

COMMONWEALTH OF KENTUCKY  
KENTUCKY SUPREME COURT  
CASE NO. 95-SC-326

RECEIVED

CLARK EQUIPMENT COMPANY

APPELLANT

MAY 24 1995

v.

CLERK  
SUPREME COURT

HONORABLE GARY D. PAYNE, JUDGE  
FAYETTE CIRCUIT COURT, DIVISION III

APPELLEE

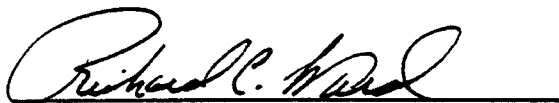
AMICUS CURIAE BRIEF  
OF THE  
AMERICAN CORPORATE COUNSEL ASSOCIATION

and

RONALD D. STANLEY and  
ALLEAN STANLEY

REAL PARTIES IN INTEREST

\* \* \* \* \*

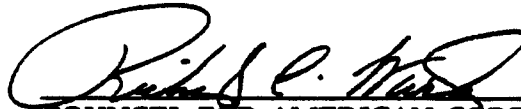


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CERTIFICATE OF SERVICE

This will certify that the foregoing Amicus Curiae Brief was served by mailing a true copy thereof, first class mail, postage prepaid, on the 24<sup>th</sup> day of May, 1995 to the following: James G. LeMaster, Mark T. Hayden, GREENEBAUM, DOLL & MCDONALD PLLC, 1400 Vine Center Tower, Lexington, Kentucky 40507; Chilton Davis Varner, Todd P. Davis, KING & SPALDING, 191 Peachtree Street, Atlanta, Georgia 30303; Judge Gary D. Payne, Fayette County Courthouse, 215 West Main Street, Lexington, Kentucky 40507; J. Brent Austin, Suite 302, Victorian Square, 401 W. Main Street, Lexington, Kentucky 40507; John C. Scott, Clerk, Office of Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40501-0229; Clarke Keller, STITES & HARBISON, 2300 Lexington Financial Center, 250 West Main Street, Lexington, Kentucky 40507; R. Craig Reinhardt, 300 West Vine Street, Kincaid Tower, Suite 650, Lexington, Kentucky 40507-1660.



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## STATEMENT OF INTEREST OF THE AMICUS CURIAE

This case involves the attempt in the underlying case to depose the in-house counsel of the Appellant Clark Equipment Company. The trial court ruled that in-house counsel could be deposed on factual matters. The Kentucky Court of Appeals opinion limits even more the attorney-client protection for in-house counsel. The Amicus Curiae, the American Corporate Counsel Association ("ACCA") has a substantial interest in this case.

ACCA is a corporation registered in the District of Columbia and the only national bar association exclusively serving the professional needs and interests of in-house counsel employed by corporations and other private sector organizations.<sup>1</sup> Since its founding in 1982, ACCA's membership has grown to more than 10,200 in-house lawyers representing approximately 4,300 private sector organizations in the United States and abroad.

ACCA has consistently advanced the principle that the privileges and obligations of the legal profession apply equally to all attorneys, regardless of their practice setting. ACCA believes that the interests of in-house counsel, their clients, and the legal community as a whole are enhanced by encouraging the use of in-house lawyers because of their ability to deliver high quality legal services in a cost-effective manner. Courts, governmental and regulatory agencies, and legal

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<sup>1</sup>The term "employed" or "in-house" counsel is used to refer to employed attorneys who work exclusively for one client and do not hold themselves out to the public for the practice of law.

commentators have noted the increased value that in-house counsel -- over outside or retained counsel -- bring their clients.<sup>2</sup>

### ARGUMENT

I. IN-HOUSE COUNSEL SHOULD RECEIVE THE SAME PROTECTION AS OUTSIDE COUNSEL: THE COURT SHOULD NOT MAKE DISTINCTIONS BASED ON THE EMPLOYMENT STATUS OF AN ATTORNEY.

Attorneys practicing law as members of legal departments for corporations constitute 10% of the legal profession.<sup>3</sup> A very large segment of the corporate America has obtained representation in the form of employed, rather than retained counsel.<sup>4</sup> Corporate legal departments are the primary providers (over 50% of the work performed) of legal services in the following practice areas: antitrust, bankruptcy, benefits/ERISA, contracts, environmental, general corporate matters, labor, mergers and acquisitions, non-governmental regulatory matters, securities/financial issues, and trademark protection.<sup>5</sup> In-house practitioners are increasingly active participants in litigation. Indeed, they are the primary providers

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<sup>2</sup>See e.g., G. Giesel, "The Ethics or Employment Dilemma of In-House Counsel." 5 Geo. J. Legal Ethics 535, 544-45 (1992) ("In-house attorneys have a unique ability to sensitize corporations to social responsibilities ... which benefit society and the organization client in the long run.")

<sup>3</sup>B. CURRAN & C. CARSON, SUPPLEMENT TO THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1988 (American Bar Foundation 1991) at 20.

<sup>4</sup>See, e.g., P. Blackman, "Gaining Ground" Corporate Counsel are Gaining in Stature, Compensation and Access to the Corridors of Power." California Lawyer. Sept. 1990, p.52.

<sup>5</sup>"Price Waterhouse 1994 Law Department Spending Survey" Graph. appearing in "Legal Beat." Wall Street Journal, December 30, 1994.

of legal services approximately twenty-five percent of the time.<sup>6</sup> The range of roles that in-house counsel play may include litigation management of outside counsel, trial strategy, supporting the document and evidentiary preparation process, and acting as lead counsel in trying the case. In short, increasing numbers of in-house lawyers are taking their practice from the board room to the court room.

The reality of the in-house practice of law today confirms what was noted over 40 years ago, namely that the place of employment, whether in-house or in private practice, is irrelevant to the nature of the services provided: "The type of service performed by a house counsel is substantially like that performed by many members of large urban law firms. The distinction is chiefly that house counsel gives advice to one regular client, the outside counsel to several regular clients." United States Shoe Machinery Corporation, 89 F. Supp. 357, 360 (D. Mass. 1950).<sup>7</sup>

Not surprisingly, courts recognize this reality by consistently holding that the rules and responsibilities of the profession apply equally regardless of the practice setting. The Supreme Court affirmed the equal status, obligations and privileges of in-house counsel by according the attorney-client privilege to communications between in-house counsel and their clients. Upjohn Co. v. United States, 449 U.S. 383 (1981). The Code of Professional Responsibility governs all attorneys with equal force without regard to their employment status. U.S. Steel Corporation v.

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<sup>6</sup>Ibid.

<sup>7</sup>We submit that even this distinction lacks force in today's legal practice, where it is common for some attorneys in the law firms to handle only one client's matters.

United States, 730 F.2d 1465, 1468 (Fed Cir. 1984) ("in-house counsel are officers of the court, are bound by the same Code of Professional Responsibility, and are subject to the same sanctions"). Courts grant clients reimbursement for their in-house attorneys fees, as well as those generated by outside counsel. See e.g., Textor v. Board of Regents, 711 F.2d 1387, 1397 (7th Cir. 1983) (rejected distinction between in-house attorneys and outside counsel for purpose of awarding fees).

Shelton v. American Motors Corp., 805 F.2d 1323 (8th Cir. 1986), which involved the attempted deposition of an in-house attorney, established rules limiting the circumstances under which any counsel may be deposed. In so doing the court recognized that the practice of deposing attorneys (whether employed or retained) is inimical to the attorney-client relationship. The deposition of an attorney invariably impacts the attorney-client relationship, raising the specter of an inadvertent waiver and undermining the confidence that the client must have in its counsel. Because our system values the client's privilege and seeks to encourage clients to communicate all necessary information to counsel, the circumstances under which any attorney may be deposed justifiably have been severely limited.

In-house counsel are more likely to be the target of depositions than outside counsel, since they are more likely to have greater and more regular access to information pertinent to the dispute. They also are more likely to have an overview and broad knowledge about the client's strategies in the pending and related litigation. Thus, there is a greater opportunity for opposing counsel to "hit the mother lode" by deposing an in-house attorney. When applying the standard for

deposition of an attorney, the court must not lose sight of the fact that, as a matter of sound public policy, the standard must be the same for in-house counsel and outside counsel.<sup>8</sup> To set any other standard will force companies to seriously reassess the value of using in-house counsel in litigation to acquire information, give legal advice, assist in case preparation and manage or conduct litigation.

### CONCLUSION

The American Corporate Counsel Association respectfully urges that the Court apply the same standard to both inside and outside counsel when determining whether or not to allow the deposition of an attorney.

Respectfully submitted,



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<sup>8</sup>In this regard, the assertion that the attorney-client privilege somehow does not apply because the in-house counsel is not licensed in the jurisdiction where the lawsuit is pending should be summarily dismissed. Such an assertion would not be made if the practice setting were different and the individual to be deposed was an associate or a partner in a law firm. The practice of law is national, if not international. Attorneys frequently counsel clients in litigation in jurisdictions where they may not be admitted. The attorney client privilege must attach in such situations. To find otherwise would be to ignore the realities of modern practice and the legitimate expectations of the client. This is true regardless of whether the individual attorney is inside or outside counsel.