

87811-1

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.

MOTION FOR DISCRETIONARY REVIEW

Noted for: May 27, 2011, 9:30 a.m.

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COURT OF APPEALS
DIVISION I
MAY 27 2011

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2A Karl B. Tegland, *Washington Practice: Rules Practice* (6th ed. 2004).11

A. Identity of Petitioner.

Marc Youngs, plaintiff in the action below, asks this Court to grant review of the decisions set forth in Part B of this Motion.

B. Decision Below.

Marc Youngs requests review of the Orders Granting Defendants' Motion for Reconsideration, which were entered by the Whatcom County Superior Court (Honorable Ira J. Uhrig) on March 25, 2011 and April 22, 2011. The orders are reproduced in the Appendix at A1-6.¹ The trial court certified the orders for discretionary review pursuant to RAP 2.3(b)(4). A9-10.

C. Issues Presented for Review.

1. 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 defendant.

2. Whether discretionary review of orders permitting defense counsel to engage in ex parte contact with plaintiff's nonparty treating

¹ The original March 25 order signed by the trial court did not list all of the material considered by the trial court. A4-6. The April 22, 2011 order corrected the omission, but is otherwise substantively identical to the March 25 order. A1-3. The Notice of Discretionary Review, filed April 22, 2011, references both orders.

physicians employed by defendant should be granted where the trial court has without opposition certified the orders for discretionary review under RAP 2.3(b)(4), where the orders involve a controlling question of law as to which there is substantial ground for a difference of opinion and where immediate review may materially advance the ultimate termination of the litigation.

3. Whether discretionary review should be granted under RAP 2.3(b)(2) because the trial court's orders constitute probable error which substantially alters the status quo, and/or substantially limits the freedom of the parties to act.

D. 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 at St. Joseph Hospital, a hospital owned and operated by PeaceHealth, in December 2008. 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.² A11-13. From the outset, Plaintiff's

² 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

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.³ 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 which it considers managing or speaking agents for PeaceHealth in this case.⁴ A23-24.

The parties were unable to resolve the issue, and on January 31, 2011, 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),

motion for a change of venue to Whatcom County. The case formally appeared on the Whatcom County docket on December 22, 2010.

³ The complaint specifically identified Drs. Leone and Dr. Berry, although they were not named as parties. A12. 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.

⁴ Under *Wright v. Group Health*, 103 Wn. 2d 192, 200, 691 P.2d 564 (1984) only those corporate employees who are managing or speaking agents for the corporation are considered "parties" for purposes of litigation. As discussed below, *Wright* is highly relevant since *Loudon* applies to "nonparty treating physicians." *Smith*, 170 Wn.2d at 665.

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.

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.

A7-8. The Order applied to all treating physicians including those employed by PeaceHealth.

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* simply does not apply to physicians employed by a corporate defendant, such as PeaceHealth. A45-56. The trial court on March 25, 2011, reversed its earlier ruling, and denied Plaintiff's Motion for a Protective Order. A4-6. The Court order stated: "counsel for PeaceHealth may have ex parte contact with PeaceHealth employees who provided health care to plaintiff Marc Youngs." A5. It is undisputed that this order permits PeaceHealth attorneys to have ex parte contact with any of Marc Young's treating physicians, regardless of whether the conduct of the physician is at issue, or whether the physician is a speaking agent for PeaceHealth.

Plaintiff moved to certify the orders for discretionary review under RAP 2.3(b)(4). A78-82. PeaceHealth did not oppose the certification motion, stating it “recognizes that this issue is likely to be a recurring one until resolved by the appellate courts.” A109-110. The trial court certified its orders for discretionary review. A9-10.

E. **Argument Why Review Should Be Accepted**

1. **The Trial Court’s Orders Conflict with and Negate the Fundamental Public Policy of *Loudon* and *Smith* Prohibiting Defense Counsel from Engaging in 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.

In December 2010, the Supreme Court in *Smith* 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 rejected the request that *Loudon* be given 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. 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 would not permit “defense attorneys to accomplish indirectly what they cannot accomplish directly.” *Smith*, 170 Wn.2d at 669.

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

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. *Id.* at 676.

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 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

⁶ *Loudon* applies to all types of 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.

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). In the lead opinion in *Smith*, the word “nonparty” appears 24 times.

The question before the Court should be a simple one then: who is a party when a corporation is a defendant? If a treating physician is not a party, then *Loudon* should apply. *Wright v. Group Health Hospital*, 103 Wn. 2d 192, 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.

Id., at 200.

Wright arose in the medical malpractice context. The Supreme Court in *Wright* rejected a claim by Group Health that all of its employees were “parties” in a lawsuit brought against the corporation. *Id.*, 103 Wn.3d at 194. Only those employees who are speaking agents for the corporation are parties. *Id.*, at 200-01. The courts and the bar have now 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 treating physicians to which Plaintiff’s requested order applies are not named parties, and they have not been identified as speaking agents. They are thus nonparties to whom *Loudon* and *Smith* apply.

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 of these treating physicians are parties. Moreover, it has refused to identify any of the treating physicians, or anyone else, as speaking agents.

The hospital ignores the fundamental issue of who is a party. It takes the position that because “a corporation can only act through its agents,” it may speak ex parte with any corporate employee, regardless of party status. *Loudon* and *Smith* simply do not apply. See e.g. A29. 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, as discussed in the next issue, a few corporate hospitals are proceeding at a rapid pace in taking over and employing what used to be independent physician practices.

2. **Discretionary Review should be Granted under RAP 2.3(b)(4) where the Trial Court has Certified the Orders for Discretionary Review, where Defendant has not Opposed Discretionary Review, and where Review of the Orders Meets the Criteria of RAP 2.3(b)(4).**

RAP 2.3(b)(4) provides for discretionary review if:

The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which

there is a substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

Washington adopted Rule 2.3(b)(4) from 28 U.S.C. § 1292(b). 2A Karl B. Tegland, *Washington Practice: Rules Practice*, at 161 (6th ed. 2004). Washington courts look to the federal court decisions for guidance in analyzing state rules similar to federal rules, where the reasoning of those decisions is persuasive. *Am. Mobile Homes of Wash., Inc. v. Seattle-First Nat'l Bank*, 115 Wn.2d 307, 313, 796 P.2d 1296 (1990).

The federal courts have found that a controlling issue of law exists when the question of law is one of first impression, and there is a substantial ground for a difference of opinion.

Courts traditionally will find that a substantial ground for difference of opinion exists where the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented.

Couch v. Telescope, Inc. 611 F.3d 629, 633 (9th Cir.2010). *See, e.g., Weintraub v. Bd. of Educ.*, 593 F.3d 196, 200 (2nd Cir. 2010); *Castellano-Contreras v. Decatur Hotels, LLC*, 576 F.3d 332, 336 (5th Cir. 2009); *Bryan v. UPS, Inc.*, 307 F.Supp.2d 1108 (N.D. Cal. 2004).

The Court's order in this case meets the criteria of an issue of first impression. *Loudon* and *Smith* prohibit ex parte contact with a plaintiff's

nonparty treating physicians. *Smith*, 170 Wn.3d at 665. The controlling question of law presented by the Court's order is whether *Loudon* and *Smith* apply to treating physicians employed by a defendant.

That there is a substantial ground for a difference of opinion on this controlling issue of law should be uncontested. The parties presented the trial court with extensive briefing on this issue reflecting those differences of opinion. But perhaps more to the point, the trial court's own rulings reflect the existence of this difference of opinion. The trial court initially found that *Loudon* and *Smith* applied and granted Plaintiffs' motion for a protective order prohibiting defense counsel from engaging in ex parte contacts with PeaceHealth treating physicians other than Dr. Leone and Dr. Berry. A7-8. The court then reversed itself, found that *Loudon* and *Smith* do not apply, and entered an order permitting defense counsel to engage in ex parte contact with any and all PeaceHealth employees who treated Marc Youngs. A1-6.

Under RAP 2.3(b)(4), the "controlling issue of law" need only be one which could materially affect the outcome of the case. "[T]he issue 'need not be dispositive of the lawsuit ...'" *Lakeland Village Homeowners Ass'n v. Great American Ins. Group*, 727 F.Supp.2d 887, 896 (E.D.Cal., 2010) citing *U.S. v. Woodbury*, 263 F.2d 784 (9th Cir. 1959).

The trial court's ruling on this pretrial issue is a critical one which will determine how this case proceeds, and which will materially affect the outcome of the case. Defendant is seeking ex parte contact with Plaintiff's treating physicians *now*, before depositions or any other proceedings take place. The harm identified by the Court in *Loudon*, warranting the bright line rule it adopted, takes place at the time of the ex parte conversation. 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 if the contacts are later determined to violate *Loudon*, as Plaintiff believes they will be. 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.⁷

Unlike the situation in *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. There will be no record of what was said in these conversations. Plaintiff and the court will be limited to the recollections by the witness of conversations occurring perhaps months in the past. The testimony of the witness will have already 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.

Loudon is a prophylactic rule. It is designed to prevent harm from occurring in the first place. Plaintiff brought the motion at the outset of litigation precisely in order to prevent the harm before it takes place. Plaintiff is seeking interlocutory review because the harm caused by this

⁷ In *Smith*, the plaintiff asked the Court for a new trial in which the testimony of the treating physician would be excluded. That may 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 treating physician may well 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.

contact is manifest, it will materially affect the outcome of the case, and cannot be fully remedied on appeal from a final judgment.

The issue which is raised by the trial court's orders is and will be a recurring issue, one on which trial courts confronted with the same issue should be given guidance from the appellate courts. 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. A 107. PeaceHealth employs 500 physicians. A111-113. Smaller hospitals are part of this phenomenon as well. Skagit Valley Hospital, for instance, recently acquired the 81 doctor Skagit Valley Medical Center. A106.

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. A107.

Given the economic consolidation in the health care industry, and the trend towards physicians employed by hospitals, it is clear that guidance is needed on this issue, and sooner rather than later. This case presents the vehicle for that guidance, with the issue clearly drawn, and experienced medical malpractice attorneys on both sides.

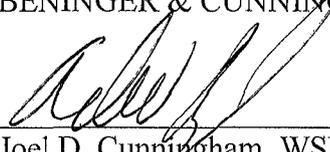
The trial court's ruling has now given large corporate employers of physicians, including but not limited to PeaceHealth, a practical way to avoid the *Loudon* requirements. Before the courts go down this road, the appellate courts should be permitted to speak to the issue directly.

3. Discretionary Review should be Granted under RAP 2.3(b)(2) because the Trial Court's Orders Constitute Probable Error.

Although Plaintiff obtained a RAP 2.3(b)(4) certification, Plaintiff also asserts that the trial court's ruling is probable error, and that discretionary review is warranted under RAP 2.3(b)(2). The rule in *Loudon* is clear. Ex parte contacts by defense counsel with a plaintiff's "nonparty treating physicians" is prohibited. The hospital does not claim that the treating physicians to be covered by Plaintiff's requested protective order are parties. Under settled Washington case law, *Loudon* and *Smith* apply to them, and prohibit the ex parte contacts authorized by the trial court. The standard here is "probable" error, not "obvious" error. The trial court's rulings constitute probable error warranting review.

Dated this 9th day of May, 2011.

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CERTIFICATE OF SERVICE

THE UNDERSIGNED hereby certifies that she caused delivery of a copy of the foregoing Motion for Discretionary Review in the manner set forth below:

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VIA LEGAL MESSENGER

Dated this 9th of May, 2011.



Dee Dee White

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.

APPENDIX

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FILED IN OPEN COURT
4/22/2011
WHATCOM COUNTY CLERK

By _____ Deputy

The Honorable Ira Uhrig
Hearing date: April 22, 2011

SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF WHATCOM

MARC YOUNGS

Plaintiff,

v.

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

Defendants.

No. 10-2-03230-1

AMENDED ORDER GRANTING
DEFENDANT PEACEHEALTH'S
MOTION FOR
RECONSIDERATION

Clerk's Action Required

THIS MATTER, having come before the Court in the above-captioned matter upon Defendant PeaceHealth's Motion for Reconsideration Pursuant to CR 59(a)(8),

And the Court having reviewed and considered the following papers filed in support thereof and opposition thereto:

AMENDED ORDER GRANTING MOTION FOR
RECONSIDERATION - 1

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34A

ORIGINAL

- 1 1. Defendant PeaceHealth's Motion for Reconsideration Pursuant to CR
- 2 59(a)(8);
- 3 2. Plaintiff's Opposition to Motion to Reconsider;
- 4 3. Defendant's Reply re Motion for Reconsideration;
- 5 4. Declaration of Heath Fox dated March 18, 2011 (with exhibits).

6 And the Court being otherwise fully advised in the premises, and the Court
7 having heard oral argument on March 18, 2011;

8 It is hereby ORDERED that Defendant PeaceHealth's Motion for
9 Reconsideration is GRANTED.

10 It is further ORDERED that Plaintiff's Motion for Protective Order
11 Prohibiting Ex Parte Contact with Plaintiff's Treating Health Care Providers is
12 DENIED, and counsel for PeaceHealth may have ex parte contact with
13 PeaceHealth employees who provided health care to plaintiff Marc Youngs.

14 This Amended Order replaces the Order dated March 25, 2011, to reflect
15 all documents reviewed by the Court.

16
17 DONE IN OPEN COURT this 22 day of April, 2011.

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20 _____
21 THE HONORABLE IRA J. UHRIG
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**AMENDED ORDER GRANTING MOTION FOR
RECONSIDERATION - 2**

JOHNSON, GRAFFE,
KEY, MONIZ & WICK, LLP
ATTORNEYS AND COUNSELORS AT LAW
925 FOURTH AVENUE, SUITE 2300
SEATTLE, WASHINGTON 98104
PHONE (206) 223-4770
FACSIMILE (206) 386-7344

1 Presented by:

2 JOHNSON, GRAFFE, KEAY,
3 MONIZ & WICK, LLP

4
5 By 

6 John C. Graffe, WSBA #11835
7 Heath S. Fox, WSBA #29506
8 Attorneys for Defendant PeaceHealth

9 Approved as to form and notice of presentation waived:

10 LUVERA, BARNETT, BRINDLEY,
11 BENNINGER & CUNNINGHAM

12
13 By: 

14 Joel D. Cunningham, WSBA #5586
15 Andrew Hoyal, WSBA #21349
16 Attorneys for Plaintiff Marc Youngs

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Received

APR 01 2011
Office of Luvera Barnett Brindley
Beninger & Cunningham

FILED

MAR 25 2011

WHATCOM COUNTY CLERK

By: _____

The Honorable Ira Uhrig
Hearing date: March 7, 2011

**SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF WHATCOM**

MARC YOUNGS

Plaintiff,

v.

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

Defendants.

No. 10-2-03230-1

**ORDER GRANTING DEFENDANT
PEACEHEALTH'S MOTION FOR
RECONSIDERATION**

Clerk's Action Required

THIS MATTER, having come before the Court in the above-captioned matter upon Defendant PeaceHealth's Motion for Reconsideration Pursuant to CR 59(a)(8),

And the Court having reviewed and considered the following papers filed in support thereof and opposition thereto:

**ORDER GRANTING MOTION FOR
RECONSIDERATION - 1**

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PHONE (206) 223-4770
FACSIMILE (206) 386-7344

Copy to Attys

1 1. Defendant PeaceHealth's Motion for Reconsideration Pursuant to CR
2 59(a)(8);

3 2. _____;

4 3. _____;

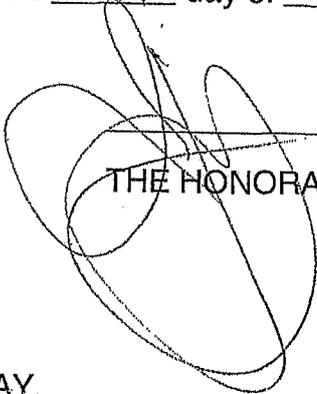
5 4. _____;

6 And the Court being otherwise fully advised in the premises;

7 It is hereby ORDERED that Defendant PeaceHealth's Motion for
8 Reconsideration is GRANTED.

9 It is further ORDERED that Plaintiff's Motion for Protective Order
10 Prohibiting Ex Parte Contact with Plaintiff's Treating Health Care Providers is
11 DENIED, and counsel for PeaceHealth may have ex parte contact with
12 PeaceHealth employees who provided health care to plaintiff Marc Youngs.

13 DONE IN OPEN COURT this 25 day of March, 2011.



16 THE HONORABLE IRA J. UHRIG

18 Presented by:

19 JOHNSON, GRAFFE, KEAY,
20 MONIZ & WICK, LLP

21 By _____

22 John C. Graffe, WSBA #11835
23 Heath S. Fox, WSBA #29506
24 Attorneys for Defendant PeaceHealth

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Approved as to form and notice of presentation waived:

LUVERA, BARNETT, BRINDLEY,
BENNINGER & CUNNINGHAM

By: _____
Joel D. Cunningham, WSBA #5586
Andrew Hoyal, WSBA #21349
Attorneys for Plaintiff Marc Youngs

**ORDER GRANTING MOTION FOR
RECONSIDERATION - 3**

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SCANNED 2

HONORABLE IRA J. UHRIG

FILED IN OPEN COURT
21 11 2011
WHATCOM COUNTY CLERK
By AS
Deputy

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WHATCOM

MARC YOUNGS,

Plaintiff,

v.

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

Defendants.

CAUSE NO. 10-2-03230-1

~~[PROPOSED]~~

ORDER

This matter came before the Court upon Plaintiff's Motion for Protective Order Prohibiting *Ex Parte* Contact with Plaintiff's Treating Health Care Providers. In reviewing the motion, the Court has considered:

1. Plaintiff's Motion for Protective Order Prohibiting *Ex Parte* Contact With Plaintiff's Treating Health Care Providers;
2. Declaration of Joel Cunningham;
3. Defendants' Response;
4. Plaintiffs' Reply;

[PROPOSED] ORDER - 1

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No JFS/

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ATTORNEYS AT LAW
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SEATTLE, WASHINGTON 98104
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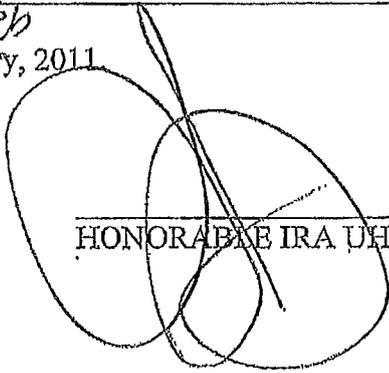
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- 8. _____

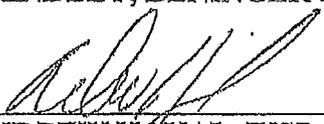
The Court being fully apprised, hereby GRANTS plaintiff's Motion for Protective Order Prohibiting *Ex Parte* Contact With Plaintiff's Treating Health Care Providers is hereby GRANTED as follows:

1. 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.

DATED this 31st day of ~~January~~ ^{Feb}, 2011



HONORABLE IRA UHRIG

Presented by:
 LUVERA, BARNETT
 BRINDLEY, BENINGER & CUNNINGHAM

 ANDREW HOYAL, WSBA #21349
 Counsel for Plaintiff

[PROPOSED] ORDER - 1

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 SEATTLE, WASHINGTON 98104
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HONORABLE IRA J. UHRIG

FILED IN OPEN COURT
4/22 2011
WHATCOM COUNTY CLERK
By _____ Deputy *B*

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WHATCOM

MARC YOUNGS,

Plaintiff,

v.

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

Defendants.

CAUSE NO. 10-2-03230-1
~~PROPOSED~~

ORDER

This matter came before the Court upon Plaintiff's Motion for Certification of Order for Discretionary Review pursuant to RAP 2.3(b)(4). In reviewing the motion, the Court has considered:

1. Plaintiff's Motion for Certification of Order for Discretionary Review;
2. Declaration of Andrew Hoyal
3. *Defendant PeaceHealth Response to Plaintiff's Motion for Certification of Order for Discretionary Review*
4. *Order for Discretionary Review*

The Court hereby FINDS as follows:

34B

~~PROPOSED~~ ORDER - 1

LUVERA, BARNETT, BRINDLEY,
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(206) 467-6090

and April 22, 2011

1 The Court's March 25, 2011 order granting Defendant's Motion for
2 Reconsideration involves a controlling issue of law as to which there is substantial ground
3 for a difference of opinion. There is no Washington authority addressing the specific issue
4 of whether the rule in *Loudon v. Mhyre* prohibiting defense counsel from engaging in ex
5 parte contact with a plaintiff's nonparty treating physicians applies to treating physicians
6 employed by the defendant. The question is therefore one of first impression requiring
7 resolution by the appellate courts;

9 2. Immediate review of the order and resolution of this issue will materially
10 advance the ultimate termination of this litigation.

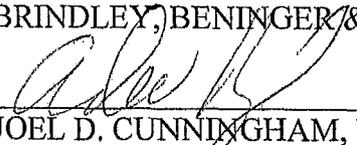
11 The Court being fully apprised, it is hereby ORDERED, ADJUDGED AND
12 DECREED that Plaintiff's Motion for Certification of Order for Discretionary Review is
13 GRANTED.
14

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18 DATED this 22 day of April, 2011.

19
20
21 HONORABLE IRA UHRIG

22 Presented by:

23 LUVERA, BARNETT
24 BRINDLEY, BENINGER & CUNNINGHAM

25 
26 JOEL D. CUNNINGHAM, WSBA #5586
ANDREW HOYAL, WSBA# 21349
Counsel for Plaintiff

[PROPOSED] ORDER - 1

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SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

MARC YOUNGS,

Plaintiff,

v.

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

Defendants.

CAUSE NO.

COMPLAINT FOR DAMAGES

 Electing Voluntary Arbitration
 Declining Voluntary Arbitration

COMES NOW the plaintiff, and for claim for relief against defendants alleges as follows:

- 1. PARTIES**
- 1.1 Plaintiff Marc Youngs is an individual currently residing in Bellingham, Washington. Plaintiff was a patient and received medical care and treatment from Defendant PeaceHealth from December 23, 2008 to January 9, 2009.
- 1.2 Defendant PeaceHealth is a duly formed corporation under the laws of the State of Washington with its principal place of business located in King County, Washington.

1 1.3 Defendants John Does, whose names and whereabouts are presently
2 unknown, also provided health care to plaintiff.

3 **2. JURISDICTION AND VENUE**

4 2.1 Jurisdiction and venue are proper in King County.

5 **3. COMPLIANCE WITH LAWS PECULIAR TO HEALTH CARE LAWSUITS**

6 3.1 Plaintiff Marc Youngs does not have hands with which to sign the requisite
7 voluntary arbitration election. He has advised his counsel that he wishes to opt out of
8 voluntary arbitration and seek a jury trial in compliance with Washington State law.

9 3.2 This action is commenced within the applicable statute of limitation.

10 **4. BASIC FACTS**

11 4.1 The nurses and staff that cared for Plaintiff are all employees and/or agents of
12 Defendant, PeaceHealth.

13 4.2 Donald Berry, M.D. is a physician licensed to practice medicine in
14 Washington State and provided health care to Plaintiff, Marc Youngs. At all time material to
15 this action, Dr. Berry was an employce and agent of Defendant PeaceHealth.

16 4.3 Richard Leone, M.D. is a physician licensed to practice medicine in
17 Washington State and provided health care to Plaintiff, Marc Youngs. At all time material to
18 this action, Dr. Berry was an employee and agent of Defendant PeaceHealth.

19 4.4 On or about December 23, 2008, Marc Youngs was admitted to PeaceHealth
20 St. Joseph Medical Center in Bellingham where he received medical care from the nursing
21 staff, agents and employees of that hospital. During that medical care, plaintiff Marc
22 Youngs suffered severe and permanent injures including eventual amputation of both his
23 legs above the knee and both his hands.

24 4.5 On January 9, 2009, Mr. Youngs was transferred to Harborview Medical
25 Center in Seattle, Washington where he was treated by a vast number of health care
26 providers for four months and where the amputations occurred.

1 **5. LEGAL THEORIES**

2 5.1 Defendant, through its agents or employees, violated RCW 7.70.010 et seq.
3 and were negligent in the care they provided to plaintiff Marc Youngs.

4 5.2 Defendant is liable under the Doctrine of Corporate Negligence.

5 5.3 Defendant is liable under the Doctrine of Respondeat Superior.

6 5.4 Defendant is liable under the Doctrine of Res Ipsa Loquitur.

7 5.5 Defendant is liable for failure to obtain an informed consent.

8 **6. PROXIMATE CAUSE**

9 6.1 Each of the above violations of law were a proximate cause of injury and
10 damage to plaintiff.

11 WHEREFORE, plaintiff prays for judgment against the above-named defendant as
12 follows:

- 13 a. For recovery of all economic damages as permitted by Washington law;
14 b. For recovery of non-economic damages as permitted by Washington law;
15 c. For pre-judgment interest;
16 d. For all such additional relief that the Court finds just and reasonable.

17 The aforesaid damages are in an amount to be proven at trial.

18 DATED this 14th day of September, 2010.

19 LUVERA, BARNETT,
20 BRINDLEY, BENINGER & CUNNINGHAM

21 /s/ Joel D. Cunningham
22 JOEL D. CUNNINGHAM, WSBA #5586

23 LAW OFFICES OF JAMES L. HOLMAN

24 /s/ James L. Holman
25 JAMES L. HOLMAN, WSBA #6799

26 Counsel for Plaintiff

HONORABLE IRA J. UHRIG
Motion Noted:
Friday, February 11, 2011, 1:30 p.m.

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WHATCOM

MARC YOUNGS,

Plaintiff,

v.

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

Defendants.

CAUSE NO. 10-2-03230-1

PLAINTIFF'S MOTION FOR
PROTECTIVE ORDER PROHIBITING
EX PARTE CONTACT WITH
PLAINTIFF'S TREATING HEALTH
CARE PROVIDERS

I. RELIEF REQUESTED

Plaintiff moves this court for an order prohibiting defense counsel from *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. This motion is based upon the Supreme Court's ruling in *Loudon v. Mhyre*, 110 Wn.2d 675, 677, 756 P.2d 138 (1988), holding that "ex parte interviews" between a defense counsel and plaintiff's non-defendant treating physicians "should be prohibited as a matter of public policy." The

PLAINTIFF'S MOTION RE EX PARTE CONTACT
WITH TREATING HEALTH CARE PROVIDERS - 1

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1 Supreme Court reaffirmed *Loudon* in November, 2010 in *Smith v. Orthopedics Intern., Ltd.*,
2 P.S., __P.3d__, 2010 WL 5129020 (Wash. 2010).

3
4 **II. STATEMENT OF FACTS**

5 This medical negligence arises from the catastrophic injuries suffered by plaintiff
6 Marc Youngs as a result of the negligent post-operative care he received at St. Joseph
7 Hospital in December 2009. Mr. Youngs was admitted to St. Joseph for lung surgery on
8 December 23, 2009. He developed a life-threatening sepsis following his surgery, and on
9 January 4, 2009 was transferred to Harborview Medical Center in Seattle for treatment.

10 Plaintiff filed this lawsuit on September 17, 2010 in King County. King County
11 Superior Court #10-2-33121-2. On December 2, 2010, the King County Superior Court
12 entered an order changing venue to Whatcom County.

13 PeaceHealth is the only named Defendant. The complaint also specifically identifies
14 Dr. Richard Leone, and Dr. Donald Berry, but does not name these physicians as parties.
15 Complaint ¶¶4.2 & 4.3. Plaintiff is not seeking the protective order as to Dr. Leone and Dr.
16 Berry.
17

18 Plaintiff's counsel has had discussions and email correspondence with counsel for
19 PeaceHealth regarding Plaintiff's contention that defense counsel cannot engage in *ex parte*
20 communications with health care providers who treated Mr. Youngs. Defense counsel does
21 not agree that plaintiff's counsel has a right to be present when he is interviewing any
22 treaters who are employees of the hospital. Defense counsel has also declined to designate
23 any employee at PeaceHealth as managing or speaking agents in this case. Cunningham
24 Dec. ¶¶2-3.
25
26

PLAINTIFF'S MOTION RE EX PARTE CONTACT
WITH TREATING HEALTH CARE PROVIDERS - 2

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1 interviews, by bringing the lawsuit with its accompanying waiver of the physician-patient
2 privilege:

3 Waiver is not absolute, however, but is limited to medical information
4 relevant to the litigation. See CR 26(b)(1). The danger of an *ex parte*
5 interview is that it may result in disclosure of irrelevant privileged medical
6 information. The harm from disclosure of this confidential information
7 cannot, as defendants argue, be fully remedied by subsequent court sanctions.
The plaintiff's interest in avoiding such disclosure can best be protected by
allowing plaintiff's counsel an opportunity to participate in physician
interviews and raise appropriate objections.

8 *Id.*

9 The *Loudon* court further rested its decision on the fiduciary nature of the physician-
10 patient relationship, which is "recognized by the Hippocratic Oath and in the ethical
11 guidelines of the American Medical Association." *Id.* at 679. The court reasoned that the
12 "presence of plaintiff's counsel as the protector of a patient's confidences will allay the fear
13 that irrelevant confidential material will be disclosed and preserve the fiduciary trust
14 relationship between physician and patient." *Id.* at 680.

15 Recognizing that a cause of action might lie against a physician for unauthorized
16 disclosure of privileged information, the court noted that "the participation of plaintiff's
17 counsel to prevent improper questioning or inadvertent disclosures enhances the
18 accomplishment of the purpose of the physician-patient privilege by also providing
19 protection to the physician." *Loudon*, 110 Wn.2d at 680.¹ The court further noted its
20
21

22
23 ¹ The Supreme Court subsequently held that a treating physician who discloses a patient's
24 confidential information without patient authorization is subject to liability both for medical
25 malpractice under RCW 7.70 et seq., and for violation of the Uniform Health Care
26 Information Act, RCW 70.02 et seq. *Berger v. Sonneland*, 144 Wn.2d 91, 101-103, 26 P.3d
257 (2001).

PLAINTIFF'S MOTION RE EX PARTE CONTACT
WITH TREATING HEALTH CARE PROVIDERS - 4

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1 concern that permitting *ex parte* interviews by defendants “could result in disputes at trial
2 should a doctor’s testimony differ from the informal statements given to defense counsel,
3 and may require defense counsel to testify as an impeachment witness.” *Id.* at 680. Based
4 on all of these considerations, *Loudon* established an absolute prohibition against *ex parte*
5 contacts by defense counsel.
6

7 In December 2010, the Washington Supreme Court affirmed the broad and absolute
8 principles it had established in *Loudon*. *Smith v. Orthopedics Intern., Ltd., P.S.*, ___P.3d___,
9 2010 WL 5129020 (Wash. 2010). *Smith* held that counsel for defendants in a medical
10 malpractice action violated *Loudon* by sending documents to a non-party treating physician's
11 counsel prior to that physician's testimony at trial. The Court confirmed that *Loudon*
12 established a bright line rule, which was violated by any *ex parte* communication with
13 plaintiff's health care providers, however indirect: “We conclude that the prohibition on *ex*
14 *parte* contact, which we set forth in *Loudon*, is broad and not confined to merely limiting
15 interviews by defense counsel with a plaintiff's treating physician.” 2010 WL 5129020, ¶
16 11.
17

18 The Court rejected defendant’s argument that transmitting documents to the non-
19 party treating physician’s lawyer did not amount to *ex parte* contact because it was
20 “communication between lawyers acting as lawyers.” As the Court held, that
21 communication presented the “very risk of disclosure of intimate detail without the
22 knowledge of [plaintiff’s] counsel” that *Loudon* was intended to minimize. *Id.*, ¶ 13. It
23 further stated that the nature of the documents transmitted—public or private—would make no
24 difference to its opinion: “even if the documents that were transmitted were entirely public
25
26

PLAINTIFF’S MOTION RE EX PARTE CONTACT
WITH TREATING HEALTH CARE PROVIDERS - 5

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1 information, we would have the same concerns. . . In our view, contact of this kind is within
2 the ambit of what we contemplated in *Loudon* when we prohibited ex parte contact between
3 defense counsel and nonparty treating physicians.” *Id.* at ¶ 17.

4
5 In reaching its holding, the Court emphasized that *any contact or communication*
6 between a defendant and a treating physician, direct or indirect, would threaten the sanctity
7 of the physician-patient relationship.

8 [P]ermitting contact between defense counsel and a nonparty treating
9 physician outside the formal discovery process undermines the physician's
10 role as a fact witness because during the process the physician would
11 improperly assume a role akin to that of an expert witness for the defense.
12 Although a treating physician fact witness may testify as to both facts and
13 medical opinions in an action for alleged medical negligence, such testimony
14 is limited to “the medical judgments and opinions *which were derived from*
the treatment.” *Carson*, 123 Wash.2d at 216, 867 P.2d 610 (emphasis added)
(citing *Richbow v. District of Columbia*, 600 A.2d 1063, 1069 (D.C.1991)).
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.

15 *If there is a risk that a nonparty treating physician testifying as a fact*
16 *witness might assume the role of a nonretained expert for the defense, it*
17 *may result in chilling communication between patients and their physicians*
18 *about privileged medical information.* We attempted to limit that possibility
19 in *Loudon* by restricting contact between defense counsel and nonparty
treating physicians. We reaffirm that intent here and apply the rule to prohibit
ex parte contact through counsel for the nonparty treating physician. If we
were to do otherwise, we would be permitting defense attorneys to
accomplish indirectly what they cannot accomplish directly.

20 *Id.*, ¶¶ 14-15 (footnote omitted)(emphasis added).

21 Thus, under *Loudon* and *Smith*, *any* ex parte contact between the defendants here and
22 non-party treating physicians is prohibited. This includes any contact for trial preparation or
23 any other purpose.

24
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PLAINTIFF’S MOTION RE EX PARTE CONTACT
WITH TREATING HEALTH CARE PROVIDERS - 6

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1 Defendant may argue that *Loudon* and *Smith* do not apply to treating physicians
2 employed by the defendant, regardless of whether Plaintiff is calling into question the
3 medical care provided by the particular employee. In *Wright v. Group Health Hospital*, 103
4 Wn. 2d 192, 200, 691 P.2d 564 (1984), the Supreme Court expressly rejected the claim that
5 every employee of a hospital should be considered a party.² In *Wright*, the plaintiff brought
6 a medical malpractice action against defendant Group Health, an HMO. Plaintiff's counsel
7 had sought ex parte interviews with health care providers employed by Group Health, but
8 who were not named parties, and whose conduct was not the subject of a claim of
9 negligence. The trial court entered an order prohibiting plaintiff's counsel from *ex parte*
10 contact with the current and former employees of Group Health. The trial court predicated
11 its order on the ground that the employees were parties and that disciplinary rules prohibited
12 ex parte contact with an adverse party represented by counsel.
13
14

15 The Supreme Court in *Wright* reversed the trial court's order, holding that the trial
16 court's order read the meaning of "party" too broadly to include all employees of a
17 defendant corporation. Instead, the Supreme Court adopted the following interpretation of
18 "party" for purposes of litigation against a corporation.

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

23 *Id.*, 103 Wn.2d at 200.

24 ² The rule in *Wright* applies to any case involving a corporation, but it is noteworthy that the
25 rule originated in a medical malpractice case in which the defendant hospital asserted that all
26 of its employees should be deemed parties.

PLAINTIFF'S MOTION RE EX PARTE CONTACT
WITH TREATING HEALTH CARE PROVIDERS - 7

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1 Thus, an employee is a “party” in litigation only if the employee has the authority to
2 speak for the corporation, such that the employee’s statements bind the corporation as a
3 party admission under evidentiary rules, (ER 801(d)(2)), and rules of agency. *Id.* The
4 employee is a “speaking agent” if under applicable Washington law, the employee has
5 authority sufficient to speak for and bind the corporation on the matters on which the
6 employee will give testimony. *Id.* at 201. *See e.g., Young v. Group Health*, 85 Wn.2d 332,
7 337-338, 534 P.2d 1349 (1975).

9 The Court in *Wright* also made clear that a defendant may not engage in subterfuge
10 to circumvent this rule, or to render the right to interview employees who are not parties a
11 hollow one. Thus,

12 Since we hold an adverse attorney may, under CPR DR 7-104(A)(1),
13 interview ex parte nonspeaking/managing agent employees, it was improper
14 for Group Health to advise its employees not to speak with plaintiffs'
15 attorneys. **An attorney's right to interview corporate employees would be**
16 **a hollow one if corporations were permitted to instruct their employees**
17 **not to meet with adverse counsel.**

18 *Id.*, 103 Wn.2d at 202-03 (emphasis added).

19 A patient has a right to confidentiality and to the restrictions set out in *Loudon* and
20 *Smith*. The current practice of medicine often involves the provision of comprehensive
21 health care services by large hospitals, health maintenance organizations, and physicians'
22 groups or clinics. The patient’s concerns for confidentiality and the physician’s fiduciary
23 duty to the patient do not depend upon the size or breadth of the organization employing the
24 physician. Defendant hospital here does not enjoy a practical exemption from the
25 requirements of *Loudon* and *Smith*, simply because of its size.

26
PLAINTIFF’S MOTION RE EX PARTE CONTACT
WITH TREATING HEALTH CARE PROVIDERS - 8

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1 Defendant in this case has asserted the right to speak ex parte with any and all health
2 care providers treating Marc Youngs, so long as they are the employees of defendants.
3 Defendant has further declined Plaintiff's request that it identify those employees who are
4 speaking agents, and therefore who can be treated as parties for purposes of *Loudon* and
5 *Smith*.³ Defendant in short seeks to have it both ways. Defendant wishes to treat all of its
6 employees as parties for purposes of ex parte communications, but not for purposes of
7 binding Defendant with testimony. This it may not do under *Loudon*, *Smith* and *Wright*.
8

9 **III. CONCLUSION**

10 On the basis of the foregoing, Plaintiff respectfully requests that this Court enter a
11 protective order prohibiting Defendant from engaging in any ex parte contact, either directly
12 or indirectly, with treating physicians for Marc Youngs, with the exception of Dr. Richard
13 Leone, and Dr. Donald Berry.
14

15 DATED this 31st day of January 2011.

16 LUVERA, BARNETT,
17 BRINDLEY, BENINGER & CUNNINGHAM

18 
19 _____
20 JOEL D. CUNNINGHAM, WSBA #5586
21 ANDREW HOYAL, WSBA #21349
22 Counsel for Plaintiff
23
24

25 ³ Since Defendant has declined to designate anyone as a speaking agent, the Court does not
26 have before it the question of whether any particular designation is appropriate.

HONORABLE IRA J. UHRIG
Motion Noted:
Friday, February 11, 2011, 1:30 p.m.

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WHATCOM

MARC YOUNGS,

Plaintiff,

v.

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

Defendants.

CAUSE NO. 10-2-03230-1

DECLARATION OF
JOEL D. CUNNINGHAM

Joel D. Cunningham, declares as follows:

1. I am one of the attorneys for Plaintiff. This declaration is based on my personal knowledge.

2. I have had discussions and emails with John Graffe, counsel for PeaceHealth, regarding our contention that counsel cannot have ex parte communications with health care providers who treated my client, Mr. Youngs, with the exception of the doctors named in the body of the complaint, Drs. Leone and Berry. Mr. Graffe does not agree that plaintiffs'

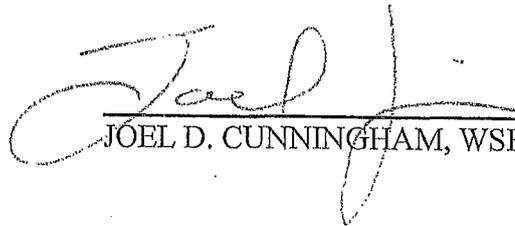
DECLARATION OF JOEL D. CUNNINGHAM - 1

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1 counsel has a right to be present when he is interviewing any treaters who are employees of
2 the defendant. I asked that Mr. Graffe designate managing or speaking agents for
3 PeaceHealth in this case as a way to reach a middle ground. He declined to designate
4 anyone and stated that he believes he has no obligation to do so.

5
6 3. Mr. Graffe and I disagree completely on this issue and need the assistance of
7 the Court to resolve.

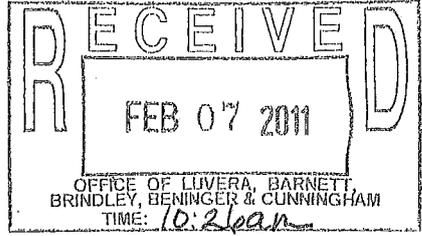
8 I swear under penalty of perjury under the laws of the State of Washington that the
9 foregoing is true and correct. Executed this 31st day of January, 2011, in Seattle,
10 Washington.

11
12
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14 _____
15 JOEL D. CUNNINGHAM, WSBA #5586
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DECLARATION OF JOEL D. CUNNINGHAM - 1

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A24



The Honorable Ira Uhrig
Hearing date and time:
Friday, February 11, 2011, at 1:30 p.m.

**SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF WHATCOM**

MARC YOUNGS

Plaintiff,

v.

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

Defendants.

No. 10-2-03230-1

**DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION FOR
PROTECTIVE ORDER**

I. RELIEF REQUESTED

Corporations, including hospitals, act only through their agents and employees. Corporations remember, think, prepare, and defend themselves against lawsuits only through their agents and employees.. Granting plaintiff the relief he requests would infringe upon the constitutional due process right that any litigant has to be represented by counsel. Therefore, defendant PeaceHealth, d/b/a PeaceHealth St. Joseph Medical Center, requests that Plaintiff's Motion for Protective Order be denied because it would be contrary to law

**DEFENDANT'S OPPOSITION TO
PLAINTIFF'S MOTION FOR
PROTECTIVE ORDER - 1**

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1 and public policy to prohibit a corporation and its attorneys from having private,
2 confidential communications with the corporation's employees regarding the issues that are
3 the subject of a lawsuit.
4

5 **II. FACTUAL BACKGROUND**

6 **A. Plaintiff Is Suing PeaceHealth Based On Allegations of Medical 7 Negligence.**

8 Plaintiff sues PeaceHealth, alleging that "defendant, *through its agents or*
9 *employees*, violated RCW 7.70.010. et seq. and were negligent in the care they provided to
10 plaintiff Marc Youngs." See Declaration of John C. Graffe ("Graffe Decl.") at Exhibit A
11 (Plaintiff's Complaint), section 5.1 (emphasis added). Plaintiff alleges that "the nurses and
12 staff that cared for Plaintiff are all *employees and/or agents* of Defendant, PeaceHealth."
13 *Id.* at section 4.1 (emphasis added).
14

15 Plaintiff further alleges that "defendant is liable under the Doctrine of Corporate
16 Negligence, defendant is liable under the Doctrine of Respondeat Superior, defendant is
17 liable under the Doctrine of Res Ipsa Loquitur, [and] defendant is liable for failure to
18 obtain an informed consent." *Id.* at sections 5.2-5.5. Plaintiff claims that "each of the
19 above violations of law were a proximate cause of injury and damage to plaintiff." *Id.* at
20 section 6.1. PeaceHealth is the only defendant identified in the plaintiff's Complaint. *Id.*
21

22 **B. Plaintiff's Complaint References a Hospitalization at PeaceHealth 23 from December 23, 2008, to January 9, 2009.**

24 Plaintiff's Complaint mentions a hospitalization starting on December 23, 2008,
25 and ending on January 9[sic], 2009, as the subject of this lawsuit. *Id.* at sections 4.4-4.5.
26

1 Plaintiff alleges that, during that hospitalization, he “received medical care from the
2 nursing staff, agents and employees of that hospital,” and that “during that medical care,
3 [he] suffered severe and permanent injuries including eventual amputation of both his legs
4 above the knee and both his hands.” *Id.* at section 4.4.
5

6 **C. PeaceHealth Directly Employs Care Providers Who Treated the**
7 **Plaintiff During the Hospitalization That Is the Subject of**
8 **Plaintiff’s Complaint.**

9 PeaceHealth employs the nurses and many of the physicians who cared for Mr.
10 Youngs during his hospitalization at St. Joseph that is the subject of this lawsuit, and has a
11 contractual obligation to defend them in legal actions for care provided within the scope of
12 their employment at PeaceHealth.¹ *See* Exhibit A, sections 4.1-4.4; Declaration of Lynn
13 Dawes, ¶¶ 2, 4.. For example, PeaceHealth directly employs Stuart Thorson, MD, a
14 pulmonologist and critical care physician who provided post-operative care to Mr. Youngs
15 in the ICU during the time period plaintiff has identified as at issue in this case. *See* Dawes
16 Decl.; Graffe Decl. Similarly, PeaceHealth employs Kelvin Lam, MD, who provided ICU
17 care to Mr. Youngs during the time in question. *Id.* PeaceHealth also employs vascular
18 surgeon Michelle Sohn, MD., who provided a vascular surgery consultation for Mr.
19 Youngs during the time period identified in his Complaint. *Id.* PeaceHealth also employs
20 Youngs during the time period identified in his Complaint. *Id.* PeaceHealth also employs
21

22 ¹ The physicians employed by PeaceHealth also have more at stake than money in a lawsuit like this one.
23 They face reporting requirements to the Washington State Department of Health, and those reports are
24 publicly available for the rest of their careers. *See* Dawes Decl. Also, for the rest of their careers, should
25 they ever wish to leave PeaceHealth, they would need to report any alleged malpractice for the purpose of
26 obtaining malpractice insurance. Also, they need to report any such events every time they apply for a
renewal of hospital privileges. *Id.* Those physicians have a strong interest in maintaining their good
professional reputations in the community. For these reasons among other more obvious ones, they have a
right to be represented by appropriate counsel.

1 all of the nurses, respiratory therapists and certified nurse assistants who provided care to
2 Mr. Youngs during his hospitalization at PeaceHealth. Dawes. Decl. ¶ 3.

3
4 **D. Plaintiff's Counsel Has Objected to Defense Counsel Representing**
5 **PeaceHealth Employees or Even Communicating With Them in**
6 **Order to Represent PeaceHealth By Asserting an Absolute Ban on**
7 **"Ex Parte" Communication.**

8 Plaintiffs' counsel have informed the undersigned that they take the position that,
9 under *Loudon v. Mhyre*, 110 Wn.2d 675, 756 P.2d 138 (1988), the undersigned may not
10 meet with or contact, outside the presence of plaintiff's counsel, anyone who provided care
11 to Mr. Youngs at PeaceHealth other than Richard Leone, M.D., and Donald Berry, M.D..
12 *See* Declaration of John Graffe, at p. 2. Defense counsel have no intention of contacting
13 any of Mr. Youngs' care providers who are not employed directly by PeaceHealth.
14 Defense counsel merely seeks communication with PeaceHealth's employees.

15 PeaceHealth therefore asks that the Court deny plaintiff's Motion for Protective
16 Order and allow PeaceHealth's counsel to have the unfettered access to PeaceHealth's
17 employees that it needs to effectively represent PeaceHealth in this litigation.

18 **III. EVIDENCE RELIED UPON**

- 19 1. Declaration of John C. Graffe, dated February 3, 2011, with Exhibits.
20 2. Declaration of Lynn Dawes, dated February 3, 2011.
21 3. Documents previously on file with the court.

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IV. ISSUE PRESENTED

Are attorneys for defendant PeaceHealth entitled to private, independent access to their client's own employees for purposes of preparing PeaceHealth's defense?

V. AUTHORITY

A. PeaceHealth has a right to communicate with its own employees about the care they provided to the plaintiff.

The plaintiff 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." Complaint at section 5.1 (emphasis added). Indeed, "a corporation can act only through its agents." *Biomed Comm, Inc. v. State Dept. of Health Bd. of Pharm.*, 146 Wn. App. 929, 934, 193 P.3d 1093 (2008) (emphasis added). The same is true for hospital corporations. WPI 105.02.01. As such, in order for PeaceHealth to investigate and defend against the plaintiff's claim involving PeaceHealth's care, it must be permitted to communicate directly and privately with its own employees about the care that was provided, the issues that arose during the treatment, and any information that is not explicitly set forth in the medical records.

Other jurisdictions that have considered this issue have recognized that a patient has a right to confidentiality regarding his medical treatment, but "there is a competing interest that employers be permitted to discuss a pending lawsuit with its employees." *Lee Memorial Health System v. Smith*, 40 So.3d 106, 108 (2010). Accordingly, several of these courts have concluded that communications between the corporate health care provider and its employee are not "disclosures" of health care information in that context.

[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 doctor/patient privilege by discussing the patient information with the hospital's risk manager, for example.

**DEFENDANT'S OPPOSITION TO
PLAINTIFF'S MOTION FOR
PROTECTIVE ORDER - 5**

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1 *Estate of Stephens v. Galen Health Care, Inc.*, 911 So.2d 277, 281-282 (Fla. 2d DCA
2 2005) (emphasis added) (“The importance of a corporation being able to speak to its agents
3 and employees is no less of a concern in other types of cases, for instance when a hospital
4 is being sued for its ‘universe’ of care, as we have here.”); *accord Lee*, 40 So.3d at 108
5 (“no ‘disclosure’ occurs when a hospital and its employees discuss information obtained in
6 the course of employment”); *see also Public Health Trust of Dade County v. Franklin*, 693
7 So.2d 1043, 1045 (Fla. 3d DCA 1997) (“the hospital as an institutional health care provider
8 has a right to conduct ex parte interviews with its own agents and employees for whom it
9 might be vicariously liable”).

10 Even if communications among PeaceHealth and its employee healthcare providers
11 are considered “disclosures” of plaintiff’s health information, these disclosures are
12 expressly permitted under RCW 70.02.050(1)(b), which provides that PeaceHealth and its
13 employee healthcare providers “may disclose health care information about a patient
14 without the patient’s authorization to the extent a recipient needs to know the information,
15 if the disclosure is: . . . (b) [t]o any other person who requires health care information . . . to
16 provide . . . legal . . . services to, or . . . on behalf of the health care provider or health care
17 facility[.]” RCW 70.02.050(1)(b) (emphasis added).³

18 **B. PeaceHealth has the right to retain counsel to conduct an**
19 **appropriate investigation of the facts of this case, communicate**
20 **privately with PeaceHealth employees, and prepare its defense.**

21 “The first step in the resolution of any legal problem is ascertaining the factual
22 background and sifting through the facts with an eye to the legally relevant.” *Upjohn Co.*
23 *v. United States*, 449 U.S. 383, 390-91, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981).

24 _____
25 ³ “Health care information” means “any information, *whether oral or recorded in any form or medium*, that
26 identifies or can readily be associated with the identity of a patient and directly relates to the patient’s health
care[.]” RCW 70.02.010 (7) (emphasis added)

1 PeaceHealth, like any other person or entity, has the right to retain counsel to assist in its
2 defense. Although an indigent litigant has no constitutional right to appointed counsel at
3 public expense in a civil case, a court may not interfere with a litigant's decision to be
4 represented by willing counsel. *Gray v. New England Tel. and Tel. Co.*, 792 F.2d 251, 257
5 (1st. Cir. 1986) ("a civil litigant does have a constitutional right, deriving from due process,
6 to retain hired counsel in a civil case"); *Potashnick v. Port City Const. Co.*, 609 F.2d 1101,
7 1117-18 (5th Cir. 1980), *cert. denied*, 449 U.S. 820 (1980) ("the right to retain counsel in
8 civil litigation is rooted of fifth amendment notions of due process"); *Newton v.*
9 *Poindexter*, 578 F. Supp. 277, 282 (E.D. Cal. 1984) ("it appears to be well-settled that a
10 defendant in a civil action who can afford to hire counsel is entitled to do so," and the right
11 "may be constitutionally guaranteed by the due process clause of the Fifth Amendment").
12
13

14 It should not be incumbent on PeaceHealth to offer argument demonstrating that
15 confidential consultation and preparation between a litigant – including a defendant – and
16 its lawyer(s) is part and parcel to the confidential attorney-client relationship required by
17 the Rules of Professional Conduct. Nevertheless, when the defendant is a corporation, the
18 investigation conducted by the corporation's attorney must, by definition, include private
19 communications with the organizational client's employees, because the client cannot act
20 or convey relevant information *except* through these persons.⁴ Significantly, these
21 communications are privileged.
22
23

24 ⁴ "An organizational client cannot act except through its officers, directors, employees, shareholders, and
25 other constituents." *See* RPC 1.13 (2008) at Comment [1]. Therefore, "a lawyer employed or retained by an
26

1 In the corporate context, . . . it will frequently be employees *beyond the*
2 *control group* . . . who will possess the information needed by the
3 corporation's lawyers. *Middle-level-and indeed lower-level-employees can,*
4 *by actions within the scope of their employment, embroil the corporation in*
5 *serious legal difficulties, and it is only natural that these employees would*
6 *have the relevant information needed by corporate counsel if he is*
7 *adequately to advise the client with respect to such actual or potential*
8 *difficulties.*

9 *Id.* at 391 (privilege is not limited to those employees within the control group).

10 "Consistent with the underlying purposes of the attorney-client privilege, these
11 communications must be protected against compelled disclosure." *Id.* at 395; *accord*
12 *Wright v. Group Health*, 103 Wn.2d 192, 194-95, 691 P.2d 564 (1984) (agreeing, in the
13 health care context, that the attorney-client privilege extends to lower level employees not
14 in the control group).

15 Washington's Rules of Professional Conduct mirror the well-settled rule in *Upjohn*
16 that an attorney's communications with a corporate client's employees are protected by the
17 attorney-client privilege:

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

25 RPC 1.13 at Comment [2] (emphasis added); *accord* RCW 5.60.060(2)(a) ("An attorney or
26 counselor shall not, without the consent of his or her client, be examined as to any

organization *represents the organization acting through its duly authorized constituents,*" including its employees. RPC 1.13(a) and Comment [1] (emphasis added).

**DEFENDANT'S OPPOSITION TO
PLAINTIFF'S MOTION FOR
PROTECTIVE ORDER - 8**

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1 communication made by the client to him or her, or his or her advice given thereon in the
2 course of professional employment.”); *see* RPC 1.6 (information disclosed to attorney shall
3 be confidential).

4
5 Notably, the jurisdictions that have addressed this issue have concluded that
6 attorneys for corporate healthcare providers should have confidential access to the
7 organization’s employees and agents in those situations in which the employees and agents
8 have relevant, factual information pertaining to the plaintiff’s health care at issue, which
9 the employees obtained in their capacity as the corporation’s agents or employees. *See*
10 *Stephens*, 911 So.2d at 281 (Fla. 2d DCA 2005); *Public Health Trust of Dade County v.*
11 *Franklin*, 693 So.2d 1043, 1045-46 (Fla. 3d DCA 1997) (the hospital and its attorneys have
12 a right to conduct ex parte interviews with its own agents and employees for whom it might
13 be vicariously liable); *White v. Behlke*, 65 Pa. D. & C.4th 479, 490 (Ct. Com. Pl. 2004) (“In
14 defending a medical negligence claim, defense counsel obviously must be permitted to
15 confer privately with the attorney’s client or the actual or ostensible employees of the client
16 who were involved with the plaintiff’s care and treatment which are the subject of the
17 suit.”).

18
19
20 When faced with this precise issue, the *Stephens* court acknowledged that

21 [t]he corporate entities have no knowledge in and of themselves. They can
22 act only through their employees and agents and should be able to speak to
23 those employees to discuss a pending lawsuit. *The [Hospital’s] attorneys*
24 *should also be able to speak with the [Hospital’s] employees and agents as*
25 *the corporate entities are able to function only through them.*

26 *Stephens*; 911 So.2d at 282 (emphasis added).

**DEFENDANT’S OPPOSITION TO
PLAINTIFF’S MOTION FOR
PROTECTIVE ORDER - 9**

3071036.1

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1 The significance and value of the attorney-client privilege cannot be overstated and
2 is critical in the context of a corporate client. Its purpose

3 is to encourage full and frank communication between attorneys and their
4 clients and thereby promote broader public interests in the observance of
5 law and administration of justice. The privilege recognizes that sound legal
6 advice or advocacy serves public ends and that such advice or advocacy
depends upon the lawyer's being fully informed by the client.

7 *Upjohn*, 449 U.S. at 389; accord RPC 1.6 at Comment [2] (“The client is . . . encouraged to
8 seek legal assistance and to *communicate fully and frankly with the lawyer even as to*
9 *embarrassing or legally damaging subject matter*. The lawyer needs this information to
10 *represent the client effectively[.]”); see also* RCW 5.60.060(2); RPC 1.13; *Barry v. USAA*,
11 98 Wn. App. 199, 204, 989 P.2d 1172 (1999) (“the attorney-client privilege protects
12 confidential attorney-client communications from discovery so clients will not hesitate to
13 fully inform their attorneys of all relevant facts.”); *Coburn v. Seda*, 101 Wn.2d 270, 274,
14 677 P.2d 173 (1984) (the attorney-client privilege has its basis in the confidential nature of
15 the communication and seeks to foster a relationship deemed socially desirable”).

16
17
18 Despite these clear and fundamental principles, plaintiff seeks to insert himself into
19 PeaceHealth's attorney-client relationship by requiring that his attorneys be present during
20 privileged communications between PeaceHealth's employees and attorneys. As a
21 practical matter, by insisting on being present at any meetings between defense counsel and
22 PeaceHealth providers, the plaintiff is compelling disclosure of privileged and confidential
23 attorney-client communications, or more accurately, preventing them from occurring in the
24 first instance. In so doing, the plaintiff is attempting to eliminate PeaceHealth's ability to
25
26

**DEFENDANT'S OPPOSITION TO
PLAINTIFF'S MOTION FOR
PROTECTIVE ORDER - 10**

3071036.1

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1 investigate the plaintiff's claims with the assistance of counsel and prevent PeaceHealth
2 from effectively defending itself against this medical malpractice lawsuit. Plaintiff offers
3 no support for this unprecedented attack on the sacrosanct attorney-client relationship.
4

5 Here, PeaceHealth must defend itself against plaintiff's allegations that
6 PeaceHealth's "agents or employees . . . were negligent in the care they provided to
7 plaintiff Marc Youngs." Plaintiffs' Complaint at section 5.1. To do so, PeaceHealth's
8 attorneys must speak with its employee care providers who provided treatment to the
9 plaintiff during the hospitalization at issue. This is necessary in order for PeaceHealth to
10 understand the issues in the case, respond to discovery requests, and prepare for
11 depositions. PeaceHealth's employees, including Drs. Berry, Leone, Lam, Sohn, and
12 Thorson, various nurses, respiratory therapists, and other employee healthcare providers
13 who treated the plaintiff, are the *sole sources of information* from which PeaceHealth can
14 investigate the case and prepare its defense. If PeaceHealth's attorneys cannot speak to its
15 employees who provided care to the plaintiff during the hospitalization at issue, there is no
16 practical way for the organization to gather facts and defend itself accordingly. This type
17 of investigation is absolutely privileged under *Upjohn, Wright*, RPC 1.13, and RPC 1.6 as
18 outlined above, and expressly permitted under RCW 70.02.050(1)(b).
19
20

21 Under the well-settled law permitting and *encouraging* privileged communications
22 between counsel for a corporate organizational client and its employees, *see, e.g., Upjohn*,
23 449 U.S. at 391; *Wright*, 103 Wn.2d 194-95; RCW 70.02.050(1)(b); *see also* RPC 1.13 and
24 RPC 1.6, and the well-reasoned analysis of the jurisdictions that have considered this issue
25
26

**DEFENDANT'S OPPOSITION TO
PLAINTIFF'S MOTION FOR
PROTECTIVE ORDER - 11**

3071036.1

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1 in the context of a corporate health care provider and concluded that “defense counsel
2 obviously must be permitted to confer privately with the attorney’s client or the actual or
3 ostensible employees of the client who were involved with the plaintiff’s care and
4 treatment which are the subject of the suit,” *White v. Behlke*, 65 Pa. D. & C.4th at 490, this
5 Court should deny Plaintiff’s Motion for Protective Order.
6

7 **C. The plaintiff’s reliance on *Loudon*, *Wright*, and *Smith* is**
8 **misplaced because none of these cases addressed defense**
9 **counsel’s right to communicate with its own client.**

10 The plaintiff contends that *Loudon v. Mhyre*, 110 Wn.2d 675, 756 P.2d 138 (1988),
11 *Wright v. Group Health*, 103 Wn.2d 192, 691 P.2d 564 (1984), and *Smith v. Orthopedics*
12 *Intern., Ltd., P.S.*, ____ P.3d __, 2010 WL 5129020 (2010), prohibit PeaceHealth and its
13 attorneys from having private communications with its employees and agents regarding the
14 health care they provided to the plaintiff during the hospitalization at issue. The plaintiff is
15 wrong. Neither *Loudon*, nor *Wright*, nor *Smith* addresses the issues in this case. While
16 *Loudon* prohibits ex parte contact between defense counsel and non-party treating
17 physicians, it does not prohibit such contact and communications between a corporate
18 defendant, its attorneys, and the corporation’s *own employees* who provided healthcare to
19 the plaintiff. To hold otherwise would leave corporate health care providers such as
20 PeaceHealth, the University of Washington, Harborview, Group Health Cooperative, etc.,
21 unable to investigate and defend themselves against malpractice claims.
22

23 The plaintiff proposes that, because he has chosen not to name various PeaceHealth
24 employees as defendants, they should be deemed “non-party” healthcare providers who are
25
26

**DEFENDANT’S OPPOSITION TO
PLAINTIFF’S MOTION FOR
PROTECTIVE ORDER - 12**

3071036.1

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1 therefore “off limits” to PeaceHealth and its attorneys unless plaintiff’s counsel is present.
2 However, this is a distinction without a difference. Whether the plaintiff names a
3 PeaceHealth employee as a defendant – or expressly implicates his or her care – should
4 have no bearing on whether PeaceHealth and its attorneys should be able to communicate
5 directly with employee healthcare providers who treated the plaintiff. PeaceHealth cannot
6 investigate, respond to discovery, prepare for depositions, and present its case at trial
7 without the assistance of its employees who actually provided the care.
8

9 Finally, plaintiff’s request that PeaceHealth designate “speaking agents” suggests a
10 misunderstanding of the holding in *Wright* and its implication in this case. The key issue
11 in *Wright* was not whether Group Health and its counsel had a right to investigate the
12 claims against it and privately interview Group Health healthcare providers regarding the
13 care at issue. *Id.* at 195. Neither the Court nor plaintiff’s counsel questioned Group Health
14 and its attorneys’ ability to have privileged, private communications with Group Health
15 healthcare providers who treated the plaintiff, which is precisely the issue in the case at
16 hand. *Id.* Indeed, the Court specifically acknowledged that a corporate employee could be
17 a “client” for purposes of the attorney-client privilege, even if that employee was not
18 technically a “party.” *Id.* at 202.
19

20 Instead, the issue in *Wright* was whether the *plaintiff’s attorney* could engage in ex
21 parte interviews with Group Health employees who were not speaking agents and,
22 therefore, not “parties” within the meaning of the disciplinary rules prohibiting ex parte
23 contact with represented parties. *Id.* Significantly, the *Wright* Court very carefully pointed
24
25
26

**DEFENDANT’S OPPOSITION TO
PLAINTIFF’S MOTION FOR
PROTECTIVE ORDER - 13**

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1 out that there is nothing that “requires an employee of a corporation to meet ex parte with
2 adverse counsel.” *Id.* at 203 (emphasis added). Yet that is precisely what the plaintiff
3 demands in this case: any time a PeaceHealth employee meets with its own corporate
4 counsel, plaintiff wants to require the employee to simultaneously meet with plaintiff’s
5 counsel.⁵ As outlined above, this would interfere with the attorney-client relationship and
6 is entirely without basis in Washington law.
7

8 Moreover, if the court must weigh competing policy concerns, the ability of a
9 healthcare provider to defend itself should clearly be of utmost importance. Otherwise, a
10 plaintiff could file a lawsuit against an organizational client such as PeaceHealth, alleging
11 that its employees committed malpractice, and then unilaterally prohibit PeaceHealth from
12 speaking directly and candidly with those same employees for the purpose of preparing its
13 defense, or require PeaceHealth to designate speaking agents for purposes of a 30(b)(6)
14 deposition without allowing PeaceHealth to communicate with the very employees who
15 would potentially be the most appropriate speaking agents for the organization.
16
17

18 VI. CONCLUSION

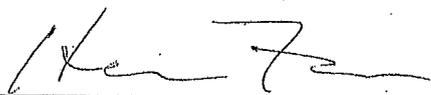
19 Pursuant to the foregoing, PeaceHealth respectfully requests that the Plaintiff’s
20 Motion for Protective Order be denied. There is simply no basis for preventing
21 PeaceHealth’s attorneys from having confidential communications with its own employees.
22 PeaceHealth cannot defend against these claims without conducting an investigation with
23

24 _____
25 ⁵ In accordance with *Wright*, PeaceHealth expects that plaintiff’s counsel will refrain from engaging in ex
26 parte contacts with its speaking agents. Likewise, PeaceHealth has taken no action to limit the plaintiff’s
ability to interview plaintiff’s health care providers who are not speaking agents.

1 the assistance of counsel. As set forth above, this investigation is protected and privileged
2 under well-settled law. The plaintiff should not be permitted to frustrate PeaceHealth's
3 ability to obtain competent legal representation merely by naming PeaceHealth as the only
4 defendant. PeaceHealth is entitled to discuss its employees' care without interference from
5 the plaintiff, whether they are named individually as defendants or not.
6

7 DATED this 4th day of February, 2011.

8 JOHNSON, GRAFFE,
9 KEAY, MONIZ & WICK, LLP

10 By 
11 John C. Graffe, WSBA #11835
12 Heath S. Fox, WSBA #29506
13 Attorneys for Defendant PeaceHealth

14
15 I declare under penalty of perjury
16 that the contents of the State of
17 Washington that I faxed, mailed
18 and delivered via messenger to
19 the court of record a copy of
20 this document on which this
21 signature is affixed.

22
23
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26
Elizabeth Mitchell
2-2-11

DEFENDANT'S OPPOSITION TO
PLAINTIFF'S MOTION FOR
PROTECTIVE ORDER - 15

3071036.1

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HONORABLE IRA J. UHRIG
Motion Noted:
Friday, February 11, 2011, 1:30 p.m.

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WHATCOM

MARC YOUNGS,

Plaintiff,

v.

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

Defendants.

CAUSE NO. 10-2-03230-1

PLAINTIFF'S REPLY RE MOTION
FOR PROTECTIVE ORDER
PROHIBITING EX PARTE CONTACT
WITH PLAINTIFF'S TREATING
HEALTH CARE PROVIDERS

The question before the Court is not whether the protective order will infringe Defendant's constitutional right to counsel. Defendant is now represented by counsel, and it will be represented by counsel if Plaintiff's order is entered. The question is whether retained counsel, or anyone else providing legal assistance to Defendant in this case, must follow established Washington law prohibiting *ex parte* contacts with non-party treating physicians. The answer is yes.

Defendant fails to address the central question raised in *Wright v. Group Health Hospital*, 103 Wn. 2d 192, 200 (1984): Who is the party? *Wright* provides a clear answer:

PLAINTIFF'S REPLY RE EX PARTE CONTACT - 1

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

4 *Id.*, 103 Wn.2d at 200 (emphasis added). *Wright* considered and rejected the contention that
5 “flexible ‘client’ test” adopted in *United States v. Upjohn Co.*, 449 U.S. 383 (1981) should
6 be used to extend the definition of “party” to corporate employees who are not
7 managing/speaking agents. *Wright*, 103 Wn.2d at 201-02.

8 Determining who is a party in this litigation is essential because *Loudon’s*
9 prohibition of *ex parte* contact applies to all “**nonparty** treating physicians.” *Smith v.*
10 *Orthopedics Intern., Ltd., P.S.*, __ Wn.2d __, 244 P.3d 939, 943 (2010), states:

11
12 In *Loudon*, we established the rule that in a personal injury action, “defense
13 *943 counsel may not engage in *ex parte* contacts with a plaintiff’s physicians.”
14 *Loudon*, 110 Wash.2d at 682, 756 P.2d 138. Underlying our decision was a
15 concern for protecting the physician-patient privilege. Consistent with that
16 notion, we determined that a plaintiff’s waiver of the privilege does not
17 authorize *ex parte* contact with a plaintiff’s **nonparty** treating physician. In
18 limiting contact between defense counsel and a plaintiff’s **nonparty** treating
19 physicians to the formal discovery methods provided by court rule, we indicated
20 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.” *Id.* (emphasis added)

21 Defendant ignores the express holding in *Wright*, and the distinction between party
22 and nonparty treating physicians in *Smith*. Defendant peremptorily rejects as irrelevant
23 Plaintiff’s request that it simply identify those physicians whom it believed were
24 managing/speaking agents and thus parties for litigations purposes.
25
26

PLAINTIFF’S REPLY RE EX PARTE CONTACT - 2

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1 Instead, Defendant argues that its counsel in this case has an unfettered right to speak
2 *ex parte* with any and all of Defendant's employees. Defendant has no such right. In
3 *Wright v. Group Health*, Group Health took the same position, arguing that all of the nurses
4 involved in the care of the plaintiff/patient "should be regarded as clients of the law firm."
5 103 Wn.2d at 194. The Supreme Court categorically rejected this position as to any
6 employees who were not managing/speaking agents. It further prohibited Group Health
7 from instructing employees not to talk to Plaintiff's counsel. *Id.* at 202-03.
8

9 Neither RPC 1.13 nor its comments give defense counsel a right to talk with
10 Defendant's employees. Under this rule, ***IF*** the lawyer for an organization client talks to an
11 employee in the course of an investigation, then the conversation is subject to the attorney-
12 client privilege. But the rule does not make the employee the client, nor provide an
13 independent right to talk to the client. Defendant's quotation from comment 2 to RPC 1.3
14 omits the sentence immediately following: "***This*** [the application of the privilege] ***does not***
15 ***mean, however, that constituents of an organization client are the clients of the lawyer.***"
16 The organizational entity, not the employee, holds the privilege.¹
17

18 To the extent that the rules in the two cases are in conflict, *Loudon* prevails because
19 of the unique circumstances involving patient-physician privilege. In response to a claim
20 that a prohibition on *ex parte* communications conflicted with *Wright's* authorization of *ex*
21 *parte* interviews with nonspeaking agent employees, *Loudon*, 110 Wn.2d at 681, stated:
22

23 _____
24 ¹ This distinction can have serious practical consequences. In *U.S. v. Graf*, 610 F.3d 1148 (9th Cir.
25 2010), for instance, the 9th Circuit upheld an employee's conviction based upon counsel's testimony
26 regarding privileged conversations with the employee. Although the conversations were subject to
attorney-client privilege, the privilege belonged to the corporation. The corporation as the client
could and did waive the privilege, and the employee received a 25 year prison sentence.

1 *Wright v. Group Health Hosp., supra*, was not concerned with the fiduciary
2 confidential relationship which exists between a physician and patient. The unique
3 nature of the physician-patient relationship and the dangers which *ex parte*
4 interviews pose justify the direct involvement of counsel in any contact between
5 defense counsel and a plaintiff's physician.

6 The application of *Loudon* in this case does not conflict with RCW 70.02.050. This
7 statute does not address or specifically allow *ex parte* communications. *Loudon* does not
8 prohibit disclosure or communications; it prohibits *ex parte* communications.

9 *Loudon* and *Smith* make clear that the policy considerations for patient privacy are
10 paramount, and other considerations must yield to or be harmonized with *Loudon*. If the
11 order is granted, defense counsel will not be precluded from obtaining information from
12 Defendant's employees. It simply cannot obtain this information in secret, behind closed
13 doors. The order would privacy rights, and Defendant's right to defend itself. Under
14 Defendant's position, however, Plaintiff's *Loudon* rights would become a practical dead
15 letter whenever large institutions providing "full service" health care are involved.

16 The case law from Florida and Pennsylvania are inapposite, interpreting their unique
17 statutes and rules. The Florida cases turn on the construction of language in a statute
18 excepting medical negligence cases from the statutory physician-patient privilege. F.S.A.
19 §456.057(8) (formerly F.S.A. §456.057(6)).² No court outside Florida has followed this case
20 law, because it depends upon Florida's unique statute. Similarly, *White v. Behlke, Rabin*
21 *and OB/GYN Consultants, Inc.*, 65 Pa. D. & C.4th 479, 485 (Pa.Com.Pl. 2004), is a trial
22

23 _____
24 ² Florida decided that *ex parte* "disclosure" of information within an institution was not really
25 "disclosure" prohibited by the statute. *In re Stephens*, 911 So.2d 277, 281-82 (Fla. App. 2005). By
26 contrast, the Washington Supreme Court in *Smith* read the *Loudon* prohibition broadly to encompass
all *ex parte* communications, whether direct or indirect, whether done face to face or through
attorney intermediaries. *Smith* cannot be reconciled with the Florida case law.

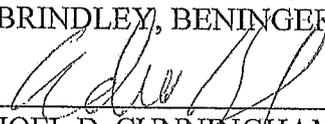
1 court decision interpreting a Pennsylvania court rule expressly allowing an attorney to talk
2 with treating physicians who are actual or ostensible employees of an attorney's client.
3 Washington has no such rule; no other state has relied upon the Pennsylvania court rule.

4
5 Out of State cases are particular inappropriate here, because Washington has been a
6 trail blazer in protecting medical privacy. Developments subsequent to *Loudon*, such as
7 HIPAA, have shown that it is the rest of the country which has belatedly recognized the
8 importance of these issues. States such as Georgia which formerly allowed *ex parte* contacts
9 now prohibit them under HIPAA. See *Moreland v. Austin*, 284 Ga. 730, 670 S.E. 68 (2008).
10 *Smith* relied only upon Washington law in emphatically reaffirming *Loudon*. Washington is
11 and remains a leader, developing its own case law.

12
13 Finally, the application of *Loudon* does not disfavor large institutional providers of
14 health care, such as PeaceHealth or the University of Washington. Rather, it places these
15 institutions on equal footing with individual doctors or small clinic sued for malpractice.
16 Doctors with stand alone, independent medical practices, such as the orthopedic clinic in
17 *Smith*, must abide by *Loudon* rules, and cannot make *ex parte* contact with treating
18 physicians employed elsewhere. Large institutional providers should not be exempt from
19 *Loudon* because they provide full-service care, and employ all the treating physicians.

20
21 DATED this 9th day of February 2011.

22 LUVERA, BARNETT,
23 BRINDLEY, BENINGER & CUNNINGHAM

24 
25 _____
26 JOEL D. CUNNINGHAM, WSBA #5586
ANDREW HOYAL, WSBA #21349
Counsel for Plaintiff

PLAINTIFF'S REPLY RE EX PARTE CONTACT - 5

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The Honorable Ira Uhrig
Hearing date: March 7, 2011

**SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF WHATCOM**

MARC YOUNGS

Plaintiff,

v.

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

Defendants.

No. 10-2-03230-1

**DEFENDANT PEACEHEALTH'S
MOTION FOR
RECONSIDERATION PURSUANT
TO CR 59(A)(8)**

I. RELIEF REQUESTED

Defendant PeaceHealth respectfully asks the court to reconsider its ruling granting the Plaintiff's Motion for Protective Order Prohibiting Ex Parte Contact with Plaintiff's Treating Health Care Providers pursuant to CR 59(a)(8).

**DEFENDANT PEACEHEALTH'S
MOTION FOR RECONSIDERATION - 1**

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II. STATEMENT OF FACTS

On February 11, 2011, in its Order granting Plaintiff's Motion for Protective Order Prohibiting Ex Parte Contact with Plaintiff's Treating Health Care Providers, the Court specifically ordered that: "Defense counsel and defendant's risk manager are prohibited from *ex parte* contact, directly or indirectly, with any of plaintiff Marc Youngs' treating physicians other than Dr. Richard Leone and Dr. Donald Berry."

III. ISSUE PRESENTED

Should the court reconsider and reverse its order granting plaintiff's motion for protective order pursuant to CR 59(a)(8), because the order (a) misapplies the definition of "party" from *Wright v. Group Health*, 103 Wn.2d 192, 691 P.2d 564 (1984); (b) conflicts and interferes with PeaceHealth's statutory quality improvement obligations under RCW 70.41.200; and (c) infringes upon PeaceHealth's due process right to counsel because it prevents PeaceHealth's defense counsel from privately communicating with the employees who provided medical care to the plaintiff simply because they are not individually named as defendants.

IV. ARGUMENT AND AUTHORITY

A. This Court should reconsider and reverse its order pursuant to CR 59(a)(8).

Pursuant to CR 59(a)(8), a party may move the court for reconsideration of an order that was based on an "error in law." The Court's February 11, 2011 Order prohibiting PeaceHealth's defense counsel and its risk manager from having "ex parte contact, directly or indirectly, with any of plaintiff Marc Youngs' treating physicians other than Dr. Richard Leone and Dr. Donald Berry" is legally

1 erroneous for three reasons: (1) *Wright v. Group Health*, has no bearing on the
2 issue of whom PeaceHealth and its lawyers may contact and interview; (2) the
3 order conflicts and interferes with PeaceHealth's quality improvement obligations
4 under RCW 70.41.200; and (3) the order impinges upon PeaceHealth's due
5 process right to counsel.

6 It is legal error to prohibit PeaceHealth and its attorneys from
7 communicating with PeaceHealth's own employees simply because they are not
8 named individually as defendants. Such a rule unfairly allows the plaintiff, by
9 naming only a corporate health care defendant, to control – and *restrict* – the
10 extent to which PeaceHealth can defend itself against plaintiff's claim of medical
11 negligence.

12 **B. *Wright v. Group Health* has no bearing on the issue of whom**
13 **PeaceHealth and its lawyers may contact and interview.**

14 Plaintiff's underlying motion for protective order was predicated on an
15 argument that, because PeaceHealth's employees are not "parties," *Wright v.*
16 *Group Health*, 103 Wn.2d 192, 691 P.2d 564 (1984), somehow extends the
17 *Loudon*¹ rule to preclude PeaceHealth and its defense counsel from having *ex*
18 *parte* communication with any of PeaceHealth's employees who were involved in
19 plaintiff's treatment unless, as with Drs. Berry and Leone, plaintiff grants them
20 permission to do so. *Wright* does no such thing. All *Wright* holds is that some of
21 a corporate defendant's employees are off limits to *ex parte* contact by the
22 *plaintiff's lawyer* under what is now RPC 4.2 (prohibiting a lawyer from
23 communicating with a "party" the lawyer knows is represented by counsel). If a
24 corporate defendant's employee has "speaking authority" for the corporation, the

25 ¹ *Loudon v. Mhyre*, 110 Wn.2d 675, 756 P.2d 138 (1988).

1 employee is off limits for plaintiff's counsel; if the employee is not a speaking or
2 managing agent, and thus lacks "speaking authority," then it is not unethical for
3 plaintiff's lawyer to contact the employee "ex parte" and seek information, if the
4 employee is willing to talk. That is all that *Wright* stands for. *Wright* has nothing
5 whatsoever to do with whom the corporate defendant's lawyer may or may not
6 contact "ex parte." Nothing in *Wright* even remotely suggests that the lawyers for
7 a corporate defendant must refrain from "ex parte" interviews of corporate
8 employees who are so low in the corporate chain of command as to lack
9 "speaking authority" for the corporation.²

10 Indeed, to the extent the *Wright* court considered the issue in this case
11 (application of the attorney-client privilege to low-level employees of a
12 corporation), the Court expressly recognized that the appropriate rule was that set
13 forth by the United States Supreme Court in *U.S. v. Upjohn Co.*, 449 U.S. 383,
14 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981). *Wright*, 103 Wn.2d at 194-95. In
15 *Upjohn*, as in **this case**, the issue was whether the attorney-client privilege
16 extended to communications between a corporation's attorneys conducting an
17 investigation and various low-level corporate employees who had knowledge of
18 the specific facts that the attorneys needed to complete their investigation and
19 render advice to the corporation. *Upjohn*, 449 U.S. at 386. In that case, the low-
20 level employees were neither speaking or managerial agents, nor named as
21 parties in litigation. Nevertheless, the *Upjohn* court concluded that the attorneys'

22
23 ² It may be that, under *Wright*, the plaintiff's lawyer may contact "ex parte" a treating
24 health care provider who is employed by a defendant hospital or corporation if the treating
25 health care provider does not have "speaking authority" for the hospital or corporation, but
26 that is not at all the same as saying that the defendant hospital's or corporation's lawyer
cannot have "ex parte" contact with that employee.

**DEFENDANT PEACEHEALTH'S
MOTION FOR RECONSIDERATION - 4**

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1 communications with even low-level employees were protected by the attorney-
2 client privilege, because limiting the privilege to speaking/managing agents
3 "frustrates the very purpose of the privilege by discouraging the
4 communication of relevant information by employees of the client to attorneys
5 seeking to render legal advice to the client corporation." *Id.* at 392.

6 In the case of the individual client the provider of information and the
7 person who acts on the lawyer's advice are one and the same. **In**
8 **the corporate context, however, it will frequently be employees**
9 **beyond the control group . . . who will possess the information**
10 **needed by the corporation's lawyers. Middle-level and indeed**
11 **lower-level employees can, by actions within the scope of their**
12 **employment, embroil the corporation in serious legal difficulties, and**
13 **it is only natural that these employees would have the relevant**
14 **information needed by corporate counsel if he is adequately to**
15 **advise the client with respect to such actual or potential**
16 **difficulties.**

17 *Id.* at 391 (emphasis added).

18 Significantly, although the *Upjohn* "flexible" client test was not applied in
19 *Wright* because of the different factual context and policy concerns, the *Wright*
20 Court noted that the *Upjohn* rule was appropriate in situations precisely like the
21 case at hand – where the question was "applicability of the privilege to the
22 employee." *Wright*, 691 P.2d at 195. The *Wright* Court explained the
23 circumstances under which the *Upjohn* rule should be applied:

24 While Group Health is correct in noting that both the attorney-client
25 privilege and the disciplinary rules share the mutual goals furthering
26 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

1 agent test is to determine who has the *authority* to bind the
2 corporation. . . . The policy reasons necessitating the “flexible”
3 test in *Upjohn* are not present here. A corporate employee who
4 is a “client” under the attorney-client privilege is not
necessarily a “party” for purposes of the disciplinary rule.

5 *Id.* at 201-02 (emphasis added).

6 Thus, the *Wright* Court’s definition of “party” was “for purposes of the
7 disciplinary rule” regarding *ex parte* contact with a represented party, which is in
8 no way at issue in this case. *Wright* is not on point.

9 The mischief in accepting plaintiff’s *Wright*-based argument and
10 misapplying the *Wright* test for “party” is that it enables a plaintiff suing a corporate
11 health care provider, such as PeaceHealth or a public hospital district, to dictate
12 and limit the extent to which lawyers for the corporate defendant can investigate
13 plaintiff’s claim, defend against it, and provide appropriate legal advice, which is
14 antithetical to our adversary system of civil litigation. If plaintiff can prevent
15 defense counsel from having “*ex parte*” contact with the corporate client’s own
16 employees simply by not putting the employees’ names in the caption (or body) of
17 the complaint, the plaintiff can interfere with the lawyer’s relationship with the
18 corporate client, which, after all, can act, think, confide in counsel, defend itself,
19 settle, or litigate *only through* its employees and agents.

20 It goes without saying that a corporation’s lawyer may interview, “*ex parte*,”
21 any corporate employee, and that the lawyer should or even must do so, when the
22 employee has or may have information relevant to the subject matter of the
23 representation (and the corporation’s lawyer may well commit malpractice if he or
24 she neglects to do so). No Washington decision has held or suggested that
25 corporate defendants in medical malpractice lawsuits are less entitled to effective
26

1 representation by their counsel. Neither *Loudon v. Mhyre*, 110 Wn.2d 675, 756
2 P.2d 138 (1988), nor *Smith v. Orthopedics Int'l, Ltd., P.S.*, 170 Wn.2d 659, 244
3 P.3d 939 (2010), so holds. Nothing in those cases stands for the proposition that
4 a defendant corporation or its lawyers cannot communicate "ex parte" with the
5 corporation's employee treating health care providers who were involved in
6 plaintiff's care. Indeed, the treating physicians with whom the *Loudon* court and
7 the *Smith* court held defense counsel could not have *ex parte* contact were not
8 employees of the named defendant. The injustice is manifest: even though
9 PeaceHealth can be held liable for any negligence in its employees' care and
10 treatment of plaintiff and could not be named as a defendant "but for" their care,
11 under the court's order PeaceHealth may not speak with its employees privately
12 about their care simply because they are not individually named as defendants.
13 Yet, plaintiff's complaint does not limit the PeaceHealth health care provider
14 employees whose care and treatment may be at issue, plaintiff has not agreed to
15 limit its claims against PeaceHealth to the care and treatment provided by Drs.
16 Berry and Leone, and plaintiff could at some later point in the case assert
17 negligence of other health care provider employees for which PeaceHealth could
18 be found vicariously liable, but with whom, under the Court's February 11, 2011
19 order, PeaceHealth, its lawyers, and its risk manager would have been precluded
20 from speaking privately.

21 The plaintiff has identified **no public policy** served by having
22 PeaceHealth's ability to speak to its own employees and defend itself turn on
23 whether the plaintiff decides to name individual treatment providers as defendants
24 or litigate solely against the corporation under a theory of *respondeat superior*.

25
26
DEFENDANT PEACEHEALTH'S
MOTION FOR RECONSIDERATION - 7

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1 **C. The Court's February 11, 2011 order conflicts and interferes with**
2 **PeaceHealth's quality improvement obligations under RCW 70.41.200**
3 **and is contrary to RCW 70.02.050(1)(b).**

4 The court's order prohibiting PeaceHealth's risk manager and defense
5 counsel from having *ex parte* contacts with the plaintiff's treating health care
6 providers conflicts with the legislature's mandate that PeaceHealth "maintain a
7 coordinated quality improvement program for the improvement of the quality of
8 health care services rendered to patients and the identification and prevention of
9 medical malpractice." RCW 70.41.200(1). As an operator of hospitals,
10 PeaceHealth must maintain

11 a quality improvement committee with the responsibility to **review**
12 **the services rendered in the hospital, both retrospectively and**
13 **prospectively, in order to improve the quality of medical care of**
14 **patients and to prevent medical malpractice.** The committee shall
15 oversee and coordinate the quality improvement and medical
16 malpractice prevention program and shall ensure that information
17 gathered pursuant to the program is used to review and to revise
18 hospital policies and procedures[.]

19 RCW 70.41.200(1)(a) (emphasis added). PeaceHealth's risk management staff
20 participates on its quality improvement committee. As required by statute,
21 PeaceHealth's Q.I. committee oversees

22 [t]he maintenance and **continuous collection of information**
23 **concerning the hospital's experience with negative health care**
24 **outcomes and incidents injurious to patients including health**
25 **care-associated infections** as defined in RCW 43.70.056, patient
26 grievances, professional liability premiums, settlements, awards,
 costs incurred by the hospital for patient injury prevention, and safety
 improvement activities[.]

Id. at (1)(e) (emphasis added). This quality improvement ("QI") process
necessarily involves communications among a variety of hospital officials,
including risk managers and legal counsel, with treating health care providers who

1 have information, including patients' private health care information, relevant to
2 "negative health care outcomes and incidents injurious to patients." It makes no
3 sense to allow patients who claim in lawsuits to have had negative outcomes to
4 disrupt this mandated information-gathering, evaluation, and prevention Q.I.
5 program; yet that is what will happen if courts grant motions like the one plaintiff
6 brought in this case to preclude hospital officials, risk managers, and legal counsel
7 from engaging in *ex parte* communications with employees who treated plaintiff.
8 A hospital should not be put to the choice of violating a court order or failing to
9 fulfill its obligations under RCW 70.41.200(1) and risking its license.

10 That such a result is inconsistent with the quality improvement mandates of
11 RCW 70.41.200 is made clear by RCW 70.02.050(1)(b), which provides that
12 health care providers may disclose information about a patient not only to facilitate
13 quality assurance and peer review, but also to facilitate the provision of legal
14 services to the health care facility. Under RCW 70.02.050(1)(b), health care
15 providers:

16 **may disclose health care information about a patient without**
17 **the patient's authorization** to the extent a recipient needs to know
18 the information, if the disclosure is: . . . (b) **[t]o any other person**
19 **who requires health care information . . . to provide . . . quality**
20 **assurance, peer review, . . . or . . . legal . . . services** to, or . . . on
21 behalf of the health care provider or health care facility[.]

22 RCW 70.02.050(1)(b) (emphasis added).

23 Without these communications, PeaceHealth could not comply with its Q.I.
24 obligations. And, the communications in which such health care information is
25 disclosed are explicitly **protected from disclosure to third parties (such as**
26

1 **plaintiff's counsel)** under RCW 70.41.200(3).³ Indeed, that statutory privilege,
2 like the attorney-client privilege, is illusory unless the communication occurs "ex
3 *parte*" – without the plaintiff's lawyer present.
4

5 A hospital or other corporate health care entity can think and act only
6 through its agents and employees. It is entitled to know what its employees know
7 to defend itself in litigation, and it is required to find out and evaluate what its
8 employees and agents know to conduct its statutorily mandated Q.I. activities. To
9 suggest that its employees' knowledge somehow becomes off limits to the hospital
10 and its defense counsel and its risk manager simply because plaintiff files a
11 medical malpractice claim makes no sense. Nothing in *Loudon* or *Smith* dictate
12 such a result.
13

14 **D. The court's order infringes on PeaceHealth's fundamental, due
15 process right to counsel.**

16 A civil litigant has "a constitutional right, deriving from due process, to retain
17 hired counsel in a civil case." *Gray v. New England Tel. and Tel. Co.*, 792 F.2d
18 251, 257 (1st Cir. 1986); *accord, Potashnick v. Port City Const. Co.*, 609 F.2d
19 1101, 1117-18 (5th Cir. 1980), *cert. denied*, 449 U.S. 820 (1980) ("the right to
20 retain counsel in civil litigation is rooted in fifth amendment notions of due
21

22 ³ RCW 70.41.200(3) provides:

23 Information and documents, including complaints and incident reports,
24 created specifically for, and collected and maintained by, a quality
25 improvement committee are **not subject to review or disclosure . . .**
26 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. [Emphasis added.]

DEFENDANT PEACEHEALTH'S
MOTION FOR RECONSIDERATION - 10

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1 process"). PeaceHealth, like any other litigant, is entitled to retain and employ
2 counsel because a "corporation is a 'person' within the meaning of the equal
3 protection and due process of law clauses." *American Legion Post #149 v.*
4 *Washington State Dept. of Health*, 164 Wn.2d 570, 192 P.3d 306 (2008) (citing
5 *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244, 56 S. Ct. 444, 80 L. Ed. 660
6 (1936)). Even in the civil context, "the right to counsel is one of constitutional
7 dimensions and should thus be freely exercised without impingement."
8 *Potashnick*, 609 F.2d at 1118 (emphasis added). The due process right to be
9 represented by counsel necessarily means, for a corporate litigant, the right to be
10 represented by counsel whose hands are not tied by prohibitions against contact
11 with the only people through whom a corporation can act, *i.e.*, its employees and
12 agents. *See Luce v. State of New York*, 697 N.Y.S.2d 806 (1999) (reversing order
13 prohibiting counsel for defendant state to confer privately with treating physicians
14 of plaintiff that were defendant state's employees); *Galarza v. United States*, 179
15 F.R.D. 291 (S.D. Cal. 1998) (denying medical malpractice plaintiff's motion to
16 prohibit *ex parte* communication by defense counsel with her treating physicians
17 who were federal employees, because to do so would "intervene in discussions
18 with the United States and its employees and agents who are necessary to the
19 preparation and defense of the United States," and "would severely and unfairly
20 limit the government's ability to defend itself," and recognizing that "[t]he
21 Government . . . lives or dies by the acts of its employees" and that the
22 government's attorney "needs full and frank disclosure by the employee/physician
23 in order to properly give sound legal advice to the United States" and be "fully
24
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26

**DEFENDANT PEACEHEALTH'S
MOTION FOR RECONSIDERATION - 11**

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1 informed of all that relates to the matter to represent the United States with any
2 effectiveness").⁴

3 **IV. CONCLUSION**

4 PeaceHealth respectfully requests the Court to reconsider and reverse its
5 order. The order conflicts with PeaceHealth's legislatively mandated Q.I. activities
6 and infringes on PeaceHealth's constitutional right to counsel. There is no public
7 policy served by prohibiting PeaceHealth and its attorneys from communicating
8 with PeaceHealth employee health care providers simply because they are not
9 named individually as defendants.
10

11 **DATED** this 21st day of February, 2011.

12 JOHNSON, GRAFFE,
13 KEAY, MONIZ & WICK, LLP

14 By 
15 John C. Graffe, WSBA #11835
16 Heath S. Fox, WSBA #29506
17 Attorneys for Defendant PeaceHealth

18
19 ⁴ See also the decisions cited in PeaceHealth's previous brief opposing plaintiff's motion
20 for protective order: *Estate of Stephens v. Galen Health Care, Inc.*, 911 So.2d 277, 281-
21 282 (Fla. 2d DCA 2005) ("The importance of a corporation being able to speak to its
22 agents and employees is no less of a concern . . . when a hospital is being sued for its
23 'universe' of care, as we have here"); *Lee Memorial Health Sys. v. Smith*, 40 So.3d 106,
24 108 (Fla. 2d DCA 2010) ("no 'disclosure' occurs when a hospital and its employees
25 discuss information obtained in the course of employment"); *Public Health Trust of Dade
26 County v. Franklin*, 693 So.2d 1043, 1045 (Fla. 3d DCA 1997) ("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 v. Behlke*, 65 Pa.
D. & C. 4th 479, 490 (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").

HONORABLE IRA J. UHRIG
Motion Noted:
Friday, March 18, 2011, 1:30 p.m.

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SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WHATCOM

MARC YOUNGS,

Plaintiff,

v.

PEACEHEALTH, et al,

Defendants.

CAUSE NO. 10-2-03230-1

PLAINTIFF'S OPPOSITION TO
MOTION TO RECONSIDER

I. RELIEF REQUESTED

Plaintiff respectfully asks the Court to deny Defendant's Motion to Reconsider the Court's February 11, 2011 order (Dkt. 13) prohibiting ex parte contact with Plaintiff's nonparty treating physicians, an order issued under the authority of *Loudon v. Mhyre*, 110 Wn.2d 675, 756 P.2d 138 (1988) and *Smith v. Orthopedics Intern., Ltd., P.S.*, 170 Wn.2d 659, 244 P.3d 939 (2010).

The parties thoroughly briefed and argued Plaintiff's original motion. The Court was fully aware of the issues raised and the respective positions of the parties when it ruled. This motion simply reiterates Defendant's earlier response and its oral argument before the Court. Nothing has occurred in the interim, either factually or legally, warranting a change

PLAINTIFF'S OPPOSITION TO
MOTION TO RECONSIDER - 1

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1 in the Court's decision. Defendant's argument is rather that the Court's initial decision was
2 wrong as a matter of law, and that the Court should simply change its decision.

3 The Court's initial decision was correct. The rule in *Loudon* and *Smith* is clear and
4 applies in this case. The *Loudon* order does not prevent defense counsel from discovery of
5 all of the relevant facts in this case, including discovery of the facts from Plaintiff's
6 nonparty treating physicians. It does not deprive Defendant of the opportunity to fully and
7 fairly defend itself. The Order rather merely prohibits defense counsel from utilizing *ex*
8 *parte* contact and communications with nonparty treating physicians, contact which violates
9 the public policy articulated in *Loudon* and *Smith*.

11 II. ARGUMENT

12 A. Defendant's Requested Relief Conflicts with the Fundamental Public 13 Policy of *Loudon* and *Smith* Prohibiting Ex Parte Contact with a 14 Plaintiff's Nonparty Treating Physician.

15 In *Smith*, the Supreme Court reiterated the fundamental public policy underlying the
16 *Loudon* rule:

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

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

23 *Smith* made clear that an additional purpose of *Loudon* was to prohibit defense
24 counsel from using *ex parte* contacts to shape the testimony of treating physician. The Court
25 noted at 170 Wn.2d at 668:

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

5 The Court elaborated this concern in a footnote which Plaintiff quotes in full:

6 Courts have recognized that, in the past, permitting "ex parte contacts with an
7 adversary's treating physician may have been a valuable tool in the arsenal of
8 savvy counsel. The element of surprise could lead to case altering, if not case
9 dispositive results." *Law v. Zuckerman*, 307 F.Supp.2d 705, 711 (D.Md.2004)
10 (citing *Ngo v. Standard Tools & Equip., Co.*, 197 F.R.D. 263 (D.Md.2000));
11 *see also State ex rel. Woytus v. Ryan*, 776 S.W.2d 389, 395 (Mo.1989)
12 (acknowledging that ex parte contact in medical malpractice cases between
13 defense counsel and a nonparty treating physician creates risks that are not
14 generally present in other types of personal injury litigation, including the
15 risk of discussing " 'the impact of a jury's award upon a physician's
16 professional reputation, the rising cost of malpractice insurance premiums,
17 the notion that the treating physician might be the next person to be sued,' "
18 among others (quoting *Manion v. N.P.W. Med. Ctr. of N.E. Pa., Inc.*, 676
19 F.Supp. 585, 594-95 (M.D.Pa.1987))), *abrogated on other grounds by Brandt*
20 *v. Pelican*, 856 S.W.2d 658, 661 (Mo.1993).

21 *Smith*, 170 Wn.2d at 669 n. 2.

22 Defendant argues that Plaintiff "has identified **no public policy**" in support of his
23 position. Motion to Reconsider at 7 (emphasis in original). Plaintiff submits that this
24 language from *Smith* fairly states the public policy on which Plaintiff relies. As Loudon
25 stated: "**We hold that ex parte interviews should be prohibited as a matter of public**
26 **policy.**" 110 Wn.2d at 678. The public policy here is clear simple and straightforward.
Loudon enunciated the policy in 1988. The Supreme Court in *Smith* emphatically
reaffirmed it four months ago.

Defendant in its argument does not even give lip service to this underlying public
policy supporting *Loudon*. Defendant refuses to acknowledge that special rules apply to

PLAINTIFF'S OPPOSITION TO
MOTION TO RECONSIDER - 3

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1 nonparty treating physicians precisely because of the “unique nature of the physician-patient
2 relationship.” *Loudon*, 110 Wn.2d at 681. Defendant responds to this public policy by
3 ignoring it.

4
5 Instead of addressing *Loudon* and *Smith* directly, Defendant argues in effect that the
6 obligations of a treating physician to his or her patient are trumped by the physician’s status
7 as a corporate employee. The “sanctity” of the physician-patient relationship, “a fiduciary
8 one of the highest degree,” which is the touchstone of the *Loudon* rule, must yield to the
9 apparently “higher sanctity” of the relationship between a corporation and its employees.
10 This argument is without any authority.

11 Defense counsel representing medical malpractice defendants are clearly unhappy
12 with the *Loudon* rule. As *Smith* recognizes and as Plaintiff’s counsel pointed out at oral
13 argument, the *Loudon* rule deprives defense counsel of the tactical advantage enjoyed by
14 defense counsel utilizing ex parte interviews with treating physicians prevalent in the pre-
15 *Loudon* era. *Smith* itself arose out of efforts of defense counsel to circumvent the limits of
16 the *Loudon* rule, and restore to Defendants the tactical advantage they previously enjoyed.¹
17 The Supreme Court firmly rejected this tactic. It found counsel’s tactics violated *Loudon*,
18 and held that it would not allow “defense attorneys to accomplish indirectly what they
19 cannot accomplish directly.” *Smith*, 170 Wn.2d at 669.
20
21

22
23 ¹ Defense counsel in *Smith* interpreted *Loudon* to prohibit only ex parte *interviews*, not ex parte *contacts*, with
24 nonparty treating physicians. Counsel therefore provided written information to the physician through the
25 physician’s attorney. 170 Wn.2d at 664. The Court rejected this strained misreading of *Loudon*, pointing out
26 that in *Loudon*, it had stated that “defense counsel may not engage in ex parte *contacts* with a Plaintiff’s
physician.” *Smith*, 170 at 666 (quoting *Loudon*, 110 Wn.2d at 682, emphasis in *Smith*).

1 Loudon is firmly established Washington law and policy. It should be applied in this
2 case.

3 B. Loudon's Rule Prohibiting Ex Parte Contacts with Nonparty Treating
4 Physicians Applies to Plaintiff's Nonparty Treating Physicians,
5 Including Nonparty Treating Physicians Employed by PeaceHealth

6 The issue before the Court can be simply put: who is a party when a corporation is a
7 defendant? This is the key issue because Loudon's prohibition on ex parte contact applies to
8 all "nonparty treating physicians." *Smith* states at 170 Wn.2d at 665.

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

18 *Wright v. Group Health Hospital*, 103 Wn. 2d 192, 200, 691 P.2d 564 (1984)

19 provides a clear answer to the question of who is a party.

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

24 *Id.*, 103 Wn.2d at 200. The courts and the bar have now operated under the *Wright* holding
25 for 27 years. There is no reason why this well-understood meaning of "party" in cases
26

1 involving corporations should not apply in this case. *Wright* arose in the medical
2 malpractice context when the Supreme Court rejected a claim by Group Health that all of its
3 employees were “parties” in a lawsuit brought against the corporation.

4 Defendant, however, argues: “All *Wright* holds is that some of a corporate
5 defendant’s employees are off limits to ex parte contact by the *plaintiff’s lawyer* under what
6 is now RPC 4.2.”² Motion at 3 (emphasis in original). This sentence does not fairly state
7 “all *Wright* holds.” *Wright* did not prohibit ex parte contact by plaintiff’s lawyers; RPC 4.2
8 already prohibited ex parte contact with parties. Rather, *Wright* held that an employee who
9 is without speaking authority for a corporation is not a “party” in litigation.” It is because
10 these employees are not parties, that *Wright* held that Plaintiffs’ counsel may have *ex parte*
11 contact with them. Indeed, *Wright* went further and held that the corporation is prohibited
12 from instructing this group of employees not to talk to Plaintiff’s counsel. *Id.* at 202-03.
13

14 Defendant’s claim that this rule leaves it to Plaintiff’s counsel to determine who
15 Defense Counsel may speak with ex parte, ignores the plain language of *Wright*. Under
16 *Wright*, Plaintiff may not talk to employees who have speaking authority for the corporation.
17 *Id.*, 103 Wn.2d at 209. Plaintiff cannot dictate the identity of those speaking agents. And
18 Defendant has rejected out of hand Plaintiff’s requests that it identify its speaking agents.
19

20 Defendant’s motion for reconsideration never offers an explicit answer to the key
21 issue of who is a party. It appears to contend that either every employee is a party - in
22 contradiction of *Wright* - or that the party status does not matter - in contradiction of *Smith*.
23

24
25 ² RPC 4.2 provides: “In representing a client, a lawyer shall not communicate about the subject of the
26 representation with a person the lawyer knows to be represented by another lawyer in the matter . . .”

1 Defendant attempts to avoid the obstacles posed by Washington law by relying
2 instead upon *United States v. Upjohn*, 449 U.S. 383 (1981). *Wright* was decided in 1984,
3 three years after the *Upjohn* decision. *Wright* specifically considered **and rejected** *Upjohn*
4 as a test for determining when a corporate employee could also be considered a party. *See*
5 *Wright*, 103 Wn.2d at 201-02.
6

7 As the Court in *Wright* well understood, *Upjohn* did not address the question of who
8 was a party. In *Upjohn*, the Supreme Court held that a corporation's attorney-client privilege
9 extends to communications between corporate employees and corporate counsel as long as
10 the communications are "made at the direction of corporate superiors in order to secure legal
11 advice." *United States v. Chen*, 99 F.3d 1495, 1502 (9th Cir. 1996) citing *Upjohn*, 449 U.S.
12 at 390-94. The corporate employees do not by virtue of the privilege become parties. No
13 case law, much less Washington case law, holds that the employees thereby become parties.
14

15 Nor do the corporate employees become a "client" in the usual sense of the word.
16 RPC 1.13 setting out the rules governing the representation of an organizational client
17 specifically states at comment 2: This [the application of the **organization's** attorney-client
18 privilege] does not mean, however, that constituents of an organization client are the clients
19 of the lawyer." The privilege recognized in *Upjohn* and in RPC 1.13 under Washington law
20 belongs to the corporation, not the corporate employee "client."³ The corporation may
21 waive the privilege notwithstanding the wishes or interests of the corporate employee
22
23
24

25 ³ In its discussion of *Upjohn*, *Wright* put the word "client" in quotes, and for good reason. *See, id.*, 103 Wn.2d
26 at 207.

1 “client.” *CFTC v. Weintraub*, 471 U.S. 343, 349-50, 105 S.Ct. 1986 (1985)(power to waive
2 attorney–client privilege for bankrupt corporation passed to bankruptcy trustee).⁴

3 Neither *Upjohn*, nor RPC 1.13 give a corporation a “right” to interview corporate
4 employees ex parte, much less a right which overrides the public policy set out in *Loudon*
5 and *Smith*. Defendant cites no authority for this “right.” Defendant states: “It goes without
6 saying that a corporation’s lawyer may interview, ‘ex parte,’ any corporate employee . . .”
7 Motion at 6. “It goes without saying” is another way of saying that no authority exists for
8 the proposition asserted. Of course, in the absence of any other considerations, a
9 corporation’s attorney *may* conduct ex parte interviews with corporate employees, just as
10 counsel may interview ex parte other witnesses in a case. But another consideration in this
11 case prohibits the ex parte interviews ordinarily permitted: the *Loudon* rule and underlying
12 public policy prohibiting ex parte interviews with nonparty treating physicians.
13
14

15 C. The Court’s Order does not Conflict and Interfere with RCW 70.02.050
16 or RCW 70.41.200

17 RCW 70.02.050 is part of the Uniform Health Care Information Act. In *Smith v.*
18 *Orthopedics*, two justices relied on this statute in dissenting from the majority’s holding that
19 defense counsel’s indirect and written communications with a nonparty treating physician
20 violated the bright line rule in *Loudon*. The dissent made the same argument that
21
22

23 ⁴ This distinction can have serious practical consequences for the employee “client.” If the corporation
24 chooses to waive the privilege, the government can use the communications against the employee. *See e.g.,*
25 *U.S. v. Graf*, 610 F.3d 1148 (9th Cir. 2010)(upholding conviction and 25 year sentence of imprisonment based
26 upon counsel’s testimony regarding previously privileged communication with defendant where corporation
waived the privilege).

1 Defendants now make, i.e., that application of *Loudon* is contrary to RCW 70.02.050(1).

2 According to this dissent:

3 [A] bright line rule prohibiting ex parte contact is contrary to state law that
4 allows disclosure in some circumstances of health care information without
5 the plaintiff's authorization. In RCW 70.02.050(1)(b), the legislature permits
6 disclosure of health care information without a patient's authorization "[t]o
7 any other person who requires health care information ... to provide ... legal
8 ... services to, or other health care operations for or on behalf of the health
9 care provider or health care facility." The lead opinion's creation of a bright
10 line rule prohibiting all ex parte contact results in requiring authorization for
11 disclosures made to health care providers or facilities.

12 170 Wn.2d at 677.⁵ Thus, according to this dissent, RCW 70.02.050 allows the disclosure
13 of patient information without authorization which would otherwise be barred by *Loudon*.

14 *Smith's* seven justice majority, however, did not find that application of RCW
15 70.02.050(1)(b) conflicted with *Loudon*. That statute was expressly before the Court. The
16 majority had RCW 70.02.050 before it, but regarded it as irrelevant.

17 RCW 70.02.050 is indeed irrelevant. The legislature did not enact the Uniform
18 Health Care Information Act as the *exclusive* statutory scheme for regulating health care
19 information. The Act did not supplant the judicial power to control the conduct of counsel
20 and parties in cases pending before the courts. It did not supplant the public policy set out in
21 *Loudon* and *Smith*. For instance, the Act creates a cause of action for unlawful disclosure of
22 health care information, with a two year statute of limitations. In *Berger v. Sonneland*, 144

23 ⁵ There were three groupings of justices in *Smith*, split on two different issues. The lead opinion written by
24 Justice Alexander and joined by Justices Owens and James Johnson, found that Defendants violated the
25 *Loudon* rule. It is this opinion which Plaintiff has cited as the majority opinion, since Justices Charles Johnson,
26 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.

1 Wn.2d 91, 26 P.3d 257 (2001), the Supreme Court held that the Act does not provide the
2 exclusive remedy for the unauthorized disclosure of health care information. It allowed
3 plaintiff to bring a common law claim, for unauthorized disclosure of health care
4 information under a 1917 precedent, *Smith v. Driscoll*, 94 Wash. 441, 162 P. 572 (1917).⁶

5
6 A health care provider who complies with the Act is not subject to remedial action
7 *under the Act*. But the Act is not the only source of law. The Act does not supplant *Loudon*
8 or *Smith*, as *Smith* recognized, or other sources of relevant law.

9 Defendant's argument regarding the quality assurance (QA) statutes appears to be an
10 afterthought, an attempt to manufacture a conflict in order to avoid its *Loudon* obligations.
11 If Defendant's obligations under *Loudon* were truly in conflict with the QA statute, then it
12 would certainly have raised it in its Response in the original motion.

13
14 Plaintiff first observes that the issue of a conflict with a QA investigation appears to
15 be purely hypothetical in nature. Plaintiff's medical treatment with PeaceHealth occurred in
16 December 2009 and early January 2010. Any QA investigation should have been instituted
17 at or shortly after the treatment in question. Defendant has presented no evidence that a QA
18 investigation was ever instituted or that enforcement of the judicially created *Loudon* rule
19 would interfere with that investigation.⁷

20
21 In any case, nothing in the Court's order or *Loudon* prevents a health care provider

22
23 ⁶ The claim under the Uniform Health Care Information Act was barred because Plaintiff filed the lawsuit more
24 than two years after the unauthorized disclosure.

25 ⁷ The existence of a Quality Assurance investigation and the effects of the investigation are not confidential,
26 and are subject to discovery. See *Anderson v. Breda*, 103 Wn.2d 901, 905, 700 P.2d 737 (1985) (Allowing
discovery of the effect, and therefore of the existence, of a QA investigation: "Open discussion is not inhibited
by permitting discovery of the effect of the committee proceedings.")

1 from conducting a QA investigation. The *Loudon* rule and QA investigations have existed
2 side by side since *Loudon* was decided in 1988. The *Loudon* order in this case is directed
3 specifically at “defense counsel” in this case and the “risk manager,” responsible for
4 directing litigation for the corporation. The *Loudon* order simply prevents defense counsel
5 in this case from participating “directly or indirectly” in the QA investigation. Nothing in
6 the order precludes Defendant from conducting a QA investigation and obtaining legal
7 advice from counsel not involved in the defense of this lawsuit.
8

9 That restriction is hardly onerous or unfair. A party has no right to a particular
10 lawyer. Defendant has no right to utilize present counsel both as its advocate in this medical
11 malpractice case and as its attorney advising on its QA obligations in the same case. The
12 potential for conflict of interest in such a scenario is patent. The legitimate actions of
13 defense counsel properly acting as the zealous advocate of his or her client in a medical
14 malpractice case are antithetical to the actions of counsel advising a health care provider
15 conducting a proper QA investigation in a nonadversarial setting. The QA process is
16 intended to allow private and confidential critical judgments of health care, which an
17 advocate in a medical malpractice case would want to contest.
18

19 Finally, a QA investigation is not limited to physician/employees of the corporation.
20 A QA investigation may extend to care given by any physician with staff privileges at a
21 hospital regardless of the physician’s employee status. *See e.g.*, RCW 70.41.200(1)(b)
22 (establishing a sanctions procedure for medical staff privileges); 70.41.200(1)(c) (requiring
23 periodic review of credentials and competency of “all persons who are employed or
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PLAINTIFF’S OPPOSITION TO
MOTION TO RECONSIDER - 11

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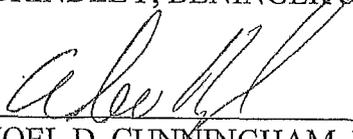
1 associated with the hospital"). If the *Loudon* must yield whenever a physician is subject to
2 a hospital's QA review, then *Loudon* would largely become a dead letter where large
3 hospitals such as PeaceHealth or Swedish are concerned. The *Loudon* rule would be
4 inapplicable not only to every physician directly employed by PeaceHealth, but to every
5 physician operating independently in the area with staff privileges at St. Joseph.
6 Defendant's QA argument is in fact a Trojan horse which would eviscerate *Loudon*. It is
7 unnecessary to eviscerate *Loudon* in order to properly operate a QA program.

9 **D. Defendant's Right to Counsel is not Violated by the Court's Order**

10 Defendant reiterates the same argument it made in response to the earlier motion
11 regarding the violation of its right to counsel. Defendant has counsel, one of the most
12 experienced medical malpractice defense attorneys in Washington. But the right to counsel
13 does not give defense counsel carte blanche to do anything he or she wants. Like all
14 lawyers, defense counsel is constrained by the laws, rules and court decisions governing the
15 practice of law, including *Loudon* and *Smith*.

16 DATED this 14th day of March 2011.

17
18
19 LUVERA, BARNETT,
BRINDLEY, BENINGER & CUNNINGHAM

20
21 
22 _____
JOEL D. CUNNINGHAM, WSBA #5586
ANDREW HOYAL, WSBA #21349
23 Counsel for Plaintiff

24
25
26 PLAINTIFF'S OPPOSITION TO
MOTION TO RECONSIDER - 12

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HONORABLE IRA J. UHRIG
Motion Noted:
Friday, April 22, 2011, 1:30 p.m.

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WHATCOM

MARC YOUNGS,

Plaintiff,

v.

PEACEHEALTH, et al,

Defendants.

CAUSE NO. 10-2-03230-1

PLAINTIFF'S MOTION FOR
CERTIFICATION OF ORDER FOR
DISCRETIONARY REVIEW

I. RELIEF REQUESTED

Plaintiff Marc Youngs respectfully requests that this Court certify for discretionary review pursuant to RAP 2.3(b)(4) its March 26, 2011 order (Dkt. 24) (attached) granting PeaceHealth's Motion for Reconsideration. That order allows defense counsel for PeaceHealth to have ex parte contact with any PeaceHealth physician who treated Marc Youngs.

The Court's order presents an issue for which discretionary review is especially appropriate. Although Plaintiff submits that the *Loudon* rule should apply and this Court erred in its March 26 ruling, Plaintiff is aware that no appellate court has addressed the specific question of whether *Loudon* applies to a plaintiff's treating physicians where those

PLAINTIFF'S MOTION FOR
RAP 2.3(B)(4) CERTIFICATION - 1

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1 treating physicians are employed by a defendant. As Plaintiff discusses below, this is a
2 question which is and will recur before this and other trial courts in this state. Appellate
3 guidance on this issue is needed. This case meets the criteria for certification set out in RAP
4 2.3(b)(4), and presents the issue squarely for the appellate courts.
5

6 **II. STATEMENT OF FACTS**

7 This is a medical negligence case which arises from the catastrophic injuries suffered
8 by plaintiff Marc Youngs as a result of the negligent post-operative care he received at St.
9 Joseph Hospital in December 2009. Mr. Youngs was admitted to St. Joseph for lung surgery
10 on December 23, 2009. He developed a life-threatening sepsis following his surgery, and on
11 January 4, 2009 was transferred to Harborview Medical Center in Seattle for treatment.
12

13 Plaintiff filed this lawsuit on September 17, 2010 in King County. King County
14 Superior Court #10-2-33121-2. On December 2, 2010, the King County Superior Court
15 entered an order changing venue to Whatcom County.
16

17 PeaceHealth is the only named Defendant. The complaint also specifically identifies
18 Dr. Richard Leone, and Dr. Donald Berry, but does not name these physicians as parties.
19 Complaint ¶¶4.2 & 4.3. Plaintiff specifically excluded Dr. Leone and Dr. Berry from the
20 *Loudon* order which is the subject of this motion.
21

22 On January 31, 2011, Plaintiff filed a motion for a protective order to prohibit
23 defense counsel from engaging in any ex parte contact with Plaintiff's treating physicians
24 other than Dr. Leone and Dr. Berry. Dkt.2. Plaintiff based his motion on *Loudon v. Mhyre*,
25 110 Wn.2d 675, 756 P.2d 138 (1988) and *Smith v. Orthopedics Intern., Ltd.*, P.S., 170
26 Wn.2d 659 (2010).

PLAINTIFF'S MOTION FOR
RAP 2.3(B)(4) CERTIFICATION - 2

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1 Following oral argument on February 11, 2011, the Court granted Plaintiff's motion.
2 Dkt. 13. Defendant moved for reconsideration of the order. See Dkt. 14 (Motion for
3 Reconsideration); Dkt. 18 (Plaintiff's Response in Opposition). The Court heard oral
4 argument on the motion on March 18, 2011. Dkt. 22. On March 25, 2011, the Court
5 granted the motion to reconsider, and entered an order allowing defense counsel to have ex
6 parte contact with any PeaceHealth employee who treated Marc Youngs. Dkt. 24.
7

8 Plaintiff is requesting that this Court certify its March 25, 2011 order for
9 discretionary review under RAP 2.3(b)(4).

10 **III. EVIDENCE RELIED UPON**

11 Declaration of Andrew Hoyal, and pleadings and files in this case.

12 **IV. LEGAL ARGUMENT**

13 RAP 2.3(b)(4) provides that discretionary review may be granted if:
14

15 The superior court has certified, or all the parties to the litigation
16 have stipulated, that the order involves a controlling question of law
17 as to which there is a substantial ground for a difference of opinion
18 and that immediate review of the order may materially advance the
19 ultimate termination of the litigation.

20 Rule 2.3(b)(4) was adapted from 28 U.S.C. § 1292(b). 2A Karl B. Tegland,
21 Washington Practice: Rules Practice, at 161 (6th ed. 2004). Washington courts look to the
22 federal court decisions for guidance in analyzing state rules similar to federal rules, where
23 the reasoning of those decisions is persuasive. *Am. Mobile Homes of Wash., Inc. v. Seattle-*
24 *First Nat'l Bank*, 115 Wn.2d 307, 313, 796 P.2d 1296 (1990).
25
26

PLAINTIFF'S MOTION FOR
RAP 2.3(B)(4) CERTIFICATION - 3

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1 The federal courts have found that a controlling issue of law exists where the
2 question of law is one of first impression, and there is a substantial ground for a difference
3 of opinion.

4 Courts traditionally will find that a substantial ground for difference of
5 opinion exists where the circuits are in dispute on the question and the court
6 of appeals of the circuit has not spoken on the point, if complicated questions
7 arise under foreign law, *or if novel and difficult questions of first impression
are presented.*

8 *Couch v. Telescope, Inc.* 611 F.3d 629, 633 (9th Cir.2010) (emphasis added). *See, e.g.,*
9 *Weintraub v. Bd. of Educ.*, 593 F.3d 196, 200 (2nd Cir. 2010); *Castellano-Contreras v.*
10 *Decatur Hotels, LLC*, 576 10th Cir. 332, 336 (5th Cir. 2009); *Bryan v. UPS, Inc.*, 307
11 F.Supp.2d 1108 (N.D. Cal. 2004).

12 The Court's order in this case clearly meets the criteria of an issue of first
13 impression. *Loudon* and *Smith* prohibit ex parte contact with a plaintiff's nonparty treating
14 physicians. *Smith*, 170 Wn.3d at 665. The controlling question of law presented by the
15 Court's order is whether *Loudon* and *Smith* apply to treating physicians employed by a
16 defendant. As we told the Court at oral argument on the motion to reconsider, no
17 Washington case specifically addresses the issue of whether *Loudon's* prohibition on ex
18 parte contact applies to treating physicians employed by a defendant.

19 That there is a substantial ground for a difference of opinion on this controlling issue
20 of law should be uncontested. The parties presented this Court with extensive briefing on
21 this issue reflecting that difference of opinion. But perhaps more to the point, this Court's
22 own rulings reflect the existence of this difference of opinion. This Court initially found
23 that *Loudon* and *Smith* applied and granted Plaintiffs' motion for a protective order
24
25
26

PLAINTIFF'S MOTION FOR
RAP 2.3(B)(4) CERTIFICATION - 4

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1 prohibiting defense counsel from engaging in ex parte contacts with PeaceHealth treating
2 physicians other than Dr. Leone and Dr. Berry.¹ Dkt. 13. This Court then reversed itself,
3 found that *Loudon* and *Smith* do not apply, and entered an order permitting defense counsel
4 to engage in ex parte contact with any and all PeaceHealth employees who treated Marc
5 Youngs. Dkt. 24.
6

7 The “controlling issue of law” does not have to be dispositive of the case for
8 purposes of certification under RAP 2.3(b)(4); it only has to be an issue that could materially
9 affect the outcome of the case. “[T]he issue ‘need not be dispositive of the lawsuit ...’”
10 *Lakeland Village Homeowners Ass’n v. Great American Ins. Group*, 727 F.Supp.2d 887,
11 896 (E.D.Cal., 2010) citing *U.S. v. Woodbury*, 263 F.2d 784 (9th Cir. 1959).
12

13 The Court’s ruling on this pretrial issue is a critical one which will determine how
14 this case proceeds, and which will materially affect the outcome of the case. Defendant is
15 seeking ex parte contact with Plaintiff’s treating physicians *now*, before depositions or any
16 other proceedings take place. The harm identified by the Court in *Loudon*, warranting the
17 bright line rule it adopted, takes place at the time of the ex parte conversation. Once the ex
18 parte contact occurs, the “cat is out of the bag.” In this case, the ex parte conversation
19 between defense counsel and Marc Young’s treating physicians cannot, as it were, be
20 rewound and erased if they are later determined to violate *Loudon*, as we believe they will
21

22
23 ¹ Plaintiff does not and has not contended that *Loudon* prevents defense counsel from
24 communicating with a treating physician whose treatment is a basis for the liability of Defendant.
25 Nor does Plaintiff contend that Defendant is precluded from ex parte contact with proper speaking
26 agents of Defendant’s corporation. Defendant, however, has refused to designate any speaking
agents, contending instead that defense counsel is entitled to ex parte contact with any employee of
Defendant. See Cunningham Dec., ¶2 (Dkt. 3)

PLAINTIFF’S MOTION FOR
RAP 2.3(B)(4) CERTIFICATION - 5

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1 be. As *Loudon* observed: “The harm from disclosure of this confidential information
2 cannot, as defendants argue, be fully remedied by subsequent court sanctions.” 110 Wn.2d
3 at 678.

4 *Smith* made clear that a fundamental purpose of the *Loudon* rule is to prevent defense
5 counsel from using the ex parte meeting to shape the testimony of the treating physician
6 about Plaintiff’s treatment.
7

8 [P]ermitting contact between defense counsel and a nonparty treating
9 physician outside the formal discovery process undermines the physician’s
10 role as a fact witness because during the process the physician would
11 improperly assume a role akin to that of an expert witness for the defense.
12 Although a treating physician fact witness may testify as to both facts and
13 medical opinions in an action for alleged medical negligence, such testimony
14 is limited to “the medical judgments and opinions *which were derived from
the treatment.*” *Carson*, 123 Wash.2d at 216, 867 P.2d 610 (emphasis added)
(citing *Richbow v. District of Columbia*, 600 A.2d 1063, 1069 (D.C.1991)).
***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.***

15 ***If there is a risk that a nonparty treating physician testifying as a fact
16 witness might assume the role of a nonretained expert for the defense, it
17 may result in chilling communication between patients and their physicians
18 about privileged medical information.*** We attempted to limit that possibility
19 in *Loudon* by restricting contact between defense counsel and nonparty
20 treating physicians. We reaffirm that intent here and apply the rule to prohibit
21 ex parte contact through counsel for the nonparty treating physician. If we
22 were to do otherwise, we would be permitting defense attorneys to
23 accomplish indirectly what they cannot accomplish directly.

24 170 Wn.2d at 668. (footnote omitted)(emphasis added).

25 Once defense counsel in this case is allowed to “shape” the testimony of Marc
26 Young’s treating physicians in ex parte conversation, 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

PLAINTIFF’S MOTION FOR
RAP 2.3(B)(4) CERTIFICATION - 6

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1 she was told by defense counsel, or to forget the prior deposition and trial testimony given
2 after he or she was “prepared” by defense counsel.

3 *Loudon* is a prophylactic rule. It is designed to prevent harm from occurring in the
4 first place. Plaintiff brought the motion at the outset of litigation precisely in order to
5 prevent the harm before it takes place. Plaintiff is seeking interlocutory review because the
6 harm caused by this contact is manifest, it will materially affect the outcome of the case, and
7 it is a harm which cannot be fully remedied on appeal from a final judgment.

8
9 The issue which is raised by the Court’s order is and will be a recurring issue, one on
10 which this Court and other trial courts confronted with the same issue should be given
11 guidance from the appellate courts. PeaceHealth has raised this same issue in another case
12 in this very court. On April 5, 2011, PeaceHealth moved for a protective order to allow it to
13 contact ex parte the treating physicians employed by PeaceHealth, even though PeaceHealth
14 liability was not predicated upon the conduct of those treating physicians. Hoyal Dec. Ex. 1
15 (*Small v. PeaceHealth*, Whatcom Superior #10-2-01077-3, Dkt. 26).²

16
17 But this issue is not just a PeaceHealth issue, though PeaceHealth’s continued
18 acquisition of physician practices in Whatcom County will mean that the issue is especially
19 acute in Whatcom County. The consolidation of organizations delivering health care in
20

21
22 ² Although PeaceHealth has styled its *Small* motion, “PeaceHealth’s Motion RE: Contact with
23 Employee Dr. Richard Leone,” the reasoning of the motion reaches to all PeaceHealth physicians.
24 Thus, its proposed order states: “Defense counsel may contact and communicate with its employee
25 physicians, including Dr. Richard Leone, who provided care/treatment to the plaintiff’s decedent,
26 Walter Small, regarding their care/treatment of Mr. Small. Communications and contact with these
physician employees are not subject to or limited by the Court’s decision in *Loudon v. Mhyre*, 110
Wn.2d 675, 756 P.2d 138 (1988).” Proposed order at 2.

PLAINTIFF’S MOTION FOR
RAP 2.3(B)(4) CERTIFICATION - 7

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1 Washington as well as throughout the country is proceeding at a rapid pace, with burgeoning
2 numbers of physicians employed by hospitals.

3 Four of the five largest medical groups in Washington are now embedded in hospital
4 systems: University of Washington Physicians (1,700 doctors); Virginia Mason Medical
5 Center (1,000); Children's University Medical Group (438); and Swedish Physicians (390).
6 The fifth, Group Health, has 1000 doctors. Hoyal Dec. Ex. 2. Nor is this a purely big city
7 phenomenon. Skagit Valley Hospital, for instance, recently acquired the 81 doctor Skagit
8 Valley Medical Center. *Id.*

9
10 Washington is consistent with national trends. Nationally, 60 percent of physicians
11 were considered self-employed in 2008, with only 34 percent as employees. By this year,
12 more than 60 percent of physicians will be salaried employees. *Id.*

13
14 Given this picture of the economic consolidation in the health care industry, it is
15 clear that the issue with which this Court has grappled in this case will not go away.
16 Guidance is needed on this issue, and sooner rather than later. This case presents the vehicle
17 for that guidance, with the issue clearly drawn, and experienced medical malpractice
18 attorneys on both sides.

19 Finally, in *Smith*, the Supreme Court emphatically reaffirmed that *Loudon* was still
20 law, and it emphatically rejected defense counsel's attempts to place *Loudon* in a straitjacket
21 with limited applicability. Rather, the Court ruled that it would not allow "defense attorneys
22 to accomplish indirectly what they cannot accomplish directly." *Smith*, 170 Wn.2d at 669.

23
24 This Court's ruling has now given large corporate employers of physicians,
25 including but not limited to PeaceHealth, a practical way to avoid the *Loudon* requirements.
26

PLAINTIFF'S MOTION FOR
RAP 2.3(B)(4) CERTIFICATION - 8

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1 Before the courts go down this road, the appellate courts should be permitted to speak to the
2 issue directly.

3 DATED this 11th day of April, 2011.

4
5 LUVERA, BARNETT,
6 BRINDLEY, BENINGER & CUNNINGHAM

7 

8 _____
9 JOEL D. CUNNINGHAM, WSBA #5586
10 ANDREW HOYAL, WSBA #21349
11 Counsel for Plaintiff

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PLAINTIFF'S MOTION FOR
RAP 2.3(B)(4) CERTIFICATION - 9

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The Honorable Ira Uhrig
Hearing date: March 18, 2011

**SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF WHATCOM**

MARC YOUNGS

Plaintiff,

v.

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

Defendants.

No. 10-2-03230-1

**DEFENDANT PEACEHEALTH'S
REPLY REGARDING MOTION
FOR RECONSIDERATION
PURSUANT TO CR 59(A)(8)**

Neither *Loudon* nor *Smith* involved "ex parte contact" between corporate defense counsel and a physician employed by the corporation. The Supreme Court has never held or even suggested that the *Loudon* rule trumps the right of a defendant corporation to have access to any and all of its employees in aid of a defense to a tort claim, or that *Loudon* also trumps a hospital's QA obligations under

**DEFENDANT PEACEHEALTH'S REPLY RE:
MOTION FOR RECONSIDERATION - 1**

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1 RCW 70.41.200(1). And unless the Supreme Court *does* change the law, there is no
2 valid legal basis for a protective order interfering with a corporation's rights or
3 statutory QA obligation. The protective order should be vacated not only on the legal
4 merits but also as a practical matter, in light of developments in discovery since
5 plaintiff obtained the order.

6 Plaintiff asserts at page 11 of his response, without citing any authority, that
7 "A party has no right to a particular lawyer"¹ and that "Defendant has no right to utilize
8 present counsel both as its advocate in this . . . case and as its [QA] lawyer. . ."
9 because of a conflict of interest. None of that is correct. A party who can pay for the
10 services (or who can find a lawyer willing to work for free) *does* have the right to
11 choose its lawyer (as long as the lawyer is in good standing).² No "conflict of interest"
12 prevents the same lawyer from providing QA-related advice and risk assessment and
13 defending a hospital against a malpractice claim and providing risk assessment, any
14 more than a conflict exists when a lawyer defending an individual also assists the
15 client in assessing the client's risks, whether those risks are related specifically to the
16 claim or more generally to client practices with which the claim is associated. And the
17 hospital employee least appropriate to exclude from the hospital's QA, risk
18 management, and claim evaluation processes is its Risk Manager.

19
20
21 ¹ Even alleged incapacitated persons "shall have the right to be represented by willing
22 counsel of their choosing at any stage in guardianship proceedings." RCW
23 11.88.045.

24 ² The notion that one's adversary in civil litigation has the right not only to dictate how
25 one prepares one's defense but also to veto one's choice of counsel (other than
26 because of a disqualifying conflict of interest arising by reason of a current or former
attorney-client relationship with that adversary), although absurd, is a necessary
corollary to plaintiff's basic position that a corporate defendant may lawfully be
prohibited from speaking with its own employees based on decisions that did not
involve any employment relationship between the defense lawyers' clients and the
physicians with whom "ex parte" contact was at issue.

**DEFENDANT PEACEHEALTH'S REPLY RE:
MOTION FOR RECONSIDERATION - 2**

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1 Because neither *Loudon* nor *Smith* involved "ex parte contact" between a
2 defense lawyer and the lawyer's client's own employee, one cannot find in or infer
3 from either decision a rule excusing or prohibiting hospitals from complying, or limiting
4 their compliance with, the statutory QA mandate in RCW 70.41.200(1). That
5 compliance is required to be ongoing, not episodic and case-specific, as plaintiff
6 attempts to suggest it is or must be. See RCW 70.41.200(1)(e). Nor can one infer
7 from *Loudon* or *Smith* a rule of law superseding, interfering with, or limiting the basic
8 right of a corporation, through its chosen lawyer(s), to prepare a defense based on
9 consultation with and information obtained from the corporation's own employees.

10 A point worth noting (and one not addressed in *Smith*) is that the physician-
11 patient privilege, which "is a creature of statute," *Carson v. Fine*, 123 Wn.2d 206, 212,
12 867 P.2d 610 (1994), and which is codified in RCW 5.60.060(4), was amended by the
13 Legislature in 1986 and 1987 to add the following waiver provision:

14 (b) Ninety days after filing an action for personal injuries or wrongful
15 death, the claimant shall be deemed to waive the physician-patient
16 privilege. **Waiver of the physician-patient privilege for any one**
17 **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.

18 *Laws of 1986, ch. 305, § 101; Laws of 1987, ch. 212, § 1501.*³ The *Loudon*
19 decision, in footnote 2 at 110 Wn.2d at 678, acknowledged those waiver
20 amendments but did not address them because they had taken effect after Loudon
21 filed his lawsuit. Plaintiff's arguments for interfering with PeaceHealth's right to
22
23

24 _____
25 ³ The emphasized language was added in 1986 and was not changed by 1987
26 amendments changing "Within ninety days of" to "Ninety days after" and deleting
other language.

DEFENDANT PEACEHEALTH'S REPLY RE:
MOTION FOR RECONSIDERATION - 3

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1 defend itself against his tort claim conflict with his waiver of privilege "as to all
2 physicians or conditions."⁴

3 Plaintiff's motion for protective order was based on a misapplication of
4 *Wright* and an unjustified extrapolation from *Loudon*. It also is untenable as a
5 practical matter, as recent developments in discovery demonstrate.

6 Plaintiff's recently served CR 30(b)(6) notice demands that PeaceHealth
7 produce for deposition the employee most knowledgeable about its policies for each
8 of several medical specialties, including pulmonology, surgery, and critical care. See
9 the (March 15) Declaration of Heath S. Fox, Ex. A. Surely it is unreasonable to
10 expect PeaceHealth to determine which of its employees is a suitable CR 30(b)(6)
11 deponent on each of the subjects identified in the notice while refraining, because of
12 the protective order, from speaking with anyone who has had a treating physician
13 relationship with the plaintiff.⁵ And, surely, it is unreasonable and unfair, not to
14 mention inconsistent with CR 30(b)(6), to limit the choice of employees from among
15 whom PeaceHealth must select its CR 30(b)(6) deponents. Yet, that is the effect of
16 the protective order.

17 In interrogatories and production requests that plaintiff has propounded
18 since obtaining the protective order, he has demanded information known by fact
19 witnesses. See *Fox Decl., Ex. B*. To comply with CR 26(b) and (g), PeaceHealth's
20 counsel should communicate with those of its employees known or believed to have
21 responsive information. That would mean having "contact" with some employees with
22 whom the protective order prohibits PeaceHealth's counsel and risk manager from

23 _____
24 ⁴ The "subject to" language does not save help plaintiff, because no court rule
imposes a limitation on the waiver.

25 ⁵ As plaintiff's counsel surely knows from review of medical records, numerous
26 pulmonologists (and most of those employed by PeaceHealth at St. Joseph Hospital)
provided care to plaintiff. *Fox Decl.*, ¶ ____.

**DEFENDANT PEACEHEALTH'S REPLY RE:
MOTION FOR RECONSIDERATION - 4**

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1 having any contact, except at depositions. Again, the protective order interferes with
2 how PeaceHealth's defense counsel can represent it.

3 Plaintiff's recent answers to PeaceHealth's interrogatories indicate that he
4 may offer expert testimony critical of care provided by PeaceHealth-employed
5 physicians other than Drs. Berry and Leone. See *Fox Decl., Ex. C*. But under the
6 protective order, defense counsel may not contact any other employed physicians
7 who provided any health care to plaintiff and for whose alleged negligence plaintiff
8 may attempt to hold PeaceHealth vicariously liable.⁶ The unfairness in that is
9 manifest.

10 The protective order imposes a new rule of, and thus a change in, the law.
11 Trial courts should not change the law. Neither statutes nor applicable court
12 decisions authorize a trial court to deny a corporate defendant the right to have its
13 counsel speak privately with its own employees just because the employees provided
14 some health care to the person suing the corporation. Plaintiff's post-order discovery
15 notices and answers demonstrate that such a protective order is inconsistent with
16 how the discovery rules are supposed to operate and susceptible of abuse by plaintiff
17 to PeaceHealth's prejudice. The Court should vacate the protective order.

18 DATED this 15th day of March, 2011.

19 I certify under penalty of perjury
20 under the laws of the State of
21 Washington that I faxed, mailed
22 and/or delivered via messenger to
23 all counsel of record a copy of
24 the document on which this
25 certificate is affixed.

26 Signed on 3/15/11
Sandra Coman

JOHNSON, GRAFFE,
KEY, MONIZ & WICK, LLP

By John C. Graffe
John C. Graffe, WSBA #11835
Heath S. Fox, WSBA #29506
Attorneys for Defendant PeaceHealth

⁶ Under the protective order, PeaceHealth's defense counsel would be precluded even from drafting and obtaining, in support of a dispositive motion, a declaration from any of plaintiff's treating providers setting forth facts that PeaceHealth learned the provider knew before the lawsuit was filed and the order was entered.

DEFENDANT PEACEHEALTH'S REPLY RE:
MOTION FOR RECONSIDERATION - 5

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HONORABLE IRA J. UHRIG
Motion Noted:
Friday, April 22, 2011

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WHATCOM

MARC YOUNGS,

Plaintiff,

v.

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

Defendants.

CAUSE NO. 10-2-03230-1

DECLARATION OF
ANDREW HOYAL

Andrew Hoyal, declares as follows:

1. I am one of the attorneys for Plaintiff. This declaration is based on my personal knowledge.

2. Attached hereto are true and correct copies of the following:

Exhibit 1: Motion and Order in *Small v. PeaceHealth*;

Exhibit 2: Excerpt from Puget Sound Business Journal dated June 27, 2010.

DECLARATION OF ANDREW HOYAL - 1

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BENINGER & CUNNINGHAM
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I swear under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed this 11th day of April, 2011, in Seattle, Washington.



ANDREW HOYAL, WSBA #21349

DECLARATION OF ANDREW HOYAL - 1

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Exhibit 1

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HONORABLE IRA UHRIG
Hearing Date: April 15, 2011, 1:30 p.m.

SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF WHATCOM

**WALTER SMALL, Deceased, by his
Personal Representative, Roger Small,**

Plaintiff,

v.

**PEACEHEALTH, d/b/a ST. JOSEPH
HOSPITAL,**

Defendant.

No. 10-2-01077-3

**PEACEHEALTH'S MOTION RE:
CONTACT WITH EMPLOYEE
DR. RICHARD LEONE**

I. RELIEF REQUESTED

Defendant PeaceHealth, through its attorneys of record, Johnson, Graffe, Keay,
~~Moniz & Wick, LLP, respectfully moves this court for an order permitting PeaceHealth's~~
litigation defense counsel to contact and discuss this case with its employee, Dr. Richard
Leone, outside of his deposition, and without any intervention of the plaintiff's counsel.

**MOTION TO PERMIT CONTACT WITH
EMPLOYEE DR. LEONE- 1**

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1 The plaintiff's Complaint alleges that PeaceHealth employed staff who treated Mr.
2 Small, and is legally responsible for its employees and agents. Nonetheless, the plaintiff
3 objects to any contact (verbal or written) between PeaceHealth's defense counsel and any
4 of Mr. Small's treating physicians, including physicians employed by PeaceHealth, outside
5 of a deposition.

6 This motion is prompted by the plaintiff's request to depose PeaceHealth employee,
7 Dr. Leone. Dr. Leone provided care to the plaintiff's decedent, Walter Small, within the
8 course of his employment with PeaceHealth. The plaintiff's discovery responses leave Dr.
9 Leone's care at issue in this case. The plaintiff objects that defense counsel cannot speak
10 with, interview, or otherwise communicate with Dr. Leone either before, or outside of a
11 deposition.

12 The parties have agreed to submit this issue to the court for resolution.
13 PeaceHealth's defense counsel has the right to speak with its own physician employees,
14 including to meet with, interview, investigate, and to prepare them for depositions,
15 regardless of whether the physician's care is at issue in this case. Of course, PeaceHealth is
16 the court's authority to speak with treating physicians it does not employ.

17 II. STATEMENT OF RELEVANT FACTS

18 A. The plaintiff alleges that PeaceHealth is liable for its agents/employees; 19 PeaceHealth is the only named defendant.

20 The plaintiff, Walter Small (deceased), through his personal representative, Roger
21 Small, filed his "Complaint for Medical Negligence" on May 4, 2010. PeaceHealth is the
22 only named defendant, and the plaintiff alleges that PeaceHealth is "legally responsible for
23 their employees and agents":

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**MOTION TO PERMIT CONTACT WITH
EMPLOYEE DR. LEONE- 2**

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1 PeaceHealth d/b/a St. Joseph Medical Center, is a Washington corporation
2 licensed to do business in the State of Washington that provides medical
3 care to patients in Whatcom County. PeaceHealth employed staff who
4 treated Plaintiff Walter Small. **PeaceHealth d/b/a St. Joseph Medical
5 Center, is legally responsible for their employees and agents.**

6 (Graffe Decl. at Exh. 1; Complaint at p. 1, ¶ 3) (emphasis added).

7 **B. Despite this, the plaintiff objects to any contact with all treating
8 physicians, including PeaceHealth's own employee physicians, outside
9 of a deposition.**

10 The plaintiff sets forth his legal basis for objecting to "ex parte"¹ contact in the
11 Complaint for Medical Negligence, wherein the plaintiff objects to any contact with any of
12 the plaintiff's treating providers, including PeaceHealth's own employee physicians, as
13 follows:

14 Consistent with the provisions of RCW 5.60.060(4)(b)² and pursuant to
15 Loudon v. Mhyre, 110 Wn.2d 675, 756 P.2d 138 (1998),³ Plaintiff does not
16 authorize any ex parte contact with any of his treating physicians either by
17 way of in person interviews, telephone conversations or conferences,
18 correspondence or requests for medical records unless accompanied by a
19 properly noted subpoena duces tecum and subpoena for deposition.

20 (Graffe Decl. at Exh. 1; Complaint at p. 5, ¶ 3) (emphasis added).⁴

21 **C. At all relevant times, Dr. Leone was a PeaceHealth employee who was
22 involved in the care and treatment of Mr. Small.**

23 ¹ Black's Law Dictionary defines "ex parte" as "on or from one party only, usu. without notice to or argument
24 from the adverse party." Black's Law Dictionary (9th ed). 2009). Contact with a party's own employees is
25 not "ex parte" contact.

26 ² RCW 5.60.060(4)(b) states in total: "Ninety days after an action for personal injury 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 conductions,
subject to such limitations as a court may impose pursuant to court rules."

³ PeaceHealth does not dispute that the *Loudon* case prevents PeaceHealth's litigation counsel from
communicating with Mr. Small's physicians who are not PeaceHealth employees.

⁴ After the plaintiff filed his Complaint, the Washington State Supreme Court issued its decision in *Smith v.
Orthopedics Int'l Ltd., P.S.*, 170 Wn.2d 659, 244 P.3d 939 (2010). As discussed below, the *Smith* case, like
the *Loudon* case, does not support the plaintiff's position that defense counsel cannot speak with
PeaceHealth's own physician employees.

**MOTION TO PERMIT CONTACT WITH
EMPLOYEE DR. LEONE- 3**

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1 The plaintiff will not dispute that Dr. Leone was involved in the care and treatment
2 of Mr. Small. Indeed, the plaintiff seeks to depose Dr. Leone, which prompted the issue
3 now before the court. The plaintiff's somewhat evasive answers to Defendant's First
4 Requests for Admissions to Plaintiff leave Dr. Leone's care at issue in this case:

5 **REQUEST FOR ADMISSION NO. 33:** Admit that the plaintiff is not
6 and will not be contending that any alleged care or treatment provided by
Richard Leone, MD is at issue in this case.

7 **RESPONSE:**

8 Object. This is not the proper subject of a Request for Admission,
9 but Plaintiff does not claim the medical physicians caused his myocardial
infarction.

10 (Graffe Decl. at Exh. 2).

11 Dr. Leone was employed by PeaceHealth at all times relevant to this suit, and he
12 remains a PeaceHealth employee to date. PeaceHealth has a contractual obligation to
13 defend its employed physicians, like Dr. Leone, in legal actions for care provided within
14 the course and scope of employment at PeaceHealth. (Dawes Decl. at ¶ 2-3).

15 **III. ISSUE PRESENTED**

16 Whether the attorneys for defendant PeaceHealth are entitled to access to their own
17 client's physician employees before the employee is deposed, and outside of the deposition
18 setting, including Dr. Leone, such to enable PeaceHealth to prepare its defense in this
19 alleged medical negligence case.

20 **IV. EVIDENCE RELIED UPON**

21 PeaceHealth relies on the papers and pleadings previously on file herein, the
22 Declaration of John C. Graffe with exhibits, and the Declaration of Lynn Dawes.

23 **V. AUTHORITY**

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26 **MOTION TO PERMIT CONTACT WITH
EMPLOYEE DR. LEONE- 4**

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1 **A. Corporations, including hospitals, can only act through their agents—**
2 **PeaceHealth must be permitted to communicate with its own employee**
3 **physicians, including Dr. Leone, privately and outside of a deposition.**

4 Recognizing that a defendant hospital can only act through its agents, the plaintiff
5 alleges that PeaceHealth is legally responsible for acts of its employees/agents. Indeed, “a
6 corporation can act only through its agents.” *Biomed Comm., Inc. v. State Dept. of Health*
7 *Board of Pharm.*, 146 Wn. App. 929, 934, 193 P.3d 1093 (2008). This same principle very
8 clearly applies to hospital corporations, such as PeaceHealth. WPI 105.02.01 states in
9 pertinent part:

10 WPI 105.02.01 Negligence—Hospital

11 The defendant _____ is a corporation. **A corporation can act**
12 **only through its officers, employees, and agents. Any act or omission of**
13 **an officer, employee, or agent is the act or omission of the hospital**
14 **corporation.**

15 WPI 105.02.01 (emphasis added and internal bracketing omitted).

16 As discussed in more detail below, the plaintiff’s position would enable a plaintiff
17 suing a corporate health care provider, such as PeaceHealth, to dictate and limit the extent
18 to which lawyers for the corporate defendant can investigate a plaintiff’s claim, defend
19 against it, and provide appropriate legal advice, which is antithetical to our adversary
20 system in civil litigation. If a plaintiff can prevent defense counsel from having contact
21 with the corporate client’s own employees simply by omitting the employee’s name from
22 the caption of the Complaint, the plaintiff can interfere with the lawyer’s relationship with
23 the corporate client, which, after all, can act, think, confide in counsel, defend itself, settle,
24 or litigate only through its employees and agents. This holds true regardless of whether a
25 particular employee physician’s care is at issue in the case.

26 It goes without saying that a corporation’s lawyer may speak with any corporate
27 employee, and that the lawyer should, or even must do so, when the employee has or may

**MOTION TO PERMIT CONTACT WITH
EMPLOYEE DR. LEONE- 5**

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1 have information relevant to the subject matter of the representation (and the corporation's
2 lawyer may well commit malpractice if he or she neglects to do so). No Washington
3 decision has held or even suggests that corporate defendants in medical malpractice
4 lawsuits are less entitled to effective representation by counsel. Neither *Loudon v. Mhyre*,
5 110 Wn.2d 675, 756, P.2d 138 (1998) nor *Smith v. Orthopedics Int'l Ltd, P.S.*, 170 Wn. 2d
6 659, 244 P.3d 939 (2010) so hold. Again, this is true regardless of whether that particular
7 employee physician's care is at issue in the case.

8 Nothing in the *Loudon* or *Smith* cases stand for the proposition that a defendant
9 corporation or its lawyers cannot communicate the corporation's employee treating
10 physicians who were involved in the plaintiff's care. Indeed, the treating physicians with
11 whom the *Loudon* and *Smith* courts held that defense counsel could not contact were not
12 employees of the named defendant. The injustice would be manifest—even though
13 PeaceHealth can be held liable for any negligence in its employees' care and treatment of
14 the plaintiff and cannot not be named as a defendant "but for" their care, PeaceHealth
15 would be precluded from speaking with its physician employees simply because they are
16 omitted from the caption.

17 The plaintiff's Complaint does not limit the PeaceHealth health care provider
18 employees whose care and treatment may be at issue, nor has the plaintiff agreed to limit
19 any claims against PeaceHealth to the care of any specific providers. The plaintiff could
20 plausibly assert that PeaceHealth is vicariously liable or acts of its employees, whether
21 individually named or not, at any time in this case. The plaintiff would be hard-pressed to
22 identify any public policy served by having PeaceHealth's ability to speak to its own
23 employees outside of a deposition, and defend itself turn on whether the plaintiff decides to

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**MOTION TO PERMIT CONTACT WITH
EMPLOYEE DR. LEONE- 6**

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1 name individual treatment providers as defendants, or to litigate solely against the
2 corporation under a theory of *respondeat superior*.

3 **B. *Loudon* and *Smith* do not preclude private communications between**
4 **hospital counsel and the hospital's own employee physicians.**

5 The plaintiff's Complaint contends that *Loudon v. Mhyre*, 110 Wn.2d 675, 756
6 P.2d 138 (1988) precludes PeaceHealth's litigation defense counsel from speaking with Dr.
7 Leone (or other employee physicians) outside of a deposition. However, *Loudon* does not
8 address the issue now before the court. The narrow issue in *Loudon* was whether defense
9 counsel in a motor vehicle collision case could be precluded from making *ex parte* contact
10 with the plaintiff's treating providers. *Loudon* did not involve medical negligence, hospital
11 liability, or issues of hospital vicarious liability for acts of employee physicians. *Loudon*
12 does not purport to address the issue in this case, which is whether hospital defense
13 litigation counsel can be precluded from privately discussing the case with its own
14 physician employees (including those like Dr. Leone whose care could be at issue).

15 Similarly, *Smith* does not address the issue before the court. The *Smith* case
16 involved a one-way exchange of documents from defense counsel to counsel for a non-
17 party, non-employee physician. Washington law does not stand for any proposition that
18 defense counsel cannot discuss a case and communicate with its own employee physicians
19 outside of a deposition. The mere suggestion that defense counsel must note the deposition
20 of his client's own employee to investigate a malpractice claim defies logic and common
21 sense. Similarly, as case matters evolve, would defense counsel need to again re-note the
22 deposition of his own employee each time it becomes necessary to discuss case matters?

23 ~~Moreover, and in addition to the above, the practical aspects of extending the~~
24 *Loudon* and *Smith* decisions to prohibit discussions between a hospital's litigation defense
25 counsel and its own physician employee regarding knowledge relevant to the case leads to
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**MOTION TO PERMIT CONTACT WITH
EMPLOYEE DR. LEONE- 7**

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1 several absurd results. First, most obviously and as discussed above, it would greatly
2 inhibit a defendant hospital's ability to investigate and defend itself in cases of alleged
3 medical malpractice. This was not at issue in *Loudon*, which was concerned only with
4 defense counsel's contacts with treating providers in a motor vehicle accident case. Nor
5 was this at issue in *Smith*, which concerned only defense counsel's one-way submission of
6 documents to the attorney for a non-party, non-employee treating physician.

7 Second, it encourages tactical pleading. If the plaintiff named Dr. Leone as a party
8 defendant, there should be no dispute that defense counsel could freely communicate with
9 him, interview him privately, and prepare him for his deposition. Alternatively, by
10 choosing not to name Dr. Leone as a defendant, the plaintiff purports to argue that Dr.
11 Leone is not a party defendant, but is a treating provider "fact witness," and therefore
12 *Loudon* applies to preclude private contact. However, there is nothing to preclude the
13 plaintiff from later naming Dr. Leone as a party-defendant in this case, or pursuing
14 vicarious liability for his conduct without expressly naming him (e.g., after he is deposed
15 by the plaintiff without the benefit of counsel).

16 The above-described results fly in the face of the reasoning in *Loudon*, which
17 precludes *ex parte* contact between a non-hospital defendant and treating providers that had
18 no employment relationship with the non-hospital defendant. The court in *Loudon* could
19 not have intended to disadvantage a hospital's ability to defend itself in civil litigation by
20 limiting a hospital's ability to speak privately with its own employees about the plaintiff's
21 medical negligence allegations. Taking the plaintiff's position to the illogical extreme, any
22 medical negligence plaintiff could preclude defense counsel from speaking privately with
23 an employee physician, even when that physician's care is directly and indisputably at

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**MOTION TO PERMIT CONTACT WITH
EMPLOYEE DR. LEONE- 8**

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1 issue, merely by naming only the hospital as a defendant.⁵ Again, this goes far beyond the
2 reach and intent of *Loudon*. Loudon acts as a shield against disclosure of medical
3 information to outside counsel; not as a tactical sword to prevent hospital defense counsel
4 from speaking privately to its employees regarding a medical negligence case, and to
5 inhibit the ability to defend.

6 Finally, taking the plaintiff's position one step further, what becomes of
7 interrogatories, requests for admissions and other discovery requests to a hospital
8 defendant? If consult from an employee physician is needed to respond to discovery, does
9 this now require discussion and answer only during a deposition and/or in the presence of
10 the plaintiff's counsel? Does this now render written discovery, including requests for
11 admissions that require assistance from an employee physician, meaningless? This same
12 logic applies to a plaintiff's request for a CR 30(b)(6) deposition from a hospital defendant
13 in a medical negligence case. If a defendant hospital is precluded from speaking with its
14 employee physicians, and determination of the proper deponent requires this, how can a
15 hospital defendant comply with CR 30(b)(6) deposition requests?

16 **C. RCW 70.02.050 expressly permits disclosure of health care information**
17 **from an employee physician to hospital litigation defense counsel**
18 **without patient authorization.**

19 The *Loudon* decision, which again does not address the hospital
20 physician/employee relationship, was premised on preventing disclosure of privileged
21 medical information in an *ex parte* setting. Even if communications between

22 ⁵ Moreover, the physicians employed by PeaceHealth have more at stake than money. Medical negligence
23 settlements are subject to mandatory reporting to the Department of Health regardless of the whether the
24 physician employee is named as a defendant. The reports are then publicly available. This report generally
25 triggers a separate investigation by the Department of Health. In addition, these reports can be relevant to a
26 physician's application for insurance if that physician leaves PeaceHealth, and in applications of re-
applications for medical privileges. Thus, clearly these physicians have a strong interest in maintaining their
good professional representations. They, like PeaceHealth, have the right to be represented by counsel.
(Dawes Decl. at ¶ 4-5).

**MOTION TO PERMIT CONTACT WITH
EMPLOYEE DR. LEONE- 9**

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1 PeaceHealth's litigation counsel and its employee physicians can be considered
2 "disclosures" of health care information, these disclosures are expressly permitted under
3 Washington statutory law. RCW 70.02.020, titled, "Disclosure by health care provider,"
4 precludes disclosure of health care information without patient authorization, "[e]xcept as
5 authorized by RCW 70.20.050."

6 RCW 70.02.050,⁶ titled, "Disclosure without patient's authorization," provides that
7 PeaceHealth and its employee health care providers, including physicians "may disclose
8 health care information about a patient without the patient's authorization to the extent the
9 recipient needs to know the information if the disclosure is: ... (b) [t]o any other person
10 who requires health care information ... to provide ... legal ... services to, or ... on
11 behalf of the health care provider or health care facility[.]" RCW 70.02.050(1)(b)
12 (emphasis added).⁷

13 RCW 70.02.050(1)(b) expressly allows for the disclosure of health care information
14 for legal services without patient authorization. If patient authorization is not required for
15 purposes of these disclosures, clearly the plaintiff's attorney has no right to interject in the
16 occurrence of such disclosures. Any alternative reading renders this statute illusory and
17 superfluous as applied to medical negligence cases against hospitals. "A court may not
18 construe a statute in a way that renders statutory language meaningless or superfluous."
19 *Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.*, 158 Wn.2d 603, 610, 146

21 ⁶ RCW 70.02.050 also allows for disclosure of health care information without patient authorization to
22 comply with peer review and quality assurance requirements imposed by RCW 70.41.200. A hospital cannot
23 meet its QI obligations with a plaintiff's attorney present, and indeed, RCW 70.41.200 explicitly provides that
24 all communications in which such health care information is disclosed is protected from disclosure to third
25 parties (such as plaintiff's counsel) under RCW 70.41.200(3).

26 ⁷ "Health care information" means "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[.]" RCW 70.02.010.

**MOTION TO PERMIT CONTACT WITH
EMPLOYEE DR. LEONE- 10**

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1 P.3d 914 (2006); *Cobra Roofing v. Labor & Indus.*, 157 Wn.2d 90, 99, 135 P.3d 913
2 (2006) (“Statutes must be interpreted and construed so that all the language used is given
3 effect, with no portion rendered meaningless or superfluous”).

4 **D. The plaintiff seeks to invade the province of the attorney-client
5 privilege—PeaceHealth has a right to prepare its defense without
6 intervention of the plaintiff’s counsel.**

7 It should not be incumbent upon PeaceHealth to offer argument demonstrating that
8 confidential consultation between a litigant, including a defendant, and its lawyer(s) is part
9 and parcel to the confidential attorney-client relationship required by the Rules of the
10 Professional Conduct. Nevertheless, whenever the defendant is a corporation, the
11 investigation conducted by the corporation’s attorney must, by definition, include private
12 communications with the organizational client’s employees, because the client cannot act
13 or convey relevant information except through these persons. “An organizational client
14 cannot act except through its officers, directors, employees, shareholders, and other
15 constituents.” See RPC 1.13 (2008) at Comment [1]. Therefore, “a lawyer employed or
16 retained by an organization represents the organization acting through its duly authorized
17 constituents,” including its employees. RPC 1.13(a) and Comment [1].

18 Significantly, these communications are privileged:

19 In the corporate context, ... it will frequently be employees beyond the
20 control group ... who will possess the information needed by the
21 corporation’s lawyers. Middle-level-and indeed lower-level-employees can,
22 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.

23 *Upjohn Co. v. United States*, 449 U.S. 383, 391 (1981).

24
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26 **MOTION TO PERMIT CONTACT WITH
EMPLOYEE DR. LEONE- 11**

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1 Washington's Rules of Professional Conduct mirror the well-settled rule in *Upjohn*
2 that an attorney's communications with a corporate client's employees are protected by the
3 attorney-client privilege:

4 When one of the constituents of an organizational client communicates with
5 the organization's lawyer in that person's organizational capacity, the
6 communication is protected by Rule 1.6. Thus, by way of example, if an
7 organizational client requests its lawyer to investigate allegations of
8 wrongdoing, interviews made in the course of that investigation between the
9 lawyer and the client's employees or other constituents are covered by RPC
10 1.6.

11 RPC 1.13 at Comment [2]; accord RCW 5.60.060(2)(a) ("An attorney or counselor shall
12 not, without the consent of his or her client, be examined as to any communication made
13 by the client to him or her, or his or her advice given thereon in the course of professional
14 employment."); see also RPC 1.6 (information disclosed to attorney shall be confidential).

15 The significance and value of the attorney-client privilege cannot be overstated in
16 the context of a corporate client. Its purpose is:

17 to encourage the full and frank communication between attorneys and their
18 clients and thereby promote broader public interests in the observance of
19 law and administration of justice. The privilege recognizes that sound legal
20 advice or advocacy serves public ends and that such advice or advocacy
21 depends upon the lawyer's being fully informed by the client.

22 *Upjohn*, 449 U.S. at 389; accord RPC 1.6 at Comment [2] ("The client is ... encouraged to
23 seek legal assistance to communicate fully and frankly with the lawyer and even as to
24 embarrassing or legally damaging subject matter. The lawyer needs this information to
25 represent the client effectively[.]"); see also RCW 5.60.060(2); RPC 1.13; *Barry v. USAA*,
26 98 Wn. App. 199, 204, 989 P.2d 1172 (1999) ("the attorney-client privilege protects
confidential attorney-client communications from discovery so clients will not hesitate to
fully inform their attorneys of all relevant facts."); *Coburn v. Seda*, 101 Wn.2d 270, 274,

**MOTION TO PERMIT CONTACT WITH
EMPLOYEE DR. LEONE- 12**

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1 677 P.2d 173 (1984) (the attorney-client privilege has its basis in the confidential nature of
2 the communication and seeks to foster a relationship deemed socially desirable).

3 Despite these clear and fundamental principles, the plaintiff seeks to insert himself
4 into PeaceHealth's attorney-client relationship by requiring no contact unless during a
5 deposition with the plaintiff's counsel across the table. Thus, by forcing communications
6 to occur at a deposition only, the plaintiff is effectively compelling disclosure of privileged
7 and confidential attorney-client communications, or more accurately, preventing them from
8 occurring in the first place. In so doing, the plaintiff attempts to eliminate PeaceHealth's
9 ability to investigate the claims with the assistance of counsel, and prevents PeaceHealth
10 from effectively defending itself against this medical malpractice lawsuit.

11 **E. Other jurisdictions have refused to adopt the plaintiff's position.**

12 Notably, other jurisdictions that have considered this issue have recognized that a
13 patient has a right to confidentiality regarding medical treatment, but "there is a competing
14 interest that employers be permitted to discuss a pending lawsuit with its employees." *Lee*
15 *Memorial Health System v. Smith*, 40 So.3d 106, 108 (2010). Several of these courts have
16 concluded that communications between the corporate health care provider and its
17 employee are not "disclosures" of health care information in that context. Florida and
18 Pennsylvania courts have repeatedly rejected the plaintiff's position, and hold that
19 corporate health care providers and their attorneys must be permitted to defend themselves
20 competently, which includes engaging in private, protected communications with their
21 employees:

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

**MOTION TO PERMIT CONTACT WITH
EMPLOYEE DR. LEONE- 13**

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1 *Estate of Stephens v. Galen Health Care, Inc.*, 911 So.2d 277, 281-82 (Fla. 2d DCA 2005)
2 (emphasis added) (“The importance of a corporation being able to speak to its agents and
3 employees is no less of a concern in other types of cases, for instance when a hospital is
4 being sued for its ‘universe’ of care, as we have here.”); *accord Lee*, 40 So.3d at 108 (“no
5 ‘disclosure’ occurs when a hospital and its employees discuss information obtained in the
6 course of employment”); *see also Public Health Trust of Dade County v. Franklin*, 693
7 So.2d 1043, 1045 (Fla. 3d DCA 1997) (“the hospital as an institutional health care provider
8 has a right to conduct ex parte interviews with its own agents and employees for whom it
9 might be vicariously liable); *White v. Behlke*, 65 Pa. D. & C. 4th 479, 490 (Ct. Com. Pl.
10 2004) (“In defending a medical negligence claim, defense counsel obviously must be
11 permitted to confer privately with the attorney’s client or the actual or ostensible employees
12 of the client who were involved with the plaintiff’s care and treatment which are the
13 subject of the suit.”).

14 When faced with this precise issue before the court, the *Stephens* court went on to
15 provide:

16 [t]he corporate entities have no knowledge in and of themselves. They can
17 act only through their employees and agents and should be able to speak to
18 those employees to discuss a pending lawsuit. The [hospital’s] attorneys
19 should also be able to speak with the [hospital’s] employees and agents as
20 the corporate entities are able to function only through them.

21 *Stephens*, 911 So.2d at 282.

22 **F. PeaceHealth has a due process right to counsel.**

23 A civil litigant has “a constitutional right, deriving from due process, to retain hired
24 counsel in a civil case.” *Gray v. New England Tel. and Tel. Co.*, 792 F.2d 251, 257 (1st
25 Cir. 1986); *accord Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1117-18 (5th Cir.
26 1980), cert denied, 449 U.S. 820 (1980) (“the right to retain counsel in civil litigation is

**MOTION TO PERMIT CONTACT WITH
EMPLOYEE DR. LEONE- 14**

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1 rooted in fifth amendment notions of due process”); *Powell v. Alabama*, 287 U.S. 45, 69
2 (1932) (“If in any case, civil [or] criminal, a state or federal court were arbitrarily to refuse
3 to hear a party by counsel, employed by and appearing for him, it reasonably may not be
4 doubted that such a refusal would be a denial of a hearing, and therefore, of due process in
5 the constitutional sense.”).

6 PeaceHealth, like any other litigant, is entitled to retain and employ counsel because
7 a “corporation is a ‘person’ within the meaning of the equal protection and due process
8 clauses.” *American Legion Post #149 v. Washington State Dept. of Health*, 164 Wn.2d
9 570, 192 P.3d 306 (2008) (citing *Grosjean v. Am. Press. Co.*, 297 U.S. 233, 244 (1936)).
10 Even in the civil context, “the right to counsel is one of constitutional dimensions and
11 should thus be freely exercised without impingement.” *Potashnick*, 609 F.2d at 1118
12 (emphasis added).

13 PeaceHealth has a constitutional right to retain defense counsel to investigate and
14 defend against the medical malpractice claim before the court. As the court in *U.S. v.*
15 *Upjohn*, 449 U.S. 383 (1981) recognized, “[t]he first step in the resolution of any legal
16 problem is ascertaining the factual background and sifting through the facts with an eye to
17 the legally relevant.” *Upjohn*, 449 U.S. at 390-91. Being precluded from conducting this
18 critical investigation outside of a deposition, and therefore in the presence of the plaintiff’s
19 counsel, impinges upon PeaceHealth’s constitutionally protected right.

20 V. CONCLUSION

21 For the foregoing reasons, PeaceHealth respectfully requests the court for an order
22 permitting PeaceHealth defense counsel to speak with its employee physicians who
23 provided care to Mr. Small, including Dr. Leone, without any intervention of the plaintiff’s
24 counsel. Defense counsel should be permitted to communicate freely with its employees in
25

26 **MOTION TO PERMIT CONTACT WITH
EMPLOYEE DR. LEONE- 15**

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1 the defense of this alleged medical malpractice case before and outside of their depositions,
2 and without the plaintiff's counsel present. This is true regardless of whether the plaintiff
3 contends that the care of the employee physician is at issue.

4 **VI. ORDER**

5 A proposed order is attached.

6 **DATED: April 5, 2011.**

7 **JOHNSON, GRAFFE,**
8 **KEY, MONIZ & WICK, LLP**

9
10 By Brian P. Waters
11 John C. Graffe, WSBA #11835
12 Brian P. Waters, WSBA #36619
13 Attorneys for Defendants
14 PeaceHealth d/b/a St. Joseph Hospital

15 I certify under penalty of perjury
16 under the laws of the State of
17 Washington that I faxed, mailed + email
18 and/or delivered via messenger to
19 all counsel of record a copy of
20 the document on which this
21 certificate is affixed.

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**MOTION TO PERMIT CONTACT WITH
EMPLOYEE DR. LEONE- 16**

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HONORABLE IRA UHRIG
Hearing: April 15, 2011, 1:30 p.m.

**SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF WHATCOM**

**WALTER SMALL, Deceased, by his
Personal Representative, Roger Small,**

Plaintiff,

v.

**PEACEHEALTH; d/b/a ST. JOSEPH
HOSPITAL,**

Defendant.

No. 10-2-01077-3

**ORDER GRANTING
PEACEHEALTH'S MOTION RE:
CONTACT WITH EMPLOYEE
DR. LEONE**

[PROPOSED]

THIS MATTER, having come regularly before the Court in the above-captioned matter upon the PeaceHealth's Motion Re: Contact with PeaceHealth Employee Dr. Leone, and the Court having reviewed the files and pleadings herein, including:

1. PeaceHealth's Motion Re: Contact with PeaceHealth Employee Dr. Leone;
2. Declaration of John C. Graffe Re: Motion to Contact PeaceHealth Employee Dr.

**ORDER RE: CONTACT WITH DEFENDANT
EMPLOYEE DR. LEONE - 1**

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1 Leone, with attached exhibits;

2 3. Declaration of Lynn Dawes Re: Motion to Contact PeaceHealth Employee Dr.
3 Leone;

4 4.

5 5.

6 and the Court having heard oral argument of counsel and being otherwise fully
7 advised in the premises,

8
9
10 IT IS HEREBY ORDERED that PeaceHealth's Motion Re: Contact with
11 PeaceHealth Employee Dr. Leone is GRANTED. Dr. Richard Leone is a physician
12 employed by PeaceHealth. Dr. Leone provided medical care and treatment to the plaintiff
13 Walter Small. Defense counsel may contact and communicate with its employee
14 physicians, including Dr. Richard Leone, who provided care/treatment to the plaintiff's
15 decedent, Walter Small, regarding their care/treatment of Mr. Small. Communications and
16 contact with these physician employees are not subject to or limited by the Court's decision
17 in *Loudon v. Mhyre*, 110 Wn.2d 675, 756 P.2d 138 (1988). Defense counsel
18 communication and contact with these employee physicians need not occur with notice to,
19 or in the presence of the plaintiff's counsel, nor is a subpoena or subpoena for a deposition
20 required in order for these communications and contact to occur.
21
22

23 DONE IN OPEN COURT this _____ day of _____, 2011.

24
25 _____
26 Honorable Judge Ira Uhrig

**ORDER RE: CONTACT WITH DEFENDANT
EMPLOYEE DR. LEONE - 2**

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Presented by:

JOHNSON, GRAFFE
KEAY, MONIZ & WICK, LLP

By:

John C. Graffe, WSBA #11835
Brian P. Waters, WSBA #36619
Defendant PeaceHealth
d/b/a St. Joseph Hospital

**ORDER RE: CONTACT WITH DEFENDANT
EMPLOYEE DR. LEONE - 3**

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Exhibit 2

From the Puget Sound Business Journal:
<http://www.bizjournals.com/seattle/stories/2010/06/28/story2.html>

Skagit Valley Hospital to buy big physicians group; in major shift, doctors are joining with hospitals

Premium content from Puget Sound Business Journal - by Peter Neurath, Contributing Writer

Date: Sunday, June 27, 2010, 9:00pm PDT

Related:

[Health Care, Insurance](#)

The 81-doctor Skagit Valley Medical Center is selling itself to [Skagit Valley Hospital](#) in a \$17.4 million deal that reflects a growing trend of independent physicians' groups joining larger organizations.

Within the last year, at least five other groups of Puget Sound area doctors have sold to or partnered with hospitals, and other, smaller doctor groups have joined larger physician organizations.

While the long-term effects of the consolidation are unclear, it could quickly affect competition, autonomy and who actually directs patient care, said Bob Perna, health care economics director at the Washington State Medical Association.

Moreover, to the extent that hospitals can bargain for higher service rates from health insurers than can independent physician groups, this trend could result in higher insurance premiums.

The Skagit Valley Medical Center sale, due to be completed July 1, follows another big acquisition last December. The 133-doctor Rockwood Clinic in Spokane sold itself to Community Health Systems, a hospital group based in Nashville, Tenn., for a reported \$50 million. Community Health Systems now owns two Spokane hospitals.

Skagit Valley Medical Center executives declined to discuss the reasons for their sale.

But experts say independent doctors are joining hospitals in part to ease their struggles with costly administrative overhead. Doctors groups also face growing capital needs to set up electronic medical records and other technologies. And they face financial pressures

from dwindling Medicaid and Medicare payments, rising malpractice insurance premiums, and fear and uncertainty over what national health care reform bodes.

"Consolidation is driven by financial pressures," said Rick Cooper, CEO of The Everett Clinic, in Snohomish County.

Compensation also is a big factor. "When a physician joins a hospital, there are virtually no limits on compensation," said Chris Rivard, health care services chair with accounting firm Moss Adams, in Yakima. "Doctors drive ancillary services to hospitals. Therefore, it is easy to justify higher salaries than the traditional (physician) practice might warrant."

For hospitals, acquiring physician groups also provides substantial benefit. They gain a reliable source of patient admissions and a stable supply of physicians on call for their patients.

Small wonder that the trend has caught on across the country. In 2008, about 60 percent of doctors were considered self-employed, while just under 34 percent were classified as employees, according to a study by the American Medical Association. "By next year, more than 60 percent of physicians will be salaried employees," Dr. Scott Gottlieb, a fellow at the American Enterprise Institute, wrote in a recent column in the Wall Street Journal.

"As a nation, we have hit a milestone," said Gregg Davidson, CEO of the 137-bed Skagit Valley Hospital, in Mount Vernon. "Fewer than 50 percent of physician clinics are privately owned."

In the Puget Sound area, four of the five largest medical groups now are 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). Group Health Medical Centers, with 1,000 doctors, serves Group Health Cooperative. (Group Health is a health maintenance organization that includes hospitals; the physicians group contracts solely with Group Health.)

Last September, 72-doctor Minor & James partnered with Swedish, Seattle's largest hospital group. In lieu of an outright sale, though, Swedish became a "joint equity partner" with the Seattle medical group, through an undisclosed financial transaction.

John Clarke, Minor & James' chief financial officer, told the Business Journal that it made sense to partner with Swedish to obtain the administrative efficiencies and access to capital its doctors will need to survive the even lower Medicare and Medicaid service payments resulting from health care reform.

Other recent sales include: the 11-doctor Seattle Cardiology to Swedish, seven-doctor Tacoma Orthopaedic Surgeons Inc. to Franciscan Health System, and 53-doctor Medical Associates of Yakima to Yakima Valley Memorial Hospital.

"I believe there's a trend, and I believe it's accelerating," said David Fitzgerald, CEO of Proliance Surgeons, in Seattle, one of the city's largest independent doctor groups.

"It does seem to be increasing right now," said Tom Curry, CEO of the state Medical Association.

Not all doctors are looking for hospital employment, however. Some small groups of doctors are joining with big physician practices, such as the 300-doctor Everett Clinic and The Polyclinic in Seattle, which have the size and business savvy to stay independent.

"Many of the traditional practitioners are anti-hospital by nature," said Rivard, at Moss Adams. "They do not want to be told how to practice, what supplies to use, how to document services and so on."

Among those taking the route of joining up: The four-doctor oncology division of Western Washington Medical Group joined The Everett Clinic last year. And some 82 doctors, including individuals and various groups, have joined The Polyclinic during the last few years.

"Medical oncology reimbursement by Medicare has decreased substantially in recent years, while the costs of therapy have risen dramatically," said Everett Clinic spokeswoman April Zepeda. "By joining us, they consolidated their billing system, consolidated drug and chemotherapy inventory and reduced staffing costs."

Still other independent doctors are eyeing Northwest Physicians Network (NPN) as an alternative to hospital employment. NPN is an independent physicians association based in Tacoma. It provides infrastructure and management and technical support for 460 independent doctors in Pierce County and south King County.

"And we're growing," said NPN Chief Medical Officer Dr. Scott Kronlund. "We expect to have upward of 500 physicians by the end of the year," up from 460 today.

PNEURATH@BIZJOURNALS.COM | 206.876.5442

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The Honorable Ira Uhrig
Hearing date and time: April 22, 2011, 1:30pm

**SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF WHATCOM**

MARC YOUNGS

Plaintiff,

v.

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

Defendants.

No. 10-2-03230-1

**DEFENDANT PEACEHEALTH'S
RESPONSE TO PLAINTIFF'S
MOTION FOR CERTIFICATION
OF ORDER FOR
DISCRETIONARY REVIEW**

Defendant PeaceHealth, through its attorneys of record, Johnson, Graffe, Keay, Moniz & Wick, LLP, responds to plaintiff's Motion for Certification of Order for Discretionary Review as follows:

PeaceHealth does not agree with all of the assertions made in plaintiff's motion. However, PeaceHealth recognizes that this issue is likely to be a

**DEFENDANT PEACEHEALTH'S
RESPONSE TO PLAINTIFF'S
MOTION FOR CERTIFICATION - 1**

**JOHNSON, GRAFFE,
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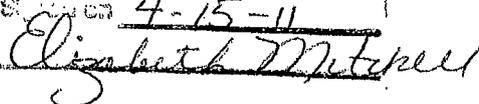
1 recurring one until resolved by the appellate courts. Thus, PeaceHealth does not
2 oppose plaintiff's effort to seek discretionary review, and leaves it to this Court's
3 discretion as to whether entry of the requested certification order is appropriate.
4

5 The parties have informally agreed to a stay of discovery and a voluntary
6 restriction on physician contact pending the outcome of the plaintiff's intended
7 request for discretionary review.
8

9 DATED this 15th day of April, 2011.

10 JOHNSON, GRAFFE,
11 KEAY, MONIZ & WICK, LLP

12 By 
13 John C. Graffe, WSBA #11835
14 Heath S. Fox, WSBA #29506
15 Attorneys for Defendant PeaceHealth

16 I, the undersigned, declare under penalty of perjury
17 that I am an attorney of the State of Washington
18 and that I faxed, mailed
19 or delivered via messenger to
20 the court of record a copy of
21 the document on which this
22 declaration is affixed.
23 Signed on 4-15-11
24 

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Shana Criscola at (907) 228-8300, extension 7886 or email.

Longview/Kelso, Washington

Carol Shea at (360) 414-7867 or email.

Clinical Experiences

Eugene/Springfield, Oregon
Brooke Hausmann at (541) 222-2508 or email.

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Sharron Pucket-Bradford at (541) 902-6131 or email.

Bellingham, Washington
Linda Anderson at (360) 752-5218 or email, Pattie Washburn at (360) 752-5177 or email.

Cottage Grove, Oregon
Dorothy Reed at (541) 222-2528 or email.

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