COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

FOR THE COMMONWEALTH

No. SJC-6749

ESSEX COUNTY

GTE PRODUCTS CORPORATION,
PLAINTIFF-APPELLANT,

v.

JEFFERSON DAVIS STEWART, III,
DEFENDANT-APPELLEE.

Motion of the American Corporate Counsel Association for Leave to File Brief as Amicus Curiae and Brief of Amicus Curiae.

Of Counsel:
DANIEL S. HAPKE, JR.
Vice President and General Counsel
GENERAL DYNAMICS ELECTRIC BOAT DIVISION
MZ D 5-10, 75 Eastern Point Road
(203) 433-2700

KATHLEEN M. O'DONOHUE
BBO #377590
Assistant General Counsel
AVERY DENNISON CORPORATION
One Clarks Hill
Framingham, Massachusetts 01701
(508) 879-0511

FREDERICK J. KREBS
SUSAN J. HACKETT
AMERICAN CORPORATE COUNSEL ASSOCIATION
1225 Connecticut Avenue, NW
Suite 302
Washington, DC 20036
(202) 296-4522

COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

FOR THE COMMONWEALTH

No. SJC-6749

GTE PRODUCTS CORPORATION,

v.

JEFFERSON DAVIS STEWART, III

Motion of the American Corporate Counsel Association
for Leave to File Brief as Amicus Curiae.

Pursuant to Rule 17 of the Rules of Appellate Procedure of this Court, *Amicus Curiae* American Corporate Counsel Association ("ACCA") requests leave to file the accompanying brief in support of affirmation of the decision of the court below. Counsel for GTE Products Corporation and Counsel for Mr. Stewart have consented to the filing of this brief.

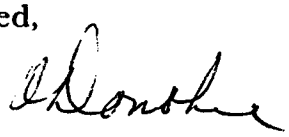
ACCA is a national bar association devoted exclusively to the professional activities of attorneys on the legal staffs of corporations and other business organizations in the private sector. With 38 local chapters across the country, ACCA has more than 10,200 members employed in a legal capacity by approximately 4,300 organizations.

ACCA and its members have a substantial interest in issues involving the attorney-client privilege in an in-house context, as well as the rights,

privileges, and obligations of attorneys practicing as employees of the client. Decisions in matters such as the one before this Court define the professional obligations of in-house counsel and the manner in which they fulfill their responsibilities. ACCA seeks to inform the Court of the implications of the issues raised by this case as they affect the in-house practice of law.

For the foregoing reasons, the motion of the American Corporate Counsel Association to file the accompanying brief as *Amicus Curiae* should be granted.

Respectfully submitted,



Kathleen M. O'Donohue
Assistant General Counsel
Avery Dennison Corporation
One Clarks Hill
Framingham, MA 01701
President, ACCA's NE Chapter
508/383-4677
BBO #: 377590

Of Counsel:

Daniel S. Hapke, Jr.
Vice President & General Counsel
General Dynamics Electric Boat Division
MZ-D-5-10, 75 Eastern Point Road
Groton, CT 06340-4989
Member, ACCA Board of Directors and Policy Committee, 1993 Chairman of the Board
203/433-2700

Frederick J. Krebs
President and Chief Operating Officer
Susan J. Hackett
Vice President and General Counsel
American Corporate Counsel Association
1225 Connecticut Avenue, NW
Suite 302
Washington, DC 20036
202/296-4522

January 17, 1995

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

CASES — Page(s)

PERIODICALS AND TREATISES — Page(s)

BAR CODES AND POLICIES — Page(s)

STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

Amicus Curiae, the American Corporate Counsel Association ("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 representing corporations and other private sector organizations.[1] 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 members do not hold themselves out to the public for retention in the private practice of law. ACCA's membership includes 475 attorneys who are members of the Massachusetts Bar.

ACCA and its members have 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; in an era in which the importance of compliance and preventive law has been recognized, the role of in-house counsel is especially important.

As the court below noted, this matter brings the policy considerations concerning exceptions to the at-will employee rule into direct conflict with the professional responsibilities of the in-house attorney. Of particular concern to ACCA is the fact that Mr. Stewart appears to be seeking to establish a different standard of ethical conduct for in-house attorneys.

---

[1]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. The term "retained" or "outside" counsel is used to signify those lawyers not on the client's payroll and who hold themselves out to the public for the practice of law.

ACCA believes that employed counsel must abide by the same rules of ethical and professional conduct as their peers in private practice. A decision which establishes a different and lesser ethical standard for in-house counsel will undermine the attorney-client relationship and relegate in-house attorneys to second-class status.

The brief that follows discusses the important policy reasons why in-house counsel and all attorneys must be held to the same high ethical standards and why it is so important that their clients accurately so perceive them.

QUESTION PRESENTED

May an in-house counsel unilaterally abrogate the attorney client privilege and divulge privileged information in a wrongful termination action against a former client?

STATEMENT OF THE CASE

Because all proceedings in this cased have been impounded, *Amicus Curiae* is unable to cite to facts of the record. Reference may be made, however, to the relevant undisputed facts described in the Superior Court's decision, and they are incorporated here by reference.

SUMMARY OF ARGUMENT

In-house counsel are uniquely positioned to counsel social responsibility and compliance with the law. This benefit can be realized only if in-house attorneys are trusted by their clients and held to the highest standards of professionalism. A decision allowing disclosure of information obtained during the attorney-client relationship would destroy that trust.

ARGUMENT

I. The Court should protect the confidence of the client in its in-house attorney.

Over the years, courts have acknowledged that public policy is served by the consistent protection of the sanctity of communications between an attorney and his or her client, including protection of communications between an in-house attorney and a corporate client. See Upjohn v. United States, 449 U.S. 383, 390 (1981) (attorney-client privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him or her to give sound and informed advice). A lawyer's ethical obligation not to reveal the confidences and secrets of his or her client not only facilitates the full development of facts essential to proper representation of the client, but also encourages clients to seek early legal assistance. ABA Code of Professional Responsibility, Ethical Consideration 4-1.

Courts, governmental/regulatory agencies, and legal commentators have noted the increased value that in-house counsel – over outside or retained counsel – bring to their clients. A very large segment of corporate America has obtained representation in the form of employed, rather than retained counsel. 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. 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 & acquisitions, non-governmental regulatory matters, securities/financial issues, and trademark protection. "Price Waterhouse 1994 Law Department Spending Survey" Graph, appearing in "Legal Beat," Wall Street Journal, December 30, 1994.

Clients choose in-house counsel for a number of reasons, including: (1) a clear preference for "preventive" rather than "remedial" lawyer-client relations, and (2) the high quality that results from greater familiarity with the client's operations and enhanced communication.

Consumer advocate Ralph Nader recently acknowledged the important public policy in-house counsel may fulfill by virtue of the nature of their close relationship with the client:

> The first function of an in-house counsel is prevention. If the in-house counsel is a professional person, the chief duty of a professional person – whether a lawyer or an engineer or a doctor – is prevention, working to prevent the very problems that they're paid to deal with in case these problems occur. . . .
>
> . . . [I]f in-house counsel is going to have the credibility of being a full member of an independent profession, with independent professional responsibilities, then they have to approximate the ethical duties that are imposed on outside counsel. Otherwise, they will be treated as mere employees or business people and their professional role will be severely denigrated. If they fall to this status, they will not be able to support their corporate employer with adequate and independent advice.
>
> S. Hackett and R. Nader, "Interview with Ralph Nader," ACCA Docket, Fall 1994, pp. 48, 50.

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 means including a professional who is mindful of his own and his employer's legal and ethical responsibilities on the business team making daily decisions about the course of a business'

practice. As a consequence, "house counsel . . . urg[e] 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 greater 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 organization 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 responsibilities may not demand but which benefit society and the organization client in the long run.
>
> G. Giesel, "The Ethics or Employment Dilemma of In-House Counsel," 5 Geo. J. Legal Ethics 535, 544-545 (fn. omitted), 1992.

Thus, highly professional employed counsel are uniquely positioned to counsel social responsibility and compliance with the law. But this benefit can be realized only if in-house attorneys are held to the highest standards of professionalism.

The degree of respect and influence accorded in-house attorneys is in direct proportion to the degree they are expected to conform to the highest standards of professional ethics. In an often-quoted statement, Justice Cardozo made the equation explicit: "Membership in the bar is a privilege burdened with conditions." In re Rouss, 116 N.E. 782, 783 (N.Y. 1917), quoted recently in Gentile v. Star Bar of Nevada, 111 S. Ct. 2720, 2470 (1991). As Roscoe

Pound stated in 1906, the bar is not "the same sort of thing as a retail grocers' association." R. Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," 29 A.B.A. Rep. 395, 7 (1906).

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 employ in-house attorneys who are true professionals, those attorneys provide representation that results in substantial benefits to both client and society. To a far greater extent than is now possible or common with outside counsel, in-house counsel develop and sustain long-term relationships with senior corporate executives. These relationships can only be built on trust. That trust is gained through shared crises, close judgment calls, time, and sheer daily proximity. In-house attorneys understand 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 encouraging clients not to violate any of the complex web of statues, 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.

A ruling which allows an in-house counsel to unilaterally abrogate the attorney-client privilege and divulge information obtained during the course of his or her representation of a former client would harm the business community *and* the legal profession by undermining the trust that is an indispensable ingredient in attorney-client relationships.

As one commentator has observed[2], the ultimate result of allowing the disclosure of privileged information in a wrongful discharge action by in-house counsel will be to create two classes of lawyers: one to whom the corporate client can disclose everything, and one with whom the client will not converse about the most sensitive concerns, rarely bringing to bear those questions the client should be most encouraged to ask.

The former Chief Justice of the Nebraska Supreme Court and immediate past ACCA Chairman of the Board brings potentially the most powerful argument to the fore in a statement concerning wrongful discharge actions by in-house counsel:

> There are two critical issues that require further consideration by those of us engaged in the in-house practice. One, do we wish to eliminate distinctions between in-house and outside counsel? And two, how do we deal with the feelings of our client, who believe that they have hired "their lawyer" and not just another employee?
>
> . . . [I]t seems to me the feelings of the client, who in the final analysis is most important, are totally ignored. A court may be able to compel an employer to permit its lawyers to sue and retain their jobs; but no court can compel the officers and directors of the corporation to feel comfortable with those lawyers.
>
> N. Krivosha, "Chairman's Message," ACCA Docket, Spring 1994, at 2.

II. The attorney-client privilege appropriately bars an attorney from bringing an action for wrongful termination if such action would require the disclosure of privileged information.

ACCA believes that an action for wrongful discharge by an in-house counsel against a former client should be barred, if such action requires the disclosure of privileged information obtained as the result of the attorney

---

[2]Ronald M. Green, "Professional Responsibility Must Prevail," ACCA Docket, Summer 1991, at 30.

client relationship.[3] In adopting this position, ACCA does not suggest that in-house counsel can be discharged in violation of state and federal laws. Nor does it suggest that there should be no recognition of the possible contractual grounds for a suit between an in-house counsel and its client. It is simply our position that public policy is best served if in-house attorneys are held to the same professional standards as outside counsel and precluded from unilaterally abrogating the attorney-client privilege.

Under the Code of Professional Responsibility, the American Bar Association's Model Code of Professional Responsibility, and State Codes of Professional Responsibility, protection of the attorney-client privilege is mandated both during the attorney-client relationship and after it has been terminated. ACCA believes that this requirement applies to in-house counsel no less than to outside counsel. A former in-house counsel has an ethical obligation not to reveal privileged communications, even if such counsel alleges that they resulted in his or her termination or resignation.

The primacy of the attorney-client privilege has been recognized in virtually every jurisdiction which has addressed the issue of wrongful termination actions by in-house counsel. Some courts have permitted former in-house counsel to sue, but even those cases demonstrate a paramount concern for protecting the attorney-client relationship. General Dynamics Corp. v. Superior Court, 7 Cal. 4th 1164, 876 P.2d 487, 32 Cal. Rptr. 2d 1 (1994); Nordling v. Northern States Power Co., 478 N.W.2d 498 (Minn. 1991); Mourad v. Automobile Club Ins. Assn., 186 Mich. App. 715, 465 N.W.2d 395, *appeal denied*, 439 Mich. 896, 478 N.W.2d 443 (1991); Parker v. M&T Chemicals, Inc., 566 A.2d 215 (N.J. Super. 1989). Still other courts have barred the suit of an in-house counsel against a former client altogether, on

---

[3] "ACCA Policy Statement on Wrongful Discharge Suits Filed by In-House Counsel," Adopted by the ACCA Board of Directors, November 6, 1991.

grounds that any such suit would be both a violation of the client's rights to choose counsel of its choice and an inappropriate dismissal of the client's rights to privileged communications with their attorney. Michaelson v. Minnesota Mining & Mfg. Co., 474 N.W.2d 174 (Minn. Ct. App. 1991), *aff'd*, 479 N.W.2d 58 (Minn. 1992); Balla v. Gambro, Inc., 145 Ill.2d 492, 584 N.E.2d 104 (1991); Willy v. Coastal Corp., 647 F. Supp. 116 (S.D. Tex. 1986), *rev'd on other grounds*, 855 F.2d 1160 (5th Cir. 1988); Herbster v. North American Co., 501 N.E.2d 343 (Ill.App. 1986), *cert. den.*, 484 U.S. 850 (1987).

By far the greatest danger posed by allowing wrongful discharge actions by in-house counsel is the erosion of confidentiality in attorney-client communications and the resulting hesitance of corporate clients to repose confidence and trust in their own attorney employees, particularly when seeking advice on the client's most sensitive matters. This danger was recognized and succinctly described in a recent opinion by Justice Ponelli of the California Supreme Court:

> In recent years the status of in-house attorneys has improved as governments and businesses have increasingly relied upon them in their drive to save legal costs. This is good for society, because attorneys with intimate knowledge of and constant access to their clients are in an excellent position to advise responsible behavior and compliance with the law. However, in-house attorneys enjoy this trust and confidence in large measure because they have been held to the same high ethical standards as all other attorneys. If, through decisions such as this, the perception arises that in-house attorneys are not being held to the same ethical standards, their professional standing and usefulness to their clients and society will diminish to the detriment of attorney and client alike.
>
> Santa Clara County Counsel Attorney's Association v. Woodside, 7 Cal. 4th 525, 558: 869 P.2d 1142, 1161 (1994) (dissenting opinion)

CONCLUSION

ACCA believes that the professional obligations of the in-house attorney must predominate in any action for wrongful discharge against a former client. Accordingly, a former in-house counsel should be barred from divulging privileged information in any such action. An in-house attorney should have, and his or her client should perceive that he or she has, the same ethical obligations as outside counsel. Such a perception is critical to the professional stature and integrity of all employed counsel in this State and elsewhere.

For the foregoing reasons, the Court should affirm the decision of the court below.

Respectfully submitted,

Of Counsel:

Daniel S. Hapke, Jr.
Vice President & General Counsel
General Dynamics Electric Boat Division
MZ-D-5-10, 75 Eastern Point Road
Groton, CT 06340-4989
Member, ACCA Board of Director and Policy Committee, 1993 Chairman of the Board
203/433-2700

Frederick J. Krebs
President and Chief Operating Officer
Susan J. Hackett
Vice President and General Counsel
American Corporate Counsel Association
1225 Connecticut Avenue, NW
Suite 302
Washington, DC 20036
202/296-4522

Kathleen M. O'Donohue
Assistant General Counsel
Avery Dennison Corporation
One Clarks Hill
Framingham, MA 01701
President, ACCA's NE Chapter
508/383-4677
BBO #: 377590

January 17, 1995