

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 and KATHY McGATLIN,

Respondents.

BRIEF OF RESPONDENT KATHY McGATLIN

Harriet K. Strasberg, WSBA #15890
203 Fourth Ave. E., Suite 520
Olympia, WA 98501
Tel: (360) 754-0304
HStrasberg@comcast.net

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	RESTATEMENT OF THE CASE.....	1
	A. FACTUAL HISTORY	1
	B. PROCEDURAL HISTORY	4
III.	ARGUMENT	7
	A. STANDARD OF REVIEW	7
	B. THE SUPERIOR COURT PROPERLY EXERCISED JURISDICTION IN GRANTING THE WRIT OF REVIEW	8
	1. <u>The Requirements for Granting the Writ Were Met</u>	8
	2. <u>The Hearing Officer Committed a Probable Error of Law in Denying the Motion for a Protective Order</u>	9
	3. <u>An Appeal After a Final Order is not an Adequate Remedy for Invasion of Constitutional and Attorney-Client Privileges</u>	11
	C. THE HEARING OFFICER ACTED ILLEGALLY IN DENYING THE PROTECTIVE ORDER BASED ON AN ERRONEOUS VIEW OF THE LAW	14
	1. <u>Employees Have a Constitutional Right to Retain Counsel to Ascertain Their Legal Rights</u>	14
	2. <u>The Balancing Test is the Proper Analysis</u>	17
	3. <u>Employees’ First Amendment Right to Counsel Outweighs the District’s Interest in Prohibiting Disclosure</u>	19
	a. <u>The District’s Interest is Achieved Without Compelling Disclosure From the Employees</u>	20

b. In a Whistleblower Matter the Balance Favors an Employee’s Rights to Consult an Attorney Without Fear of Compelled Disclosure	24
D. ATTORNEY-CLIENT PRIVILEGE PROTECTS EMPLOYEES FROM A REQUIREMENT TO PRODUCE OR IDENTIFY DOCUMENTS PROVIDED TO A PERSONAL ATTORNEY	31
1. <u>The Privilege Applies to Documents Provided as Part of a Genuine Attorney-Client Relationship for the Purpose of Seeking Legal Advice</u>	32
2. <u>The Transmission of Documents to an Attorney is a Protected Attorney-Client Privileged Communication</u>	36
3. <u>RPC 1.6 Gives Assurance That Documents Shared in an Attorney-Client Relationship Will Remain Confidential</u>	41
E. THE SUPERIOR COURT’S FINDINGS ARE NOT A BASIS FOR REVERSAL	44
F. APPELLANT’S BRIEF VIOLATES THE RULES OF APPELLATE PROCEDURE	45
IV. CONCLUSION.....	46

TABLE OF AUTHORITIES

WASHINGTON CASES

Barry v. USAA, 98 Wn. App. 199, 989 P.2d 1172 (1999).....12

Cedell v. Farmers Ins. Co. of Washington, 176 Wn.2d 686,
295 P.3d 239 (2013)10, 12

City of Seattle v. Holifield, 170 Wn.2d 230, 240 P.3d 1162,
1166 (2010)7, 11, 12

Dana v. Piper, 173 Wn. App. 761, 295 P.3d 305 (2013).....12

Darkenwald v. State Emp't Sec. Dep't, 182 Wn. App. 157,
328 P.3d 977 *aff'd*, 183 Wn.2d 237, 350 P.3d 647 (2015)25

Dep't of Labor & Indus. v. Bd. of Indus. Ins. Appeals of State,
___ Wn. App. ___, 347 P.3d 63, 65 (2015)8, 11

Devine v. Dep't of Licensing, 126 Wn. App. 941,
110 P.3d 237 (2005)9

Dietz v. Doe, 131 Wn.2d 835, 935 P.2d 611 (1997)12, 32

Doe v. Blood Center, 117 Wn.2d 772, 819 P.2d 370 (1991)14

Heidebrink v. Moriwaki, 38 Wn. App. 388, 685 P.2d 1109 (1984)
rev'd on other grounds, 104 Wn.2d 392, 706 P.2d 212 (1985).....12

Nichols v. Seattle Hous. Auth., 171 Wn. App. 897,
288 P.3d 403 (2012)8, 44

Olson v. Haas, 43 Wn. App. 484, 718 P.2d 1 (1986).....12

Pappas v. Holloway, 114 Wn.2d 198, 787 P.2d 30 (1990)32

R.A. Hanson Co., Inc. v. Magnuson, 79 Wn. App. 497,
903 P.2d 496 (1995)33

<i>Seventh Elect Church in Israel v. Rogers</i> , 102 Wn.2d 527, 688 P.2d 506 (1984)	12
<i>Soter v. Cowles Pub. Co.</i> , 162 Wn.2d 716, 174 P.3d 60 (2007)	38, 39
<i>State v. Rice</i> , 174 Wn.2d 884, 279 P.3d 849 (2012)	30
<i>State ex rel. Sowers v. Olwell</i> , 64 Wn.2d 828, 394 P.2d 681 (1964)	32, 34, 35
<i>State v. Williams</i> , 171 Wn.2d 474, 251 P.3d 877 (2011)	30
<i>Strange v. Spokane Cnty.</i> , 171 Wn. App. 585, 287 P.3d 710 (2012)	11
<i>Wright by Wright v. Grp. Health Hosp.</i> , 103 Wn.2d 192, 691 P.2d 564 (1984)	12

CASES FROM OTHER JURISDICTIONS

<i>Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Arizona</i> , 881 F.2d 1486 (9th Cir. 1989)	13
<i>Bd. of Trustees, Cut Bank Pub. Sch. v. Cut Bank Pioneer Press</i> , 160 P.3d 482 (Mont. 2007)	23, 24
<i>Borough of Duryea, Pa. v. Guarnieri</i> ,— U.S. —, 131 S. Ct. 2488, 180 L. Ed. 2d 408 (2011)	14
<i>Costco Wholesale Corp. v. Superior Ct.</i> , 47 Cal. 4th 725, 740, 219 P.3d 736 (2009)	37
<i>DeNeui v. Wellman</i> , 2008 WL 2330953 (DSD June 5, 2008)	17
<i>Denius v. Dunlap</i> , 209 F.3d 944, 953-54 (7th Cir. 2000)	14
<i>Fox Searchlight Pictures, Inc. v. Paladino</i> , 89 Cal.App.4 th 294, 106 Cal.Rptr.2d 906 (2001)	42, 43

<i>Gonzaga Univ. v. Doe</i> , 536 U.S. 273, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002)	22
<i>Harper & Row Publishers, Inc. v. Decker</i> , 423 F.2d 487 (7th Cir.1970)	13
<i>Hernandez v. Tanninen</i> , 604 F.3d 1095 (9th Cir. 2010)	13
<i>Jacobs v. Schiffer</i> , 47 F.Supp.2d 16 (Dist. D. C. 1999) (<i>Jacobs I</i>)	10, 18, 25, 26, 41
<i>Jacob v. Schiffer</i> , 204 F.3d 259 (D. C. Cir. 2000) (<i>Jacobs II</i>)	7, 10, 17, 18, 19, 20, 25, 27, 28, 29
<i>Marshall v. D.C. Water & Sewage Auth.</i> , 218 F.R.D. 4 (D.D.C. 2003)	39, 40
<i>Martin v. Lauer</i> , 686 F.2d 24 (D.C. Cir. 1982)	<i>passim</i>
<i>Mitchell v. Superior Court</i> , 37 Cal.3d 591, 208 Cal.Rptr. 886, 691 P.2d 642 (1984)	36, 37
<i>Osborn v. Board of Regents of University of Wisconsin System</i> , 647 N.W. 2d 158 (2002)	23
<i>Pickering v. Board of Education</i> , 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968)	17
<i>In re Primus</i> , 436 U.S. 412, 98 S. Ct. 1893, 56 L. Ed. 2d 417 (1978)	14
<i>Shaffer v. Defense Intelligence Agency</i> , 601 F.Supp.2d 16 (Dist.D.C. 2009)	29
<i>United States v. Miami Univ.</i> , 294 F.3d 797 (6th Cir. 2002)	23
<i>Upjohn v. United States</i> , 449 U.S. 383, 101 S.Ct. 677, (1981)	15
 <u>REVISED CODE OF WASHINGTON</u>	
RCW 5.60.060(2)(a)	31

RCW 7.16.040	8, 11, 12, 44
RCW 28A.405.300	5
RCW 42.41.045(2)	29, 30
<u>FEDERAL STATUTES</u>	
20 U.S.C. § 1232g(a)(4)(A).....	23
20 U.S.C. § 1232g(b).....	21
<u>LAW REVIEW ARTICLES</u>	
Rob Silverblatt, <i>Hiding Behind Ivory Towers: Penalizing Schools That Improperly Invoke Student Privacy to Suppress Open Records Requests</i> , 101 GEO. L.J. 493, 498 (2013).....	24
<u>OTHER AUTHORITIES</u>	
34 C.F.R. 99.31(b)(1)	23
34 CFR Part 99.3	24
CR 26(c)	9
RAP 13.5	9
RAP 2.3(b).....	9
RAP 10.3	21, 45, 46
RAP 18.9	45, 46
RPC 1.6	41
U.S. CONST. Art. VI, § 2.....	11
APPENDIX A: <i>DeNeui v. Wellman</i> , 2008 WL 2330953 (DSD June 5, 2008)	

I. INTRODUCTION

The Respondent, Kathy McGatlin, was granted relief by the Superior Court protecting her right to consult an attorney regarding potential whistleblower activity. The Appellant, Tacoma School District, is attempting to compel disclosure of confidential communications provided by Ms. McGatlin to her attorney to support its disciplinary case against her and to retaliate against her for the whistleblower action. The District seeks to invade First Amendment and statutory privileges when there has been no public disclosure of such communications. Employees must be permitted to share documents with their attorney pertaining to potential whistleblower activities, without fear of compelled disclosure. The District's arguments amount to imposing on employees a preclearance requirement that violates the First Amendment and interferes with the attorney-client privilege. This Court should affirm the judgment of the Superior Court.

II. RESTATEMENT OF THE CASE

A. Factual History

Lincoln High School certificated employees, Kathy McGatlin, Truby Pete, and Sheila Gavigan (hereinafter "Employees")¹ grew

¹ Kathy McGatlin and Truby Pete are certificated counselors. Sheila Gavigan is a certificated teacher. The undersigned counsel represents only Kathy McGatlin.

increasingly concerned in the 2013-14 school year about decisions made by Lincoln High School administrators regarding denial of educational opportunities provided to students. CP 449, 571-3. Employees were particularly concerned with the school's practice of routing certain students into alternative education programs. CP 439, 449, 571-3. Based on their training and experience, Employees suspected that these practices were unprofessional and unethical. CP 444, 449. Employees were also concerned that the practices were possibly discriminatory against racial minorities. CP 439.

Employees initially raised their concerns to the Superintendent for the District, Carla Santorno. CP 449. When they received no response, Employees sought private legal counsel to advise them of their rights and responsibilities and whether to proceed with a whistleblower action. CP 571. In order to receive well-reasoned and accurate legal advice, Employees provided their private legal counsel, Ms. Mell, with certain records. At issue here is the propriety of the District's attempt to inquire into whether these records contained personally identifiable student information, as the term is defined by the Family Educational Rights and Privacy Act (FERPA). CP 459. In sharing these documents, Employees expected that all communications and documents shared with Ms. Mell

would be protected from disclosure based on attorney-client privilege and that attorneys were not allowed to reveal their client's confidences and secrets based on their own professional responsibilities. CP 571-3.

With the assistance of Ms. Mell, Employees submitted a formal whistleblower complaint to the District on August 28, 2014. CP 527, 475-483. De-identified records were attached to this whistleblower complaint to the District. Superintendent Santoro dismissed the complaint on the day she received it. CP 524. Having been unsuccessful in pursuing their complaint with the District, Ms. Mell and/or Employees brought their concerns to King 5 News, submitting redacted records to support their claims. CP 446, 527. King 5 ran a news story on the matter on September 2, 2014.²

Thereafter, Employees submitted a whistleblower complaint to the Department of Education's Office for Civil Rights (OCR), which accepted the complaint for investigation, an investigation which is ongoing. CP 439-42. Employees complained to the Puget Sound Educational Service District (PSESD) regarding the unprofessional conduct of certain administrators. PSESD forwarded the complaint to the Office of Professional Practices ("OPP") of the Office of Superintendent of Public

² 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/>.

Instruction (“OSPI”), where an investigation is also ongoing. CP 444, 544-50. The record contains no evidence of public dissemination of any personally identifiable student information to any agency or to the media.

B. Procedural history

Following the King 5 news report, in September 2014, the District held “investigative interviews” with Employees requesting that they divulge information about their communications with their personal attorney. CP 501, 527. The District also filed a lawsuit against Employees and Ms. Mell in Pierce County Superior Court, Case No. 14-2-12979-9, for replevin, seeking the return of all records that Employees had provided to Ms. Mell. Ms. Mell and Employees have always asserted that any information about what documents were provided to Ms. Mell is protected by a constitutional and attorney-client privilege. The Superior Court litigation is ongoing.³

On October 1, 2014, Ms. Mell informed the District that the whistleblower complaint contained only de-identified records and that she had sequestered any record containing identifying student information. CP 449. Ms. Mell has repeatedly reaffirmed her promise to sequester and not disseminate records protected by FERPA. CP 457. King 5 News also

³ Employees sought discretionary review and consolidation of that matter with this case but this court denied review. CP 453-73.

informed the District that the records it received contained no personally identifiable student information. CP 446.

On October 31, 2014, Tacoma School District issued a notice of probable cause to suspend Ms. McGatlin for 10 days for insubordination and alleged violations of School District policies and FERPA. CP 488. Ms. Pete and Ms. Gavigan received similar letters. CP 99. Each employee appealed the notice of probable cause pursuant to RCW 28A.405.300. The parties selected Former King County Superior Court Judge Deborah Fleck as the Hearing Officer in Ms. McGatlin's case.

In the course of the litigation of the disciplinary suspension, the District sent written discovery requests and indicated it intent to conduct depositions of Ms. McGatlin, Ms. Pete and Ms. Gavigan in order to determine which documents were provided to Ms. Mell, by whom and in what form. App. Br., at 10. Ms. McGatlin filed a Motion for Protective Order with Hearing Officer Fleck, as did the other employees respectively, requesting that she be prevented from being required to respond to questions that interfere with the attorney-client privilege or violate her constitutional right to seek advice from counsel before filing a whistleblower complaint. CP 418-35.

Judge Fleck, the Hearing Officer, denied the Motion for a Protective Order. CP 574-582. The Hearing Officer determined that the District's insistence that only it could redact student records constituted a "preclearance requirement" or prior restraint. CP 581. Applying the balancing test set forth in *Martin v. Lauer*, 686 F.2d 24, 32 (D.C. Cir. 1982), Judge Fleck determined that Ms. McGatlin had a constitutional right to access the courts and consult an attorney for the purposes of seeking advice on a possible whistleblower action regarding the education options of minority students and that District's interest in protecting students' privacy under state and federal law was protected by its own policies and by attorney Mell's agreement not to disseminate the records. CP 581. She also determined that Employees were not attempting to "cloak" documents with the protection of attorney-client privilege by providing them to their attorney but rather, were legitimately seeking legal advice to determine if they should take the legally significant step of filing a whistleblower complaint. CP 579. Despite these findings, the Hearing Officer denied the Motion on the basis that there is "no controlling Washington authority" to support the issuance of a Protective Order and that the First Amendment cases cited by Employees applied only to "oral communications." CP 582.

McGatlin petitioned the Pierce County Superior Court for a writ of review. CP 382-400. Pete and Gavigan did so as well. The matters were consolidated for oral argument. CP 27-32. The Superior Court granted the employees' writs of review and held:

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 v. Schiffer*, 204 F.3d 259 (DC Cir. 2000).

CP 602-04.

The District filed its appeal in this Court thereafter. The cases remain consolidated on appeal.

III. ARGUMENT

A. STANDARD OF REVIEW

Whether the writ was properly granted is a question of law that this Court should review *de novo*. *City of Seattle v. Holifield*, 170 Wn. 2d 230, 240 P.3d 1162, 1166 (2010). This Court should review “the challenged

administrative decision on the record of the administrative tribunal, not of the superior court operating in its appellate capacity.” *Dep’t of Labor & Indus. v. Bd. of Indus. Ins. Appeals of State*, ___ Wn. App. ___, 347 P.3d 63, 65 (2015), citing *Nichols v. Seattle Hous. Auth.*, 171 Wn. App. 897, 902-3, 288 P.3d 403 (2012). Consequently, this court reviews the record as it was developed at the administrative level.

B. THE SUPERIOR COURT PROPERLY EXERCISED JURISDICTION IN GRANTING THE WRIT OF REVIEW

1. The Requirements for Granting the Writ Were Met

A statutory writ allows for limited appellate review of a judicial or quasi-judicial action when the remedy of appeal is otherwise unavailable. The Superior Court did not err in granting the writ pursuant to RCW 7.16.040, which 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 court “acts illegally” for purposes of a writ of review when an inferior 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. These requirements borrowed the formula from the rules governing interlocutory review and discretionary review of a trial court decision, RAP 13.5 and RAP 2.3(b) respectively. *Id.* “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 officer acted illegally, and there is no plain adequate remedy at law.

2. The Hearing Officer Committed A Probable Error Of Law In Denying The Motion For A Protective Order.

The Superior Court correctly determined that both prongs of the test for issuance of a writ of review were met and corrected the Hearing Officer’s probable error of law. The Superior Court, applying the *Holifield* test, determined that the Hearing Officer “act[ed] illegally” when, in the exercise of judicial functions, she erred in denying the Motion for Protective Order and the decision substantially altered the status quo of the parties. CP 602-04.

CR 26(c) authorizes an adjudicator to enter a protective order as necessary to protect a person from “annoyance, embarrassment,

oppression, or undue burden or expense.” While an appellate court reviews an adjudicator’s discovery rulings for abuse of that discretion, it is an abuse of discretion to deny a protective order based on the wrong legal standard or an improper understanding of the law. *Cedell v. Farmers Ins. Co. of Washington*, 176 Wn.2d 686, 694, 295 P.3d 239 (2013).

Here, the Hearing Officer denied the Motion for a Protective Order in part because there was no controlling authority in Washington and in part based on an improper reading of *Jacobs v. Schiffer*, 204 F.3d 259 (D.C. Cir 2000) (*Jacobs II*) and *Jacobs v. Schiffer*, 47 F.Supp.2d 16 (1999) (*Jacobs I*). Denying the motion for the protective order has the practical impact of imposing on Employees a pre-disclosure clearance requirement in a whistleblower action, as the Hearing Officer recognized but then dismissed. Such a pre-clearance requirement was specifically rejected by the *Jacobs* court.

To deny a motion or a protective order based on a lack of directly analogous authority is improper. Proper resolution of this matter – or any other legal matter - does not depend on the existence of an identical case. 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. The Hearing Examiner's failure to apply federal law prohibiting inquiry into privileged communications between an attorney and her client in the context of a whistleblower case constitutes 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. Invading the privilege clearly alters the status quo and causes irreparable harm. Once a constitutional privilege is lost, it cannot be regained. Once compelled to reveal privileged information, the District will forever gain factual knowledge. The bell cannot be un-rung. The Superior Court correctly determined that the Hearing Officer acted illegally. CP 602.

3. An Appeal After A Final Order Is Not An Adequate Remedy For Invasion Of Constitutional and Attorney-Client Privileges.

Pursuant to RCW 7.16.040, statutory certiorari is available to review interlocutory decisions in courts of limited jurisdiction even though a final judgment in the case may be appealed. Denial of the writ is appropriate when there is an adequate remedy by appeal from final judgment. *Dep't of Labor & Indus.*, 347 P.3d at 65. But, here, a writ of review is appropriate because there is no adequate remedy at law: compelled disclosure of privileged information cannot be adequately

remedied by an 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 cannot be regained once it is waived. It is for this reason that Washington courts do not hesitate to grant discretionary interlocutory review when the attorney-client privilege is at issue.⁴ *Cedell v. Farmers Ins. Co. of Washington*, 176 Wn.2d 686, 690, 295 P.3d 239 (2013); *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).

Preserving the attorney-client privilege while proceedings are ongoing is also well-recognized in federal court. The federal writ of

⁴ The purposes served by a writ of review under RCW 7.16.040 are similar to that served by interlocutory review. *Holifield, supra* at 245. Because the only method of review of interlocutory decisions in courts of limited jurisdiction is the statutory writ, the criteria for granting the writ is similar to that for granting interlocutory review. *City of Seattle v. Williams*, 101 Wn.2d 445, 454-55, 680 P.2d 1051 (1984).

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). Claims of attorney-client privilege in the face of discovery requests frequently, if not always, 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." 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)).

Without a Protective Order, Employees will be forced to surrender their attorney-client privilege and constitutional rights, rights and privileges that cannot be restored once surrendered. This case is precisely the type where a writ of review is appropriate. The Superior Court acted

properly by finding that waiting until the end of the case to appeal was not an adequate remedy.

C. THE HEARING OFFICER ACTED ILLEGALLY IN DENYING THE PROTECTIVE ORDER BASED ON AN ERRONEOUS VIEW OF THE LAW.

1. Employees Have A Constitutional Right To Retain Counsel To Ascertain Their Legal Rights.

Access to the courts is a fundamental constitutional right, grounded in the First Amendment right to petition the government. 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). The Washington Constitution also includes the right to access the courts. See *Doe v. Blood Center*, 117 Wn.2d 772, 819 P.2d 370 (1991).

Part of that fundamental right includes the right to communicate with a lawyer for the purpose of seeking legal advice. *Martin v. Lauer*, 686 F.2d 24, 32 (D.C. Cir. 1982); *Denius v. Dunlap*, 209 F.3d 944, 953-54 (7th Cir. 2000). As articulated by the *Martin* Court:

“Meaningful access to the courts is a fundamental right of citizenship in this country.” ... Thus, while private parties must ordinarily pay their own legal fees, they have an undeniable right to retain counsel to ascertain their legal rights.

Martin, supra, 686 F.2d at 32. Internal citations omitted. As a practical matter, clients cannot expect to receive complete and accurate advice to their legal questions without being able to provide their attorney with relevant materials to review.

To ensure that the right to counsel remains meaningful, restrictions on the attorney-client privilege have been applied only when the relationship is abused. As articulated by the *Martin* court in addressing such restrictions:

Restrictions on speech between attorneys and their clients directly undermine the ability of attorneys to offer sound legal advice. ... Limitations on the attorney-client privilege have therefore been drawn narrowly, to remove the privilege only where the privileged relationship is abused.

...

The government's argument ignores appellants' legitimate interest in an early assessment of their legal rights. "**The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant.**" *Upjohn v. United States*, 449 U.S. 383, at 390-1, 101 S.Ct. 677, at 683 (1981). Maintaining the confidentiality of attorney-client communications facilitates this process by encouraging the client to supply his attorney with relevant information. *Id.* If the client were to "act at his peril," in pre-screening information that may be exempt from FOIA, however, these initial consultations could be seriously hampered.

Martin, supra, 686 F.2d at 32-33. Emphasis added. Some citations and footnotes omitted.

In *Martin*, the Court held that the rights of the employees were constitutional, vital, and “deserving of rigorous protection.” 686 F.2d at 33. The D. C. Circuit Court recognized that the same rationale underlying attorney-client privilege also underlies the First Amendment right to access the courts: to obtain sound legal advice, clients must be able to communicate freely with their attorneys. *Id.* at 32-33. Recognizing that restrictions on speech between attorneys and their clients directly undermines the ability of attorneys to offer sound legal advice, 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.

Even more so in the whistleblower context, a client must be free to share relevant documents with an attorney without fear of compelled disclosure provided that the attorney maintains the confidentiality of those communications. Thus, the scope of documents that can be disclosed in an attorney-client relationship is much broader than what is subject to

public disclosure. *Jacobs v. Schiffer*, 204 F.3d at 264. (“[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) (Disclosure by a physician to a personal attorney is not a public disclosure and did not violate HIPAA but rather, is a limited disclosure to a personal counsel, which cannot be disclosed to a third party pursuant to the attorney-client privilege).

2. The Balancing Test is The Proper Analysis

Martin v. Lauer, 686 F.2d 24 (D.C. Cir. 1982) is the lead case addressing right of a government employee to seek legal counsel in a whistleblower context without restrictions or interference by the government. In *Martin*, the Court addressed a governmental agency memorandum permitting the agency to prescreen and requiring post-hoc disclosure of both documents and information given by a government employee to a personal attorney. The *Martin* court concluded that the proper way to resolve the issue was to balance the interests of the employees, *qua* citizens, against those of the government, as an employer, citing *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731,

20 L.Ed.2d 811 (1968).

The balancing test was again used in *Jacobs v. Schiffer*, 47 F.Supp.2d 16 (Dist. D.C. 1999) (*Jacobs I*). In *Jacobs*, an attorney for the Department of Justice, suspected his supervisors of wrongdoing, and retained a personal attorney to assess his potential whistleblower complaint. *Jacobs I*, 47 F.Supp.2d at 18. The agency informed Jacobs that, prior to disclosing documents to his attorney, he would have to identify those documents he wanted to reveal. *Id.* Jacobs filed suit claiming that these pre-clearance requirements violated the First Amendment right to freely consult counsel and his Fifth Amendment right to seek legal advice. *Id.*

After applying the *Martin* balancing test, the Court held that the pre-clearance requirement was a prior restraint and violated Jacobs' First Amendment right to consult with an attorney. *Id.* at 24. In affirming this holding in *Jacobs II*, 204 F.3d at 266, the Circuit Court reaffirmed the balancing test articulated in *Martin*, clearly applying it to the disclosure of documents proposed to be shared by an employee/attorney to his personal attorney in the context of a potential whistleblower action.

Because both *Martin* and *Jacobs* involve government employees acting as whistleblowers, the analysis is particularly pertinent here. The

Martin court, in identifying the interests of the employee as a potential whistleblower, recognized its importance, and held that the employees’ “speech interests [were] not only legitimate but, because they implicate[d] appellants’ fundamental right of access to the courts, [were] deserving of rigorous protection.” *Id.* at 33.

After all, “[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.’ ... 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.

3. Employees’ First Amendment Right to Counsel Outweighs the District’s Interest in Prohibiting Disclosure.

In both *Martin* and *Jacobs*, the government had instituted an across-the-board prior restraint on disclosures to attorneys. However, because there was no indication that any information would be shared by the employees’ attorneys, the courts found the prior restraints to be unconstitutional and held that the employees’ First Amendment rights in speaking to an attorney outweighed the government’s general interest in the protection of documents. *Martin*, 686 F.2d at 34-35; *Jacobs*, 204 F.3d at 266.

The Court recognized that the First Amendment right to an

informed counsel is superior to the statutes and regulations. *Jacobs II*, 204 F.3d at 265. In 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 personal attorney promised or was obligated to keep the information confidential, the employee's constitutional rights outweighed the interest of the employer. *Id.*

As Hearing Officer Fleck determined, the District has imposed a prior restraint on disclosures of student records to personal attorney here both by imposing discipline on Employees for sharing information with a personal attorney for the purpose of seeking legal advice and by attempting to discover what documents were shared with the attorney. As the holdings in *Martin* and *Jacobs II* establish, in the case of a potential whistleblower, the District can neither forbid its employees from sharing such documents with their attorneys nor can it require post hoc disclosure of such privileged communications.

a. The District's Interest Is Achieved Without Compelling Disclosure From The Employees.

The Hearing Officer correctly determined that the District's interest in protecting students' privacy under state and federal law was

protected by its own policies and by attorney Mell's agreement not to disseminate the records. CP 581. There is absolutely no evidence in the record of any public disclosure of personally identifiable student information protected by the Family Education Rights and Privacy Act, 20 U.S.C. § 1232g(b)(1) ("FERPA").

The District relies solely on its duty to comply with FERPA when identifying its interest in seeking the documents provided by McGatlin to her personal attorney to advise her in assessing her potential whistleblower complaint. App. Br., at 4-5. But, the District's overstates its interest, which does not necessitate an outright ban on employees sharing information with private attorneys, when the attorney has a duty not to disclose those communications to a third party pursuant to a statutory attorney-client privilege.

A clear understanding of FERPA will assist this court in ascertaining the District's interest.⁵ FERPA is a spending statute. Federal funds for school districts are contingent upon the existence of policies that are designed to prevent disclosure of student education records. 20 U.S.C. § 1232g(b) provides:

No funds shall be made available under any applicable program to any educational agency or institution which has a

⁵ 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*.

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...

It is undisputed that the District has such policies. App. Br., at 4. And, “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).

The District argues that FERPA, and its implementing regulations, specifically prohibit third parties from redacting identifiers from transcripts or other student records. App. Br., at 4-6. The District cites no actual regulation to support its interpretation. Nor is there any regulation or case law that states that only the District can redact personally identifiable information. A review of the regulations and case law proves that the District’s argument is not well-grounded. First, “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 clearly 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). Second, the regulations permit a third party to release records without consent after the record is redacted and is no longer personally identifiable:

(1) De-identified records and information. An educational agency or institution, **or a party that has received education records** or information from education records under this part, **may release the records or information without the consent required** by § 99.30 after the removal of all personally identifiable information **provided that** the educational agency or institution or **other party has made a reasonable determination that a student's identity is not personally identifiable**, whether through single or multiple releases, and taking into account other reasonably available information.

34 C.F.R. 99.31(b)(1). Emphasis added.

Nothing in FERPA prevents a third party from providing de-identified student records to a personal attorney. 34 C.F.R. 99.31(b)(1) does not identify who must de-identify the records. Simply put, once a record is redacted and contains no personally identifiable information, that record is no longer an “education record” protected by FERPA. *Osborn v. Board of Regents of University of Wisconsin System*, 647 N.W.2d 158, 168 n.11

(2002); See also *Cut Bank Pub. Sch.* 160 P.3d at 487 (2007).⁶

While the District certainly has an interest in retaining federal funding, there is no evidence that this interest has been endangered here. In the 40 years since the passage of FERPA, not a single school district in the entire country has lost funding under FERPA. 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 overlooks the primary purpose of FERPA: to protect children and their parents. See 34 C.F.R. § 99.2. This interest is advanced, not harmed, by allowing employees to speak to and to share documents with a personal attorney when they suspect wrongdoing, providing there is no subsequent disclosure of personally identifiable student information.

b. In A Whistleblower Matter, The Balance Favors An Employee's Right To Consult An Attorney Without Fear Of Compelled Disclosure

As the Hearing Officer correctly noted (CP 581):

[T]he constitutional rights of the Employees to access the

⁶ As the District noted (App. Br., at 6), 34 CFR Part 99.3 prohibits disclosure even if there are no personal identifiers, if the information is linkable to a specific student that would allow a person, who has no knowledge of relevant circumstances, to identify the student with reasonable certainty. However, there is absolutely nothing in the record to support that a disclosure of this nature occurred.

courts and consult with an attorney for the purposes of seeking advice on a possible whistleblower action regarding the educational options of minority students would be weighed as significant.

But, Judge Fleck erred in viewing *Martin* as only applying to oral communications. *Martin* addressed only oral communications because that was the only type of communication the parties issue on appeal. In a footnote, 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. Consequently, the issue was moot. The District's attempt to attach some significance to the fact that the court did not address the issue should be rejected. App. Br., at 20-1. 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). Nonetheless, the *Jacobs* courts applied the *Martin* balancing test to documentary disclosures in both *Jacobs v. Schiffer*, 47 F.Supp.2d 16, at 21 (Dist. D.C. 1999) (*Jacobs I*) and *Jacobs v. Schiffer*, 204 F.3d 259, 264 (D.C. Cir. 2000) (*Jacobs II*). The Hearing Officer's failure to recognize this is clearly erroneous.

In the context of an employee's desire to pursue a potential whistleblower case, the *Jacobs I* court, applying the *Martin* holding, explained the problems inherent in a preclearance requirement:

To enforce the requirement in this case would put the agency on notice of the employee's suspicions of wrongdoing. It would also delay the employee's access to legal advice until the request for authorization to disclose had run its administrative course. If the employee must follow FOIA procedure before imparting the information to his lawyer, he may, irrespective of whether he prevails, be deprived of legal counsel for months or years, and the more embarrassing or inculpatory the information, the greater the risk that implicated persons within the agency will stall the FOIA process. In sum, the restraint imposed on Mr. Jacobs' legitimate interests is considerably more onerous than the one that the D.C. Circuit found unconstitutional in *Martin*.

Id. at 22.⁷

The pre-clearance requirement was unconstitutional in *Jacobs* because less restrictive alternatives protected the government's interest without foreclosing potential whistleblowers from receiving informed legal advice. *Jacobs I*, at 23. These alternatives are present here: Ms. Mell invoked her duty to maintain client confidences and has vociferously maintained these confidences. Another alternative identified was that the employer could seek a protective order from the court if it believed dissemination of protected information was likely, something the District

⁷ The District's alternative suggestion that the employees or their counsel make a public records request for the documents has the same constitutional flaws as noted by the *Jacobs* court here. (App. Br. at 23).

neither sought nor agreed to here. Ms. Mell's agreement and her actions involving no public dissemination of identifiable student information are consistent with the existence of such a protective order.

The practical implication of the District's arguments here is directly analogous to the situation faced by the employee in *Jacobs*. The District's position amounts to a prior restraint. According to the District, McGatlin and other employees are not permitted to redact documents prior to showing them to a personal attorney. App. Br. at 5-6. Rather, employees must, prior to sharing documents with a personal attorney, provide the documents evidencing their suspicions of wrongdoing to the District for redaction and approval, or alternatively make a public records request identifying the documents and allowing for redaction.

The District attempts to distinguish the *Jacobs* cases, on the basis that there is a prohibitive statute in place, i.e. FERPA. The District's contention is without merit. 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.

The District also attempts to distinguish *Jacobs* based on timing of

the motion for a protective order, arguing that in *Jacobs*, the attorney filed suit in advance of providing documents to the attorney. App. Br., at 21-22. This distinction is legally insignificant since, in this case, the District's rhetoric about "crude redactions" notwithstanding, there is absolutely zero evidence that there was any disclosure of a FERPA-protected document to anyone other than perhaps the private attorney of Employees.

The District's is mistaken in its reliance on the *Jacobs* court's statement that the First Amendment does not provide an employee seeking legal advice "with *carte blanche* authority to disclose any and all confidential information to the employee's attorney." App. Br. at 21-22, citing *Jacobs II* at 265-66. A more careful reading of the Court's statement explains that it approved the sharing of nonpublic information with a personal attorney to enable Jacobs to get legal advice, while denying Jacobs his request to share the documents with unidentified attorneys at unnamed public interest organizations:

[I]n the whistle-blower context, where a legal question arises as to whether a contemplated public disclosure would be prohibited by law, "[s]urely, [the employee] must be allowed to consult his attorney for an answer to that question absent some strong governmental interest in limiting such communications." *Martin II*, 686 F.2d at 33 n. 41.

Jacobs II, 204 F.3d at 266. See also *Shaffer v. Defense Intelligence Agency*, 601 F.Supp.2d 16 (Dist.D.C. 2009) (Affirming First Amendment right to share statutorily protected documents with a personal attorney when necessary for attorney to advise employee of his rights regarding potential termination of employment and options for seeking the protection of whistleblower statutes).

Employees, here, were legitimately acting as whistleblowers, reporting concerns of illegal practices first to the Superintendent and subsequently to OCR and the PSESD.⁸ The prerequisites to filing a valid whistleblower complaint are complicated and it takes an attorney well-versed in these laws to be able to properly assess the documents and information and give sound legal advice.⁹

The District also erroneously implies that the *Jacobs* court based its decision on a finding that the documents were material to the whistleblower complaint. App. Br., at 24. But, that implication is patently false. The court made no conclusion that the documents were material to the complaint but referred to the employee's description of the documents as "material." *Jacobs II*, 204 F.3d at 261-2. Whether the documents

⁸ While different from the complaint to OCR, the complaint to PSESD meets the definition of a good faith report of an improper governmental action as defined in Chapter 42.41 RCW.

⁹ Indeed, only after consulting with a lawyer was Respondent's whistleblower complaints investigated by the OCR and PSESD. CP 439-44.

shared are actually “material” to the ultimate whistleblower complaint is not a legal standard. An attorney may need to sift through a great deal of factual information and documentation with an eye toward the legally relevant and significant. *Martin*, 686 F.2d at 32-33.

In its Statement of the Case, the District also improperly relies on RCW 42.41.045(2) to support of its assertion that Ms. McGatlin was absolutely prohibited from sharing confidential information with her personal attorney. App. Br., at 7. RCW 42.41.045(2) cannot be interpreted in a way that interferes with the constitutional right to confer with to an attorney. Washington courts construe statutes so as to preserve their constitutionality. *State v. Rice*, 174 Wn.2d 884, 900, 279 P.3d 849 (2012). *State v. Williams*, 171 Wn.2d 474, 476, 251 P.3d 877 (2011). This law does not provide the District with an additional basis to deny Ms. McGatlin her constitutional rights.

Both because Employees sought the advice of a personal attorney for the purposes of potentially pursuing a whistleblower complaint and because there is no evidence of a *de facto* public disclosure, this court should find that the Hearing Officer erred in her understanding of the law when she denied the Employees’ Motions for a Protective Order here.

The Hearing Officer's improper denial of Ms. McGatlin's Motion for a Protective Order here equates to compelling the disclosure of information in violation of her First Amendment rights. FERPA does not act as a prior restraint on an employee's ability to consult with an attorney when balanced against the Employees' fundamental constitutional right to consult with counsel to pursue a whistleblower complaint regarding the District's denial of equal access to educational opportunities for minority students. With the balance of interests in favor of permitting Employees to speak freely with their attorney, the District's attempt to interfere with their right to do so is plainly unconstitutional.

D. ATTORNEY-CLIENT PRIVILEGE PROTECTS EMPLOYEES FROM A REQUIREMENT TO PRODUCE OR IDENTIFY DOCUMENTS PROVIDED TO A PERSONAL ATTORNEY

The Hearing Examiner also acted illegally by declining to apply attorney-client privilege to protect confidential communications when there was no abuse of the attorney-client relationship. Washington's attorney-client privilege is set forth in RCW 5.60.060 (2)(a) and provides:

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.

The attorney-client privilege applies to communications and advice between an attorney and client and extends to documents that contain a

privileged communication. *Dietz v. Doe*, 131 Wn.2d at 842. Because the privilege sometimes results in the exclusion of evidence otherwise relevant and material, and thus may be contrary to the philosophy that justice can be achieved only with the fullest disclosure of the facts, the privilege is not absolute; rather, it is limited to the purpose for which it exists. *Id.*

The facts here support the application of the attorney-client privilege because its application is sought for its intended purpose: to allow the client to communicate freely with an attorney without fear of compulsory discovery. *Dietz*, 131 Wn.2d at 842, citing *State ex rel. Sowers v. Ohwell*, 64 Wn.2d 828, 832, 394 P.2d 681 (1964); *Pappas v. Holloway*, 114 Wn.2d 198, 203, 787 P.2d 30 (1990) (privilege encourages free and open communications by assuring that communications will not be disclosed to others directly or indirectly).

1. The Privilege Applies To Documents Provided As Part Of A Genuine Attorney-Client Relationship For The Purpose Of Seeking Legal Advice

Requiring compelled disclosure of documents shared by Employees when they understood their disclosures to be confidential interferes with their right to speak freely to an attorney and defeats the rationale behind the attorney-client privilege. In *Martin*, the court dealt

not only with the First Amendment but also discussed the attorney-client privilege as “interwoven” with the right to effective assistance of counsel. *Martin*, 686 F.2d at 32. It is through the attorney-client privilege that the common law encourages full and frank discussion between attorney and client, and promotes the broader public interest in the observation of law and administration of justice.

Limitations on the attorney-client privilege have therefore been drawn narrowly, to remove the privilege only where the privileged relationship is abused. Absent such abuse, or a waiver of the privilege, our legal system jealously protects the confidential status of attorney- client communications.

Martin, 686 F.2d at 32-33

Before compelling disclosure in the context of the attorney-client privilege, Washington courts have also looked to whether there was abuse in the attorney-client relationship or whether the disclosure was genuinely for the purpose of seeking legal advice.

In that regard, the District’s reliance on *R.A. Hanson Co., Inc. v. Magnuson*, 79 Wn. App. 497, 903 P.2d 496 (1995) is misplaced. App. Br., at 18-19. In *Hanson*, the plaintiff served a subpoena on an attorney, seeking information about whether the defendant’s attorney, on behalf of its client, had paid a third party’s legal fees. 79 Wn. App., at 500. While the court acknowledged that the purpose of the attorney-client privilege is

to allow a client to obtain proper legal advice, the court held that the act of transferring money for a client to a third party does not constitute a confidential professional communication or advice, stating:

The attorney-client relationship is not genuine where its only purpose is to gain confidentiality for the client or to use the lawyer as a mere conduit for the payment of money.

Id. at 502. Thus, the Court of Appeals held that the attorney was obligated to answer, because the transfer of money was separate and apart from the genuine attorney-client relationship.

Here, there was no abuse of the attorney-client relationship. Rather, the record establishes that Ms. McGatlin genuinely sought the legal advice of a personal attorney to ascertain her rights and she subsequently filed a whistleblower case based on the advice she was given. CP 571-3. The Hearing Officer correctly found that Employees were not attempting to cloak documents with the protection of attorney-client privilege by providing them to their attorney but that they shared information as part of a genuine effort to seek legal advice. CP 579.

The Washington Supreme Court in *State ex rel. Sowers v. Ohwell*, 64 Wn.2d 828, 394 P.2d 681 (1964), applying similar principles, reiterated that the purpose of the attorney-client privilege is to afford the client freedom from fear of compulsory disclosure after consulting a legal

advisor. But, in that case, the defendant client gave to his defense attorney a knife, which was actual evidence in the criminal investigation and which the court determined had very little value for the purposes of aiding counsel in the preparation of the defense of his client's case. The Court, balancing the attorney-client privilege against the public interest in the criminal investigation, required the attorney to surrender the criminal evidence that the attorney had in his possession because of the heightened nature of a criminal investigation but preserved the privilege to ensure that the source of the evidence was not revealed.

Sowers does not result in compelled disclosure here. Any records were provided as part of a legitimate effort to assist counsel in preparing an effective whistleblower complaint. And, the Districts' purported interest in compliance with FERPA does not rise to the same interest as a criminal investigation, particularly where there is no evidence of any public disclosure of FERPA-protected information. Thus, the balance applied in *Sowers* weighs strongly in favor of issuance of a protective order here to protect Employees from compulsory disclosure of documents shared with their personal attorney as part of a genuine effort to seek legal advice.

2. The Transmission of Documents to An Attorney is a Protected Attorney-Client Privileged Communication

The Hearing Examiner also acted illegally by declining to apply attorney-client privilege to the Ms. McGatlin's communicative acts to her attorney, because there is no case in Washington directly on point. This was not a proper basis to deny her Motion. 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 when they are part of a genuine attorney-client relationship.

The Hearing Officer erroneously distinguished *Mitchell v. Superior Court*, 37 Cal.3d 591, 595, 208 Cal.Rptr. 886, 691 P.2d 642 (1984) on the basis that it concerned public documents versus statutorily protected documents. But, the source of the information transmitted to counsel that was not the distinguishing feature in *Mitchell*. Rather, *Mitchell* concerned information transmitted between an attorney and a client that was factual in nature. The Court did not compel disclosure of factual information based on attorney-client privilege because that information was transmitted in the course of an attorney-client relationship in the context of investigating, and prosecuting a lawsuit and could properly be

characterized as a confidential communication. *Id.* 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.

In *Costco Wholesale Corp. v. Superior Ct.*, 47 Cal. 4th 725, 740, 219 P.3d 736 (2009), in a case where no public documents were involved, the Supreme Court of California applied the attorney-client privilege to protect a transmission of documents, relying on *Mitchell, supra*. The Court stated:

And because the privilege protects the *transmission* irrespective of content, there should be no need to examine the content in order to rule on a claim of privilege.

Costco, 47 Cal. 4th at 739. (Italicization in original). In California, it is the dominant purpose test that is the relevant inquiry. If the dominant purpose of the communication with the attorney is to seek legal advice, then the underlying documents are protected from disclosure based on attorney-client privilege. *Id.* 739-40. “[I]f the communications were made during the course of an attorney-client relationship, the communications, including any reports of factual

material, would be privileged, even though the factual material might be discoverable by some other means.” There is no doubt that the dominant purpose of Employees’ communications with their personal attorney was to seek legal advice. As a result, the transmission of the documents at issue should be privileged and not subject to discovery.

The District has erroneously argued that *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 174 P.3d 60 (2007) is in conflict with the California rule protecting transmission of documents between attorney and client. App. Br., at 18. While the Washington Supreme Court, in *Soter*, did not address the transmission of documents *per se*, the Court held that all documents sought by the newspaper were protected either based on work-product or attorney-client privilege. “[T]he attorney-client privilege exists to allow clients to communicate freely with their attorneys without fear of later discovery” and “to encourage free and open communication assuring that communications will not be later revealed directly or indirectly.” 162 Wn. 2d at 745. The District’s attempt to delve into Ms. McGatlin’s communications to her attorney strikes at the heart of this protection.

Soter also holds where the factual information is available elsewhere, the court will not invade the attorney client or work product

privilege to compel disclosure of such documents. *Id.* at 748. Even assuming the District were correct, which we do not concede, the documents provided to Ms. Mell were like the map in *Soter* in that the District cannot prove substantial need for the materials provided by Ms. McGatlin to her personal attorney. The District can obtain the complaints filed with its own Superintendent, OCR and PSESD from the agencies themselves.

Common sense dictates that the act of transmitting documents is a means for a client to communicate with and seek legal advice from the attorney. The act of transmission indicates which documents the client thinks are important for an attorney to be aware of before the attorney can give informed legal advice. As an example, one phone bill that contains a list of phone numbers, when it is selected from a larger universe of bills, may transmit important information 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 provided to the attorney. This communicative aspect of transmission was recognized by the Court in *Marshall v. D.C. Water & Sewage Auth.*, 218 F.R.D. 4 (D.D.C. 2003).¹⁰ There, the Court protected from disclosure

¹⁰ This case applied the work product doctrine and did not reach the issue of attorney-client privilege.

documents that would allow the requesting party to learn what documents were provided to counsel because disclosure would reveal “what documents counsel thought she needed” to answer discovery, “disclose her theory of how to answer” interrogatories, and determine “what information she thought was important to collect.” *Marshall*, 218 F.R.D at 6.

Since the documents at issue are all District created documents, the District already has them. Not only is there is no reason to invade the attorney-client privilege to seek the documents but the District’s request is itself improper since the only reason that the District has to seek these documents is punitive: to use them as evidence to support the letters of probable cause for suspension issued to Employees. Even if the District were to receive from Ms. Mell the documents that were allegedly produced to her, it would need to know who gave them to her to support its claim. Forcing a client to divulge which and when documents are transmitted 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.

3. RPC 1.6 Gives Assurance That Documents Shared In An Attorney-Client Relationship Will Remain Confidential

The attorney-client privilege is enforced and advanced by Rules of Professional Conduct that give clients the assurance that information they share with their attorney will remain confidential. RPC 1.6 prohibits a lawyer from sharing client's secrets and confidences and is instrumental in encouraging the free flow of information. Inherent in RPC 1.6 is a presumption that a client can freely share documents with an attorney for the purpose of receiving legal advice as long as that privilege is not abused.

The policy rationale in *Jacobs I* was not only based on the First Amendment but was also based on the Fifth Amendment right to due process and the Rules of Professional Conduct applicable to lawyers. *Jacobs I* at 20-21. The Court clearly held that when a client discloses to her personal attorney information necessary to advise the client of rights and obligations as a whistleblower and when that information is shared with the express understanding that the information should go no further, the personal attorney becomes, as a practical matter, an "alter ego" of the client, and the personal attorney is duty bound to keep confidences and secrets of the client as her own. Consequently, disclosure to a personal attorney under these circumstances is not a public disclosure.

Likewise, whatever information that was shared with Ms. Mell was shared for the sole purpose of giving Ms. Mell the information that she needed to give legal advice regarding a legitimate whistleblower complaint. Ms. Mell is duty bound by her clients not to disseminate the information. Her actions are consistent with her understanding that she remains duty bound not to disseminate any documents with personally identifiable student information, if indeed she had such information. In that light, the sanctity of the attorney-client relationship should be preserved and it was error not to deny issuance of the protective order.

The California Court of Appeal distinguished between an attorney-client disclosure for the purpose of seeking legal advice and a public disclosure of protected information which “will usually find no sanctuary in the courts.” *Fox Searchlight Pictures, Inc. v. Paladino*, 89 Cal.App.4th 294, at 311, 106 Cal.Rptr.2d 906 (2001). *Fox Searchlight* concerned a situation where an in-house counsel planned to sue a corporation for wrongful termination of employment. A corporation sued the former counsel for disclosing confidential and privileged information with a personal attorney representing her in the wrongful discharge action. The employee/ attorney moved to strike as a SLAPP suit. The Court held the

employee may disclose all facts relevant to the termination including employer confidences and privileged communication, stating:

[I]n-house counsel may disclose ostensible employer-client confidences to her own attorneys to the extent they may be relevant to the preparation and prosecution of her wrongful termination action against her former client-employer.

Fox Searchlight, 89 Cal.App.4th at 310.

The rationale for the court's ruling in *Fox Searchlight* is similar to the policy concerns before this court. In *Fox*, the Court held that the primary concern is to avoid unwarranted *public* disclosure of secrets, as opposed to legitimate disclosure to a personal attorney limited in scope to information that the client believes is necessary to her attorney's rendering of legal advice. The Court also reasoned that fundamental fairness permitted the client to make a limited disclosure of protected information to the extent necessary to give legal advice. Indeed, the Court held that it would assist the client in avoiding impermissible public disclosures if the attorney has complete knowledge of all potentially confidential information known to the client and relevant to the litigation.

It is only through such full disclosure the attorneys for the in-house counsel can make judgments about what is disclosable and what is not.

Fox Searchlight, 89 Cal.App.4th at 313.

Like other courts where this matter has been raised, this Court should differentiate between a disclosure to a personal attorney for the purpose of seeking legal advice and a public disclosure. In the case of the former, it was error to deny the protective order to protect the privilege associated with genuine attorney-client disclosures. In the latter, no privilege would exist and discovery would be required.

E. THE SUPERIOR COURT’S FINDINGS ARE NOT A BASIS FOR REVERSAL

The Appellant erroneously argues, without any support that the Superior Court’s findings are insufficient and require reversal. App. Br., at 14-16. The District also argues that the Superior Court’s findings are more akin to conclusions of law and should be reviewed in that light. However, this Court reviews the Hearing Officer’s decision *de novo* based on the record at the administrative level. *Nichols*, 171 Wn. App. at 902-04. The Superior Court does not need to provide detailed findings. At the Superior Court level, Ms. McGatlin challenged the Hearing Officer’s denial of the Motion for a Protective Order because she made a probable error of law and there was no adequate remedy short of requesting the writ pursuant to RCW 7.16.040. Employees are not challenging the findings of fact made by the Hearing Officer. Consequently, the District’s argument is misplaced and not a basis for reversal.

F. APPELLANT'S BRIEF VIOLATES THE RULES OF APPELLATE 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. This was not a mere oversight; Appellant's statement of facts contains pages worth of argument, including extensive briefing on its interpretation of FERPA regulations. See App. Br., at 4-6. As an example, the District argued in its Statement of Facts that FERPA permits redaction only by District to redact records. The District has also made repeated and disingenuous allegations to this Court as well as to previous tribunals that attorney Mell published unredacted information to several media outlets.

(App. Br. at 1, 8, 22). The record of publication of personally identifiable student information plainly does not exist. This Court should sanction Appellant for its deliberate violation of RAP 10.3.

Respondent has 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 factual information. Respondents accordingly request that they be awarded attorney's fees pursuant to RAP 18.9.

IV. CONCLUSION

Therefore, Respondent respectfully requests that the decision of the Superior Court be AFFIRMED, and that she be awarded fees and costs pursuant to RAP 18.9.

Respectfully submitted this 18th day of December, 2015



HARRIET STRASBERG, WSBA # 15890
Attorney for Respondent Kathy McGatlin

CERTIFICATE OF TRANSMITTAL

I hereby certify that the foregoing Brief of Respondent Kathy McGatlin was sent to the following counsel in the means specified:

Patricia Buchanan
Onik'a i. Giliam
Patterson Buchanan
2112 Third Ave., Ste. 500
Seattle, W A 98121
pkb@pattersonbuchanan.com
oig@pattersonbuchanan.com
Via E-mail by Agreement

Tyler K. Firkins
Stephanie L. Beach
Van Sic len, Stocks & Firkins
721 45th St NE
Auburn, WA 98002
tfirkins@vansiclen.com
sbeach@vansiclen.com
Via E-mail by Agreement

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

HARRIET STRASBERG

APPENDIX A

2008 WL 2330953

Only the Westlaw citation is currently available.
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

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

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.

STRASBERG LAW OFFICE

December 18, 2015 - 2:15 PM

Transmittal Letter

Document Uploaded: 1-477246-Respondent's Brief.pdf

Case Name: TRUBY PETE, SHEILA GAVIGAN & KATHY McGATLIN v. TACOMA SCHOOL DISTRICT

Court of Appeals Case Number: 47724-6

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Harriet Strasberg - Email: HStrasberg@comcast.net

A copy of this document has been emailed to the following addresses:

HSTRASBERG@COMCAST.NET