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The in-house bar association<sup>SM</sup>

September 17, 2003

The Supreme Court of the State of New Hampshire  
One Noble Drive  
Concord, NH 03301

Re: *In the Matter of Unnamed Applicant*, Case No. ADM-2003-0060  
(CLO Working in New Hampshire without a New Hampshire License)

Honorable Members of the Court:

We write on behalf of the American Corporate Counsel Association (ACCA) and its Northeast Chapter, many of whose members practice law in the legal departments of companies with offices located in New Hampshire. We realize that the court did not solicit our comments on the above-referenced matter, but hope that you will nonetheless accept this letter and review its contents in the form of an informal "amicus curiae" to your consideration.

ACCA is a bar association with over 15,000 individual members who work as employed in-house counsel for private sector organizations (public and private, for-profit and non-profit entities). ACCA's Northeast Chapter is made up of 588 corporate counsel working in New Hampshire, Rhode Island, Vermont, Massachusetts, and Maine. Our interest in this matter, however, stems from more than the vocal concerns about this case raised by our local members, but from our long history of involvement in unauthorized practice of law cases involving in-house counsel. Since ACCA's inception in 1982, we have worked with states across the country, and most recently with the American Bar Association's Commission on Multijurisdictional Practice (MJP) of Law, toward the development of reforms that would better reflect the realities and client concerns of modern legal practice, which is certainly multijurisdictional, and indeed, almost "borderless" in its application. We have helped several states over the years craft in-house counsel registration rules, as well as our more recent service in promoting the reforms recommended by the ABA's MJP Commission.

The situation raised by this matter, namely, that of a corporate counsel who is licensed and in good standing in one state, but practicing exclusively and full time for a corporate client in offices located in another state, is surprisingly common. Indeed, in the course of our work, we have encountered hundreds, if not thousands, of in-house counsel who are operating in a similar fashion. It is relatively rare, however, for the matter of such a counsel to be raised as a complaint with the state bar or the high court of the host state. Thus, our interest in offering some thoughts to this Court as it proceeds in this matter.

Without passing any judgment on the facts specific to this case or the arguments made by and against the Unnamed Applicant, we offer the following:

### **The Movement Toward MJP Reforms that Would Authorize the Applicant's Behavior**

The most important issue we wish the Court to consider is the policy impact of its ruling on the Applicant in light of the current momentum currently sweeping the states (and under consideration in New Hampshire) to amend the unauthorized practice rules of each state. A number of states have already passed reforms, including Colorado, Delaware, Georgia, New Jersey, Nevada, and North Carolina. Every other State, including New Hampshire, is either in the process of committee-type review (with an eye toward recommendations for reform), or has completed review and issued a report recommending reforms which is awaiting adoption by the State's high court. These States' reforms are moving in a direction consistent with the theories behind new ABA Model Rules 5.5, 8.5, and related model recommendations for admission on motion, foreign counsel improvements in law practice and temporary and permanent practice, pro hac vice reforms, and other reforms suggested and adopted in 2002 from the report of the Commission on Multijurisdictional Practice of the ABA.<sup>1</sup>

While not every state will adopt sweeping reforms across every topic listed, and while not all reforms passed will conform exactly to the language of the ABA models, the reasons for the ABA MJP reform movement's momentum are best described by the Conference of Chief Justices in their letter of endorsement to the ABA MJP Commission:

WHEREAS, the states' highest courts regard consumer protection and an effective system of professional regulation as one of their prime responsibilities; and

WHEREAS, the Commission on Multijurisdictional Practice (the MJP Commission) has outlined a series of steps to improve the American Bar Association's model rules on the practice of law and the regulation of the profession; and

WHEREAS, the Commission's report emphasizes and reaffirms the central role of the state courts in implementing professional responsibility.

NOW THEREFORE BE IT RESOLVED that

1. The Conference of Chief Justices commends the proposals of the MJP Commission as a good platform on which states can build a more effective and more predictable regulation; and
2. The Conference of Chief Justices asks its representatives in the ABA's House of Delegates to vote to adopt the recommendations of the MJP Commission.

(See [http://www.abanet.org/cpr/mjp/comments\\_0602.html](http://www.abanet.org/cpr/mjp/comments_0602.html) for the letterhead copy.)

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<sup>1</sup> For complete information on the ABA MJP Commission, its proposals, testimony, commentary, academic resources, and the adopted recommendations to revise the Model Rules of Professional Conduct, see <http://www.abanet.org/cpr/mjp-home.html>.

In New Hampshire, a committee of the bar is already examining proposed reforms to the state's unauthorized practice rules; the process of this committee will be to bring suggested reforms to this court for adoption, rejection or amendment.<sup>2</sup> While we don't know yet what this committee will propose, or what this court will accept, if this committee is working parallel with the experience of committees in scores of other states, most of the reforms that they will consider would have the effect of authorizing the practice (including a retroactive amnesty) of the Unnamed Applicant in this matter.<sup>3</sup> Assuming that New Hampshire, consistent with the direction of *every other state focusing on this issue*, adopts such a policy, it will likely raise questions as to why this court would chastise the Applicant at the same time it was preparing to receive a report from a committee whose purpose is to propose new rules that would authorize the behavior the ruling finds objectionable.

### **A Large Number of States Provide a Safe Harbor for Corporate Counsel Already**

Even in those states that have not yet adopted formal MJP reforms based on the ABA Model Rule changes and recommendations, there are a significant number of states that have exceptions to rules or registration systems in place that authorize corporate counsel to practice for their client in a state in which they are not admitted. ACCA has worked with a number of states to help them adopt such rules, and still others have created exceptions from the rules by opinions of courts or bar ethics committees.

Fourteen jurisdictions have corporate counsel rules: Colorado, Florida, Idaho, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nevada, Ohio, Oklahoma, Oregon, South Carolina, and Washington. Six jurisdictions without corporate counsel rules permit out-of-state lawyers to serve as corporate counsel as an exception to their prohibitions against the unlawful practice of law: Alabama, Maryland, New Jersey, Texas, Virginia and Washington, DC. (The new in-house counsel rule just approved by the New Jersey Supreme Court is not effective until January 1, 2004, and Virginia's new corporate counsel admission and registration rule goes into effect July 1, 2004.) In addition, Delaware, Georgia, New Jersey and North Carolina now authorize corporate counsel licensed elsewhere to work in their states as part of their new MJP reform. As you can see, many states (recognizing that the practice of in-house counsel is a matter of risk only to the sophisticated corporate client, and that in-house lawyers are often transferred regularly from office to office) have adopted these rules to facilitate in-house counsel practices and effective corporate client services; these rules have the effect of ensuring that counsel who are otherwise "flying below radar" are subject to the jurisdiction of the state in which they are operating.

### **No Injury and no Harm**

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<sup>2</sup> The New Hampshire Bar Association Ethics Committee is chaired by Rolf Goodwin, (rolf.goodwin@mclane.com).

<sup>3</sup> The proposed reforms adopted or proposed to date in over 30 states offer provisions to authorize the practice of in-house counsel who are working in a state in which they are not licensed so long as they are licensed (and in good standing in every jurisdiction in which they are admitted), working solely for their employer, and not holding themselves out as licensed locally or attempting to represent their client in local courts without pro hac authorization or locally admitted co-counsel. Some of these reforms take the form of rule amendments; some take the form of a registration system which is administered by the bar to provide a limited license. The remaining states have not yet indicated what they are planning to do.

It is notable that bar counsel did not bring this action because of a public harm or complaint (indeed, the issue arose only because the Applicant filled out an application for Admission on Motion); the client is a sophisticated consumer of legal services who feels well and professionally represented by the Applicant; and there is no erosion or violation of the fundamental values of professionalism or client services under the rules of the state other than that of proper licensure. So while one can debate whether there was potentially a “foul,” there certainly is no identified “harm.” Thus, we respectfully suggest that making an example of this counsel rectifies no wrongs and unnecessarily places the court in the position of making an example of the Applicant while preparing to change the rules under which he or she is being prosecuted.

Further, the only remedy against this Applicant’s license is a referral of the court’s findings to the Applicant’s home state bar of admission, since by definition his or her licensure is not subject to New Hampshire authority.<sup>4</sup> Experience tells us that this kind of referral will not receive a high level of attention at the bar of the Applicant’s admission for several reasons, the most important being the backlog of cases that are considered higher priority (involving theft, charlatans, lawyer substance abuse and impairment, and other high threat issues), and the fact that there is no complaint of client injury or belief that the Applicant is not competent to practice. The National Organization of Bar Counsel (NOBC) has attested to this problem and this is part of their reasoning for endorsing the MJP reforms we’ve referenced.

Accordingly, ACCA respectfully suggests that the court may wish to stay its consideration of this case until the committee of your state bar examining MJP reforms is able to issue its recommendations. We are confident that they will offer an exception to the UPL rules that would cover the Applicant’s situation and allow the court the capacity to resolve this matter consistent with the direction it sees the rules moving. If for some reason your state bar committee becomes the first to endorse MJP reforms which would not provide an exception for the Applicant’s behavior, you may always reinstate your case. We are further pleased to offer our assistance to this court or the bar if the result of this matter’s consideration is a decision to pursue the adoption of a corporate counsel limited admission registration system, in support of which we can provide copies of rules adopted by other states and our own recommended model, which Virginia is the most recent state to adopt.

Please feel free to contact us if you have questions or if we may be of service in providing information necessary to your review of this matter. Thank you for your consideration of our perspectives.

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<sup>4</sup> It is notable that the MJP reforms offered by the ABA models would help remedy just this issue; in the future, a corporate counsel not licensed in your state, but working there under the rule’s limited licensure, would be subject to the authority of this Court and the State’s rules and disciplinary processes for any violation of local rules.

Sincerely,

The Northeast Chapter of the American Corporate Counsel Association  
By:



Scott E. Squillace  
Chapter President  
European Counsel, Cabot Corporation

The American Corporate Counsel Association (ACCA)

By:

Frederick J. Krebs  
President  
ACCA

Susan Hackett  
Senior Vice President and General Counsel  
ACCA

cc: Office of the Attorney General, New Hampshire  
New Hampshire Bar Association