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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MARK LITCHFIELD and a class of similarly situated individuals,

Petitioners,

v.

KPMG, LLP,

Respondent.

REVIEW FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE STEVEN C. GONZALEZ

**ANSWER OF MARK LITCHFIELD AND THE PLAINTIFF CLASS
TO AMICUS BRIEF OF
ASS'N OF WASHINGTON BUSINESS**

SMITH GOODFRIEND, P.S.
Catherine W. Smith
WSBA No. 9542
1109 First Avenue, Suite 500
Seattle, WA 98101
(206) 624-0974

BENDICH STOBAUGH
& STRONG, P.C.
Stephen K. Strong
WSBA No. 6299
701 Fifth Avenue, Suite 6550
Seattle WA 98104
(206) 622-3536

Attorneys for Petitioners/Plaintiffs

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I. INTRODUCTION

This is the Answer of Plaintiff Mark Litchfield and the plaintiff class to the amicus brief of the Association of Washington Business (AWB) in support of defendant KPMG. The AWB's brief states KPMG's arguments more clearly than KPMG itself, thereby revealing much more about how these arguments are self-defeating.

II. FACTS

The AWB says it is "*clear that Litchfield was an exempt professional, and the same is true of the class of KPMG Audit Associates he would represent. The record before this Court shows that their primary duty was in the field of accounting and that performance of this duty required knowledge of an advanced type. It is also clear that their work involved the consistent exercise of discretion and judgment.*" AWB Br. 8-9 (emphasis added). AWB has no record citations for these "facts" because the record shows the opposite.

When a client organization is audited by KPMG or another firm, the accuracy of financial statements is checked, among other things. Since the client usually has many thousands of transactions, a senior member of the audit team chooses a

sampling method for each kind of transaction so that, for example, accounts payable transactions are sampled and checked for accuracy. For entry-level audit associates such as Mark Litchfield, this means they receive piles and piles of invoices to check their dollar amounts against the accounts payable ledger. There is no independent judgment or discretion involved. Any discrepancy in the numbers is brought to the attention of a CPA member of the team. CP 164-68.

The audit associates also check the arithmetic in the organization's books, adding up rows and columns with an adding machine to check whether they match the reported totals. Again, there is no independent judgment or discretion. Any arithmetic differences are brought to the attention of a CPA. CP 169-70.

Another typical task for audit associates is to check "controls," such as whether checks over a certain dollar figure that require two signatures actually have the two signatures. CP 170-71. And audit associates check reported inventory totals by going to the warehouse and watching a client employee physically count items in the inventory. CP 172.

All of these routine tasks performed by audit associates are closely supervised by CPAs, usually in the same room. CP 173-75.

Mark Litchfield was paid \$43,000/yr. for this routine work. He was required to work several hundred hours of unpaid overtime. CP 167, 175-76.

KPMG did not materially dispute these facts about the very routine work of audit associates. It mainly quarreled with Mark Litchfield's use of plain English instead of accounting jargon to describe the tasks, saying it "belittled" the profession. CP 1556. And it cited a small number of exceptions to the routine work.¹ Such exceptions do not make a person an exempt professional. WAC 296-128-530(3) and (4); ES.A. 9.5.9.

III. ANSWER

A. **THE AWB'S ARGUMENT FOR A "RIGHT TO RELY" ON AN AGENCY'S INFORMAL "GUIDANCE" IS REFUTED BY ITS OWN SUPREME COURT DECISION IN AWB V. DEP'T OF REVENUE.**

AWB devotes a large part of its brief to an argument for a supposed right of AWB members to "rely on L&I's guidance," e.g., AWB Br. 6-12. AWB actually wants to "rely" on an entirely backwards reading of both that "guidance" and the Department of Labor and Industries' (DLI's) professional exemption regulation on

¹ See Answer of Mark Litchfield and the Plaintiff Class to Society of CPAs amicus brief, p. 17 and n. 5 and, more generally, Answer, *id.*, pp. 11-18.

which the guidance is based. (See pp. 5-10, *infra*.) But leaving its backwards reading aside, AWB's alleged right to "rely" on "guidance" is thoroughly disproven by AWB's own case, *Ass'n of Washington Business v. Dep't of Revenue*, 155 Wn.2d 430, 120 P.3d 46 (2005) (hereafter the "AWB" case).

The AWB contended in its *AWB* litigation that an agency had no authority to issue "interpretive" rules without specific statutory authority to adopt them, *AWB*, 155 Wn.2d at 434, and that having those interpretative rules in the WAC "misled" the public "into believing the rules were binding." *Id.* at 435. The Supreme Court held that agencies could and often should issue interpretive rules, *id.* at 442-45, and, most importantly here, the Court held that they are in no way binding on either the public or the courts. *Id.* at 447.

The Supreme Court said in the *AWB* case why there is no right to "rely" on either interpretive rules or guidance -- only "legislative" rules have the "force of law." *Id.* at 446-47.² Interpretive rules, and, even more so, "guidance" that has not been through the rulemaking process, are merely "advisory" as to what

² AWB says (AWB Br. 5) that DLI's professional exemption rule is a "legislative" rule. WAC 296-128-530. But AWB's "right to rely" argument here is based on informal "guidance," *id.* at 11, 12, not a "legislative" rule. AWB Br. 6-7.

an agency's position would be in a party's dispute with that agency. "They are not binding and are afforded no deference other than the power of persuasion. The public cannot be penalized or sanctioned for breaking them." *AWB*, 155 Wn.2d at 447.

Accordingly, *AWB*'s own case disproves *AWB*'s argument (*AWB* Br. 11) that "AWB members must rely" on L&I's policy guidance interpreting its regulations.

B. AWB'S ARGUMENT THAT PROFESSIONAL LICENSING STATUTES ARE IRRELEVANT TO THE EDUCATIONAL REQUIREMENTS FOR PROFESSIONAL STATUS IS CONTRADICTED BY THE VERY SAME GUIDANCE ON WHICH THE AWB PURPORTS TO "RELY."

AWB devotes the bulk of its brief (*AWB* Br. 1-2, 5-9, 12-18) to arguing that *the Court cannot "determine who is and who is not employed in a bona fide professional capacity" by looking at statutes "that regulate the qualifications and professional practices of that professional."* *AWB* Br. 12 (emphasis added). And it refers to accountants, resident physicians, nurses, and lawyers as part of a "parade of horrors" that supposedly shows how statutory licensing requirements could not apply in determining whether they are professionals. *AWB* Br. 12- 14, 16-18. *AWB* contends that looking at statutory professional qualifications in determining whether a person such as a resident physician is a "bona fide"

professional is “bizarre” (AWB Br. 16) and “absurd” (AWB Br. 17), and that “professional status” must be based “*solely*” on DLI “determinations.” AWB Br. 14 (emphasis on “*solely*” by AWB). *Actually, rather than being “bizarre” to look at licensing statutes, DLI’s guidance specifically refers to the statutory licensing of resident physicians and other professionals (see p. 9, infra).*

AWB tries to make its sole source argument by mischaracterizing plaintiffs’ argument concerning the importance of licensing in determining whether an employee is a “bona fide” professional. AWB wrongly contends that *plaintiffs* would base professional status solely on licensing requirements, not on the DLI’s professional exemption regulation, *e.g.*, AWB Br. 12, 15. This misstates the situation entirely. DLI’s professional exemption neither lists pertinent professions, nor does it state when or how a person qualifies as a professional within any particular profession. WAC 296-128-530. Instead, the regulation only generally describes the *types* of occupations that qualify as professions. *Id.* AWB correctly summarizes the part of the regulation at issue here - - the educational component -- “to qualify for the professional exemption, among other things, the work being performed must require *knowledge of an advanced type in a field of science or*

learning.” WAC 296-128-530(1)(a), (5).” AWB Br. 6 (emphasis added). And, AWB recognizes that “*this advanced knowledge is customarily acquired by a prolonged course of specialized intellectual instruction and study*, as distinguished from a general academic education and from an apprenticeship.” WAC 296-128-530(1)(a).³ AWB Br. 6 (emphasis added).

Accordingly, contrary to what AWB says (Br. 12-18), the courts or DLI do not rely “**solely**” on any DLI list of “determinations” stating which occupations are professions; undoubtedly because that list *does not exist*. And rather than making licensing statutes the sole source on professional status (as AWB pretends that plaintiffs argue, AWB Br. 12-14), DLI *requires* consideration of external sources to determine, “among other things,” whether the job “must require ‘knowledge of an advanced type in a field of science or learning.’” AWB Br. 6. And where does DLI look to find the requirements of “advanced knowledge”? According to DLI’s

³ There is slightly different wording in DLI’s Administrative Policy, ES.A. 9.5.1: “3) Advanced knowledge must be in a field of science or learning and 4) Advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.” (DLI summary of federal regulation, stating the state regulation has “little difference,” *id.*, and that the federal interpretations on this point are followed. ES.A. 9.5.2.)

guidance, ES.A. 9.5,⁴ the requirements are often found in state licensing laws.

For example, ES.A. 9.5.8.1 states with respect to nurses:

8.1 Registered nurses have traditionally been recognized as professional employees. Although, in some cases, the course of study has become shortened, but more concentrated, *nurses who are registered by the appropriate State examining board will continue to be recognized as having met the professional requirement.* (Emphasis added.)

And ES.A. 9.5.8.3 refers to certified teachers:

8.3 Teaching and Related Professions. Teaching, instructing or lecturing with the result of imparting knowledge is work subject to the professional exemption.

The primary duty of an employee as a teacher must be that of activity in the field of teaching. The exemption is also met *if the teacher has satisfied the educational requirements of the Office of Superintendent of Public Instruction and has been granted the right to teach in public or private schools. Mere certification by the State, or employment in a school will not suffice to qualify an individual for exemption if the individual is not in fact both certified and engaged as a teacher.* (Emphasis added.)

This DLI guidance, ES.A. 9.5 -- the same guidance on which AWB says it "must rely" (AWB Br. 11) -- shows that looking at professional licensing statutes is required in the professions where

⁴ DLI Administrative Policy ES.A. 9.5 is found at App. 46 to KPMG's Respondent's and Cross-Appellant's Brief.

the Legislature has determined that the public interest demands codification of the entry educational requirements for a profession. And while AWB says it would be “bizarre” and “absurd” to look at licensing statutes to determine whether resident physicians or lawyers are professionals (AWB Br. 16-17), the guidance in fact refers to precisely these licensed professions:

5. Lawyers, Doctors and Dentists are Exempt Professionals. *An employee who has a valid license to practice law, medicine, including residents and interns, or dentistry and who actually practices in his or her field is an exempt professional regardless if paid on a salary, hourly, or fee basis. If an individual meets these criteria no further analysis is required. If they hold the degree but do not practice within their licensed profession, the appropriate short or long test must be satisfied for the exemption to apply. (Emphasis on “and” is DLI’s; additional emphasis added.)*

ES.A. 9.5.5.

In contrast, with respect to non-licensed professions such as artists and musicians, the guidance says:

8.4 Artistic Professions. This is work that is original and creative in nature, and work that requires invention, imagination, or talent and discriminating skills in a recognized field of endeavor. This is professional work that requires the individual to be original in the particular artistic field and express creative powers to achieve such results. This is distinguished from work that can be produced by a person with general manual or intellectual ability and training. The result of work that is original and

creative in nature depends on and varies according to the intention, imagination and talent of the employee.

ES.A. 9.5.8.4.

With respect to accountants in particular, the guidance says that CPAs are normally exempt, while unlicensed accountants may not be. ES.A. 9.5.8.2. And entry-level junior accountants such as plaintiff Mark Litchfield, who was right out of college and doing the on-the-job training required for licensing,⁵ “are not normally exempt” according to DLI (*id.*):

Accounting clerks, *junior accountants*, and other accountants, on the other hand, *normally perform a great deal of routine work* that is not an essential part of and necessarily incident to any professional work which they may do. *Such accountants are not normally exempt* when the majority of their work is routine work. (Emphasis added.)

Accordingly, DLI’s guidance shows that licensing requirements are normally considered when determining the educational prerequisites of any specific professions for exemption purposes. AWB’s argument that these professional licensing requirements are not at all relevant is directly contrary to the very guidance on which AWB purports to rely.

⁵ See Answer of Mark Litchfield and the Plaintiff Class to Society of CPAs Amicus Brief, pp. 11-18.

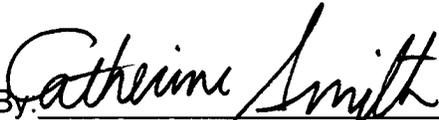
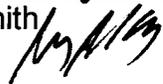
IV. CONCLUSION

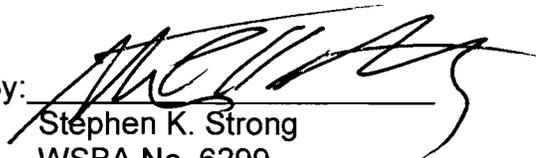
Unlicensed audit associates such as Mark Litchfield and the plaintiff class are not exempt from overtime.

Respectfully submitted this 1st day of August, 2011.

SMITH GOODFRIEND, P.S.

BENDICH STOBAUGH
& STRONG, P.C.

By: 
Catherine W. Smith
WSBA No. 9542 

By: 
Stephen K. Strong
WSBA No. 6299

Attorneys for Petitioners/Plaintiffs

DECLARATION OF SERVICE

I, Monica I. Dragoiu, declare under penalty of perjury that I am over the age of 18 and competent to testify and that the following parties were served as follows:

On Monday, August 1, 2011, I personally delivered a copy of plaintiffs' ANSWER TO *AMICUS BRIEF OF ASSOCIATION OF WASHINGTON BUSINESS* to:

George Greer
Orrick, Herrington & Sutcliffe LLP
701 Fifth Ave, Ste 5600
Seattle, WA 98104
ggreer@orrick.com

Leonard J. Feldman
STOEL RIVES LLP
600 University St, Ste 3600
Seattle, WA 98101
ljfeldman@stoel.com

William Francis Cronin
Barbara J. Kastama
CORR CRONIN MICHELSON BAUMGARDNER &
PREECE LLP
1001 4th Ave, Ste 3900
Seattle, WA 98154
wcronin@corrchronin.com
*Attorneys for Washington Society of Certified Public
Accountants*

Kristopher Ian Tefft – *VIA ABC COURIERS*
Association of Washington Business
1414 Cherry Street SE
Olympia, WA 98507
krist@awb.org
Attorney for Association of Washington Business

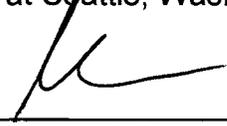
On Monday, August 1, 2011, I further served via email copies of the above-referenced documents to KPMG's out of state co-counsel:

Jennifer Altfeld Landau/Michael C. Kelley
Garrett K. Craig
Sidley Austin LLP
555 West Fifth St, Ste 4000
Los Angeles, CA 90013
jlandau@sidley.com
mkelley@sidley.com
gcraig@sidley.com

Colleen M. Kenney
Sidley Austin LLP
One South Dearborn
Chicago, IL 60603
ckenney@sidley.com

I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: August 1, 2011, at Seattle, Washington.



Monica I. Dragoiu, *Legal Assistant*