No. S031593

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

SANTA CLARA COUNTY COUNSEL ATTORNEYS ASSOCIATION,	)
Respondent,	)
v.	)
STEVEN WOODSIDE as COUNTY COUNSEL,	)
Appellant,	)
and	)
COUNTY OF SANTA CLARA,	)
Appellant.	)

AMICUS CURIAE BRIEF OF
AMERICAN CORPORATE COUNSEL ASSOCIATION

After Judgment by the Court of Appeal
Sixth Appellate District, No. H008865

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INTRODUCTION

Santa Clara's deputy county counsels ask this Court for the right to sue their employer and sole client. Their short-sighted focus on immediate economic benefit, however, has blinded them to the fact that first class lawyers do not sue their clients. As the court noted below, there are similarities between in-house attorneys employed in the private sector and attorneys employed by the government. Accordingly, ruling in favor of the deputies here would distinguish employed or in-house counsel from retained or outside counsel on the all-encompassing issue of loyalty to the client.[1] Such a classification could only undermine the attorney-client relationship and relegate in-house attorneys to second class status.

As the only national bar association of lawyers throughout the country who serve as in-house counsel to corporations, small businesses and non-profit organizations, we ask the Court to reject that distinction as antithetical to the very core of the relationship between a lawyer and client. If anything, the needs of client corporations are even more dependent on the undivided loyalty of in-house counsel than on outside counsel. In-house counsel know the inner workings and corporate culture of their clients in ways that outside counsel

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[1] We use the term "employed" or "in-house" counsel to refer to attorneys who work exclusively for one client and do not hold themselves out to the public for the practice of law. We use the term "retained" or "outside" counsel to signify those lawyers not on the client's payroll and who hold themselves out to the public for the practice of law.

cannot. They can and should serve as trusted advisers and corporate conscience on the increasingly complex issues that corporations face today.

The American Corporate Counsel Association believes that its interests and those of the companies its members serve are and must be aligned on this issue. The brief that follows discusses the important policy reasons why in-house counsel and all attorneys must be held to the same high standards and why it is so important that their clients accurately so perceive them.

ARGUMENT

I.

THE CONFIDENCE OF CORPORATIONS AND PUBLIC ENTITIES IN THEIR IN-HOUSE COUNSEL MUST BE PRESERVED

As the Court of Appeal noted, "in-house attorneys . . . are involved in an employment relationship which is similar to that of Association members." (Slip. Op. at 10, 12 Cal.App.4th 1543, 1550, [vacated per grant of petition for review in this appeal].) The American Corporate Counsel Association represents over 1,100 in-house attorneys in California. We believe the position taken by the deputy county counsels here diminishes and ignores the fundamental role played by all in-house counsel in today's complex and litigious world.

It has always been recognized that due to an attorney's professional independence and ethical obligations "[t]he counselor is the conscience of the corporation." (R. Kagan & R. Rosen, On the Social Significance of Large Law

Firm Practice, 37 Stan. L.Rev. (1985) 399, 410.) But bringing that counselor in-house has added benefits. Making a fully professional lawyer a full-time employee of a corporation or a government entity means including a professional who is mindful of his own and his employer's legal and ethical responsibilities. As a consequence, "house counsel discharge their obligation to give ethical advice by urging executives to favor long-term over short-term interests." (E. Spangler, Lawyers for Hire (1986) [quoted in D. Rhode and D. Luban, Legal Ethics (1992) at 366].)

A recent article in the Georgetown Journal of Legal Ethics spells out the connection in more detail:

> In-house attorneys affect the full range of corporate decisions. Because in-house attorneys routinely function as insiders with the employer-clients, they have tremendous insight into the organization and its actions. Because in-house attorneys routinely work with management on various matters, in-house counsel can benefit from management's trust, not simply as counsel, but as a respected co-worker. In-house counsel perhaps can better influence organizational decisions and actions than can outside counsel. . . .
>
> * * *
>
> In-house attorneys have a unique ability to sensitize corporations to social responsibilities and social issues which law or professional responsibility may not demand but which benefit society and the organizational client in the long run.
>
> (G. Giesel, The Ethics or Employment Dilemma of In-House Counsel (1992) 5 Geo. J. Legal Ethics 535, 544-545, fn. omitted.)

The court in Goldstein v. Lees (1975) 46 Cal.App.3d 614, made explicit the connection between professional responsibility and professional efficacy:

> "[The corporation's legal adviser] must be in a position to give [an opinion] without bias or prejudice and to have it recognized as being so given. Unless he is in that position his usefulness to his client is impaired."
>
> (Id. at 622, quoting ABA Committee on Prof. Ethics, Opn. No. 86.)

Thus, highly professional employed counsel are uniquely positioned to counsel social responsibility and compliance with the law while minimizing legal costs in business and in government. Both of those benefits can be realized only if attorneys are held to the highest standards of professionalism. As Professor Geoffrey Hazard, one of the drafters of the ABA Model Rules, testified at trial,

> [M]any of us thought and I think that if you started carving up exceptions really you would define something in the way of a paralegal or a second class lawyers and there's very great danger in doing that.
>
> I think it's very important that house counsel feel the sense of responsibility of lawyers. I believe reputable house counsel . . . don't want to have their identity, as such, diluted, because they're mindful of their responsibilities as lawyers.
>
> (VII 729:16-730:2.)

Professor Hazard is correct. The degree of respect and influence accorded in-house attorneys -- including government attorneys -- is in direct proportion to the degree they are expected to conform to the highest standards of

professional ethics.[2] In an often quoted statement, Justice Cardozo made the equation explicit: "Membership in the bar is a privilege burdened with conditions." (In re Rouss (N.Y. 1917) 116 N.E. 782, 783, quoted most recently in Gentile v. State Bar of Nevada (1991) 111 S.Ct. 2720, 2470.) As Roscoe Pound stated in 1906, The bar is not "the same sort of thing as a retail grocers' association."[3]

Much more than prestige is at stake here. If employed counsel are not taken seriously as professionals, their clients and society will suffer. When corporations and government entities employ in-house attorneys who are true professionals, those attorneys provide representation that results in substantial benefits to both client and society. This becomes particularly important in light of the recent dramatic increase in the role of in-house counsel, as corporate managers have come to recognize that high quality legal services can be delivered

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[2] As Professor Giesel stated:

> [A] code of ethics or professional responsibility distinguishes a profession from an occupation, not only as an ethical code per se but as a means of self-regulation. [Fn.] To the extent lawyers want to enjoy the esteem engendered by the title "professional," lawyers must safeguard the standards of professional responsibility.
>
> (Giesel, supra, 5 Geo. J. Legal Ethics at 551.)

[3] R. Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, 29 A.B.A. Rep. 395, 7 (1906) [quoted in D. Rhode, Why the A.B.A. Bothers: A Functional Perspective on Professional Codes, 59.Tex. L.Rev. (1981) at 720].

on a more cost effective basis by employed attorneys than by retained counsel.

That increase in importance began to be felt almost two decades ago and has gained momentum ever since. As Professor Chayes put it in 1985:

> A striking development in the legal profession over the last decade has been the rapid growth in both importance and size of in-house, or corporate counsel.
>
> . . . . The increase in size and significance of corporate counsel is most pronounced among the largest corporations in the American economy . . . .
>
> (Chayes, A. and Chayes, A., "Corporate Counsel and the Elite Law Firm," 37 Stan. L.Rev. 277, 277-278 (1985).)[4]

To a far greater extent than is now possible and common with outside counsel, in-house counsel develop and sustain long term relationships with senior corporate executives, relationships that are built on trust. That trust is gained through shared crises, close judgment calls, time and sheer daily proximity. In small corporations, the in-house counsel may be one person; in larger corporations the relationship of trust begins with senior general counsel and extends to his or her staff. In-house attorneys understand

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[4] See P. Blackman, "Gaining Ground: Corporate Counsel Are Gaining in Statute, Compensation and Access to the Corridors of Power," California Lawyer, Sept. 1990, p. 52.) In the article, cited earlier, Professor Giesel thoroughly documents the fact that "[o]ne of the most significant occurrences in the legal profession in recent years is the development of the role of in-house counsel." (Giesel, supra, 5 Geo. J. Legal Ethics at 540; see id. at 540-545.)

their client's priorities, procedures and institutional history. It is a relationship whose importance to business and society cannot be overestimated.

Members of the American Corporate Counsel Association and other in-house counsel play an important role not only in facilitating the work of American business, but also in ensuring that clients do not violate any of the complex web of statutes, regulations and case law that govern the operation of modern business. That work takes place not just at the highest corporate levels, but also at the middle and lower management level, where managers must learn to trust the advice of in-house counsel. In a modern corporation, as in modern society, trust is not automatic. It must be earned over time and it must be maintained.

One of the most important roles of employed counsel, for example, is the avoidance of unnecessary litigation, whether from outside the company or from employees of the company. The in-house counsel -- due to sustained and intimate relationships at all levels and because of earned trust and proximity -- is in a position not only to counsel management to prevent or avoid litigation, but also to help create an environment in which the litigation that does occur is more defensible. As in-house counsel, he or she can anticipate problems and advise management to articulate and enforce management policies calculated to avoid litigation. This is a critical role for the in-house

lawyer that is almost impossible for outside counsel to duplicate.

The inside counsel also plays a central role in facilitating settlement of litigation and continually assessing the impact of litigation costs and diversion of resources from other corporate tasks. But to do these jobs, the corporate counsel must have the ear of management. Management must believe that in-house counsel puts the interests of the company foremost. That perception on the part of management cannot withstand litigation by its own counsel -- whatever the excuse or justification -- against the company and its management.

II.

THE ETHICAL OBLIGATION NOT TO SUE THE CLIENT APPLIES TO ALL ATTORNEYS

Two fundamental principles are crucial to the professional integrity and stature of all employed counsel in this State: (1) Every attorney owes a duty of undivided loyalty to his or her client, including an obligation not to sue the client while continuing to represent that client; and (2) The ethical obligations of an attorney who represents only one client as an employee are no less than the obligations of any other attorney. Those principles compelled the ruling of the Court of Appeal in this case and require that this Court affirm that ruling.

A. An Attorney Cannot Sue His or Her Client While Continuing to Represent That Client

The County has demonstrated that the deputies' proposed lawsuit is prohibited by both the Rules of Professional Conduct and the common law of legal ethics. (Appellants' Brief on the Merits ("App. Br.") at 4-12.) That lawsuit is prohibited by rules 3-300[5] and 3-310(B) of the Rules of Professional Conduct, and by this Court's firmly established rule prohibiting an attorney from "assum[ing] a position adverse or antagonistic to his client without the latter's free and intelligent consent. . . ." (Anderson v. Eaton (1930) 211 Cal. 113, 116.)

Plaintiffs claim that the Rules are not specific enough -- that there should be an express rule prohibiting suit before they are foreclosed from doing so. (Resp. Br. at 17-19.) But there is no express rule forbidding an attorney from altering a client's documents to assure his collection of fees, yet an attorney who did so "violated his duty of fidelity to his

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[5] The deputies contend that characterizing their proposed lawsuit as an "adverse pecuniary interest" to their client proves too much because, "[b]y that logic, government attorneys have taken a 'pecuniary interest adverse to a client' merely by seeking a salary." (Respondents' Opening Brief ("Resp. Br.") at 20.) That argument overlooks the crucial difference between "seeking a salary" and <u>suing</u> one's <u>client</u> for a higher salary. The adverse pecuniary interest involved here is these attorneys' lawsuit for money, not their interest in being paid for their services.

Rule 3-300 does not require that attorneys work for free and clearly permits an attorney to negotiate with the client for suitable compensation. Rule 3-300 does mandate, however, that if an attorney is unsuccessful in negotiating with a current client a level of compensation with which he or she is satisfied, then the attorney may not pursue the matter to the level of adversity and antagonism entailed in a lawsuit.

client" and suspension from the bar was warranted. (Hinds v. State Bar (1941) 19 Cal.2d 87, 91.) Similarly, there is no rule expressly forbidding an attorney from attempting to force through fear the payment of his or her bill for legal services, yet an attorney who did so "'violated his oath and duties as an attorney'" and was properly disciplined. (Lindenbaum v. State Bar (1945) 26 Cal.2d 565, 573.)

It would be impossible to set down a rule specifically prohibiting every conceivable means that an attorney might devise for pursuing his or her economic interest at the expense of the client's, but this Court has expressly stated that any such conduct is prohibited:

> When an attorney, in his zeal to insure the collection of his fee, assumes a position inimical to the interests of his client, he violates his duty of fidelity to his client.
>
> (Hulland v. State Bar (1972) 8 Cal.3d 440, 448.)

The deputy county counsels are paid their "fee" in the form of their salaries. They propose to sue their client for a higher salary, or "fee," by charging that very client with bad faith -- while continuing to represent that client. It is hard to imagine a form of conduct more "inimical to the interests of [their] client" than that.

B. An Employed-Attorney's Ethical Obligations Are No Less Than Those of a Private Attorney

The County lawyers have never denied that a private independent attorney may not sue his or her client and yet

continue to represent that client. As the Court of Appeal noted, such conduct would violate "the common understanding and the common conscience of the bar" and would "constitute[] a reprehensible breach of loyalty . . ." (Slip Op. at 7 [quoting Grievance Com. of the Bar v. Rottner (1964 Conn.) 203 A.2d 82, 85.) Those of us who practice as in-house counsel are and must be bound by the same rules of professional ethics as any other attorney.

The very first paragraph of the Rules of Professional Conduct makes the point unequivocally: "these rules shall be binding upon all members of the State Bar." (Rules Prof. Conduct, rule 1-100(A), emphasis added.) Attorneys employed by business entities are specifically incorporated in the definition of a "law firm." (Id., rule 1-100(B)(1)(c).)

Professor Hazard testified at trial that in-house counsel are subject to the same rules of professional ethics as other attorneys. (VII R.T. at 727-730.) Case law confirms his testimony. In Goldstein v. Lees (1975) 46 Cal.App.3d 614, the court ruled that a former in-house counsel was not entitled to claim compensation for representing shareholders against a corporation for whom he had formerly been general counsel. The Court stated, "Clearly, if [the attorney] were counsel to the corporation [his former client], he could not, consistently with his position as general counsel, act as proxy for one contending group of shareholders." (Id. at 622; accord, Global Van Lines, Inc. v. Superior Court (1983) 144 Cal.App.3d 483 [former in-

house counsel disqualified as attorney for litigation opponent of that attorney's former client, as required by rule prohibiting adverse successive representation].)[6]

That in-house attorneys are held to the highest ethical standards is graphically illustrated by cases dealing with an issue related to but different from the issue presented by this case. That issue is the ability of former employed counsel to sue their former clients after the attorney-client relationship has been severed. Resolution of that issue has been less than uniform, but a distinct theme of solicitude for the attorney-client relationship emerges from those cases. Most courts prohibit such suits altogether as a violation of the terminated attorney's duty of loyalty; those that permit suit do so only after insisting that the essentials of the attorney-client relationship cannot be compromised.

In Herbster v. North American Co. (1986 Ill.App.) 501 N.E.2d 343, cert. den. (1987) 484 U.S. 850, the court refused to permit a former in-house attorney to sue for retaliatory discharge where the attorney alleged that he had been fired for refusing to remove or destroy materials sought in

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[6] See also Willy v. Coastal Corp. (S.D.Tex. 1986) 647 F.Supp. 116, 118, revd. in part on other grounds, 855 F.2d 1160 (5th Cir. 1988) aff'd (1992) 112 S.Ct. 1076 [Texas Canons of Ethics and Disciplinary Rules apply equally to in-house counsel]; U.S. Steel Corporation v. United States (1984 Fed.Cir.) 730 F.2d 1465, 1468 ["in-house counsel are officers of the court, are bound by the same Code of Professional Responsibility, and are subject to the same sanctions"].) Of course, the attorney-client privilege applies with equal force to communications between in-house counsel and their clients. (Upjohn Co. v. United States (1981) 449 U.S. 383.)

discovery. Similar to the deputy county counsels in this case, the attorney claimed that "although he is an attorney he is only an employee of North American and as such is entitled to bring this action for retaliatory discharge." (Id. at 346, emphasis added.) The court decisively rejected that argument, stating:

> [w]e cannot separate plaintiff's role as an employee from his profession. Unlike the average employee, plaintiff was a registered attorney subject not only to [his employer's] review but also, like other attorneys, subject to disciplinary review and the Code of Professional Responsibility.
>
> (Ibid.)

The Court underscored the attorney's fiduciary duty to his former client employer and concluded that:

> Attorneys are governed by different rules and have different duties and responsibilities than the employees in recent retaliatory discharge cases.
>
> (Id. at 348.)

In Balla v. Gambro. Inc. (Ill. 1991) 584 N.E.2d 104, the Illinois Supreme Court ruled the same way. In Balla, a former in-house attorney claimed he had been terminated for opposing the acceptance and sale of defective kidney dialysis machines. The Illinois Supreme Court ruled that the attorney could not bring a suit for retaliatory discharge. (Id. at 10.)

The rulings in Herbster and Balla are tough, even though they respond to situations far more sympathetic to litigation: former employees fired for upholding ethical

standards.[7] But they are consistent with numerous other decisions that hold that former in-house counsel may not sue their former clients. (See County Br. at 19.) These cases demonstrate that, even if employee attorneys are presented with ethical dilemmas in their representation of their employers, the same standards of ethical conduct apply, and courts will not lightly relax the duty of loyalty even so far as to permit former in-house attorneys to sue their employers.[8]

Regardless of whether employee attorneys may properly sue their former employers after the attorney-client relationship has ended, there can be no doubt that the duty of loyalty applies with full force to these attorneys while the

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[7] See Giesel, supra, 5 Geo. J. Legal Ethics at 557-562.

[8] Some cases have permitted former in-house counsel to sue, but even those cases demonstrate a paramount concern for protecting the attorney-client relationship. In Nordlinger v. Northern States Power Co. (Minn. 1991) 478 N.W.2d 498, the Minnesota Supreme Court permitted a former in-house counsel to sue for breach of employment contract, "provided however, that the essentials of the attorney-client relationship are not compromised." (Id. at 502, emphasis added.) In Mourad v. Automobile Club Ins. Assn (Mich. App. 1991) 465 N.W.2d 395, the court permitted an terminated employee to sue his former employer, an insurance company because the attorney's primary duties were to represent the insurance company's insureds, rather than the company. (Id. at 400.) When not representing insureds, the attorney had acted as an administrative supervisor, and "[i]n this sense, plaintiff did not have an attorney-client relationship, but was hired to administer the office." (Ibid.)

Finally, in Parker v. M&T Chemicals, Inc. (N.J. Super. 1989) 566 A.2d 215, the court permitted an attorney to sue his former employer under a whistle-blower statute. The court was careful to note, however, that the attorney "does not demand reinstatement, a remedy provided by the Act," (id. at 218) but was making a "claim for money damages only . . . ." (Id. at 220.)

relationship continues, and that duty prohibits the lawsuit these attorneys would bring against their client.

CONCLUSION

When some in-house counsel sue their employers, the critical perception that all in-house counsel have an undivided loyalty to their client weakens. At the present time, all in-house counsel clearly understand the rule: attorneys do not sue their clients. If that understanding begins to erode, more suits such as this are inevitable. But the concomitant loss of the perception and reality of loyalty to the client will come at great cost to the profession, to the clients we serve and to society.

The American Corporate Counsel Association urges this Court to hold all of us -- retained, employed and government attorneys alike -- to the same duty of loyalty to our clients.

Dated: , 1993 Respectfully submitted,

By: /s/
DANIEL S. HAPKE, JR.

Vice President and General Counsel
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1993 Chairman and Attorney for
AMERICAN CORPORATE COUNSEL ASSOCIATION

OF COUNSEL:
FREDERICK J. KREBS
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CERTIFICATE OF SERVICE

RE: Santa Clara County Counsel Attorneys Association v. Steven Woodside and County of Santa Clara Court No. S031593

I, the undersigned, declare under penalty of perjury that:

I am a citizen of the United States, over the age of 18, and not a party to the within cause or action. My business address is 5001 Kearny Villa Road, San Diego, California 92186.

On August 16, 1993, I served true copies of the following:

Amicus Curiae Brief of
American Corporate Counsel Association

on the following party(ies) in said action, by placing a true copy thereof, enclosed in a sealed envelope, and serving:

Please see Service List.

X **BY MAIL:** By depositing said envelope, with postage thereon fully prepaid, in the United States mail in San Francisco, California, addressed to said party(ies);

____ **BY FACSIMILE:** By faxing said documents to the fax number indicated on the Service List.

____ **BY PERSONAL SERVICE:** By causing said envelope to be personally served on said party(ies), as follows:

By Federal Express Delivery

By Hand Delivery

Executed in San Francisco, California, on August 16, 1993.

I declare, under penalty of perjury, that the foregoing is true and correct.

/s/

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