RECORD NO. 05-1257

In The

United States Court of Appeals

For The Fourth Circuit

STEVEN C. MORRISON,

Plaintiff - Appellee,

v.

BOARD OF LAW EXAMINERS OF THE STATE OF NORTH CAROLINA, *et al.*,

Defendants - Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR EASTERN DISTRICT OF NORTH CAROLINA
AT RALEIGH

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF CORPORATE COUNSEL IN SUPPORT OF APPELLEE STEVEN C. MORRISON

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Only one form need be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of individual parties as well as corporate parties. Disclosures are required from amicus curiae only if amicus is a corporation. Counsel has a continuing duty to update this information. Please file an original and three copies of this form.

No. 05-1257 Caption: STEVEN C. MORRISON V. BOARD OF LAW EXAMINERS OF THE STATE OF NORTH CAROLINA

Pursuant to FRAP 26.1 and Local Rule 26.1,

Association of Corporate Counsel (name of party/amicus) who is Amicus (appellant/appellee/amicus),

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1. Is party/amicus a publicly held corporation or other publicly held entity?
   [ ] YES [X] NO
2. Does party/amicus have any parent corporations?
   [ ] YES [X] NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?
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   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?
   [ ] YES [X] NO
   If yes, identify entity and nature of interest:

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   If yes, identify all members of the association, their parent corporations, and any publicly held companies that own 10% or more of a member's stock:

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Susan Hackett
(signature)
Senior VP and General Counsel

Aug. 17, 2005
(date)

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STATEMENT OF INTEREST

The Association of Corporate Counsel (ACC, formerly known as the American Corporate Counsel Association, or ACCA) was formed in 1982 as the bar association for in-house counsel. With almost 18,000 members from over 8,000 private sector organizations in 55 counties, ACC members serve a diverse range of domestic and international public, private, and not-for-profit corporations. ACC's members are employed by both large and small companies, including 98 of the Fortune 100 companies; internationally, its members serve 74 of the Global 100 companies.

While ACC provides its members with a variety of resources in common with many bar associations, including CLE, online resources, practice committees and local chapters, one of its primary missions is to act as the voice of the in-house bar, not only in connection with matters that concern corporate legal practice and the ability of its members to fulfill their functions as in-house legal counsel to their companies, but also on broader issues relating to the regulation of the legal profession generally.

ACC seeks leave to file its brief *amicus curiae* because of the profound implications of this case on the ability of its members to provide appropriate legal representation to their clients. As the U.S. economy has increasingly transformed to one which is nationally, and indeed multi-nationally, based, the need to remove

historical but now outdated practice barriers – which no longer serve the interests of public protection and which can preclude otherwise qualified and competent in-house lawyers from fully and readily serving the expanding geographical legal needs of their clients – is critical. Such barriers are objectionable because they can significantly impede corporate clients' freedom to hire expert counsel of their choice or to relocate in-house legal staff with whom they have a long-standing, trusted and highly professional relationship.

The North Carolina rule at issue here prevents Appellee, a lawyer who is licensed to practice in three states (two of which are comity states with North Carolina),[1] has practiced law continuously since 1979 and without any blemish on his record, and otherwise meets all of the requirements for a comity admission by motion, from being so admitted merely because he did not practice in either of the two comity states for four of the last six years preceding his motion for admission by comity. Paradoxically, one of the jurisdictions he practiced in during the requisite period *was North Carolina itself* (as an in-house counsel under the state's

[1] A comity state is one which admits members of the bar of the State of North Carolina to its bar on motion. See, Section .0502(3) of the Rules of the Board of Law Examiners of the State of North Carolina.

multi-jurisdictional practice "MJP" provisions authorizing his practice[2]); the other was California (a non-comity state).

The District Court below properly recognized that this state-specific practice requirement has no rational connection with North Carolina's acknowledged right to ensure that only competent attorneys are admitted to practice in the state and, therefore, this requirement is an unconstitutional barrier to the lawyer's fundamental rights to travel and to practice law.

Residency requirements and other limitations to comity admissions have significant practical ramifications on corporate clients and their in-house lawyers. Since these requirements have nothing to do with an attorney's competence or fitness to practice law, they are not connected to any legitimate state interest in protecting the public. ACC respectfully requests permission to present the Court with its views as to why the elimination of these outdated and protectionist barriers to commerce are so important, and why their elimination furthers important and laudable public policy goals.

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[2] N.C. Code of Prof. Resp. § 5.5(c): "A lawyer admitted to practice in another jurisdiction, but not in this jurisdiction, does not engage in the unauthorized practice of law in this jurisdiction if the lawyer's conduct is in accordance with these Rules and...(2)... (A) the lawyer provides legal services to the lawyer's employer or its organizational affiliates and the services are not services for which pro hac vice admission is required."

ARGUMENT

"A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law."
Schware v. Board of Bar Exam. of State of N.M.,
353 U.S. 232, 77 S. Ct. 752 (1957)

"In licensing attorneys there is but one constitutionally permissible state objective; the assurance that the applicant is capable and fit to practice law."
Keenan v. Board of Law Examiners of State of N. C., 317 F. Supp. 1350, 1362 (E.D.N.C. 1970).

The technological advances and the global economy of the new millennium have effected enormous change in the way the world does business. These changes have had a particularly dramatic impact on the need of corporate clients for seamless legal representation that embraces a broad range of expertise in a large number of local, state, federal, and international jurisdictions. Sophisticated business clients (and an increasing number of individual clients with multi-jurisdictional service needs) should be free to employ or retain counsel who are well-positioned and expert in providing those services. As companies expand their operations and their legal work becomes increasingly complex, corporate decision-makers count on their in-house (and outside) counsel to be able to handle all their legal issues, wherever those legal issues may arise. When local outside counsel are necessary or an asset, they are sought out and retained. But the idea that a company that has business in all fifty states needs a lawyer admitted in each state on the payroll in order to accomplish its legal agenda is one that makes no sense.

The nature of in-house lawyers' practice and expertise allows them to competently represent their clients in their area of specialization across jurisdictional borders. Indeed, many of the issues on which they advise clients who operate nationally or internationally necessarily involve the rules of all of the jurisdictions in which the client has facilities and is doing business. To name but a few, these include compliance counseling, contracts and negotiations, employment issues, intellectual property issues, environmental issues, and securities regulation.

Corporate counsels' multi-jurisdictional practices span the gamut of cross-border activities, ranging from interstate communications to interstate travel, and sometimes (as was the case here) even require counsel to relocate to a new state. These lawyers' services, heavily and rightly relied upon by their corporate clients, simply cannot be provided if outmoded state barriers are permitted to stand that preclude qualified and competent lawyers from practicing in jurisdictions other than those in which they were initially licensed.

Recognizing the challenge that this new reality poses, national legal organizations, including ACC, the American Bar Association and the National Conference of Chief Justices, have endorsed rules that narrowly limit the barriers a state may erect to those which further the only legitimate public purpose they serve: to "protect the public against rendition of legal services by unqualified

persons." Comment 2 to ABA Model Rule 5.5 (2003).[3] North Carolina's bar, recognizing the ripeness and reasonable nature of these reforms, amended a

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[3] Model Rule 5.5, entitled "Unauthorized Practice Of Law; Multijurisdictional Practice Of Law", states:

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

number of its previous rules which created barriers to multi-jurisdictional practice, and adopted an initial series of reforms in 2003. Residency requirements for comity admission, such as those that continue to be imposed by North Carolina in this case and others like it, do not serve that purpose and run counter to the MJP reform momentum that the various states, and indeed the country, are now embracing. The rules in contest in this case unjustifiably – and unconstitutionally – encumber the rights of unquestionably ***qualified*** lawyers from practicing and impede clients' right to chose the best ***qualified*** counsel of their choice.

The case at bar strikingly illustrates why such residency requirements for comity admission should be struck down. Mr. Morrison has been a practicing lawyer since 1979. He is licensed to practice law in three states: Indiana, Ohio and California; he has practiced in each of those states in a professional and competent manner, attracting and serving satisfied clients. When he moved from California to North Carolina several years ago at his employer's request after it completed an acquisition which resulted in the relocation of its headquarters, he was, under

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(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

North Carolina's rules, permitted him to practice in law North Carolina as in-house counsel. He represented that single and substantial client in North Carolina for a number of years. He has never been the subject of bar complaints or discipline in any state. These facts and his sterling professional reputation as an accomplished lawyer fully establish his competence and fitness to practice -- and for an experienced practitioner are a far better indicator of his qualifications than his ability to answer questions on a bar exam. The happenstance that he practiced for more than four of the last six of his then nearly twenty-five years of practice in California and as in-house counsel in North Carolina, which is the only reason his application for comity admission has been rejected, in no way makes him more or less qualified – *particularly where the locus of a portion of the practice being rejected was in North Carolina itself. That rejection is all the more egregious given that North Carolina expressly found him competent during those same years to practice there as in-house counsel.*

The United States Supreme Court has already ruled that residency restrictions on admission unconstitutionally bar qualified lawyers from practicing. In *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 105 S. Ct. 1272 (1985), the Court ruled that even ***post***-admission residency requirements were unconstitutional. In *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 108 S. Ct. 2260 (1988), the Court applied these same principles to strike down a ***pre-***

admission residency requirement on comity admissions by motion (even though, unlike *Piper* and like here, there was a bar exam alternative for admission to practice that did not have any residency requirements). The Court did so because it concluded that residency requirements have no relationship to fitness or competency to practice:

> The question, however, is whether lawyers who are admitted in other States and seek admission in Virginia are less likely to respect the bar and further its interests solely because they are nonresidents. We cannot say this is the case. While *Piper* relied on an examination requirement as an indicium of the nonresident's commitment to the bar and to the State's legal profession, see *Piper*, supra, at 285, 105 S.Ct., at 1279, it does not follow that when the State waives the examination it may make a distinction between residents and nonresidents. *Id.*, 487 U.S. at 68.

Similarly, requiring an experienced lawyer to take another bar exam is not a meaningful indicator of that lawyer's professional merit, ethical performance, or competence. To the contrary, there are a host of better indicators which are far less time consuming and intrusive, such as looking at the lawyer's actual practice record and professional conduct. This is precisely what an admission on motion seeks to verify.

North Carolina's state-specific requirement also impedes clients' rights to select qualified counsel of their choice because it deters qualified counsel from accepting an in-house position that would require them to move to North Carolina. This deterrent effect was one of the reasons cited by a North Carolina Court in

striking as unconstitutional an earlier one year residency requirement as a pre-requisite to taking the bar examination:

> Even though a one year exclusion from the practice of law does not foreclose other avenues of employment... the desirable, competent attorney is doubtless much deterred from an interstate move by it. He is likely to find true personal fulfillment only in the active practice of the profession to which he has dedicated himself. An undesirable who finds the practice only a money getting occupation, and maybe not a very good one at that, is not so likely to be deterred. He is more likely to believe the grass grows greener on the other side of the hill. It is quite possible the effect of Rule VI(6) is the opposite of that said to be intended: the best are kept away and effectively excluded. *Keenan v. Board of Law Examiners of State of N. C.*, 317 F. Supp. 1350, 1362 (E.D.N.C. 1970).

The deterrent effect of the instant restrictions – and the unjustified burden they place on a lawyer's fundamental rights of interstate travel and to practice law – are no different. Certainly, unless the decision below is affirmed, other desirable and dedicated lawyers are going to think twice about accepting a corporate client's request to relocate to North Carolina, since such an outcome will also signal that they will either have to move out of the state or take another bar exam in the event that the job were to end. Thus, here, as in *Keenan*, the rule may have the opposite effect of what is intended: those lawyers who corporations judge to be the best qualified to serve their needs (or, as is even more impactful, to *continue* serving their needs) if they expand their business into North Carolina may well be excluded.

Notably, in other contexts, the State of North Carolina has recognized and embraced the challenge of the new millennium. Thus, the Chamber of Commerce of Charlotte – a city which has entered the ranks of global financial centers – notes in its website:

> During the last three decades, thanks to the foresight and initiative of leaders across the state, North Carolina has created a competitive business climate favorable to a highly diverse range of companies.
>
> Today, as manufacturing growth slows nationwide and economic competition becomes more challenging, North Carolina again has taken the initiative by developing and implementing a strategic plan to create high-quality jobs, high-performance businesses and prosperity across the state. ***The goal: to position North Carolina for continued national and global success in the 21st century.***
>
> (http://www.charlottechamber.com/content.cfm?content_id=238&category_level_id=133; emphasis added).

As the Supreme Court has emphasized, the legal profession is essential to achieving such goals:

> Like the occupations considered in our earlier cases, the practice of law is important to the national economy, the "activities of lawyers play an important part in commercial intercourse." *Piper*, *supra*, 470 U.S. 274, 105 S. Ct. 1272.

The legal profession also has an obligation to take the initiative and implement the changes that are needed to further these goals – particularly where to do so involves no credible risk. If the State Board of Law Examiners of North Carolina (or any other state) is unwilling to take the lead in this effort, but instead insists on relying on outmoded rules and practices, this Court must guide them

toward establishing standards that are appropriate for the modern world and that do not impinge unnecessarily on either clients' or lawyers' legitimate rights. Certainly history has shown us that the states that are in the forefront of adapting to economic changes reap enormous benefits. A case in point is how Delaware became the most favored jurisdiction in the country for incorporation when it had the foresight to implement a progressive corporate law regime while other States stuck with antiquated codes. This Court can take judicial notice of the enormous positive impact this had on Delaware's economy as a whole, and on its legal community, as one corporation after another chose Delaware as its state of incorporation and was governed by its laws.

Indeed, in the age of the global economy, whatever justification exclusionary comity or "unauthorized practice of law" laws may have had historically has been rendered obsolete, at least as applied to experienced lawyers licensed to practice by any one of the fifty United States. One of the transforming factors is that the entirely "local" legal transaction is now virtually non-existent, particularly where corporate clients are concerned. The reality is that almost all significant commercial transactions have legal ramifications in multiple jurisdictions.

Key also has been the emergence of new and highly complex areas of the law which, in turn, has made the lawyer's expertise in those areas a far more

essential criteria for clients than the particular jurisdiction in which he or she was initially admitted to practice. Simply put, the mere fact that a lawyer is licensed to practice in North Carolina or any other state does not mean that he or she is truly "competent" to advise a client on every issue a client – corporate or individual – may face in that state. Likewise, a lawyer who is expert in some specialties of law may be competent to advise clients on these matters regardless of the jurisdiction in which the client or matter resides.

For example, a North Carolina lawyer who has spent many years practicing primarily in the area of trusts and estates is unlikely to be competent to advise a client as to how to structure a complex securities transaction or a patent claim, and the North Carolina securities lawyer is likely to be equally ill-equipped to handle a will contest or custody battle. Just as the State Bar relies on even the unseasoned lawyers it admits to practice after examination to accept only representations they are qualified to handle, the State Bar can rely on the experienced lawyers it admits by motion to know what they are and are not qualified to do.

North Carolina's (and indeed, most states') exclusionary admission rules can no longer be justified as based on a constitutionally permissible ground of ensuring "competence and fitness" to practice law. It is no longer reasonable to contend that a lawyer is not "competent or fit" to practice in North Carolina if he is, as Mr. Morrison is: (i) properly accredited by another state, (ii) in good standing in all

states in which he is admitted, (iii) meets the minimal experiential and professional conduct requirements, (iv) is entitled to obtain admission on motion practice in this, or any other, federal court in the nation – including the United States Supreme Court, in the courts of numerous other states, and virtually any arbitration or other dispute resolution venue throughout the country, and (v) has already been found to be competent to practice law as a corporate counsel within the state of North Carolina. To the extent these rules are permitted to survive, they do so at the expense and to the detriment of the very clients they were supposed to safeguard and in violation of the constitutional rights of qualified lawyers admitted in other states.

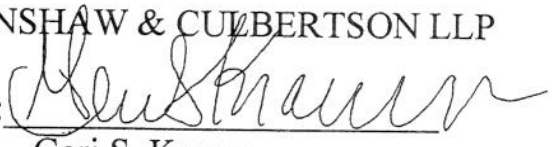
CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the District Court's ruling striking the state-specific practice requirements for comity admissions on motion be affirmed.

Dated: August 17, 2005

Respectfully submitted,

HINSHAW & CULBERTSON LLP

By: 

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REQUEST FOR ORAL ARGUMENT

ACC requests permission to participate in oral argument.

Dated: August 17, 2005

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CERTIFICATE OF COMPLIANCE

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EXCLUSIVE of the Corporate Disclosure Statement, Table of Contents; Table of Citations; the Request for Oral Argument and the Certificate of Filing and Service, this Brief of Amicus Curiae contains 15 pages.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 17th day of August 2005, I filed with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit, via hand delivery, the required number of copies of this Brief of Amicus Curiae, and I further certify that I served, via U.S. mail, postage pre-paid, the required number of copies of the foregoing upon:

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The necessary filing and service upon Counsel were performed in accordance with the instructions given me by counsel in this case.

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