In The

# SUPREME COURT OF NEW JERSEY

No. 67232

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| **SUSSEX COMMONS ASSOCIATIONS, LLC, a limited liability company of the State of New Jersey, and HOWARD BUERKLE,** | : | **ON A PETITION FOR CERTIFICATION FROM A FINAL JUDGMENT OF THE NEW JERSEY SUPERIOR COURT APPELLATE DIVISION** |
| *Plaintiff-Respondents* | : | |
| | : | Appellate Division: |
| *vs.* | : | Docket No. A-1567-08T3 |
| | : | Hon. Jose L. Fuentes |
| **RUTGERS, THE STATE UNIVERSITY RUTGERS ENVIRONMENTAL LAW CLINIC, and RUTGERS UNIVERSITY CUSTODIAN OF RECORDS,** | : | Hon. William P. Gilroy |
| | : | Hon. Maris P. Simonelli |
| | : | |
| | : | Law Division: |
| | : | Docket No. L-8465-06 |
| | : | Hon. T.L. Francis |
| *Defendant-Petitioners* | : | |

## BRIEF OF AMICUS CURIAE ASSOCIATION OF AMERICAN LAW SCHOOLS*


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*Permitted to file an amicus curiae brief in this cause by the Appellate Division on June 16, 2009.

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## I. STATEMENT OF INTEREST OF AMICUS CURIAE

*Amicus curiae* Association of American Law Schools (AALS) is a non-profit association of 171 public and private law schools. Its purpose is "the improvement of the legal profession through legal education." AALS Bylaws, Art. 1, § 1-2 (2008), *available at* http://www.aals.org/about_handbook_bylaws.php. The AALS serves as the academic society for law teachers and is legal education's principal representative to the federal government and to other national higher education organizations. The AALS requires each member school to provide "instruction regarding professional skills," and most of its members have created teaching law firms, known as "clinical programs," as a means to achieve this goal as well as to develop students as professionals. *Id*. at Art. 6, § 7(c). These programs exist, subject to each state's regulation and supervision, so that law students can learn appropriate values and skills, while providing service to real clients in actual legal matters in a faculty-supervised setting.

The AALS submits this brief Amicus Curiae (permitted by the Appellate Division on June 16, 2009 to file in this cause) to support the trial court's ruling that the Rutgers Environmental Law Clinic is not subject to the New Jersey Open Public Records Act, codified at N.J.S.A. 47:1A-1 to -13 (West 2010), or the narrower common law public records doctrine, in the conduct of their lawyering activities. This issue is of importance to the AALS because public law school clinical law professors and their students practicing law in a clinical setting will not be able to competently or ethically represent clients if they must reveal client confidences that other members of the bar would be required to keep. As a result, clinical education, one of the most important educational

developments in law schools over the last 40 years, would not be viable in public law schools but would instead be limited only to private law schools.

The AALS incorporates by reference the procedural history in the Petitioner's brief.

## II. SUMMARY OF ARGUMENT

It is of general public importance to assure that public university clinical programs and publicly employed lawyers representing private clients be able to protect non-privileged but confidential client information from public records requests. Whether through construction of the common law or Open Public Records Act and its exceptions, or through a determination of its non-application to a legal clinic in light of the Court's inherent power to regulate the practice of law, the Court should grant the petition for certification and hold that the client-related records of the Rutgers clinics are no more and no less available to third parties or the adversaries of their clients than are the records of private law school clinics and traditional and non-profit law offices in the state. That holding recognizes the judiciary's authority over the practice of law in New Jersey and it ensures a learning environment for clinic students that is legally and professionally the same as the one they will enter as practicing lawyers.

## III. THE PEDAGOGICAL RECORDS EXCEPTION TO THE OPEN PUBLIC RECORDS ACT APPLIES TO LAW SCHOOL CLINICAL PROGRAMS AS THEY COLLECT MATERIALS RELATED TO TRADITIONAL LAWYER ROLES, AS SHOULD A SIMILAR RULING FOR THE COMMON LAW RIGHT OF ACCESS

The Legislature made certain that law school clinical programs were not swept into ambit of the Open Public Records Act by enacting a specific exception from that Act for pedagogical records, if indeed the Act applies at all in this setting. *See* Point IV, *infra*.

The pertinent provision states that the "government record shall not include, with regard to any public institution of higher education, the following information which is deemed to be privileged and confidential: pedagogical, scholarly and/or academic research records . . . ." N.J.S.A. 47:1A-1.1 (West 2010).

This Court has declared that "[c]linical training is one of the most significant developments in legal education." *In re Determination of Executive Comm'n of Ethical Standards Re: Appearance of Rutgers Attorneys*, 116 N.J. 216, 217, 561 A.2d 542, 543 (1989). A series of "blue ribbon" reports by the lawyers, legal educators, and higher education experts reach the same conclusion, stressing the importance of skills and professionalism teaching, and the advantages of clinical programs in teaching skills and professionalism effectively. *See Legal Education and Professional Development – An Educational Continuum 213* (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap (1992) ("MacCrate Report"); Roy Stuckey, et al., *Best Practices for Legal Education* 188-198 (Clinical Legal Education Association 2007); William M. Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* 146-61 (Jossey-Bass 2007). As this Court noted in *In re Determination of Executive Comm'n*, the reason for adding clinical programs to the law schools was pedagogical, though these clinics also serve clients' needs. 561 A.2d at 543-44.

This Court also demonstrated the importance of this approach to effective law teaching in its endorsement of the ABA law school accreditation requirements by requiring all attorneys to have graduated from an ABA-accredited law school. R.P.C. 1:24-2(b). One requirement for ABA accreditation is that the law school offer "substantial opportunities for . . . 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 . . . ." ABA Standard for Approval of Law Schools 302(b)(1) (2010-11), *available at http://www.abanet.org/legaled/standards/standards.html*. Thus, the ABA's requirement that law schools offer live client or real life practice experiences rests upon their pedagogical importance, and this Court's reliance on the ABA's requirements further demonstrates that clinical programs are a key part of pedagogy.

In order to achieve their goal of improving the legal profession, it is essential that these programs be models of professionally responsible practice. This replication of the professional setting ensures that the values the students learn during this formative stage are consistent with the highest standards of legal ethics. *See* Peter A. Joy, *The Law School Clinic As A Model Ethical Law Office*, 30 Wm. Mitchell L. Rev. 35, 36-37 (2003). By removing the full information security enjoyed in all other law practice settings in the state, the decision below gives students at Rutgers law clinics a compromised experience of what it means to practice law.

In the same vein, a categorical exclusion of client-related records in clinics created for pedagogical reasons flows logically from this Court's rulings on the common law public access doctrine, and this Court should grant the petition for certification to make that explicit. The common law doctrine requires that the requester establish an "interest in the public record," which then must "outweigh the State's interest in non-disclosure." *Educ. Law Ctr. v. New Jersey Dep't. of Educ.*, 198 N.J. 274, 302, 303 , 966 A.2d 1054, 1071, 1073 (2009). Both the need and interest in non-disclosure for client-

related records can be established categorically. The requester's need would not be for improvement of government operations, since the representation of private clients is not government operations, but rather, at most, for private needs -- presumably a desire to secure materials that would exceed the scope of or could not be obtained as easily through the civil discovery process. Again categorically, the countervailing considerations will always be weighty. The effects of requiring disclosure of client-related information will be to deter clients and third parties from supplying information to law school clinic counsel. In essence, the two-step common law doctrine leads logically to a common law pedagogical exception for client-related law school clinic records.

## IV. CLINICAL ATTORNEYS ARE NOT CONDUCTING OFFICIAL BUSINESS WHEN THEY PERFORM THE TRADITIONAL FUNCTIONS OF A LAWYER. CLINICAL ATTORNEYS ARE BOUND BY THE SAME RULES OF PROFESSIONAL CONDUCT AS ALL OTHER LAWYERS. APPLICATION OF THE OPEN PUBLIC RECORDS ACT OR THE COMMON LAW RIGHT OF ACCESS TO APPLY TO PUBLIC UNIVERSITY LAW SCHOOL CLINICS VIOLATES THIS COURT'S CONSTITUTIONAL AUTHORITY TO REGULATE THE PROFESSION OF LAW IN THE STATE.

Appellants seek to use the New Jersey Open Public Records Act and the common law public access doctrine to secure from opposing counsel client-related records which attorneys would normally have an ethical obligation to preserve as client confidences. R.P.C. 1.6 (2010). To succeed in their argument, appellants must persuade the court that the public law school clinical professor is acting "in the course of . . . official business" and therefore must disclose litigation preparation materials or client confidences that fall outside of privilege without any showing of need by the requester (quotes from the New Jersey Open Public Records Act, N.J.S.A. 47:1A-1.1 (West 2010).) Under the common law right of access, the threshold test is similar -- whether the record is "made by public

officers in the exercise of public functions." *N. Jersey Newspapers Co. v. Passaic County Bd. of Chosen Freeholders*, 127 N.J. 9, 13, 601 A.2d 693, 695 (1992), *quoted in Educ. Law Ctr. v. New Jersey Dep't. of Educ.*, 198 N.J. 274, 302, 966 A.2d 1054, 1071 (2009).

The two-pronged nature of the public records law tests – public official *and* official business – focuses the requirement on situations in which there should be accountability to the public. *Educ. Law Ctr. v. New Jersey Dep't of Educ.*, 198 N.J. 274, 287, 966 A.2d 1054, 1060 (2009) ("OPRA's clear purpose . . . is 'to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.'").

According to the trial court, the University has already disclosed responsive documents that might relate to such accountability, such as overall budget information or salaries of employees. But, as the U.S. Supreme Court has stated, even a publicly-employed attorney representing a client owes the client, not the public, the duty of loyalty and confidentiality. *Polk County v. Dodson*, 454 U.S. 312, 321, 102 S.Ct. 445, 451, 70 L.Ed.2d 509 (1981). ("[A] public defender is not amenable to administrative direction in the same sense as other employees of the State . . . . Held to the same standards of competence and integrity as a private lawyer, . . . a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client."). That same distinction holds for the clinical law student who, under the clinical professor's supervision, represents clients as permitted by the N.J. Ct. R. 1:21-3(b) (2010).

The courts do not treat publicly employed attorneys as public officials engaging in official business when they represent private clients. The U.S. Supreme Court distinguished public defenders, who like some clinical attorneys are paid by a public authority, from other public officials because they were not performing a public function. The Court therefore ruled that the public defenders were not acting "under color of state law" when performing lawyer's "traditional functions." *Polk County v. Dodson,* 454 U.S. 312, 325, 102 S.Ct. 445, 453, 70 L.Ed.2d 509, 521 (1981).

This Court dealt in a consistent way with clinical law professors. Though clinical professors at a public law school are paid with public funds, the Court ruled that they were not state employees in the context of the law regarding conflict of interest for state employees because they were not performing a public function when acting as clinical lawyers. *In re Determination of Executive Comm'n on Ethical Standards Re: Appearance of Rutgers Attorney*, 116 N.J. 216, 227, 561 A.2d 542, 548 (1989).

These rulings that publicly-paid attorneys and clinical professors are not acting in the course of official business when they represent private clients lead to a construction of public records laws that is consistent with this Court's exclusive role in the regulation of the bar. This Court has consistently interpreted the N.J. Const. art. VI, § 2, ¶ 3, to give it exclusive power over disciplining attorneys. *In re Hearing on Immunity for Ethics Complainants*, 96 N.J. 669, 676-78, 477 A.2d 339, 343 (1984); *In re LiVolsi*, 85 N.J. 576, 583, 428 A.2d 1268, 1271 (1982); *State v. Rush*, 46 N.J. 399, 411-12, 217 A.2d 441, 447 (1966). The Court noted, "Unlike our authority over practice and procedure, which we sometimes share in the spirit of comity, our authority over the discipline of attorneys is not subject to legislative action. This Court's power to regulate attorneys is exclusive."

*McKeown-Brand v. Trump Castle Hotel & Casino*, 132 N.J. 546, 556, 626 A.2d 425, 430 (1993). Courts in other jurisdictions, even those without explicit constitutional authority, maintain that the constitutional separation of powers doctrine vests with the courts the inherent and exclusive power over admission and regulation of attorneys. *See, e.g.*, *Beyers v. Richmond*, 594 Pa. 654, 666-67, 937 A.2d 1082, 1090-91 (Pa. Super. Ct. 2007); *Petition of New Hampshire Bar Association*, 151 N.H. 112, 118, 855 A.2d 450, 455 (N.H. 2004); *In re Petition of Burson*, 909 S.W.2d 768, 774 (Tenn. 1995).

This Court tied its promulgation of the clinical practice rule, R.P.C. 1:21-3(b), to its role in regulating the practice of attorneys. This Court said:

> 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 . . . We have changed our Court Rules to permit the supervised practice of law by third-year students and recent graduates who are not yet admitted to the bar while participating in approved programs. [*In re Determination of Executive Comm'n on Ethical Standards Re: Appearance of Rutgers Attorneys*, 116 N.J. 216, 218-29, 561 A.2d 542, 543-44 (1989)].

Nor would the matter be resolved by limiting clinical education to private law schools. The Court said, in examining the conflict of interest law's application to a Rutgers clinical law faculty member, "The fact that there is State involvement in education should never be a disadvantage." *In re Determination of Executive Comm'n*, 116 N.J. at 223, 561 A.2d at 546. "Given the educational purposes of the clinic, and that the State University would be academically and educationally disadvantaged by the contrary interpretation, we hold that a Rutgers University professor in a teaching clinic of this type is not to be regarded as a State employee for purposes of the conflicts-of-interest law." *In re Determination of Executive Comm'n*, 116 N.J. at 229, 561 A.2d at 549.

In addition to the negative effect any contrary holding would have on the availability of clinical education to students in either of the state law schools, it would also diminish a source of free legal services to those unable to pay. Indeed, this Court, in enumerating the clinical programs at Rutgers that provided representations of clients in need as examples of the benefits of clinical legal education, noted specifically the Rutgers Environmental Law Clinic. *In re Determination of Executive Comm'n,* 116 N.J. at 219, 561 A.2d at 544.

The essence of effective and ethical practice, in a law school clinical setting as in every other practice setting, is the lawyer's ability to develop the case outside public scrutiny. The U.S. Supreme Court, in recognizing the need to protect case preparation materials from mere requests like the request in this case (absent a showing of need to disclose them), pointed out that disclosure "could disrupt the orderly development and presentation of [the attorney's] case." *U.S. v. Nobles*, 422 U.S. 225, 239, 95 S.Ct. 2160, 2170, 45 L. Ed. 2d 141, 154 (1975) (extending the civil doctrine announced in *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), to criminal trials).

Justice Murphy, writing for a unanimous court in *Hickman*, emphasized that the protection of more than attorney-client privileged documents was essential to serving clients and the cause of justice when he gave the rationale for the Work Product Doctrine:

> Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests . . . . Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The

> effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served. [*Hickman, supra*, 329 U.S. at 511, 67 S.Ct. at 393-94, 91 L.Ed. at 153.]

In concurring in *Hickman*, Justice Jackson also noted the effects of required disclosure in terms of conflict of interest. *Hickman, supra*, 329 U.S. at 516-18, 67 S.Ct. at 396-97, 91 L.Ed. at 465-66. The required disclosure of notes by the attorney and those working under the attorney's direction might make the attorney a potential witness in the case. This conflict of interest with the client's interests might require the attorney to recuse. R.P.C. 3.7 (2010). Thus, disclosure of any notes like those requested in this case has the added potential to create conflict of interest. Indeed, the problems of disclosure on mere demand of attorney's records, even those not privileged, is at the essence of R.P.C. 1.6 (2010), which emphasizes the centrality of confidentiality to the lawyer-client relationship. These confidences are broader than those protected by attorney-client privilege. *In re Advisory Opinion No. 544 of the New Jersey Supreme Court Advisory Comm. on Prof'l Ethics*, 103 N.J. 399, 406, 511 A.2d 609, 612 (1986) ("[R.P.C. 1.6] expands the scope of protected information to include all information relating to the representation, regardless of the source or whether the client has requested it be kept confidential . . . .").

If the court does not grant the petition for certification, one could imagine that opposing counsel might regularly file public records act requests of law school clinics to demand any document a client might have provided, any notes of meetings on the case, and any research in files, in ways that would be unprecedented, making clinical attorneys reluctant to ask for the documents or write notes. In short, putting aside privileged communications, there is no stopping place for this extrajudicial discovery. Further, the

time it will take to collect the demanded information will seriously encroach on the work of the clinics. The risks are strengthened by that fact that disclosures of the sort sought here would not be reciprocal; in other words, the public law school clinic would be subject to requirements to disclose without any showing of need, while the lawyer for the other parties would be exempt from open records requests.

It is also well recognized that the attorney needs the free flow of information in order "to advise the client to refrain from wrongful conduct," which further implicates the courts' role in protecting attorney-client communications. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt [2] (2010). (This Court has cited the ABA Model Rules comments to Rule 1.6 as explanatory, though the Model Rules comments were not adopted in New Jersey. *In re Advisory Opinion No. 544 of the New Jersey Supreme Court Advisory Comm. on Prof'l Ethics*, 103 N.J 399, 405, 511 A.2d 609, 612 (1986).).

There is nothing to indicate that the New Jersey Legislature intended, nor could it, impinge on this Court's regulatory scheme for lawyers nor to discourage clinical teaching. Indeed, the Legislature's limitation of the Open Public Records Act to public officials and official action, already defined by the courts to exclude clinical professors acting in traditional lawyering roles, avoids the collision course. Similarly, the common law public records exception is limited to the public official and public business.

The U.S. and New Jersey courts then have consistently endorsed the distinction between, on the one hand, public officials creating public records in their governance role and, on the other hand, publicly-paid attorneys, such as clinical professors and public defenders, who perform lawyerly activities on behalf of private clients. For traditional lawyering activities on behalf of private clients, the courts, in their exclusive disciplinary

authority, require that attorneys create a private atmosphere, not subject to the mere demand of access by any citizen who is curious. In contrast, the New Jersey Open Public Records Act and common law right of access doctrine apply to the public officials who owe their primary duty to the public, not to a particular private client, and to the public records they make as they serve the public.

## V. CONCLUSION

This Court, exercising its constitutionally-protected authority, has made preservation of client confidences a key aspect of lawyering and has supported clinical education as an opportunity to build a skilled and ethical legal profession. The New Jersey law schools share the Court's aims, and have made clinical courses available to their students. Deeming client records to be public records would impermissibly encroach on this Court's constitutional authority, would weaken the client-representation clinical programs in New Jersey's public law schools, and would do nothing to further the public records law's goal of making public officials accountable for their decisions. As the trial court made clear, the law does not require this drastic result.

The New Jersey Open Public Records Act and the common law doctrine do not conflict with this Court's exclusive role in regulating attorneys. Nor are they meant to harm the task of preparing future lawyers through public law school clinical programs. These laws should not be construed to deem a clinical attorney's representation of a client the acts of a state official who acts "in the course of his or its official business." N.J.S.A. 47:1A-1.1 (West 2010). Nor, in reference to the common law public records doctrine, should the clinical attorney be deemed a public official in the exercise of his or her public

function operating a public office. It is of great public importance that the Court make this clear.

If there could be any doubt about the way this Court has already consistently interpreted these provisions, the specific statutory provisions that except pedagogical records from the Open Public Records Act should remove that doubt. N.J.S.A. 47:1A-1 (West 2010).

Respectfully submitted,

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I am aware that if any of the foregoing statements made by me is willfully false, I am subject to punishment.

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