NO. 101304-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JARED KARSTETTER and JULIE KARSTETTER,
Appellants/Plaintiffs.
v.
KING COUNTY CORRECTIONS GUILD,
Respondent/Defendant.

# ANSWER TO PETITION TO REVIEW DECISION OF THE COURT OF APPEALS FOR DIVISION ONE

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## INTRODUCTION

Petitioner Jared Karstetter—the self-professed principal of his own law firm, with its own employees and thousands of clients—asks for discretionary review so he can attempt, for a third time, to persuade a court to ignore what a voluminous, undisputed record and settled law make blindingly obvious: Karstetter was the King County Correction Guild's retained, outside attorney and therefore subject to dismissal at any time, for any reason. None of the arguments Karstetter advances provide grounds for disturbing the well-reasoned decision below, nor do they meet the criteria for review under RAP 13.4(b). Indeed, this Court discounted the very same arguments when Karstetter unsuccessfully sought direct review of the trial court's summary judgment award.

First, Karstetter disputes the Court of Appeals' application of the common-law right-to-control test to determine his employment status, instead urging the Court to expand the economic dependency test to this novel context. However,

Washington has long applied the right-to-control test to the breach of contract and wrongful termination claims Karstetter alleges here, while limiting the economic dependency test to statutory schemes with the specific intent to broaden the definition of "employee." Karstetter's invitation for the Court to usurp the legislature's role by refashioning the common-law definition of "employee" provides no basis for review. And the lower court's application of common-law employment standards to the specific facts of the Karstetter–Guild relationship will shed no light on any important issue beyond those particular parties. Moreover, the issue is academic because even under Karstetter's preferred test, the undisputed material facts establish he was an independent contractor.

Second, Karstetter argues that the right-to-control test's dispositive factor, which examines the putative employer's control over the putative employee's manner of performing work, is inconsistent with a lawyer's responsibility to exercise independent professional judgment. However, this argument

turns entirely on a false dichotomy between a lawyer's professional responsibilities and a client's ability to direct the lawyer's method of executing his work. Karstetter supports this forced conflict through a selective and incomplete recitation of Washington's Rules of Professional Conduct. In actuality, the RPCs contemplate that a client may wish to closely direct his lawyer's method of performance. Since Karstetter and the Guild could have, but did not, arrange for the Guild to control the manner that Karstetter performed his legal work, it was entirely appropriate for the court below to rely on this fact in finding Karstetter an independent contractor.

Third, Karstetter urges the Court to accept review to extend the wrongful termination tort to the independent contractor relationship. But the Court already declined to do so in this very case, when it ruled that Karstetter could maintain his wrongful termination claim only to the extent he sufficiently pled he was the Guild's in-house attorney. That ruling accords with

longstanding Washington precedent, as well as the fundamental need to maintain trust between attorney and client.

The Court should deny discretionary review.

## I. STATEMENT OF THE CASE

The Guild is a Tukwila-based labor union, which retained Karstetter and his law firm as its attorney for many years until terminating them in 2016 for unauthorized and self-interested disclosure of Guild confidences. Those disclosures related to the Guild's handling of a recently discovered embezzlement by its former treasurer, Michael Music, and the resulting turmoil within the Guild. Then-President of the Guild, Randy Weaver, sought to hold Music accountable for the embezzlement. Karstetter opposed those efforts and sought to minimize the scandal, maintain his position as the Guild's legal advisor, and deflect membership scrutiny of his role in the affair—including by drumming up an investigation into Weaver on an unrelated, minor issue. Karstetter's opposition came to a head when he circumvented the Guild's Executive Board and disclosed Guild

confidences without authorization to County management in order to silence his most vocal critic and tell his side of the story. Based on independent legal advice, the Guild terminated Karstetter and his firm.

This case first came before this Court at the pleading stage. In that procedural posture, the Court held that the RPCs do not categorically bar in-house attorney employees from maintaining breach of contract and wrongful termination claims against their client–employers. *Karstetter v. King County Corrections Guild (Karstetter I)*,193 Wn.2d 672, 682, 444 P.3d 1185 (2019). The Court expressly observed that, as required by the procedural posture of the case, it was not rendering judgment on whether Karstetter was in fact an in-house attorney employee who fell within the newly recognized exception to the traditional rule that clients may fire their attorneys at any time, for any reason. *Id*. at 684, n.6. It remanded to decide whether this case fit within the traditional rule or the newly announced exception.

On remand, the parties engaged in extensive discovery and then filed cross-motions for summary judgment. Reviewing the voluminous record, Hon. Regina Cahan of the Superior Court for King County found numerous material facts undisputed which, applying the common-law right-to-control test, warranted summary judgment for the Guild.

Karstetter requested this Court directly review the trial court's judgment, asserting that Judge Cahan applied the wrong employment test and that this purported error raised an urgent issue of public import. The Court declined direct review and transferred the case to Division I of the Court of Appeals.

On August 29, 2022, the appellate court issued an opinion affirming summary judgment. *See Karstetter v. King County Corrections Guild (Karstetter II)*, __ Wn. App. __, 516 P.3d 415 (2022). The Court of Appeals agreed with the trial court that the right-to-control test, as articulated in *Hollingbery v. Dunn*, 68 Wn.2d 75, 411 P.2d 431 (1966), governed Karstetter's employment status in assessing his common-law claims.

*Karstetter II*, at 418–19. Applying that test to the record evidence, the court found "the factors weigh overwhelmingly toward Karstetter being an independent contractor such that they are not susceptible of more than one interpretation or conclusion." *Id*. at 420.

The court noted that "[b]y Karstetter's own admission, the Guild did not have a great extent of control over Karstetter's work. It did not provide Karstetter with direction on the types of arguments to make, identify relevant authority, advise him how to structure presentations, advise him how to prepare for management hearings, nor did the Guild review Karstetter's briefing. Over their long history, the Guild edited perhaps one or two of the countless letters and e-mails he sent on its behalf. In general, the Guild 'yielded to [his] expertise' in performing a task." *Id*.

Moreover, the Court observed that Karstetter is the "governor and sole shareholder" of his own professional services corporation through which he ran his law firm, which paid

salaries to him, his wife, and an associate, who were all the corporation's employees. *Id*. at 420–21. Yet the Guild had no control over Karstetter's employees, whom Karstetter alone could supervise and discipline. *Id*. at 420. Meanwhile, Karstetter's position as an attorney is a "distinct occupation" and separate from the work of the Guild's members and officers, requiring specialized education and skills. *Id*.

The Court of Appeals also relied on the fact that Karstetter supplied his own "instrumentalities, tools, and his place of work," including Karstetter's "home and office space" rented in Edmonds, office supplies and equipment the corporation claimed as tax-deductible, professional liability insurance covering Karstetter and his associate, and firm email addresses. *Id*. at 420–21. The corporation filed federal tax returns, paid unemployment and B&O taxes, and reported employees' salaries on W-2s. *Id*. at 420. Additionally, the corporation maintained its own benefits plan, allowing the Karstetters to obtain their own health insurance and retirement account. *Id*. at 421.

Most decisively, the court held Karstetter could not be an in-house employee because, by his own admission, he represented "thousands of independent or individual clients," "a number of corporate clients," and, during the relevant contract period, at least four other law enforcement unions—which provided at least 25 to 33 percent of Karstetter's firm's income between 2011 and 2015. *Id*. & n.7. And during the contract period, "[t]he Guild never objected to Karstetter representing other clients," just as "Karstetter only twice sought a conflict waiver from the Guild." *Id*. at 420.

Since the *Hollingbery* factors overwhelmingly demonstrated Karstetter was an independent contractor, the court held RPC 1.16 privileged the Guild to terminate its relationship with him at will, irrespective of his firm's contract language. *Id*. at 422. That right precluded Karstetter's breach of contract and wrongful termination claims.

Neither the Superior Court nor the Court of Appeals reached the issues of whether Karstetter's contract was

unenforceable under RPC 1.8(a) or whether Karstetter's egregious misconduct destroyed the integrity of the attorney-client relationship and/or provided just cause under the contract to warrant his immediate discharge.

## II. ISSUES PRESENTED FOR REVIEW

The Guild does not seek review of any issue. The issues Karstetter seeks to review are properly stated as:

1) Did the Court of Appeals correctly apply the common-law standard to test employment status, articulated in *Hollingbery v. Dunn*, 68 Wn.2d 75, 80–81, 411 P.2d 431 (1966), to Karstetter's common-law claims? If not, was this error harmless because Karstetter is also an outside contractor under the statutory "economic dependence" test?

2) Do the RPCs conflict with the application of the *Hollingbery* factor examining a putative employer's ability to control the manner of the putative employee's work?

3) Should the Court expand the wrongful termination tort to permit retained, outside attorneys to sue their former clients?

## III. ARGUMENT

### A. The Court of Appeals correctly applied the right-to-control test to determine Karstetter's employment status, and the result would have been the same under his preferred statutory test.

As with his unsuccessful petition for direct review, the crux of Karstetter's appeal is his contention that Court of Appeals erred by applying the common law's traditional right-to-control test rather than the statutory economic dependency test set forth in *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 867–68, 281 P.3d 289 (2012). Pet. 7–15. According to Karstetter, the Washington Supreme Court "rejected" the former and embraced the latter. *Id*. at 14.

He is wrong. The right-to-control test remains good law and, as the Court of Appeals noted, has "been upheld as 'the bedrock principle' on which such relationships are analyzed under the common law." *Karstetter II*, 516 P.3d at 419; *accord LaRose v. King Cty.*, 8 Wn. App. 2d 90, 128, 437 P.3d 701, 722 (2019); *Zylstra v. Piva*, 85 Wn.2d 743, 747, 539 P.2d 823 (1975) (right-to-control is the "traditional test" for employment).

Under this test, employers have the right to control "the time, manner, method, [and] means" employees use to perform their work, *Hollingbery*, 68 Wn.2d at 81, whereas independent contractors work without being "subject to the other's right to control his physical conduct in performing the services." *Ebling v. Gove's Cove, Inc.*, 34 Wn. App. 495, 498, 663 P.2d 132 (1983).

Washington courts use the right-to-control test to ascertain employment status for a variety of causes of action, including the very claims Karstetter brought here. *See Rapp v. Ellis*, 14 Wn.2d 659, 671–73, 129 P.2d 545 (1942) (analyzing right-to-control in breach of contract action); *Blacken v. Everett Bottling Works*, 137 Wash. 502, 505–06, 242 P. 1102 (1926) (same); *Awana v. Port of Seattle*, 121 Wn. App. 429, 435, 89 P.3d 291 (2004) (applying test to wrongful termination claim). *See also Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 119–22, 52 P.3d 472 (2002) (applying test to employers' common-law duty of care to prevent work-related injuries); *Larner v. Torgerson*, 93 Wn.2d

801, 804, 613 P.2d 780 (1980) (applying test to workers' compensation claims); *Murray v. Corson Corp.*, 55 Wn.2d 733, 737, 350 P.2d 468 (1960) (applying test to personal injury claim).

By contrast, the economic dependency test has far more limited application. This Court first adopted that test in *Anfinson*, a case construing the Washington Minimum Wage Act (MWA). 174 Wn.2d at 866–68. Determining "whether a worker is an employee under the MWA" presented a "question of statutory interpretation." *Id.* at 866. The Court accordingly homed in on the MWA's statutory definition of "employee," which includes "any individual permitted to work by an employer." *Id.* at 867. Washington enacted this "broad definition" based on the federal Fair Labor Standards Act (FLSA). *Id.* at 867–69. The U.S. Supreme Court characterized the parallel federal definition of employment as "the broadest definition that has ever been included in one act." *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3, 65 S.Ct. 295, 89 L.Ed. 301 (1945). Congress and Washington's Legislature both enacted these incredibly broad

definitions precisely to bring economic rights to workers who would not qualify as "employees" under common law. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326, 112 S.Ct. 1344, 117 L.Ed. 2d 581 (1992). *Accord Walling v. Portland Terminal Co.*, 330 U.S. 148, 150–51, 67 S.Ct. 639, 91 L.Ed. 809 (1947).

Thus, "*Anfinson* does not stand for the broad premise that Washington has adopted an economic dependence standard to distinguish employees from independent contractors." *Karstetter II*, 516 P.3d at 419. The Court adopted that test "strictly in the context of the [MWA]" because of that statute's remedial purposes, *id*. at 419, n.4, and the broad "employee" definition that facilitated it.

Karstetter does not assert an MWA claim. He seeks to import the MWA's expansive statutory definition into garden-variety common-law claims. His only rationale for doing so is a naked appeal to judicial legislation, urging the Court to "pioneer" employee rights law by recognizing his common-law claims as

equivalent to MWA claims. Pet. 7. Karstetter misunderstands the Court's role. The *Anfinson* court properly honored the Legislature's and People's pioneering efforts to protect workers' rights through duly enacted statutes and initiatives; it did not judicially "pioneer" away from longstanding common-law precedent absent a properly enacted statute or initiative providing that direction.

Where a statute does not define "employee," courts presume "the legislature intended the word to mean what it did at common law … ." *Marquis v. City of Spokane*, 130 Wn.2d 97, 110, 922 P.2d 43 (1996).[1] Since no statutory definition of employment applies to Karstetter's non-statutory claims, the common-law—i.e., right-to-control—test applies.

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[1] *Marquis* held that the Washington Law Against Discrimination permitted claims by independent contractors. *Id.* at 105–13. It reached that result because the broad statutory policy of eradicating discrimination reached beyond the employment context into other areas, so that the independent contractor/employee distinction was not relevant. It did not, however, apply that distinction while departing from the common-law test policing the boundary between the categories.

Unsurprisingly, no Washington appellate court has ever applied the economic dependency test outside the MWA's statutory context (or a related context incorporating a similar statutory definition). *Karstetter II*, 516 P.3d at 419. Other jurisdictions agree the common-law right-to-control test is the correct analysis in the absence of a statute expansively defining an "employee." As the California Supreme Court explained, in concurring with the approach of federal courts:

> Federal courts have long recognized that the distinction between tort policy and social-legislation policy justifies departures from common law principles when claims arise that one is excluded as an independent contractor from a statute protecting "employees." Where not expressly prohibited by the legislation at issue, the federal cases deem the traditional "control" test pertinent to a more general assessment whether the overall nature of the service arrangement is one which the protective statute was intended to cover.

*S. G. Borello & Sons, Inc. v. Dep't of Indus. Rels.*, 48 Cal. 3d 341, 352, 769 P.2d 399, 405 (1989) (collecting cases).

Applying the expansive economic dependency test for employment would be particularly inappropriate here, where the

Supreme Court carved out a "narrow" exception, limited to in-house employees with "only one client—an employer—" who "refrain[] from taking on clients that would conflict with" their full-time obligations to their employer. *Karstetter I*, 193 Wn.2d at 679–80, 683, 684 n.6. The expansive test for MWA employment is not consistent with that narrow limitation.

In contrast with this pure legal question, Karstetter makes only a passing objection to the Court of Appeals' application of the *Hollingbery* factors. Pet. 11–12. This near silence is understandable as the factors overwhelmingly demonstrate Karstetter's freedom from Guild control.

In addition to the numerous facts the court cited, *supra*, 7–9, there are others that are equally compelling: (1) Karstetter admitted in his IIU interview he was not an in-house attorney and that the Guild instead employed his firm, CP 759, 1274, 1295; (2) Karstetter identified his firm, a "solo practice," as his employer on his WSBA profile, CP 1049, 1379–80; (3) the contract with the Guild defined the employed "attorney" as

Karstetter's firm, not Karstetter individually, CP 786–90; (4) his firm's contracts with other clients were also styled "employment agreements," naming his firm as the executive board's "employees", emphasizing the permanency of the relationship, and touting the firm's 24/7 availability, CP 699–700, 994, 1376, 1517, 1519–20, 1522–23, 1527–28, 1559–60, 1562, 2360–61; (5) Karstetter held himself out as the principal of his own firm when soliciting clients, CP 687, 692; (6) Karstetter never received a W-2 or 1099 from the Guild, CP 964, and did not advise the Guild how to classify his firm's compensation for tax purposes, CP 967; (7) the Guild did not pay for the firm's supplies, equipment (other than a single iPad), CP 1222–25, 1229–31, rent, or utilities, CP 1141; (8) nor did the Guild provide Karstetter medical benefits or paid time off, or withhold employment, social security, workers' compensation, or unemployment taxes. CP 965, 967–68, 1344–45.

Even if the Court were to endorse Karstetter's proposed replacement of the common-law test, it would not aid his cause.

As a matter of economic reality, Karstetter depended on himself and his firm, not the Guild, for his livelihood. Although *Anfinson* did not expressly adopt any of the competing multi-factor tests used to assess economic dependence, *Anfinson*, 174 Wn.2d at 869 (acknowledging different federal formulae), it affirmed the Court of Appeals' reliance on six factors, which "overlap" with the common-law test although have different ultimate "focus[es]." *Anfinson v. FedEx Ground Packaging Sys., Inc.*, 159 Wn. App. 35, 42, 244 P.3d 32 (2010):

> (1) The degree of control that the business has over the worker[;] (2) [t]he worker's opportunity for profit or loss depending on the worker's managerial skill[;] (3) [t]he worker's investment in equipment or material; (4) [t]he degree of skill required for the job[;] (5) [t]he degree of permanence of the working relationship[; and] (6) [t]he degree to which the services rendered by the worker are an integral part of the business.

*Id*.

Four of the six factors clearly favor an independent contractor relationship. First, as the Court of Appeals found, the Guild did not control the *manner* in which Karstetter performed

his work. *Supra*, 7. Second, because the Guild did not limit Karstetter's ability to work for other clients—an ability he took extensive advantage of—his opportunities for profit or loss depended primarily on his own skill in managing his law firm. *Supra*, 9. *See Chilingirian v. Fraser*, 194 Mich. App. 65, 70, 486 N.W.2d 347, 349 (1992), *remanded* 442 Mich. 874 (1993) (under "economic realities" test, attorney was independent contractor because he belonged to law firm that "provided legal services to a number of other clients"). Third, his firm invested heavily in equipment, material, and facilities for Karstetter's and his associate's work, whereas the Guild invested little more than an iPad and use of a parking space. *Supra*, 8. Fourth, legal representation requires skills acquired through specialized training. *Id*. The fifth and sixth factors favor employment, but these are equally consistent with outside general counsel work.

Since Karstetter is an independent contractor under either test, the chief issue for which he seeks review is moot.

### B. A lawyer's obligations under the RPCs do not complicate the application of *Hollingbery's* inquiry into control over the manner of performance.

Karstetter next urges the Court to accept review to reconcile a supposed conflict between *Hollingbery*'s dispositive inquiry into a putative employer's ability to control the manner of a worker's performance and various RPC statements about a lawyer's exercise of independent judgment in representing clients. Pet. 16–17. The Court should not accept review of the decision on this basis because there is no such conflict.

A lawyer's professional judgment is not, as Karstetter suggests, a bar to client supervision. RPC 1.2 deals with the allocation of responsibility between a lawyer and client. The rule states that a lawyer "shall consult with the client as to the means by which the[] [objectives of the representation] are to be pursued." RPC 1.2(a); *see also* RPC 1.4(a)(2). Such consultation implies that lawyer and client should, at the outset of representation, calibrate the lawyer's discretion and client's input over day-to-day tasks. Comment 2 to the rule generalizes

that clients "*normally* defer to the special knowledge and skill of their lawyer with respect to the means to be used… ." RPC 1.2, cmt. 2 (emphasis added). But that need not always be the case because, contrary to Karstetter's theory, the comment also acknowledges that "a lawyer and a client may disagree about the means to be used to accomplish the client's objectives" and expressly disclaims "prescribe[ing] how such disagreements are to be resolved." *Id*. This Court has clarified that "[a] lawyer is required to abide by the client's decisions concerning the objectives of the representation" and "the means by which those are carried out." *In re Disciplinary Proceeding Against Van Camp*, 171 Wn.2d 781, 800, 257 P.3d 599 (2011).[2]

[2] Karstetter also cites Comment 1 to RPC 1.3, which sets forth a lawyer's duty of diligence. The only part of the comment even arguably relevant here merely references RCP 1.2's suggestion that a lawyer "*may* have authority to exercise professional discretion in determining the means by which a matter should be pursued." RPC 1.2, cmt. 1 (emphasis added). The permissive framing of the comment highlights Karstetter's incorrect reading.

To buttress his theory, Karstetter offers a partial excerpt of RPC 5.4(c), using strategic ellipses to cast the rule as a bar against permitting a person who employs or pays the lawyer "to direct or regulate the lawyer's professional judgment in rendering such legal services." Pet. 16. In fact, the text Karstetter conveniently glosses over shows that RPC 5.4(c) more narrowly prohibits "a person who recommends, employs, or pays the lawyer to render legal services *for another* to direct or regulate the lawyer's professional judgment." RPC 5.4(c) (emphasis added). In other words, the rule is an adjunct to the duty of loyalty, warning against a lawyer coming under undue influence from a third party financier of his actual client. *See Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 388, 715 P.2d 1133, (1986) (where defense counsel retained by insurance company to defend individual under reservation of rights, rule "demands that counsel understand that he or she represents only the *insured,* not the company") (emphasis in original). RPC 5.4(c) does not

disturb RPC 1.2's duty for a lawyer to consult with his client about the means used to achieve the representation's objectives.

While a lawyer must undoubtedly exercise independent judgment in advising a client, that does not mean a lawyer cannot be subject to a client's tactical preferences, if the client desires that level of control.[3] The very fact that many lawyers do work in-house for organizational clients and under the supervision of lay constituents demonstrates that there is no inherent conflict between a lawyer fulfilling his professional obligations and taking direction as to the manner of performing his work. *See* Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards or Purchasing Legal Services from Lawyers in A Multidisciplinary Partnership*, 13 Geo. J. Legal Ethics 217, 271 (2000) ("For a long time, the legal profession seriously questioned whether in-house counsel could exercise the requisite

[3] As the RPCs note, if there is "a fundamental disagreement" between lawyer and client over means, the lawyer's recourse is to withdraw from representation, not prevail over a client's wishes. RPC 1.2, cmt. 2.

degree of independence of professional judgment. Those questions have largely disappeared. Similar reservations were once expressed about the lawyers employed by legal services organizations, unions, and prepaid legal plans. Those reservations too have disappeared."). Karstetter could have negotiated such an arrangement with the Guild, but the facts show the nature of his representation was very different.

Karstetter's insistence that the test of his employment status ignore the Guild's lack of control over his manner of performance is also impossible to square with the economic dependence standard he favors. That standard too inquires into a "[t]he degree of control that the business has over the worker"; it just does not treat the factor as dispositive. *Supra*, 19. If Karstetter's theory were right, the degree-of-control factor would disappear from *any* evaluation of a lawyer's employment status.[4]

[4] Karstetter argues this Court adopted such a lawyer exception in *Dolan v. King County*, 172 Wn.2d 299, 258 P.3d 20 (2011), where the Court found that the degree-of-control factor should not apply in deciding the PERS eligibility of a public defender

### C. As an independent contractor attorney, Karstetter cannot bring a wrongful termination claim.

As shown above, the Court of Appeals correctly found that Karstetter was an independent contractor. It therefore held that RPC 1.16 barred him from asserting a wrongful termination claim against his former client. *Supra*, 9. This follows from *Karstetter I*, which noted that "employment claims" against clients remain unavailable to outside counsel. 193 Wn.2d at 678. The Supreme Court's statement tracks Washington's traditional limitation of wrongful discharge claims to employees. *Awana*,

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employed by a state-affiliated non-profit. *Id*. at 318, n.15. *Dolan* was limited to the idiosyncrasies of public defense work. *Dolan* cited a U.S. Supreme Court case which reasoned that canons of professional responsibility "mandated" a public defender "exercise of independent judgment," which is inconsistent with his employer's control over day-to-day job performance. *Id*. (citing *Polk County v. Dodson*, 454 U.S. 312, 321, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981)). *Dodson*, in turn, explained that the particular conflicting professional canon was the equivalent of RPC 5.4(c), *Dodson*, 454 U.S. at 321 & n.11, which regulates third party payor influence. *Supra*, 23. Public defenders, who must take direction from their criminal defendant clients, not their state or non-profit employers, are therefore constrained from accepting close employer supervision. In-house union attorneys (which Karstetter claims to be) face no such dilemma, since they both represent and are paid by their union employers.

121 Wn. App. at 433 (wrongful termination tort available only to employees because it "depends, by definition, on termination of employment"). Karstetter nonetheless contends that even independent contractor attorneys should be able to maintain wrongful termination claims against their former clients. Pet. 17–25. His theory is meritless.

Karstetter relies on the Court's extension of whistleblower protections to those who assist disclosing parties in *Karstetter I*. Pet. 19–20. But to bring a wrongful termination claim, an assisting attorney must still be employed in-house. *Karstetter I* specifically held that "contract and wrongful discharge suits are available" to attorneys only "in the narrow context of in-house attorneys … ." *Karstetter I*, 193 Wn.2d at 687. *Id.* at 678 (in a "traditional attorney-client relationship, RPC 1.16 would almost certainly prohibit a lawyer from bringing employment claims against a client."); *id.* at 684 ("We hold that in-house attorneys may pursue wrongful discharge and breach of contract claims against their client employers. We further hold that Karstetter has

pleaded facts sufficient to bring these claims against the Guild *as an in-house attorney employee*.") (emphasis added). The Court's repeated explanations of its holding make clear beyond question that RPC 1.16 bars traditional private-practice lawyers from asserting wrongful discharge claims against clients who exercise their prerogative under the rules to terminate their lawyer "at any time, for any reason." *Id.* at 678.

*Karstetter I*'s holding limiting wrongful discharge claims by attorneys against their clients to in-house attorneys accords with Washington's longstanding recognition that a wrongful discharge cause of action is an exception to the common-law rule that *an employment relationship* is terminable at will. *See, e.g.*, *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 226–34, 685 P.2d 1081, 1086 (1984); *Martin v. Gonzaga Univ.*, 191 Wn.2d 712, 723, 425 P.3d 837 (2018).

Extending wrongful discharge claims to independent contractors would expand the reach of that narrow exception far beyond its doctrinal roots in the employment relationship.

Regardless of whether that extension may be warranted for non-attorney independent contractors, the traditional purpose of maintaining trust between clients and private-practice attorneys counsels strongly against expanding that exception for the first time in this context. *See Karstetter I*, 193 Wn.2d at 678–84. Notably, none of the out-of-state authorities Karstetter cites involve an outside attorney with a private practice suing a former client for wrongful termination, and the Guild is unable to find any decision recognizing such an extraordinary cause of action.[5]

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[5] Karstetter admits that his discharge would not have been wrongful had he violated the integrity of the attorney-client relationship. Pet. 23. He brazenly contends that the Guild never raised this argument, *id*., even though the Guild briefed and argued this defense at length during both the trial court and appellate proceedings and offered the opinion of a legal ethics expert in support of its position. *See* Guild App. Br. 51–69; Appendix 1 (attaching opinion of Arthur Lachman). Since it dismissed Karstetter's claims on the threshold employment issue, the Court of Appeals never reached the merits of this defense. *Karstetter II*, 516 P.3d at 422, n.9. However, the fact that the Guild severed its relationship with Karstetter due to his egregious ethical breaches further militates against granting discretionary review.

## IV. CONCLUSION

For the foregoing reasons, the Guild respectfully requests the Court deny Karstetter's petition for discretionary review.

I certify that this document contains 4,974 words, in accordance with RAP 18.17.

Respectfully submitted this 31st of October, 2022.

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**DECLARATION OF SERVICE**

I, Jennifer Woodward, hereby declare under penalty of perjury under the laws of the state of Washington that on the date noted below I caused the foregoing document to be filed with the Washington State Supreme Court via the appellate efiling system, which will automatically provide notice of such filing to all required parties.

Signed in Seattle, WA, this 31st day of October, 2022.

Jennifer Woodward

Jennifer Woodward, Paralegal

# Appendix 1

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May 19, 2021

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**Re: Expert Report in *Karstetter v. King County Corrections Guild, et al.*, King County Superior Court Cause No. 16-2-12397-0 SEA**

Dear Mr. Dalmat and Mr. Berger:

This letter summarizes my expert opinions to date regarding fiduciary and ethical duties of Jared Karstetter in the above-referenced litigation matter. I understand that there may be additional issues for me to opine on or expert opinions to rebut. I reserve the right, therefore, to render additional opinions based on additional information, opinions, or assertions in this case.

## BACKGROUND & QUALIFICATIONS

As indicated on my CV, attached, I have been a lawyer licensed to practice in the State of Washington since 1989, when I graduated with highest honors from the University of Washington School of Law in Seattle. After a clerkship with Judge Eugene Wright of the Ninth Circuit Court of Appeals and a year teaching litigation and commercial law subjects at the University of Puget Sound (now Seattle University) School of Law in 1991, I have practiced as a commercial litigation attorney since 1991.

From 1999 until 2003, I served as chair of Graham & Dunn's Ethics/Loss Prevention Committee, where I had primary responsibility for resolving ethics and loss prevention issues at the firm.

Since 2003, my solo practice has focused on advising lawyers and law firms on ethics and risk management issues. My practice involves a wide range of lawyer ethics and risk management advising and consulting services, including providing opinions and advice to lawyers and firms about ethics, discipline, sanctions, and liability issues

(including those related to confidentiality and conflicts of interest); conducting training on ethics and liability issues; providing expert services in liability and disqualification matters; and consulting on the development of a risk management program for a national insurer of criminal and legal aid lawyers. I have also conducted numerous ethics CLE programs on ethics and liability issues for practicing lawyers, and have taught the Professional Responsibility class at the University of Washington School of Law in the winter quarter of 2013 and the spring quarter of 2008. I have also taught pretrial practice and civil procedure classes at UW Law School.

I was a member of the WSBA Rules of Professional Conduct Committee from 2003 to 2008, and served as its chair from 2008 to 2010. In addition, I have worked on WSBA task forces dealing with advance fee/retainer issues and lawyer succession planning. I served as President of the Association of Professional Responsibility Lawyers (APRL), a national organization of lawyers who practice in the areas of legal ethics and lawyer risk management. I have been actively involved in creating training sessions for APRL, and have served on many panels presenting ethics issues. I served as Chair of the Planning Committee for the ABA Center for Professional Responsibility's annual National Conference on Professional Responsibility, the country's premiere legal ethics program. I also served a two-year term as the national co-chair of the Firm Counsel Project, an ABA initiative bringing together lawyers working as ethics and risk management counsel in law firms, and I moderated several local FCP roundtables in Seattle.

I am a co-author (with Professors Tom Andrews and Rob Aronson, and practitioner Mark Fucile) of the treatise, *The Washington Law of Lawyering,* published in 2012 by the WSBA. I have also edited portions of the Washington Legal Ethics Deskbook, the second edition of which was published in 2020.

## MATERIALS REVIEWED & RELIED UPON

I have been provided with and reviewed the following materials in reaching my opinions in this matter:

- Chronology provided by counsel and documents referenced therein
- Guild Constitution & Bylaws
- Complaint (May 24, 2016); Third Amended Complaint (Mar. 3, 2020)
- Guild's Amended Answer to Third Amended Complaint (Dec. 23, 2020)
- Opinion of Washington Supreme Court, *Karstetter v. King County Corrections Guild,* 193 Wn.2d 672, 444 P.3d 1185 (2019)

- Amicus Curiae Brief of the Washington Employment Lawyers Association, in *Karstetter v. King County Corrections Guild,* Washington Supreme Court No. 95531-0 (Sept. 7, 2018)

- Declarations of Jared Karstetter (July 6, 2016, July 19, 2016, Jan. 9, 2021, Jan. 10, 2021, Mar. 6, 2021); Wesley Foreman (Apr. 6, 2021); Cynthia McNabb (Apr. 22, 2021)

- Deposition Transcripts in this case of Jared Karstetter (July 31, 2020; Sept. 16, 2020, Jan. 25, 2021, Mar. 30, 2021, Apr. 15, 2021); CR 30(b)(6) of Jared C. Karstetter, Jr., P.S., by & through Jared Karstetter (Apr. 15, 2021); Matt Owens (Apr. 13, 2021); Randy Weaver (July 30, 2020); David Brown (Apr. 14, 2021); Eric Urie (Apr. 14, 2021); Mark Fucile (Apr. 16, 2021)

- Deposition Transcript of Matthew Owens in *KCCG v. Music, et al.,* King County Superior Court Cause No. 18-2-57918-0 SEA (July 21, 2020)

- Plaintiff's Supplemental Response to Guild's Interrogatory No. 14 & RFP (Apr. 12, 2021)

- Declaration of Jared Karstetter in Music Criminal Matter, Snohomish County Superior Court (Aug. 26, 2018)

- Report of Det. Donnelly, Tukwila Police Department, Music Investigation (Jan. 25, 2018)

- CNA Professional Liability Insurance Policy, Law Offices of Jared C. Karstetter, Jr., P.S. (June 1, 2018)

- Email chain between Matt Owens and Ryan Lufkin (Apr. 2021)

## OPINIONS

### I. TERMINATION OF THE GUILD'S LAWYER-CLIENT RELATIONSHIP WITH KARSTETTER

As the Guild's outside general counsel,[1] Jared Karstetter was ethically required to withdraw from representing the Guild immediately upon being discharged by the Guild,

[1] I have reached the conclusion that Karstetter was functioning as the Guild's outside general counsel based on the following facts and testimony: (1) Karstetter's October 2011 contract with the Guild to provide services as its "legal advisor" was with his corporate law firm, Law Offices of Jared C. Karstetter, Jr., P.S., not with him individually; (2) Karstetter held out to the public as being available to serve clients through his corporate law firm, and the corporate law firm did in fact provide services to multiple clients, one of

with or without cause. Under the Washington legal ethics rules, a client can terminate the services of a lawyer at any time and for any reason, or for no reason at all. RPC 1.16(a)(3) provides that, with an exception regarding complying with the rules of a tribunal, a lawyer who is discharged by the client must withdraw from representation of the client.[2] A lawyer's authority to act on behalf of the client or to bind the client also ceases upon discharge by the client. *See* RPC 1.2(f) ("A lawyer shall not purport to act as a lawyer for any person or organization if the lawyer knows or reasonably should know that the lawyer is acting without the authority of that person or organization, unless the lawyer is authorized or required to so act by law or a court order.").

The unique fiduciary relationship between a client and its lawyer is based fundamentally on trust and confidence on the part of the client and of undivided loyalty and devotion on the part of the lawyer. A client, therefore, must be free to end the relationship when it no longer has absolute confidence in the integrity or the judgment of the lawyer. Language in an agreement with the client that restricts or conditions the absolute right of a client to discharge its outside counsel violates these Washington ethics rules and fiduciary principles. Due process rights on discharge and termination contained in the Guild's retainer agreement with Karstetter's corporate law firm violate these ethics and fiduciary principles, and are therefore of no effect.

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which was the Guild (as stated in the Karstetter corporate law firm's CR 30(b)(6) deposition and by Karstetter's associate, Wes Foreman, who testified in a declaration dated April 6, 2021, that he provided services to 2-3 other labor unions and 5-10 individual clients "[u]nder Karstetter's direction"; Karstetter also testified in his Sept. 16, 2020, deposition, at page 252, that he served private clients, including Guild members in matters unrelated to Guild business, "all the time"); (3) according to Karstetter's statement in the April 2016 IIU interview (at page 14), his corporate law firm included employment or retention of not just Karstetter, but also an associate lawyer, a legal assistant, and his wife; (4) the Guild did not treat Karstetter as its employee for federal income tax purposes, nor was he was issued a Form W-2 as an employee of the Guild, nor were tax withholdings made by the Guild as would be required for an employee (and it is noteworthy that Karstetter, as the Guild's general counsel, did not advise the Guild to issue a W-2 to himself or make tax withholdings on his compensation as an employee, failures that would have exposed the Guild and/or its constituents to substantial IRS penalties if he were actually an employee); (5) Karstetter reported revenue and income applicable to Guild services on federal and state tax returns for his corporate entity, and took salary from that corporation as its employee, not as an employee of the Guild; (6) Karstetter's corporate law firm maintained an office at a location other than the Guild's office, from which he served all of his corporate law firm clients; (7) Karstetter's corporate law firm obtained, at its own expense, professional liability insurance applicable to all of its clients, through and in the name of the corporate law firm; and (8) Karstetter stated in his April 2016 IIU interview (at page 35) that he was not an in-house employee of the Guild. Contrary to contentions that have been made by Karstetter and his counsel in depositions I have reviewed, the Supreme Court reached its holding based on a CR 12(b)(6) motion to dismiss, and it did not decide as a matter of fact or law that Karstetter was an employed in-house lawyer of the Guild. *See Karstetter v. King County Corrections Guild,* 193 Wn.2d 672, 684 n.6, 444 P.3d 1185 (2019) (expressly not opining on "whether Karstetter's employment as an in-house attorney employee would survive summary judgment").

[2] *See also* RPC 1.16, cmt. [4] ("A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services.").

Moreover, permitting a lawyer to recover contract damages for services that are not actually rendered prior to withdrawal by the lawyer and termination of the relationship would effectively penalize the client for exercising its absolute right to discharge the lawyer. Such a recovery also exposes the client to having to make duplicate payments for legal services associated with retaining new counsel. As a result, the Washington ethics rules and fiduciary principles preclude a contract damages recovery based on contractual due process rights or compensation for legal services for the time-period after termination of the retainer agreement and discharge of Karstetter as the Guild's outside general counsel.[3]

## II. APPLICATION OF RPC 1.8(a) TO KARSTETTER'S 2011 CONTRACT WITH THE GUILD

Karstetter violated RPC 1.8(a) and his fiduciary duties to the Guild in adjusting the lawyer-client relationship by proposing and entering into the new 2011 retainer agreement[4] with the Guild to continue providing services as the Guild's legal advisor by (1) failing to advise the Guild in writing of the desirability of seeking, and giving the Guild a reasonable opportunity to seek, the advice of an independent lawyer regarding the new agreement; and (2) failing to obtain the Guild's informed consent, in a writing signed by the client, to the essential terms of the agreement and the lawyer's role in the transaction.

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[3] RPC 1.16(a)(3) and RPC 1.2(f) do not distinguish between inside and outside counsel, and in my view, a client's virtually absolute right to discharge a lawyer, with or without cause, and to terminate authority of the lawyer to act on the client's behalf under these ethics rules apply with equal force to lawyers employed as in-house general counsel for the same reasons discussed above regarding outside counsel. In holding that a damages action brought by a former in-house employed lawyer may proceed based on alleged breach of contract or wrongful termination by an employer, the Supreme Court did not purport to change or limit these ethics rules regarding an inside counsel's mandatory withdrawal and cessation of authority to act upon discharge by the client. *See also* Amicus Curiae Brief of the Washington Employment Lawyers Association, in *Karstetter v. King County Corrections Guild,* Wash. Sup. Ct. Cause No. 95531-0, at 2, 11 (Sept. 7, 2018) (association that advocates for *employee* rights noted in an amicus brief submitted to the Supreme Court in this case that the due process and reinstatement provisions in the Guild's Collective Bargaining Agreement, which were implicitly referenced in Karstetter's 2011 contract with the Guild, "are in direct conflict with RPC 1.16(a) because they prevent a client from terminating an attorney's representation," and "[a]s such, they are injurious to the public and are unenforceable").

[4] Although the agreement drafted by Karstetter is titled an "employment agreement," I am not using that terminology in this report because, for the reasons stated in footnote 1 above and based my experience in advising and representing lawyers and law firms over many years, the 2011 agreement is one for retention of a corporate law firm as outside general counsel rather than for employment by the client of an individual lawyer in an employer-employee relationship. Karstetter himself admitted in his April 2016 IIU interview that it was his corporate law firm, including its staff, that was "employed" by the Guild, not himself individually. Apr. 12, 2016, IIU Interview, at 14 ("The King County Corrections Guild employs the Law Offices of Jared C. Karstetter, Jr., P.S., which stands for 'personal services corporation.' That involves myself; I have a legal assistant, my wife; and I have an associate."); *id.* at 35 (Karstetter stated that "I'm not" an in-house employee of the Guild).

Upon formation of a lawyer-client relationship, a lawyer assumes fiduciary duties to act in the best interests of the client. When a lawyer urges a change to adjust the terms of an existing lawyer-client relationship to the lawyer's advantage, "the situation is fraught with the potential for conflicts of interest and for taking undue advantage of the client."[5] As a result, the Washington Supreme Court, applying common law fiduciary duty principles and noting that "an attorney-client transaction is prima facie fraudulent," has held that

> A fee agreement between a lawyer and a client, revised after the relationship has been established on terms more favorable to the lawyer than originally agreed upon may be void or voidable unless the attorney shows that the contract was fair and reasonable, free from undue influence, and made after a fair and full disclosure of the facts on which it is predicated.[6]

Consistent with these fiduciary principles, the mid-stream adjustment to a fee or retainer agreement can also, in some situations, require compliance with RPC 1.8(a), even when adjusting the terms of the lawyer-client relationship in the in-house general counsel context. This is such a situation in my view, and whether Karstetter was functioning as the Guild's outside general counsel or as its employed in-house general counsel, he was required to meet both his fiduciary duty as described above and the rigorous requirements of RPC 1.8(a) in proposing and executing the 2011 retainer agreement with the Guild.

RPC 1.8(a), the "business transaction with a client" conflict of interest rule, provides:

> A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
>
> (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of an independent lawyer on the transaction; and

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[5] Andrews, Aronson, Fucile & Lachman, THE LAW OF LAWYERING IN WASHINGTON, at 9-5 – 9-6 (WSBA 2012) (quoting ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT §41:911 (1984, as updated)).

[6] *Valley/50th Ave., L. L.C. v. Stewart*, 159 Wn.2d 736, 743-45, 153 P.3d 186 (2007) (also noting that "[t]he disclosure which accompanies an attorney-client transaction must be complete").

> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

The rule "does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5." RPC 1.8, cmt. [1]. However, relying in part my own commentary in a WSBA treatise, the Washington Court of Appeals has noted that "[t]he rule likely . . . applies to fee agreement modifications after the attorney-client relationship is formed."[7] In my view, for the reasons stated below and based on all the circumstances, RPC 1.8(a) applied to Karstetter's proposal to add a "just cause" termination provision in renewing his contract as the Guild's legal advisor and general counsel in 2011.

RPC 1.8(a) was violated in Karstetter's request to change the terms of his lawyer-client relationship with the Guild in 2011 in two significant ways. First, the revision purported to add a "just cause" clause that substantially altered how the lawyer-client relationship could be terminated. While Karstetter in his October 10, 2011 letter pointed to the addition of the "just cause" provision in general terms, he did not specifically explain how this proposal affected the Guild's virtually absolute right to terminate the lawyer-client relationship under the applicable RPCs at any time and for any reason.

Second, Karstetter failed to mention that he was taking an expansive view of his rights under the proposed "just clause" provision that no reasonable client could possibly have envisioned or anticipated. As the facts and the testimony in this case have borne out, Karstetter consistently interpreted the "just cause" provision in the 2011 contract as essentially giving him broad rights as a member of the bargaining unit itself. For example, he asserted at the April 2016 IIU interview the right to fair representation as if he himself was a county corrections officer and bargaining unit member.[8] He also

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[7] *Chism v. Tri-State Const., Inc.,* 193 Wn. App. 818, 850 & n.26, 374 P.2d 193 (quoting Andrews, et al., THE LAW OF LAWYERING IN WASHINGTON, *supra,* at 9-6, for the proposition that the Washington Supreme Court, if faced with the issue, would likely decide "that a change to a fee agreement midstream benefiting the lawyer constitutes a business transaction with a client (and therefore a prohibited conflict of interest) unless the rigorous requirements of RPC 1.8(a) are met"), *review denied,* 186 Wn.2d 1013 (2016).

[8] *See* Karstetter Dep., Sept. 16, 2020, at 308-09 (Karstetter testified that he and other board members had "always understood" that "I was to be treated exactly the same as a Guild member and afforded exactly the same due process and investigatory rights that they have with their employer"); *id.* at 396 (Karstetter testified that "I'm entitled to the same level of representation any of those people [referring to Guild members] are per my contract"; April 12, 2016, email from Karstetter to Urie (stating that Karstetter would "have Randy [at the IIU interview] as the President to 'represent' me as this involves actions of a Guild Representative"); April 12, 2016, IIU Interview Trans, at 30 ("I want my employer representing me [at the IIU interview] just like I represent our members"); *id.* at 41 ("I consider myself a corrections officer."); Karstetter, Decl., Jan. 9, 2021, at 6 ("My Employment Agreement granted me the same rights, privileges and due process afforded the membership"). *See also* Urie Dep., April 14, 2021, at 61, 64 (the officer who conducted the April 12, 2016 IIU interview testified that non-Guild members are not entitled to representation at IIU interviews, and characterized Karstetter's request for representation at the April 12th

asserted the right to a defense of bar grievances brought against him on the assumption that he himself was a member of the bargaining unit.[9] These expansive interpretations of the contractual "just cause" language as applying beyond just termination rights were not specifically disclosed in writing by Karstatter in the October 10, 2011 letter.

These failures implicated RPC 1.8(a) because they are not "ordinary" changes to terms of the agreement to retain the services of Karstetter's law firm, whether in the in-house or outside counsel context. He was required to make a complete disclosure about the termination rights the Guild would giving up, as well as his expansive interpretation of "just cause," and his construction of the contract as giving him rights associated with being treated essentially as a bargaining unit member (i.e., as a county corrections officer employee). And especially where, as here, the organizational client looked to Karstetter as its primary attorney and "legal advisor," it was incumbent upon Karstetter to advise the Guild as to the desirability of obtaining independent legal advice on these issues and for the Guild to be given a reasonable opportunity to obtain that advice. That did not happen.[10] Karstetter violated his fiduciary duties and RPC 1.8(a) in obtaining the 2011 agreement and adjusting the terms of the lawyer-client relationship with the Guild without complying with the strict requirements of the rule.

## III. KARSTETTER'S APRIL 2016 IIU COMPLAINT, INTERVIEW, & SUBSEQUENT CONDUCT[11]

Karstetter committed serious breaches of his fiduciary duties to the Guild and egregious violations of the confidentiality, conflict of interest, and candor duties under the Washington RPCs in connection with voluntarily appearing for the IIU interview regarding his April 2016 complaint against a Guild board member and subsequent communications with county employees regarding that complaint and interview. For the reasons stated below, these violations of fundamental ethical and fiduciary duties by Karstetter were, in my view, such that no amount of corrective action could have reasonably restored the harm done to the lawyer-client relationship with the Guild.

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interview as "odd" and "inappropriate"); Brown Dep., Apr. 14, 2021, at 122 ("at times, you know, Jerry, himself, said that he was abiding by the [county's] code of conduct just as everyone else was").

[9] *See* April 14, 2016, email from Karstetter to the Guild board members (demanding legal representation for defense of bar complaints "just like each and every one of you get" based on the "due process" provision of his 2011 retainer agreement); April 16, 2016, email from Karstetter to Guild board members (stating that "I am entitled to representation in attempts to 'discipline' or 'terminate' me").

[10] *See* Karstetter Dep., Sept. 16, 2020, at 261.

[11] My opinions in this section regarding the 2016 IIU complaint, interview, and subsequent conduct apply whether Karstetter was an outside or in-house counsel. *See also* Fucile Dep., Apr. 16, 2021, at 62 (plaintiff's expert testified that the lawyer ethics rules do not generally apply differently based on whether the lawyer is inside or outside counsel).

A. Karstetter breached his fiduciary and ethical confidentiality duties to the Guild in connection with his April 2016 IIU complaint and interview, as well as subsequent communications with, and forwarding of documents to, county employees regarding the same.

Subject to specific exceptions set forth in subparagraph (b), RPC 1.6(a) provides that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent [or] the disclosure is impliedly authorized in order to carry out the representation." The prohibition against revealing confidential information "also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person." RPC 1.6, cmt. [4]. The confidentiality rule "contributes to the trust that is the hallmark of the client-lawyer relationship," so that the client is "encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter." RPC 1.6, cmt. [2].

A Washington comment on the rule explains the breadth of what is protected under the confidentiality lawyer ethics rule:

> The phrase "information relating to the representation" should be interpreted broadly. The "information" protected by this Rule includes, but is not necessarily limited to, confidences and secrets. "Confidence" refers to information protected by the attorney client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

RPC 1.6, cmt. [21] (emphasis added).

Karstetter revealed information relating to his representation of the Guild that is generally protected under RPC 1.6(a). Among other things, he discussed in detail during the April 12th interview information about ongoing issues relating to (1) accusations of financial impropriety regarding the Guild's treasurer Michael Music, including conveying some information regarding the settlement of claims related to those accusations for which Karstatter provided legal advice; (2) an accusation of impropriety regarding parking reimbursements to the Guild's president; (3) allegedly improper private social media postings by board and union members regarding Guild issues and Karstetter's conduct; (4) conversations in board meetings and among board members.[12] In the days

[12] As listed in the April 21, 2016, letter from the PSLG law firm recommending to the Guild board that Karstetter's contract for legal services be terminated based in part on the April 12th IIU interview, these disclosures of "dozens of confidential Guild matters" included: "detailed information about intimate and previously confidential information about how the Guild handled matters concerning its former treasurer

following the IIU interview, Karstatter then provided additional confidential information and documentation regarding these matters via email to county IIU investigators and county attorneys and employees, with the expectation that the transcript of the interview and other materials would then be available to members and county officials.[13] He stated in the IIU interview multiple times and in the follow-up emails that he was making these disclosures outside the Guild to facilitate getting what he viewed as the full and truthful story out to Guild members and others via Public Records Act disclosures.[14]

All of these matters related to Karstetter's representation of the Guild, which by the terms of his 2011 agreement to provide legal services as the Guild's "Attorney" and "legal advisor" broadly included "the representation of all Guild members in IIU interviews, police interviews involving line-of-duty matters, . . . Loudermill Hearings or other matters or any other investigation(s) conducted by agencies where Guild members are the subject." It also included his participation at "Executive Board Meetings, General

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(Tr. 36 - 45) as well as some of the contents of the confidential settlement agreement reached with the treasurer (Tr. 44); advice he gave to Lenny Orth about his role as a shift representative (Tr. 22), Mr. Orth's physical condition after a Guild meeting (Tr. 28), and numerous conversations he had with Mr. Orth about Guild business; conversations he had with [Weaver] about Guild matters (Tr. 30), and conversations [Weaver] had with another of the Guild's attorneys (Tr. 40); how Guild's Executive Board members voted on the resolution of issues concerning the former Guild treasurer (Tr. 24) and on other matters (Tr. 27); text messages sent between Guild's Executive Board members (Tr. 38); the substance of legal advice he gave to the Guild (Tr. 39) as well as the substance of conversations he had with another of the Guild's lawyers (Tr. 39); what Guild members said during Guild meetings (Tr. 28); information about a petition being circulated by Guild members (Tr. 34); discussions with Dave Richardson about the Facebook page (Tr. 27) and discussions between Mr. Richardson and Mr. Orth about the Facebook page (Tr. 30)."

[13] Apr. 13, 2016, email from Karstetter to E. Urie (expressing appreciation for conducting the IIU interview the previous day, asking that the transcript be "rushed," and forwarding an email and attachments containing confidential information relating to the Guild for inclusion in the IIU complaint materials, also noting that it was "likely a large number of County officials will likely want to read it to get the 'other side' of the Story"); Apr. 13, 2016, email from Karstetter to S. Slonecker and C. McNabb (giving county lawyers a "heads-up" about the IIU complaint and interview the previous day "because of our 'off-the-record' discussion regarding your question as to why the membership hasn't been told the 'story,'" also stating that he "was able to get the story out" and "now it will be available"); Apr. 15, 2016, email from Karstetter to county attorneys and officials (attaching transcript of the IIU interview and a cover letter to the membership from Karstetter, and noting that "The Membership and County NEED to know the back story on this and hopefully someone will have the integrity to post this on the Guild Facebook Page"). Neither Karstetter nor Owens could recall in their depositions that specific authorization or consent was obtained to forward confidential Guild documents to county personnel after the April 12th IIU interview. Owens Dep., Apr. 13, 2021, at 172; Karstetter Dep., Sept. 16, 2020, at 293.

[14] Apr. 12, 2016, IIU Interview, at 36 ("I'm sorry this interview is taking so long, but. . . it's going to be publicly disclosed, so I want everybody to see what this is about because I haven't been allowed to tell the story."); *id.* at 43 ("The bottom line is when we're done with this interview the membership is going to know to make a public disclosure request for the contents of my interview. You are my only source to get my story out because I'm not allowed to."); *id.* at 51-52 ("This will be publicly disclosable and this is a mechanism for the silent majority to get the truth."). Karstetter noted that he would probably lose his job with the Guild after the interview, and that he didn't care. *Id.* at 44-45.

Membership Meetings and any other meetings that the GUILD asks attendance at." The issues raised by Karstetter in the April 12th IIU interview therefore constituted information relating to his representation of the Guild under RPC 1.6(a). It was, in my opinion, particularly egregious to disclose these materials to personnel of King County, including its management, employees, and lawyers, which constitutes the primary opposing party with whom the Guild interacts in carrying out its collective bargaining and fair representation functions.[15]

All potential defenses under the Washington RPCs for disclosing this information at the IIU interview and thereafter were inapplicable and unavailable under the circumstances. Karstetter's main defense for disclosing this confidential information appears to be that Matt Owens, the Guild's Vice-President, authorized him to do so. Owens lacked such authority for at least four reasons.

First, I have seen nothing in the materials I have reviewed giving Owens authority to consent to or direct disclosure of confidential information on behalf of the Guild. Under RPC 1.13(a), a lawyer employed or retained by an organization "represents the organization acting through its *duly authorized* constituents" (emphasis added). *See also* RPC 1.2(f) ("A lawyer shall not purport to act as a lawyer for any person or organization if the lawyer knows or reasonably should know that the lawyer is acting without the authority of that person"). Actual authority of the Guild's constituent was therefore required, and both the Guild's bylaws and the contract with Karstetter make clear that Karstetter was to take instruction from the president or the board.

Second, even if some concept of "apparent authority" applied to this situation as contended by plaintiff's expert in his deposition (it does not),[16] it was not reasonable for

[15] In fact, Karstetter testified that county personnel, including the DAJD director, a senior county prosecutor, and the human resources director "begged to get something out" (Karstetter Dep., Sept. 16, 2020, at 270), indicating that he was motivated at least in part to advance the interests of the county, a third-party non-client. Karstetter has also suggested that he was not wearing his lawyer "hat" when making the disclosures of confidential client information relating to his IIU complaint, but he was at all times during this time-period acting as the Guild's lawyer and general counsel, and was subject to the ethical and fiduciary duties of a lawyer to his client. *See, e.g.,* Karstetter Decl., July 6, 2016, at 2 (Karstetter testified that he was the attorney for the Guild or its predecessor "a[t] all times since 1987"); Plaintiff's Supp. Resp. to Guild's Interrog. No. 14, Apr. 12, 2021, at 2 (plaintiff's expert, Mark Fucile, describes Karstetter as "general counsel for the Guild"). The matters he was discussing related directly to the matters assigned to him as the Guild's legal advisor. The fact that not all of the advice he offered was legal advice does not mean he was not the Guild's lawyer, and he could not avoid duties associated with the lawyer-client relationship by simply asserting that he was at any particular moment acting only as an individual or employee. In short, Karstetter was acting in a representational capacity as the Guild's lawyer until he was discharged in late April 2016.

[16] Mark Fucile, plaintiff's legal ethics expert, opined at his deposition that Owens had "apparent authority" to consent to or authorize Karstetter's disclosures at the IIU interview. Fucile Dep., Apr. 16, 2021, at 70. However, the legal principle of "apparent authority" in agency law is defined as "Authority that a third party reasonably believes an agent has, based on the third party's dealings with the principal, even though the principal did not confer or intend to confer the authority." Bryan Garner, BLACK'S LAW DICTIONARY

Karstetter to conclude that Owens had such authority in this situation because Owens was himself asserting the same sorts of cyber-harassment complaints as Karstetter. Owens had submitted such a complaint directly to the Guild board alleging cyber-harassment of Guild members on April 9th,[17] and Karstetter stated at the IIU interview on April 12th that both he and Owens were making similar complaints.[18] Owens confirmed in his deposition that his and Karstetter's personal interests were aligned in "getting the word out":

> I had been so confronted by people, literally peasants with pitchforks and torches, that I was – we need to get some kind of version of the truth out. And I would admit it was probably our version of the truth, but it was more factually based.[19]

Given Owens's own personal interests on the issue as an officer and board member who owed fiduciary duties to the organization, it was not reasonable for Karstetter (himself facing a personal interest conflict of interest, as discussed below) to rely on Owens for authority to disclose confidential information outside the organization on these issues.

Third, there is no indication that any authorization for Karstetter to disclose this confidential client information to outsiders at the IIU interview was based on *informed* consent as required in RPC 1.6(a). RPC 1.0(e) states that "informed consent" "denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and

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164 (11th ed. 2019). Karstetter was dealing with the principal, his client, in this context rather than third parties, so this principle has no application here. And I am unaware of any rule, commentary, case law, or ethics opinion suggesting that a lawyer can obtain informed consent based on something other than actual authority from their client. To the extent Mr. Fucile actually meant that it appeared to him that Owens had authority to authorize the disclosures of confidential client information at the IIU interview and thereafter as a factual matter, he himself qualified that opinion to mean that accepting that a constituent has such authority must be reasonable under the circumstances. Fucile Dep., *supra,* at 70-71. As explained *infra,* it was not reasonable in my view for Karstetter to rely on Owens for authority to permit or provide informed consent to the disclosures at issue here.

[17] Apr. 9, 2016, email from Owens to All Board Members ("Mr. Gorman and Orth I fully expect you to be held accountable for your repeated attack and insults about me performing the duties I inherited. You have cyber bullied me for the last time, consider notice given.").

[18] *See, e.g.,* Apr. 12, 2016, IIU Interview, at 16 ("[Orth is] blowing up Matthew Owens in his capacity as an elected official of the guild. We are being blamed for putting into place something that we didn't put into place, and I want it to stop."); *id.* at 24 ("Matt and I are being personally attacked for doing what we needed to do with the full support of [Orth]."); *id.* at 51 (Karstetter states that he is seeking a resolution to the matter that will "stop the disruption that is both affecting DAJD, and certainly the guild and my life personally, and probably Matt Owens' life personally").

[19] Owens Dep., Apr. 13, 2021, at 154-55 (emphasis added). Owens also testified that he was motivated to get the story out in part to give Music "a little protection" because Music was suicidal at the time. *Id.* at 169-70 (Owens also recognized that "Music turned out to be a thief")

reasonably available alternatives to the proposed course of conduct." As noted in the commentary explaining this definition,

> The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of another lawyer. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid.

RPC 1.0, cmt. [6]. Obtaining informed consent ordinarily requires an affirmative response by the client or authorized constituent, and a lawyer may not generally assume consent from a client's or constituent's silence. *See id.,* cmt. [7].

Karstetter admitted in his deposition that he did not disclose to or discuss with Owens the implications to the Guild of waiving confidentiality or privilege prior to obtaining consent or authorization from Owens to reveal such confidential information, and Owens testified during his deposition that Karstetter did not explain the adverse effects of waiving privilege protections in the short meeting they had before the IIU interview.[20] Informed consent to disclose was not obtained from the Guild by Karstetter prior to making the disclosures of confidential information at the IIU interview and subsequently.

Fourth, regardless of the language in the bylaws or retainer agreement with the Guild regarding who can direct Karstetter in his role as the Guild's legal advisor and general counsel, Karstetter failed to comply with the strict requirements of RPC 1.13(b) and (c) prior to disclosing information about the alleged cyber-harassment misconduct by a Guild board member. Those rules essentially require that when faced with knowledge of conduct by an organizational constituent that is a violation of that constituent's legal obligation to the organization, a lawyer must refer the matter to a higher authority in the organization, "including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law." RPC 1.13(b). Under these circumstances, this ethics rule required taking the matter first to the Guild's

[20] Karstetter Dep., Sept. 16, 2020, at 280; Owens Dep., April 13, 2021, at 157.

president, and then, if warranted, to the board, the highest authority in the Guild.[21] Only then would Karstetter have been permitted to disclose this information outside the organization, and only if the requirements of RPC 1.13(c) were met. Obtaining authorization from Owens to disclose the confidential information outside the Guild in the IIU interview was insufficient, and Karstetter's disclosures did not comply with the requirement to "report out" in RPC 1.13(b) and (c).[22]

During the pendency of this action, Karstetter has at times asserted that disclosure of confidential information at the IIU interview and thereafter based on cyber-bullying activity was authorized by the so-called "self-defense" exception to confidentiality in RPC 1.6(b)(5), but that defense fails as well.[23] That rule permits disclosure of otherwise confidential information by a lawyer "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client." None of these situations were present here.

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[21] Karstetter has asserted that the board was dysfunctional such that it could not consider and resolve matters relating to social media conduct of its members, or consent to outside disclosures by its lawyer of confidential Guild information during the early 2016 time-period, but I have seen no evidence that this was the case. He points to a motion at the February 24, 2016, board meeting in which the board decided that there would be no new contracts or rolling over of existing contracts until after an upcoming board election, but the minutes of that meeting state that the board would "continue to represent the membership in disciplinary matters, contract negotiations and matters with timelines concerns." Karstetter himself presented other matters to the full board or membership during the early 2016 time-period, including issues and information relating to the Music settlement (*see, e.g.,* Feb. 11, 2016, Memorandum from Karstetter/Foreman to KCCB General Membership), insurance issues for the Guild (*see* Mar. 26, 2016, email from Karstetter to Guild Board), and Karstetter's requests for the Guild to pay his legal expenses in defending the bar grievances (in emails dated Apr. 14 and 16, 2016). Owens presented his cyber-bullying concerns in an email to all board members on April 9, 2016, three days before the IIU interview. And Karstetter himself informed the full board of the IIU interview in an email the day after, on April 13th. There is simply no evidence that Karstetter could not have complied with the up-the-ladder reporting requirement in RPC 1.13(b) prior to determining whether he could report outside the organization under RPC 1.13(c). He chose instead, by his own admission, to bypass the board in order to get the word out to members, county employees, and the public using the IIU complaint and interview.

[22] The fact that Randy Weaver was not present at the April 12th IIU interview is therefore irrelevant in reaching my opinions on the confidentiality breach issue. Karstetter was not entitled to "representation" by anyone from the Guild at the IIU interview, and Karstetter was required under RPC 1.13(b) and (c) to report up to the highest authority in the organization, the Guild's board, prior to any reporting outside the organization. *See also* Urie Dep., Apr. 14, 2021, at 60, 67 (the IIU investigator testified that there was no urgency to conduct the intake interview from his standpoint, and he did not see it as a "big deal" whether Karstetter had representation at the interview or not). And as discussed above, Karstetter did not obtain *informed* consent to disclose confidential information from any Guild constituent prior to the IIU interview.

[23] In his deposition, plaintiff's legal ethics expert Mark Fucile noted that he felt "more comfortable" analyzing Karstetter's disclosures as being authorized by the Guild rather than as being permitted under the self-defense exception to confidentiality under RPC 1.6(b)(5). Fucile Dep., April 16, 2021, at 138.

In the absence of a proceeding or other pending formal action, the application of this RPC 1.6(b)(5) exception to Karstetter was limited under this exception to responding directly to the non-client persons making allegations against him.[24] In my view, any further disclosure outside the organization in this context would have required that Karstetter give advance notice to the Guild so it could protect its confidentiality rights if so desired.[25] He did not do so.[26]

Finally, even if the disclosure of confidential information had been permitted based on a defense under RPC 1.6(b) or after up-the-ladder reporting within the Guild under RPC 1.13(c), Karstetter violated his ethical and fiduciary duties of confidentiality by disclosing far more than was reasonably necessary under the circumstances. A lawyer is permitted to disclose confidential information under the exceptions in RPC 1.6(b) "only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified," and "a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose." RPC 1.6, cmt. [16]; *see also* RPC 1.6, cmt. [10] (disclosure is permitted under the self-defense exception in RPC 1.6(b)(5) "to the extent the lawyer reasonably believes is necessary to establish a defense"); RPC 1.13(c)(2) (reporting out after reporting up within the organization under the rule is permitted "to the extent reasonably necessary to prevent substantial injury to the organization"). As summarized in Washington's Comment [25] to RPC 1.6:

> The exceptions to the general rule prohibiting unauthorized disclosure of information relating to the representation "should not be carelessly invoked." *In re Boelter,* 139 Wn.2d 81, 91, 985 P.2d 328 (1999). A lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of avoidable disclosure.

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[24] *See* RPC 1.6, cmt. [10] (RPC 1.6(b)(5) "does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion"; *see also* WSBA Advisory Op. 965 (1986) ("apparently maligning" a law firm is insufficient to permit disclosure); ABA Formal Ethics Op. 21-496, at 3 ("The Committee concludes that, alone, a negative online review, because of its informal nature, is not a 'controversy between the lawyer and the client' within the meaning of Rule 1.6(b)(5), and therefore does not allow disclosure of confidential information relating to a client's matter.").

[25] *See* Andrews, et al., THE LAW OF LAWYERING IN WASHINGTON, *supra,* at 6-49 ("clients should be notified if a lawyer is contemplating disclosing confidences to respond to a third person's allegations of misbehavior by the lawyer").

[26] During the IIU interview, Karstetter made clear that one of his motivations was to stop the harassment, including Orth's dissemination of information on social medial about how to file bar grievances with the WSBA. In my view, any attempted interference by Karstetter with a person's right to bring a bar grievance implicates RPC 8.4(d), which prohibits conduct prejudicial to the administration of justice.

Even if an exception had been available under the confidentiality rules, Karstetter's disclosures in the April 12th IIU interview went well beyond what can possibly be considered reasonable under the circumstances. He not only went into great detail, as noted above, about matters relating to internal Guild matters and meetings in which he provided legal advice and counsel, he went so far as to strongly criticize his client, referring to certain Guild board members as "idiots" and "losers," and saying near the end of the interview, "screw these people."[27] And he even volunteered to the county employees how he would go about advising the Guild board on a particular legal issue, knowing full well (indeed, expecting) that the transcript of the interview would be made public.[28] Karstetter did not at any point acknowledge his ethical and fiduciary duty to act reasonably to minimize the risk of avoidable disclosure. His disclosures to county employees and managers at the IIU interview and thereafter were, in short, careless, wide-ranging, and unnecessary.

B. Karstetter breached his fiduciary and ethical loyalty and conflict of interest duties to the Guild in connection with the IIU complaint and interview.

The fiduciary duty of loyalty prohibits a lawyer from representing a client when where there is a disqualifying conflict of interest. Under RPC 1.7(a)(2), a conflict of interest exists when "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, former client, a third person, or by a personal interest of the lawyer." Where a conflict of interest exists, representation of the client is permitted only if (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each the affected client; and (2) the affected client(s) give informed consent, confirmed in writing. RPC 1.7(b)(1), (4).

Loyalty and independence of professional judgment are essential elements in the lawyer-client relationship. RPC 1.7, cmt. [1]. "The lawyer's own interests should not be permitted to have an adverse effect on representation of a client." RPC 1.7, cmt. [10]. In this matter, with respect to the April 12th IIU complaint and interview, the strong personal interests of Karstetter created a significant risk that his representation of the Guild would be materially limited. In my opinion, this conflict was not consentable under RPC 1.7(b)(1),[29] and the disqualifying conflict precluded him from advising the Guild with respect to his IIU complaint. Under these circumstances, Karstetter also had a duty to advise the Guild to obtain independent counsel and advice regarding Karstetter's

[27] Apr. 12, 2016, IIU Interview, at 44, 51.

[28] *Id.* at 52-53.

[29] Karstetter did not disclose a conflict of interest to the Guild or any of its constituents in any event, and no informed consent to a personal interest conflict was obtained orally or in writing even if the conflict was consentable under RPC 1.7(b)(1). *See* Karstetter Dep., Sept. 16, 2020, at 274; Owens Dep., Apr. 13, 2021, at 139.

intention to disclose confidential client information outside the organization prior to Karstetter making those disclosures. His failure to do so in my view was an egregious breach of his fiduciary and ethical duties.

Karstetter had a serious, limiting personal interest conflict regarding the IIU complaint and interview based on these circumstances. First, Karstetter himself referenced numerous personal interests during the IIU interview, including his financial and economic interests, as well as his desire to stop alleged cyber-bullying against him by Guild members. For example, during the interview, Karstetter referenced "personal attacks" by some Guild members that embarrassed him and could have "a very negative consequence on [his] family";[30] discussed his attempt to roll over the legal services contract with the Guild;[31] and expressed concern with losing his livelihood, "which is a six-figure income," also noting his "vested interest" in receiving monthly compensation from the Guild, and indicating that the social media posts were having "an impact on his financial future."[32] And, as discussed in detail above, he was proceeding with the IIU process in order to get his own story out to members and county employees. In short, Karstetter left no doubt that he filed the IIU complaint and attended the IIU intake interview primarily, if not exclusively, in furtherance of his personal interests.

Second, Karstetter had a strong personal interest in aligning and communicating with some board members as opposed to others. This was clear from his statements in the IIU interview in which he spoke favorably about some board members, including Matt Owens and Michael Music, and unfavorably about others, such as Randy Weaver and Leonard Orth, including characterizing the members of the opposing faction as "idiots" and "losers."[33] It was also acknowledged by several witnesses that there were two factions within the Guild board, one pro-Karstetter and one anti-Karstetter.[34]

Karstetter's personal interest in acknowledging factions within the board and favoring some constituents over others is illustrated most vividly in an email he sent to a "friendly" board member, Dave Brown, on February 15, 2016, upon learning that board

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[30] Apr. 12, 2016, IIU Interview, at 24, 26, 30, 35, 51.

[31] *Id.* at 19.

[32] *Id.* at 14, 31, 39.

[33] *Id.* at 44.

[34] Urie Dep., Apr. 14, 2021, at 32 (describing two factions of the Guild, one headed by Karstetter, the other by Weaver); Owens Dep., Apr. 13, 2021, at 177-78 (discussing the "very evident divide" between pro-Karstetter and anti-Karstetter factions on the Guild board, and noting "some tension" between Karstetter and Guild president Randy Weaver); Brown Dep., Apr. 14, 2021, at 66-67 (listing the members of the pro-Karstetter and anti-Karstetter camps on the Guild board, and placing Weaver in the anti-Karstetter faction). Karstetter himself admitted in his deposition that he limited an email communication to board members who "had my back." Karstetter Dep., Mar. 30, 2021, at 252.

president Randy Weaver's parking reimbursement issue was apparently being investigated by the county. In that email, Karstetter stated prior to any investigation on his own part that "Randy's f--ed," "You need to have Matt [Owens] send you this so my finger prints aren't on this," and "Let's see how loud Lenny [Orth] gets when he sees Randy going down with [Michael] Music." In that February 15th email, Karstetter expressed outrage for Weaver exercising the Guild's right to obtain the advice of outside counsel in the Music matter, telling Brown that the board "needed" to "pin the $6K bill" on Weaver after Karstetter's contract was "rolled over."

Kastetter's duty was to the organizational client acting through *all* of its duly authorized constituents (RPC 1.13(a)). Favoring of one group of board constituents as against another group constituted a serious breach of the duty of loyalty to the organization as a whole. It also represented a fundamental misunderstanding by Karstetter of his role as a lawyer for the organizational client. And such conduct highlights another significant personal interest at play in Karstetter's bringing and pursuing the IIU complaint against an "unfriendly" board member in April 2016.

Third, Karstetter had a strong personal interest in the matter based on his relationship with Matt Owens, the Guild officer and board member who Karstetter says granted authorization and consent to disclose confidential information at the April 12th IIU interview on behalf of the Guild. Karstetter testified at his deposition that Owens was his "closest friend" in the Guild,[35] and Karstetter has represented Owens as his personal lawyer for many years.[36] And as discussed above, Owens had raised parallel cyber-harassment allegations against "unfriendly" Guild and board members. Yet, it was his friend, client, and fellow victim, Matt Owens, whom Karstetter looked to and relied upon for consent and authorization to publicly disseminate confidential and sensitive information relating to the representation of the Guild.

The combination of these personal interests created a significant risk that Karsetter's representation of the Guild would be materially limited under RPC 1.7(a)(2). It goes without saying that Karstetter was not be permitted to *advise* the Guild in his role as general counsel in these circumstances regarding his own proposed disclosure of confidential Guild information (hence, the need for Karstetter to recommend that the Guild consult independent counsel, which he did not do). In evaluating the risks associated with this conflict of interest, another important consideration is that pursuing this complaint could have a serious adverse financial effect on the Guild. This is because it was Karstetter himself who would normally provide representation of a Guild member

[35] Karstetter Dep., Sept. 16, 2020, at 332.

[36] Owens Dep., Apr. 13, 2016, at 21-22 (Owens testified that Karstetter is his long-time family attorney, dating back to 2008); Apr. 19, 2018 IIU Interview, at 10 (Karstetter acknowledged that he has represented Owens personally "for years").

accused of misconduct, so the Guild would potentially face additional expense associated with obtaining outside counsel for that purpose as well.

Karstetter does not even appear to have recognized the serious conflict of interest he faced in bringing the IIU complaint against a constituent of the Guild. He did not disclose the personal interest conflict to his client, he did not evaluate whether the client could consent to it, and he did not seek written, informed consent from the Guild to his ongoing representation. He continued to unreasonably rely on his close friend and long-time personal client for consent to disclose and authorization to proceed on behalf of the Guild. Based on these circumstances, I believe that Karstetter had a disqualifying conflict of interest and committed another egregious breach of fiduciary duty to the Guild in bringing and pursuing the IIU complaint in April 2016.

C. Karstetter breached his fiduciary and ethical duty of honesty and candor to the Guild in connection with the April 2016 IIU complaint and interview.

RPC 8.4(c) prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. The fiduciary duty of lawyers requires that a lawyer act in utmost good faith in dealing with clients, which of course includes honest and truthful communication. Karstetter breached his candor duties to the Guild as follows:

- As mentioned above, Karstetter dishonestly and misleadingly asserted that he was entitled to representation by the Guild at the IIU interview in connection with his IIU complaint against a Guild board member, even though Karstetter was not a county employee or member of the union's collective bargaining unit. Karstetter appears to have interpreted his 2011 contract with the Guild as conferring such a right, but I am not aware of any legal or factual basis for such an assertion.

- Moreover, as discussed in detail above, Karstetter's statements at the IIU interview and follow-up communications evinced a calculated, dishonest plan to use the IIU complaint process to manipulate the situation, get his version of the story out to Guild members and county employees, and promote his personal interests.[37] Karstetter's statements and conduct in working around the board to

[37] *See also* Urie Dep., Apr. 14, 2021, at 51 (IIU investigator noted in his deposition that Karstetter frequently used "back channels and things like that"). Capt. Urie also testified that that "[t]here was no urgency" to have the IIU intake interview that day, stating that he had often rescheduled interviews involving Karstetter. *Id.* at 60. And it is clear from Karstetter's statements at the interview that the alleged physical threat was merely a pretext for bringing the IIU complaint and getting the word out. *See* Apr. 12, 2016, IIU Interview, at 18 (Karstetter refused to identify who might have made the physical telephone voicemail threat against him, noting that "I'm not going to give you that information because that's irrelevant"); *id.* at 33 ("I am not saying there are any physical threats whatsoever. I'm saying that at best this is civil cyber-harassment.")

communicate outside the organization was a deceptive scheme to avoid his fiduciary and ethical obligations.

- During the IIU interview, Karstetter also admitted lying to a judge at a January 22, 2016 hearing in order to leave and take a phone call from the Guild president.[38] *See also* RPC 3.3(a)(1) (prohibiting a lawyer from knowingly making a false statement of fact or law to a tribunal).

## IV. OTHER FIDUCIARY & ETHICAL BREACHES BY KARSTETTER[39]

### A. Weaver Parking Reimbursement Issue

As discussed above, Karstetter's February 15, 2016, "Randy's f--ed" email to Dave Brown highlighted Karstetter's personal interest in taking sides on behalf of some Guild board members regarding the allegations of financial impropriety against board president Randy Weaver in connection with parking reimbursements. In my opinion, Karstetter was not permitted advise the Guild regarding the parking reimbursement issue under RPC 1.7 without at least disclosing the conflict and obtaining the client's informed consent, confirmed in writing, which he did not do.

Although Karstetter testified that he was simply taking direction on the Weaver parking issue from Owens, who was the Guild's vice president and de facto treasurer in the absence of Michael Music, Owens testified in his deposition that he continually sought Karstetter's advice in connection with that issue.[40] This included Karstetter giving [conflicted] advice to Owens, his "closest friend" on the Guild board and his "long-time family attorney," regarding the very authority Karstetter has asserted as the basis for cooperating with and forwarding information to county investigators.[41] Owens testified

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[38] Apr. 12, 2016, IIU Interview, at 36-37..

[39] My opinions in this section apply whether Karstetter was an outside or in-house counsel. *See also* Fucile Dep., Apr. 16, 2021, at 62 (plaintiff's expert testified that the lawyer ethics rules do not generally apply differently based on whether the lawyer is inside or outside counsel).

[40] E.g., Owens Dep., Apr. 13, 2021, at 34-36 (Owens testified that he sought and received advice from Karstetter shortly after Weaver handed him the check for parking reimbursements); *id.* at 43 (stating that in dealing with the Weaver parking issue, "The only person I talked to was Jerry. And the reason being is he was counsel."). Karstetter's attempt to characterize himself as acting as an employee rather than as an attorney in the context of the Weaver parking reimbursement investigation is therefore of no avail. *See* Karstetter Dep., Mar. 30, 2021, at 151. The IIU ultimately decided that there was no evidence that Weaver had intended to commit fraud against the county in connection with the parking reimbursements. Urie IIU Report on Weaver Parking Reimbursement Issue, June 16, 2016, at 13.

[41] *See* RPC 8.4(a) (prohibiting lawyers from violating the RPCs or attempting to do so "through the acts of another").

that when he was initially contacted by county investigators regarding the parking reimbursement issue,

> it was, like, okay, what the hell do I do here? I mean -- and because the ombudsman's office has the authority to compel a county employee to give up information. Even though it was union related, I called up Jerry and said, Hey, what's up, what do I do? And he said Well, can you authorize me to look into this? And I said, Go ahead. . . . I'm saying I called him and said, What do I do? And he suggested that he could look into it. And I said, Would you please look into it.[42]

On March 3, 2016, Karstetter left a message with Lynn Anders of the county ombudsman office, stating that he had been contacted by someone asserting confidentiality with respect to the Weaver parking reimbursement issue (presumably as a whistleblower),[43] and asking for a return call so he could arrange getting information being requested "as expeditiously as possible." Karstatter then voluntarily provided confirmation of a credit card number in a phone call with Anders later that day. The next day, on March 4th, Karstetter voluntarily provided a redacted Guild bank statement, as well as a redacted spread sheet "illustrating what appears to be credit card activity" relating to Weaver's parking expenditures, to the IIU investigator, Eric Urie.[44] He continued communicating with county ombudsman and IIU personnel regarding the Weaver parking issue in subsequent days. In disclosing and communicating outside the Guild confidential information about the parking reimbursement matter relating to his representation of the Guild without the Guild's informed consent, Karstetter violated RPC 1.6(a).

In making these disclosures, Kastetter also acted dishonestly. First, as noted above, he manipulated the situation to suggest that Owens gave him "authority" to cooperate with the county's investigation while at the same time managing communications among friendly board member "so my finger prints aren't on this" (as Karstetter stated in the February 15th email to Brown).[45] Second, he misleadingly

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[42] Owens Dep., Apr. 13, 2021, at 69-70.

[43] In Karstetter's interactions with the Guild member whistleblower, now identified as Pete Boehme, Karstetter's client was at all times the Guild, and any advice or assistance Karstetter provided to Boehme potentially implicates fiduciary duties of loyalty and avoidance of conflicts of interest. I have seen no evidence that Karstetter disclosed or obtained consent to any such conflict.

[44] Urie IIU Report on Weaver Parking Reimbursement Issue, June 16, 2016, at 4.

[45] In a March 10, 2016, email to the county prosecutor, Karstetter later sought confidentiality in the county's response to a public records request as to his (and Owens's) cooperation "as a witness" in the parking reimbursement investigation, providing further evidence of his attempt to keep his "fingerprints" off this issue.

represented numerous times that the county ombudsman had "subpoenaed" him for the Guild documents and that disclosures of Guild information he made were compulsory.[46] Even after the April 12th IIU interview, Karstetter continued to falsely represent that the Guild had been "subpoenaed" for credit card information relating to the Weaver parking reimbursement issue.[47] And in his deposition, IIU investigator Urie testified that it appeared to him that there was "some agenda going on behind the scenes" in Karstetter's turning documents over to the county without an "actual subpoena" having been issued.[48] These communications and conduct by Karstetter implicate the lawyer's fiduciary duty requiring the utmost good faith in representing a client, as well as RPC 8.4(c)'s prohibition against conduct that is dishonest or deceptive.

For the foregoing reasons, the totality of Karstetter's handling of the Weaver parking reimbursement issue was, in my opinion, an egregious breach of his fiduciary and ethical duties to the Guild that justified termination of his services and that could not reasonably have been the subject of corrective action.

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[46] Mar. 4, 2016, email from Karstetter to Urie (stating that the Ombudsman "has verbally 'subpoenaed' or 'compelled' production of material in the possession of the Guild relative to ownership of a particular account ending in .... []. I have been told to provide this information, under color of confidentiality, to DAJD IIU which I am hereby complying with"); Mar. 10, 2016, email from Karstetter to several county employees (Karstetter notes his "involvement with the King County Ombudsman's Office in complying with their compulsory demand for certain documentation relative to their KCC 2.52 Investigation"). Karstetter's March 10th email also indicated he was assigning Wes Foreman to handle any representation of Weaver in the parking reimbursement matter because of Karstetter's role in responding to [nonexistent] subpoenas on behalf of the Guild, but that delegation was of no effect and would not solve any conflict given that Foreman was Karstetter's associate in his law firm, and Karstetter would remain involved in any such work as Foreman's supervisor. *See* Karstetter Dep., Mar. 30, 2021, at 227-28 (Karstetter testified that representing the Weavers in this context "would be too big a conflict," but noted that he would have reviewed any work done by Foreman in a representation of Weaver); Foreman Decl., Apr. 6, 2021, at 4 (Foreman testified that Karstetter "was my supervising attorney for all of my work for all of [Karstetter's] clients, including the Guild," and that he "always" worked under Karstetter's supervision). There is also no indication from the record I have reviewed that Karstetter ever recommended that Weaver obtain independent counsel regarding the parking reimbursement matter, which I believe was required under the circumstances given Karstetter's view of the seriousness of Weaver's alleged misconduct.

[47] In an April 15, 2016, email from Karstetter to county attorneys and officials, an attached cover letter to the membership from Karstetter stated that "the Guild had received a 'subpoena' for CONFIRMATION OF A CREDIT CARD NUMBER," and "[t]he only thing I provided, pursuant to legal mandate, was the confirmation of a particular credit card number as belonging to the Guild."). There was no subpoena, and this statement is also untrue because, as noted in the June 16, 2016, IIU report on the Weaver parking reimbursement issue, at page 4, Karstetter forwarded bank statements and spreadsheets to the county as well.

[48] Urie Dep., Apr. 14, 2021, at 45. Captain Urie also testified that he thought Karstetter, "at least through the IIU process, felt that it was okay to lie to us." *Id.* at 89; *see also id.,* at 29 (Urie testified that he thought Karstetter "enjoyed pushing issues or his own activities in IIU interviews to probably the edge of where he should have been. If there's a line about appropriate conduct, he liked to ride the edge of it and sometimes step across it.").

B. Duties to the Guild as a Former Client

The ethical duty of confidentiality under RPC 1.6 continues after termination of the lawyer-client relationship. RPC 1.6, cmt. [20]. Under RPC 1.9(c), setting forth confidentiality duties to a former client,

> A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Karstetter revealed information without consent of the Guild in violation of RPC 1.9(c)(2) on at least two occasions in 2018. First, in a voluntary interview on April 19, 2108, regarding a new IIU complaint against Orth, Karstetter talked at length and in detail about information relating to his prior representation of the Guild without the Guild's consent, including the Music financial impropriety matter and resulting settlement (also indicating that he still possessed documents regarding this matter that he was willing to share with the IIU investigators). Second, Karstetter submitted a declaration dated August 26, 2018, in support of his friend Michael Music in the criminal matter in Snohomish County resulting from Music's financial improprieties. In that declaration, Karstetter discussed in depth information relating to his representation of the Guild, even attaching a copy of the confidential settlement agreement between the Music and the Guild. In addition, in an August 10, 2017 memorandum regarding an IIU complaint filed by Owens against Leonard Orth, a county corrections employee noted that Owens stated in his intake interview that "the information that [Owens] included in his memorandum came from former Guild legal advisor Jared Karstetter."

In each of these situations, Karstetter also used information learned during his representation of the Guild to the disadvantage to his former client and without its consent in violation of RPC 1.9(c)(1).[49] And after his departure from the Guild, in both 2016 and 2018, Karstetter assisted Owens in drafting letters in support of claims Owens was asserting against the Guild for wrongfully removing him from his position as a Guild

[49] *E.g.,* Apr. 19, 2018 IIU Interview, at 92 (explaining that "[t]he Guild is responsible" for the Music financial impropriety situation); *id.* at 121 ("Anybody I've talked to outside the guild and outside, you know, the politics of King County, private citizens, attorney friends of mine, they can't flipping believe this. And their finger points back to what kind of guild is that. I'm not proud of it. I wasn't responsible for it."); Karstetter Dec. (Music Criminal Matter), Aug. 26, 2018, at 5 ("The Guild had a history, since the mid-90's of using Guild funds to purchase food, snacks, coffee, meals and other items for the Guild Office and membership meetings. . . . Never were these things questioned by the membership, the Board, our CPA or our Board of Trustees.").

officer.[50] To the extent this information had become "generally known" under the exception to former client confidentiality in RPC 1.9(c)(1), it was only because Karstetter had made it so by unethically disclosing it publicly and bringing this lawsuit, rendering the "generally known" defense unavailable in my opinion. Yet again, Karstetter seems to have been oblivious to his confidentiality duties under the RPCs.[51]

C. Lawsuit as Violating the Integrity of the Lawyer-Client Relationship

Karstetter's cavalier attitude about breaching confidences of his former client also informs my opinion that Karstetter's bringing suit against the Guild violates the integrity of the attorney-client relationship under the Washington Supreme Court's holding in this case. As noted above, he has bootstrapped his own improper disclosure of confidential information harmful to the Guild into an apparent license to use and disclose that information at will in this and other proceedings.

It is also particularly instructive to me that Karstetter's breach of confidentiality was rooted in his failure to comply with the "up-the-ladder" reporting requirement in RPC 1.13(b) and (c). As noted in the leading national treatise on legal ethics and the law of lawyering in discussing the significant indicators that a suit for wrongful termination should not be allowed to proceed:

> When the lawyer took extramural action, but without first exhausting the remedy of reporting 'up-the-ladder,' so that the matter could be resolved internally and without adverse publicity or legal jeopardy to the organization, the employer's right to take adverse employment action should be particularly strong.[52]

This is precisely the situation that occurred as a result of Karstetter's conduct in connection with the IIU complaint and interview, and subsequent disclosures: Karstetter foreclosed the Guild's ability to resolve the issues internally by taking it upon himself to pursue his personal interests and make harmful disclosures about the Guild to the county and the public without first bringing the matter before the board as required in RPC 1.13(b) and (c). This conduct violated the integrity of the lawyer-client relationship that should foreclose this lawsuit under the Supreme Court's holding in this case.

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[50] *See* Doc. #1233, Mar. 6, 2018, email from Kartetter to Owens, with draft 2016 demand letter apparently drafted by Karstetter for Owens, and 2018 draft letter apparently redlined by Karstetter (Karstetter noted that he "took the liberty to poke the bear just a bit more" in the 2018 letter).

[51] *See* Karstetter Dep., Apr. 15, 2021, at 402 (Karstetter testified that he is unaware of his duties to former clients under the RPCs).

[52] 1 Geoffrey C. Hazard, Jr., W. William Hodes & Peter R. Jarvis, THE LAW OF LAWYERING §21.05, at 21-20 (4th ed. 2021).

Finally, in an email to the Guild's outside lawyer on April 9, 2021, Matt Owens, a witness in this case, stated that he is being represented by Karstetter, described as his "long-time family attorney," in connection with seeking legal representation from the Guild for defending a subpoena issued for his deposition in this case in which Karstetter himself is a party. This obvious breach of practice norms by Karstetter in acting in a representative capacity on behalf of a Guild member who is also a witness in his own lawsuit, and directly against the interests of his former client, does further violence to the integrity of lawyer-client relationship.[53]

Under all of these circumstances, therefore, it is my view that the ability for a lawyer to bring claims against his former client (even assuming for the sake of argument that an in-house general counsel relationship existed here) does not apply in the circumstances of Karstetter's lawsuit against the Guild.

D. Competence & Duty of Care Issues

Karstetter breached the ethical duty of competence (RPC 1.1) and the lawyer's duty of care to the Guild in the following ways:

- Attempted redactions of bank records that Karstetter forwarded to the county IIU investigator regarding the Weaver parking reimbursement issue, in violation of his confidentiality obligations under RPC 1.6(a), were inadvertently legible.[54]

- Karstetter admitted in his deposition making a mistake in the drafting of the Music settlement agreement, omitting what he says was an intended provision that a liquidated damages clause would apply against the Guild in the event of breach (as written, the liquidated damages clause applied only against Music). Yet, Karstetter advised Guild board members on numerous occasions that the Guild risked liability under a liquidated damages clause in the event they breached the non-disparagement clause in the agreement as if the clause had been included in the agreement.[55]

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[53] Karstetter has engaged in other ethical misconduct in this litigation that also implicates the integrity of his former lawyer-client relationship with the Guild in my opinion. He produced in discovery in this case a clearly privileged Guild email communication dated April 18, 2016, from the Guild's counsel, David Snyder, to Guild president Randy Weaver containing legal advice regarding Karstetter's conduct and the retainer agreement. And in supporting defamation claims that have been asserted against the Guild and its constituents in this action, I understand that Karstetter has misrepresented as authentic a manipulated version of an April 28, 2016, email long after the original email was in his possession through public records requests, and therefore knew that the original email contained no attachment with the statements that Karstetter contends are defamatory.

[54] Urie IIU Report on Weaver Parking Reimbursement Issue, June 16, 2016, at 4.

[55] *See* Karstetter Dep., Mar. 30, 2021, at 68-69.

- Karstetter committed violations of state law on campaign financing through his practice of making contributions to campaigns, and then receiving reimbursement for those contributions from the Guild.[56]

- Karstetter advised the Guild that it could rely on his law firm's lawyer malpractice insurance when he or his associate was involved in handling a fair representation matter for a Guild member.[57] This was incorrect advice because the Guild was not at any time a named insured under his law firm's malpractice insurance policy.[58] The Guild had failed to maintain theft or D&O insurance as called for in its bylaws. Having taken it upon himself to advise on liability insurance issues over the years, Karstetter in my opinion had a duty of care as the Guild's general counsel to take reasonable steps to ensure that the Guild was fully advised on insurance issues. He did not do so until late March of 2016. And having advised about the availability of his law firm's malpractice policy to cover potential claims against the Guild, it was at the very least a breach of the duty of competence for Karstetter to fail to inform the Guild that he had coverage for the defense of bar grievances when he was asking the Guild to pay those expenses in April 2016.[59]

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[56] This matter was investigated by the Washington Public Disclosure Commission (*see* PDC Memorandum dated Nov. 1, 2016), eventually resulting in a judgment for a civil penalty being entered against Karstetter on July 27, 2018.

[57] Mar. 26, 2016, email from Karstetter to Guild Board re Clarification of Insurance ("As long as I'm involved in the case, my Malpractice will protect both Wes and I and the Guild since we are representing the Guild.") (emphasis added); Karstetter Dep., Sept. 16, 2020, at 266 (Karstetter admitted that he had represented to the Guild that his firm's malpractice insurance could cover the Guild in some circumstances because that had occurred one time in the past); Karstetter Dep.., Jan. 25, 2021, at 126-27 ("I think what I had said was because I handled everything that would create liability for the Guild, . . . they always knew that if there was a lawsuit filed because we didn't represent somebody adequately, that my insurance carrier would cover me because I would be sued. And that happened one time years and years ago, and the Guild got free representation by, you know, being co-defendants with me."); CR 30(b)(6) Karstetter Dep., Apr. 15, 2021, at 55 (Karstetter testified on behalf of his corporate law firm that the Guild board made the decision 3-4 years earlier regarding liability insurance to "just continue running under my flag").

[58] In his initial response to board member bar grievances against him, in a letter dated April 27, 2016, Karstetter noted on page 3 that "Attorneys employed by a labor organization cannot be sued for malpractice," and "The Union can be sued for breach of the duty of [fair] representation." Yet, he had advised the board that he had coverage under his corporate law firm's malpractice insurance policy when he represented Guild members, and had suggested that the Guild had coverage in those situations under his firm's policy as well.

[59] Karstetter Dep., Sept. 16, 2020, at 254, 295 (Karstetter admitted he did not inform the board that he had coverage for defending bar grievances in his firm's malpractice liability policy, stating that he "[d]idn't know it at the time").

## V. DISMISSAL OF BAR GRIEVANCE

Plaintiff's legal ethics expert, Mark Fucile, relies in part for his opinions on the dismissal in February 2018 by the Washington State Bar Association's Office of Disciplinary Counsel ("ODC") of a bar grievance that had been brought against Karstetter by the Guild. Rebutting Mr. Fucile's conclusion, in my opinion and based on my experience in defending bar grievance matters, dismissal of the grievance has no bearing on the ethics and fiduciary duties implicated regarding Karstetter's conduct. It was not a dismissal "on the merits" of the specific RPC violations alleged, but rather was an exercise of prosecutorial discretion and was done expressly because "it would not be interests of justice to continue the proceeding" against him. Bar counsel in my experience has wide discretion in deciding the extent to which it will prosecute alleged ethics violations by lawyers, if at all. As such, the dismissal did not actually and necessarily decide any of the ethics or fiduciary duty issues presented in this lawsuit.[60]

Moreover, neither the February 5, 2018, dismissal letter nor the follow-up letter from ODC's Chief Disciplinary Counsel dated March 9, 2018, explained what "justice" factors were considered or resolved in reaching the decision to dismiss. Both letters referenced the higher standard of proof for sustaining professional disciplinary violations, which is a clear preponderance standard pursuant to ELC 10.14(b) (as compared to a "simple preponderance" of the evidence standard for civil actions).[61] The factual record has now been developed extensively through discovery in the civil lawsuit, much of which was not available to bar counsel as of the date of dismissal.[62] As a result, bar counsel might well reach a different conclusion about proceeding with the Guild's bar grievance against Karstetter if it was brought today or after conclusion of the civil proceeding.

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[60] In addition, a stipulated dismissal by bar counsel and the respondent lawyer must be approved by the hearing officer unless it would result in "a manifest injustice," and entry of the stipulation is final and not appealable. ELC 9.1(d)(1), (d)(4).

[61] Bar counsel's letter dated February 5, 2018, noted that the dismissal decision "was made after careful consideration of the evidence and [the] standard of proof applicable in lawyer discipline cases." Chief Disciplinary Counsel's March 9, 2018, letter referred to an "insufficient factual basis for [continuing the grievance prosecution] in light of the applicable burden of proof."

[62] This included two days of sworn deposition testimony of Matt Owens, in which he was extensively questioned about his May 2017 declaration that was referenced in the dismissal letter. Karstetter himself has been deposed over five days, and he has submitted multiple sworn declarations in this matter since the dismissal. And numerous documents have been produced (such as Karstetter's February 2016 "Randy's f--ed" email) and other sworn witness testimony given (such as Eric Urie's April 2021 deposition) that were not available in the dismissed grievance proceeding that might have affected bar counsel's decision whether to proceed.

## VI. CONCLUSION

At the most fundamental level, Karstetter simply misunderstood his role as the lawyer for the Guild. At times, he acted as if he himself was a constituent of his organizational client rather than as the lawyer for his client.[63] Although Karstetter purported to be acting in his client's best interests, describing himself at one point as a "fixer,"[64] he often took it upon himself to determine what those interests should be, failing in the early 2016 time-period to honor his obligation RPC 1.2(a) to "abide by [the] *client's* decisions concerning the objectives of representation." He did not in my view exercise appropriate professional restraint in offering detached advice to his client, and often permitted anger, emotions, and personal interests and resentments to affect his conduct. He discouraged and criticized his client's consultation with other counsel, sometimes based on an apparent fear of losing the Guild's business. And he failed to honor fundamental ethical and fiduciary duties of confidentiality, loyalty, and candor in significant and egregious ways. The lawyer-client relationship was irretrievably broken based on Karstetter's conduct, and no amount of corrective action could have saved that relationship.

Indeed, Karstetter was consistently oblivious to his ethical obligations under the Washington RPCs. As discussed above, his addition of a "just cause" provision tied to the Guild's collective bargaining agreement in his corporate law firm's contract with the Guild violated RPC 1.8(a). And even assuming a valid contract was in place with the Guild, based on my experience in representing and advising lawyer clients over many years, the Guild was fully justified in terminating Karstetter's services as its legal advisor and general counsel in April 2016 based on his ethical and fiduciary breaches.

Very truly yours,

Arthur J. Lachman
WSBA #18962

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[63] Apr. 12, 2016, IIU Interview, at 41 ("I consider myself a corrections officer.").

[64] Karstetter Dep., Mar. 30, 2021, at 137.

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## Education

J.D., Highest Honors, University of Washington School of Law, Seattle, WA, 1989
Order of the Coif
Associate Editor-in-Chief, Washington Law Review, 1988-89

Masters of Accounting Science (Outstanding Student in Taxation), University of Illinois at Urbana-Champaign, 1982

B.S. in Accountancy, University of Illinois at Urbana-Champaign, 1981 (passed Uniform CPA Examination, 1981)

## Professional Practice Experience

Lawyer Risk Management & Ethics Advisor/Consultant, Litigation Attorney, Seattle, 2003-present (Martindale-Hubbell AV Rating)

Litigation Attorney (Of Counsel), Graham & Dunn, Seattle, 1995-2003

- Chair, Firm Ethics/Loss Prevention Committee, 1999-2003
- Director of Professional Development, 2001-03

Associate, Davidson Czeisler Kilpatric & Zeno, Kirkland, 1993-95

Litigation Associate, Culp Guterson & Grader, Seattle, 1991-93

Judicial Clerk, Judge Eugene A. Wright, U.S. Court of Appeals, Ninth Circuit, Seattle, 1989-90

Judicial Extern, Judge John C. Coughenour, U.S. District Court, Western District of Washington, Seattle, Winter 1989

Summer Associate, Perkins Coie, Seattle, Summer 1988

Tax Senior Accountant, Sweeney Conrad CPAs, Bellevue, 1984-86

Tax Staff Accountant, Arthur Andersen & Co., Seattle, 1982-84

## Teaching & Related Experience

Part-Time Instructor, Professional Responsibility, University of Washington School of Law, Seattle, Winter 2013; Spring 2008

Fellow, National Institute for Teaching Ethics & Professionalism, Atlanta, April 2009

Lecturer, Albers School of Business, Seattle University, Business & Accounting Ethics, Fall 2005

Part-Time Instructor, Pretrial Practice/Civil Procedure, University of Washington School of Law, Seattle, 1996; 1999-2000

Visiting Assistant Professor of Law, Civil Procedure/Commercial Law, University of Puget Sound (now Seattle University) School of Law, Tacoma, 1990-91

Graduate Teaching Assistant, Department of Accounting, University of Washington, Seattle, 1986-89; University of Illinois at Urbana-Champaign, 1981-82

## Publications

Editor, Washington Legal Ethics Deskbook, Washington State Bar Association, 2009 Supplement; 2d edition (2020)

Co-Author (with Thomas Andrews, Robert Aronson, and Mark Fucile), The Law of Lawyering in Washington, Washington State Bar Association (2012)

"Are They Just Bad Apples? Ethical Behavior in Organizational Settings": An Introduction, 2007 Symposium Issue of the Professional Lawyer

What You Should Know Can Hurt You: Management & Supervisory Responsibility for the Misconduct of Others under Model Rules 5.1 & 5.3, 18 PROF. L. 1 (2007)

Zeal in Client Representation – FAQs, 2005 Symposium Issue of the Professional Lawyer

Note, *Attorney's Fee Contingency Enhancements: Toward a Complete Incentive to Litigate Under Federal Fee-Shifting Statutes,* 63 WASH. L. REV. 469 (1988)

## Professional Associations

Washington State Bar Association

Rules of Professional Conduct Committee
Chair, 2008 – 2010
Member, 2003-06; 2007-08
Advertising & Solicitation Rules Subcommittee (CPE), 2016-18
Planning Ahead Task Force, 2007-09
Trust Account & Retainers Task Force, 2006-07
Court Rules & Procedures Committee, Member, 1996-98

Association of Professional Responsibility Lawyers

Co-Chair, Future of Lawyering Committee, January 2018 – present
Member, Regulation of Lawyer Advertising Committee, 2014-2016
President, August 2013 – August 2014
President-Elect, August 2012 – August 2013
Secretary, August 2011 – August 2012
Treasurer, August 2010 – August 2011
Board of Directors, 2007-2009; Programs Committee, 2006 – 2014

National Conference Planning Committee, ABA Center for Professional Responsibility

Chair, July 2012 – July 2014
Member, July 2007 – July 2012; July 2014 to June 2015

Firm Counsel Project, ABA Business Law Section—Professional Conduct Committee

Co-Chair, 2006-2008; Coordinator, Seattle Roundtables

## Instructor/Moderator at Seminars/CLEs

- Fees & Fee Agreements (WSBA Office of Disciplinary Counsel Ethics School, Seattle, April 2021, October 2015, April 2013, October 2011 & May 2011; WSBA Readmission Course, February 2011)

- Changes to Lawyer Advertising & Communication Rules Under RPC Title 7: What You Need to Know (WSBA Webcast, April 2021)

- Attorney's Lien Update – Opportunities & Ethical Challenges in Securing & Collecting Fees (Liens: What You Need to Know Today, WSBA, December 2020, December 2018; Seattle; King County Bar Association, November 2019)

**Instructor/Moderator at Seminars/CLEs (continued)**

- Putting the Public in Public Interest: What Do Consumers Want? (Plenary Session Moderator, International Conference on Legal Regulators, Virtual Meeting (Chicago), October 2020)

- Ripped from the Listserv: Joint Representations, Clients Wearing Multiple Hats, & Other Material Limitation Conflicts (Moderator, Association of Professional Responsibility Lawyers, 2020 Mid-Year Meeting, Austin, February 2020)

- Professional Responsibility & the Activities of Non-Lawyers: Unauthorized Practice of Law by Non-Lawyers and Supervision of Non-Lawyers (The Law of NewLaw 2019, Practising Law Institute, San Francisco, October 2019)

- "Less Fast, Less Furious"? Protecting Clients & the Public in an Era of Regulatory Reform (Moderator, Association of Professional Responsibility Lawyers, 2019 Annual Meeting, San Francisco, August 2019)

- Considering the Future of Rule 5.4, ABA National Conference on Professional Responsibility, Vancouver, May 2019

- What Do You Mean I Can't Defend Myself on Yelp? (Moderator, ABA National Conference on Professional Responsibility, Louisville, May 2018)

- It's Not Me, It's You: Ethics Through the Looking Glass (Seattle University School of Law Ethics of Persuasion CLE, Seattle, January 2018)

- Ethics in Estate Planning & Elder Law (Moderator, ABA National Conference on Professional Responsibility, St. Louis, June 2017)

- The Future is Now: Regulatory Barriers, Challenges, & Opportunities in the Delivery of Legal Services by Lawyers (Moderator, Association of Professional Responsibility Lawyers, 2017 Mid-Year Meeting, Miami Beach, February 2017)

- What's New in RPC Title 7? Proposed Changes to Lawyer Advertising Rules—the Regulatory and Constitutional Dimensions (WSBA 14th Annual Law of Lawyering Conference—Day 2, Seattle, December 2016)

- Identifying the Client, & the Collision of Loyalty & Confidentiality Duties When Representing Multiple Clients in a Single Matter (Washington Council of School Attorneys, Seattle, May 2016)

- Where Duties of Client Loyalty & Confidentiality Meet, Do Ethical Duties Collide? Joint Representation in a Single Matter Revisited (Moderator, Association of Professional Responsibility Lawyers, Mid-Year Meeting, San Diego, February 2016)

**Instructor/Moderator at Seminars/CLEs (continued)**

- Ethics of Preparing Witnesses for Deposition: ~~Zealous~~ Conscientious & Ardent Advocacy, Within the Bounds of the Law (WSBA Winning With Discovery: Civil Litigation, Seattle, August 2015)

- Recent Developments, Conflicts of Interest: Everything Old is New Again (Moderator, ABA National Conference on Professional Responsibility, Denver, May 2015)

- Ethical Issues in Advising Stakeholders (WSBA Two Lawyers & a Pot Farmer Walk Into a Bar, Seattle, April 2015)

- Ethics Issues in Real Estate Purchases & Sales (Advanced Commercial Real Estate Purchases & Sales Conference, Law Seminars International, Seattle, April 2015)

- Pushing the Envelope without Ripping it Open: The Ethics of Counseling Clients in Legal Gray Areas (Panelist, 34th Annual WSBA Northwest Securities Institute, Seattle, May 2014)

- The Washington RPCs & "Professionalism": Recent Developments (Annual Ethics Update, Washington Defense Trial Lawyers, Seattle, December 2013)

- Lawyer Fiduciary Duties: Testing the Limits of Client Loyalty & Confidentiality (Moderator, ABA National Conference on Professional Responsibility, San Antonio, May 2013)

- Ethics & the Courtroom (WSBA The Persuasive Trial Attorney, Seattle, October 2012 & December 2011)

- Law Firm Management & Supervision: Where We Are & Where We're Headed (Moderator, ABA National Conference on Professional Responsibility, Boston, June 2012)

- Making Threats to Gain Advantage in Litigation: A Case Study in Ethics, Advocacy & Professionalism (Moderator, Association of Professional Responsibility Lawyers, Mid-Year Meeting, New Orleans, February 2012)

- Current Developments in Legal Ethics (Practising Law Institute's California MCLE Marathon 2011, San Francisco, December 2011)

- Show Me the Money: Retainers & Flat Fees Revisited (Moderator, ABA National Conference on Professional Responsibility, Memphis, June 2011)

**Instructor/Moderator at Seminars/CLEs (continued)**

- Ethics Issues in Securities Practice (31st Annual Northwest Securities Institute, Portland, February 2011)

- Current Developments in Legal Ethics (Practising Law Institute's California MCLE Marathon 2010, San Francisco, December 2010)

- The Importance of Being Earned: Retainers, Advance Fees, & Trust Accounts (Moderator, Association of Professional Responsibility Lawyers, Annual Meeting, San Francisco, August 2010)

- Ethics in Civil Legal Aid Practice: Hot Topics (NLADA Substantive Law, Litigation & Advocacy Directors Conferences, Chicago, July 2010)

- Preparing Lawyers (Effectively) to Prepare Witnesses (Ethically) (Moderator, ABA National Conference on Professional Responsibility, Seattle, June 2010; Web Version, August 2010)

- Latest Issues in Legal Ethics (Practising Law Institute's California MCLE Marathon 2009, San Francisco, December 2009)

- Ethical Issues of Interest to Real Estate Practitioners (WSBA Fall Real Estate Conference, Seattle, December 2009)

- Effective & Ethical Fee Agreements: Client Intake, Disclosure Obligations & Drafting Tips (Co-Moderator, KCBA, Seattle, September 2009)

- Ethics Basics for Business Lawyers (ABA Annual Meeting, Chicago, August 2009)

- Nexus, Perplexus: What are the Limits on Judicial Power to Discipline Lawyers? (Moderator, Association of Professional Responsibility Lawyers, Annual Meeting, Chicago, July 2009)

- Mens Rea Standards in the Law of Lawyering (Moderator, ABA National Conference on Professional Responsibility, Chicago, May 2009)

- Fees, Fee Agreements, & Trust Accounting (WSBA Washington Legal Ethics Deskbook Live: New Rules, New Resources, Seattle, May 2009)

- Ethics & Choice of Law (Moderator, Association of Professional Responsibility Lawyers, Mid-Year Meeting, Boston, February 2009)

- Ethics Hypotheticals (WSBA Law of Lawyering Conference, Seattle, December 2008)

**Instructor/Moderator at Seminars/CLEs (continued)**

- Who's In Charge Here: The Adventures of Ms. Niceperson (Moderator, Association of Professional Responsibility Lawyers, Annual Meeting, New York, August 2008)

- Ethics Issues in Real Estate Purchases & Sales (Real Estate Purchases & Sales, Law Seminars International, Seattle, March 2008)

- Mountains & Molehills in Montana: An In-Depth View (Moderator, Association of Professional Responsibility Lawyers, Mid-Year Meeting, Pasadena, February 2008)

- The New Rules of Professional Conduct (Moderator, WSBA Last Chance Video Roundup, Seattle, December 2007)

- Principled Practice: Non-Conflicts Hypotheticals with Emphasis on 2006 RPC Rule Changes (WSBA Law of Lawyering Conference, Seattle, December 2007)

- Ethics Hypotheticals: A Panel Discussion (Moderator, WSBA The Rules of Professional Conduct: A Year Later, Seattle, September 2007)

- Ethics in Civil Legal Aid Practice: The Basics (NLADA Substantive Law Conference, San Jose, July 2007)

- Are They Just Bad Apples? Ethical Behavior in Organizational Settings (Moderator, Opening Plenary Session, ABA National Conference on Professional Responsibility, Chicago, May 2007)

- General Counsel Trends for In-House Ethics & Risk Management Advisors (Moderator; ABA Business Law Section 2007 Spring Meeting, Washington, D.C., March 2007)

- A Review of the New Rules of Professional Conduct (WSBA/WYLD Young Lawyers Express, Leavenworth, February 2007)

- Beyond Ethics & Discipline: Regulating the Practice of Law Via Consumer Protection & Deceptive Trade Practices Legislation (Association of Professional Responsibility Lawyers, Mid-Year Meeting, Miami, February 2007)

- Conflicts Panel (WSBA New Rules of Professional Conduct, Seattle, September 2006)

- Ethics of Witness Preparation: 2006 Update (WSBA Successful Prosecution in Complex Business Disputes, Seattle, March 2006; WSBA Best of CLE, Seattle, December 2006)

**Instructor/Moderator at Seminars/CLEs (continued)**

- Conflicts Panel (WSBA Law of Lawyer Conference, Seattle, December 2005)

- Ethical Dilemmas for the Practicing Lawyer (Moderator, WSBA, Vancouver, WA, November 2004, 2005)

- Ethics Panel: Keeping Up with the Washington RPCs of Interest to Criminal Law Practitioners (WSBA Criminal Justice Institute, Seattle, September 2005)

- What's It To You?: Standing in Disqualification & Ethics Matters (Moderator, Association of Professional Responsibility Lawyers, Annual Meeting, Chicago, August 2005)

- Zealous Advocacy Within the Bounds of the Law: How Low Can You Go? (ABA National Conference on Professional Responsibility, Chicago, June 2005)

- RPC Committee Update (UW Professional Responsibility Institute, Seattle, December 2004)

- Vicarious Disciplinary & Civil Liability for Acts of Partners, Associates & Staff (Association of Professional Liability Lawyers, Annual Meeting, Atlanta, August 2004)

- Sarbanes-Oxley & the Washington Lawyer (WSBA Environmental & Land Use Law Mid-Year, Eastsound, May 2004; WSBA Best of CLE, Seattle, December 2004)

- Ethics in Real Estate Transactions (WSBA Doing the Deal: Purchase & Sale of Commercial Real Estate, Seattle, April 2002)

**BARNARD IGLITZIN & LAVITT**

**October 31, 2022 - 1:38 PM**

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