regard,"[124] it explained that the "Rutgers clinic attorneys may, in some matters, have an obligation to explain to clients that certain documents could be disclosable under OPRA."[125] The only further guidance the Committee offered on assessing the unique Rutgers clinical

122. *See* Letter from Jon C. Dubin, Assoc. Dean for Clinical Educ. and Professor of Law, Rutgers Sch. of Law—Newark, to Carol Johnston, Esq., Sec'y, Supreme Court Advisory Comm. on Prof'l Ethics (Feb. 23, 2011) (on file with author) (referencing N.J. Rules of Professional Conduct R. 1.4(c) ("RPC"), which states that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation"). Although RPC 1.6(a) mandates that attorneys keep all information relating to a representation confidential unless the information falls within certain enumerated exceptions, RPC 1.6(d)(4) authorizes lawyers to disclose such information in order "to comply with other law." Thus, the Rutgers Clinic's request for an advisory opinion indicated that it assumed that a Rutgers clinical professor would be acting ethically if that lawyer disclosed otherwise confidential information where OPRA mandated the disclosure. *See* Letter from Jon C. Dubin to Carol Johnston, *supra*. *See generally* Rebecca Aviel, *The Boundary Claim's Caveat: Lawyers and Confidentiality Exceptionalism*, 86 TUL. L. REV. 1055, 1059, 1106 (2012) (alteration in original) (describing the "ambiguity" and "chaos" generated by the use of the permissive "may" rather than the mandatory "shall" in the ABA's 2002 revised Model Rules of Professional Conduct 1.6(b)(6)'s exception to client confidentiality for compliance with "other law"—adopted in some form by forty-one states, including by New Jersey in RPC 1.6(d)(4)—and concluding that "[t]he message sent by the permissive provision is a chaotic one, inviting speculation about what is meant by the bar's tenuous and ambivalent acknowledgement of 'other law['s]' demands"). While OPRA exempts from disclosure documents protected under the attorney-client privilege, *see* N.J. STAT. ANN. § 47:1A-1.1 (West 2012), there is a wide gap between the relatively narrow scope of the attorney-client privilege and the broad duty of client confidentiality. *See generally* Fred C. Zacharias, *Harmonizing Privilege and Confidentiality*, 41 S. TEX. L. REV. 69, 72-75 (1999) (noting the breadth of client confidentiality ethical rules in which "virtually everything having to do with a case is deemed a secret held by the lawyer for the client's behalf" and the contrastingly narrow attorney-client privilege, which "covers only specified types of communications, not other information that might come to a lawyer's attention . . . [and] has numerous exceptions, which courts apply liberally").

123. Sussex Commons Assocs. v. Rutgers, No. L-8465-06, slip. op. at 3 (N.J. Super. Ct. Law Div. Oct. 7, 2008).

124. *See* Letter from Carol Johnston, Esq., Sec'y, N.J. Supreme Court Advisory Comm. on Prof'l Ethics, to Jon C. Dubin, Esq., Assoc. Dean for Clinical Educ., Rutgers Sch. of Law—Newark, ACPE Docket No. 04-2011 (May 12, 2011) (on file with the author).

125. *Id.*

program ethical duty to counsel clients about potential OPRA disclosure was an obligation to weigh "[t]he 'needs and sophistication of the client,' the likelihood that documents would be disclosable under OPRA, the sensitivity of disclosable documents, and the effect disclosure may have on the client."[126] Thus, under the Advisory Committee's analysis of the appellate division's *Sussex Commons* decision, the Rutgers clinics would have been the only law offices in the state ethically required, in some circumstances, to counsel clients about the risk of documents supplied to their representatives (clinical students or faculty) in connection with their cases becoming potentially disclosable to the opposing party to their legal action or indeed to millions of strangers to that action upon request under OPRA.[127] Rutgers clinic clients would not enjoy the ordinary expectation of a lawyer's duty of client confidentiality with respect to such documents and would know that by retaining a Rutgers clinic as counsel, the client would be relinquishing such a right or expectation in the event of OPRA-mandated disclosure.[128]

Shortly before the Advisory Committee issued its opinion, the New Jersey Supreme Court accepted certification of Rutgers's appeal in *Sussex Commons*[129] and a year later issued a unanimous decision reversing the appellate division.[130] In so doing, the Court reestablished and refined its two-factor approach in *Appearance of Rutgers Attorneys* to a three-factor framework for evaluating the applicability to Rutgers clinics of general statutes pertaining to state entities.[131] After eschewing plain language textual interpretation of statutes that would produce absurd results[132] and recounting the courts' varying constructions of Rutgers's state status and hybrid characteristics,[133] the court set out its three-factor paradigm derived from *Appearance of Rutgers Attorneys*. Rather than applying a "bright line rule" the court observed that its cases command resorting to three considerations: (1) the purposes served by the general state statute and statutory program at issue; (2) the effect of the application of that program on the purposes of the Rutgers legislative charter and establishment as the state university of New Jersey; and (3) the guiding interpretive principle that state involvement in education should never be a disadvantage.[134]

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126. *Id.* (citation omitted).

127. *See* Jennifer Dearborn, *Ready, Aim, Fire: Employing Open Records Acts as Another Weapon Against Public Law School Clinics*, 39 RUTGERS L. REC. 16, 25 (2012) (commenting after the appellate division's *Sussex Commons* decision that "any member of the public, ranging from the most powerful adversary to a vindictive or merely curious citizen, may request and obtain personal facts about a particular [Rutgers clinic] client").

128. *See* Sussex Commons Assocs. v. Rutgers, No. L-8465-06, slip. op. at 21 (N.J. Super. Ct. Law Div. Oct. 7, 2008).

129. Sussex Commons Assocs. v. Rutgers, 16 A.3d 384 (N.J. 2011).

130. Sussex Commons Assocs. v. Rutgers, 46 A.3d 536 (N.J. 2012).

131. *See id.* at 543-44; *In re* Exec. Comm'n on Ethical Standards Re: Appearance of Rutgers Attorneys, 561 A.2d 542, 545-46 (N.J. 1989).

132. *Sussex Commons*, 46 A.3d at 542.

133. *Id.* at 543-44.

134. *See id.* (internal citations omitted). Courts have instead "resolved the question of whether general state statutes apply to Rutgers by considering both the purposes of the general program and the purposes of the Rutgers legislative charter." *Appearance of Rutgers Attorneys*, 561 A.2d at 545

The court also reinforced its resort to and reliance on its 1989 opinion in *Appearance of Rutgers Attorneys* and noted that its rationale applied with "equal force" to analysis of the application of OPRA to the Rutgers clinics.[135] The Court explained that it had invited the legislature to overturn that 1989 decision and the legislature had not done so.[136] Accordingly, when the legislature enacted OPRA in 2001, it did so with full knowledge of the Court's 1989 opinion and reasoning.[137]

The Court also reframed the issue for the purpose of applying its three-step analysis. It explained that the issue was not whether OPRA applies to the state's law schools and therefore to certain aspects of their law clinics, such as receipt of public funding through the school and university; that much is conceded.[138] Rather, the case presents "a narrower issue: whether records related to clinical cases at public law school clinics are subject to OPRA [and][i]n addressing that question . . . whether the Legislature intended to apply OPRA to teaching clinics that function like private law firms."[139]

In applying the three-step framework to this reframed question, the court first found that OPRA's purposes would not be well served through application to clinic case and client file materials. It stated:

> By its very terms, OPRA seeks to promote the public interest by granting citizens access to documents that record the workings of government in some way. That important aim helps serve as a check on government action.
>
> Clinical legal programs, though, do not perform any government functions. They conduct no official government business and do not assist in any aspect of State or local government. Instead, they teach law students how to practice law and represent clients. In addition, not even the University, let alone any government agency, controls the manner in which clinical professors and their students practice law.
>
> As a result, we do not see how it would further the purposes of OPRA to allow public access to documents related to clinic cases.[140]

Next, the Court appeared to merge the latter two inquiries by delineating the potential disadvantage and harms due to clinic case file OPRA disclosure.[141] This included concerns raised by the clinics and amici[142] that "people in need of legal assistance might hesitate to use a public law school clinic out of fear that

(citing Rutgers v. Piluso, 286 A.2d 697 (N.J. 1972)). A simple principle helps guide that analysis: "The fact that there is State involvement in education should never be a disadvantage." *Id.* at 546.

135. *Sussex Commons*, 46 A.3d at 546.

136. *Id.* at 545.

137. *Id.*

138. *Id.* at 543-44.

139. *Id.* at 544.

140. *Id.* at 546-47.

141. *Id.* at 547.

142. In addition to briefs filed by Rutgers University and by the clinical programs at Rutgers, the Clinical Legal Education Association (along with the American Association of University Professors and Society of American Law Teachers) and the Association of American Law Schools filed amicus briefs in support of the Rutgers clinics' position. *Id.* at 533.

their records could be disclosed; clients might be reluctant to communicate freely with their counsel; and outside law firms might refrain from working with clinics on particular matters."[143] In addition, "OPRA's presumption of access would diminish clinical training by making it less like the actual practice of law . . . . [And] the academic freedom of law schools would be undermined."[144]

The harm would also include opening the door to "additional, and perhaps vexatious, OPRA requests in the future" causing clinics to "divert attention and resources away from training students and serving clients to respond to those requests."[145] Significantly, the court found that even if all documents requested could be protected under various OPRA exemptions, the clinics would still be harmed by shouldering the "administrative burden of preparing for, responding to, and possibly litigating over each item requested."[146] While the court found it "difficult to measure the precise impact of the above concerns," it concluded that "the consequences are likely to harm the operation of public law [schools] and, by extension, the legal profession and the public."[147]

The court also highlighted the "absurd result" that public law school clinics would be subject to case record disclosure but private law school programs

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143. *Id.* at 546.

144. *Id.*

145. *Id.*

146. *Id.* at 547-48. Justice Albin authored a singular concurrence joining only in the court's judgment that the clinic need not comply with Sussex's OPRA requests. *Id.* at 549-51 (Albin, J., concurring). Justice Albin reached this result through the narrower conclusion that all of Sussex's OPRA requests unquestionably fell within one or more of OPRA's express statutory exemptions and, as such, the court's more categorical exemption for all clinical case-related materials is unnecessary to protect the clinics' "special mission" from disadvantage and harm. *See id.* at 550-51. The rest of the Court rejected Justice Albin's reasoning by finding hardships, even where documents ultimately may fall into one of the express statutory OPRA exemptions, due to the burdens of case-by-case review discussed above. *Id.* at 547-49. The New Jersey Legislature apparently recognized the burdens and disadvantages of case-by-case OPRA review on the state Public Defender's Office in crafting an express exemption from OPRA for case related materials from that office. *See* N.J. STAT. ANN. § 47:1A-5(k) (West 2012). Moreover, as discussed above, if OPRA were deemed applicable to Rutgers clinical case files and related materials, the Rutgers clinics would be the only law offices in the state that would be disadvantaged with the need to fight additional and collateral battles with court adversaries and others over the disclosability of documents that the courts had previously and expressly deemed nondisclosable under New Jersey's contextual and balancing civil discovery rule protections in litigation. *See* Farmer & Askin, *supra* note 104, at 1 ("These materials could not only be sought by opposing counsel as a 'second bite of the apple' in ongoing cases after unsuccessfully seeking these materials through normal discovery processes, they could also be sought by any member of the public who dislikes one of the clinic's clients or is simply curious about a client's personal facts."). Further, as also discussed above, under Justice Albin's interpretation, the Rutgers clinics arguably would still be disadvantaged as the only law offices in the state ethically required, in some circumstances, to counsel clients about the risks of supplying documents to their representatives (clinical students or faculty) due to potential OPRA disclosure. *See supra* notes 122-28 and accompanying text. Rutgers clinic clients also would not enjoy the ordinary expectation of a lawyer's duty of client confidentiality with respect to such documents and would know that by retaining a Rutgers clinic as counsel, the client would be relinquishing such a right or expectation in the event of OPRA-mandated disclosure. *See supra* note 128 and accompanying text.

147. *Sussex Commons*, 46 A.3d at 548.

would not.[148] This would produce two classes of clinics with public programs disadvantaged solely because they are public in obvious contravention of *Appearance of Rutgers Attorneys's* third principle.[149] The court also implied that these disadvantages would undermine the second consideration pertaining to the legislative purposes underlying Rutgers's charter and establishment as the state university of New Jersey. It observed that "it would be ironic if the State's statutory obligation to provide adequate resources for high quality public education at Rutgers, . . . created a basis to invoke OPRA and thereby weaken an academic program."[150]

Finally, the Court dismissed the claim that the common law right of access supplied any additional basis for case-related disclosure requests against the Rutgers clinics. The common law right only extends to "written records 'made by public officers in the exercise of public functions.'"[151] "Because clinical professors at public law schools do not act as public officers or conduct official business when they represent private clients at a law school clinic, the common law right of access does not extend to records maintained in that setting."[152] In summary, notwithstanding unquestioned recognition that Rutgers University and its law school are "public agencies" subject to OPRA, the New Jersey Supreme Court utilized a three-step framework and common sense maxims and assumptions to conclude that documents from Rutgers clinical client case files and related case and project materials are nonetheless categorically exempt from disclosure under OPRA and the common law right of access.[153]

IV. CONCLUSION

Clinical legal education has become an accepted and integral component of legal education with all law schools now mandated to provide "substantial . . . live-client or other real-life" educational opportunities.[154] Since all public law schools, which now number more than eighty,[155] are required to operate clinical programs, issues concerning the legal construction of state law school clinical programs are becoming more commonplace.[156] At the same time,

148. *Id.*

149. *Id.*

150. *Id.* at 547 (citing N.J. STAT. ANN. § 18A:65–27(I)(b)).

151. *Id.* at 549 (quoting N.J. Newspapers Co. v. Passaic Cnty. Bd. of Chosen Freeholders, 601 A.2d 693, 695 (N.J. 1992)).

152. *Id.*

153. Id. at 543-48.

154. *See* AM. BAR ASS'N, ABA STANDARDS FOR APPROVAL OF LAW SCHOOL 19-20 (2012), *available at* http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012_2013_aba_standards_and_rules.authcheckdam.pdf (Standard 302(b)(1) requiring that law schools "offer substantial opportunities for: (1) live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one's ability to assess his or her performance and level of competence").

155. *See* Peter A. Joy, *The Cost of Clinical Legal Education*, 32 B.C. J.L. & SOC. JUST. 309, 312 (2012) (describing tuition costs in 2010 at the eighty public law schools approved by the ABA in assessing the costs of clinical legal education).

156. *See supra* note 11.

states and state bars are seeking to promote increased opportunities for law students to participate in clinical legal education programs to expand access to legal services for persons unable to afford or access counsel. States and state bars are also seeking to expand clinical educational opportunities to ensure law graduates are better versed in the legal profession's skills and values and better prepared for the challenges of twenty-first century law practice.[157] Thus, the

157. For example, responding to the New York State Bar Association Task Force and Special Committee recommendations to promote greater law school clinical participation and preparation for practice among students applying for admission to the New York Bar—the largest single state bar in the country— the New York Court of Appeals recently changed its bar admission rules by relaxing limits on clinical credits permitted to be considered for the overall bar admission law school credit requirement and reclassifying clinical course credits in a similar manner as classroom course credits for bar admission purposes. *See* N.Y. CT. R. 520.3(c)(2). In announcing the 2012 changes to New York's bar admission rules, the New York Board of Bar Examiners' press release stated:

> The changes to section 520.3 of the Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law [] are intended to reflect the realities of current legal education, provide greater flexibility to students for scheduling classes and promote clinical legal education to better prepare law school graduates for the practice of law. . . .
>
> . . . .
>
> One major change that should have a significant impact on legal education is allowing an increase in the maximum number of credit hours permitted for clinical education, field placement courses or externships, which may be counted towards the total credit hours required for graduation. The requirements will also allow clinical courses to be counted toward the classroom credit hour requirement, provided certain requirements are met. These changes are intended to address the growing concern that graduates of law schools are insufficiently prepared to enter practice. Representative of these views are the reports of the New York State Bar Association Special Committee to Study the Bar Examination and Other Means of Measuring Lawyer Competency, issued in September 2010, and the New York State Bar Association Task Force on the Future of the Legal Profession, issued in April 2011, which emphasized the need for expanded clinical experiences in law school to improve the skills of new lawyers. The new rule will hopefully lead to the expansion of practice opportunities for law students.

Press Release, N.Y. State Bd. of Bar Exam'rs, Jan, 12, 2012, *available at* http://www.nybarexam.org/Press/PressReleasOrder_Section50RuleChanges.pdf; *see also* N.Y. STATE BAR ASS'N, REPORT OF THE TASK FORCE ON THE FUTURE OF THE LEGAL PROFESSION 47-49 (2011), *available at* http://www.nysba.org (recommending changes in N.Y. CT. R. 520.3 to expand clinical educational opportunities for applicants to the NY bar after observing that "[a]t a time when the bench and bar have been decrying the lack of training and preparedness of law graduates for the competent and ethical practice of law, it is surprising that the state with the largest bar in the country still imposes significant legal restrictions on clinical and practical skills training for law graduates seeking admission to its bar"). In addition, all fifty states and the District of Columbia now have court rules authorizing supervised law student practice, and several states and other jurisdictions have expressly indicated a desire to expand clinical legal educational opportunities through such rules. *See generally* CLINIC BAR RULES BY STATE, GEORGETOWN LAW, http://www.law.georgetown.edu/academics/ academic-programs/clinical-programs/our-clinics/clinic_state_bar_rules/clinic_state_ bar_rules.cfm (last visited Apr. 5, 2013) (containing a compilation of all fifty-one state and local student practice rules and several federal court student practice rules); *see, e.g.*, W. VA. CODE R. § 10.0(a) ("As one means of providing assistance to lawyers who represent clients unable to pay for such services, and to encourage law schools and supervising attorneys to provide clinical instruction in trial work of varying kinds, the following rule is adopted."); North Dakota, Practice of Law by Law Students § I., *available at* http://www.ndcourts.gov/rules/Limited/frameset.htm (same); *see also* S.D. Fla. L.R., Admission

need to ensure that a law school's public status does not unnecessarily undermine these educational and service goals has become increasingly manifest.

The Rutgers cases demonstrate that the legal construction of public law school clinical programs should be functional and not formalistic. The New Jersey Supreme Court's three-factor framework derived most directly from *Sussex Commons* and *Appearance of Rutgers Attorneys* compels careful attention to whether the underlying purposes of a general legal scheme applicable to state entities are well served when applied to the unique context of state law school clinical program work. It also requires careful consideration of the legislature's educational goals and aspirations in establishing the state university and law school, and the guiding common sense principle that the involvement of the state in the provision of higher education should never disadvantage such a clinical program. Because many state universities and their law clinics have similar hybrid characteristics to Rutgers and cannot be deemed the state or a typical state entity for all purposes or functions,[158] the Rutgers cases' framework can and should be instructive well beyond New Jersey's boundaries in addressing many unanswered interpretive issues regarding the operation of other public university law school clinical programs.

Indeed, the New Jersey Supreme Court's recognition that Rutgers clinical lawyering may neither be controlled by the university nor any level of government[159]— a conclusion supported by settled professional responsibility principles[160]—suggests that public law school clinical programs should never be deemed the state when lawyering for private clients since this work must proceed completely independent from and potentially in opposition to the state.

Rule 6, *available at* http://www.flsd.uscourts.gov/wpcontent/uploads/2011/04/FINAL_2011_Local_Rules.pdf ("The following Rule for Student Practice is designed to encourage law schools to provide clinical instructions in litigation of varying kinds, and thereby enhance the competence of lawyers in practice before the United States courts.").

158. *See generally* Denis Binder, *The Changing Paradigm in Public Legal Education*, 8 LOY. J. PUB. INT. L. 1 (2006) (describing the increasing trend of "quasi-privatization" of public law schools with decreasing state financial support of and involvement in state law schools).

159. Sussex Commons Assocs. v. Rutgers, 46 A.3d 536, 547 (N.J. 2012).

160. For example, American Bar Association (ABA) Model Rule of Professional Conduct 5.4(c) (formerly ABA Model Code of Professional Responsibility, DR 5-107(B)) and New Jersey Rule of Professional Conduct 5.4(c) provides: "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." The United States Supreme Court has recognized that, as adopted in a state's lawyer disciplinary rules, "[this] rule is 'mandatory in character,' and a lawyer who violated it would be 'subject to disciplinary action.'" Polk Cnty. v. Dodson, 454 U.S. 312, 321 n.11 (1981); *see also* ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1208 (1972) (stating the "lawyer-client relationship exists between the clients and the . . . clinic lawyers[;] not between the [university's or law school's] governing body" and "the governing board must be particularly careful not to interfere with the handling of a particular matter"). "[T]he loyalty of the lawyer runs to his client and not to the governing body [and] [i]t is not important whether the members of the governing body which furnishes or pays for legal services for another are lawyers; for the loyalty of the lawyer is to his client and not to the entity paying him." *Id.*; *cf.* In re Educ. Law Ctr., Inc., 429 A.2d 1051, 1059 (N.J.1981) (governing board of nonprofit, public interest law firm must not exercise control over staff attorney's representation of individual client).

As the United States Supreme Court recognized in *Polk County v. Dodson*,[161] it is the public defender's independence from and opposition to the state that makes clear that state public defenders cannot be deemed state actors when lawyering for private clients.[162] There is little room or rationale for a different result with respect to public law school clinical programs.[163] In short, the application of the Rutgers cases' framework should limit the unnecessary frustration of the important experiential education and service goals of clinical legal education, and help ensure that a clinic's public affiliation not be an obstacle to its advancement of the public interest.

161. 454 U.S. 312 (1981).

162. *Id*. at 318-23; *see also* West v. Atkins, 487 U.S. 42, 50 (1988) (explaining the Court's holding in *Polk County*). State courts in other states have expressly incorporated *Polk County's* reasoning into their state law in interpreting their open public records laws categorically to exempt from disclosure case-related documents from state public defenders' offices. *See, e.g.,* Coronado Police Officers Ass'n v. Carroll, 131 Cal. Rpt. 2d 553, 558-61, (Cal. Ct. App. 2003) (citation omitted) (relying in part on *Polk County* to determine that "a public defender is not a state agent, but rather acts as a private attorney when representing clients" and therefore the office's client file and related materials are not public records subject to disclosure under California's open records law); *see also* Kight v. Dugger, 574 So.2d 1066, 1068-69 (Fla. 1990) (same under Florida's open records law).

163. In *Polk County*, the Court recognized that its rationale and holding, which stated that traditional lawyering functions on behalf of private clients are not actions of the state, would not extend to hiring and firing decisions and potentially to certain administrative and systemic policy decisions of public defender offices. 454 U.S. at 324-26; *see also* Richard J. Wilson, In Memoriam, *Howard B. Eisenberg, Essays*, 86 MARQ. L. REV. 223, 262-63 (2002) (noting that the *Polk County* Court adopted the National Legal Aid and Defender Association's ("NLADA") amicus position, not asserted by any of the parties, arguing for a "functional analysis" of when public defenders' actions should be deemed under "color of law", which would distinguish traditional lawyering functions from larger systemic and policy functions or employment decisions and exempt the former); Brief of National Legal Aid and Defender Association as Amici Curiae Supporting Petitioner, Polk Cnty. v. Dodson, 454 U.S. 312 (1981) (No. 80-824) 1981 WL 389917 (setting out NLADA's "functional analysis" approach). Thus, the *Polk County* "traditional lawyering" rationale would not extend to the state university's (or the state's) employment-related, systemic policy, or resource allocation decisions, or to certain administrative actions pertaining to a public law school's clinical program. Indeed, while not referencing *Polk Cnty. v. Dodson*, the New Jersey Supreme Court's *Sussex Commons* decision reflected a similar functional analysis in holding that Rutgers University documents on public funding of law school clinics are subject to disclosure under OPRA, even though case-related documents and similar materials must be categorically exempt. *See Sussex Commons*, 46 A.3d at 543-44.