the payroll of a particular business entity or as a member or associate of a law firm which has been "retained" by the business entity. (Collectively, they are referred to as "corporate counsel.")

In their professional activities, members of ACCA and other corporate counsel, using their experience and legal training, are regularly called upon to provide advice to their corporate clients on a wide variety of matters which require judgments and insights that are uniquely legal. As such, corporate counsel are intimately involved, *inter alia*, in formulating company policy on compliance with regulatory matters, in advising management on pending and threatened litigation, and on the extent and nature of disclosure requirements.

The holdings of the courts below directly and materially impact the ability of corporate counsel to provide legal advice to their clients. Due to the direct impact of such decisions on the professional activities of corporate lawyers, ACCA seeks to place in focus the importance of the issues raised by this petition as they uniquely affect corporate counsel.

The Court should issue a writ of certiorari so that the contours of the attorney-client privilege and the attorney work product doctrine may be better defined. Such a definition would provide necessary guidance to corporate counsel on the extent to which their communications will be protected from unwarranted intrusions.

For the foregoing reasons, the motion of the American Corporate Counsel Association for leave to file the accompanying brief as *amicus curiae* in support of the petition should be granted.

SEPTEMBER 25, 1987

Respectfully submitted,

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No. 87-326

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

G.D. SEARLE & CO., PETITIONERS

V.

DEBRA A. AND GEORGE SIMON, RESPONDENTS

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE AMERICAN CORPORATE COUNSEL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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As *amicus curiae*, the American Corporate Counsel Association ("ACCA") supports the petition for certiorari and respectfully urges the Court to issue a writ of certiorari.

INTEREST OF THE *AMICUS CURIAE*

ACCA is a national bar association devoted exclusively to the professional activities of attorneys on the legal staffs of corporations and other business organizations that are in the private sector or have private sector attributes (referred to as "employed counsel"). With 29 local chapters across the country, ACCA has approximately 7500 members employed in a legal capacity by some 3000 organizations. Many of these members are the chief legal officers of their clients.

It is estimated that between 30,000 and 60,000 members of the Bar are employed by business entities. In addition, ACCA estimates that over 20% of the more than 600,000 members of the bar in the United States (at least 120,000 lawyers) provide some form of legal service to corporate entities whether as "employed" counsel on the payroll of a

particular business entity or as a member or associate of a law firm which has been "retained" by the business entity.

In their professional activities, members of ACCA and other corporate counsel, using their experience and legal training, are regularly called upon to provide advice to their corporate clients on a wide variety of matters which require judgments and insights that are uniquely legal. As such, corporate counsel are intimately involved, *inter alia*, in formulating company policy on compliance with regulatory matters, in advising management on pending and threatened litigation, and on the extent and nature of disclosure requirements.

The holdings of the courts below directly and materially impact the ability of corporate counsel to provide legal advice to their clients. Due to the direct impact of such decisions on the professional activities of corporate lawyers, ACCA seeks to place in focus the importance of the issues raised by this petition as they uniquely affect corporate counsel.

INTRODUCTION

Corporate counsel[1] provide a broad spectrum of legal advice on a daily basis to the business entities they serve. The nature and extent of that advice remains the same regardless of whether the lawyer is "employed" or "retained." The very purpose of this advice is, *inter alia*, to provide the business entity with the information necessary to comply with applicable laws and regulations, to take the legal steps necessary to protect its interests, to adjust business policy and practice in response to legal considerations and, when in litigation or faced by a risk of litigation, to provide an appropriate response. No business entity can function today without the input of its lawyers. To the extent any court decision erodes (as this case does here) or expands the traditional protections afforded by the attorney-client privilege or attorney work product doctrine, it has widespread implications.

Due to the increasing dependence on the legal function by business, it is important that definitive guidance be provided on the scope and application of both the attorney-client privilege and the attorney work

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1 Although ACCA was formed to address the professional needs of employed counsel, the issues presented by this petition relate not just to inside (employed) counsel, but also directly impact the professional responsibility of outside (retained) counsel. In this brief we collectively refer to "corporate counsel" to designate those members of the bar who primarily practice corporate law and serve the business interests of their clients regardless of the nature of their retention or association.

product doctrine as they apply to the myriad of communications involving corporate counsel.[2]

The instant petition provides an opportunity for the Court to further refine the contours of both the attorney-client privilege and the attorney work product doctrine in the business context. Although the instant case demonstrates only one facet of this interrelationship, its significance is far broader than the factual context in which it arises. Thus the legal implications of the decision below are potentially far reaching and ACCA urges this Court to grant the Writ of Certiorari.

THE BACKGROUND

Petitioner G.D. Searle & Co. ("Searle"), a Delaware corporation, is or has been a defendant in over 480 product liability claims relating to the copper intrauterine contraceptive device known as the CU-7 IUD. At some point after being served with a complaint, Searle's corporate counsel prepares a case analysis for that case. These analyses include, *inter alia*, the estimated future cost in defending the case and any estimated exposure. The analyses were also used to determine settlement strategies.

The case analyses were provided to Searle's Risk Management group where they were aggregated. The information was not generally disseminated, and Searle took precautions to be sure that unauthorized persons did not have access to this highly confidential information prepared by its corporate counsel.

Plaintiffs in the CU-7 litigation sought production of all case analyses -- both for each individual case and the aggregate of all the individual cases. The trial court did not order production of the individual case analyses because it found they were protected by the attorney-work product doctrine. However, it found that what was protected individually from discovery was not protected in the aggregate and ordered production of the aggregate analyses. The Eighth Circuit concurred with the district court that the individual case analyses were exempt from disclosure, but nevertheless, through a convoluted form of reasoning and over a strong dissent, allowed plaintiffs access to the aggregation of these analyses.

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2 During the past decade this Court has addressed the work product doctrine only twice -- in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), and *Federal Trade Comm'n v. Grolier Inc.* 462 U.S. 19 (1983) -- and, other than in *Upjohn*, has not addressed issues concerning the attorney-client privilege since its *per curiam* affirmance in *Decker v. Harper & Row Publishers, Inc.*, 400 U.S. 348 (1971). *Cf. Goldberg v. United States*, 425 U.S. 93 (1976) (work product doctrine considered in the context of the Jencks Act).

Simon v. G.D. Searle & Co., 816 F.2d 397 (8th Cir. 1987). On petition for rehearing *en banc*, the Eighth Circuit split 5 to 5. The petition for writ of certiorari followed.

ARGUMENT

The ability of management to effectively satisfy its legal obligations and to undertake prudent management practices is circumscribed by its ability to obtain the input and advice of legal counsel. In some of these matters, only a lawyer can provide the necessary information and judgment. For example, in evaluating the merits of a particular claim -- both for its possible success or failure as well as the future costs associated with such a claim -- only corporate counsel can provide that information (as Searle's counsel did here). Without corporate counsel's input, management would be unable to make prudent business decisions on whether, and for how much, it should settle a claim, to determine its contingent liabilities, or to predict with any level of accuracy its future cash flow needs with respect to such a claim or group of claims.

Any intrusion into the relationship between the corporate counsel and the client raises significant policy issues. The effect of the decision below is to create those sorts of intrusions which have far-ranging, adverse implications. Accordingly, this Court should issue a writ of certiorari to clarify for both the lower courts and counsel the contours of the attorney-client privilege and attorney work product doctrine.

A. THE ROLE OF CORPORATE COUNSEL

Societal and business relations have reached such a level of complexity today that many transactions entail legal considerations. In addition, notwithstanding recent attempts at deregulation, business must operate in a substantially increased regulatory framework. For example, the level of federal government regulation has increased dramatically in the past three decades. Since the 1950s, when there were only a few federal agencies (*e.g.*, SEC, IRS, FTC) whose regulatory responsibility was likely to affect most corporations, the number of agencies with regulatory oversight which has grown dramatically. Today the number of federal agencies with broad regulatory responsibilities which have been created in the past three decades (*e.g.*, OSHA, EEOC, DOE, FEC, etc.) is a multiple of the number in existence in the 1950s. Moreover, many of these agencies have been replicated at the state level. Thus, business must be advised by lawyers.

Corporate counsel's role in advising business involves many different aspects. At the core of each of them, however, is bringing to bear

uniquely legal judgments and insights. These may range, for example, from advising a business about compliance with regulatory requirements, to evaluating and defending threatened and actual claims against the business entity. How those uniquely legal judgments are translated into corporate policies and responses varies depending on the nature of the advice given and the context in which it is given.

For example, corporate counsel's involvement in the litigation process is not limited to defending a particular claim before a court or administrative agency; they also play a critical role in determining how a litigation impacts a company's other legal responsibilities. Corporate counsel must also provide management with an assessment of the risk that a particular claim has for the company so that management may plan its future cash needs as they will be impacted by the claim itself (should judgment be rendered against it or the claim settled) as well as the costs of defending such a claim.

These judgments also enhance management's ability to satisfy its disclosure obligations under the securities laws and with respect to the presentation of the company's financial statements. For example, in the preparation of a company's financial statements, for which management has the prime responsibility,[3] a company should accrue, or "set up," reserves sufficient to cover the expected costs of each claim unless, in management's judgment, the likelihood of loss is remote, non-quantifiable, or immaterial. FINANCIAL ACCOUNTING STANDARDS BOARD OPINION NO. 5. These accounting obligations are also embodied in the Federal Securities laws. *See, e.g.*, Regulation S-X, 17 C.F.R. § 210.1-01 *et seq.*

Accordingly, if a company does not properly establish reserves for litigation because it failed to obtain adequate input from its lawyers, it could face future liabilities to both shareholders and the Securities & Exchange Commission under the securities laws, or to creditors who might go unpaid if the initial litigation involves risks of such proportion as to threaten the continued viability of the entity.[4]

Similarly, for management to plan its cash flow needs, it must evaluate both the risk of the claim itself and the future expense associated

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[3] *See In re Interstate Hosiery Mills*, 4 S.E.C. 706, 721 (1939); *SEC v. Bangor Punta Corp.*, 331 F. Supp. 1154, 1163 (S.D.N.Y. 1971), *cert. denied*, 414 U.S. 924 (1973)

[4] *E.g.*, consider the impact of the Dalkon Shield litigation on A.H. Robins.

with each particular claim. Estimates of future costs in defending such litigation are the product of legal strategies which counsel determine. Among other items, these estimates reflect deposition and document production strategies, whether and to what extent experts will be employed, and the nature and extent of motion practice. Thus, this evaluation is peculiarly within the province of the lawyer and entails substantial legal judgments and privileged concerns. The quantification of these legal judgments, if known by an adversary, provides invaluable insights to opposing counsel in formulating counter strategies and can create an unfair advantage.

The calculation of the potential loss resulting from a case or the future legal costs in the defense of a case are, in reality, merely a financial quantification of complex legal strategies reflecting the lawyer's work product.[5] These calculations also reflect a lawyer's advice to his client about the matters being handled by him. The fact that its format has changed -- *i.e.*, it may not appear in the rubric that is commonly considered the format of legal advice -- does *not* alter its underlying nature.

Corporate counsel's role in providing legal input to the business planning process does not stop with evaluating the financial impact of a claim or series of claims. To the extent a claim is not aberrational, it can provide significant learning for the business entity in its product development or in the types of standards which will govern the entity's future conduct.[6] Thus, to the extent that the litigation provides information as to

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5 As such they are no different than the decisions of counsel on what to ask a prospective witness, what to show a witness in preparing the witness to testify, or what documents to review prior to any document production. These communications and activities has been found to be protected either by the work product doctrine (*see, e.g., Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986), *Sporck v. Peil*, 759 F.2d 312 (3d Cir.), *cert. denied*, 106 S. Ct. 232 (1985)), or the attorney-client privilege (*see, e.g., In re Grand Jury Witness (Salas)*, 695 F.2d 359 (9th Cir. 1982); *Coleman v. American Broadcasting Cos.*, 106 F.R.D. 201 (D.D.C. 1985)). The courts have traditionally recognized the sanctity of these activities and have insulated them from disclosure to one's adversaries.

6 It has long been recognized that compliance with existing standards will not necessarily insulate a defendant from a finding of negligence. *See The T.J. Hooper*, 60 F.2d. 737 (2d Cir. 1932) *cert. denied*, 287 U.S. 662. Thus, the law has led to the change in product standards (*see, e.g., Pike v. Frank G. Hough*, 2 Cal 3d 465, 85 Cal. Rpts. 629, 467 P.2d 229 (1970) (backup buzzers installed on trucks as a result of this decision)), business conduct (*see, e.g., Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985) (director's standard of care changed)), and even professional standards (*see, e.g., Fischer v*

business practices (*e.g.*, product safety and development), the lawyers' input and reflections can be, and usually are, invaluable.[7]

All of these issues necessarily involve legal insights and judgments which are peculiarly within a lawyer's province. Prudent management must seek these insights and act upon them accordingly. Management and its counsel should not be deterred by a fear that this uniquely legal input will be open to discovery and that such discovery will lead to economic loss at the hands of adversaries in litigation. Corporate counsel's responsibility to provide these judgments and views in a professional manner should never be tempered by the risk that they might be required to be disclosed. Particularly this should be the case when that revelation might have a devastating impact on counsel's client in either that or some other proceeding.[8] These communications have been and should continue to be afforded the traditional attorney-client and work product protections.

B. THE LITIGATION CONTEXT

Not surprisingly, the issue of disclosure of these uniquely legal communications and views is only likely to arise in the context of litigation. Accordingly, the importance of defining the contours of the protections to be afforded legal consultations is highlighted by the increasing

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Kletz, 266 F. Supp.180 (S.D.N.Y. 1967) (accounting profession adopted Statement on Auditing Procedure No. 47 relating to subsequent events to comply with the holding)).

7 Effective management will ask its lawyers to provide "lessons we have learned" from the litigation to help prevent future problems. These inputs obviously reflect a combination of legal and business judgments -- but they are derived primarily from a legal setting. The legal inputs take on the characteristic of "product improvement" and have a salutary effect on society. As such, they are the *sine qua non* of "subsequent remedial measures." *Cf.* FED. R. EVID. 407 (remedial measures inadmissible). Before disclosure of these judgments is allowed, the impact of a policy allowing such discovery should be carefully evaluated.

8 As Searle's petition notes (at pp. 16-17), plaintiffs in mass tort litigation sell the information obtained in discovery, as here, to other plaintiffs in related litigation. Moreover, the plaintiffs' bar usually coordinates mass tort and related litigation through national steering committees which take on the aura of a corporate entity, but are not burdened by the possibility of discovery imposed on a corporate entity. Moreover, the routine trading of this information among plaintiffs apparently has the imprimatur of the courts. *See, e.g., Cipollone v. Liggett Group*, No 87-5014 (3d Cir. June 8, 1987).

volume of business-oriented litigation.[9] In 1986, over 254,828 suits were filed in the federal courts -- a 41% increase since 1981.[10] Of these, more than 161,000, or 62%, involved business -- a 72% increase since 1981.[11] In all of these matters, corporate counsel's involvement is likely to be

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9 To the extent that the Eighth Circuit's holding was predicated on the fact that Searle's business involves litigation and therefore this impliedly negates the right to the application of the traditional protection from disclosure accorded an attorney's activities, the increasing volume of litigation would lead to the conclusion that no legal communication is entitled to protection. Moreover, the *a fortiori* conclusion that courts may draw from this aspect of the Eighth Circuit's opinion is that any legal advice given by counsel may lose the traditional protections afforded counsel's communications and activities.

10 During the period 1978 to 1983, 12,000,000 lawsuits (an average of 2,000,000 a year) were filed in state courts. Bacus, Liability: Trying Times, NATION'S BUSINESS, February, 1986, at 24. Information published by the National Center for State Courts suggests that the volume of litigation in the state court systems is increasing and that the numbers of suits involving claims above minimal jurisdictional levels is far in excess of 2,000,000 a year. Although no meaningful national statistics are available for state courts showing the type of suits filed therein, it is expected that a substantially lower percentage of the state court actions are business-related. Nevertheless, the number of business-related suits in state courts is significant.

11 More than half of the suits filed in federal court involved business issues or business and were thus likely to involve corporate counsel. The business-related suits cover the entire panoply of business activities. It appears that the number of commercial, *i.e.*, business related suits breaks down as follows:

	1981	1986
Total Suits Brought	180,576	254,828
Contracts	51,159	88,352
Tort - Commercial	10,000	29,000
Statutory		
Antitrust	1,352	877
Civil Rights	15,419	19,000
Commerce	1,080	922
Labor	9,300	12,600
Patent, *et al.*	4,027	5,681
Securities	1,768	3,059
Other	———	2,000
Total Suits Brought	94,105	161,491
% of Suits Involving Business	52%	63%

1986 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS. (Due to the imprecision of some of the statistics, certain of the above numbers such as torts - commercial and civil rights are estimates.)

present at many different levels -- from advice and consultation prior to the start of litigation, through intimate involvement in the litigation process, to reflections following conclusion of the legal process.

C. THE POLICY ISSUES WHICH NEED BE ADDRESSED

In defining the contours of both the attorney-client privilege and the attorney work product doctrine and when discovery will be allowed, there are numerous policy issues which should be considered. These considerations include:

- whether the material sought is relevant to the issues;[12]
- whether the concept of "fundamental fairness"[13] is impinged by allowing an opposing party access to counsel's thoughts about a particular piece of litigation or its advice to management in general;
- whether the information sought is available from other sources;[14]
- whether production of the requested data is likely to have an adverse public impact without any material countervailing benefit for the party to whom it is produced;[15]

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12 Here the Eighth Circuit implicitly found that the material was not relevant when it noted it was unlikely the material would be admissible. *See* Petitioner's Brief for Cert., at App. 15.

13 This Court has long considered "fundamental fairness" a touchstone in determining the extent of allowable discovery. *See, e.g., Federal Open Market Comm. v. Merrill*, 443 U.S. 340, 359-60 (1979); *Bowsher v. Merck & Co.*, 460 U.S. 824, 836, 846 (1983); *Federal Trade Comm'n v. Grolier Inc.*, 462 U.S. 19, 32 (1983).

14 FED. R. CIV. P. 26(b)(3) provides in pertinent part that work product is available "only upon a showing that the party seeking discovery has a substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent materials by other means." We note in passing that neither the court of appeals or the district court appeared to require the plaintiffs to make the requisite showing of "substantial need".

15 For example, if reserve information is likely to be disclosed, will management even develop that information. Moreover, will the production such information encourage more litigation and add to the *in terrorem* affect of litigation.

- whether reserve information is opinion or fact;[16]

- whether legal advice loses its characteristic (and protection) if used for business purposes.[17]

The opinions below failed to fully consider any of these issues in evaluating the contours of both the attorney-client privilege and the attorney work product doctrine. Rather, the courts below attempted to make a mechanical analysis of the question without regard to the proper policy considerations affecting the disclosure of the information at issue. Thus, the court below failed to adequately consider the far reaching implications of their decisions.

D. REASONS FOR GRANTING THE PETITION

The opinion of the Eighth Circuit below opens a wide door through which unwarranted intrusions into the attorney-client privilege and attorney work product doctrine can easily be made. The implications of this decision are far-reaching and, unless appropriate boundaries are established with respect to these intrusions, the reasoning underlying the Eighth Circuit's opinion can create an exception which will swallow the protections traditionally afforded and required by the privilege and doctrine.[18]

The opinion below raises serious issues as to the ability of management to protect the communications it receives from corporate counsel when it calls upon its legal advisors to provide uniquely legal considerations as an essential underpinning for formulating business policy and management planning. It poses substantial questions as to the scope and nature of the protected advice corporate counsel can and must provide to the business entity. Moreover, it directly affects what corporate counsel

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16 *See, e.g., Union Carbide Corp. v. Travelers Indem. Co.*, 61 F.R.D. 411, 413 (W.D. Pa. 1973) (opinions and conclusions with respect to reserves carried should not be discoverable).

17 *See, e.g., In re LTV Sec. Litig.*, 89 F.R.D. 595, 601 (N.D. Tex. 1981); *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 517 (D. Conn.), *appeal dismissed*, 534 F.2d 1031 (2d Cir. 1976).

18 To the extent *Upjohn* confirmed the principle that the work product doctrine is applicable to corporate counsel's activities, the opinion below has the potential to sharply curtail its application.

can and cannot say to management about litigation without fear of exposing those communications to the prying eyes of opposing counsel.

Unless corporate counsel can definitively measure the definitional boundary of legal advice, that advice will be unduly guarded when and if it is even provided. This Court has the opportunity to provide substantial guidance to lower courts, as well as corporate counsel, on the contours of the privileges and protection to be afforded communications of corporate counsel in a business context. In view of the potential for serious erosion of protection caused by the Eighth Circuit's holding below and the importance of the issue to the corporate bar, the Court should review this case.

CONCLUSION

We respectfully urge the Court to accept the petition for certiorari; to consider the need of business entities in having unfettered access to its legal advisers without fear that this advice will be subject to discovery and a weapon for its adversaries; and to provide a workable standard for the application of the attorney-client privilege and attorney work product doctrine in the context of the increasingly large volume of litigation involving business entities.

Dated: September 25, 1987

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