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STATE OF WASHINGTON

BY _____
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NO. 47724-6-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

TACOMA SCHOOL DISTRICT,

APPELLANT

v.

TRUBY PETE, SHEILA GAVIGAN, & KATHY MCGATLIN

RESPONDENTS.

APPEAL FROM PIERCE COUNTY SUPERIOR COURT

**BRIEF OF RESPONDENTS TRUBY PETE
AND SHEILA GAVIGAN**

Tyler K. Firkins
Stephanie L. Beach
Van Sicien, Stocks & Firkins
721 45th St NE
Auburn, WA 98002
253-859-8899
tfirkins@vansiclen.com
sbeach@vansiclen.com

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INTRODUCTION

The Respondents, Truby Pete and Sheila Gavigan, sought the protection of the Superior Court to preserve their confidential communications with their attorney pertaining to their whistleblowing activities. The Appellant, Tacoma School District, seeks to compel Pete and Gavigan to disclose confidential communications so that it can retaliate against Pete and Gavigan for their whistleblowing activities. The Superior Court refused to abrogate Pete and Gavigan's fundamental rights. By this appeal, the District asks this Court to do so.

RESTATEMENT OF THE CASE

A. Factual History

Truby Pete and Sheila Gavigan (collectively "the Employees"¹) were education professionals at Lincoln High School in the Tacoma School District.² CP 61. During the 2013-2014 school year, the Employees grew increasingly concerned about decisions made by Lincoln administrators with regard to the educational opportunities provided to students. CP 61. Of particular concern to these employees was the school's practice of routing students of color into alternative education programs. CP 53, 61. Based on their training and experience, the

¹ A third employee Kathy McGatlin is separately represented in a collateral appeal.

² They have since been involuntarily transferred to different schools in retaliation for their whistleblowing activities.

Employees suspected that the practices were both unprofessional and discriminatory. CP 58, 61. The student body at Lincoln High School has a larger percentage of minority students than other high schools in the Tacoma School District, raising a concern in the eyes of the Employees that Lincoln's unique policies and practices had a disparate impact on students of color. CP 53.

Initially, the Employees raised their concerns with their immediate supervisors at Lincoln High School. The Employees then sought the assistance of District Superintendent Carla Santorno. CP 61, 132. When their concerns went ignored, the Employees felt that a whistleblower complaint might be necessary. CP 61. The Employees sought private legal counsel to advise them of their rights and responsibilities in the process and assess the strength of any claims they might bring.

The Employees consulted Joan Mell, an experienced education law attorney. CP 60-63. In order to receive full and accurate legal advice, the employees provided Ms. Mell with certain records. The District now alleges, without proof, that some of the records may have contained student information, as that term is defined the Family Educational Rights and Privacy Act (FERPA). CP 71. It is these records that are at issue here.

The Employees submitted a formal whistleblower complaint, drafted with the assistance of Ms. Mell, to the District on August 28, 2014. CP 87-95, 132. The very same day she received it, Superintendent Santoro dismissed the complaint. CP 319. Having gotten nowhere with the District, Ms. Mell and/or the Employees brought their concerns to King 5 News. CP 145. King 5 ran a news story on the matter on September 2, 2014.³ CP 66. Ms. Mell also submitted complaints to the Department of Education's Office for Civil Rights (OCR) and the Puget Sound Educational Service District (PSESD). CP 53-58. OCR and PSESD, recognizing the seriousness of the reports, commenced independent investigations into the District's practices. CP 53-58.

B. Procedural history

In response to the news story aired by King 5, the District began conducting what it termed "investigative interviews." CP 111, 132. The District also filed a lawsuit against the Employees in Pierce County Superior Court, No. 14-2-12979-9, seeking replevin of all records the Employees had provided to Joan Mell. CP 66. The Employees have always asserted that any information about who provided what and when

³ The story aired by King 5 is available for viewing at <http://www.king5.com/story/news/local/tacoma/2014/09/03/graduation-lincoln-high-school-reengagement-center/15001863/>.

is protected by constitutional and attorney-client privilege. CP 67. The Superior Court litigation remains ongoing.

On October 1, 2014, Ms. Mell informed the District that she would sequester any records she had received, and there would be no dissemination of any records containing identifying student information. CP 62. Ms. Mell reaffirmed her promise to sequester all records at a Superior Court hearing on November 7, 2014. CP 69. King 5 News also sent a letter to the District, informing it that the news station had not received any student records and all papers they received were redacted of all identifying information. CP 145.

On October 31, 2014, Tacoma School District issued notices of probable cause to suspend Ms. Pete and Ms. Gavigan for 10 days for insubordination for asserting their constitutional rights.⁴ CP 99. The Employees challenged the District's determination of probable cause, and the matters were set adjudication by a hearing examiner. Judge Deborah Fleck served as hearing examiner for Ms. Pete. Judge Terry Lukens served as hearing examiner for Ms. Gavigan.

During discovery, the District indicated that it intended to question the Employees about which records were provided to Joan Mell, when and by whom. The Employees moved for protection orders to prevent the

⁴ While the District did not use these words, its efforts to refuse salary to the Employees for exercising their rights demonstrates its intention.

District from inquiring into information protected by their constitutional and attorney-client privileges. CP 35, 225.

Both hearing examiners issued rulings denying the motions for protection orders. Hearing Officer Fleck determined that the District's insistence that only it could redact student records constituted a "preclearance requirement" or prior restraint. CP 153. Applying the balancing test set out in *Martin v. Lauer*, 686 F.2d 24, 32 (D.C. Cir. 1982), Hearing Officer Fleck found that the Employees had a constitutional right to consult with an attorney, and had exercised that right by seeking Ms. Mell's assistance for the purpose of filing a whistleblower complaint. CP 151-53. Hearing Officer Fleck further found that any rights the school district had were adequately protected by its own policies and Ms. Mell's agreement not to disseminate the documents. CP 154. Despite these findings, Hearing Officer Fleck denied the motion on the basis that "[t]here is no controlling Washington authority," and that the First Amendment cases cited by the employees applied only to oral communications. CP 154.

Hearing Officer Lukens on the other hand, determined that because the documents had not been prepared by the Employees, they were not protected by attorney-client privilege. CP 338. Hearing Officer Lukens

also found, with little explanation, that the First Amendment was not implicated in this matter. CP 338-39.

The Employees petitioned the Pierce County Superior Court for a writ of review to correct the decisions by the Hearing Examiners. CP 1-26. The matters were then consolidated for oral argument with a third District employee, Kathy McGatlin. CP 27-32. The Superior Court granted the Employees' writs of review and overturned the decisions of the hearing examiners. Specifically, the Superior Court found:

1. Petitioner has met the requirements for a grant of statutory certiorari.
2. The Hearing Officer committed error by failing to enter the protective order in this matter.
3. The status quo of the parties would be altered by failing to enter the protective order, and the rights of Petitioner would be destroyed.
4. The Petitioner has a First Amendment Privilege or Attorney Client Privilege as to communications and communicative acts with her private attorney, including designating which documents were given to the attorney, by whom, and in what form. *Jacob [sic] v. Schiffer*, 204 F.3d 259 (DC Cir. 2000).

CP 191.

The District timely filed its appeal thereafter. The cases remain consolidated on appeal.

I. ARGUMENT

A. Standard of Review

Whether a writ of certiorari (otherwise known as a “writ of review”) was properly granted is a question of law that this Court reviews de novo. *City of Seattle v. Holifield*, 170 Wn.2d 230, 240, 240 P.3d 1162 (2010). In granting or denying a writ of review, the superior court operates in an appellate capacity, not as a trier of fact. *Dep’t of Labor & Indus. v. Bd. of Indus. Ins. Appeals*, ___ Wn. App. ___, 347 P.3d 63, 65 (2015). Accordingly, this Court reviews the record as it was developed at the administrative tribunal. *Id.* Here the District complains that the Superior Court erred when it granted the writ of review.

B. Respondents satisfied the requirements for the grant of a writ of review.

The Superior Court in this case did not commit error in granting the writs. The purpose of the statutory writ is to enable limited appellate review of a judicial or quasi-judicial action when the remedy of appeal is unavailable. RCW 7.16.040, governing statutory writs, provides:

A writ of review shall be granted by any court, ... when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy

and adequate remedy at law.

An inferior tribunal “acts illegally” for purposes of a writ of review when that tribunal

(1) has committed an obvious error that would render further proceedings useless; (2) has committed probable error and the decision substantially alters the status quo or substantially limits the freedom of a party to act; or (3) has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of revisory jurisdiction by an appellate court.

Holifield, 170 Wn.2d at 244-45. “[A] claim that the writ can issue ‘only’ for patent error, however, is not supported by the case law.” *Id.* at 241, n. 10. “Correcting errors of law is the function of the writ of review.” *Devine v. Dep’t of Licensing*, 126 Wn. App. 941, 949, 110 P.3d 237 (2005).

In this case, it was appropriate to issue a writ because the hearing officers acted illegally, and there is no plain adequate remedy at law.

1. The Hearing Examiners committed a probable error of law that substantially alters the status quo by refusing to enter a protective order.

The *Holifield* test applicable in this case first examines whether the hearing officers committed probable error when denying the Respondents’ motions for a protective order. Pursuant to CR 26(c), an adjudicator may enter a protective order as necessary to protect a person from “annoyance, embarrassment, oppression, or undue burden or expense.” While it is

within the adjudicator's discretion whether to enter a protective order, it is an abuse of discretion to deny a protective order based on the incorrect or improper understanding of the law. *A.G. v. Corp. of Catholic Archbishop of Seattle*, 162 Wn. App. 16, 21, 271 P.3d 249 (2011); *Cedell v. Farmers Ins. Co. of Washington*, 176 Wn.2d 686, 694, 295 P.3d 239 (2013).

Here, both Hearing Examiners denied the Employees' motions for protective orders based on a lack of directly analogous authority in Washington. CP 154, 338-39. This is not a valid basis to deny a motion for a protective order. Proper resolution of this matter – or any other legal matter - does not depend on the existence of an identical case. If it did, there would be no reason for this Court to exist. Furthermore, an adjudicator may not ignore First Amendment jurisprudence simply because it does not arise out of Washington. Federal authority on the federal constitution should be considered persuasive, if not controlling in the absence of Washington authority. *Strange v. Spokane Cnty.*, 171 Wn. App. 585, 593, 287 P.3d 710 (2012); *see also* U.S. CONST. Art. VI, § 2.

In this case, federal law, applicable in Washington State, clearly exists that prohibits the District from making inquiry into communications between an attorney and her clients regarding accessing courts. *Martin v. Lauer*, 686 F.2d 24, 32 (D.C. Cir. 1982). Therefore, a ruling by a hearing officer that federal cases construing the federal constitution somehow do

not bind the courts of Washington is probable error.

The second part of the *Holifield* test is whether the probable error “substantially alters the status quo.” *Holifield*, 170 Wn.2d at 244-45. Breaching the privilege will clearly alter the status quo. Once a constitutional privilege is lost, it cannot be remade by judicial enactment. Here, once the attorney is compelled to reveal privileged information, the opposing party will be in possession of that information, and cannot be ordered to forget the information. The bell cannot be un-rung. *See generally* William G. Childs, *When the Bell Can’t Be Unrung: Document Leaks and Protective Orders in Mass Tort Litigation*, 27 REV. LITIG. 565 (2008).

Therefore it is clear that the Hearing Officers acted illegally. For a more detailed analysis of the probable error analysis see sections C-D, *infra*. The next question is whether there is an adequate remedy at law.

2. An appeal after a final order is not an adequate remedy for invasion of a constitutional privilege or of the attorney-client privilege.

Statutory certiorari is available to review interlocutory decisions in courts of limited jurisdiction, even when a final judgment in the case may be appealed. RCW 7.16.040. Denial of the writ is appropriate only when there is an adequate remedy by appeal from final judgment. *Dep’t of Labor & Indus.*, 347 P.3d at 65. Here, the Superior Court properly granted

the writ of review because compelled disclosure of privileged information cannot be adequately remedied by a subsequent appeal at the close of proceedings.

Interlocutory orders that adversely affect a claim of attorney-client privilege materially alter any proceeding in which they are granted. The attorney-client privilege can never be regained once it is destroyed. The harm is irreparable. It is for this reason that Washington courts do not hesitate to grant discretionary review when attorney-client privilege is at issue.⁵ *Cedell*, 176 Wn.2d at 690; *Dietz v. Doe*, 131 Wn.2d 835, 841, 935 P.2d 611 (1997); *Wright by Wright v. Grp. Health Hosp.*, 103 Wn.2d 192, 193, 691 P.2d 564 (1984); *Seventh Elect Church in Israel v. Rogers*, 102 Wn.2d 527, 528, 688 P.2d 506 (1984); *Dana v. Piper*, 173 Wn. App. 761, 763, 295 P.3d 305 (2013); *Barry v. USAA*, 98 Wn. App. 199, 203, 989 P.2d 1172 (1999); *Olson v. Haas*, 43 Wn. App. 484, 485, 718 P.2d 1 (1986); *Heidebrink v. Moriwaki*, 38 Wn. App. 388, 389, 685 P.2d 1109 (1984) *rev'd on other grounds*, 104 Wn.2d 392, 706 P.2d 212 (1985).

The importance of preserving attorney-client privilege while proceedings are on-going is also well-recognized in federal court. The

⁵ The purposes served by a writ of review under RCW 7.16.040 are similar to that served by discretionary review. The Washington Supreme Court has held that the criteria for one should inform the other, because the only method of review of interlocutory decisions in courts of limited jurisdiction or administrative tribunals is the statutory writ. *City of Seattle v. Williams*, 101 Wn.2d 445, 454-55, 680 P.2d 1051 (1984).

federal writ of mandamus, much like Washington's statutory writ, examines "whether the petitioner will be damaged or prejudiced in any way not correctable on appeal." *Hernandez v. Tanninen*, 604 F.3d 1095, 1099 (9th Cir. 2010). As noted by the Ninth Circuit, claims of attorney-client privilege in the face of discovery requests are frequently, if not always, deemed to meet this standard. *Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Arizona*, 881 F.2d 1486, 1491 (9th Cir. 1989). This is because "an appeal after disclosure of the privileged communication is an inadequate remedy" for the "irreparable harm a party likely will suffer if erroneously required to disclose privileged materials or communications." *Admiral*, 881 F.2d at 1491. "[M]aintenance of the attorney-client privilege up to its proper limits has substantial importance to the administration of justice, and ... an appeal after disclosure of the privileged communication is an inadequate remedy." *Id.* (quoting *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 492 (7th Cir.1970)).

The same is true regarding the loss of a constitutional privilege under the First Amendment. In fact, the nature of the privilege asserted in this case is constitutional in nature rather than just statutory, and thus would merit greater scrutiny. *State v. Berry*, 31 Wn. App. 408, 411, 641 P.2d 1213 (1982).

Without a protective order, the Employees will be forced to surrender their constitutional and statutory attorney-client privileges. These privileges cannot be restored once surrendered. This case is precisely the type where a writ of review is appropriate. The Superior Court did not err by finding that the Employees lacked an adequate remedy through the normal appeal process.

C. The Hearing Examiners acted illegally by denying Respondents' motions based on an erroneous view of First Amendment jurisprudence.

Access to the Courts is a fundamental constitutional right, found in the First Amendment right to petition the government.⁶ Part of that fundamental right includes the right to communicate with a lawyer. *Denius v. Dunlap*, 209 F.3d 944, 953 (7th Cir. 2000); *Martin v. Lauer*, 686 F.2d 24, 32 (D.C. Cir. 1982). The Superior Court did not err by finding that the Hearing Examiners acted illegally, as their decisions disregard constitutional jurisprudence and permit the District to intrude into the Employees' First Amendment and attorney-client privileges, which cannot be regained once surrendered.

⁶ The Washington Constitution also incorporates a right of access to the courts. *Doe v. Puget Sound Blood Cir.*, 117 Wn.2d 772, 780-81, 819 P.2d 370 (1991).

1. The right to consult with an attorney is protected by the First Amendment.

The First Amendment to the United States Constitution provides that “Congress shall make no law ... abridging ... the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” A vital component of this right is the right of access to the courts. *Borough of Duryea, Pa. v. Guarnieri*, — U.S. —, 131 S. Ct. 2488, 2494, 180 L. Ed. 2d 408 (2011); *In re Primus*, 436 U.S. 412, 426, 98 S. Ct. 1893, 56 L. Ed. 2d 417 (1978). Courts have consistently held that in order for these rights to be meaningful, the First Amendment must also incorporate the right to consult an attorney. *See e.g. Denius*, 209 F.3d at 953; *Martin*, 686 F.2d at 32. Hearing Officer Lukens clearly erred by determining otherwise.

As a practical matter, clients cannot expect to receive complete and accurate answers to their legal questions without providing their attorneys with all relevant materials. For this reason, the scope of documents that a client can disclose to her attorney is much broader than the scope of documents she can disclose to the public. *Jacobs v. Schiffer*, 204 F.3d 259, 264 (D.C. Cir. 2000) (*Jacobs II*) (“[C]ommunication of government information by a federal government employee to the employee’s attorney, where the attorney is bound to keep such information confidential, is not a

public disclosure of such information.”); *DeNeui v. Wellman*, 2008 WL 2330953, at *3 (D.S.D. June 5, 2008) (“The disclosure at issue in this case is not a public disclosure at a judicial proceeding but rather is a limited disclosure to Dr. Rud’s personal counsel, which in turn cannot be disclosed to a third party pursuant to the attorney-client privilege.”); *Fox Searchlight Pictures, Inc. v. Paladino*, 89 Cal. App. 4th 294, 313 (2001); cf. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984) (pretrial discovery is not a public process).

The primary case discussing what the First Amendment permits a government employee to disclose to her attorney without fear of reprisal is *Martin v. Lauer*. In that case, the Department of Justice (DOJ) directed its employees not to share any non-public information with their attorney without prior approval, and that if the employees had already shared information with an attorney, that they should immediately report what they shared.⁷ *Martin*, 686 F.2d at 27-28, 31. Failure to follow this directive would result in discipline, including possible discharge from employment. *Id.* In analyzing the constitutionality of the directive, the D.C. Court of Appeals determined that the First Amendment applied to the

⁷ The directive stated, in part, “If you or your employees have already provided information or documents to the attorney, either directly or indirectly, I want a report concerning all oral information provided and a copy of all such documents delivered to me” within the next two days. *Martin*, 686 F.2d at 28.

In light of these facts, Hearing Officer Lukens’ characterization of *Martin* as addressing only proposed disclosures to an attorney is incorrect.

employees' consultation with an attorney, and applied the balancing test first articulated in *Pickering v. Board of Ed.*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968). This test, used specifically for government employees, weighs the rights of the employee against the rights of the government "in promoting the efficiency of the public services it performs through its employees." *Id.* at 31 (quoting *Pickering*, 391 U.S. at 568). This same balancing test was adopted by the Washington Supreme Court in a case where a government employer fired an employee for speaking on a matter of public concern. *Binkley v. City of Tacoma*, 114 Wn.2d 373, 382, 787 P.2d 1366 (1990).⁸

The balance between the employees' and the government's interests "will differ according to the type of speech, the nature of the agency, and the context in which the speech is uttered." *Martin*, 686 F.2d at 31. In *Martin*, the Court held that the rights of the employees were constitutional, vital, and "deserving of rigorous protection." 686 F.2d at 33. Specifically, the Court recognized that the same rationale underlying attorney-client privilege also underlies the First Amendment right to counsel – namely, that in order to obtain sound legal advice, clients should be able to communicate freely with their attorneys. *Id.* at 32-33. The Court stated, "Restrictions on speech between attorneys and their clients

⁸ In adopting this balancing test, the Washington Supreme Court relied upon the same case that *Martin* did in its holding, i.e. *Pickering*. *Binkley*, 114 Wn.2d at 382.

directly undermine the ability of attorneys to offer sound legal advice.”

Id. at 32. The *Martin* court continued:

As the common law has long recognized, the right to confer with counsel would be hollow if those consulting counsel could not speak freely about their legal problems. Through the attorney-client privilege, the common law “encourage(s) full and frank discussions between attorneys and their clients and thereby promote(s) broader public interests in the observance of law and the administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends on the lawyer being fully informed by the client.”

Id. at 32 (quoting *Upjohn v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)).

The Court further held that, on the other hand, the interests of the government in any given case are highly variable, depending in large part on the nature of the information the employees disclose. *Id.* at 34. On one end of the scale are trivial matters, such as internal personnel policies. *Id.* On the other end of the scale is information that implicates national security.⁹ *Id.* Whether the government has alternative means to ensure the confidentiality of its information is another important consideration in the balancing test. *Id.* In *Martin*, the Court recognized that the government had an interest in protecting sensitive information, but determined that this

⁹ Even national security concerns, however, do not permit the government to completely bar employees from sharing documents with their attorney. *King v. United States*, 99 Fed. Cl. 99, 104 (2011).

interest could be protected without intruding upon the employees' rights to speak freely with their attorney. 686 F.2d at 34. It therefore held that the DOJ's directive was unconstitutional under the First Amendment. *Id.* at 35.

This balancing test was utilized again in *Jacobs v. Schiffer*, 47 F.Supp.2d 16 (Dist. D.C. 1999) (*Jacobs I*). In that case, Daniel Jacobs, an attorney for the DOJ, suspected his supervisors of unspecified wrongdoing, and hired an attorney to determine whether he should file a whistleblower complaint. *Jacobs I*, 47 F.Supp.2d at 18. The DOJ informed Mr. Jacobs that he would not be permitted to share any documents with his attorney without obtaining permission from the Department. *Id.* After applying the *Martin* balancing test, the Court found that this restriction was unconstitutional as a violation of Jacobs' First Amendment right to consult with an attorney. *Id.* at 24.

The D.C. Court of Appeals upheld this determination, and further held that the DOJ's position below was not justified or reasonable. *Jacobs II*, 204 F.3d at 266. The Court reaffirmed the balancing test articulated in *Martin*, applying it to the documentary disclosure proposed by Jacobs in the district court action. The Court first recognized that the First Amendment, as a constitutional provision, was necessarily superior to statutes and regulations. *Jacobs II*, 204 F.3d at 265. Examining the

interests at stake, the Court stated, “Relevant to this balancing is whether the attorney is likely to keep this information in confidence, as suggested by willingness to enter into a protective order, or whether such communications to the personal attorney will operate as a *de facto* public disclosure.” *Id.* Thus, where the attorney promised or was obligated to keep the information confidential, the balancing test had to look “beyond the balance between disclosure and non-disclosure” and consider the weight of the employee’s constitutional rights. *Id.*

As the holdings in *Martin* and *Jacobs II* establish, a governmental entity cannot forbid its employees from sharing documents with their attorneys simply because those documents are not accessible to the general public. Employees have a vital constitutional right to consult an attorney, and the government cannot impinge upon that right.

2. This case presents additional interests that must be considered in the balancing test.

The First Amendment rights of the Employees to consult an attorney are not the only interests at issue in this matter. Of particular importance here is that the Employees were acting as whistleblowers, reporting concerns of discriminatory and unethical practices to OCR and the PSESD. As noted by the court in *Martin*, the right to consult an attorney is especially important in the case of whistleblowing:

We also note that while the “whistleblower” provisions of the CSRA, 5 U.S.C. § 2301, are not directly applicable to this case, see note 19 *supra*, they are supportive of the public interest in encouraging unhampered discussions between government employees and their attorneys. A government employee deciding whether to “blow the whistle” on government fraud, waste, abuse or illegality must ascertain whether disbursal of the information that supports his charges is “prohibited by law.” If disbursal is not prohibited by law, and the employee is subjected to a retaliatory discharge, the CSRA provides him with a defense to that discharge. Thus, the legal question whether disclosure is prohibited by law is of critical importance to the whistleblower. Surely, he must be allowed to consult his attorney for an answer to that question absent some strong governmental interest in limiting such communications.

Martin, 686 F.2d at 33 n. 41; *see also Jacobs I*, 47 F. Supp.2d at 21 (same).

This heightened interest only makes sense when one considers what whistleblowing involves. As an example, agencies like OCR have the power to investigate and halt racist practices in schools in an effective manner. However, these agencies cannot investigate a school without some indication that federal law has been violated. Thus, it is important that OCR receive articulate information that implicates Title VII. Attorneys are of course more likely to be versed in federal civil rights laws than the average school employee and can articulate the employee’s facts in a way that points the investigating agency in the right direction. With

the help of an attorney, a school employee can help investigative agencies to do their jobs much more effectively than they could on their own.¹⁰

There is also a third party to consider in this particular case: the students and their parents. The District has continually asserted that these parties' interest in the privacy of educational records trumps all other interests at stake. However, students and parents also have a strong interest in seeing that racism and other illegal education practices are not being utilized in their schools. From the average parent's perspective, which is more important – preventing anyone from knowing that their child got a B- in algebra, or ensuring that their child is not at risk for being placed in alternative education because he's African American? Any reasonable parent is sure to choose the latter. The balancing test should therefore be applied to encourage whistleblowers to come forward, in order to protect the interests of students and their families.

3. The District's interests.

In order to assess the District's interests in this matter, it is first important to understand what exactly FERPA does.¹¹ The relevant portion of FERPA at issue here provides that

¹⁰ Indeed, only after consulting with a lawyer were the Respondents' whistleblower complaints investigated by the OCR and PSES. CP 53-58.

¹¹ Appellant presents its interpretation of FERPA as if it were a fact present on the record. This is a violation of RAP 10.3, as discussed *infra*.

No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization...

20 U.S.C. § 1232g(b).

“Education records” are defined as records that “(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.” 20 U.S.C. § 1232g(a)(4)(A). Records that have been redacted of all personal identifying information are not “educational records” under FERPA. *United States v. Miami Univ.*, 294 F.3d 797, 824 (6th Cir. 2002); *Bd. of Trustees, Cut Bank Pub. Sch. v. Cut Bank Pioneer Press*, 160 P.3d 482, 487 (Mont. 2007).

Under FERPA, federal funding for school districts is contingent upon the existence of policies that are designed to prevent disclosure of student education records. 20 U.S.C. § 1232g. “FERPA’s nondisclosure provisions speak only in terms of institutional policy and practice, not individual instances of disclosure.” *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002). As such, an individual

employee of the school cannot “violate” FERPA, nor can the school be liable to the student whose records were disclosed. *Id.* (no private right of action under FERPA).

While the District certainly has an interest in retaining federal funding, this interest has not been endangered here. As Hearing Officer Fleck correctly noted, the District has the required policies in place, and therefore cannot lose funding. CP 153. The unlikelihood of the District losing funding over the actions of the employees is especially evident considering the past practices of the federal government. In the 40 years since FERPA’s passage, not a single school district in the entire country has lost federal funding. Rob Silverblatt, *Hiding Behind Ivory Towers: Penalizing Schools That Improperly Invoke Student Privacy to Suppress Open Records Requests*, 101 GEO. L.J. 493, 498 (2013). The District’s purported interest of preventing FERPA violations is at best overblown, and insubstantial when balanced against the Employees’ fundamental constitutional rights of access to the courts.

4. The balance of interests favors the Employees.

The interests that must be balanced in this case are thus the Employees’ First Amendment right to consult an attorney in order to assert a whistleblower complaint and the District’s interest in adhering to FERPA. The Employees’ interest is a constitutional one, especially

important given that the Employees were seeking advice on asserting a whistleblower complaint. The District's interest however, is statutory and well overstated, as there is no real possibility that it will lose its federal funding. Further tipping the scales toward the Employees, Ms. Mell has promised on multiple occasions to keep the documents in confidence, and is indeed obligated to do so by RPC 1.6. Hearing Officer Fleck was correct in determining that the balance of interests weighs in favor of the Employees' right to share information with their attorney Ms. Mell.

However, Hearing Officer Fleck erred by determining that *Martin* applies only to oral communications. *Martin* addressed only oral communications because that was the only type of communication at issue on appeal. In a footnote to the opinion, the Court stated that "(b)ecause appellants have already disclosed to the agency any documents that they may have shown to their attorneys, there is no live controversy over the permissibility of requiring disclosure of documents previously shown to appellants' attorney." *Martin*, 686 F.2d at 29-30, fn. 24. As the issue was moot, the Court had no need to discuss disclosures of written documents. The decision of a court not to address an issue is *not* a decision on the merits. See *Darkenwald v. State Emp't Sec. Dep't*, 182 Wn. App. 157, 165, 328 P.3d 977 *aff'd*, 183 Wn.2d 237, 350 P.3d 647 (2015) (moot issues are generally dismissed and not considered on the merits). That the

holding in *Martin* applies to both oral statements and documents is readily apparent from cases applying it. *See e.g. Jacobs I*, 47 F.Supp.2d 16.¹²

The District attempts to distinguish the *Jacobs* cases, on the basis that there is a prohibitive statute in place, i.e. FERPA.¹³ The District's contention is without merit, as it involves a selective misreading of these cases. The existence of a statute protecting the relevant records does not serve as a prohibition on the ability of employees to share them with private attorneys. *Martin*, 686 F.2d at 34. This is because sharing information with one's attorney is not a public disclosure. *Jacobs II*, 204 F.3d at 264. In both *Jacobs* cases, the relevant records were generally protected from public disclosure. Mr. Jacobs was an attorney with unfettered access to materials protected by attorney-client privilege, confidentiality agreements, and court orders. *Jacobs I*, 47 F.Supp.2d at 22

¹² This portion of *Jacobs I* was upheld on appeal in *Jacobs II*. Notably, *Jacobs II* arose out of **the same court** as *Martin*. It is unlikely that the D.C. Circuit misunderstood its own jurisprudence in applying *Martin* to documents as well as oral communications.

¹³ The District makes two further contentions in its attempt to distinguish *Jacobs*. First, the District contends that Joan Mell already disseminated the private information before her offer to hold them in secrecy. This contention not supported by the evidence. As King 5 has already informed the District, Ms. Mell did not provide the media with any student records. CP 145. Thus, the only "third parties" which might have received unredacted records are the OCR and the PSESD. FERPA does not apply to disclosures made to agencies tasked with enforcing education laws. 20 U.S.C. § 1232g(b)(3), (5); 34 C.F.R. § 99.31 (a)(3).

Second, the District contends that the documents were not material to the Employees' whistleblower complaints. Neither Hearing Examiner made any such finding. Additionally, the District has no basis for making such an assertion, as it cannot know what documents Ms. Mell considered relevant in drafting complaints on behalf of the Employees. This Court should disregard this unsupported statement of "fact" by the District.

n. 10. Those documents were also exempt from disclosure under FOIA. *Jacobs II*, 204 F.3d at 261. However, those limitations did not prevent Jacobs from sharing documents with his attorney.

Even a statute specifically prohibiting public disclosure of certain information does not prevent an individual from sharing documents with their attorney. In *DeNeui v. Wellman*, a doctor provided a patient's medical records to his attorney after being subpoenaed as a witness in a malpractice action. 2008 WL 2330953 at *1. Generally, disclosing an individual's healthcare information is a violation of the Health Insurance Portability and Accountability Act (HIPAA).¹⁴ However, the Court in *DeNeui* stated that disclosure to a private attorney, who is bound by attorney-client privilege, does not constitute a public disclosure. *Id.* at *3. As such, HIPAA did not act as a prohibition on the doctor from sharing his patient's healthcare information with his attorney. *Id.*

FERPA does not act as an absolute prior restraint on an employee's ability to speak to an attorney; examination of the District's interests under the balancing is still required. Properly applying the actual holdings in *Martin* and *Jacobs*, and properly applying the correct balance should have resulted in the entry of the protective order. Therefore, the

¹⁴ Much like FERPA, HIPAA is aimed at institutional policy and does not encompass a private right of action. *Acara v. Banks*, 470 F.3d 569, 572 (5th Cir. 2006).

Superior Court did not err by reversing the decisions of the Hearing Examiners.

D. The requested documents and any communications regarding them are protected from disclosure based on attorney-client privilege.

The Hearing Examiners also acted illegally by failing to protect the Employees' attorney-client privileges. Both Hearing Examiners declined to apply attorney-client privilege to the Employees' communicative acts to their attorney, because there is no case in Washington directly on point. Again, this was not a proper basis to deny the Employees' motions for a protective order. Application of attorney-client privilege does not depend on an identical case; nor should it, given the vital importance of this privilege in our legal system. This privilege, as it has consistently been interpreted, applies to all communicative acts, including the transmission of documents.

The attorney-client privilege is codified at RCW 5.60.060. This statute states, "An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment." RCW 5.60.060(2)(a). "The attorney-client privilege applies to communications and advice between an attorney and client and extends to documents that contain a privileged communication."

Dietz, 131 Wn.2d at 842. Neither the attorney nor the client can be compelled to disclose information protected by this privilege. *Seattle Nw. Sec. Corp. v. SDG Holding Co.*, 61 Wn. App. 725, 734-35, 812 P.2d 488 (1991).

The attorney-client privilege is designed to assure “that communications will not later be revealed directly or indirectly.” *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 745, 174 P.3d 60 (2007). As such, communication between an attorney and client encompasses more than just the legal advice the attorney provides to the client. For example, the scope of this privilege extends to information and objects that the attorney has obtained through communication with the client. *State ex rel. Sowers v. Olwell*, 64 Wn.2d 828, 831, 394 P.2d 681 (1964). An attorney need not even divulge the identity of a client, when doing so would “convey the substance of confidential communications between attorney and client.” *Dietz*, 131 Wn.2d at 846. The policy rationale behind this broad scope of protection is to afford the client freedom from fear of compulsory disclosure after consulting her legal advisor. *Id.* at 832.

Other states that abide by these same principles have held that transmission of documents is a communicative act protected by the attorney-client privilege, regardless of whether the documents themselves are publicly available. In *Mitchell v. Superior Court*, 37 Cal.3d 591, 595,

208 Cal. Rptr. 886, 691 P.2d 642 (1984), Bette Mitchell filed suit against a chemical plant for polluting the air and ground water near her home with dibromochloropropane (DBCP). In a deposition conducted by the chemical plant, defense counsel asked Ms. Mitchell about the nature and content of any warnings she had received from her attorneys about the effects of DBCP. *Id.* at 597. The Supreme Court of California held that Ms. Mitchell, the plaintiff/client, was not required to answer the questions, as the answers were protected by attorney-client privilege. *Id.* at 601. The Court noted that attorney-client privilege is designed to facilitate full and open conversation between individuals and their attorneys. In furthering that purpose, the Court held that the privilege protects not only statements, “but additionally actions, signs, or other means of communicating information.” *Id.* at 600. Thus, the Court held that “it is the actual fact of the transmission which merits protection, since discovery of the transmission of specific public documents might very well reveal the transmitter's intended strategy.” *Id.* In other words, the means of transmission may still be protected even where the information conveyed is otherwise not. *Id.* at 601.

Like California, Washington recognizes that “[t]he attorney-client privilege exists in order to allow the client to communicate freely with an attorney without fear of compulsory discovery.” *Dietz*, 131 Wn.2d at 842.

“Its aim is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” *Youngs v. Peacehealth*, 179 Wn.2d 645, 650, 316 P.3d 1035 (2014) (quoting *United States v. Jicarilla Apache Nation*, — U.S. —, 131 S.Ct. 2313, 2320, 180 L.Ed.2d 187 (2011)).

Contrary to the District’s assertion, the idea that transmission of information is communicative is not merely a legal view uniquely held by California. For example, in *Jacobs By & Through Jacobs v. Am. Motors Corp.*, 1989 WL 200920, at *5 (W.D. Mo. Feb. 20, 1989),¹⁵ the Court found that a letter transmitting discovery materials was privileged, even though the discovery materials themselves were not. This was because “The transmittal letter reveals the substance of a communication between the client and the attorney in which the client transmits information the attorney believes important in representing his client.” *Id.* Similarly, in *Marshall v. D.C. Water & Sewage Auth.*, 218 F.R.D. 4, 6 (D.D.C. 2003), the Court found that allowing the requesting party to learn what documents the client sent to counsel would reveal “what documents counsel thought she needed” to answer discovery, “disclose her theory of how to answer” interrogatories, and determine “what information she

¹⁵ The Western District of Missouri has no rules prohibiting the citation of its unpublished opinions, regardless of date issued. *See* GR 14.1(b).

thought was important to collect.”¹⁶ See also *Steelcase Inc. v. Haworth, Inc.*, 954 F. Supp. 1195, 1200 (W.D. Mich. 1997) (“It is at least conceivable, however, that the transmittal of a patent by an attorney to the client may have some communicative element protectable by the attorney-client privilege.”).

In *Fisher v. United States*, 425 U.S. 391, 410, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976), the United States Supreme Court recognized that “(t)he act of producing evidence... nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced.” See also *In re Hyde*, 235 B.R. 539, 543 (S.D.N.Y. Bankr. 1999) *aff’d*, 205 F.3d 1323 (2d Cir. 2000) (“Even if the contents of documents are not privileged, however, the act of producing those documents might be.”). This principle was adopted here in Washington in *State v. Dennis*, 16 Wn. App. 417, 423-24, 558 P.2d 297 (1976), a case in which the Court of Appeals held that the defendant’s act of placing a bag of cocaine on the table in front of a police officer was a testimonial admission of guilt. See also *State v. Wethered*, 110 Wn.2d 466, 471, 755 P.2d 797 (1988) (act of producing hashish constituted confession). Although these cases applied an entirely different privilege (Fifth Amendment), the fundamental principle remains the same: transmission itself can be a communication.

¹⁶ This case applied the work product doctrine and did not reach the issue of attorney-client privilege.

Common sense dictates that the act of transmitting documents is a way for the client to communicate with and seek legal advice from the attorney. The act of transmission can indicate which documents the client thinks are important, or suggest a certain approach based on the order of presentation. This is especially so if the documents are transmitted in response to a specific request. As example, one cell phone bill that contains information about certain numbers, when it is selected from a larger universe of bills, may communicate important thoughts being transmitted from client to attorney or vice versa. In this situation, the party seeking the records could get the records from the phone company, but that would not reveal which bills the client had isolated for emphasis.

Important to this case is who communicated, or transmitted certain records. Even if the District were to receive from Joan Mell the documents that were allegedly produced to her, it would need to know who gave them to her and in what form to support its claim. Thus, the mere fact of the existence of selected documents is not at all what is at issue here. Forcing a client to divulge what documents are transmitted, how, and when would deter clients from transmitting any documents to their attorney and would frustrate the ability of clients to seek legal advice and of attorneys to provide accurate advice.

As the District correctly notes, attorney-client privilege applies only to communication, and not to the underlying facts. *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 741-42, 174 P.3d 60 (2007). However, there is an important distinction, recognized in Washington law, between the underlying facts and how those facts are recorded or transmitted. *Youngs v. Peacehealth*, 179 Wn. 2d 645, 653, 316 P.3d 1035 (2014); *see also Sowers*, 64 Wn.2d at 834 (prosecutor could introduce firearm surrendered by defendant’s attorney, but could not elicit testimony about source of evidence). In *Soter*, the Court prohibited disclosure of accident scene photographs taken by the attorney’s hired investigator, because the newspaper had equal access to the location and could take its own photographs.¹⁷ 162 Wn.2d at 748. These photographs could have revealed the attorney’s or the client’s thoughts, based on what was focused on, how many photographs had been taken, and what angle they were taken at. As the Court recognized, attorneys must have some degree of privacy “in order to assemble information, sift what they consider to be the relevant from the irrelevant facts, prepare legal theories, and plan strategy” for their clients. *Id.* at 748-49.

Similarly, here, Ms. Mell and her clients must be afforded some degree of confidentiality in order to assemble information and sift the

¹⁷ The Court prohibited disclosure of these photographs even though they were not opinion work product. *Soter*, 162 Wn.2d at 748.

relevant from the irrelevant before compiling an adequate whistleblower complaint. Like the newspaper in *Soter*, the District already has the information contained in the documents - it created the documents and was provided copies of all documents in the course of the related lawsuit. CP 74-75. The content of these documents is not at issue. What the District seeks is information about who transmitted which documents to Joan Mell, at what time, and in what manner. Since this transmission of documents for the purpose of seeking legal advice is at the heart of the attorney-client privilege, the Superior Court did not err by granting the protective order.

The only Washington case, besides *Soter*, cited by the District does not support its position. In that case, *R.A. Hanson Co., Inc. v. Magnuson*, 79 Wn. App. 497, 500, 903 P.2d 496 (1995), the plaintiff served a subpoena on an attorney (who did not represent the defendants), seeking information about whether the defendants had paid a third party's (a prior adversary of plaintiff's) legal fees. The Court of Appeals held that the attorney was obligated to answer, because there was no attorney-client relationship between the attorney and the defendants. *Id.* at 502. Rather, the attorney's relationship with the defendants was merely a "conduit for the payment of money." *Id.* (quoting *United States v. Hirsch*, 803 F.2d

493, 499 (9th Cir. 1986)).¹⁸ Here, however, there is no dispute that there is an attorney-client relationship between Ms. Mell and the Employees. Further, Hearing Officer Fleck found that the Employees were not attempting to cloak the documents by providing them to Ms. Mell.¹⁹ CP 151. *R.A. Hanson* has no application to this case.

The weight of authority indicates that the communicative act of selecting documents and then transmitting the documents to an attorney is a privileged communication. As such, details about any transmissions Ms. Pete and Ms. Gavigan submitted to Ms. Mell are not discoverable. The Hearing Examiners erred by permitting the District to invade this important privilege. This Court should accordingly affirm the decision of the Superior Court.

E. There is no requirement that the Superior Court issue a detailed reasoning of its decision.

The District also complains that the Superior Court did not provide a detailed explanation of its decision to grant the writ. This is not a valid assignment of error and does not entitle the District to the relief it seeks. The Superior Court is not required by any statute or case to provide

¹⁸ This same result would be compelled today under RPC 1.8(t), which states "A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6."

¹⁹ The District did not assign error to this finding of fact.

detailed reasoning of its decision to grant a writ of review.²⁰ A detailed reasoning is not even necessary for appellate review, as “this court reviews the challenged administrative decision on the record of the administrative tribunal, not of the superior court operating in its appellate capacity.” *Nichols v. Seattle Hous. Auth.*, 171 Wn. App. 897, 904, 288 P.3d 403 (2012). Accordingly, the District’s assertion that detailed findings are required lacks any merit.

F. Appellant’s brief violates the rules of procedure.

Respondents respectfully request that they be awarded attorneys’ fees and costs, pursuant to RAP 18.9. Under this rule, the Court may award compensatory damages to a party that has been harmed by another party’s failure to follow the rules of procedure. Alternatively, this Court may also order a party to pay sanctions to the Court for violations of the rules. RAP 18.9(a).

Appellant’s brief violates RAP 10.3, governing the content of briefs. RAP 10.3(a)(5) provides that the brief of the appellant should include “A fair statement of the facts and procedure relevant to the issues presented for review, **without argument**. Reference to the record must be included for each factual statement.” (Emphasis added). Appellant’s statement of facts contains substantial argument, in violation of this rule.

²⁰ The superior court’s order in *Holifield* was a mere three sentences long, yet the Court said nothing about the lack of detail. 170 Wn.2d at 236.

This was no mere oversight; Appellant's statement of facts contains multiple pages worth of argument, including extensive briefing on its interpretation of FERPA regulations. See Br. of Appellant, 3-5. This Court should sanction Appellant for its deliberate violation of RAP 10.3.

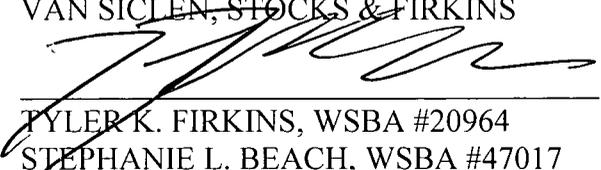
Respondents have expended significant time and effort into responding to Appellant's improper argument, as well as to present this Court with a statement of facts that is actually limited to the record. Respondents accordingly request that they be awarded attorney's fees pursuant to RAP 18.9.

II. CONCLUSION

Therefore, Respondents respectfully request that the decision of the Superior Court be AFFIRMED, and that they be awarded fees and costs pursuant to RAP 18.9.

Respectfully submitted this 18th day of December, 2015.

VAN SICLEN, STOCKS & FIRKINS



TYLER K. FIRKINS, WSBA #20964

STEPHANIE L. BEACH, WSBA #47017

Attorneys for Respondents Pete and
Gavigan

721 45th Street NE

Auburn, WA 98002

Telephone: (253) 859-8899

Email: tfirkins@vansiclen.com and
sbeach@vansiclen.com

CERTIFICATE OF TRANSMITTAL

I hereby certify that the foregoing Brief of Respondents Gavigan and Pete was sent to the following counsel in the means specified:

Patricia Buchanan
Onik'a I. Gilliam
2112 Third Ave., Ste. 500
Seattle, WA 98121
pkb@pattersonbuchanan.com
oig@pattersonbuchanan.com
Via E-mail & ABC Legal Messenger

FILED
COURT OF APPEALS
DIVISION II
2015 DEC 18 PM 4:37
STATE OF WASHINGTON
BY _____
DEPUTY

Harriet Strasberg
203 4th Ave. E., Ste. 520
Olympia, WA 98501
hstrasberg@comcast.net
Via E-mail by Agreement

DATED this 18th day of December, 2015, at Auburn, Washington.



Diana M. Butler

APPENDIX A

2008 WL 2330953

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United States District Court,
D. South Dakota,
Southern Division.

Laurie DeNEUI and Terry DeNeui, Plaintiffs,
v.
Dr. Bryan WELLMAN and Wilson Asfora, P.C.
d/b/a Sioux Falls Neurosurgical Associates,
Defendants.

CIV. No. 07-4172-KES. | June 5, 2008.

Attorneys and Law Firms

A. Russell Janklow, Pamela R. Bollweg, Shannon Falon,
Steven M. Johnson, Johnson, Heidepriem, Janklow,
Abdallah & Johnson, LLP, Sioux Falls, SD, for Plaintiffs.

Edwin E. Evans, Melissa Carol Hinton, Davenport,
Evans, Hurwitz & Smith, Sioux Falls, SD, for
Defendants.

ORDER DENYING MOTION FOR PROTECTIVE ORDER

KAREN E. SCHREIER, Chief Judge.

*1 Plaintiffs move for a protective order to prevent plaintiff Laurie DeNeui's treating physician, Dr. Nathan Rud, from disclosing to his personal counsel information that is protected by the physician-patient privilege. Dr. Rud opposes the motion. The motion is denied.

FACTUAL BACKGROUND

Plaintiffs filed a civil action against defendants alleging that defendant Dr. Bryan Wellman was medically negligent in his care for plaintiff Laurie DeNeui (DeNeui) and further that he breached his duty of care to DeNeui by failing to obtain her informed consent before providing treatment. Plaintiffs also bring a claim against defendant Wilson Asfora, P.C., d/b/a Sioux Falls Neurosurgical Associates, under the theory of respondeat superior.

Plaintiffs bring a claim against all defendants for loss of consortium.

Dr. Wellman performed an anterior cervical discectomy and fusion on DeNeui in October of 2005. Plaintiffs allege that the surgery caused DeNeui to become permanently and totally disabled. Dr. Rud is a family practice physician and has been DeNeui's primary care physician since late 1998 or early 1999. Dr. Rud referred DeNeui to Dr. Wellman and has continued to provide care to DeNeui subsequent to the surgery at issue in this case.

During the course of discovery, plaintiffs noticed the deposition of Dr. Rud. Docket 29. Dr. Rud's malpractice carrier, which also provides malpractice insurance for Dr. Wellman, retained counsel John Gray to represent Dr. Rud. Neither Gray, nor a member of his firm, has been retained by the malpractice carrier to represent Dr. Wellman in connection with this litigation. Plaintiffs responded by moving for a protective order prohibiting Dr. Rud from discussing DeNeui's medical history with his counsel prior to the deposition. Docket 30. Dr. Rud filed a response opposing plaintiffs' motion.

DISCUSSION

In their briefs before the court, plaintiffs argue that Dr. Rud should not be allowed to discuss DeNeui's medical history with Gray, as any such discussion would be a breach of DeNeui's physician-patient privilege. Dr. Rud argues that he has a right to consultation of legal counsel prior to his deposition in this litigation, and that DeNeui's physician-patient privilege has been waived as a result of her bringing suit.

Both parties agree that because this is a federal diversity action the state law of the forum state, in this case South Dakota, governs the protections afforded by the physician-patient privilege. *See In re Baycol Prod. Litig.*, 219 F.R.D. 468, 469 (D.Minn.2003); Fed.R.Evid. 501. Under South Dakota law:

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of his physical, mental, or emotional condition, including alcohol or drug addiction, among himself, physician, or

psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.

*2 SDCL 19-13-7.

This privilege, however, is waived under certain circumstances:

In any action or proceeding ... if the physical or mental health of any person is in issue, any privilege under § 19-13-7 is waived at trial or for the purpose of discovery under chapter 15-6 if such action or proceeding is civil in nature. However, the waiver of the privilege shall be narrow in scope, closely tailored to the time period or subject matter of the claim.

SDCL 19-2-3.

Plaintiffs argue that to the extent DeNeui has waived her physician-patient privilege, that waiver does not apply to conversations Dr. Rud has with his attorney. Plaintiffs argue that any such conversations would be outside of the scope of the waiver provision in South Dakota law, which only allows for waiver "at trial or for purpose of discovery." Under plaintiffs' interpretation of SDCL 19-2-3, the privilege is waived with respect to the testimony Dr. Rud gives during the deposition, but not for Dr. Rud's discussions with his personal counsel prior to the deposition.

In support of this argument, plaintiffs cite *Schaffer v. Spicer*, 88 S.D. 36, 215 N.W.2d 134 (S.D.1974). In *Schaffer*, the plaintiff brought suit against her doctor after the doctor provided her former husband with an affidavit detailing information he had obtained through his relationship as a psychiatrist with plaintiff. *Schaffer*, 215 N.W.2d at 135. The psychiatrist argued that the physician-patient privilege had been waived because the plaintiff had put her psychological health at issue in the divorce trial and subsequent hearings determining custody of her children.¹ *Id.* at 136. The South Dakota Supreme Court found that even if the privilege had been waived, that "waiver does not authorize a private conference between doctor and defense lawyer." *Id.* at 137 (quoting *Hammonds v. Aetna Casualty & Surety Co.*, 7 Ohio Misc. 25, 243 F.Supp. 793, 805 (N.D.Ohio 1965)).

Plaintiffs also cite a number of cases from foreign jurisdictions, in support of their contention that ex parte communications between defense counsel and a plaintiff's treating physician should not be permitted. *See, e.g., Manion v. N.P.W. Med. Ctr. of N.E. Pa., Inc.*, 676 F.Supp. 585, 594-95 (M.D.Pa.1987); *Loudon v. Mhyre*, 110 Wash.2d 675, 756 P.2d 138, 140 (Wash.1988); *Duquette v. Superior Court*, 161 Ariz. 269, 778 P.2d 634, 641 (Ariz.Ct.App.1989). The court agrees with this authority to the extent that it holds that counsel for the named defendants in this case should not have ex parte contact with Dr. Rud. Such contact, without the presence of plaintiffs' counsel, presents a number of risks potentially prejudicial to plaintiffs. *See Myhre*, 756 P.2d at 140 (the doctor may inadvertently disclose privileged information regarding a medical condition not at issue in the litigation); *Duquette*, 778 P.2d at 641 (the doctor may feel compelled to participate because the doctor shares malpractice carriers with the named defendant).

The type of contact at issue in *Schaffer* and the other authority cited by plaintiffs, however, is altogether different from the type of contact that is at issue in this instance. Here, Dr. Rud seeks to have contact with his personal attorney, not the attorney that represents the defendants. Dr. Rud has been subpoenaed to give deposition testimony in connection with an injury suffered by one of his patients related to treatment provided based upon his referral. In this situation, the court finds that Dr. Rud has the right to consult with counsel regarding his impending testimony and that he may discuss matters protected from the outside world by the physician-patient privilege within the context of the attorney-client relationship.

*3 As noted in *Baylaender v. Method*, 230 Ill.App.3d 610, 171 Ill.Dec. 797, 594 N.E.2d 1317 (Ill.App.Ct. 1992), one of the cases cited by plaintiffs, "[t]he fundamental value of facilitating access between a client and his attorney is expressed in the formulation and protection given to their communications under the attorney-client privilege." *Baylaender*, 171 Ill.Dec. 797, 594 N.E.2d at 1325. The court in *Baylaender* observed that allowing a doctor to discuss with personal counsel matters protected by the physician-patient privilege does not erode the protections afforded by that privilege:

[T]he treating physician has the means by which to control the sharing of any information by his attorney, or for that matter his carrier, through enforcement of the attorney-client privilege. The

lawyer would be bound by the attorney-client privilege not to disclose without his client's consent, and the physician would be bound by his fiduciary duty to his patient to withhold such consent.

Id. at 1325.

Whether or not Dr. Rud himself has been named in the lawsuit, he has the right to consult with counsel with regard to plaintiffs' lawsuit to which he is at least tangentially involved. Although plaintiffs represent that they do not intend to name Dr. Rud as a defendant, their intention could change during the course of this litigation. Under SDCL 19-2-3 the court finds that DeNeui has put her health at issue by alleging she received improper medical care and therefore waived her physician-patient privilege with respect to that care. The court finds that the waiver in SDCL 19-2-3 is not so narrow as to apply *only* to testimony actually given at trial or during discovery, but also is applicable to a physician engaging in preparation with his private attorney for those legal events. As discussed above, the attorney-client privilege serves to substantially limit any effect that the right to counsel has on the physician-patient privilege. Even if the privilege has not been waived in this situation, Dr. Rud's right to legal representation outweighs any concerns of a breach of the physician-patient privilege.

In their briefs, plaintiffs express their concern that because both Dr. Rud and Dr. Wellman are covered by the same malpractice insurance carrier, Dr. Rud's

Footnotes

¹ Although the waiver statute at issue in *Schaffer* was an earlier version than the one in effect today, the differences in the two versions are not relevant to this court's order.

testimony will be improperly influenced by Gray. Gray has been retained to represent Dr. Rud and it would be a violation of his ethical obligations as a lawyer to act in a manner inconsistent with Dr. Rud's best interests. There is no evidence that would suggest to the court that Gray would engage in such improper conduct, and plaintiffs' bare assertions are not a proper basis upon which to grant plaintiffs' motion for a protective order.

Finally, plaintiffs argue that any disclosure of information governed by the patient-physician privilege by Dr. Rud to his personal counsel would violate HIPAA. HIPAA regulations provide for the disclosure of privileged information for purposes of obtaining legal services. *See* 45 C.F.R. §§ 164.502(a)(1)(ii), 164.501. The disclosure at issue in this case is not a public disclosure at a judicial proceeding but rather is a limited disclosure to Dr. Rud's personal counsel, which in turn cannot be disclosed to a third party pursuant to the attorney-client privilege. Under these circumstances, the court does not find that HIPAA requires the court to grant plaintiffs' motion for a protective order.

*4 Based on the foregoing, it is hereby

ORDERED that plaintiffs' motion for a protective order (Docket 30) is denied.

All Citations

Not Reported in F.Supp.2d, 2008 WL 2330953

APPENDIX B

1989 WL 200920

Only the Westlaw citation is currently available.
United States District Court, W.D. Missouri,
Western Division.

Charles R. Jacobs, by and through his appointed
guardian James R. Jacobs, and James R. Jacobs,
Individually, Plaintiffs,

v.

AMERICAN MOTORS CORPORATION, et al.,
Defendants.

No. 89-0518-CV-W-5. | Feb. 20, 1989.

Attorneys and Law Firms

Evalyn R. Lee, William H. Pickett, William H. Pickett,
P.C., Kansas City, Mo., James L. Gilbert, James L.
Gilbert & Associates, Arvado, Colo., for plaintiffs.

Frederick K. Starrett, Curtis L. Tideman, Miller, Bash &
Starrett, P.C., Kansas City, Mo., Joseph W. Yates, III,
Yates, Fleishman, McLamb & Weyher, Raleigh, N.C.,
Burgain G. Hayes, Kenneth J. Ferguson, Leslie A.
Benitez, Clark, Thomas, Winters & Newton, Austin, Tex.,
for defendants.

ORDER

SCOTT O. WRIGHT, Chief Judge.

*1 This case is a products liability action arising out of a Jeep CJ7 rollover accident. Chrysler Corporation, successor to defendants herein, contends five documents submitted to the Court in camera are protected from discovery under the attorney-client privilege and/or the attorney work-product doctrine. After review of the documents and the parties' submissions on these issues, the Court finds the documents fall within the ambit of the attorney-client privilege and the work product doctrine and will be protected from disclosure.

I. Introduction

Plaintiff's Third Request for Production of Documents

seeks (1) documents regarding Movable Barrier Tests 1461, 1477, 1484 and 1509; (2) documents "authored by R.M. Huffstutler as a result of" those tests and "any reference to the need for Jeep AMC to 'retrofit' its vehicles to avoid liability"; and (3) other documents "of any kind or nature from any Jeep AMC employee which discuss the potential of any of the shackles supporting the Jeep suspension to break or otherwise affect in any way the stability of the Jeep."¹

The basis for the defendant's claim of privilege is that the Third Request seeks memoranda discussing the legal significance of these tests. Specifically, the request expressly seeks memoranda prepared by Rahn M. Huffstutler, a lawyer, engineer and member of AMC's product liability legal defense team during 1981- 1982. Four of the documents submitted in camera relate to Huffstutler's work in 1981-1982. Defendant asserts the final document is privileged because it relates to legal analysis (not involving Huffstutler but arguably within the Third Request) generated in response to litigation later in the 1980's.

II. Factual Background

In assembling the following chronology, the Court has consulted the following exhibits:

1. AFFIDAVIT OF BOOKER T. McQUEEN, Personnel Administration Supervisor. Executed January 9, 1990 and filed in this action.
2. MEMORANDUM ORDER OF JUDGE ROBERT V. FRANKLIN, Court of Common Pleas, Wood County, Ohio. No. 88-CIV-212, Filed May 17, 1989.
3. MEMORANDUM ORDER OF JUDGE WILLIAM E. STECKLER, United States District Judge, Southern District of Indiana, Case No. IP 88-685-C. Filed September 7, 1989.
4. MEMORANDUM ORDER OF JUDGE KAREN LeCRAFT HENDERSON, United States District Judge, District of South Carolina, Case No. 3-89-161-16. Filed September 13, 1989.
5. MEMORANDUM ORDER OF LACEY A COLLIER, Circuit Judge, Circuit Court of First Judicial Circuit of Florida, Civil Action No. 88-6120-CA-01, Filed October 30, 1989.

6. AFFIDAVIT OF RITA A. BURNS, attorney for Chrysler Corporation. Executed January 11, 1990 and filed in this action.”

Examination of these documents reveals the following facts. Rahn M. Huffstutler was hired by American Motors Corporation as an engineer in 1974. From 1975-1978 he attended law school and was reimbursed by AMC for his education costs. At AMC’s expense, he also attended legal seminars on legal issues germane to products liability litigation. Huffstutler obtained his law degree and was admitted to the bar in 1979. At all times relevant to this case, Huffstutler was a licensed attorney.

*2 In 1981, Huffstutler became Manager of Product Design Studies. In this capacity, he worked with AMC’s legal department and with privately retained counsel on product liability cases, particularly Jeep CJ rollover cases. He routinely gave legal advice, performed legal analysis, interpreted technical information for lawyers, responded to legal staff inquiries, represented AMC as counsel in product liability cases, and consulted with AMC’s legal staff and outside retained counsel on a variety of issues central to jeep rollover litigation. His employment ended in 1988 when Chrysler’s acquisition of AMC eliminated his position.

After Huffstutler left AMC he contacted various lawyers seeking employment in litigation against AMC. Unbeknownst to AMC at the time, Huffstutler actually met with and furnished to these lawyers documents he had removed from AMC, including some of the documents at issue here. The documents removed by Huffstutler and given to opposing counsel included documents prepared by him and other AMC employees in the course of defending products liability cases such as the instant case. In several instances, Huffstutler offered himself as an expert witness against his former employer in pending cases on which he had previously performed legal and technical analysis for AMC.

AMC first learned of this turn of events when Huffstutler was listed as an expert witness against the company in Jeep CJ litigation. When this occurred, AMC immediately demanded that Huffstutler cease his involvement on the other side of AMC litigation and return all documents which he had removed. Huffstutler apparently ignored this request and AMC instituted a legal action in Wood County, Ohio; Wood County is the county in which Huffstutler resides. The Court of Common Pleas, Wood County, Ohio, permanently enjoined Huffstutler from any direct or indirect participation on the other side of the Jeep rollover litigation and ordered Huffstutler to return all documents he removed on the basis that the documents

were privileged and the Huffstutler had unlawfully removed them. *American Motors Corp. v. Huffstutler*, 88-CIC-212 (Wood County, Ohio, May 17, 1989).

Subsequent to this ruling, other federal and state courts have examined the relationship of Huffstutler and AMC and these courts have uniformly held that Huffstutler had an attorney-client relationship with AMC and in that capacity he generated privileged memoranda. “[H]uffstutler was an attorney for AMC and an agent for the AMC Legal Department in the performance of legal duties.” *Perry v. Jeep Eagle Corp.*, No. IP 88-685-C, slip op. at 8 (S.D.Ind. August 24, 1989); see also *Hull v. Jeep Eagle Corp.*, No. 3-89-161-16, slip op. at 5 (D.S.C., Sept. 13, 1989) (adopting the factual findings in *Perry*); *Matthews v. Jeep Eagle Corp.*, No. 88-6120-CA-01, slip op. at 4 (Escambia City, Fla., October 30, 1989) (“Huffstutler had an attorney-client relationship with AMC.”). Additionally, the court in *Sanders v. Jeep Corp.*, No. CI 86-656 slip op. at 1 (Orange City, Fla., October 28, 1988) held that documents responsive to the identical document request the Court addresses today were subject to the work-product privilege.²

III. Analysis

*3 This is a product liability action and subject matter jurisdiction is founded on diversity of citizenship. Rule 501 of the Federal Rules of Evidence provides that evidentiary privileges are to be determined in accordance with state law in diversity actions. Consequently, the Missouri attorney-client privilege, codified at Mo.Rev.Stat. § 491.060(3) (1986), is applicable here. See e.g., *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 402 (8th Cir. 1987). That subsection provides as follows:

The following persons shall be incompetent to testify:

(3) An attorney, concerning any communication made to him by his client in that relation or his advice thereon, without the consent of such client . . .

The Missouri Supreme Court has interpreted this provision broadly. The Court in *State ex rel. Great American Ins. Co. v. Smith*, 574 S.W.2d 379 (Mo. 1978) quoted the following passage from the American Law Institute’s Model Code of Evidence, Rule 209(d):

(d) ‘confidential communication between client and lawyer’ means information transmitted by a voluntary act of disclosure between a client and his lawyer in confidence and by a means which, so far as the client is aware, discloses the information to no third persons other

than those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which it was transmitted.

Comment on Clause (d)

[C]ommunication between client and lawyer includes not only a communication from client to lawyer but also a communication from lawyer to client.”

Id. at 384. (emphasis supplied in Smith).

As the Missouri Court of Appeals has recognized, the emphasized passage means “[a]ll of what the client says to the lawyer and all of what the lawyer says to the client is protected by the attorney-client privilege.” *Lipton Realty, Inc. v. St. Louis Housing Auth.*, 705 S.W.2d 565, 570 (Mo.Ct.App. 1986) (citation omitted). Of course, otherwise discoverable factual or technical material cannot be made privileged by reciting it to the lawyer or the client in a confidential communication. Only the actual communications within the scope of the representation are protected. *Smith*, 574 S.W.2d at 385.

The work-product doctrine is a rule of qualified immunity established in *Hickman v. Taylor*, 329 U.S. 495 (1947), and now expressed in Rule 26(b)(3) of the Federal Rules of Civil Procedure. Rule 26(b)(3) provides that “a party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for the other party’s representative . . . only upon a showing that the party seeking discovery has substantial need of the materials.” Since the court’s decision in *Hickman*, the courts have recognized that particular solicitude is given mental impression/opinion work product as contrasted to ordinary work product protection accorded other documents and materials prepared in anticipation of litigation. See e.g. *Upjohn Co. v. United States*, 449 U.S. 383, 400 (1981) (mental impression/opinion work product as “deserving special protection”); *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977). In *Upjohn*, the court considered, but found it unnecessary to decide, whether any showing of necessity could ever overcome the protection afforded such work product. It recognized, however, that simply showing “substantial need and inability to obtain the equivalent without undue hardship” is not sufficient. *Id.* at 401. See also *In Re Murphy*, 560 F.2d at 336 (“opinion work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances”).

*4 The work product doctrine will not protect a document from discovery unless it was prepared in anticipation of litigation. Fed.R.Civ.P. 26(b)(3); *In re Grand Jury Subpoena*, 784 F.2d 857, 862 (8th Cir. 1986), cert dismissed sub nom. See *v. United States*, 107 S.Ct. 918 (1987). The determination of whether a document was produced in anticipation of litigation is purely a factual inquiry:

[T]he test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. But the converse of this is that even though litigation is already a prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of litigation.”

8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2024, at 198-99 (1970) (footnotes omitted); *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir. 1987) (quoting passage above with approval).

The Court believes each of the submitted documents are privileged and also constitute mental impression work product. Accordingly, the discussion of why the Court will so rule will have to be somewhat circumspect in order to protect the confidentiality of these documents. The Court will refer to each document by its date.

The November 21, 1984 document is a memorandum to C.S. Sklaren from Huffstutler. Mr. Sklaren was at the time an in-house attorney in charge of supervising AMC’s products liability litigation. Copies of the memo to W.C. Jones, an executive and manager at AMC, and C.E. Merritt, an executive and manager at AMC. The memo reflects an analysis of test results for Sklaren’s review of issues presented in pending and closed products liability cases. This memo contains the attorney/engineer’s (Huffstutler’s) analysis of and explanation for the test results of “shackles”, a component part in the Jeep CJ model. The actual test results will be provided to the plaintiffs.”

The document is clearly privileged. Huffstutler was an attorney and agent of the Legal Department who provided confidential assistance to an in-house attorney for the purpose of assisting that attorney in rendering legal services to AMC. While this conclusion would preclude

discovery under any circumstances, it is also significant that the document also constitutes mental impression work product as it was prepared to assist in defending pending lawsuits³ and contains the attorney's theories and impressions about the significance of the data to those cases.

The January 7, 1982 document is a memorandum to J.E. MacAfee, Director of Vehicle Engineering at AMC, from Huffstutler. Copies of the memo to C.S. Sklaren, W.C. Jones and C.E. Merritt. The document is an internal memo regarding "shackles" to an in-house executive and manager with authority to seek and receive legal advice. Huffstutler renders legal advice, sets out his opinion as to trial strategy, and renders an opinion about the legal significance of future plans for this part. The document is a communication from an attorney to a client within the scope of the representation and is thus privileged. The Court is also of the opinion that it constitutes mental impression work product as AMC had ongoing litigation at the time the memo was generated."

*5 The January 26, 1982 document is a transmittal letter from W.C. Jones to C.S. Sklaren. Copy to K.I. Gluckman, an attorney in the legal department of AMC with responsibility for supervising products liability litigation, and Huffstutler. The letter describes test information requested by Sklaren. The technical information contained in the referenced documents is not subject to privilege and will be turned over to the plaintiff. The claim to privilege rests on the contention that the transmittal letter reveals the test information the attorney believed important and upon which his legal opinions are based because some but not all of the tests were requested. The Court agrees. The transmittal letter reveals the substance of a communication between the client and the attorney in which the client transmits information the attorney believes important in representing his client. While the plaintiff is entitled to the underlying technical information contained in the reports, they have no right to know the portions of the information that is deemed important by defendant's counsel.

The February 9, 1982 document is a memorandum to R. Kamm, Chief Vehicle Engineer, from Huffstutler. Copies to W.C. Jones and C.S. Sklaren. The document is a follow-up to the memo of January 7, 1982. The memo reflects an inquiry into an issue related to products liability litigation and reiterates the opinions Huffstutler rendered as legal/engineering counsel to AMC. As such, it is privileged.

The July 7, 1988 document is a memorandum from Michael Currin, engineer and product analysis specialist,

to M.D. Fisher, attorney and in-house counselor with responsibility for supervising Chrysler products liability. The document is an internal memo prepared for and at the request of in-house counsel regarding technical and historical analysis of Jeep rear shackles. It constitutes communication between client and attorney within the scope of the representation and thus is privileged. Further, the document was prepared in anticipation of litigation and, therefore, constitutes work product. The memo contains the mental impressions of the test data and, therefore, receives the highest protection available under this qualified privilege. Finally, the document represents the product of consultations with a non-testifying expert and is not discoverable.

Plaintiffs' contend that even if these documents are deemed to have been generated within the attorney/client relationship, they are not privileged because they were generated for the purpose of committing a future crime or fraud. "The attorney-client privilege must necessarily protect the confidences of wrongdoers, but the reason for that protection--the centrality of open client and attorney communication to the proper functioning of our adversary system of justice--'ceas[es] to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing." United States v. Zolin, 109 S.Ct. 2619, 2626 (1989) (quoting 8 J. Wigmore, Evidence § 2298, p.573) (emphasis in Wigmore). Plaintiffs' argument is not well taken. The Court has examined the in camera documents, as well as the affidavit submitted by plaintiffs, and finds no indication that the advice of counsel was sought by AMC to perpetrate a future crime or fraud. Rather, the documents at issue evidence an ongoing attorney-client relationship which is addressing pre-existing and ongoing litigation in an entirely proper manner. Further, plaintiffs' contention that the documents constitute mere technical data and, accordingly, are discoverable is inapposite. The underlying technical data should be produced to the plaintiff. The documents submitted in camera, however, constitute legal and engineering analysis of the data. That is a critical distinction. In light of the above, it is hereby

*6 ORDERED that the documents submitted by defendants in camera were generated within the attorney-client relationship and, further, in anticipation of litigation, and are hence privileged under either the attorney-client privilege or the work product doctrine and need not be produced. It is further

ORDERED that defendants' motion to rule the above inquiry moot is denied as moot.

All Citations

Not Reported in F.Supp., 1989 WL 200920

Footnotes

- 1 Defendants represent to the Court that they are producing documents responsive to this request with the exception of the five documents at issue today.
- 2 Counsel for defendants represents that the five documents submitted in camera in Sanders are the identical documents at issue today.
- 3 The Court finds as fact that all the in camera documents were prepared in anticipation of litigation.

End of Document

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