

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

MARC YOUNGS, Petitioner

vs.

PEACEHEALTH, a Washington corporation d/b/a PEACEHEALTH ST
JOSEPH MEDICAL CENTER and d/b/a PEACEHEALTH MEDICAL
GROUP, and UNKNOWN JOHN DOES, Respondents

and

UNKNOWN JOHN DOES, Defendant.

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

In *Loudon v. Mhyre*, 110 Wn.2d 675, 756 P.2d 138 (1988), the Supreme Court held that as a matter of public policy, ex parte contacts between defense counsel and a plaintiff's non-party treating physician are prohibited. Defense counsel may obtain evidence from non-party treating physicians of a plaintiff, but only by means of formal discovery, with all parties present, not by means of private face-to-face meetings between defense counsel and plaintiff's treating physicians behind closed doors.

Last year, the Supreme Court in *Smith v. Orthopedics Intern.*, 170 Wn.2d 659, 244 P.3d 939 (2010), reaffirmed *Loudon*. The Court rejected an attempt to narrowly construe and limit *Loudon's* scope, by making clear that *Loudon* applied to any ex parte contact, direct or indirect, through attorneys or other intermediaries, and that it was not limited to ex parte interviews. The Court made clear that it would not allow defendants to whittle away at the rule with exceptions and limitations, in an attempt to bring about its practical demise.

The trial court in this case, however, ruled that the *Loudon* rule has no application to a treating physician who is employed by a corporate defendant. The court denied Plaintiff's motion for a protective order prohibiting defense counsel from engaging in ex parte contact with his non-party treating physicians employed by Defendant PeaceHealth.

Further, the Court entered an order expressly allowing defense counsel for PeaceHealth to have ex parte contact with any of Plaintiff Marc Young's treating physicians employed by PeaceHealth.

No Washington case law supports this ruling. The *Loudon* rule is clear and unequivocal prohibiting any ex parte contact between defense counsel and any "nonparty treating physician." *Smith*, 170 Wn.2d at 665. The hospital submitted no evidence that Marc Young's treating physicians covered by the order are parties. They are not, and the hospital has not argued otherwise.

Washington has a long-settled rule that only managing or speaking agents of a corporation are to be considered "parties" for litigation purposes when the corporation is the named party. *Wright v. Group Health Hospital*, 103 Wn. 2d 192, 691 P.2d 564 (1984). The hospital, however, refused to identify any of Marc Young's treating physicians as managing or speaking agents, regarding this issue as irrelevant.

The policy considerations supporting the adoption of the *Loudon* rule, especially protection of the sanctity of the physician-patient relationship, apply as forcefully to a physician who happens to be employed by a corporation, as it does to the physician who practices her profession and treats her patients in a solo or small clinical practice. Since the policy considerations are the same, the rules should be the same.

The trial court's order expressly allowing defense counsel to engage in ex parte contact with any PeaceHealth physician who treated Marc Youngs should be reversed, and the original order of the trial court prohibiting ex parte contact with Marc Young's non-party treating physicians reinstated.

II. ASSIGNMENTS OF ERROR

1. Whether the trial court erred in entering an order permitting defense counsel to engage in ex parte contacts with any of Plaintiff's treating physicians employed by Defendant.

2. Whether the trial court erred in reconsidering and denying an order prohibiting defense counsel from engaging in ex parte contacts with Plaintiff's non-party treating physicians.

III. STATEMENT OF ISSUES

Whether the fundamental public policy set out in *Loudon v. Mhyre*, 110 Wn.2d 675, 756 P.2d 138 (1988) and reaffirmed in *Smith v. Orthopedics Intern.*, 170 Wn.2d 659, 244 P.3d 939 (2010), prohibiting defense counsel from engaging in ex parte contact with a plaintiff's nonparty treating physician, applies to treating physicians who are not parties, but who are employed by a corporate defendant.

IV. STATEMENT OF THE CASE

This is a medical negligence case arising from catastrophic injuries suffered by Marc Youngs as a result of negligent post-operative care he received in December 2008 at St. Joseph Hospital. PeaceHealth owns and operates St. Joseph in Bellingham as well as other hospitals in Washington and elsewhere in the northwest. Mr. Youngs was admitted to St. Joseph for lung surgery where he developed a life-threatening sepsis, resulting in the loss of both legs below the knee and both hands above the wrist.

Plaintiff filed this lawsuit on September 17, 2010, naming PeaceHealth as the Defendant.¹ CP 212-13. From the outset of litigation, Plaintiff's counsel had discussions and email correspondence with defense counsel regarding Plaintiff's contention that *Loudon v. Mhyre*, 110 Wn.2d 675, 756 P.2d 138 (1988), prohibited defense counsel from engaging in ex parte contact with Mr. Youngs' treating physicians, other than Dr. Richard Leone and Dr. Donald Berry, treating physicians whose conduct is at issue.² Defense counsel disagreed, and asserted that *Loudon* did not apply to any treating physician employed by PeaceHealth. Defense counsel also declined Plaintiff's request that it designate the employees whom it

¹ Plaintiff filed the complaint in King County, the location of the corporate headquarters for PeaceHealth. In December, the King County Superior Court granted PeaceHealth's motion for a change of venue to Whatcom County.

² The complaint specifically identified Drs. Leone and Dr. Berry, although they were not named as parties. CP 213. Plaintiff has excluded these physicians from the *Loudon* order he is seeking, and has not objected to ex parte contacts with them on the part of defense counsel.

considered as managing or speaking agents for PeaceHealth in this case. CP 248-49.

With the parties unable to agree on this issue, Plaintiff moved for a protective order prohibiting defense counsel from engaging in ex parte contact, directly or indirectly, with Plaintiff's treating physicians, other than Dr. Leone and Dr. Berry. Plaintiff based his motion on *Loudon v. Mhyre*, 110 Wn.2d 675 (1988) and *Smith v. Orthopedics Intern., Ltd., P.S.*, 170 Wn.2d 659, 244 P.3d 939 (2010), cases holding that ex parte contact between defense counsel and plaintiff's "**nonparty** treating physicians," *Smith*, 170 Wn.2d at 665, "should be prohibited as a matter of public policy." *Loudon*, 110 Wn.2d at 678. CP 251-59; 195-99.

The trial court initially granted Plaintiff's motion as follows:

Defense counsel and the defendant's risk manager are prohibited from *ex parte* contact, directly or indirectly, with any of plaintiff Mark Youngs' treating physicians other than Dr. Richard Leone and Dr. Donald Berry.

CP 192-93. The Order applied to all treating physicians including, but not limited to, those employed by PeaceHealth.³

PeaceHealth moved to reconsider the order, making the same argument that it made in its original opposition, i.e., that the rule in *Smith* and *Loudon* does not apply to physicians employed by a corporate

³ To be clear, defense counsel has not asserted a right to ex parte communications with treating physicians not employed by PeaceHealth.

defendant, such as PeaceHealth. CP 180-91. The trial court on March 25, 2011, reversed its earlier ruling, and denied Plaintiff's Motion for a Protective Order. CP 62-64; 11-12. But the Court order went further than the denial of Plaintiff's original motion. The Court order stated: "counsel for PeaceHealth may have ex parte contact with PeaceHealth employees who provided health care to plaintiff Marc Youngs." CP 63. It is undisputed that this order permits PeaceHealth attorneys to have ex parte contact with any of Marc Young's treating PeaceHealth physicians, regardless of whether the conduct of the physician is at issue, or whether the physician is a speaking agent for PeaceHealth. PeaceHealth proposed the language in the Order, and the language accurately states its position that the *Loudon* rule simply does not apply to any treating physicians employed by a corporate defendant.

The trial court certified its orders for discretionary review, and on May 26, 2011, the Commissioner granted Plaintiff's Motion for Discretionary Review.⁴

⁴ The Court entered two orders granting Defendant's Motion for Reconsideration on March 25, and April 22, 2011. The substance of the orders is the same for purposes of this appeal. The second order corrected the first order by including documents considered by the trial court that had been omitted from the first order. Plaintiff included both orders in his Notice of Discretionary Review.

V. ARGUMENT

1. The Trial Court's Order Allowing Defense Counsel to Engage in Ex Parte Contact with any Non-party Treating Physician Employed by Defendant PeaceHealth Conflicts with and Negates the Fundamental Public Policy of Loudon and Smith Prohibiting Ex Parte Contact with a Plaintiff's Nonparty Treating Physician.

In *Loudon v. Mhyre*, 110 Wn.2d 675, 756 P.2d 138 (1988), the Washington Supreme Court held that “as a matter of public policy” a defendant is absolutely prohibited from having *ex parte* contact with a plaintiff’s nonparty treating physicians. *Id.* at 678. The Court’s ruling was categorical and without exception or limitation.

In December 2010, the Supreme Court in *Smith v. Orthopedics Intern.*, 170 Wn.2d 659, 244 P.3d 939 (2010) emphatically reaffirmed *Loudon*. It reiterated the purposes underlying the *Loudon* rule:

[T]he fundamental purpose of the *Loudon* rule is to protect the physician-patient privilege and to that end, we emphasized the importance of protecting the *sanctity* of that relationship, saying, “The relationship between physician and patient is ‘*a fiduciary one of the highest degree ... involv[ing] every element of trust, confidence and good faith.*’”

Smith, 170 Wn.2d at 667 (emphasis added).

The rule in *Loudon* is predicated upon this special nature of the physician-patient relationship. The rules applicable to contact with other

witnesses do not apply to physicians who are or have been in this special physician-patient relationship with a plaintiff.⁵

Loudon does not prohibit a defendant from investigating the case or obtaining evidence from the treating physician. The prohibition is only on **ex parte** contact. A defendant is still entitled to obtain evidence from treating physicians through formal discovery. *Id.*, at 676-77.

Smith also made clear that one purpose of the *Loudon* rule was to prohibit defense counsel from using ex parte contacts to shape the testimony of treating physicians. The Court stated:

If a nonparty treating physician receives information from defense counsel prior to testifying as a fact witness, ***there is an inherent risk that the nonparty treating physician's testimony will to some extent be shaped and influenced by that information.***

Id. at 668 (emphasis added). A footnote elaborated this concern specifically in the context of medical malpractice cases:

Courts have recognized that, in the past, permitting “ex parte contacts with an adversary's treating physician may have been a valuable tool in the arsenal of savvy counsel. The element of surprise could lead to case altering, if not case dispositive results.” *Law v. Zuckerman*, 307 F.Supp.2d 705, 711 (D.Md.2004) (citing *Ngo v. Standard Tools & Equip., Co.*, 197 F.R.D. 263 (D.Md.2000)); see also *State ex rel. Woytus v. Ryan*, 776 S.W.2d 389, 395 (Mo.1989) (acknowledging that **ex parte contact in medical malpractice cases between defense counsel and a**

⁵ In *Loudon*, the patient died as a result of medical malpractice. The Court adopted the rule against ex parte contact in order to protect the physician-patient relationship, notwithstanding the termination of the relationship in that case through death. *Id.* at 676.

nonparty treating physician creates risks that are not generally present in other types of personal injury litigation, including the risk of discussing “ ‘the impact of a jury's award upon a physician's professional reputation, the rising cost of malpractice insurance premiums, the notion that the treating physician might be the next person to be sued,’ ” among others (quoting *Manion v. N.P.W. Med. Ctr. of N.E. Pa., Inc.*, 676 F.Supp. 585, 594-95 (M.D.Pa.1987))), *abrogated on other grounds by Brandt v. Pelican*, 856 S.W.2d 658, 661 (Mo.1993).

Smith, 170 Wn.2d at 669 n. 2 (emphasis added). Thus, the rationale for *Loudon's* absolute bar on ex parte contacts is even stronger in medical malpractice cases than in other cases to which *Loudon* applies.⁶

Loudon does not prohibit a defendant from investigating the case or obtaining evidence from the treating physician. The prohibition is only on **ex parte** contact. A defendant is still entitled to obtain evidence from treating physicians through formal discovery. *Id.* at 676-77.

Smith declined to give *Loudon* a narrow or limiting construction. The defendant in *Smith* argued that *Loudon* only barred “ex parte interviews” with a treating physician, and did not bar the defendant from transmitting information to the treating physician’s attorney. *Smith*, 170 Wn.2d at 665. *Smith* rejected this argument, and found that the transmission of information in this manner violated *Loudon*. It held that it

⁶ *Loudon* applies to all personal injury cases, not just medical malpractice cases. Nevertheless, it is no accident that *Smith* and *Loudon* were both medical malpractice cases. The problem of ex parte contact and the potential for prejudice to the Plaintiff are particularly acute in medical malpractice cases, as the foregoing discussion from *Smith* recognizes.

would not permit “defense attorneys to accomplish indirectly what they cannot accomplish directly.” *Id.* 170 Wn.2d at 669. The Court concluded “that *the prohibition on ex parte contact, which we set forth in Loudon, is broad* and not confined to merely limiting interviews by defense counsel with a plaintiff’s treating physician.” *Id.* at 666 (emphasis added).

Smith and *Loudon* are clear that the prohibition on ex parte contact applies to all “**nonparty** treating physicians.” In a key paragraph setting out the holding in *Loudon*, and identifying the situations to which *Loudon* applies, *Smith* states:

In *Loudon*, we established the rule that in a personal injury action, “defense counsel may not engage in ex parte contacts with a plaintiff’s physicians.” *Loudon*, 110 Wash.2d at 682, 756 P.2d 138. Underlying our decision was a concern for protecting the physician-patient privilege. Consistent with that notion, we determined that a plaintiff’s waiver of the privilege does not authorize ex parte contact with a plaintiff’s **nonparty** treating physician. In limiting contact between defense counsel and a plaintiff’s **nonparty** treating physicians to the formal discovery methods provided by court rule, we indicated that “the burden placed on defendants by having to use formal discovery is outweighed by the problems inherent in ex parte contact.” *Id.* at 677, 756 P.2d 138. We rejected the argument that requiring defense counsel to utilize formal discovery when communicating with a **nonparty** treating physician unfairly adds to the cost of litigation and “gives plaintiffs a tactical advantage by enabling them to monitor the defendants’ case preparation.”

Smith, 170 Wn.2d at 665 (emphasis added). The word “nonparty” appears 24 times in the lead opinion in *Smith*.⁷

If a treating physician is not a party, then *Loudon* applies. The question before the Court should then be a simple one: who is a party when a corporation is a defendant? *Wright v. Group Health Hospital*, 103 Wn. 2d 192, 200, 691 P.2d 564 (1984) provides a clear answer to this question.

We hold the best interpretation of “party” in litigation involving corporations is only those employees who have the legal authority to “bind” the corporation in a legal evidentiary sense, *i.e.*, those employees who have “speaking authority” for the corporation.

Wright also arose in the medical malpractice context. The defendant, Group Health, is a large provider of comprehensive health care, as is PeaceHealth. The Supreme Court in *Wright* rejected a claim by Group Health that all of its employees were “parties” in a lawsuit brought

⁷ There were three groupings of justices in *Smith*, split on two different issues. The lead opinion written by Justice Alexander and joined by Justices Owens and James Johnson, found that Defendants violated the *Loudon* rule. It is this opinion which Plaintiff has cited as the majority opinion, since Justices Charles Johnson, Sanders, Chambers and Stephens joined its holding and discussion on the *Loudon* violation. Of the nine justices, only Justices Fairhurst and Madsen found no *Loudon* violation. Plaintiff refers to Justice Fairhurst’s opinion as the dissenting opinion. The lead opinion and the two justice dissent formed the majority on the second issue, holding that on the facts of the case, the *Loudon* violation was not prejudicial.

against the corporation. *Id.*, 103 Wn.2d at 194. Only those employees who are speaking agents for the corporation are parties. *Id.* at 200-01.⁸

The courts and the bar have operated under the *Wright* holding for 27 years. There is no reason why this well-understood meaning of “party” in cases involving corporations should not apply in this case.

The hospital has never offered an explicit answer to the key issue of who is a party. Although the hospital contends that it can speak ex parte with any of Marc Young's treating physicians at PeaceHealth, it does not argue that all or any of these treating physicians are parties. Moreover, it has refused to identify any of the treating physicians, or anyone else, as speaking agents. CP 248-49. The trial court’s order expressly allows defense counsel to have ex parte contact with any of Plaintiff’s treating physicians employed by PeaceHealth, without any determination whether these treating physicians are managing/speaking agents for PeaceHealth.

Instead, the hospital ignores the fundamental issue of who is a party. In the trial court, it took the position that because “a corporation can only act through its agents,” it may speak ex parte with any corporate

⁸ In adopting the speaking agent test, the Court considered and rejected the “flexible ‘client’ test” of *United States v. Upjohn*, 449 U.S. 383 (1981), a test which if adopted would have applied party status to “many nonmanagerial employees.” *Wright*, 103 Wn.2d at 201-02. The Court recognized the *Upjohn* test was not intended as a means of identifying who was a party, and that this use of the test took it out of context.

employee, regardless of party status. *See e.g.* CP 235. It takes the position that *Loudon* and *Smith* simply do not apply to its actions. The obligations of a treating physician to his or her patient are, on the hospital's theory, trumped by the physician's status as a corporate employee. The "sanctity" of the physician-patient relationship, "a fiduciary one of the highest degree" according to *Loudon* and *Smith*, has gone unmentioned by the hospital, yielding to the apparently "higher sanctity" of the relationship between a corporation and its employees.

The hospital's argument is without any authority. Moreover, it renders *Loudon* and *Smith* a practical dead letter at a time when a few corporate hospitals are proceeding at a rapid pace in taking over what used to be independent physicians practices, and employing the physicians directly.

The consolidation of organizations delivering health care in Washington as well as throughout the country is proceeding at a rapid pace, with burgeoning numbers of physicians employed by hospitals. Four of the five largest medical groups in Washington are now embedded in hospital systems: University of Washington Physicians (1,700 doctors); Virginia Mason Medical Center (1,000); Children's University Medical Group (438); and Swedish Physicians (390). The fifth, Group Health, has 1000 doctors. CP 46. PeaceHealth employs 500 physicians. Smaller

hospitals are part of this phenomenon as well. Skagit Valley Hospital, for instance, recently acquired the 81-doctor Skagit Valley Medical Center. CP 45.

Washington is consistent with national trends. Nationally, 60 percent of physicians were considered self-employed in 2008, with only 34 percent as employees. By this year, more than 60 percent of physicians will be salaried employees. CP 46

The trial court's ruling has now given large corporate employers of physicians, including but not limited to PeaceHealth, a practical way to avoid the *Loudon* requirements. *Smith v. Orthopedic* illustrates how this would work. The defendant in *Smith* was an orthopedic surgeon. When a blood clot developed following orthopedic surgery, the nonparty treating physician, a vascular surgeon, performed surgery to remove the clot. *Smith*, 170 Wn.2d at 662. The *Loudon* violation occurred when defense counsel for defendant sent written materials to counsel for the nonparty vascular surgeon. *Id.* at 670

Under the trial court's order in this case, no *Loudon* violation would have occurred in *Smith* if the orthopedic surgeon and the vascular surgeon were employed by the same corporate hospital. Nothing would have changed in the care each physician provided the patient or in the physician-patient relationship each had with the patient. The only change

would be that the physicians were employed and paid by the corporate hospital, rather than by their own individual practices. With this one change, defense counsel would not have needed to undertake the elaborate effort of communicating indirectly with the nonparty treating physician through his counsel. See *Smith*, 170 Wn.2d at 663. Defense counsel simply could have talked to both of them in a private office in the hospital without violating *Loudon*.

A patient has a right to confidentiality and to the restrictions set out in *Loudon* and *Smith*. The current practice of medicine often involves the provision of comprehensive health care services by large hospitals, health maintenance organizations, and physicians' groups or clinics. The patient's concerns for confidentiality and the physician's fiduciary duty to the patient do not depend upon the size or breadth of the organization employing the physician. PeaceHealth, and other large health care organizations, should not enjoy a practical exemption from the requirements of *Loudon* and *Smith*, simply because of size, or the use of the corporate form.

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2. **The Trial Court Erred in Vacating its Original Order which Prohibited Defense Counsel from Engaging in Ex Parte Contact with any of Plaintiff's Treating Physicians Other than the Treating Physicians Named in the Complaint.**

The trial court originally granted Plaintiff's motion for a protective order premised on *Loudon* and *Smith*, and ordered defense counsel not to engage in ex parte contacts with any treating physician other than Dr. Leone and Dr. Berry, the two PeaceHealth treating physicians named in the complaint. CP 192-93. Plaintiff raised this issue with defense counsel, and sought an agreed resolution or court order in order to avoid the irreparable harm which follows from a *Loudon* violation.

Loudon is a prophylactic rule, designed to prevent harm from occurring in the first place. Defense counsel for his part sought ex parte contact with Plaintiff's treating physicians before depositions or any other proceedings took place. Plaintiff brought the motion at the outset of litigation precisely in order to prevent the harm before it takes place. Plaintiff sought interlocutory review of the trial court's adverse ruling for the same reason.

Once the ex parte contact occurs, the "cat is out of the bag." In this case, the ex parte conversations between defense counsel and Marc Young's treating physicians cannot, as it were, be rewound and erased. As *Loudon* observed: "The harm from disclosure of this confidential

information cannot, as defendants argue, be fully remedied by subsequent court sanctions.” 110 Wn.2d at 678.

As noted above, *Smith* made clear that a fundamental purpose of the *Loudon* rule is to prevent defense counsel from using the ex parte meeting to shape the testimony of the treating physician about Plaintiff’s treatment. *Smith*, 170 Wn.2d at 668. Once defense counsel in this case is allowed to “shape” the testimony of Marc Young’s treating physicians in private conversations, that shaping cannot be fully undone after trial by an appellate finding that defense counsel’s actions violated *Loudon*. Neither an appellate court nor a trial court can effectively order a treating physician to forget what he or she was told by defense counsel, or to forget the prior deposition and trial testimony given after he or she was “prepared” by defense counsel.

In *Smith*, the plaintiff asked the Court for a new trial in which the testimony of the treating physician would be excluded. This may well have been an adequate remedy for that plaintiff in those circumstances, but it is most certainly not an adequate remedy in all cases. The “unshaped” testimony of a nonparty treating physician may be favorable to a plaintiff. The plaintiff, and the court and the jury, are entitled to that “unshaped” testimony. If ex parte interviews are allowed, the possibility of that “unshaped” testimony is simply lost.

The Supreme Court's ruling in *Smith* that on the facts before it, the *Loudon* violation was not prejudicial, presents another reason for a protective order preventing the harm in the first place. Defense counsel in *Smith* sent the nonparty treating physician's lawyer a copy of the trial brief, the trial transcript of the Plaintiff's medical expert, a copy of the treating physician's deposition, and an outline of questions for direct examination. Treating physician's counsel had provided him with a copy of all but the last document. *Smith*, 170 Wn.2d at 663.

This ex parte communication violated *Loudon*. Nevertheless, the Court had the deposition testimony of the treating physician, a deposition taken before the ex parte communication. The Supreme Court determined that the physician's deposition paralleled his trial. Thus, there was no showing that the testimony was influenced by the ex parte contact. *Id.* at 673.

Unlike *Smith*, there will be no record here of the ex parte contacts which will take place if the orders stand. Defense counsel is insisting on the right to private face-to-face interviews with all of Plaintiff's PeaceHealth treating physicians before their depositions are taken. There will be no written record of what will be said in these conversations. There will be no record of the testimony of these treating physicians before the ex parte contact to compare with the trial testimony. Assuming

that Plaintiff is even allowed to inquire about the content of the conversations, Plaintiff and the court will be limited to the recollections by the witness of conversations occurring perhaps months in the past.⁹ The testimony of the witness will already have been shaped by defense counsel, and the witness will doubtlessly be able to make legitimate claims of lack of memory as to specific questions asked by, and information provided by, defense counsel in the private meetings. An order prohibiting this contact before it occurs is the only appropriate way to deal with this issue.

VI. CONCLUSION

Plaintiff Marc Youngs respectfully asks this Court to vacate the orders granting Defendant's Motion for Reconsideration, and to reinstate the protective order originally entered on February 11, 2011.

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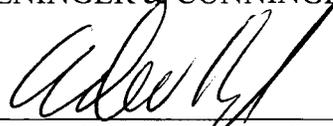
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⁹ PeaceHealth has asserted that these ex parte conversations are subject to the attorney-client privilege, *see* CP 235-36. It will clearly take the position that the privilege bars any inquiry into the conversations themselves.

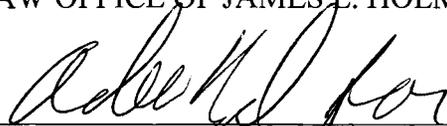
DATED this 11th day of August, 2011.

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CERTIFICATE OF SERVICE

THE UNDERSIGNED hereby certifies that she caused delivery of
a copy of the foregoing Appellant's Opening Brief in the manner set forth
below:

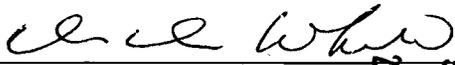
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