

NO. 67013-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MARC YOUNGS,

Petitioner,

v.

PEACEHEALTH, a Washington corporation
d/b/a PEACEHEALTH ST. JOSEPH MEDICAL CENTER
and d/b/a PEACEHEALTH MEDICAL GROUP,

Respondents.

BRIEF OF RESPONDENT

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I. SUMMARY OF ARGUMENT

Plaintiff Marc Youngs seeks to extend *Loudon v. Mhyre*, 110 Wn.2d 675, 756 P.2d 138 (1988), and *Smith v. Orthopedics, Int'l Ltd., P.S.*, 170 Wn.2d 659, 667, 244 P.3d 939 (2010), to prohibit PeaceHealth's defense counsel and risk manager from communicating privately, and on a privileged basis, with any of his treating physicians (except two), even though those treating physicians are hospital employees through whom PeaceHealth provided care to Youngs, and/or are treating physicians whose care Youngs may seek to hold PeaceHealth vicariously liable.¹ The trial court correctly denied Youngs such relief.

To expand *Loudon* and *Smith* as Youngs seeks to do would leave corporate health care providers such as PeaceHealth unable to effectively investigate and defend themselves against claims brought by patients. Corporations, including hospitals, can act only through their employees and agents. Corporations remember, think, prepare, and defend themselves against lawsuits only through their employees and agents. To investigate the case, understand the issues, respond to discovery requests, prepare for depositions, and defend the corporation, defense counsel for

¹ Neither *Loudon*, nor *Smith*, nor any other of *Loudon*'s progeny in Washington has involved "contact" between personal injury defense lawyers and employees of the defense lawyers' clients.

the corporation must be able to speak with those corporate employees and agents who acted on behalf of the corporation and who hold the corporation's knowledge. To require defense counsel's communications with the corporation's employees and agents to take place only in the presence of plaintiff's counsel would deprive the corporation of its attorney-client privilege, and infringe upon the corporation's constitutional due process right to be represented by counsel whose hands are not tied by prohibitions against contact with the only people through whom the corporation can act, think, and remember.

Although Youngs insists that *Loudon* and *Smith* mandate the result he seeks, neither *Loudon* nor *Smith* addressed the extent to which defense counsel for a defendant corporate health provider or its defense counsel could communicate with corporate employees or agents who were involved in plaintiff's care. Neither case involved a corporation's defense counsel's ex parte communication with employees or agents of the defendant corporation. And, although Youngs insists that *Wright* dictates that only speaking or managing agents of a defendant corporation are parties with whom defense counsel may have private privileged communications, *Wright* did not so hold. It held only that speaking or managing agents of a defendant corporation were parties with whom

plaintiff's counsel could not have *ex parte* communications under applicable Rules of Professional Conduct.

The expansion of *Loudon* and *Smith* that Youngs seeks ignores the waiver provisions of RCW 5.60.060(4)(b) which were not applicable in *Loudon* or addressed in *Smith*. The fundamental purpose of the *Loudon* rule is to protect the physician-patient privilege. But RCW 5.60.060(4)(b), which did not apply in *Loudon* and was not addressed in *Smith*, provides that, 90 days after filing a personal injury lawsuit, the plaintiff is deemed to have *waived* the physician-patient privilege, and that

“Waiver of the physician-patient privilege for any one physician or condition constitutes a waiver of the privilege as to ***all*** physicians or conditions . . .” [Emphasis added.]

Because the privilege is a creature of statute, 90 days after he filed suit Youngs had no physician-patient privilege for a court to protect.

Any court-imposed rule against *ex parte* “contact” between attorneys for a corporate health care provider defendant in a personal injury lawsuit and treating physicians employed by such corporate defendant, or for whose care plaintiff may seek to hold defense counsel’s corporate client vicariously liable, must be one that can be harmonized with statutes, *other than* RCW 5.60.060(4), that deal with patient-specific health care information, not to mention the concept of *respondeat superior*. There are two Washington statutes that concern patient-specific

health care information: the Uniform Health Care Information Act, RCW ch. 70.02, and the hospital quality improvement program statute, RCW 70.41.200, both of which allow for disclosure of health care information by PeaceHealth's treating health care employees and agents to PeaceHealth, its attorneys, and its risk manager.

RCW 70.02.050(1)(b) allows PeaceHealth to disclose Youngs' health care information to persons who need the information "to provide . . . quality assurance, peer review, or administrative, legal . . . services" to PeaceHealth. Because PeaceHealth can disclose such information only through its employees and agents, the kind of expansion of *Loudon* and *Smith* Youngs seeks cannot be harmonized with RCW 70.02.050(1)(b).²

RCW 70.41.200(1) requires all Washington hospitals to have a comprehensive and continuous "quality improvement" program "for the improvement of the quality of health care services rendered to patients and the identification and prevention of medical malpractice," which includes, among other things, both retrospective and prospective review of the services rendered in the hospital, and the "maintenance and continuous

² Nor can it be harmonized with federal health care privacy, Health Care Quality Improvement Act (HIPAA) regulations, 45 C.F.R. § 164.506(a) and (c), which also allow health care providers to disclose a patient's confidential health care information to their lawyers, without the patient's knowledge or consent.

collection of information concerning the hospital's experience with negative health care outcomes and incidents injurious to patients” Allowing Youngs (who, by suing, has waived his physician-patient privilege as to “all physicians or conditions”) to dictate which of PeaceHealth’s employees or agents its risk manager and defense lawyers may speak to without his lawyers present conflicts with RCW 70.41.200(1).

For all these reasons, the trial court properly granted reconsideration, denied Youngs’ motion for protective order, and ruled that “counsel for PeaceHealth may have ex parte contact with PeaceHealth employees who provided health care to plaintiff Marc Youngs.” CP 9, 12.

II. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did RCW 5.60.060(4)(b) establish a public policy that superseded the rule of *Loudon*, the fundamental purpose of which, according to *Smith*, is “to protect the physician-patient privilege” created by that statute?

2. Even if the *Loudon* rule was not displaced by RCW 5.60.060(4)(b), is it appropriate to extend the rule to prohibit “contact” between defense counsel for a defendant hospital corporation and those treating physicians who are employed by the defendant hospital corporation and through whom it provided health care to the plaintiff,

and/or who are physicians for whose care plaintiff may seek to hold the defendant hospital corporation vicariously liable?

3. Can the protective order Young seeks prohibiting *ex parte* contact with PeaceHealth's employee treating physicians be harmonized with other statutes that address the type of communications that his proposed order would prohibit, such as RCW 70.02.050(1)(b) and RCW 70.41.200(1)?

4. Would expanding *Loudon* and *Smith* as Youngs proposes deprive hospitals sued for personal injuries of their attorney-client privilege and their constitutional right to due process of law under U.S. Const. amend. V and/or Const. art. I § 3?

5. Was Youngs, because of his own discovery requests and/or responses, properly denied an order prohibiting PeaceHealth's defense lawyers and risk managers from communicating *ex parte* with those of Youngs' treating physicians who are PeaceHealth employees and/or whose care Youngs may seek to hold PeaceHealth vicariously liable?

III. COUNTERSTATEMENT OF THE CASE

A. Plaintiff's Complaint Against PeaceHealth.

Marc Youngs brought this medical malpractice action against PeaceHealth, which operates St. Joseph Medical Center in Bellingham, and "unknown John Does" seeking damages for allegedly negligent post-

operative care he received during his hospitalization at St. Joseph from December 23, 2008 to January 9, 2009. CP 212-14. PeaceHealth was the only defendant named in Youngs' complaint. CP 212 (caption). Youngs alleged that, during his hospitalization at St. Joseph, he "received medical care from the nursing staff, agents and employees" of "PeaceHealth St. Joseph Medical Center," CP 213, ¶ 4.4, and that the nurses and staff that cared for him, as well as Dr. Donald Berry and Dr. Richard Leone who also provided health care to him, were all employees and/or agents of PeaceHealth, CP 213, ¶¶ 4.1-4.3.

Youngs further alleged that PeaceHealth, "through its agents and employees, violated RCW 7.70.010 et seq. and were negligent in the care they provided" to him. CP 214, ¶¶ 5.1. He also alleged that PeaceHealth is liable under the "Doctrine of Corporate Negligence," under the "Doctrine of Respondeat Superior," under the "Doctrine of Res Ipsa Loquitur," and "for failure to obtain an informed consent."³ CP 214,

³ Hospitals, however, absent extraordinary circumstances, have no duty to obtain informed consent. *Howell v. Spokane & Inland Empire Blood Bank*, 114 Wn.2d 42, 56, 785 P.2d 815 (1990) ("Outside an extraordinary situation, the hospital staff is not under a duty to secure an informed consent from the patient. Such a cause of action is more properly brought against the physician . . ."); *Alexander v. Gosner*, 42 Wn. App. 234, 239, 711 P.2d 347 (1985), *rev. denied*, 105 Wn.2d 1017 (1986) ("Any duty to inform Mrs. Alexander of the test results would have been that of her privately retained physician, not the hospital or its personnel. To hold a hospital or its employees have a duty to intervene in the independent physician/patient relationship, unless the hospital is aware of circumstances more extraordinary than those in the record before this court, would be far more disruptive than beneficial to a patient"). Because Youngs has not

¶¶ 5.2-5.5. Although specifically identified in the body of the complaint as treating physicians, CP 213, ¶¶ 4.2-4.3, Drs. Berry and Leone were not named as defendants, *see* CP 212 (caption). Nor has Youngs limited his vicarious liability claims against PeaceHealth to just the care provided by Drs. Berry and Leone. *See* CP 212-214; *see also* CP 136-38.

PeaceHealth employs many physicians (not just Drs. Berry and Leone) who cared for Mr. Youngs during his hospitalization at St. Joseph.⁴ CP 205, ¶ 2. PeaceHealth also employs all of the nurses, respiratory therapists and certified nurse assistants who provided care to Youngs during his hospitalization at St. Joseph. CP 206, ¶ 3. Moreover, PeaceHealth has a contractual obligation to defend its employed physicians and nurses in legal actions for care provided within the scope of their employment at PeaceHealth. CP 206, ¶ 4. And, if PeaceHealth pays a monetary settlement or judgment based on an allegation of medical negligence on the part of one or more of its employed physicians, PeaceHealth must report it to the Washington State Department of Health,

alleged any extraordinary circumstances giving rise to an independent duty on the part of PeaceHealth (or St. Joseph) to obtain his informed consent, Youngs presumably seeks to hold PeaceHealth vicariously liable for the failure of one or more physicians, as Peace Health's agent or employee, to obtain informed consent.

⁴ In addition to Drs. Berry and Leone, PeaceHealth also employs Dr. Stuart Thorson, Dr. Kevin Lam and Dr. Michelle Sohn, CP 205, ¶ 2, 209 ¶ 7, all of whom were involved in Youngs' care at St. Joseph, *see* CP 216-28. These five physicians are not an exclusive list of the PeaceHealth employees who provided care to Mr. Youngs. CP 209, ¶ 7.

whether or not the physician was named as a defendant in the case. CP 206, ¶ 5. Such reporting normally results in the Department of Health conducting its own separate investigation of, and the generation of permanent record for, the physician(s) involved. CP 206, ¶ 5.

B. Plaintiff's Motion for A Protective Order.

After this lawsuit was filed, Youngs' counsel notified PeaceHealth's defense counsel of his request that counsel for Youngs be present for any all meetings that defense counsel might have with any PeaceHealth employees (other than Drs. Leone and Berry) who provided care to Youngs during his hospitalization at St. Joseph. CP 209, ¶ 4; *see also* CP 248-49, ¶ 2. When defense counsel would not accede to that request, as it would frustrate PeaceHealth's and defense counsel's ability to investigate the case, respond to discovery, and prepare PeaceHealth's defense, *see* CP 209, ¶¶ 5, 8; *see also* CP 248-49, ¶¶ 2-3, Youngs moved for a protective order to prohibit PeaceHealth's defense counsel from having "*ex parte* contact, directly or indirectly, with any of plaintiff Marc Young's treating health care providers, with the exception of Dr. Richard Leone, and Dr. Donald Berry."⁵ CP 251. In his proposed order, Youngs sought to extend

⁵ Neither in his motion for protective order, CP 251-59, nor in his reply on that motion, CP 195-99, nor in his opposition to PeaceHealth's motion for reconsideration, CP 141-52, nor at any other time, has Youngs limited his *respondeat superior* claims against PeaceHealth to claims based upon alleged negligence of Drs. Leone and Berry.

the prohibition on *ex parte* contact to PeaceHealth's risk manager as well. CP 246; *see* CP 193.

In his motion, Youngs argued, as he does on appeal, that (1) the prohibition against defense counsel having *ex parte* contact with plaintiff's nonparty treating physicians articulated in *Loudon v. Mhyre*, 110 Wn.2d 675, 756 P.2d 138 (1988), and *Smith v. Orthopedics Int'l Ltd., P.S.*, 170 Wn.2d 659, 667, 244 P.3d 939 (2010), prohibits even *ex parte* contact between defense counsel and nonparty treating physicians employed by a corporate defendant such as PeaceHealth; and (2) only managing or speaking agents of a corporate entity such as PeaceHealth could be considered "parties" for purposes of litigation under *Wright v. Group Health Hosp.*, 103 Wn.2d 192, 691 P.2d 564 (1984), and thus, unless PeaceHealth were willing to designate a treating health care provider, other than Dr. Leone or Dr. Berry, as a managing or speaking agent, PeaceHealth's defense counsel could not communicate privately with that nonparty treating health care provider.⁶ CP 251-59 (motion); *see also* CP

⁶ Although the motion was styled as a one for an order prohibiting *ex parte* contact with Youngs' treating "health care providers" – a term broader than "physicians" and broad enough to include nurses and other professionals with whom Youngs' communications would be privileged unless waived, CP 251, the protective order Youngs proposed and the trial court entered prohibited contact by PeaceHealth's defense counsel and risk manager "with any of plaintiff Marc Youngs' treating *physicians* other than Dr. Richard Leone and Dr. Donald Berry." CP 192-93, 245-46 (emphasis added). In his opening brief on appeal, Youngs does not indicate whether he takes the position that *Loudon*

195-99 (reply). Although PeaceHealth had not agreed that Drs. Leone and Berry were managing or speaking agents, Youngs' counsel apparently decided they were and had no objection to PeaceHealth's defense counsel talking with them *ex parte*. Compare RP 6:18-23 with RP 10:14-23.

PeaceHealth opposed Youngs' motion for protective order, pointing out, among other things, that (1) PeaceHealth can act only through its employees and agents; (2) it and its defense counsel must be able to communicate directly and privately with PeaceHealth's employees to investigate Youngs' claims and prepare PeaceHealth's defense; (3) PeaceHealth has a constitutional right to hire counsel to represent it in civil litigation; and (4) prohibiting PeaceHealth's defense counsel and risk manager from communicating with PeaceHealth employees involved in Youngs' care except in the presence of Young's counsel would infringe upon PeaceHealth's attorney-client privilege. CP 209-40. PeaceHealth further pointed out that neither *Loudon* nor *Smith* prohibited *ex parte* contact and communication between a corporate defendant, or its attorneys, and the corporation's own employees who provided health care to the plaintiff, and that *Wright* had nothing to do with the right of a corporate defendant and its attorneys to have privileged, private

applies to non-physicians, such as nurses, with whom his communications are privileged. See RCW 5.62.020 and .030.

communications with the defendant corporation's own employees who provided care to the plaintiff. CP 240-42.

The trial court heard oral argument on February 11, 2011, RP 4-22, and granted the motion for protective order. RP 22; CP 192-93, 194. The trial court ordered that: "Defense counsel and the defendant's risk manager are prohibited from *ex parte* contact, directly or indirectly, with any of Marc Youngs' treating physicians other than Dr. Richard Leone and Dr. Donald Berry." CP 193.

C. PeaceHealth's Motion for Reconsideration.

PeaceHealth timely moved for reconsideration. CP 180-91. In its motion for reconsideration, PeaceHealth explained why *Wright* has no bearing on the issue of whom PeaceHealth and its counsel (as opposed to plaintiff's counsel) may contact and interview *ex parte*, and why neither *Wright* nor *Loudon* and *Smith* should be read to enable a plaintiff, by choosing to name as a defendant only a corporate health care provider, to interfere with defense counsel's ability to defend its corporate health care provider client, which can only act, think, confide in counsel, defend itself, settle, or litigate through its employees and agents. CP 182-86.

PeaceHealth further explained how the trial court's protective order conflicted and interfered with PeaceHealth's quality improvement obligations under RCW 70.41.200 and was contrary to RCW

70.02.050(1)(b). CP 187-89. And, PeaceHealth explained how the trial court's order infringed on its due process right to counsel. CP 189-91.

Youngs opposed the motion for reconsideration, CP 141-52, again asserting that *Loudon* and *Smith* precluded any *ex parte* contact between defense counsel and Young's nonparty treating physicians, and that *Wright* answers the question of who is a party and says that only managing or speaking agents are parties. CP 141-48. Youngs also argued that the trial court's order did not conflict or interfere with RCW 70.02.050 or RCW 70.41.200. CP 148-52.

In the meantime, Youngs served a CR 30(b)(6) deposition notice on PeaceHealth, demanding that PeaceHealth produce for deposition the employee most knowledgeable about its policies for several medical specialties, including pulmonology, surgery, and critical care. CP 106, ¶ 3, 108-09. Youngs also propounded interrogatories to PeaceHealth, asking it to identify any and all witnesses it believes has knowledge of facts pertaining to the action or Youngs' alleged injuries and the factual information of which each such witness is aware, CP 119 (Interrogatory No. 8), and to identify and describe the contents of any "record, ghost file, lab report/lab slip, and/or any other document" not previously produced relating to Youngs' care, claimed damages, or claimed injuries, "prior to

and subsequent to his hospitalization,” CP 119 (Interrogatory No. 7)⁷ Moreover, Youngs provided answers to interrogatories PeaceHealth had propounded to him indicating that his claims against PeaceHealth implicated the care of several health care providers employed by PeaceHealth, not just the care provided by Drs. Leone and Berry. CP 106, ¶ 5, 125 (Interrogatory No. 5), 136-38 (Interrogatory No. 21).

In reply on its motion for reconsideration, PeaceHealth not only reiterated that plaintiff’s arguments were premised on a misapplication of *Wright* and an unjustified extrapolation of *Loudon* and *Smith*, CP ____ (Defendant PeaceHealth’s Reply Re: Motion for Reconsideration at 1-4),⁸ but also that PeaceHealth could not reasonably respond to Youngs’ CR 30(b)(6) notice or certain of his other discovery requests when its counsel could not communicate, directly or indirectly, with treating physicians in PeaceHealth’s employ, other than Drs. Leone and Berry, who might have responsive information. CP ____ (PeaceHealth’s Reply at 4-5). PeaceHealth also noted that Youngs’ answers to interrogatories suggested

⁷ Neither of those requests excluded information or documents held by Youngs’ treating physicians with whom the protective order precluded PeaceHealth’s defense counsel and risk manager from communicating privately.

⁸ On October 5, 2011, the parties to this appeal entered into a “Stipulation Re Filing of Defendant PeaceHealth’s Reply Regarding Motion for Reconsideration” in order to get the reply, which was missing from the trial court’s docket, into the court file and made a part of the record on appeal. On October 6, 2011, PeaceHealth designated the Stipulation and the copy of PeaceHealth’s Reply attached thereto as Clerk’s Papers, but no index showing the assigned CP numbers has yet been received.

that he might offer expert testimony critical of care provided by treating physicians employed by PeaceHealth other than Drs. Leone and Berry, yet the trial court's protective order unfairly precluded defense counsel from communicating with those other employed physicians even though Youngs might attempt to hold PeaceHealth vicariously liable for their care. CP ____ (PeaceHealth's Reply at 5). Moreover, PeaceHealth noted that the trial court's order was in conflict with amendments to RCW 5.60.060(4), which were not applicable in *Loudon*, or addressed in *Smith*, which make clear not only that the physician-patient privilege is waived ninety days after filing a personal injury or wrongful death action, but also that "[w]aiver of the physician-patient privilege for any one physician or condition constitutes a waiver of the privilege as to all physicians or conditions, subject to such limitations as a court may impose pursuant to court rules." CP ____ (PeaceHealth's Reply at 3-4).

The trial court heard oral argument on PeaceHealth's motion for reconsideration on March 18, 2011, and reserved ruling. RP 23-46; CP 102. On March 25, 2011, the trial court entered its order on the motion for reconsideration, CP 8-9, 62-63, which stated:

It is Ordered that Defendant's Peace Health's Motion for Reconsideration is GRANTED.

Plaintiff's Motion for Protective Order Prohibiting Ex Parte Contact with Plaintiff's Treating Health Care

Providers is DENIED, and counsel for PeaceHealth may have ex parte contact with PeaceHealth employees who provided health care to plaintiff Marc Youngs.

CP 9, 63.

D. Youngs' Appeal.

Youngs moved to certify the order for discretionary review under RAP 2.3(b)(4). CP 49. PeaceHealth did not oppose that motion, *see* CP 14-15, but presented an Amended Order Granting Defendant PeaceHealth's Motion for Reconsideration which listed all of the documents the trial court had considered, CP 16-18. After hearing argument, the trial court granted the motion for certification, CP 5, and entered the proposed amended order granting the motion for reconsideration, CP 5, 11-12.

Youngs moved for discretionary review under RAP 2.3(b)(2) and (b)(4). The Court of Appeals Commissioner granted discretionary review under RAP 2.3(b)(4).

IV. STANDARD OF REVIEW

Generally, the grant or denial of a protective order is reviewed for abuse of discretion. *E.g., In re Disciplinary Proceeding Against Sanai*, 167 Wn.2d 740, 753, 225 P.3d 203 (2009) (grant); *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 423, 138 P.3d 1053 (2006) (denial); *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 796, 819 P.2d 370 (1991) (grant).

An appellate court will find an abuse of discretion only “on a clear showing” that the court's exercise of discretion was “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A trial court’s discretionary decision “is based ‘on untenable grounds’ or made ‘for untenable reasons’ if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)).

T.S., 157 Wn.2d at 423-24.

Questions of how to interpret a statute and how to reconcile statutes present issues of law subject to de novo review, e.g., *Whatcom County Fire Dist. No. 21 v. Whatcom County*, 171 Wn.2d 421, 427, 256 P.3d 295 (2011); *Am. Legion Post No. 149 v. Dep’t of Health*, 164 Wn.2d 570, 616, 192 P.3d 306 (2008), as do questions concerning what a constitutional provision allows or prohibits, e.g., *Optimer Int’l, Inc. v. RP Bellevue, LLC*, 170 Wn.2d 768, 771, 246 P.3d 785 (2011).

A trial court ruling may be affirmed on any ground supported by the record, *Estep v. Hamilton*, 148 Wn. App. 246, 255, 201 P.3d 331 (2008), *rev. denied*, 166 Wn.2d 1027 (2009) (citing *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989)), even if the court did not consider it, *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986) (citing *Reed v. Streib*, 65 Wn.2d 700, 709, 399 P.2d 338 (1965)).

V. ARGUMENT

A. PeaceHealth, and Its Defense Counsel and Risk Manager, Have a Right to Communicate *Ex Parte* with PeaceHealth's Own Employees and Agents Through Whom PeaceHealth Provided Care to Youngs and Who Hold PeaceHealth's Knowledge.

Corporations, including hospitals, can act only through their officers, employees and agents. *See* WPI (Civ.) 50.18 (“A corporation can act only through its officers and employees. Any act or omission of an officer or employee is the act or omission of the corporation”); WPI (Civ.) 105.02.01 (“A [hospital] corporation can act only through its officers, employees, and agents. Any act or omission of an officer, employee, or agent is the act or omission of the hospital corporation”); *Biomed Comm., Inc. v. State Dep't of Health Bd. of Pharm.*, 146 Wn. App. 929, 934, 193 P.3d 1093 (2008) (“a corporation can act only through its agents”). Indeed, Youngs acknowledged as much when he brought this lawsuit against PeaceHealth, alleging that PeaceHealth, “through its agents or employees, violated RCW 7.70.010 et seq. and were negligent in the care they provided to plaintiff Marc Youngs.” CP 214, ¶ 5.1.

Because corporations, including hospitals, can act only through their officers, employees, and agents, it is only through their officers, employees, and agents that corporations can remember, think, prepare, and defend themselves against lawsuits. Thus, in order for a corporation such as PeaceHealth to investigate and defend against a claim by a plaintiff

such as Youngs, or even determine what it knows about a particular case, it must be permitted to communicate directly and privately with its own employees and agents who may have knowledge about the care that was provided and the issues in the case. “The importance of a corporation being able to speak to its agents and employees is no less of a concern . . . for instance when a hospital is being sued for its ‘universe’ of care, as we have here.” *Estate of Stephens v. Galen Health Care, Inc.*, 911 So.2d 277, 281 (Fla. 2d Dist. Ct. App. 2005).

Other jurisdictions that have considered the issue have recognized that, while patients have a right to confidentiality of their health care information, “there is a competing interest that employers be permitted to discuss a pending lawsuit with [their] employees.” *Lee Memorial Health System v. Smith*, 40 So.3d 106, 108 (Fla. 2d Dist. Ct. App. 2010). Thus, courts in several other jurisdictions have concluded that communications of confidential information between corporate health care providers, their attorneys, and their employees are not disclosures of health care information violative of the physician-patient privilege,⁹ and institutional

⁹ Moreover, such disclosures are expressly permitted under Washington law. Under RCW 70.02.050(1)(b), PeaceHealth and its employee health care providers “may disclose health care information about a patient without the patient’s authorization to the extent a recipient needs to know the information, if the disclosure is . . . to any other person who requires health care information . . . to provide . . . legal . . . services to, or . . . on behalf of the health care provider or health care facility”

health care providers and their counsel have a right to conduct ex parte interviews with the institutional health care provider's agents and employees.

[W]hen a patient reveals confidential information to a health care provider who is employed by or is an agent of a hospital corporation, a doctor is not disclosing that information in violation of a doctor/patient privilege by discussing the patient information with the hospital's risk manager, for example.

Estate of Stephens, 911 So.2d at 282; see also *Lee*, 40 So.3d at 108 (“no ‘disclosure’ occurs when a hospital and its employees discuss information obtained in the course of employment”); *Public Health Trust of Dade County v. Franklin*, 693 So.2d 1043, 1045 (Fl. 3d. Dist. Ct. App. 1997) (“the hospital as an institutional health care provider has a right to conduct ex parte interviews with its own agents or employees for whom it might be vicariously liable”); *White v. Behlke*, 65 Pa. D. & C. 4th 479, 490 (Pa. Ct. Com. Pl. 2004) (“In defending a medical negligence claim, defense counsel obviously must be permitted to confer privately with the attorney’s client or the actual or ostensible employees of the client who were involved with the plaintiff’s care and treatment which are the subject of the suit”). As explained in *Estate of Stephens*, 911 So.2d at 282:

The corporate entities have no knowledge in and of themselves. They can act only through their employees and agents and should be able to speak to those employees to discuss a pending lawsuit. The [corporate entities’]

attorneys should also be able to speak with the [corporate entities'] employees and agents as the corporate entities are able to function only through them.

B. Prohibiting PeaceHealth's Defense Counsel and Risk Manager from Having Ex Parte Privileged Communications with PeaceHealth's Own Employees and Agents Would Violate PeaceHealth's Due Process Rights.

A civil litigant has “a constitutional right, deriving from due process, to retain hired counsel in a civil case.” *Gray v. New England Tel. and Tel. Co.*, 792 F.2d 251, 257 (1st Cir. 1986); accord *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1117-18 (5th Cir. 1980), cert. denied, 449 U.S. 820 (1980) (“A civil litigant’s right to retain counsel is rooted in fifth amendment notions of due process”).¹⁰ PeaceHealth, like any other litigant, is entitled to retain and employ counsel because a “corporation is a ‘person’ within the meaning of the equal protection and due process of law clauses.” *American Legion Post #149 v. Washington State Dept. of Health*, 164 Wn.2d 570, 594, 192 P.3d 306 (2008) (citing *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244, 56 S. Ct. 444, 80 L. Ed. 660 (1936)).

The due process right to be represented by counsel necessarily means, for a corporate litigant, the right to be represented by counsel whose hands are not tied by prohibitions against contact with the only

¹⁰ The Washington Supreme Court has never held the protections of the due process clause of Const. art. I § 3 to be anything other than coextensive with the protections afforded by U.S. Const. Amend. V. See, e.g., *Bellevue Sch. Dist. v. E.S.*, 171 Wn.2d 695, 714, 257 P.3d 570 (2011).

people through whom a corporation can act, *i.e.*, its employees. *See Luce v. State of New York*, 697 N.Y.S.2d 806 (1999) (reversing order prohibiting counsel for defendant state to confer privately with treating physicians of plaintiff that were defendant state's employees); *Galarza v. United States*, 179 F.R.D. 291, 294-95 (S.D. Cal. 1998) (denying medical malpractice plaintiff's motion to prohibit *ex parte* communication by defense counsel with her treating physicians who were federal employees, because to do so would "intervene in discussions with the United States and its employees and agents who are necessary to the preparation and defense of the United States," and "would severely and unfairly limit the government's ability to defend itself," and acknowledging that "[t]he Government . . . lives or dies by the acts of its employees" and the government's attorney "needs full and frank disclosure by the employee/physician in order to properly give sound legal advice to the United States" and be "fully informed of all that relates to the matter to represent the United States with any effectiveness").¹¹

¹¹ *See also Estate of Stephens*, 911 So.2d at 281 ("The importance of a corporation being able to speak to its agents and employees is no less of a concern . . . when a hospital is being sued for its 'universe' of care"); *Public Health Trust of Dade County*, 693 So.2d at 1045 ("the hospital as an institutional health care provider has a right to conduct *ex parte* interviews with its own agents and employees for whom it might be vicariously liable"); *White*, 65 Pa. D. & C. 4th at 490 ("In defending a medical negligence claim, defense counsel obviously must be permitted to confer privately with the attorney's client or the actual or ostensible employees of the client who were involved with the plaintiff's care and treatment which are the subject of the suit").

The confidential consultation, communication, and preparation between a litigant – including a corporate defendant – and its counsel is part and parcel of the confidential attorney-client relationship required by the Rules of Professional Conduct. When the defendant is a corporation, the investigation conducted by the corporation’s counsel must, by definition include private communications with the corporations’ employees and agents, because the client cannot act or convey relevant information except through its employees and agents. “An organizational client . . . cannot act except through its officers, directors, employees, shareholders, and other constituents.” RPC 1.13 (2008) at Comment 1. Therefore, “a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents,” including its employees. RPC 1.13(a) and Comment 1.

Moreover, communications between lawyers retained by an organization and the organization’s employees or other constituents are protected by the attorney-client privilege.¹² RPC 1.6 provides that information disclosed to attorney shall be confidential, and RPC 1.13 at Comment 2 makes clear that:

¹² RCW 5.60.060(2)(a) provides that: “An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.”

When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6.

Thus, had the trial court prohibited PeaceHealth, or its defense counsel and risk manager, from communicating privately on a privileged basis in this case with PeaceHealth's employees or agents involved Youngs' care, the trial court would have eviscerated PeaceHealth's attorney-client privilege and deprived PeaceHealth of its constitutional right to due process of law.

C. Neither Loudon Nor Smith Required the Trial Court to Prohibit Defense Counsel or the Risk Manager for PeaceHealth from Obtaining Information on a Privileged Basis from the PeaceHealth's Employees and Agents Through Whom It Provided Health Care to Youngs.

Youngs asserts that the trial court's order allowing PeaceHealth's defense counsel to engage in ex parte contact with treating physicians employed by PeaceHealth somehow conflicts with *Loudon* and *Smith*. He asserts that *Loudon* and *Smith* prohibit defense counsel's ex parte contact with any treating physician who is a "nonparty" to the litigation.

But, neither *Loudon* nor *Smith* involved or addressed ex parte "contact" between personal injury defense lawyers and persons for whose conduct the plaintiffs were seeking to hold corporate defendants

vicariously liable. Nor did either of these cases hold that treating physicians who were not named as individual defendants, but who were employed by a named corporate defendant health care provider, were not clients for purposes of the corporation's attorney-client privilege with whom its counsel could meet privately and confidentially.

In both *Loudon* and *Smith*, the treating physicians with whom *ex parte* "contact" was at issue were treating physicians who were wholly independent of the defense lawyers' clients. They were not a corporate health care provider defendant's employees or agents, or even partners of an individual health care provider defendant.

In this case, Youngs has alleged, in general terms, that all the providers from whom he received health care during his hospitalization at St. Joseph were employees or agents of PeaceHealth for whose care PeaceHealth is liable under *respondeat superior*. See CP 213-214, ¶¶ 4.1, 4.4, 5.1, and 5.3. Youngs' answers to PeaceHealth's interrogatories indicate that he may offer against PeaceHealth expert testimony critical of care provided by physicians who provided care to him at St. Joseph, other than Drs. Leone and Berry with whom he agrees defense counsel may have *ex parte* contact. CP 85 (Interrogatory No. 5), 96 (Interrogatory No. 21). And, although Youngs has not sought to prohibit PeaceHealth's defense lawyers and risk manager from having *ex parte* contact with Drs.

Leone and Berry, he has not waived the right to seek to hold PeaceHealth vicariously liable for acts or omissions of other of Youngs' treating physicians or other health care providers who are employees or agents of PeaceHealth.

Although it is one thing to prohibit a defense lawyer from having *ex parte* "contact" with a doctor or other provider who is unrelated to the lawyer's client, it is quite another to prohibit such contact when the doctor or other provider is the client's employee or agent, or someone for whose care the plaintiff may seek to hold the client vicariously liable. *See* cases discussed in Sections V. A. and V. B., *supra*. Neither *Loudon* nor *Smith* addressed the issue of the extent to which defense counsel for a corporate defendant could communicate with privately and confidentially with the corporate defendant's employees and agents, much less prohibited defense counsel or risk managers for a corporate defendant health care provider from having privileged *ex parte* communications with the corporate defendant's employees and agents.

D. Contrary to Young's Assertions, *Wright* Is Neither On Point Nor Instructive.

Youngs claims, *App. Br. at 11*, that *Wright v. Group Health Hosp.*, 103 Wn.2d 192, 691 P.2d 564 (1984) answers the question of "who is a party when a corporation is a defendant," such that only those treating

physician employees who are managing or speaking agents for PeaceHealth are “parties” with whom it’s defense counsel and risk manager may have *ex parte* privileged communications unless (as in the case of Drs. Leone and Berry) Youngs consents. Youngs’ reliance on *Wright* is misplaced.

Wright holds only that some of a corporate defendant’s employees are off limits to contact by a *plaintiff’s* lawyer under what is now RPC 4.2 (which prohibits a lawyer from having communication with a “party” he or she knows is represented by counsel in a matter). Under *Wright*, if a corporate defendant’s employee has “speaking authority,” he or she is off limits to the plaintiff’s lawyer’s informal contacts; if the employee lacks such “speaking authority,” it is not unethical for a plaintiff’s lawyer to contact and seek information from the employee “*ex parte*.”

That is all *Wright* stands for. *Wright* has nothing to say (and implies nothing) about whom the *corporation’s* lawyer may or may not contact “*ex parte*.” Nothing in *Wright* suggests that a corporate defendant’s lawyer must refrain from “*ex parte*” interviews of corporate employees who are low enough in the chain of command to be fair game for the plaintiff’s lawyer to contact.¹³ Indeed, the *Wright* court took pains

¹³ It may be that, under *Wright*, the plaintiff’s lawyer can contact “*ex parte*” a treating provider who is employed by the hospital or other corporation the plaintiff’s lawyer’s

to acknowledge that a corporate employee could be the corporate lawyer's "client" for purposes of the corporation's attorney-client privilege even if that employee was not managerial enough to qualify as a "speaking agent" or "party" for purposes of the ethical rule prohibiting the *plaintiff's* lawyer from trying to interview privately a party represented by counsel.

To the extent that the *Wright* court considered any issue similar to one in *this* case, *i.e.*, application of the *attorney-client* privilege to low-level employees of a corporation, the court expressly recognized that the proper rule is that of *United States v. Upjohn Co.*, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981). *Wright*, 103 Wn.2d at 194-95. The issue in *Upjohn* was whether the attorney-client privilege extends to communications between the attorney for a corporation and the corporation's lower-level employees who have knowledge of facts relevant to an investigation being conducted by corporate counsel in order to advise the corporation. *Upjohn*, 449 U.S. at 386. The corporate employees at issue were neither managers of, nor "speaking" agents for, the corporation, nor were they named defendants in litigation. The court concluded that corporate counsel's communications with them were

client is suing if the treating provider is not also an employee of the defendant corporation with "speaking authority," but that is not at all the same as saying the *corporation's* lawyer *cannot* have "ex parte" contact with that employee even though he or she is the corporation's employee.

protected by the attorney-client privilege because limiting the privilege to communications between counsel and a corporation's speaking/managing agents would "frustrate[] the very purpose of the [attorney-client] privilege by discouraging the communication of relevant information by employees of the client [the corporation] to attorneys seeking to render legal advice to the client corporation." *Upjohn*, 449 U.S. at 392.

In the case of the individual client the provider of information and the person who acts on the lawyer's advice are one and the same. In the corporate context, however, it will frequently be employees beyond the control group as defined by the court below – "officers and agents . . . responsible for directing [the company's] actions in response to legal advice" – who will possess the information needed by the corporation's lawyers. Middle-level – and indeed lower-level – employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.

Upjohn, 449 U.S. at 391.

Significantly, although *Upjohn's* "flexible" client test was not applied in *Wright* because the factual context was different and because of policy concerns, the court took pains to note that the *Upjohn* rule would be appropriate for situations precisely like the situation this case presents:

While Group Health is correct in noting that both the attorney-client privilege and the disciplinary rules share the mutual goals of "furthering the attorney-client relationship", the *policies* represented by these two rules

are different. In enunciating a flexible “control group” test, the *Upjohn* Court was expanding the definition of “clients” so the laudable goals of the attorney-client privilege would be applicable to a greater number of corporate employees. The purpose of the disciplinary rule, on the other hand, is to protect the corporation so its agents who have the authority to prejudice the entity’s interest are not unethically influenced by adverse counsel. Thus, the purpose of the managing-speaking agent test is to determine who has the *authority* to bind the corporation. . . . The policy reasons necessitating the “flexible” test in *Upjohn* are not present here. A corporate employee who is a “client” under the attorney-client privilege is not necessarily a “party” for purposes of the disciplinary rule [and thus someone who counsel for a party adverse to the corporation is prohibited from contacting *ex parte*].

Wright, 103 Wn.2d at 201-02.

To accept Youngs’ proposed distortion of *Wright* and apply it in this case would be antithetical to our adversary system of civil litigation, because it would vest in counsel for plaintiffs in personal injury lawsuits against corporate health care providers the power to dictate the extent to which lawyers for such defendants can provide their clients with a proper and competent defense. If a personal injury plaintiff’s counsel can prevent defense counsel from having “*ex parte*” contact with his or her corporate client’s own employees simply by not naming the employees as defendants in the caption of the complaint, the plaintiff can interfere with the defense lawyer’s relationship with his or her client, which, after all, can act, think, confide in counsel, defend itself, settle, or litigate *only through its employees*.

It goes without saying – or should – that a *corporation's* lawyer may interview, “*ex parte*,” any corporate employee, and that the lawyer *should or even must* do so when the employee has or may have information relevant to the subject matter of the representation (and thus commits malpractice if he or she neglects to interview the employee). No Washington decision has held or suggested that medical malpractice lawsuits are different, and that corporate defendants in medical malpractice cases are less entitled to effective assistance of defense counsel.

E. Given the 1986 and 1987 Amendments to RCW 5.60.060(4) Which Did Not Apply in *Loudon* and Were Not Addressed in *Smith*, Neither *Loudon's* “No Contact” Rule, Much Less Youngs’ Desired Expansion of It Can Be Grounded in the Physician-Patient Privilege.

1. The purpose of *Loudon's* “no contact” rule was to protect the physician-patient privilege.

In its 1988 decision in *Loudon v. Mhyre*, 110 Wn.2d 675, 756 P.2d 138 (1988), the Supreme Court announced adoption of a new public policy based on the physician-patient privilege:

We hold that *ex parte* interviews [of a plaintiff’s non-party treating physicians] should be prohibited as a matter of public policy. The physician-patient privilege prohibits a physician from being compelled to testify, without the patient’s consent, regarding information revealed and acquired for the purpose of treatment. RCW 5.60.060(4). A patient may waive this privilege by putting his or her physical condition in issue. *See Randa v. Bear*, 50 Wn.2d 415, 312 P.2d 640 (1957); *Phillips v. Sasser*, 74 Wn.2d

439, 445 P.2d 624 (1968). Waiver is not absolute, however, but is limited to medical information relevant to the litigation. *See* CR 26(b)(1).

Loudon, 110 Wn.2d at 677-78 (footnotes omitted). The Supreme Court has since explained that “the fundamental purpose of the *Loudon* rule is to protect the physician-patient privilege.” *Smith v. Orthopedics Intern. Ltd. P.S.*, 170 Wn.2d 659, 667, 244 P.3d 939 (2010).

2. The physician-patient privilege is wholly statutory.

The Supreme Court has made clear that the physician-patient privilege did not exist at common law, is not a rule of constitutional law, and is a creature of statute, specifically RCW 5.60.060(4).

[Washington’s physician-patient] privilege is set forth in RCW 5.60.060(4), and prohibits examining a physician in a civil action as to any information acquired in attending a patient without his or her consent. The privilege is a creature of statute, and thus is a procedural safeguard and not a rule of substantive or constitutional law. . . . At common law, no testimonial privilege existed for communications or information exchanged between patient and physician. . . .

Carson v. Fine, 123 Wn.2d 206, 212-13, 867 P.2d 610 (1994) (citations omitted).

3. RCW 5.60.060(4)(b) did not apply to the *Loudon* case, but does apply to Youngs’ case.

When the *Loudon* lawsuit was commenced in 1986, the statute that had created the physician-patient privilege, RCW 5.60.060(4), provided:

A regular physician or surgeon shall not, without the consent of his patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him to prescribe or act for the patient, but this exception shall not apply in any judicial proceeding regarding a child's injuries, neglect or sexual abuse, or the causes thereof.

See Laws of 1965, ch. 13 § 97 (amending statute to add final "but this exception" clause). When the *Loudon* lawsuit was filed, the law was that a patient did not automatically waive his or her physician-patient privilege simply by bringing a personal injury lawsuit. *Bond v. Indep. Order of Foresters*, 69 Wn.2d 879, 881, 421 P.2d 351 (1966). The 1986 Legislature amended RCW 5.60.060(4), moving the "but this exception does not apply" clause to a new subsection (a), and adding the following waiver-election requirement in a new subsection (b):

Waiver of the physician-patient privilege for any one physician or condition constitutes a waiver of the privilege as to all physicians or conditions, subject to such limitations as a court may impose pursuant to court rules.

Laws of 1986, ch. 304 § 11. A year later, the 1987 Legislature amended subsection (b) to make waiver automatic 90 days after filing of suit, rather than elective. *Laws of 1987, ch. 212 § 1501*. That amendment effectively overruled *Bond*. Since the 1987 amendment, RCW 5.60.060(4)(b) has provided that:

Ninety days after filing an action for personal injuries or wrongful death, the claimant shall be deemed to waive the physician-patient privilege. Waiver of the physician-

patient privilege for any one physician or condition constitutes a waiver of the privilege as to all physicians or conditions, subject to such limitations as a court may impose pursuant to court rules.

*Laws of 1986, ch. 305 § 101.*¹⁴ No civil rules have been adopted to limit the waiver provisions in RCW 5.60.060(4)(b).

The Supreme Court noted in *Loudon*, 110 Wn.2d 678 n. 2, that under the then-recent 1986 and 1987 amendments to RCW 5.60.060(4), the statute creating the physician-patient privilege, “waiver is now . . . deemed to have occurred . . . within 90 days of filing a personal injury or wrongful death action,” but that “[t]hese amendments do not apply here as Loudon filed this action before August 1, 1986.”¹⁵ Since Loudon was decided, the Supreme Court has commented once on the meaning and/or effect of those amendments, codified in RCW 5.60.060(4)(b), stating:

A waiver of [the statutory physician-patient] privilege as to one of plaintiff’s physicians also constitutes a waiver as to other physicians who attended the plaintiff with regard to the disability or ailment at issue. . . . A patient who could

¹⁴ Subsequent amendments have added to RCW 5.60.060(4) the prefatory phrase “Subject to the limitations under RCW 70.96A.140 or 71.05.360 (8) and (9).” None of those limitations are relevant here. RCW 70.96A.140 concerns involuntary commitment; RCW 71.05.360(8) and (9) concern rights of persons involuntarily detained or committed for mental health reasons.

¹⁵ In *Holbrook v. Weyerhaeuser Co.*, 118 Wn.2d 306, 309 n.2, 822 P.2d 271 (1992), in which the court declined to apply *Loudon* to Industrial Insurance cases on the ground that RCW 51.04.050 had *abolished* the physician-patient privilege in the context of Industrial Insurance, *id. at 311*, the court also noted that “[a]t the time Loudon filed his action, RCW 5.60.060(4) did not contain the language deeming waiver to have occurred 90 days after filing of a personal injury action.”

select among various physicians' opinions, and claim privilege as to the remainder, would make a mockery of justice. . . . "It is not consonant with justice and fairness to permit the patient to reveal his secrets to several doctors and then when his condition comes in issue to limit the witnesses to the consultants favorable to his claims." . . . This conclusion is now expressly set forth in RCW 5.60.060(4): "Waiver of the physician-patient privilege for any one physician or condition constitutes a waiver of the privilege as to *all* physicians or conditions . . ."

Carson, 123 Wn.2d at 214 (citations omitted; bold type added; italics by the court).

In deciding *Smith* in 2010,¹⁶ the Supreme Court did not address the significance of, or even acknowledge, RCW 5.60.060(4)(b), presumably because the courts below had not done so and because the parties had not address that statutory provision in their briefs. Had the *Smith* court considered RCW 5.60.060(4)(b), it would have had to identify a legal basis for the *Loudon* rule other than the statutory physician-patient privilege, because the waiver "as to all physicians and all conditions" language in RCW 5.60.060(4)(b) no longer permits the court to treat the privilege as subject to waiver only as to some physicians or only as to "relevant" conditions.

¹⁶ *Smith* held that a violation of *Loudon*, but one not sufficiently prejudicial to warrant a new trial, occurred because defense counsel in a medical malpractice case had sent the lawyer for a non-party treating physician, who had been deposed and who the defense was going to call to testify at trial as fact witness, a copy of the plaintiff's trial brief, a transcript of trial testimony by an expert for plaintiff, and an outline of possible questions for the physician's direct examination at trial.

Unconstrained by the not-yet-applicable waiver provision in RCW 5.60.060(4)(b), the *Loudon* court promulgated public policy, grounded squarely in the (wholly statutory) physician-patient privilege:

We hold that ex parte interviews should be prohibited as a matter of public policy. The physician-patient privilege prohibits a physician from being compelled to testify, without the patient's consent, regarding information revealed and acquired for the purpose of treatment. RCW 5.60.060(4). [Footnote omitted.]

Loudon, 110 Wn.2d at 677-78. The Legislature, however, has determined that, by suing for personal injury damages, a plaintiff *waives* the privilege created by RCW 5.60.060(4) “as to *all* physicians or conditions,” not just those the plaintiff puts at issue in the lawsuit or that a court deems “relevant.” As previously noted, the waiver is subject to “such limitations as a court may impose pursuant to court rules,” but no such court rules have been adopted.

The words “waive” and “all” are unambiguous. By waiving a privilege that did not exist at common law, a party is left with no privilege to assert. By waiving the privilege as to “all physicians or conditions,” the patient loses any right to limit the physicians of whom, or the health conditions about which, the defense may inquire. The statutory physician-patient privilege now provides no protection at all, as to any physician or any condition, “relevant” or merely potentially relevant, to a person who

has chosen to sue for damages for alleged personal injury. Waiver of the physician-patient privilege, which is wholly a creature of statute, *Carson*, 123 Wn.2d at 212-13,¹⁷ leaves a plaintiff without a basis under the privilege for objecting either to *ex parte* “contact” between defense counsel and his or her treating physicians, or to the particular health conditions about which defense counsel asks such physicians.

The public policy reflected in RCW 5.60.060(4)(b) has superseded the one that the *Loudon* court announced, and must be respected. When the language of a statute is plain, “courts must effectuate it, even if it evinces policy choices that [the court considers] to be ill advised.” *State v. Gossage*, 165 Wn.2d 1, 7, 195 P.3d 525 (2008).¹⁸ When a rule of law is strictly a creature of statute “formulation of a new policy” with regard to the subject matter of the statute “is the responsibility of the Legislature, not a task for [the courts].” *Atchison v. Great W. Malting Co.* 161 Wn.2d

¹⁷ See also *Holbrook v. Weyerhaeuser Co.*, 118 Wn.2d 306, 308 n.1, 822 P.2d 271 (1992) (“[b]ecause the physician-patient privilege was not known at common law, it is limited in its scope by the statutes which create it”); *Phipps v. Sasser*, 74 Wn.2d 439, 444, 445 P.2d 624 (1968) (“unlike the attorney-client and priest-penitent privilege, which have a common-law origin and are broad in their scope, the physician-patient privilege is of purely statutory origin; was not known at common law, and is limited in its scope by the statutes which create it”) and 445 (“Since the legislature has created a physician-patient privilege, where none existed at common law, and has made its own limitations as to scope and as to where it shall not be applicable, any changes in it should be made by the legislature”).

¹⁸ “Even assuming for argument’s sake that the statute is ambiguous, the court should not proceed directly to policy reasoning but should first look to the legislative history of the statute to discern and effectuate legislative intent.” *Gossage*, 165 Wn.2d at 7.

372, 381, 166 P.3d 662 (2007) (quoting *Huntington v. Samaritan Hosp.*, 101 Wn. 2d 466, 470, 881 P.2d 216 (1994)); see also *Ball-Foster Glass Container Co. v. Giovanelli*, 163 Wn.2d 133, 156, 177 P.3d 692 (2008) (“[t]he legislature is the proper forum to amend our statutes”).¹⁹ Washington courts do not undertake to evaluate the wisdom behind a statute absent an issue affecting constitutional rights, *State v. Costich*, 152 Wn.2d 463, 476, 98 P.3d 795 (2004), and RCW 5.60.060(4) is not a rule of constitutional law, *Carson*, 123 Wn.2d at 212-13.

Thus, if RCW 5.60.060(4) were the only statute that makes what goes on between patient and doctor private and confidential, subsection (4)(b) would effectively have made *Loudon* inoperative in the context of 90-day-old personal injury lawsuits filed after August 1, 1986. More importantly to this case, any court-imposed rule against *ex parte* “contact” between attorneys for corporate health care provider defendants in personal injury lawsuits and plaintiffs’ treating physicians who are employed by such corporate defendants, or for whose care plaintiff may seek to hold defense counsel’s corporate client vicariously liable, cannot

¹⁹ See also *Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.2d 1014 (2001) (“[T]he Legislature is the fundamental source for the definition of this state’s public policy and we must avoid stepping into the role of the Legislature by actively creating the public policy of Washington. ““This court should resist the temptation to rewrite an unambiguous statute to suit our notions of what is good public policy, recognizing the principle that ‘the drafting of a statute is a legislative, not a judicial, function. [Citations omitted]””).

be squared with RCW 5.60.060(4)(b)'s automatic waiver provisions as to *all* physicians and conditions. And, any such court-imposed rule must be one that can be harmonized with statutes, other than RCW 5.60.060(4), that deal with patient-specific health care information, not to mention the concept of *respondeat superior*. There are two other Washington statutes that need to be considered, both of which authorize, or implicitly require, St. Joseph and other Washington hospitals to gather otherwise confidential patient health care information from physicians through whom they provide health care. *See* RCW 70.02.050(1)(b) and RCW 70.41.200.

F. Prohibiting PeaceHealth's Risk Managers and Lawyers from Privately Interviewing PeaceHealth Employees Based on An Extension of the Loudon Rule Not Only Would Be Inconsistent with RCW 5.60.060(4)(b), But Also Would Ignore RCW 70.02.050(1)(b) and RCW 70.41.200.

1. RCW 70.02.050(1)(b) expressly permits PeaceHealth to disclose health care information concerning Youngs to its risk managers and lawyers because they are persons who need the information in order to provide legal services to PeaceHealth, and a corporation can disclose information only through employees who have the information.

Three years after the decision in *Loudon*, the Legislature enacted the Uniform Health Care Information Act, RCW ch. 70.02. *Laws of 1991 ch. 335*. That statute governs the disclosure of "health care information," defined in RCW 70.02.010(7) as "any information, whether oral or recorded in any form or medium, that identifies or can readily be associated with the identity of a patient and directly relates to the patient's

health care, including a patient's [DNA]." Generally speaking, a health care facility (which a hospital is, RCW 70.02.010(6)) or health care provider is supposed to disclose health care information only with the patient's authorization, RCW 70.02.020(1), but subject to exceptions spelled out in RCW 70.02.050.

RCW 70.02.050(1)(b) provides that a health care facility or provider *may* disclose, without the patient's authorization, information about a patient to facilitate quality assurance or peer review, as well as to facilitate the provision of legal services *to* the health care facility or provider.²⁰ RCW 70.02.050(1)(b) provides in pertinent part:

A health care provider or health care facility may disclose health care information about a patient without the patient's authorization to the extent a recipient needs to know the information, if the disclosure is:

* * *

(b) To any other person who requires health care information . . . to provide planning, quality assurance, peer review, or . . . legal . . . services to . . . the health care provider or health care facility . . . and the health care facility reasonably believes that the person:

(i) Will not use or disclose the health care information for any other purpose; and

²⁰ The Health Care Insurance Portability and Accountability Act, P.L. 104-191 ("HIPAA") contains a similar provision allowing for disclosure of a patient's confidential health care information without the patient's authorization to any person who requires that information to provide legal services to a health care provider or health care facility. See 45 C.F.R. § 164.506(a) and (c).

(ii) Will take appropriate steps to protect the health care information[.]

RCW 70.02.050(1)(b) (emphases added).²¹

PeaceHealth’s defense counsel and risk manager need “health care information” about Youngs – “information, whether *oral or recorded* in any form or medium, that . . . directly relates to [Youngs’] health care” – in order for defense counsel to provide legal services to PeaceHealth relating to the lawsuit in which he claims tort damages for the outcome of that same health care. It is the individual employees and agents of PeaceHealth through whom PeaceHealth provided care to Youngs who have and can disclose the information PeaceHealth’s lawyers and risk manager need. RCW 70.02.050(1)(b) allows disclosure of such information without Youngs’ consent. And, because RCW 70.02.050(2)(e) and RCW 70.02.060 make separate provision for disclosure pursuant to compulsory process,²² RCW 70.02.050(1)(b) allows

²¹ Youngs has never argued that PeaceHealth’s risk managers and lawyers will use health care information about him for any purpose other than those enumerated in RCW 70.02.050(1)(b), or that they will fail to protect the information.

²² RCW 70.02.050(2) provides that: “A health care provider shall disclose health care information about a patient without the patient’s authorization if the disclosure is: . . . (e) Pursuant to compulsory process in accordance with RCW 70.02.060.” RCW 70.02.060 then sets forth the procedures to be followed for disclosure pursuant to compulsory process.

for disclosure to those who need it to provide legal services to a health care facility without compulsory process, and thus in private interviews.²³

Youngs may repeat on appeal an argument he made in opposition to PeaceHealth's motion for reconsideration, *see* CP 148-49, that RCW 70.02.050(1)(b) is irrelevant because the concurring opinion in *Smith* cited RCW 70.020.050(1)(b) as conflicting with the majority's adoption of a bright-line rule prohibiting all *ex parte* contact, *Smith*, 170 Wn.2d at 677 (concurring opinion of Justice Fairhurst), but the majority did not so find, and thus, according to Youngs, impliedly rejected that criticism. Youngs, however, reads too much into *Smith*.

The absence of any reference by the *Smith* majority to RCW 70.02.050(1)(b) is not correctly interpreted as a rejection of the argument. Only *amici curiae* made an RCW 70.02.050(1)(b) argument in *Smith*, and the Supreme Court ordinarily does not consider arguments raised only by *amici curiae*. *E.g.*, *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 629 n.30, 90 P.3d 659 (2004) (“We have many times held that arguments raised only by *amici curiae* need not be considered” (quoting *State v. Gonzalez*, 110 Wn.2d 738, 752 n. 2, 757 P.2d 925

²³ *See also Manor Care of Dunedin, Inc. v. Keiser*, 611 So.2d 1305 (Fla. Dist. Ct. App. 1992 (statutory exception to privacy protections for health care information that allow defendants access to such information also permit *ex parte* interviews of employees).

(1988)). Moreover, *Smith* did not present an issue concerning “contact” with a corporate defendant’s own employees, so the Supreme Court did not have reason to address the applicability of *Loudon* to contact with treating physicians who are a employees of a corporate defendant.

2. RCW 70.41.200(1) requires inquiry of Youngs’ physicians, by PeaceHealth’s risk manager and lawyers, concerning the care provided to Youngs at St. Joseph, and RCW 70.41.200(3) authorizes such inquiry to be conducted in private and not as part of the litigation discovery process.

By the time the *Loudon* case was decided in 1988, the Legislature had enacted RCW 70.41.200. *Laws of 1986, ch. 300 § 4*. With minor amendments in 1993, 2004, 2005 and 2007,²⁴ that statute requires every hospital to:

. . . maintain a coordinated quality improvement program for the improvement of the quality of health care services rendered to patients and the identification and prevention of medical malpractice. The program shall include at least the following:

- (a) The establishment of a quality improvement committee with the responsibility to review the services rendered in the hospital, both retrospectively and***

²⁴ *Laws of 1993, ch. 492 § 415* (changing the term “quality improvement” for “quality assurance”); *Laws of 2004, ch. 145 § 3* (adding reference to medication errors in subsection (1)(g), and providing for information-sharing among hospital committees); *Laws of 2005, ch. 291 § 3* (adding the following underlined language to subsection (3): “Information and documents, including complaints and incident reports, created specifically for, and collected and maintained by, a quality improvement committee are not subject to review or disclosure, except as provided in this section, or discovery or introduction into evidence in any civil action . . .”); *Laws of 2007, ch. 273 § 22* (adding the references to infections subsections (1)(e) and (1)(g)).

prospectively, in order to improve the quality of medical care of patients and to prevent medical malpractice. The committee shall oversee and coordinate the quality improvement and medical malpractice prevention program and shall ***ensure that information gathered pursuant to the program is used to review and to revise hospital policies and procedures***;

(b) ***A medical staff privileges sanction procedure through which credentials, physical and mental capacity, and competence in delivering health care services are periodically reviewed*** as part of an evaluation of staff privileges;

(c) ***The periodic review of the credentials, physical and mental capacity, and competence in delivering health care services of all persons who are employed or associated with the hospital***;

(d) ***A procedure for the prompt resolution of grievances by patients or their representatives related to accidents, injuries, treatment, and other events that may result in claims of medical malpractice***;

(e) ***The maintenance and continuous collection of information concerning the hospital's experience with negative health care outcomes and incidents injurious to patients including health care-associated infections*** as defined in RCW 43.70.056, patient grievances, professional liability premiums, settlements, awards, costs incurred by the hospital for patient injury prevention, and safety improvement activities;

(f) The maintenance of relevant and appropriate information gathered pursuant to (a) through (e) of this subsection concerning individual physicians within the physician's personnel or credential file maintained by the hospital;

(g) Education programs dealing with quality improvement, patient safety, medication errors, injury prevention, infection control, staff responsibility to report professional misconduct, the legal aspects of patient care, improved communication with patients, and causes of

malpractice claims for staff personnel engaged in patient care activities; and

(h) Policies to ensure compliance with the reporting requirements of this section. [Emphases added.]

The quality improvement program mandated by RCW 70.41.200(1) requires communication among a variety of hospital personnel, including risk managers and lawyers advising the hospital and physicians who have information about “negative health care outcomes and incidents injurious to patients.” The communications in which such health care information is disclosed for a permitted statutory purpose are privileged under RCW 70.41.200(3):

Information and documents, including complaints and incident reports, created specifically for, and collected and maintained by, a quality improvement committee are not subject to review or disclosure, except as provided in this section, or discovery or introduction into evidence in any civil action, and no person who was in attendance at a meeting of such committee or who participated in the creation, collection, or maintenance of information or documents specifically for the committee shall be permitted or required to testify in any civil action as to the content of such proceedings or the documents and information prepared specifically for the committee. . . .²⁵

²⁵ RCW 70.41.200(3) goes on to list exceptions, none of which apply, and none of which Youngs has argued apply, here:

This subsection does not preclude: (a) In any civil action, the discovery of the identity of persons involved in the medical care that is the basis of the civil action whose involvement was independent of any quality improvement activity; (b) in any civil action, the testimony of any person concerning the facts which form the basis for the institution of such proceedings of which the person had personal knowledge acquired

The privilege created by RCW 70.41.200(3) belongs to the hospital, not the patient. Unless quality improvement communications concerning patients' care can take place outside the patients' lawyers' presence (and thus *ex parte*), the privilege is illusory. Indeed, because hospitals do not control how much time elapses between a "negative health care outcome" or "incident injurious to a patient" and a malpractice lawsuit based on such an outcome or incident, and because the quality improvement program is required to be "continuous," RCW 70.41.200(1)(e), in many instances, risk managers and lawyers for the hospital, long before a patient files a medical malpractice suit, will have already been gathering information – privately and subject to the RCW 70.41.200(3) privilege – from treating physicians, including physicians who are hospital employees, as well as physicians who are not hospital employees but who practice at the hospital.

independently of such proceedings; (c) in any civil action by a health care provider regarding the restriction or revocation of that individual's clinical or staff privileges, introduction into evidence information collected and maintained by quality improvement committees regarding such health care provider; (d) in any civil action, disclosure of the fact that staff privileges were terminated or restricted, including the specific restrictions imposed, if any and the reasons for the restrictions; or (e) in any civil action, discovery and introduction into evidence of the patient's medical records required by regulation of the department of health to be made regarding the care and treatment received.

Contrary to Youngs' suggestion below, *see* CP 151, nothing in RCW 70.41.200 requires that hospitals use different risk managers and lawyers for quality improvement purposes and litigation-defense purposes. But absent a conflict of interest because of a lawyer's prior or existing relationship with the plaintiff, the plaintiff –particularly one who has waived his physician-patient privilege as to “all physicians or conditions” – has no standing to disqualify lawyer(s) whom his or her adversary retains as its defense counsel.

A hospital or other corporate health care entity can think and act only through its employees and agents. A hospital is entitled to know what its employees and agents know to defend itself in litigation, and is required to find out and evaluate what its employees and agents know to conduct its statutorily mandated quality improvement activities. To suggest that the knowledge of a hospital's agents and employees suddenly becomes off limits to the hospital and its defense counsel and risk manager just because the patient files a medical malpractice claim makes no sense. Nothing in *Loudon* or *Smith*, dictates such a result.

G. Even if Youngs Would Otherwise Have Been Entitled to the Protective Order He Sought, He Was Properly Denied Such Relief Because of the Discovery He Propounded to PeaceHealth.

After initially securing the trial court's ruling prohibiting “contact” between PeaceHealth's counsel and his treating physicians, including those

who are PeaceHealth employees, and while PeaceHealth's motion for reconsideration was pending, Youngs served on PeaceHealth a CR 30(b)(6) notice demanding that PeaceHealth produce for deposition the employee most knowledgeable about all of its December 2008 "Policies, Procedures, Protocols and standing orders for all the various departments, including but not limited to critical care, infectious disease, pulmonary medicine, surgery oxygenation, ventilation and BiPAP." CP 109.

It is unreasonable to expect a defendant corporation to determine which of its employees is a suitable CR 30(b)(6) deponent on each of the subjects identified in that notice while requiring it to refrain, because of a protective order, from speaking with any PeaceHealth-employed physician who treated Youngs.²⁶ And, surely, it is unreasonable and unfair, not to mention inconsistent with CR 30(b)(6), to limit the choice of employees from among whom PeaceHealth must select its CR 30(b)(6) deponents. Yet, that would be the effect of the protective order Youngs seeks.

Moreover, in interrogatories and requests for production requests that Youngs propounded after obtaining the protective order, and while PeaceHealth's motion for reconsideration was pending, Youngs asked

²⁶ As PeaceHealth pointed out in its reply on the motion for reconsideration, CP ____ (PeaceHealth's Reply at 4 n.5), and Youngs' counsel never disputed, "plaintiff's counsel surely knows from review of medical records, numerous pulmonologists (and most of those employed by PeaceHealth at St. Joseph Hospital) provided care to plaintiff."

PeaceHealth not only to identify any and all witnesses it believes has knowledge of facts pertaining to the action or Youngs' alleged injuries and the factual information of which each such witness is aware, CP 119 (Interrogatory No. 8), but also to identify and describe the contents of any "record, ghost file, lab report/lab slip, and/or any other document" not previously produced relating to Youngs' care, claimed damages, or claimed injuries, "prior to and subsequent to his hospitalization," CP 119 (Interrogatory No. 7) To respond to these discovery requests and comply with CR 26(b) and (g), PeaceHealth and its counsel are required to make a reasonable inquiry which should include communicating with those of its employees and agents known or believed to have responsive information. That necessarily would mean having "contact" with PeaceHealth's employed physicians involved in treating Youngs. Yet, under Youngs' proposed protective order PeaceHealth's counsel and risk manager would have been precluded from finding out what, if any information or documents not previously produced that Youngs' PeaceHealth-employed treating physicians, except through depositions. Again, the protective order Youngs seeks would have interfered with PeaceHealth's and its counsel's ability to properly respond to Youngs' own discovery requests.

Finally, Youngs has never acceded to the proposition that his vicarious liability claims against PeaceHealth are limited to claims based on only Dr.

Leone's and Dr. Berry's care and treatment. Neither his complaint nor his interrogatory answers so limits his claims. But under Youngs' proposed protective order, defense counsel would be unable to contact any PeaceHealth-employed physicians, other than Drs. Leone and Berry, who provided any health care to Youngs, even if they are physicians whom Youngs' experts will testify violated the standard of care, or for whose alleged negligence Youngs seeks to hold PeaceHealth vicariously liable. The unfairness in that is manifest.

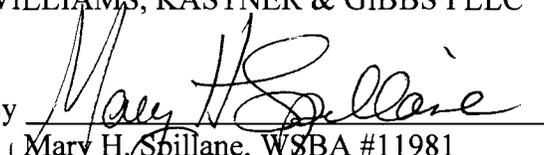
VI. CONCLUSION

For the foregoing reasons, the Court should affirm the trial court's grant of PeaceHealth's motion for reconsideration and its ultimate decision not to grant Youngs the protective order he sought.

RESPECTFULLY SUBMITTED this 10th day of October, 2011.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that October 10, 2011, I caused a true and correct copy of the foregoing document, "Brief of Respondent," to be delivered in the manner indicated below to the following counsel of record:

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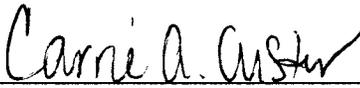
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