No. 83-1466

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SUPREME COURT OF NEW HAMPSHIRE,
Appellant,

v.

KATHRYN A. PIPER,
Appellee.

On Appeal from the United States Court of Appeals
for the First Circuit

BRIEF OF THE AMERICAN CORPORATE COUNSEL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

JERRY M. AUFOX, ESQUIRE
Member of the American
Corporate Counsel Association
2400 North Wolf Road
Franklin Park, IL 60131
(312) 455-7111
Counsel of Record

THOMAS I. DAVENPORT, ESQUIRE
Member of the American
Corporate Counsel Association
3155 West Big Beaver Road
Troy, MI 48084
(313) 643-3645

NANCY A. NORD, ESQUIRE
Executive Director
American Corporate Counsel
Association
1225 Connecticut Avenue, N.W.
Suite 202
Washington, D.C. 20036
(202) 296-4523

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1466

SUPREME COURT OF NEW HAMPSHIRE,
Appellant,

v.

KATHRYN A. PIPER,
Appellee.

On Appeal from the United States Court of Appeals for the First Circuit

---

BRIEF OF THE AMERICAN CORPORATE COUNSEL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

Amicus Curiae, American Corporate Counsel Association, supports the Appellee, Kathryn A. Piper, and respectfully requests this Court to affirm the action of the United States Court of Appeals for the First Circuit on a Rehearing *En Banc* which affirmed the decision of the United States District Court for the District of New Hampshire.

INTEREST OF *AMICUS CURIAE*

Amicus Curiae, the American Corporate Counsel Association ("ACCA"), is composed of members of the bar who do not hold themselves out to the public for the

practice of law and who are engaged in the active practice of law solely on behalf of corporations, partnerships, and other organizations in the private sector. ACCA is the only national bar association whose efforts are devoted exclusively to the professional needs of attorneys who are members of the legal staffs of organizations in the private sector. ACCA has approximately 5,000 members who are employed as corporate counsel by some 700 organizations.

Not only do corporate law department attorneys make up an increasing portion of the bar, but they are doing an increasing percentage of the legal work of the organizations that employ them. A growing number of corporations have all or a large portion of their legal work, including trial work in various state and federal courts, performed solely by attorneys on their legal staffs. In essence, then, the type of legal work performed by ACCA members is no different from the work performed by attorneys practicing in law firms.

ACCA seeks to promote rules and procedures concerning access and admission to practice so that corporate counsel can manage adequately corporate legal affairs consistent with bar authorities' and ACCA's interest in maintaining high standards of competence. The question of residency as a qualification for bar admission is of great concern and importance to the members of ACCA and the clients they serve, inasmuch as it has impact upon the ability of corporate counsel to represent effectively their clients in the states which have such residency requirements for admission.

Residency requirements do not address attorney competence. Instead, they are artificial barriers to practice which deter the provision of more cost effective legal services to those corporations that use inside counsel. Thus, this case is of significant interest to the members of ACCA.

JURISDICTION

The jurisdictional grounds are fully set forth in the Brief of the Appellant, Supreme Court of New Hampshire, and the Motion to Affirm filed by Appellee. Kathryn A. Piper, and need not be set forth here again in accordance with Rule 36.5 of this Court.

SUMMARY OF ARGUMENT

Although states have authority to regulate admissions to the bar and the practice of law within their boundaries, that right is not unfettered. Restrictions on practice must reasonably relate to determining fitness and capacity to practice. *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1947); *In re Griffiths*, 413 U.S. 717 (1973).

In the case at hand the State seeks to require residence as a prerequisite to admission to practice. Under *Hicklin v. Orbeck*, 437 U.S. 518 (1978), New Hampshire must demonstrate that nonresidents "constitute a peculiar source of evil" and that discrimination against nonresidents "bears a substantial relationship to the particular 'evil' they are said to present." *Id.* at 525-527. ACCA agrees with appellee that the State has not demonstrated a substantial relationship between residency requirements and fitness and capacity to practice law. Therefore, application of *Hicklin* requires that the requirements be struck down as violative of the Privileges and Immunities Clause (Article IV, Section 2, Clause 1 of the U.S. Constitution).

The appellee has fully briefed the issues surrounding violation of the Privileges and Immunities Clause. ACCA agrees with the reasoning set out by appellee and it is not ACCA's wish to repeat the arguments made by appellee and other *amici* supporting the appellee. Instead, ACCA wishes to emphasize to the Court that residency requirements have a particularly adverse effect

on ACCA's membership and their corporate clients. These attorneys have been engaged to develop expertise in their employers' legal problems and yet cannot be deployed fully because of the requirement for residency.

Most companies market their products or services in more than one state and, often, in many foreign countries. They need to be represented by lawyers who are familiar not only with the law of the jurisdiction but also with their particular organizations. Residency requirements present an artificial barrier to the effective utilization of legal services by companies with legal staffs that reside outside, but that transact business inside the State of New Hampshire. Residency requirements deny such companies the use of counsel of their choosing. This Court should not countenance artificial barriers to practice but should, in accordance with its line of prior decisions, support and encourage the effective competition and utilization of legal services.

ARGUMENT

I. RESIDENCY REQUIREMENTS BURDEN INTERSTATE COMMERCE BY IMPEDING EFFICIENT DELIVERY OF LEGAL SERVICES.

A. Many Corporations Have Created Corporate Law Departments to Provide More Efficient Delivery of Legal Services.

Recent years have seen a significant growth in the number of attorneys practicing law as employees of corporations, partnerships and other organizations in the private sector. Indeed, it has been estimated that such attorneys now make up between 10 and 15 per cent of the total practicing bar. In the recent edition of the *Directory of Corporate Counsel*, published by Law & Business, Inc./Harcourt Brace Jovanovich, Publishers (1984-1985), more than 25,000 attorneys employed by 5,000 organizations were listed.

Corporate lawyers working full time for corporations and other private sector organizations are the fastest growing segment of the legal profession. The growth of corporate law departments is based in part on the fact that corporate managers are realizing that handling legal problems by employing "in-house" attorneys can be more cost-effective than retaining counsel on a contractual basis. Because inside counsel are intimately familiar with the operations of their employers, they can provide more effective counseling and representation than an outside attorney unfamiliar with the company, who must be retained only because the legal problem has arisen in a state with a residency requirement.

As law departments of organizations have expanded, the technical and general legal problems that are handled by inside attorneys have also expanded. It is not unusual to find the vast majority, if not all, of the legal work of a corporation being performed by attorneys in the law department. The *Law & Business Directory of Corporate Counsel* lists 16 primary areas of practice for inside counsel and 140 sub-areas of specialization by inside counsel.

In a published study of 188 corporate law departments by Arthur Young & Company for the Association of the Bar of the City of New York, it was found that 31 percent of the manufacturing companies, 38 percent of the financial companies, and 45 percent of the non-manufacturing companies had all or a substantial part of their litigation performed by members of their legal staffs. *Survey of Corporate Law Departments' Practices, Report of Arthur Young & Company to the Association of the Bar of the City of New York* (December, 1983).

With the growth of the corporate law department, the need to hire local counsel in each jurisdiction in which a problem arises is diminished. Therefore, a requirement that an attorney be a resident before practicing law in

the state places a costly burden on the corporation which has already employed qualified counsel.

B. Residency Requirements for Admission to the Bar Impede the Efficient Delivery of Legal Services to Corporations That Use Inside Counsel.

The activities of lawyers play an important role in the conduct of commerce in the United States. Attempts to regulate the conduct of lawyers which interfere with the free flow of information to consumers of legal services have been struck down by this Court. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). Residency requirements such as New Hampshire's also act as an artificial barrier to the cost-effective delivery of legal services and should, similarly, be struck down.

Most corporations and organizations which employ attorneys as full-time staff have operations ranging beyond the territorial limits of a single state. Corporations establishing law departments are usually engaged heavily in interstate commerce and involve themselves in transactions in numerous states. The inability of the corporate legal staff to practice and represent these corporations in the states in which they do business simply because of a residency requirement effectively denies the corporation effective legal counseling delivered in a cost-efficient fashion.

One could argue that admission *pro hac vice* for inside counsel would resolve such problems. However, not only is such admission subject to the discretion of the local court, but the implied threat of removal has been used as a Sword of Damocles over the attorney. It is not uncommon for an attorney, before being admitted *pro hac vice*, to be asked how many times he or she has sought such admission. The threat, sometimes implicit and occasionally explicit, is that such requests, if too frequent, will be denied.

Further, not all legal representation involves court appearances. Inside counsel represent corporations before state agencies, in administrative hearings, and in contract disputes. Some bar associations have suggested that the use of unadmitted inside counsel in such matters may be unauthorized practice of law. Further, it is not inconceivable that a question could be raised as to whether the advice given by the unadmitted attorney would be protected by the attorney-client privilege. In such jurisdictions, then, the only safe alternative is for the corporation to engage local counsel to work with its inside legal staff, thus creating economic waste, duplication of services, and increasd costs of doing interstate business.

Residency requirements place a particular burden on corporations located in multistate metropolitan areas such as Washington, D.C. or New York. As an example of the questions raised by a residency requirement, if a Washington, D.C. corporation were to move its corporate office to the Virginia suburbs, would its attorneys residing in Washington or Maryland and who were not members of the Virginia bar need to move to Virginia before those attorneys could continue to practice law for their corporate employer? [1]

Residency requirements are especially troublesome when a corporation is concerned with proliferation of similarly based causes of action brought in several states flowing from the same or similar product, such as an automobile, chemical or a drug. Handling such cases by as many counsel as there are jurisdictions with restrictive residency requirements leads to wasteful dissipation of assets. Efficiency in dispute resolution, as developed by experience, is beneficial for the courts, the client, and the client's adversaries.

---

[1] The Virginia residency requirement was recently overturned in *Giller v. Virginia Board of Bar Examiners*, C.A. 83-1282-A (E.D. Va. February 8, 1984), 52 U.S.L.W. 2505, *appeal pending*, No. 84-1259 (4th Cir.).

Counsel for ACCA is aware of various situations in which residency requirements present real problems for ACCA members. For example, some corporations, such as Sears, Roebuck and Co. ("Sears"), have established regional law offices in various sections of the United States. Sears' Eastern regional law office is located in St. Davids, Pennsylvania, a suburb of Philadelphia. That department is responsible for the regional affairs of Sears in seventeen eastern jurisdictions extending from Maine to South Carolina and as far west as Ohio, West Virginia and the eastern part of Kentucky. Since their offices are located in the Philadelphia metropolitan area, the attorneys working in that department reside in Pennsylvania. Residency requirements for admission to practice in states other than Pennsylvania have forced Sears to retain outside counsel in matters which could otherwise have been handled more efficiently and more economically by its own attorneys. There would seem to be no valid economic, legal or ethical reason for such a limitation on the practice of these lawyers, many of whom have extensive and successful trial and appellate experience not only in Pennsylvania and in other states, but also in a number of federal district and appellate courts including the Supreme Court of the United States itself.

Another company, Alcan Aluminum Corporation ("Alcan"), has its corporate headquarters in the State of Ohio, but the majority of Alcan's plants are in the State of New York. Alcan also happens to be incorporated in New York. New York State, until recently, had a residency requirement for admission to the New York state Bar, and the corporate legal staff of Alcan, which was domiciled in the State of Ohio, could not, without getting admitted *pro hac vice*, represent their company in the courts in the State of New York or generally practice law representing their company in New York.

A. M. Castle & Co., a mid-sized corporation with plants nationwide, has its corporate headquarters located in

Illinois, with a small legal staff. In order to satisfy its requirements for legal services, it is forced to hire outside counsel in a number of states in which it does business that have a residency requirement for admission to the bar. Such outside counsel unnecessarily duplicate the skills and knowledge necessary for effective representation of A. M. Castle.

The Budd Company, as a further example, is a Pennsylvania corporation, with its headquarters and legal staff in Michigan. Its products are used in millions of vehicles, in practically every state. It too has been forced, because of residency requirements, to hire outside local counsel to handle legal problems it otherwise would have handled with inside counsel.

The experiences of these corporations are not atypical. These companies and their experiences are representative of many other ACCA members. As we progress toward the twenty-first century, corporations are relying on sophisticated, complex and technology-oriented methods of manufacturing, production, and delivery of services. Also, the increased complexity of manufacturing, distribution, and doing business in general requires organizations and corporations that deal in interstate commerce to engage counsel who have an intimate and thorough knowledge of the product, and its technology.

Consequently, corporations have found it increasingly necessary to use their own inside counsel for representation to control the continually increasing costs of maintaining the necessary level of technical expertise of the attorneys that represent them. If those attorneys cannot represent corporations in various states simply because they do not reside there and, therefore, cannot gain admission to the bar, corporations effectively are forced to retrain and duplicate these services in every state in which they do business. This results in economic waste and the inefficient delivery of legal services.

The residency requirement is a barrier which burdens those who sell products, and otherwise transact business, in the State of New Hampshire, but who do not reside there. When such local interest conflicts with the national interest of having national markets without barriers, the local interest, if not clearly persuasive, should give way to the national. *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977).

C. Residency Requirements Impose Anti-Competitive Restraints on the Practice of Law.

The real result of the New Hampshire residency requirement is to impose anti-competitive restrictions on the availability of legal services within the state. The residency requirement clearly should fall when compared with the national interest of national commerce and interstate relationships. *United Building and Construction Trades Council v. City of Camden*, U.S. , 104 S.Ct. 1020, 79 L.Ed.2d. 249 (1984); *Hunt v. Washington State Apple Advertising Commission, supra.* If the lower court's decision is not allowed to stand, corporations with inside counsel will incur increased costs flowing from duplication of professional services because they will be forced to hire local counsel to do work that otherwise would be performed by its own law department attorneys. The result will be to raise artificial barriers and reduce competition for the practice of law within the state.

Corporations, as well as individuals, should be free to select qualified, competent counsel to represent them as long as those counsel are subject to disciplinary sanctions imposed by the jurisdiction in which they are practicing (see page 12 *infra*). Business entities with inside counsel are sophisticated users of legal services that can well make their own decisions as to how to fill their requirements for legal counseling and representation. Those companies should not be restricted from making their

own judgments as to which attorneys to hire merely because a state has a residency requirement. Corporations should not have to concern themselves with whether or not the attorneys they chose to represent them can leap hurdles erected by the state to bar competent, qualified attorneys who do not happen to reside in the local jurisdiction. The corporate client is not served in any way and is indeed considerably harmed by a requirement forcing it to use attorneys who reside in the local jurisdiction. The residency requirement does not serve the interests of the client; instead, it is nothing short of a form of protectionism, which should not be condoned by this Court.

II. THERE IS NO LEGITIMATE STATE INTEREST TO PROTECT WHICH REQUIRES RESIDENCY FOR ADMISSION TO THE BAR.

Under *Hicklin*, the state must show that the residency requirement is needed to avoid the particular "evil" nonresidents would create.[2] In this case, attorney competency is not an issue since appellee has recently passed the bar examination. The only reason appellant has set forth to justify the requirement is the need for state control to maintain and ensure the professional conduct of attorneys practicing in the state. There are, however, many other

---

[2] The teaching of *Hicklin* was recently applied in *Giller v. Virginia Board of Bar Examiners*, C.A. 83-1282-A (E.D. Va. February 8, 1984), 52 U.S.L.W. 2505, *appeal pending*, No. 84-1259 (4th Cir.). The court, relying on *Hicklin*, invalidated Virginia's requirement that an applicant for admission be a "permanent resident" of the Commonwealth of Virginia, as a violation of the Privileges and Immunities Clause. The court held that nonresidents were not the source of the "evils" sought to be avoided, namely, a bar membership unfamiliar with local practice and customs and insufficiently scrutinized for proper character. The court also found that the means employed in the statute to protect against such "evils" were not well-tailored to accomplish the expressed goals.

less burdensome means for ensuring adequate state control to discipline attorneys without requiring residency.

It is axiomatic that a state may properly discipline attorneys who practice within its borders or who are admitted to its bar. A condition for being admitted *pro hac vice* is the willingness to submit to discipline by the admitting court. Likewise, attorneys admitted in a state remain subject to sanctions although practicing outside the state. The American Bar Association Model Rules of Professional Conduct adopted by the Full House of Delegates of the ABA on August 2, 1983, states in Rule 8.5, "Jurisdiction":

> A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.

The ABA, in adopting that rule, recognized that the practice of law is becoming less parochial. This was confirmed in the commentary to the rule which stated:

> In modern practice, lawyers frequently act outside the territorial limits of the jurisdiction in which they are licensed to practice either in another state or outside the United States. In doing so, they remain subject to the governing authority of the jurisdiction in which they are licensed to practice . . .

Thus, the Model Code recognizes the fact that a court may properly discipline an attorney admitted to practice before it, and that any admitted attorney remains subject to that court's jurisdiction, notwithstanding the attorney's residency or practice beyond the jurisdictional territorial limits of that court. The bar of any state, through its disciplining process, has the power to disbar and discipline those attorneys admitted to the bar if those attorneys do not conduct themselves in the required manner.

The State could also require a non-resident attorney admitted to practice in that state to designate an agent

for service of process. An example is Section 520.11 of Rules for Admission of the Court of Appeals of the State of New York which states:

> 520.11 Designation of agent for service of process.
>
> (a) Every applicant for admission to practice who does not reside and is not employed full-time in the State shall be required, as a condition of admission, to execute and file with the Appellate Division of the department in which the applicant is being admitted, a duly acknowledged instrument in writing setting forth the applicant's residence or mailing address and designating the clerk of such Appellate Division as the applicant's agent upon whom process may be served, with like effect as if served personally upon the applicant, in any action or proceeding thereafter brought against the applicant and arising out of or based upon any legal services rendered or offered to be rendered by the applicant within the State.

When a rule, such as a residency requirement for admission, has a discriminatory effect, the local interest must not only be justified, but no other alternative must be able to satisfy those interests. This Court has stated in *Hunt v. Washington State Apple Advertising Commission*, *supra*, at 353:

> . . . the burden falls on the State to justify it (the discriminatory statute) both in terms of local benefits flowing from the statute and the unavailability of non-discriminatory alternatives adequate to preserve the local interest at stake.

As shown above, there is no rational state interest in requiring residency for admission to the New Hampshire bar, since the legitimate interests in regulating the bar and administering discipline can be adequately accomplished by non-discriminatory alternatives.

CONCLUSION

The decision below, striking down residency requirements for admission to the practice of law in the State of New Hampshire, is in keeping with the modern practice of law and the promotion of effective competition of legal services. It allows individuals, corporations, and other organizations with inside legal staffs to utilize attorneys of their choice in the most cost-effective manner possible. Accordingly, *Amicus Curiae*, the American Corporate Counsel Association, respectfully prays that the decision of the Court below be upheld.

Dated this 30th day of July, 1984.

Respectfully submitted,

JERRY M. AUFOX, ESQUIRE
Member of the American
Corporate Counsel Association
3400 North Wolf Road
Franklin Park, IL 60131
(312) 455-7111
Counsel of Record

THOMAS I. DAVENPORT, ESQUIRE
Member of the American
Corporate Counsel Association
3155 West Big Beaver Road
Troy, MI 48084
(313) 643-3645

NANCY A. NORD, ESQUIRE
Executive Director
American Corporate Counsel
Association
1225 Connecticut Avenue, N.W.
Suite 202
Washington, D.C. 20036
(202) 296-4523