IN THE
SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

NO. A-1567-08T3

SUSSEX COMMONS ASSOCIATES, LLC and HOWARD BUERKLE,
Plaintiffs in MID-L-8465-06
Appellants,

vs.

RUTGERS, THE STATE UNIVERSITY; RUTGERS ENVIRONMENTAL LAW CLINIC; AND RUTGERS UNIVERSITY, CUSTODIAN OF RECORDS,
Defendants in MID-L-8465-06
Appellees

On Appeal from the Final Order dated October 7, 2008 in the Superior Court of New Jersey, Law Division
Honorable Travis L. Francis, A.J.S.C., Middlesex County Superior Court

BRIEF OFAMICUS CURIAE ASSOCIATION OF AMERICAN LAW SCHOOLS

Elliott S. Millstein
American University
Washington College of Law
4801 Massachusetts Avenue, N.W.
Washington, D.C. 20016
Elliott@wcl.american.edu
(202) 274-4224

Susan Westerberg Prager
Executive Director
ASSOCIATION OF AMERICAN LAW SCHOOLS
1201 Connecticut Avenue, N.W.
Suite 800
Washington, DC 20036
sprager@aals.org (202)296-8851

Robert F. Williams
Counsel of Record
Attorney at Law
Rutgers, The State University of New Jersey, Camden
217 N. 5th St.
Camden, NJ 08102
rfw@crab.rutgers.edu
(856) 225-6372

Nancy H. Rogers
The Ohio State University
Moritz College of Law
55 W. 12th Avenue
Columbus, OH 43210
Rogers.23@osu.edu (614) 688-3451

IN THE
SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

NO. A-1567-08T3

SUSSEX COMMONS ASSOCIATES, LLC and HOWARD BUERKLE,
Plaintiffs in MID-L-8465-06
Appellants,

vs.

RUTGERS, THE STATE UNIVERSITY; RUTGERS ENVIRONMENTAL LAW CLINIC; AND RUTGERS UNIVERSITY, CUSTODIAN OF RECORDS,
Defendants in MID-L-8465-06
Appellees

On Appeal from the Final Order dated October 7, 2008 in the Superior Court of New Jersey, Law Division
Honorable Travis L. Francis, A.J.S.C., Middlesex County Superior Court

BRIEF OFAMICUS CURIAE ASSOCIATION OF AMERICAN LAW SCHOOLS

Elliott S. Millstein
American University
Washington College of Law
4801 Massachusetts Avenue, N.W.
Washington, D.C. 20016
Elliott@wcl.american.edu
(202) 274-4224

Susan Westerberg Prager
Executive Director
ASSOCIATION OF AMERICAN LAW SCHOOLS
1201 Connecticut Avenue, N.W.
Suite 800
Washington, DC 20036
sprager@aals.org (202)296-8851

Robert F. Williams
Counsel of Record
Attorney at Law
Rutgers, The State University of New Jersey, Camden
217 N. 5th St.
Camden, NJ 08102
rfw@crab.rutgers.edu
(856) 225-6372

Nancy H. Rogers
The Ohio State University
Moritz College of Law
55 W. 12th Avenue
Columbus, OH 43210
Rogers.23@osu.edu (614) 688-3451

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

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, sec. 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, sec. 7(c). These programs exist 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 to support the trial court's ruling that law school clinics are not subject to the New Jersey Open Records Act, codified at N.J.S.A. 47:1A-1 to -13 (2005), 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.

II. CLINICAL ATTORNEYS ARE NOT PUBLIC OFFICIALS WHO ARE 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.

Appellants seek to use the New Jersey Open Records Act and the common law public records doctrine to secure from opposing counsel records which attorneys would normally have an ethical obligation to preserve as client confidences. N.J. RPC 1.6. These requested documents include, among others, client-provided materials, time records of activities on behalf of the client, and materials gathered by counsel in preparation for representation. To succeed in their argument, appellants must persuade the court that the public law school clinical professor is a public official acting in the course of official business and must disclose client confidences.

The two-pronged nature of the open records law test – 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 (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 to provide a clinic or salaries of employees. But, as the rulings below make clear, an attorney representing a client owes the client, not the public, the primary duty, in terms of the documents gathered and time spent. That same distinction holds for the clinical law

student who, under the clinical professor's supervision, represents clients as permitted by the N.J. Court Rules, R. 1:21-3(b).

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 clinical attorneys are paid by the state, 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, 312, 102 S.Ct. 445, 446, 70 L.Ed.2d 509 (1981). The Supreme Court of New Jersey 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 (1989).

These rulings that publicly-paid attorneys and clinical professors are not public officials when they represent private clients lead to a construction of public records laws that is consistent with the Supreme Court of New Jersey's exclusive role in the regulation of the bar. The Supreme Court of New Jersey has consistently interpreted the New Jersey Constitution, Article VI, sec 2, para. 3, to give it exclusive power over disciplining attorneys. In re Hearing on Immunity for Ethics Complainants, 96 N.J. 669, 676-678 (1984); In re LiVolsi, 85 N.J. 576, 583 (1982); State v. Rush, 46 N.J. 399, 411-12, (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 (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, 937 A.2d 1082, 1090-1091 (Pa. 2007); Petition of New Hampshire Bar Association, 855 A.2d 450, 455 (N.H. 2004); In re Petition of Burson, 909 S.W.2d 768, 774 (Tenn. 1995).

The Supreme Court of New Jersey tied its promulgation of the clinical practice rule, R. 1:21-3(b), to its role in regulating the practice of attorneys. The 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 Executive Commission on Ethical Standards Re: Appearance of Rutgers Attorneys, 116 N.J. 216, 218-219 (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." Id., 116 N.J. at 223. "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." Id., 116 N.J. at 229.

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 remove a source of free legal services to those unable to pay. Indeed, the New Jersey Supreme 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. Id., 116 N.J. at 219.

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, 95 S.Ct. 2160, 2170, 422 U.S. 225, 239, 45 L.Ed.2d 141 (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, gave the rationale for the Work Product Doctrine by emphasizing that the protection of more than attorney-client privileged documents was essential to serving clients and the cause of justice:

> 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. Any 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 393-394.]

In concurring in Hickman, Justice Jackson also noted the effects of required disclosure in terms of conflict of interest. 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. N.J. RPC 3.7. Thus, disclosure of any notes like those requested in this case has the added potential to create conflict of interest. Knowing this potential in advance, some clinical attorneys might have to decline representation.

Indeed, the problems of disclosure on mere demand of attorney's records, even those not privileged, is at the essence of N.J. RPC 1.6, which emphasizes the centrality of confidentiality to the lawyer-client relationship. These confidences are broader than those protected by attorney-client privilege. Lightman v. Flaum, 761 N.E.2d 1027, 1031 (N.Y. 2001) (attorney's ethical duty to preserve client confidences is much broader than the attorney-client privilege.). The comment to ABA Model Rule 1.6 states:

> A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. *The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct.* [Model Rules of Prof'l Conduct 1.6 cmt. [2] (2007) (emphasis added).]

Because, as noted in the comment, the lawyer "needs this information to represent the client effectively," the clinical lawyer who had to disclose materials assembled in the

representation of clients any time any person made a public records request would find no comfort that RPC 1.6 contains an exception from discipline for disclosures required by law. N.J. RPC 1.6(b)(6). That attorney still could not "represent the client effectively" and therefore probably could not ethically accept the client. N.J. RPC 1.16. This principle is especially compelled in 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].

There is nothing to indicate that the New Jersey Legislature intended to impinge on the New Jersey Supreme Court's regulatory scheme for lawyers nor to discourage clinical teaching. Indeed, the Legislature's limitation of the Open 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 Records Act and common law public records 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.

III. THE PEDAGOGICAL RECORDS EXCEPTION TO THE OPEN RECORDS ACT APPLIES TO LAW SCHOOL CLINICAL PROGRAMS AS THEY COLLECT MATERIALS RELATED TO TRADITIONAL LAWYER ROLES.

In addition to the multiple reasons offered above, the Legislature made certain that law school clinical programs were not swept into ambit of the Open Records Act by enacting a specific exception from that Act for pedagogical records. 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.

As the Supreme Court of New Jersey noted in In re Executive Commission, the reason for adding clinical programs to the law schools was pedagogical, though these clinics also serve clients' needs. 116 N.J. at 218-219. The 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. 1:24-2(b). One requirement for ABA accreditation is that the law school offer "substantial opportunities for . . . live client or 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) (2007-08), *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 the Supreme Court of New Jersey's reliance on the ABA's requirements further demonstrates that clinical programs are a key part of pedagogy.

Law school clinics are an integral part of modern legal education in that they provide a setting to teach the highest standards of ethical practice to students engaged in the practice of law. Over the past forty years, clinical legal education has become an increasingly important part of American legal education. Most law schools have established clinical programs in-house that replicate law firms, for the important purpose of educating law students for the practice of law. See Report of the Committee on the Future of the In-House Clinic (AALS Section on Clinical Legal Education et al. eds., 1991) (reprinted in 42 J. Legal Educ. 508, 518 (1992). The AALS has played an important continuing role through its annual Clinical Teachers Conference in helping to create and train the cadre of law teachers now teaching in American law schools. These teachers work to transmit to students the skills and values of the legal profession through supervision and teaching them while they take on, for the first time, the role of being a lawyer.

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).

Among the professional values that have animated the creation and growth of clinical programs is the idea of "justice for all." Students in these programs learn about the importance of access to justice while the programs themselves provide free legal services to many clients who might otherwise be unrepresented. See Legal Education and Professional Development – An Educational Continuum 213 (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, 213) (1992) ("MacCrate Report"). To that end, in 1969 the American Bar Association promulgated a Model Student Practice Rule for the express purpose of expanding competent legal services for indigent clients and encouraging the expansion of clinical programs. Joy, supra, at 40. Since then the courts of all 50 states and most federal courts have created student practice rules that permit supervised students to represent clients (for a compilation of these rules see David F. Chavkin, Am I My Client's Lawyer?: Role Definition and the Clinical Supervisor, 51 SMU L. Rev. 1507, 1546 (1998)) and in these 40 years thousands of law students learned to be lawyers while serving an uncounted multitude of clients across the land.

The Supreme Court of this state has declared that "clinical training is one of the most significant developments in legal education." In re Determination of Executive Commission of Ethical Standards Re: Appearance of Rutgers Attorneys, 116 N.J. 216, 217 (1989). Clinics are essential to the education of the next generation of lawyers. A series of "blue ribbon" reports by the lawyers, legal educators, and higher education

experts underscores the importance of skills and professionalism teaching, and the advantages of clinical programs in teaching skills and professionalism effectively. MacCrate Report, supra, at 238 (American Bar Association); Roy Stuckey, et al., Best Practices for Legal Education 188-198 (2007 (legal educators); William M. Sullivan, et al., Educating Lawyers: Preparation for the Profession of Law 146-161 (2007) (higher education experts).

While lawyers can learn skills in law school clinics or in their law practice, only "real-client" clinical instruction in law school emphasizes the "conceptual underpinnings of these skills." MacCrate Report, supra, at 234. Clinics teach students how to reflect on the practice of law, how to integrate the doctrines learned in traditional classes into practice, how to formulate hypotheses and test them in the real world, how to approach each decision creatively and analytically, and how to identify and resolve issues of professional responsibility. *See* Anthony G. Amsterdam, Clinical Legal Education – A 21st Century Perspective, 34 J. Legal Educ. 612 (1984). Students who experience these methods in law school learn how to learn from their experiences in practice throughout the rest of their legal careers.

While the pedagogical exception to the New Jersey Open Records Act applies with special logic to the law school clinic, the Legislature provided the pedagogical exception more broadly. A broad range of other university clinical programs involve students in supervised practice settings, and these programs also could not succeed if the client representation they perform is subject to public records laws. For example, social work clinics, dental clinics, nursing clinics, psychology clinics and optometry clinics have become key parts of the effective education of these professionals and depend, for their

continued viability, on their ability to preserve client/patient confidences. The Legislature made it clear in the pedogical exception that it did not intend to destroy these learning opportunities by rendering the client and patient records open to public review.

IV. CONCLUSION

The New Jersey Supreme 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 end 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 Records Act and the common law doctrine do not conflict with the New Jersey Supreme Court's exclusive role in regulating attorneys nor destroy the feasibility 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 is receiving records "in the course of his or its official business." N.J.S.A. 47:1A-1.1. Nor, in reference to the common law public records doctrine, should ~~such~~ the clinical attorney be deemed a public official in the exercise of his or her public function operating a public office.

If there could be any doubt about the way the Supreme Court has already consistently interpreted these provisions, the specific statutory provisions that except

pedagogical records from the Open Records Act should remove that doubt. N.J.S.A. 47:1A-1.

Respectfully submitted,

Robert F. Williams
Counsel of Record
Attorney at Law
Rutgers, The State University
of New Jersey, Camden
217 N. 5th St.
Camden, NJ 08102
rfw@crab.rutgers.edu
(856) 225-6372

Elliott S. Millstein
American University
Washington College of Law
4801 Massachusetts Avenue, N.W.
Washington, D.C. 20016
Elliott@wcl.american.edu
(202) 274-4224

Nancy H. Rogers
The Ohio State University
Moritz College of Law
55 W. 12th Avenue
Columbus, OH 43210
Rogers.23@osu.edu
(614) 688-3451

Susan Westerberg Prager
Executive Director
ASSOCIATION OF AMERICAN LAW
SCHOOLS
1201 Connecticut Avenue, N.W.
Suite 800
Washington, DC 20036
sprager@aals.org
(202) 296-8851