IN THE SUPREME COURT OF ALABAMA

CASE NUMBER: No. 1001053

EXXON MOBIL CORPORATION

Appellant,

v.

STATE OF ALABAMA DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, and RILEY BOYKIN SMITH, et al.

Appellees.

On Appeal from the Circuit Court of Montgomery County (No. CV-99-2368)

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF and AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

Sally S. Reilly, Esq.
President, Alabama Chapter of the American Corporate Counsel Ass'n.
Southern Progress Corporation
2100 Lakeshore Drive
Birmingham, AL 35209

Michael Roster, Esq.

John H. McGuckin, Jr., Esq.
Executive V.P., General Counsel & Secretary
Union Bank of California, N.A.
400 California Street
San Francisco, CA 94104

Executive V.P. & General Counsel
Golden West Financial Corporation
1901 Harrison Street, 17th Floor
Oakland, CA 94612

Frederick J. Krebs, Esq.
President
Susan Hackett, Esq.
Senior V.P. & General Counsel
American Corporate Counsel Ass'n.
1025 Connecticut Avenue, N.W., Suite 200
Washington, D.C. 20036-5425

William B. Lytton, Esq.
Senior V.P. & General Counsel
International Paper Company
400 Atlantic Street
Stamford, CT 06921

John K. Villa, Esq.
F. Lane Heard III, Esq.
Williams & Connolly LLP
725 12th Street, N.W.
Washington, D.C. 20005

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BRIEF IN SUPPORT OF APPELLANT

This case places before the Court a trial court ruling that calls into question whether Alabama will depart from its own precedent and that of every other American court by refusing to honor the attorney-client privilege because the lawyer giving advice was in-house counsel. The trial court's ruling brings to the fore the manner in which modern American corporations obtain the legal advice that is essential to their functioning and that furthers the administration of justice by its preventive, rather than remedial, focus. By relegating the in-house lawyer to a limbo status on the all-important issue of privilege, that ruling offends basic notions of justice and deprives corporate America of its counsel of choice - the in-house lawyer.

Just before production from a new natural gas field in Mobile Bay was to begin, an Exxon project manager called upon his in-house counsel to examine a lease - in particular, the royalty provisions - and to prepare a legal opinion. Based upon his examination of the case law and legal treatises, in conjunction with information supplied by his client about the legal positions taken by the lessor and another lessee, in-house counsel prepared an opinion letter in which he outlined three plausible interpretations of the royalty provisions and assessed the likelihood of success, from the standpoint of litigation, for each interpretation. Exxon treated counsel's letter confidentially and, when it was requested in discovery, claimed the attorney-client privilege for it. The trial court, for reasons that were not clearly expressed, ordered that the letter be produced to plaintiffs, who made it the centerpiece of their case.

Because the trial court's ruling undermines the integrity of the attorney-client privilege in Alabama - and may possibly be understood as denying the attorney-client privilege to "in-house" counsel - the American Corporate Counsel Association ("ACCA") moves pursuant to Rule 29 of the Alabama Rules of Appellate Procedure for leave to submit the attached brief as amicus curiae in support of Appellant's position that the trial court erred in refusing to treat in-house counsel's letter as a privileged communication between attorney and client.

ACCA is uniquely familiar with the issue of attorney-client privilege as it applies to in-house counsel and the organizations they serve. For that reason, ACCA believes that the attached brief will assist the Court in its consideration of this appeal. ACCA is the only national bar association that exclusively represents and serves in-house counsel to corporations and other organizations

in the private sector. Since its founding in 1982, ACCA has grown to represent more than 12,800 lawyers working in more than 5,500 business and not-for-profit organizations, which range from multinational corporations with large law departments (including the vast majority of the Fortune 1000)1 to family-owned businesses with a single lawyer on staff. Indeed nearly 75% of ACCA's members work in law departments with fewer than 5 lawyers. Many of ACCA's members' clients are located in, do business in, or employ citizens of, Alabama.

ACCA's primary function is as a bar association for its attorney members; it does not lobby at the local, state or national level. It is often solicited for its comments and expertise on matters involving in-house counsel, however, and ACCA regularly provides testimony and comment to legislatures, professional groups and licensing authorities and files amicus briefs in courts across the country on such matters. Despite its many activities and pursuits, no issue is more fundamental to ACCA and to the practice of the thousands of in-house counsel who rely on it to represent their voice on professional matters than certain and predictable rules governing the application of the attorney-client privilege. Accordingly, ACCA respectfully requests leave to file its brief urging the Court to uphold this State's broad, long-established, and well-defined application of the privilege and to reverse the trial court's ruling.

Respectfully submitted,

Sally S. Reilly, Esq.
President, Alabama Chapter of the American Corporate Counsel Ass'n.
Southern Progress Corporation
2100 Lakeshore Drive
Birmingham, AL 35209

Michael Roster, Esq.
Executive V.P. & General Counsel
Golden West Financial Corporation
1901 Harrison Street, 17th Floor
Oakland, CA 94612

Frederick J. Krebs, Esq.
President
Susan Hackett, Esq.
Senior V.P. & General Counsel
American Corporate Counsel Ass'n.
1025 Connecticut Avenue, N.W., Suite 200

John H. McGuckin, Jr., Esq.
Executive V.P., General Counsel & Secretary
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400 California Street
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F. Lane Heard III, Esq.
Williams & Connolly LLP

Washington, D.C. 20036-5425

725 12th Street, N.W.
Washington, D.C.
20005

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John William Gergacz, Attorney-Corporate Client Privilege 3.02 [2][a][i], at 3-14 (2d ed. 1990)

Paul R. Rice, Attorney-Client Privilege in the United States § 3:14 (2d ed. 1999)

Restatement (Third) of the Law Governing Lawyers § 68 cmt. c (2000)

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STATEMENT OF THE ISSUE

1. When in-house counsel gives the corporate client legal advice, should that communication be denied the protection of the attorney-client privilege historically accorded similar communications with outside counsel?

2. Did the trial court err in refusing to treat the "Broome Letter" as a privileged communication between attorney and client where:

- the Letter was authored by an attorney working in the in-house law department and was written on law department stationary that identified the author as "counsel" to the company;
- the Letter provided legal advice in the form of three alternative interpretations of an oil and gas lease royalty provision, including an assessment of the likely outcomes should the interpretations be litigated;
- the person making the request for legal advice was a company manager acting in the scope of his responsibilities - i.e., the project accounting supervisor responsible for forwarding to senior management a recommendation regarding payment of the royalty
- the three persons who received the Letter were part of the management team responsible for preparing a recommendation to senior management about the company's obligation regarding payment of the royalty; and
- the Letter was not disclosed outside the company.

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STATEMENT OF FACTS

On April 5, 1993, upon request for a legal opinion, Charles Broome, a lawyer working in Exxon's law department, authored a three-page letter (the "Broome Letter" or the "Letter") to R. J. Kartzke, the Exxon project manager for Mobile Bay, interpreting the royalty provision in Exxon's lease agreement with the State of Alabama. The pertinent facts regarding the Letter are as follows:

In 1993, R. J. Mertz was the accounting supervisor for Exxon's Mobile Bay project. R*(Mertz deposition at 13:4-10, attached to Exxon's 11/8/00 Motion to Reconsider and/or Motion to Stay); R27/1234:16-17 (Broome).1 He reported to the project manager, R. J. Kartzke. R*(Mertz depo. at 13:11-15). In connection with the imminent transfer of responsibility for the Mobile Bay project from the construction group to the operations group, Mertz requested a legal opinion from Exxon's law department "regarding what are the requirements of the mineral lease." R*(Mertz depo. at 18:2-19:17, 26:4-15); see also R27/1226:8-15 (Broome). He did so, because "[w]e generally get, for our . . . larger leases, . . . an opinion to ensure that royalties are paid in accordance with the terms of the mineral lease" - an opinion that is then shared with senior management, which makes the final decision about what royalty payments are due. R*(Mertz depo. at 18:17-20, 43:18-24). Mertz did not simply read the lease himself and decide what royalties to pay because "I'm not a lawyer. I don't make legal

determinations on legal documents." Id. at 42:12-13.

Charles Broome graduated from Tulane Law School in 1975 and, after graduation, became a member of the Louisiana bar and went to work in the Exxon law department in New Orleans. R26/1153:18-1154:21 (Broome). In 1993, there were approximately 25 lawyers in the department: 10 "production attorneys," who provided day-to-day legal advice to production management, and 15 "litigation attorneys," who handled trial matters. R26/1156:15-1157:4, 1171:1-18 (Broome). Broome's title was "Counsel, Southeastern Production Division." R26/1155:14-17 (Broome). He reported to the Division Attorney, Mark Harrison, who in turn reported to the law department's chief attorney for production in Exxon's Houston office. R26/1155:18-1156:8 (Broome). Broome's principal "client" in the company was R. J. Kartzke. R26/1158:4-6 (Broome).

Broome was not surprised to receive a request to analyze the Mobile Bay lease. Company executives, he testified, "don't commonly interpret lease forms . . . . [T]hat's the job of the law department." R26/1179:9-11 (Broome). Broome went about the task as would any lawyer. First, he reviewed a 1987 opinion letter written by another member of the law department. PX49 at 1; R*(Broome depo. at 94:22-25, attached to Exxon's 11/8/00 Motion to Reconsider and/or Motion to Stay). Then he read the cases cited in that letter and brought them up to date by "Shepherdizing" them. R*(Broome depo. at 95:18-21). Then he looked at secondary sources, including Williams & Meyers, Oil and Gas Law, a leading treatise on oil and gas law. R*(Broome depo. at 95:8-12). He examined the Alabama statute on pre- and post-judgment interest. R*(Broome depo. at 104:19-24). He took into account what he had been told by the client about how the Department of Conservation and Natural Resources and Shell Oil Company interpreted the lease. R26/1195:2-1196:23 (Broome). And based on this legal research and information, Broome provided an evaluation of the legal merits of (i) the position taken by the State, (ii) the position taken by Shell, (iii) a third position that he believed harmonized two sub-parts of the royalty provision and had "some support in the case law," and (iv) a "more extreme" interpretation that he advised had "little chance of being upheld." PX49. Having provided this analysis, Broome did not participate in management's subsequent discussion of the royalty payment or in management's decision. R26/1181:21-24, 27/1207:11-16 (Broome).

The Letter was addressed to Kartzke, the project manager (and Broome's "principal client" on a "day-to-day basis"), and copied to Mertz and a fellow accountant who also had responsibility for preparing a recommendation about the royalty payment. The Letter was at all times treated as confidential. R*(Capobianco aff. at 4, attached to Exxon's 11/6/00 Notice of Filing Documents In

Camera).

Exxon claimed the attorney-client privilege for the Broome Letter, but the trial court rejected the claim, offering this explanation:

> As I told y'all yesterday - and I still have a problem with it - is whether or not that letter is confidential in the meaning of confidential under the rules. I don't think that it is. The reason I say this is this Broome letter, what he was writing up, he had obviously Mr. Carretta's opinion, his own review, and then competitor information. What he's doing in this letter is he's summarizing the different things that are going on with the royalties. But the one thing that he states in here is if I need to go beyond a safe approach, you know, he'll come up with more. In other words, I don't think that there's anything confidential about this. This is an information letter going out to people. To be honest with you, this letter probably went out to other companies as well.

R21/125:19-126:11. The court rejected plaintiff's contention that the crime-fraud exception applied. R21/127:14-22.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The trial court's ruling requiring disclosure of the Broome Letter is both troubling and astonishing - troubling, because it lacks a clear rationale (and, to the extent there is a rationale, lacks any support in the record); and astonishing, because it calls into question whether Alabama will reverse its historic position broadly protecting the attorney-client privilege and part company with other federal and state tribunals, all of whom routinely honor the attorney-client privilege for communications between in-house counsel and their corporate clients.2 The ruling's ambiguity all too easily makes it subject to a reading that in-house counsel and their corporate clients are somehow less deserving of the protection of the attorney-client privilege. For that reason, ACCA feels compelled to step forward and explain why considerations of public policy, as well as the application of basic legal principles, require reversal of the trial court's ruling.

In today's corporate world, the common law principles on which the privilege is founded apply with equal force to communications with in-house and outside counsel. The smooth functioning of the modern American corporation demands that its employees be able to secure candid, confidential advice - and the advisor of choice for such advice is very often the inside corporate lawyer. This Court should unequivocally reaffirm the application of this oldest, and most important, evidentiary privilege by reversing the decision below.

The attorney-client privilege rests on two fundamental precepts: first, that the public interest in the administration of justice will be served if (i) clients make complete disclosure to their lawyers of all that they know so that (ii) lawyers can give fully informed and unvarnished legal advice; and, second, that such disclosure and advice will only take place where clients are assured that those communications are treated as privileged. The attorney-client privilege, and the courts that have applied it, do not concern themselves with whether the lawyer is "in-house" or not. Indeed, where privilege is concerned, it would be misguided for our judicial system to distinguish between inside and outside counsel, just as it would to distinguish between a solo practitioner in Haleyville and a partner in one of Birmingham's major law firms. In the American system of justice, a lawyer is a lawyer, and Mr. Broome is a lawyer.

Although the attorney-client privilege predates the advent of corporations and corporate legal departments, the rise of the modern American corporation in due course established the legitimacy of the corporation's claim that its communications with inside counsel are privileged. Indeed, no one seriously disputed that point in the landmark Supreme Court decision, Upjohn Co. v. United States, 449 U.S. 383 (1981). In Alabama, the issue has never been in doubt. As first codified in Title 7, Section 438, Code of Alabama (1940), and later at Section 12-21-161, the Alabama attorney-client privilege did not draw distinctions based on the nature of the client or the employment status of the attorney. The statute provided that "No attorney . . . shall be competent or compelled to testify . . . against the client as to any matter or thing . . . ." Rule 502 of the Alabama Rules of Evidence, which superseded § 12-21-161, speaks just as comprehensively, with the Advisory Committee noting expressly that the Rule includes "communications made in behalf of a corporate client" and follows Upjohn "in expanding the scope of the corporate attorney-client privilege."

The Broome Letter is the quintessential privileged communication protected by Rule 502. Put another way, if the Broome Letter is not privileged, then nothing is privileged - nor can one any longer be sure just what is privileged and what is not. The Letter is a direct communication between Exxon's in-house counsel and a

managerial representative of Exxon, where the substance of the communication, cast in classic legal language, is an analysis of four reasonable interpretations of a lease provision combined with an assessment of the likelihood that each interpretation will prevail at trial. Calling it just "an information letter going out to people," the trial court questioned whether the Letter was confidential, adding that "this letter probably went out to other companies as well." Because that comment is so obviously speculation, lacking any basis in the record, however, the question arises whether the court's ruling was not based on an underlying reservation whether the legal advice rendered by in-house counsel merits the same protection as advice rendered by outside counsel. If a court's unfounded speculation can negate this privilege - even in one case - then clients will be deprived of the certainty of confidentiality and will fall silent.

The scope and application of the attorney-client privilege for in-house counsel is a vital issue for Exxon in this case, for ACCA's members in Alabama and across the country in their day-to-day dealings, and for the smooth operation of the modern American corporation. It is important, first and foremost, that corporate clients be well counseled. As the Supreme Court recognized in Upjohn, the privilege works to facilitate corporate compliance with the broad range of regulatory and contractual obligations that many, if not most, corporations confront daily. Over the past quarter century, American corporations have recognized that the most effective way to obtain that counsel is often from in-house counsel who know the company, its managers, its business, and its issues. This has led to the growth and sophistication of inside corporate counsel offices. For many corporations, counsel of choice includes in-house counsel. When corporations turn to in-house counsel for legal advice, that decision should not be frustrated by the application of different standards to attorney-client communications.

The trial court's ruling on the Broome Letter, both in substance and expression, undermines the principles of certainty, predictability and choice that are essential to the operation of the privilege and thereby frustrates the public purpose of ensuring that corporate clients secure effective legal advice.

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ARGUMENT

I. THE ATTORNEY-CLIENT PRIVILEGE APPLIES TO IN-HOUSE COUNSEL

The trial court's explanation of its ruling on the Broome Letter is not clearly stated or supported by the record. Although the court describes the pivotal question as whether the Letter "is confidential in the meaning of confidential under the rules," the court then goes on to discuss, not how the Letter was handled, but what the Letter says, then closes by speculating, "To be honest with you, this letter probably went out to other companies as well." One cannot be sure what the trial court meant. ACCA's members - and, we believe many others - see beneath the holding's surface speculation an underlying skepticism about whether in-house lawyers truly function as lawyers and whether their communications are entitled to the attorney-client privilege. This brief addresses both that skepticism and the error into which it led the trial court.

The court erred, for the law is settled that the attorney-client privilege applies to all lawyers who are acting as lawyers, whether they are employed in-house or by an outside firm. The error has obvious consequences for Exxon, but its reverberations carry beyond Exxon's corridors both to Alabama corporations and corporations outside the State whose activities touch Alabama commerce. The very holding - denying the attorney-client privilege to a letter of legal advice that interprets complicated lease provisions and evaluates likely litigation outcomes - will have a chilling effect on communications between corporate clients and in-house counsel. The court's inscrutable explanation of the holding only increases a corporate client's uncertainty about what communications are privileged and, as a consequence, decreases its willingness to seek legal advice from in-house legal staff.

A. The Alabama Rule

Alabama has long recognized that corporations enjoy the attorney-client privilege. In Jay v. Sears, Roebuck & Co., 340 So. 2d 456 (Ala. Civ. App. 1976), the defendant sought to depose a Sears employee and Sears counsel regarding an alleged conversation between them about whether the defendant had paid his bill. The trial court sustained Sears' objection on the ground of privilege, denying defendant the right to question the employee about what he told the lawyer and the right to question the lawyer at all. As the basis for its decision, the court relied on Alabama's codification of the attorney-client privilege, Ala. Code § 12-21-161, which made no distinction between corporate and individual client, but provided that "[n]o attorney . . . shall be competent or compelled to testify in any court in this state for or against the client as to any matter or thing, knowledge of which may have been acquired from the client, or as to advice or

counsel to the client given by virtue of the relation as attorney . . . ."

In 1993, reviewing a petition for writ of mandamus, the Alabama Supreme Court allowed the deposition of the insurance company's general counsel to go forward, but only because the plaintiff stipulated in his brief that he did not seek "to depose [the general counsel] as to any confidential communication that may have taken place between any Alfa employee and [the general counsel] . . . ." Ex parte Alfa Mut. Ins. Co., 631 So. 2d 858, 859 (Ala. 1993). Citing Upjohn v. United States, 449 U.S. 383 (1981), the Alabama Supreme Court reaffirmed that "[a] corporate client is entitled to the privilege." Id. at 860; see Melco Sys. v. Receivers of Trans-America Ins. Co., 268 Ala. 152, 163, 105 So. 2d 43, 52 (1958) (upholding claim of attorney-client privilege by lawyer representing the receivers for insolvent corporation).

With the adoption of Rule 502 of the Alabama Rules of Evidence, it is now even more clear that corporations may claim the attorney-client privilege. Rule 502 provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client, (1) between the client or a representative of the client and the client's attorney . . . .

Ala. R. Evid. 502(b). The Rule defines "client" to include a "corporation . . . that consults an attorney with a view to obtaining professional legal services from the attorney." And the Rule makes no distinction between the "client's attorney" based on whether she is in-house or outside.

The Advisory Committee comments emphasize Rule 502's expansive scope. First, the comments underscore that the definition of "client" includes non-individual entities consistent with "[h]istoric Alabama law [which] has recognized that a corporation may be a client." Second, with respect to the meaning of a "representative of the client," Rule 502 "follows [Upjohn] in expanding the scope of the corporate attorney-client privilege beyond those employees within the control group, to include anyone who 'for the purpose of effecting legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.'" Third, the Rule takes the term "legal services" and defines it "broadly to include, among other things, the providing of mere legal advice." In sum, Alabama's Rule 502 is as broad a definition

of the privilege as is known to the law.

B. The General Rule

As the Advisory Committee comments on Rule 502 indicate, Alabama law reflects the prevailing rule, first sketched by the Supreme Court at the turn of the century and stated unequivocally 65 years later. As early as 1915, in a case where the Interstate Commence Commission sought to compel production of communications between the railroad and its counsel, the United States Supreme Court drew no distinction between individuals and corporations insofar as the attorney-client privilege was concerned. It held that Congress had not granted the Commission authority to inspect any correspondence, but in dicta spoke about the corporation's privilege:

> The desirability of protecting confidential communications between attorney and client as a matter of public policy is too well known and has been too often recognized by textbooks and courts to need extended comment now. If such communications were required to be made subject to examination and publication, such enactment would be a practical prohibition upon professional advice and assistance.

United States v. Louisville & Nashville R.R. Co., 236 U.S. 318, 336 (1915). In the years that followed, a consensus emerged that corporations, like individuals, were entitled to claim the attorney-client privilege for communications with their counsel - and to do so whether counsel had his office in-house or at an outside law firm. In 1981 that consensus secured the clear imprimatur of the Supreme Court.

In that year, the Supreme Court decided Upjohn Co. v. United States, 449 U.S. 383 (1981). The case concerned an extensive internal investigation of questionable payments to foreign officials led by Upjohn's General Counsel working with outside counsel. When the IRS began its own investigation to determine the tax consequences of the foreign payments, it demanded production of the questionnaires, memoranda and interview notes created during the company's investigation. Upjohn asserted the attorney-client privilege and work product protection for the materials. When the Court agreed to hear Upjohn, as one commentator remembers, "scholars and practitioners alike took note," for the case "provided an opportunity for the Supreme Court both to explain its willingness to extend to corporations a privilege originally designed for individuals

and to define precisely the scope and meaning of the corporate privilege." John E. Sexton, A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege, 57 N.Y.U. L. Rev. 443, 443-44 (1982).

Although the Supreme Court declined "to lay down a broad rule or series of rules" to define for all purposes the scope of the attorney-client privilege in the corporate context, 449 U.S. at 386, the Court did lay four cornerstones. First, the Court treated as uncontested the proposition that "the privilege applies when the client is a corporation," noting that it had assumed that the privilege applies for more than a half-century. 449 U.S. at 390. Second, the Court dismissed any notion that the privilege protects only the communication from the client to counsel. The "privilege [also] exists to protect . . . the giving of professional advice to those who can act on it." Id. Third, the Court rejected the "control group" test as failing to give effect to the purposes of the privilege. Id. at 392. Fourth, and most importantly, the Court cautioned against a narrow application of the privilege. Faced with a wide and complicated array of legal problems, corporations, unlike individuals, have reason constantly to seek legal advice. Recognition of the attorney-client privilege encourages "the valuable efforts of corporate counsel to ensure their client's compliance with the law." Id. A grudging or widely varying recognition of the privilege, as much as a cavalier rejection of it, undermines those efforts because, for the privilege to be served, "the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected." Id. at 393.

After Upjohn, it is now settled elsewhere (as it long has been in Alabama) that corporations can claim the attorney-client privilege and can do so for in-house and outside counsel alike. Sexton, supra, at 473 ("[T]hat the attorney-client privilege is available to corporations . . . must now be considered settled law."); Restatement (Third) of the Law Governing Lawyers § 73 cmt. b (2000) ("Extending the privilege to corporations . . . was formerly a matter of doubt but is no longer questioned."); John William Gergacz, Attorney-Corporate Client Privilege ¶ 3.02 [2][a][i], at 3-14 (2d ed. 1990) ("No distinction should be made for the purpose of attorney-corporate client privilege between an attorney who is employed in-house and one who is outside the corporate organization. . . . The proposition seems to be well-settled.") (citing Upjohn); 1 Paul R. Rice, Attorney-Client Privilege in the United States § 3:14 (2d ed. 1999) ("The confidential communications between in-house counsel and this client are privileged to the same extent as communications between outside retained counsel and the clients who have consulted him for legal advice or

assistance.").

Thus, in a case decided only two months after Upjohn, where plaintiffs sought discovery of the internal investigation conducted for LTV by the General Counsel, his staff and an outside law firm, the court upheld the claim of attorney-client privilege, stating that the "privilege attaches equally to LTV's General Counsel Smith and his staff who were also performing services of a legal nature and furnishing legal advice during the course of the SEC investigation." In re LTV Sec. Litig., 89 F.R.D. 595, 601 (N.D. Tex. 1981). The court was unequivocal in so holding, because "Upjohn laid to rest suggestions that House Counsel are to be treated differently from outside counsel with respect to activities in which they are engaged as attorneys." Id.

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C. The Importance to Modern Corporations of the Candid Advice of Inside Counsel.

1. The public purpose served by the privilege The attorney-client privilege is unique among the privileges recognized in our jurisprudence. Unlike the marital privilege or priest-penitent privilege or even the physician-patient privilege, each of which first and foremost protects private interests, the attorney-client privilege serves a public purpose. "Its purpose," the Supreme Court reminded in Upjohn, "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." 449 U.S. at 389 (emphasis added).

   The privilege is grounded in the definition of what a "professional" relationship means: that attorneys are honest; that clients rely on their advice; and that fully informed attorneys and well-advised clients facilitate the administration of justice. In short, "[t]he privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." Id. (emphasis added) citing Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure"

(emphasis added)).

As the Supreme Court underscored in Upjohn, the privilege also serves a distinct (albeit related) public purpose - to facilitate client compliance with the law. One has only to go to the law library to see tangible proof of the kudzu-like growth of the law in all its forms: statute, regulation, judicial decision, administrative decision, and commentary on all of the above. In this ever-expanding thicket of law, the privilege recognizes that modern legal processes are complicated and often arcane; that many legal rules are complex and most are fact-specific in their application; and that lawyers are better situated than nonlawyers "to appreciate the effect of legal rules and to identify facts that determine whether a legal rule is applicable" - if only clients feel free to make full disclosure to their lawyers. Restatement (Third) of the Law Governing Lawyers § 68 cmt. c.

According privilege to attorney-client communications serves the purpose of facilitating compliance with the law whether the client is an individual or corporation. This rationale, however, applies with particular force to the modern corporation and its counsel. What the Supreme Court said about the antitrust laws - "the behavior proscribed by the [Sherman] Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct" - could be said about much modern law. United States v. United States Gypsum Co., 438 U.S. 422, 440-41 (1978). For corporations large and small, of course, the problem is not simply compliance with the "gray zone" of one body of law and regulation, but an array of complex, often interrelated regulatory schemes at the federal, state and local level, including tax, labor, employment, contracts, commercial transactions, securities, intellectual property, e-commerce, real estate, environmental and antitrust matters - and not just in one state or locality, but in many.

The number and variety of laws with which corporations must comply (not to mention the number and variety of contractual obligations) means, in turn, that corporate officials at many levels need to consult counsel constantly. See Upjohn, 449 U.S. at 392. It was with a pragmatic view of these realities that the Supreme Court spoke of "the valuable efforts of corporate counsel to ensure their client's compliance with the law." Id. And it is this perception of the way

that corporate counsel operate - i.e., in-house counsel, if he is given the relevant information, by reason of his strategic location can inform corporate officials of their legal duties and obligations, and they will act accordingly - that led the Court "to bestow preeminent value upon fostering the flow of information between corporate clients and attorneys." Sexton, supra, at 469.

The attorney-client privilege serves an important public purpose where corporations are concerned, moreover, not just because corporations are so frequently faced with so many legal issues, but also because how the corporation resolves those issues may have far-reaching consequences - whether those consequences are measured in terms of hundreds of employees or tens of thousands of consumers or millions of dollars. Where punitive damages for toxic torts, defective products, or unconscionable financial manipulations are the price to be paid for "getting it wrong," there is all the more reason to encourage corporations to "get it right" by providing reasonable certainty that discussions between corporate counsel and the client involving hard issues and sensitive legal matters will be protected.

One has only to consider the roster of companies by whom ACCA's members in Alabama are employed to appreciate that these considerations are not academic, but are daily realities. ACCA members in Alabama are employed by all manner of clients, including highly regulated industries:

Alabama Gas Corporation
Alfa Mutual Insurance Co.
BellSouth Telecommunications
Blue Cross & Blue Shield of Ala.
Carraway Methodist Hospitals
Blount, Inc.
Caremark Rx, Inc.
Colonial BancGroup, Inc.
Compass Bank & Bancshares
Energen Corp.
Healthsouth Corp.
Lawyers Title Insurance Corp.
Medical Assurance Inc.
Mercedes-Benz U.S. Int'l, Inc.
Mutual Savings Ins. Co.
Protective Life Corp.
Saks, Inc.
United States Pipe & Foundry Co.
University of Alabama Health University of Alabama System Services Foundation
USX Corp

Delchamps, Inc.
Gulf States Paper Corp.

Hundreds more companies located outside the state face the same array of legal issues and have the same need to call upon in-house counsel for preventive advice, but must also now question (if their business touches Alabama to the degree that it might create personal jurisdiction) whether Alabama courts will respect the advice as privileged.

2. The special effectiveness of in-house counsel For ACCA members working for these well-known entities, as for lesser-known organizations, the Upjohn rationale is common sense. It recognizes, not merely that modern corporations need legal advice (and need it all the time), but that the most effective legal advice can be the daily, institutional advice that comes from in-house counsel. In-house legal advice can be particularly effective in three respects. First, it is more easily called upon. The in-house lawyer is down the hall or in the same building. Her telephone number is a four-digit extension. She parks in the company parking lot and eats in the company cafeteria. Knowing her and seeing her frequently, employees are both more likely to think about seeking legal advice and then to feel comfortable doing it.

   Second, in-house counsel is more efficient. To say "efficient" is not to employ a euphemism for "cheaper," although as a general rule in-house counsel are indeed less costly. The in-house lawyer is efficient in a broader sense because she has one client. She knows its officers and employees, its organizational structure and decision making routines, its lexicon and records, and, not least, its recurring legal issues. Her "learning curve" is shorter and less steep. She can jump on a new problem right away in an intelligent and informed fashion. And because the in-house lawyer is efficient in this sense, she is, to double-back to the first reason, all the more likely to be called upon for legal advice. The corporate employee who is "on the fence" whether to request legal advice is more likely to call upon in-house counsel than an outside firm because he knows that the former is more likely to be familiar with the issue and does not have a "meter" that will start running.

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Third, following from the first two reasons, in-house counsel can often be more effective because they are in a position to provide "preventive" legal advice. The Upjohn court recognized just this in speaking of "the valuable efforts of corporate counsel to ensure their client's compliance with the law," particularly given that "the modern corporation[s] . . . 'constantly go to lawyers to find out how to obey the law.'" 449 U.S. at 392 (quoting Burnham, Attorney-Client Privilege in the Corporate Arena, 24 Bus. Law. 901, 913 (1969)). Once a regulatory investigation has been launched or a lawsuit filed, there is no question that the attorney-client privilege applies to the legal advice given in defense of the investigation or lawsuit. What Upjohn commonsensically reminds one of is that, from the standpoint of the public purpose served by the privilege, there is all the more reason for the privilege to apply to the legal advice that prevents a regulatory investigation or lawsuit from ever arising. Better the advice that prevents spilt milk than the advice how to clean it up. And in-house are particularly well situated to provide the former kind of advice.

3. The need for predictability For these reasons, public policy supports application of the attorney-client privilege to communications involving legal advice between corporate clients and their counsel, especially in-house counsel. The public purpose of the privilege is served, however, only when corporate client and counsel can "predict with some degree of certainty whether particular discussions will be protected." "An uncertain privilege," said the Supreme Court, "or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." Upjohn, 449 U.S. at 393; In re LTV Sec. Litig., 89 F.R.D. at 602 ("The predictability of confidence is central to the role of the attorney."). That was in 1981. Twenty years later, when juries award punitive damages at previously unimaginable levels and reports of such verdicts and underlying rulings travel almost instantaneously from desktop to desktop across the country, it is no longer true that it takes "widely varying application by the courts" to render the privilege uncertain. One aberrant decision is enough to produce shock waves that travel well beyond the state's borders. Achieving the benefits of the attorney-client privilege must therefore involve (i) well-defined criteria (ii) consistently applied (iii) in clearly expressed decisions.

4. The right to counsel of choice Many American corporations have come to the conclusion that at least for some matters in-house counsel are more effective. An ever-increasing number of small and start-up companies are following suit. Clients who subscribe to that view should be free both to employ counsel in-house and to consult such counsel on any and all legal issues confronting the corporation with the absolute assurance that the communications will be treated as privileged. When there is uncertainty whether the courts will apply the privilege to the legal advice rendered by in-house counsel, the only safe course is for corporate clients to turn to outside lawyers or not seek legal advice at all - a choice that is often no choice at all.3 And even if the client turns to outside lawyers, does it depart from its customary practice of having inside counsel supervise and/or collaborate with outside counsel so as to have greater confidence that its communications will be privileged? Or do inside and outside counsel for the corporate client attempt to interact in the usual way, but under a cloud of uncertainty as to what communications are privileged, always speaking and writing guardedly? If allowed to stand, the trial court's ruling means that the client's right to counsel of its choice - whether the choice is based on cost, expertise, responsiveness or personality - will be compromised.

   What will also be compromised is the dignity of the in-house lawyer. The circumstances in which lawyers practice can vary depending on whether they are solo practitioners, public defenders or prosecutors, or whether they work for large law firms, corporations or government agencies. But in America there are no second class lawyers when it comes to the attorney-client privilege. When a lawyer renders legal advice to his client, he is not less a lawyer and his communications are not less deserving of privilege merely because he receives his compensation by a payroll check rather than an invoice.

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II. THE BROOME LETTER IS PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE

The trial court's ruling on the Broome Letter is a double-barreled

threat to the attorney-client privilege and its predictable application, for it is both wrong in result and recondite in rationale.

A. The Trial Court's Ruling Is Wrong

The Broome Letter fits snugly within the protection of Rule 502 of the Alabama Rules of Evidence. The Rule says:

A [1] client has a privilege to refuse to disclose and to prevent any other person from disclosing [2] a confidential communication [3] made for the purpose of facilitating the rendition of professional legal services to the client . . . between the client [4] or a representative of the client and [5] the client's attorney or a representative of the attorney . . . .

Ala. R. Evid. 502(b) (emphasis added). Applying the language of the Rule to the Broome Letter:

1. As the client, Exxon possesses the privilege and indisputably has invoked it at every stage of the proceedings when plaintiffs have sought to obtain discovery, or to make evidentiary use, of the Broome Letter.
2. Broome treated the Letter confidentially. He addressed it to the Mobile Bay Project Manager, R. J. Kartzke, and indicated that copies were to go to R.J. Mertz, the accounting supervisor who had requested the legal opinion, and R.G. Bremer, who worked with Mertz and was expected to join him in preparing cost estimates based on Broome's legal analysis of the royalty provision. Nothing in the record (or alleged by plaintiff) evidences any disclosure inconsistent with confidentiality.
3. The clear purpose of the Letter was the rendition of legal services. Mertz testified that he requested a legal opinion from Broome, and the Letter provides just such legal advice. Because the Mobile Bay project was moving from the construction phase to the operations phase, with production soon to begin and, therefore, royalties to pay for the first time, Mertz needed to get a legal opinion "to ensure that royalties are paid in accordance with the terms of the mineral lease" with the State. R*(Mertz depo. at 18:18-20). In short, Mertz was doing precisely what the Upjohn court explained the attorney-client privilege was intended to encourage - seeking legal advice from in-house counsel to ensure compliance with the company's legal obligations. Mertz did not construe the lease himself because "I'm not an attorney. I don't make legal determinations on legal documents." Id. at 42:12-13.

As counsel, Broome did what lawyers do: "Our executives don't commonly interpret lease forms. That - that's the job of the law department." R26/1179:9-11 (Broome). Indeed, even apart from Broome's testimony describing what he did, the Letter reflects quite plainly that he was looking at the lease provisions, and assessing how they might reasonably be interpreted, from a legal perspective. PX49. The Letter does the following: it considers (i) the plain meaning of the lease language, (ii) the inferences to be drawn from the absence of a clear statement on one point, (iii) the effect of the provision construing ambiguous clauses in favor of the drafter, (iv) the support found in the case law and (v) in secondary sources, (vi) the legal rationale for Shell's differing interpretation of the lease, (vii) a "harmonizing" interpretation of the two key provisions, (viii) the legal principle of contractual interpretation that requires all provisions to be given scope, (ix) the chances of sustaining the alternative interpretations in litigation, (x) the likelihood and timing of a challenge by the State to any interpretation contrary to its own, and (xi) the statutory provision for interest on underpayments. Each is an earmark of legal analysis; collectively, they tattoo the entire body of the Letter.

Likewise indicative of the Letter's nature and purpose, it employs the lawyer's lingo. A reader who did not know that Broome was a lawyer would see these phrases and know in moment that it is a lawyer talking:

- "Support for their position can be found in some case law and secondary sources, but there is no Alabama case on point." PX49 at 1.
- "[I]t would have a substantial chance of success in litigation; however, a number of reasonable arguments may be raised against it."
- "This is apparently based on a broad interpretation of the phrase in Sec. 5(b) 'used . . . in the development and operation of the leased area . . . .' In my view, while that phrase supports an argument for free use of fuel in production operations, I am not able to find much support for extending it to treating operations." PX49 at 2.
- "A plausible interpretation of the lease royalty provision is to construe 5(a) as stating a valuation point on the leased area, such that the lessor would bear a portion of post-production costs, but reflecting the cost-netting limitation stated for manufactured products under 5(b)."

- "This approach has some support in the case law, although none of the cases construes lease language very similar to the form we are operating under."
- "I would assess the likelihood of prevailing in court on this interpretation as less than 50%."
- "Even apart from the provision that the lease be construed in favor of the lessor, courts are disinclined to give a major clause no effect when there are alternative constructions which allow it some scope." In sum, Mertz requested a legal opinion about the lease, and Broome provided just that.

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4. Kartzke, Mertz and Bremer were all "representatives of the client." Kartzke, as the project manager, and Mertz, as the accounting supervisor for the project, were persons having authority both to seek legal advice and to act on it. Broome testified that Kartzke was his "principal client." R26/1158:4-6 (Broome), and Mertz explained that obtaining a legal opinion on the lease, as he did here, was a customary step in making the transition from construction to operations. R*(Mertz depo. at 18:17-20, 43:18-24). Moreover, the Letter states that Mertz and Bremer would prepare cost estimates based on the legal analysis, so both can be said to have received the Letter "while acting in the scope of their employment" as project accountants, "for the purpose of effecting [the] legal representation for the client," as manifest in that legal analysis. PX49 at 3.

5. Finally, without question, Broome was Exxon's attorney (and had been for the previous 18 years). R26/1154:2-8 (Broome).

   There is no indication that the trial court examined the Letter according to the criteria set forth in Rule 502. With no explanation, the court came to two conclusions, both of which are erroneous. It said that "[t]his is an information letter going out to people." R21/126:9-10. But if, by "information letter," the court means a factual description of the lease or a narrative of the lease negotiations or some other opinion-free presentation, the Letter is plainly none of these. It interprets the lease and evaluates the likelihood that the alternative interpretations will prevail in litigation.

> The court also said that, "[t]o be honest with you, this letter probably went out to other companies as well." R21/126:10-11. This conclusion has the virtue of explaining why the court thought the Letter was not confidential, for if it had been circulated to third parties not part of the client group, the privilege would have been waived. But the court's conclusion is gratuitous speculation, for there is no evidence that anyone read the Letter other than Kartzke, Mertz and Bremer.
>
> One can review the Letter, Rule 502 and the trial court's ruling, and it is not difficult to identify the "odd man out" in that threesome. The Letter meets the criteria of Rule 502; the ruling ignores the Rule and misreads the Letter. Thus, the trial court abused its discretion.[4]

B. The Trial Court's Ruling Is Cryptic

The trial court's rationale is difficult to decipher. The court does not say what it meant by "information letter." And precisely because the comment about the Letter going out to other companies is so obviously speculation, one hesitates to conclude that the court meant that to be the basis for the ruling. The observation that Broome was merely "summarizing the different things that are going on with the royalties" is plainly inaccurate. R21/126:1-3. And the connection between the observation that Broome expresses a willingness to "come up with more" and the conclusion that therefore "I don't think that there's anything confidential about this" is elusive. R21/126:7-8. An oral ruling, as captured in a transcript, can often be cryptic. But this ruling is particularly obscure, all the more so because the trial court did not refer to Rule 502 or any case authority.

So how is the ruling to be understood? If the grounds hinted at by the trial court do not withstand scrutiny, then the most likely result is that courts in the future will interpret the ruling as saying that there is an "asterisk" by the attorney-client privilege when it comes to the legal advice of in-house counsel. To allow the trial court's ruling, so interpreted, to stand would send a message that there is something suspect about the use of in-house counsel.

In a case like this that has drawn national attention, any lack of clarity compounds the effect of the ruling's error. It threatens to chill reliance on in-house counsel both for Alabama corporate clients and those clients elsewhere who,

like Exxon, do business in the State and pay close attention to its judicial decisions and jury verdicts.

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CONCLUSION

The ruling below raises concerns for the legal profession and for corporate clients served by in-house counsel that are larger even than the gigantic verdict that plainly resulted from the erroneous admission of the Broome Letter. Any decision that casts doubts about the ability of Alabama corporations (or corporations that do business in Alabama) to use in-house counsel affects every corporate client who would ordinarily seek advice from corporate counsel. It affects as well the professional status of the entire in-house bar, including those who serve public clients such as the State. The ruling below that permitted into evidence an unquestionably privileged communication should be reversed so that these unintended results can be prevented.

Respectfully submitted,

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Sally S. Reilly, Esq.
President, Alabama Chapter of the American Corporate Counsel Ass'n.
Southern Progress Corporation
2100 Lakeshore Drive
Birmingham, AL 35209

Michael Roster, Esq.
Executive V.P. & General Counsel
Golden West Financial Corporation
1901 Harrison Street, 17th Floor
Oakland, CA 94612

Frederick J. Krebs, Esq.
President
Susan Hackett, Esq.
Senior V.P. & General Counsel
American Corporate Counsel Ass'n.
1025 Connecticut Avenue, N.W., Suite 200
Washington, D.C. 20036-5425

John H. McGuckin, Jr., Esq.
Executive V.P., General Counsel & Secretary
Union Bank of California, N.A.
400 California Street
San Francisco, CA 94104

William B. Lytton, Esq.
Senior V.P. & General Counsel
International Paper Company
400 Atlantic Street
Stamford, CT 06921

John K. Villa, Esq.
F. Lane Heard III, Esq.
Williams & Connolly LLP
725 12th Street, N.W.

Washington, D.C.
20005

notes

1. References to the reporter's transcript of the trial are in the format "R [volume]/[page]: [line] ([witness, where applicable])" and to the trial exhibits ("PX" or "DX") by number and page. References to materials that are in the record but were placed under seal by the trial court are in identified by "R*" followed by a description of the document.
2. Throughout the brief, ACCA will use the term "corporate client" as a shorthand reference for organizations that employ in-house counsel, whether those organizations are for-profit corporations or not-for-profit entities of one kind of another.
3. The risk is real, however, that many corporate clients will choose the "unsafe" course of not consulting counsel at all given the time, inconvenience and expense involved in "going outside" for retained services.
4. Whether a communication is privileged is "a question of fact for the [trial] court to resolve." Connolly v. State, 500 So. 2d 57, 61 (Ala. Crim. App. 1985). Here, unlike Connolly, however, the Court need not defer to the trial court's "determination of the competency [or credibility] of a witness," for there are no disputed facts that were resolved by the trial court. This Court can assess the nature of the Broome Letter for itself.