IN THE

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

UNITED STATES STEEL CORPORATION, Plaintiff-Appellant, v. UNITED STATES OF AMERICA, Et Al Defendants-Appellees.	Appeal Number 84-639, 640

BRIEF AMICUS CURIAE OF THE AMERICAN CORPORATE COUNSEL ASSOCIATION

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INTEREST OF AMICUS CURIAE

Amicus Curiae, the American Corporate Counsel Association (ACCA), is composed of members of the bar who do not hold themselves out to the public for the practice of law and who are engaged in the active practice of law solely on behalf of corporations, partnerships, and other organizations in the private sector. ACCA, which was formed in March, 1982, is the only national bar association whose efforts are devoted exclusively to the professional needs of attorneys who are members of the legal staffs of organizations in the private sector. ACCA has approximately 4,000 members who are employed as "corporate counsel" by over 750 organizations.

Not only do attorneys practicing as members of the legal staffs of organizations make up an increasing portion of the bar, but they are doing an increasing percentage of the legal work of organizations which employ them. Some corporations have long had all or a large portion of their legal work performed by attorneys on their legal staffs. Recently many organizations have expanded the role of their law departments to include trial work as well.

Thus, the decision on appeal to this Court denying trial counsel for United States Steel (USS) access to information constituting part of the record in the proceedings below, notwithstanding the finding of the court that "there is no doubt that USS has a need for access" to the information, solely because counsel are members of the USS law department, is of critical importance to the members of ACCA and the clients they

serve. The Court's decision effectively prohibits counsel from representing their client and denies USS the counsel of its choice. As such this decision has a substantial adverse impact on members of ACCA and their clients.

QUESTION PRESENTED

WHETHER A COURT MAY DENY A PARTY'S COUNSEL ACCESS TO RECORDS FOUND TO BE NECESSARY TO THE PROSECUTION OF THE PROCEEDING SOLELY BECAUSE COUNSEL IS AN EMPLOYEE OF THE PARTY.

STATEMENT OF THE CASE

This is an appeal from two decisions by Judge Watson of the Court of International Trade denying counsel for USS access to certain business documents compiled during administrative proceedings before the International Trade Administration (ITA) and the International Trade Commission (ITC). USS is being represented in these proceedings solely by members of its corporate legal staff. It has consciously chosen not to employ "outside" counsel.

The first decision grew out of a challenge by USS to final subsidy determinations by the ITA. 569 F. Supp. 870 (C.I.T. 1983). There, counsel for USS was denied the right to examine confidential documents, which were part of the record, even though counsel for the other plaintiffs were granted access to the documents by the court. The second case grew out of the appeal by USS from a negative injury determination by the ITC. 6 CIT (Slip Op. 83-95, September 22, 1983). Again, the court denied counsel for USS access to documents notwithstanding a finding of need for access to the documents while granting access to counsel who were not on the corporate payroll of the other corporate plaintiffs

and intervenors. The individual cases were consolidated for consideration by this Court.

Although Judge Watson found that access to the information was essential to the USS's case, he refused access to USS counsel on the ground that counsel were members of the corporate law department and full-time employees of the corporation. In reaching its decision, the court did not attempt to perform the necessary balancing of the need for the information and the need for maintainence of confidentiality as required by the statute, 19 U.S.C. § 1516a(b)(2)(B). Instead, the court adopted a per se rule that corporate counsel, as a class, will be denied access to information necessary to represent the client. In explaining its ruling the court stated:

> the distinction between in-house counsel and retained counsel is made because... a closer and more sustained relationship can be presumed as an outgrowth of the employer-employee relationship.

569 F. Supp. at 871.

The court extended its argument earlier enunciated in Atlantic Sugar, Ltd. v. United States, 85 Cust. Ct. 133 (1980) that, in this case, retention of outside counsel remained a reasonable way for USS to satisfy its need for access to the information. The court effectively conditioned access to these documents on the retention of "outside" counsel by USS.

SUMMARY OF ARGUMENT

The decision below is an arbitrary and capricious abuse of judicial power and is based on a totally erroneous premise.

It creates artificial barriers to the effective provision of legal services to organizations and establishes arbitrary and artificial distinctions between classes of attorneys which have no factual basis. Finally, it places any party that selects, as counsel of its choice, a corporate employee at a distinct disadvantage in the proceeding. This Court should not countance this result.

ARGUMENT

I. THE COURT'S DECISION IGNORES THE CHANGING NATURE OF THE PRACTICE OF LAW.

Attorneys practicing law as members of corporate law departments make up between 10% and 15% of the practicing bar and constitute the fastest growing segment of the legal profession. The growth of the corporate law department is explained in part by the fact that corporate managers are realizing that the handling of legal problems by directly employing attorneys can be more cost-effective than retaining counsel on a contract basis. They also have come to realize that the quality of legal services is in no way diminished.

As law departments grow, the types of legal problems that are handled by employed lawyers expands. It is not unusual today to find corporations handling the vast majority, if not all, legal work with attorneys from their law department. Indeed, ACCA's very existence is a result of the growth and vitality of the corporate law department. In fact, a just published study of 188 corporate law departments by Arthur Young & Company for the Association of the Bar of the City of New York, found that 31% of the manufacturing companies, 38% of the financial

companies and 45% of the non-manufacturing companies had all or a substantial part of their litigation performed by members of their legal staffs. Survey of Corporate Law Department Practices, Report of Arthur Young & Company to the Association of the Bar of the City of New York (December, 1983)

The court's decision is an anachronism; it smacks of guild practices to protect outside counsel's position, and implies that certain kinds of legal work cannot properly be done by corporate counsel. It also implies that corporate counsel are less able than private counsel to meet their professional obligations. The decision is squarely at odds with accepted practice within the business community: a practice which has evolved out of the recognition that high quality legal services can be delivered in a more cost-effective fashion by salaried attorneys.

The court clings to an unfounded notion that somehow corporate lawyers are different from other lawyers and therefore a distinction can be drawn based on this difference. This notion is not supported by the record in the case, it is clearly erroneous, and ignores the realities of modern day law practice.

A. CORPORATE COUNSELS' STATUS AS EMPLOYEES HAS NO RELEVANCE TO THEIR RESPONSIBILITIES, AS LAWYERS, TO THEIR CLIENTS AND TO THE COURT, AND HENCE, SHOULD NOT BE USED AS CRITERIA FOR DETERMINING ACCESS.

Because the corporate attorney deals with the client's problems on a day-to-day basis, the attorney can develop an in-depth knowledge about the client and its legal problem that is difficult to replicate when dealing with a law firm on a case-by-case basis. (To the extent "outside" counsel can replicate this in-depth knowledge, it is only because they are effectively

operating as the alter ego of "inside" counsel and no difference -- real of imagined -- can be found between their roles, in which event the fundamental underpinning of the decisions below is destroyed.) Companies have, therefore, made the decision to expand the role and function of their law departments and they may call upon their lawyers to perform the full range of legal services from general advice and contract negotiations to court-room litigation. It is not uncommon for corporations to perform all their litigation by using corporate counsel exclusively. In fact several organizations, whose lawyers are members of ACCA, do all of their litigation with legal department staff.

It is thus impossible to draw a distinction between lawyers based upon employment status. The superficiality of such a distinction was recognized as long ago as 1950, in United States v. United Shoe Machinery Corporation, 89 F. Supp. 357 (D. Mass. 1950), in which Judge Wyzanski stated:

> The type of service performed by a house counsel is substantially like that performed by many members of large urban law firms. The distiction is chiefly that house counsel gives advice to one regular client, the outside counsel to several regular clients.

Id. at 360.[1]

All attorneys, regardless of whether they are employed or retained by their client, are subject to the same standards of professional responsibility and are subject to disciplinary

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[1] It is submitted that even this distinction is more correct in theory than in practice. It is common today for an attorney in a large law firm practice to in effect handle only one client's matters.

proceedings for breach of those standards. The Code of Professional Responsibility applies with equal force to all attorneys without distinction. All attorneys, without distinction, are officers of the court. That lawyers live by a certain code of professional conduct is well-known and understood by corporate clients.

If corporate law department attorneys perform the same work and are held to the same professional and ethical standards as are their counterparts in law firms, it is difficult to advance a logical argument for denying them the information necessary to adequately represent their client.

The lower court suggests that affording access to corporate counsel will increase the opportunity for the information to be inadvertently disclosed in a business setting. The court does not make this finding based on any evidence in the record,[2] but instead apparently relies on an unfounded personal perception of what practice is like in a business setting.

The court's reasoning is difficult to understand, unless it is suggesting that corporate law department attorneys, as a class, cannot be trusted to exercise the same degree of restraint with respect to confidential information that is expected of other attorneys. This suggestion directly questions the professionalism of corporate law department attorneys and must be dismissed out of hand. Baxter Travenol Laboratories, Inc. v. LeMay, 89 F.R.D. 410 (S.D. Ohio 1983).

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[2] Indeed, the record clearly indicates that USS has put in place an elaborate and carefully constructed procedure for protecting the confidentiality of information received by counsel.

B. THE COURT'S DECISION DENYING ACCESS HAS THE EFFECT OF DENYING THE CLIENT ITS RIGHT TO EFFECTIVE COUNSEL.

The right to be represented by counsel of choice is an integral part of the fabric of this country's legal system. Indeed, the most basic statute governing procedure before federal agencies, the Administrative Procedures Act, 5 U.S.C. § 555(b), explicitly states that parties to proceedings before agencies shall have the right to counsel of their choice. Neither the statute, nor case law under it, in any way limit this right by defining the class of lawyers that may represent a party. In fact, such efforts have been rejected by the courts. Likewise, the courts have also shown a very great reluctance to intrude into the decision of choice of counsel.

In the instant case, USS is represented exclusively by corporate counsel in litigation involving the Court of International Trade. To require USS to seek outside representation in this limited situation will deny it counsel of its choice, and, indeed, could deprive it of effective counsel. It is fiction to believe that an attorney retained for the limited purpose of examining the sought after confidential information can provide the same quality of representation as the attorney who has conducted the research for the case, has represented the client at the administrative level, has prepared the pleadings, and will

handle the other issues which might be presented to the Court.[3]

Many of the attorneys, who are members of ACCA, represent their companies to the exclusion of outside firms. Those companies have made the decision to internalize delivery of legal service for a variety of reasons, the foremost of which is that they have found that corporate counsel can provide the necessary high-quality legal skills in the most cost-effective manner. The effect of the court's decisions, then, is to deny the client the right to effective counsel and consequently works a substantial hardship on the client, which is not justified by the blanket rule denying access.

II. DENYING CORPORATE COUNSEL ACCESS TO INFORMATION DISCRIMINATES AGAINST CORPORATE COUNSEL WITHOUT A RATIONAL BASIS AND, THEREFORE, IS UNCONSTITUTIONAL.

It is axiomatic that state action which results in different treatment of classes of individuals is prohibited by the Fifth Amendment unless there is a rational basis for that different treatment. See U.S. v. Kras, 409 U.S. 434 (1973). See also Fleming v. Nestor, 363 U.S. 603 (1960). In this case the court argued that the factor of permanent employment "is a rational means by which to distinguish between lawyers." Slip Op. 83-76, p.6. But this is a distinction without a rational difference.

The Trade Agreements Act, 19 U.S.C. § 1516a(b)(2)(B), requires the court, before granting counsel access to confiden-

[3] Indeed the Court below is in effect requiring USS to obtain private counsel who will be ignorant of the facts and be unable to evaluate the withheld material with any degree of sophistication.. This is an effective denial of the right to counsel.

tial business information, to balance the need for the information with the need for maintaining confidentiality.[4] The lower court, however, contends that the required balancing can be done by constructing a bright-line test which looks to the employment status of the attorney requesting the information. ACCA contends that the result is the creation of an arbitrary and artificial distinction between classes of attorneys without effectively advancing a legitimate policy -- protection of confidential information.[5]

The Court assumes, erroneously, that the factor of employment automatically defines the relationship with the client and that this relationship is different for retained counsel. By drawing this distinction, the court has made it impossible for corporate counsel to fully and adequately represent the client before the Court of International Trade. By curtailing counsel's ability to practice, the court has created a distinction between classes of attorneys that works to the severe disadvantage of the corporate counsel and, therefore, is unconstitutional.

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[4] Neither the statute nor the legislative history draws any distinction between the types of attorneys to whom access may be granted. ACCA is not aware of any statute which distinguishes between employed and retained counsel in setting out rights or duties of counsel.

[5] ACCA submits that once it is determined, as it was here, that the information is needed to prosecute the suit, the balancing test has been struck and access may then be limited; but access must be granted to that group of individuals who need the information. We do not believe the balancing test was ever intended to limit the use of counsel once need was found!

Looking at the employment status of an attorney to generalize about that attorney's duties or type of practice ignores the realities of present day law practice. Many corporations use only corporate counsel to perform legal work. Other corporations have totally segregated the attorneys in the law department to the point of separate addresses and letterhead, so that an uninformed observer would not be aware that the attorney is indeed an employee. Other corporations rely entirely on outside law firms for legal counseling and indeed have no "in-house" attorneys. In some situations all of the corporation's legal work is performed by only one firm, and then only one or two individuals who devote themselves exclusively to that client and may also serve as corporate officers or members of the Board while retaining "outside" counsel status. Indeed, ACCA is aware of many instances in which law firm partners serve as corporate general counsel and spend a majority of their time on that one client.

Consequently, it is incorrect to assume automatically a close business relation exists only between the corporate law department attorney and the client. It is, therefore, nonsensical to fashion a per se rule based on that assumption. That, however, is what the lower court has done.[6]

[6] The court admits that retained counsel may also have the suspect close working relationship with the client, but it chooses to ignore any suggestion that retained counsel may also experience the "unnatural and unremitting strain" which may follow from the need to guard confidentiality of information in a prolonged working relationship. In so doing, the lower court necessarily finds that inside counsel are incapable of meeting their professional obligations by the mere fact of being "inside."

The court's decision also ignores the role that outside attorneys play in the business decision of companies in foreign countries. Foreign companies have not moved as rapidly to develop their corporate legal staffs and, therefore, rely very heavily on outside counsel for a wide range of business and legal advice. Although the decision of the lower court would deny the necessary information to corporate counsel representing United States companies, it would allow access to outside counsel, retained by foreign companies, that perform exactly the kind of representation that troubles the Court in the instant case.

The decision also ignores the fact that the law profession is a highly mobile one. Those retained counsel to which the court would grant access today very well may decide to join the corporate law department tomorrow. Presumably, those attorneys would then find themselves subject to the same pressures the Court is so concerned about with respect to inside corporate counsel. Logically then, the protective order entered by the court should preclude outside counsel, as a condition of seeing the information, from ever becoming employed by that corporate client in any capacity. Failure to do this merely highlights the inconsistency in the reasoning of the court below.

III. THE COURT'S IMPOSITION OF A PER SE RULE BASED SOLELY ON EMPLOYMENT PLACES ANTICOMPETITIVE CONSTRAINTS ON THE PRACTICE OF LAW.

The court's rule denying corporate counsel access to confidential business information assumes that corporate counsel by reason of their employment will be more prone to improperly disclose confidential information. The result is that a corporate client

will be forced to hire outside counsel in order to have access to this critical information in the case. The long range impact of the court's decision may be to limit the right of corporations to internalize their legal work.

The Department of Justice has expressed concerns over the anticompetitive impact of a rule such as the one imposed by the lower court. In comments before the ITC, the Department has stated:

> We note particularly the anticompetitive and potentially inflationary impact of a rule that discriminates against in-house counsel. Many businesses, in an effort to reduce the cost of the legal services they need, choose to rely in whole or part for those services on a salaried legal staff. The availability of that choice provides incentives for outside firms to make their services more attractive in terms of cost, quality, efficiency, and other competitive factors. To the extent that in-house counsel are arbitrarily handicapped in their ability to perform comparable services, competition in the market for legal services is diminished.

Comments of the Department of Justice on the International Trade Commission's Proposed Revision of Section 207.7 of its Procedures for the Conduct of Injury Investigations in Antidumping and Countervailing Duty Cases, July 17, 1981.

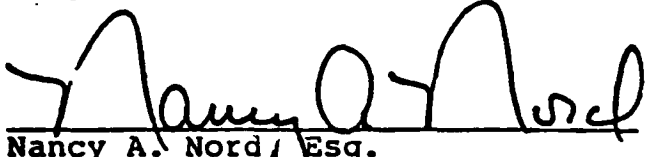
If the court's decision is allowed to stand, corporations ultimately will be forced to pay higher amounts for professional services that could be performed at a lower cost by corporate law attorney. The result will be to carve out one area of the law as the exclusive preserve of outside counsel. Creating these distinctions without an overwhelming reason based on fact and logic for doing so, which is clearly lacking in the present case, will lead to a lack of competition, unnecessary higher costs in the delivery of legal services and the creation of unfortunate distinctions -- that will not serve the profession well -- between types of attorneys.

CONCLUSION

The decision below denying counsel for USS access to portions of the record solely on the basis that counsel are full time employees of the legal staff of USS is without rational basis and is an arbitrary and capricious abuse of judicial authority. The necessary effect of this case is to severely restrict the ability of corporate law departments to provide high quality, cost-effective professional services to their business clients. Accordingly, Amicus Curiae, the American Corporate Counsel Association, respectfully prays that the decision of the Court below be reversed.

Dated: December 19, 1983
Washington, D.C.

Respectfully submitted,



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