IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

IN RE: PETITION TO AMEND THE RULES REGULATING THE FLORIDA BAR -- 1-3.7; 3-5.1(G); 3-5.2; 14-1.1 AND CHAPTER 15.

CASE NO. 75,716

COMMENTS OF
THE AMERICAN CORPORATE COUNSEL ASSOCIATION
REGARDING PROPOSED CHAPTER 15 (Authorized House Counsel)

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INTRODUCTION AND SUMMARY OF ARGUMENT

The proposed rule under consideration by this Court is a symptom of, rather than a solution to, a serious and systemic problem dealing with how attorneys are licensed in the State of Florida. A requirement that all attorneys resident in the State take the Florida bar examination poses a undue burden on the profession, especially on attorneys practicing in corporate law departments. The proposed rule does not lessen that burden. In that respect, this Court should consider the following issues:

a) what is the character of legal practice in the United States today;

b) what conditions in Florida prompted the request for the adoption of this rule;

c) does this rule serve the purpose of protecting the client, the public and promoting competence;

d) does the rule single out corporate counsel for separate treatment while not addressing other comparable conduct;

e) does the current rule remedy the serious problems in the present system which imperil the professional integrity of the legal profession and the public's trust; and

f) is there a better, more comprehensive solution to this problem that clearly places the interest of the public as its first priority.

STATEMENT OF INTEREST

The American Corporate Counsel Association ("ACCA") is composed of members of the bar who are engaged in the active practice of law as employees of corporations and other organizations in the private sector and who do not hold themselves out to the public for the practice of law. ACCA has approximately 7900 members who counsel their clients on legal matters arising in a number of jurisdictions. These members are employed as in-house counsel by some 3000 organizations.

ACCA seeks to promote rules and procedures concerning access and admission to practice so that corporate counsel can adequately manage corporate legal affairs consistent with bar authorities' and ACCA's interest in maintaining high standards of competence. State admission to practice policies are of particular concern to ACCA because in-house lawyers often need to represent their clients in a wide variety of jurisdictions. The licensing and admission practices in the various States directly affect the ability of ACCA membership to provide cost-effective high quality legal services to corporate clients.

Because of the importance of this issue, in June of 1987, ACCA, in conjunction with the American Bar Association and the New York University Law School, sponsored an invitational Symposium ("Symposium") to further explore admission to practice issues in the United States. The Symposium was attended by several hundred judges, legal scholars, bar admission authorities and lawyers for private law firms. From that Symposium, ACCA became convinced that courts in the relevant states must come together, acknowledge the reality of the practice of law in a computer and jet age, and develop a system of

admissions which insures competence without unduly restricting the public's access to cost-effective services.

ARGUMENT

What Is The Character of Practice In The United States

The practice of law in the 1990's is national and international. As stated by Michael K. McChrystal, Professor of Law at Marquette University and a recognized expert on admissions issues:

> The state-based system of bar admissions . . . seems anachronistic. This is an era of multistate, even multinational law firms. Legal matters are often oblivious to state boundaries and send lawyers scurrying into the courtrooms and law offices of many states. Clients often require legal advice on the laws of many states and nations. In sum, the practice of law is frequently multistate, but bar admission still occurs one state at a time. [1]

The need for a rational admission system which recognizes the reality of contemporary legal practice is particularly acute in Florida because of the State's recent emergence as a major international business and financial center. Numerous businesses have found that Florida is a commercially attractive location in which to operate. As a result, more and more corporations have moved their offices into the State. This has not only meant the relocation of in-house legal staffs, it has meant that many national and multinational law firms have also relocated to Florida in order to provide better and more cost-effective services to their clients.

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[1]McChrystal, *National Bar Admissions: Sketching the Issue*, ACCA Docket, Vol. 5, No. 3, p. 16 (1987).

It would be a mistake to assume that the law being practiced as a result of this relocation is strictly Florida law. On the contrary, the extent of Florida law involved in the commercial transactions of these companies most probably has not varied substantially since the companies relocated. The law being applied is a function of the transaction and not the physical location of the lawyers.

In most situations, the legal issues faced by in-house counsel on a day-to-day basis are totally unrelated to their location. Corporate moves into an area are seldom motivated by legal considerations. Physical location is more often an issue of client convenience than one related to the legal issues involved. The relocation of administrative offices is often motivated by such factors as quality of life, climate and cost of living, whether a given area will be an attractive location to white-collar employees, whether or not such an employee pool exists and ease of access to other locations. For example, the location of some corporations to Florida is related not only to a market in Florida, but also to South Florida's ease of access to Latin American markets.

In this age of transnational computer communication and jet travel, a lawyer's location is simply not a factor in the efficient conduct of legal matters. This reality has already been recognized by the United States Supreme Court in Piper v. The Supreme Court of New Hampshire, 470 U.S. 274 (1985), where the Court, citing the effects of modern technology on the practice of law, rejected arguments asserting that residency was a requirement for competent practice. Moreover, restrictive practice rules have been cited by chambers of commerce as counter-productive to their efforts to present Florida as an attractive location that should be considered by international enterprises.

What Conditions In Florida Prompted The Development Of This Rule

In 1984, ACCA first became actively involved in admission to practice issues in the State of Florida. At the behest of a growing body of in-house counsel in the State, ACCA representatives, the Honorable Frank McFadden, former Chief Judge of the United States District Court for the Northern District of Alabama, and Lawrence A. Salibra, II, Chairman of ACCA's National Litigation Committee, attended the annual Florida State Bar meeting and strongly urged the Bar to recommend rules that acknowledged the reality of a national practice, particularly as it related to in-house counsel. The State Bar, however, insisted that the rule remain that all in-house counsel acting on behalf of their client in Florida, who had not taken the Florida bar examination, were engaged in unauthorized practice. At that time, it was clearly recognized that a large number of lawyers in Florida, many in-house, were not admitted to the Florida Bar. As ACCA predicted, the number of in-house lawyers not admitted to the Florida Bar would continue to grow as lawyers attempted to serve the best interests of their clients.

More recently, ACCA, through Mr. Salibra, testified before the State Bar Committee on Unauthorized Practice in Tampa. Again it was recognized, that there are corporate counsel and other attorneys not admitted in Florida, and, in fact, Florida attorneys not admitted in other states, who regularly practiced outside their licensed jurisdiction. In addition, it was undisputed that the number of resident in-house counsel not admitted in Florida was growing. It was also recognized that there is little that could practically be done to enforce the

present regulatory scheme. In fact, it was specifically stated that complaints against lawyers not admitted in Florida were routinely noted and filed unless they were from clients. It was noted that routine complaints made by other Florida lawyers in order to gain negotiating advantages were generally "noted and filed." Finally, it was acknowledged that no cormplaints by corporate clients against their in-house counsel had been made.

In short, what has prompted the rule now being proposed is not concern for protecting the client, but is simply the inability to enforce the existing rules. There are no doubt numerous private counsel who practice in Florida who are not admitted to the Florida bar. Many practice from their offices out of state or simply fly into Florida when necessary. Others associate with local counsel admitted in Florida and their name appears on the firm letterhead denoting them as not admitted in Florida. Meanwhile, Florida counsel are undoubtedly engaged in the unauthorized practice of the law in other states. Notwithstanding all of this activity, the most visible group against which the present rules remain unenforced is the in-house practictioner. This proposed rule is designed to deal with that situation. But does it? Notwithstanding the obvious fact that this rule has no reasonable relationship to competence, one wonders why there is any realistic expectation that the new rule will result in more compliance than the present rule.

Does This Rule Promote The Objective Of Protecting the Client

The most obvious shortcoming of the proposed rule is the fact that it has no reasonable relationship to protecting the client or the public. Corporations hire in-

house counsel because they need specialized attorneys who understand the corporate culture and the intricacies of their business. Corporations are sophisticated consumers of legal services. They will not somehow get better service or more protection because the attorneys they hire have to sit for a redundant bar examination. They will not be assured of more competent legal representation because after three years the attorney with whom the corporate client was perfectly satisfied needs to take time off to pass a bar examination. Instead the current licensing scheme results in unnecessary added expense to the client without any corresponding degree of protection. The proposed rule has the same result.

In addition, this Court must realize that laws often do not vary greatly across state lines, and that those laws which might indeed be unique are not inaccessible to the multistate practioner. Corporate counsel, like many private practitioners, practice on a multistate level, not to flaunt state regulation, but because it is in their clients' interests. Corporate counsel practice across state lines by definition. Yet, this rulemaking effort is not one prompted by corporate clients seeking more competent counsel.

Does The Rule Single Out Corporate Counsel For Unique Treatment

Corporate counsel are continually involved in multistate practice. However, the states have had little interest regulating in any significant way the in-house lawyer,in part, because the corporations are sophisticated consumers of legal services who need not rely on the courts to evaluate the competence of their counsel. However, what is true about corporate practice is also true about much

of the private bar. In fact, ACCA's efforts in the admissions area are rapidly gaining widespread support from the private bar who readily acknowledge that few legal issues respect political boundaries.

ACCA is frankly somewhat puzzled as to why the Florida State Bar should be focusing on the in-house bar, while doing little or nothing about the private bar, much of whose interstate practice contravenes present disciplinary rules. If there is a problem, certainly the more important problem exists in the context of the private bar, the members of which are much more likely than ACCA members to be confronted with issues involving local law. This argues that any rule this Court adopts should be uniform and should address licensing issues in the context of the practice of law as it exists in the late 20th Century.

Does The Rule Solve Serious Problems Which Impair The Professional Integrity Of Admissions Process.

As Professor McChyrstal noted, today's legal practice is national or international in scope. It is unlikely that even those issues that had heretofore been considered parochial matters can long remain the subject of local regulation. For example, in the area of domestic relations law there have been discussions that would preempt local regulations in order to provide for consistent international treatment by treaty. The international sale of goods is regulated by treaty rather than by state commercial law. Faced with these facts of contemporary society, the courts and the profession can ill afford a system of regulation that not only fails to recognize these realities, but presents obstacles to the efficient provision of services to the public.

The present admissions system in the United States forces lawyers to choose between their ethical obligation to provide efficient services to their clients and compliance with outdated formal rules. Although claiming to serve the client's interests, these rules nevertheless are perceived as serving the economic interest of the profession at the expense of the public. Once again, Professor McChrystal notes:

> In a state based system of bar admission, as exists today, variations and idiosyncrasies in the state bar admission rules can prove difficult obstacles to qualified lawyers seeking admission. The state based system also lends itself to abuse through protectionist rules, designed to reduce competition for lawyers already licensed in the state. [2]

The reality that Florida lawyers, as well as lawyers in other states will be compelled to practice on a national basis to serve their clients is a fact of life. The courts and the profession must acknowledge this reality and devise a new framework of regulation to insure professional competence. The proposed rule does not address this problem. At best it is an attempt to mask a symptom of the problem rather than an attempt to address the substance of the problem.

This Court should not underestimate the serious nature of the problem nor the fact that the special role this profession occupies is at the pleasure of the public. If the public believes that either the profession or the courts are failing to serve its interests, it can and will act to revoke its trust. Dismaying examples of this fact have occurred.

Recently, the New York legislature passed a statute limiting its liberal admissions policy in retaliation to the restrictive practices of the States of Florida

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[2] *Id.*

and New Jersey. This action was prompted by the failure of the New Jersey Courts and representatives of New York (such as the distinguished former Justice of the New York Court of Appeals, the Honorable Hugh Jones) to reach a satisfactory negotiated solution. ACCA was deeply involved in the debate in New York, and supported the position of the New York Court of Appeals that retaliatory legislation was inappropriate. Several ACCA members who were former members of the judiciary expressed concern that an action by the legislature on such a direct professional issue as competence to serve the public, in contravention of a clear expression of the State's highest court signaled a public feeling that the courts and the profession were no longer capable of regulating the themselves. Unfortunately, we must report that this legislation has become law in New York.

The problem which the proposed rule seeks to address is very serious, but unfortunately the proposed rule is not a correct solution.

Is There A Better Solution

As a result of the action in New York, ACCA has sought to encourage dialogues between admissions officials in several states to develop state admissions policies that accommodate contemporary legal practice. ACCA believes this Court could best serve the interests of the public by joining those discussions to ultimately bring about a uniform standard of admission for all the states. This is would will address the clients' and the public's interests. The proposed rule focuses attention on the need to address the real problem, and the obvious shortcomings of the rule emphasize that need.

ACCA wishes to offer to this Court its offices in beginning these discussions. It would also encourage this Court to encourage similar discussions through the Conference of State Chief Justices. With Europe rapidly moving toward a uniform standard of admission of practice among countries as a response to needs of its public, the United States can ill afford delay.

CONCLUSION

ACCA urges this Court to reject the proposed rule and instead begin work with other state licensing bodies to fashion uniform state-by-state licensing procedures.

DATED this 18th day of April, 1990

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CERTIFICATE OF SERVICE

I, Nancy A. Nord, CERTIFY that on this eighteenth day of April, 1990, I caused a copy of the foregoing Brief to be served by mailing the same, postage prepaid to:

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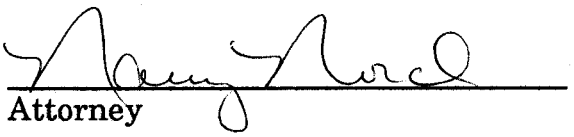

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