

No. 95531-0

No. 75671-1-I

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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KING COUNTY CORRECTIONS GUILD,

Appellant,

v.

JARED KARSTETTER and JULIE KARSTETTER,

Respondents.

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BRIEF OF RESPONDENTS

(CORRECTED)

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## TABLE OF CONTENTS

Table of Contents.....	ii
Table of Authorities.....	iv
I. INTRODUCTION.....	1
II. STATEMENT OF ISSUES PERTAINING TO APPELLANT’S ASSIGNMENTS OF ERROR.....	2
III. KARSTETTER’S RESTATEMENT OF THE CASE.....	3
IV. ARGUMENT.....	9
1. Standard of Review.....	9
2. Washington law simply does not constrain any person, even an attorney-employee, from working pursuant to an enforceable employment agreement and, therefore, the trial court did not err.....	10
3. Washington law permits attorney-employees to negotiate compensation and to enter into employment agreements with their client-employers and, therefore, the trial court did not err.....	15
4. Washington courts have permitted on repeated occasions attorney-employees to bring wrongful discharge actions and, therefore, the trial court did not err.....	19
5. The Guild relies errantly on non-binding Authority to suggest a public policy override that requires dismissal of Mr. Karstetter’s claims.....	22

6.	The trial court must be afforded the opportunity to evaluate the material facts and consider in equity whether the guild may avoid Mr. Karstetter's claims.....	24
V.	KARSTETTER REQUESTS AN AWARD OF REASONABLE ATTORNEY FEES AND COSTS FOR SUCCESSFULLY OPPOSING THE GUILD'S APPEAL.....	25
VI.	CONCLUSION.....	26

## TABLE OF AUTHORITIES

### Cases

<i>LK Operating, LLC v. Collection Grp., LLC</i> 81 Wn.2d 49, 72-73, 331 P.3d 1147 (2013).....	9, 11, 12
<i>Halvorson v. Dahl</i> , 89 Wn.2d 673, 674-75, 574 P.2d 1190 (1978).....	9, 10
<i>Haberman v Wash. Pub. Power</i> 109 Wn.2d 107, 120, 744 P.2d 1032 (1987).....	9
<i>Orwick v. Seattle</i> 103 Wn.2d 249, 254, 692 P.2d 793 (1984).....	9
<i>Simburg, Ketter, Sheppard &amp; Purdy, LLP v. Olshan</i> , 109 Wn.App. 436, 445-46, 988 P.2d 467 (Div. I, 1999).....	12
<i>Belli v. Shaw</i> 98 Wn.2d 569, 657 P.2d 315 (1982).....	13
<i>Valley/50th Ave. LLC v. Stewart</i> 159 Wn.2d 736, 153 P.3d 186 (2007).....	13
<i>Fetty v. Wenger</i> 110 Wn.App. 598, 600, fn. 4, 36 P.3d 1123 (2001) .....	13, 14
<i>Kimball v. Public Util. Dist. 1</i> 64 Wn.2d 252, 257, 391 P.2d 205 (1964).....	13, 14
<i>General Dynamics Corp., v Superior Court</i> , 7 Cal.4th 1164, 876 P.2d 487, 490 (1994).....	14, 15
<i>Cotton v Kronenberg</i> 111 Wn.App. 258, 270-71, 44 P.3d 878 (Div. I, 2002).....	15

<i>Kennedy v. Clausing</i> 74 Wn.2d 483, 492, 445 P.2d 637 (1968).....	15
<i>Newman v Highland School Dist. No. 203</i> 186 Wn.2d 769, 776-80, 381 P.3d 1188 (2016). ....	16
<i>Chism Tri-State Constr., Inc.</i> 193 Wn. App. 818, 374 P.3d 193 (Div. I, 2016).....	16, 17, 19
<i>Corey v Pierce Co.,</i> 154 Wn.App. 752, 225 P.3d 367 (Div. I, 2009).....	18, 19, 24
<i>Wilson v. City of Monroe</i> 88 Wn.App. 113, 115-16, 943 P.2d 1134 (Div. I, 1997).....	19
<i>Smith v. Bates Tech. College</i> 139 Wn.2d 793, 807, 991 P.2d 1135 (2000).....	19
<i>Rickman v. Premera Blue Cross</i> 184 Wn.2d 300, 313, 358 p.3d 1153 (2015).....	20
<i>Weiss v Lonquist,</i> 173 Wn.App. 344, 359-60, 293 P.3d 1264 (2013).....	20
<i>Becker v. Cmty. Health Sys., Inc.,</i> 182 Wn.App. 935, 332 P.3d 1085 (2014).....	20
<i>Wise v. City of Chelan</i> 133 Wn.App. 167, 135 P.3d 951 (Div. III, 2006).....	20
<i>Muhl v. Davies Pearson, P.C.,</i> 2015 Wash. App. LEXIS 2522, 14-28 (Div. II, 2015).....	20
<i>Burkhart v Semitool, Inc.,</i> 300 Mont. 480, 5 P.3d 1031, 1039 (2000).....	21

<i>Fox Searchlight Pictures, Inc. v. Paladino</i> , 89 Cal.App.4th 294, 314-15, 106 Cal.Rptr.2d 906 (2001).....	21
<i>Crews v. Buckman Labs. Int’l, Inc.</i> , 78 S.W.3d 853, 860-64 (2002).....	21
<i>Heckman v. Zurich Holding Co. of Am.</i> , 242 F.R.D. 606, 610 (D.Kan. 2007). ....	21
<i>Herbster v. N. Am. Co. for Life &amp; Health Ins.</i> , 150 Ill.App.3d. 21, 26-29, 501 N.E.2d 343 (1986).....	22
<i>Balla v. Gambro, Inc.</i> , 145 Ill.2d 492, 502-05, 584 N.E.2d 104 (1991).....	22, 23
<i>Jacobson v. Knepper &amp; Moga, P.C.</i> , 185 Ill.2d 372, 376-78, 706 N.E.2d 491 (1998).....	24
<i>Van Asdale v. Int’l Game Tech.</i> , 577 F.3d 989, 994-96 (9th Cir. 2009).....	23
<i>Arnold v. City of Seattle</i> , 185 Wn.2d 510, 520-21, 374 P.3d 111 (2016).....	26
<b>Statutes and Rules</b>	
42.41.010.....	26
49.60.020.....	20
49.48.030.....	20
49.60.020.....	24
GR 14.1.....	20
CR 12(b)(6) .....	<i>passim</i>
RPC 1.6.....	23

RPC1.8.....	2
RPC 1.16.....	<i>passim</i>
RAP 18.1.....	26

## I. INTRODUCTION

This case presents a question of whether an employer-client can avoid the contractual commitments and statutory protections owed to its employee-attorney. While a generic attorney-client relationship is terminable upon a client's expression to sever the relationship, this general rule fails to resolve the layered legal inquiry that is necessary within this employment case. Because Appellant King County Corrections Guild (hereinafter "Guild") focuses solely on the attorney-client relationship that existed between itself and Mr. Karstetter, it also strategically ignores the controlling nuance that is implicated by the dual relationship of employer-employee. Considering the rich legal history in Washington that protects persons in the workplace, this Court should affirm the trial court and permit Mr. Karstetter's nascent employment-based claims to proceed.

After decades into Mr. Karstetter's career of serving and representing the interests of corrections offers, the Guild unexpectedly terminated his employment. The employer initiated this adverse action after more than four years into a then-existing five-year employment contract. The Guild had employed Mr. Karstetter for many years pursuant to a series of employment agreements that honored the parties' long-term employment relationship, the benefit to the Guild of employing Mr. Karstetter at below-market rates and provided Mr. Karstetter with reassurance of job security on terms similar to those enjoyed by the Guild's membership. Mr. Karstetter and his wife, Julie, then brought employment and contract claims following his sudden termination.

The Guild now seeks review of Judge Oishi's refusal to grant dismissal of the breach of contract and wrongful discharge claims based on the pleadings alone. Even though it had thoughtfully negotiated and voluntarily consented to a series of employment contracts with Mr. Karstetter, the employer now attempts to assert that public policy considerations amount to an absolute defense and prohibition of these claims. On this assertion, the Guild is wrong because no source of Washington law permits an employer to retaliate and breach a contract without recourse.

**II. STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR**

1. Whether the trial court should be given the opportunity to first examine the factual circumstances and evidence of repeated negotiations and voluntary consent to a series of employment contracts between Mr. Karstetter and the Guild.

2. Whether Mr. Karstetter's employment contract with the Guild is, as a matter of law, inherently unfair to the Guild, voidable for lack of informed consent by the Guild, or is otherwise subject to unilateral avoidance by the Guild upon termination of its attorney. RPC 1.8, 1.16.

3. Whether persons licensed to practice law in Washington are, as a class, wholly exempted from the protections and remedies typically afforded to other employees under Washington law.

4. Whether persons licensed to practice law in Washington may enjoy the benefits of an employment contract with an employer-client.

### III. KARSTETTER'S RESTATEMENT OF THE CASE

To understand Mr. Karstetter's claims,<sup>1</sup> one needs to start from the beginning. His dedication and service on behalf of the King County Corrections Officers began 1975 when he first served as a corrections officer.<sup>2</sup> At the time of working in this corrections position, Mr. Karstetter was a member of SEIU Local 519, Public Safety Employees, which is essentially a predecessor entity of the Guild. He then worked for Local 519 in the position of Business Representative between 1984 and 1987.<sup>3</sup>

After graduating from law school and passing the Bar in Washington, Mr. Karstetter remained employed with Local 519 in the position of Legal Advisor, which included the job functions of both the Business Representative and the union's in-house legal representative for non-litigation matters. Throughout his employment with Local 519, Mr. Karstetter received a Continuing Employment Contract, which contains terms like those found in the subsequent employment contracts signed by

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<sup>1</sup> Mrs. Karstetter's claims are dependent on the success of her husband's claims and, therefore, not before the Court in this appeal.

<sup>2</sup> Appx. at 2 (the Declaration of Jared Karstetter in Support of Answer to Motion for Discretionary Review is previously on file herein, but is filed with this brief in the form of an Appendix for ease of reference).

<sup>3</sup> *Id.*

the Guild.<sup>4</sup> Specifically, Mr. Karstetter received the benefit of a just cause standard and an expectation of continuing employment.<sup>5</sup>

Local 519 later discovered it had incurred a financial liability with SEIU and Mr. Karstetter due to a failure to contribute toward his retirement. The employer and employee then worked cooperatively to preserve their relationship and resolve the liability identified by SEIU.<sup>6</sup> The resolution of this internal administration issue first necessitated that Local 519 provide Mr. Karstetter with counsel and, second, that he create of The Law Firm of Jared C. Karstetter, Jr., P.S., in order to encourage an appearance of Mr. Karstetter working as a non-employee contracted counsel.<sup>7</sup> Despite the creation of this business entity, Local 519 and its attorney-employee did not intend to alter the fundamental and long-term nature of their employment relationship.<sup>8</sup> Mr. Karstetter, in fact, did not experience any appreciable change in his employment and Local 519 continued to provide him with reassurances of job security.<sup>9</sup>

A decertification movement occurred within Local 519 and, following a brief break in employment, Mr. Karstetter began working for the newly-birtherd Guild that the corrections officers founded after separating their bargaining interests from those of the police officers.<sup>10</sup>

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<sup>4</sup> *Id.* at 2-3; Appx. at 9, 15-17 (the Declaration of Henry H. Cannon is included in the Appendix for ease of reference).

<sup>5</sup> Declaration of Rick Hubl (CP 137-46).

<sup>6</sup> Appx. at 3-4, 9-10.

<sup>7</sup> Appx. at 10-11.

<sup>8</sup> Appx. at 3-4, 26, 30-31.

<sup>9</sup> Appx. at 3, 9-10.

<sup>10</sup> Appx. at 3-4, 26.

Similar to his position with Local 519, Mr. Karstetter worked in the position of Legal Advisor, which consists of a hodgepodge of labor relations work, both legal and administrative.<sup>11</sup> During his tenure, Mr. Karstetter frequently served as the ‘public face’ of the Guild on routine and formal matters alike. In this capacity, the former Director of the Department of Adult and Juvenile Detention recognized Mr. Karstetter’s status as employment-like and acting in an official capacity on behalf of the Guild.<sup>12</sup> When necessary, the Legal Advisor and the Guild would agree to retain the services of outside counsel for litigation or external disciplinary proceedings.<sup>13</sup>

The similarity of Mr. Karstetter’s employment positions is important, as he enjoyed the benefit of employment contracts with the Guild over a period of 20 years. The employment agreements between the Guild and Mr. Karstetter memorialized his historical service to the corrections community, the parties’ interest to continue their employment relationship, the benefit of the Guild to have unfettered access to Mr. Karstetter, the benefit of Mr. Karstetter’s services at below-market rate, his reporting relationship to the President and the Executive Board, a five-year term of employment and just cause protections.<sup>14</sup> His long-standing employment protections were clearly important to Mr. Karstetter, especially when considering the substantial nature of his Guild

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<sup>11</sup> Appx. at 4.

<sup>12</sup> Declaration of Claudia Balducci (CP 131-12).

<sup>13</sup> Appx. at 4.

<sup>14</sup> CP 11-16; Appx. at 4-5.

employment and the fact that any outside non-conflicting work could not begin to replace his employment with the Guild.<sup>15</sup>

The factors supporting the existence of the Guild's employment relationship with Mr. Karstetter are boundless. The Guild identified publicly Mr. Karstetter as its Legal Advisor on the staff section of its website and it did not attempt to differentiate him in any manner from the officers or other Guild members.<sup>16</sup> The Guild also provided its attorney-employee with business cards, a Guild email address, an iPad and name badges, in addition to issuing Mr. Karstetter secured identification that provided him access to facilities and parking structures that the general public cannot access.<sup>17</sup> On a somewhat informal basis, the Guild also provided compensation by handwritten check, with Mr. Karstetter identified individually as the payee.<sup>18</sup> Some of his compensation took the form of "retro pay," which was triggered when the Guild members were also to receive retroactive pay or other compensation adjustments pursuant to the labor agreement.<sup>19</sup> Such factors support the employer-employee status of the parties and dispel the myth that Mr. Karstetter performed duties through a separate entity as a wholly removed, outside counsel to the Guild.

More directly, the attorney representing the Guild in these proceedings admitted the factual reality of Mr. Karstetter's employment

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<sup>15</sup> Appx. at 4-6; 9-10.

<sup>16</sup> Appx. at 5.

<sup>17</sup> Appx. at 4-5, 34-35.

<sup>18</sup> Appx. at 36-37.

<sup>19</sup> *Id.*

status during a separate hearing on November 2, 2016. When appearing before the Public Disclosure Commission, Mr. Iglitzin identified Mr. Karstetter as “**the sole employee of the Guild.**”<sup>20</sup> Except for purposes of verifying the employer-employee relationship in this case, references to other external matters involving these parties is specious, as those matters do not control the legal analysis herein.<sup>21</sup> The still unproven allegations of lawyer misconduct require a different legal inquiry in a separate tribunal.<sup>22</sup> Even if relevant to an analysis of Mr. Karstetter’s pre-termination performance as an employee, Mr. Iglitzin’s reprisals occurred months after the initiation of Mr. Karstetter’s lawsuit and, in the end, only subjected the Guild to additional liability.<sup>23</sup>

On April 27, 2016, the Guild summarily terminated Mr. Karstetter’s employment without warning, opportunity to confer with the Executive Board or any observation of just cause standards. It did so after more than four years into a five-year employment contract term.<sup>24</sup> Strangely, the Guild did not contest its voluntary assent to the employment

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<sup>20</sup> Appx. at 60, p. 23 ln. 16 (a certified and excerpted transcript of the Special Commission Meeting of the Public Disclosure Commission is included in the Appendix at 38-70).

<sup>21</sup> Appellant’s Amended Opening Brief at p. 8, fn.3 (referencing the WSBA grievance and the 45-Day Citizen Action Letter to the Public Disclosure Commission, each filed by Mr. Iglitzin on behalf of the Guild).

<sup>22</sup> It is significant that, when complaining to the WSBA, the Guild did not attempt to assert that Mr. Karstetter had coerced the Guild into signing a series of employment contracts, nor does it assert that he engaged in ethical misconduct by negotiating an employment contract.

<sup>23</sup> Appx. at 85 (a true and correct copy of the PDC Compliance Officer’s report is included in the Appendix at 71-85; includes staff recommendations for reference of two violations committed by the Guild to the Attorney General for possible prosecution).

<sup>24</sup> CP 1-16.

contract in any of the prior four years, nor had it questioned the employment of Mr. Karstetter during any of the 15 years before the most recent contract. To justify this revelatory approach of contractual avoidance, the Guild relies on alleged ethical violations by Mr. Karstetter and the advice given to it by the Public Safety Labor Group (hereinafter “Legal Defendants”).<sup>25</sup> The soundness of the legal advice is dubious when considering the advising counsel’s inability to practice law in Washington and the lack of any appreciable investigation or interview involving Mr. Karstetter.<sup>26</sup> By offering their opinions and encouraging the ouster of Mr. Karstetter, the Legal Defendants also earned the Guild’s business as its new counsel.<sup>27</sup> The Karstetters then filed suit against the Guild, individual Guild officers/members and the Legal Defendants.<sup>28</sup>

The parties have engaged in a substantial amount of early motions practice, but little or no discovery to date. The motions practice required Mr. Karstetter to submit a number of declarations and responses.<sup>29</sup> Counsel for Mr. Karstetter also issued written discovery requests for information that is typically sought in employment cases.<sup>30</sup> The Guild filed a motion to dismiss, pursuant to CR 12(b)(6), based on an assertion that the parties’ attorney-client relationship renders Mr. Karstetter’s claims

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<sup>25</sup> Appellant’s Amended Opening Brief at 3-4; CP 98-105.

<sup>26</sup> Declaration of Judith A. Lonquist (CP 128-30).

<sup>27</sup> The claims against the Legal Defendants, including tortious interference, are not before this Court on appeal.

<sup>28</sup> CP 1-16.

<sup>29</sup> CP 128-52.

<sup>30</sup> Appellant’s Amended Opening Brief at 6-7.

barred by law.<sup>31</sup> After significant briefing and oral argument, the trial court granted dismissal of some claims, but permitted Mr. Karstetter to proceed on claims of breach of contract and wrongful termination.<sup>32</sup> The Guild then sought interlocutory review of this matter.

#### IV. ARGUMENT

##### 1. Standard of review.

An inquiry as to whether certain alleged facts establish an RPC violation is a question of law that is subject to *de novo* review. *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 49, 72-73, 331 P.3d 1147 (2013). Such analyses are typically fact intensive, thus requiring all reasonable inferences and disputed facts to be interpreted in Mr. Karstetter's favor. *LK Operating*, 181 Wn.2d at 72.

The appellate review of a 12(b)(6) motion will consider whether *any plausible set of facts* that would support the valid claims can be conceived. *Halvorson v. Dahl*, 89 Wn.2d 673, 674-75, 574 P.2d 1190 (1978). Dismissal of an action for failure to state a claim pursuant to CR 12(b)(6) is appropriate only if "it appears beyond doubt that the plaintiff can prove *no set of facts*, consistent with the complaint, which would entitle the plaintiff to relief." *Haberman v. Wash. Pub. Power*, 109 Wn.2d 107, 120, 744 P.2d 1032 (1987) (*quoting Bowman v. John Doe*, 104 Wn.2d 181, 183, 704 P.2d 140 (1985) (*emphasis supplied*); *Orwick v.*

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<sup>31</sup> CP 17-30.

<sup>32</sup> CP 39-40.

*Seattle*, 103 Wn.2d 249, 254, 692 P.2d 793 (1984)). This Court is entitled to consider hypothetical situations that are not part of the formal record and may even be raised for the first time on appeal. *Halvorson*, 89 Wn.2d at 675. Any conceivable hypothetical will defeat motion to dismiss on the pleadings if the scenario is sufficient to support the claims at issue. *Id.* at 674.

Mr. Karstetter pled properly claims that are legally sufficient and suitable for trial on the merits. There is no error in the trial court's denial of the Guild's 12(b)(6) motion and this matter should be remanded for further proceedings.

2. Washington law simply does not constrain any person, even an attorney-employee, from working pursuant to an enforceable employment agreement and, therefore, the trial court did not err.

The Guild relies predominately upon RPC 1.16<sup>33</sup> for its assertion that *any* employment agreement with an attorney-employee is subject to unilateral avoidance based on an at-will privilege held exclusively by a client-employer.<sup>34</sup> The Guild's position is inherently flawed for several reasons. First, RPC 1.16 is an ethics rule of general applicability that is designed to protect clients, possibly vulnerable or less sophisticated, from being bound in contract during a legal controversy that is often sensitive, highly personal and filled with emotion for the layperson client. Second, the Guild ignores purposely the legal and factual differences between an

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<sup>33</sup> "A client has the right to discharge a lawyer at any time, with or without cause . . ." RPC 1.16(a)(3), comment 4.

<sup>34</sup> Appellant's Amended Opening Brief at 10-13.

enforceable employment contract and a fee agreement involving an attorney-client relationship.<sup>35</sup> And third, there is an utter absence of Washington authority to support the Guild's interpretation of RPC 1.16 as applied to an employer-employee relationship.

Instead of relying on case law that interprets the application of RPC 1.16 to permit a unilateral termination of an employment contract without risk of liability, the Guild references other cases that cite ethics rules and attempts to apply those decisions by analogy.<sup>36</sup> These cases are not authoritative in the employment law context, nor are they sufficiently analogous. In *LK Operating*, the Washington Supreme Court analyzed former RPC 1.8(a) and whether the terms of a joint venture proposal between an attorney and client were unfair to the client's interests, or if there lacked an appreciable disclosure of terms to the client. *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 49, 89, 331 P.3d 1147 (2013). When considering whether a contract is unenforceable because it violates public policy, this Court must decide whether the contract itself is injurious to the public. *LK Operating*, 181 Wn.2d at 87. Clearly, a contract of employment – *even one that involves an attorney-employee* – is neither prohibited, nor does it violate the public good. Even when a RPC violation is asserted as a defense to a contract claim, there is no rule that declares such contracts as automatically unenforceable. *Id.* at 87-88. Referring to its reluctance to establish a strict rule, the Washington

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

Supreme Court stated that the following:

“Such a holding would shift the guiding inquiry from whether the *contract* is injurious to the public to whether the *RPC violation* is injurious to the public — the former is relevant when determining whether a contract is unenforceable because it violates public policy, while the latter is relevant in attorney disciplinary proceedings. It would also ignore the clear admonishment that “the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.””

*Id.* (citing Model Rules, Scope at ¶ 20) (*italics and internal quotes in the original*).

The admonishment above is particularly relevant herein, as the trial court may later wish to evaluate whether the employer simply invoked RPC 1.16 to manipulate a defense and establish a plausible excuse for terminating the employee after four years into a five-year term.<sup>37</sup> Even assuming *arguendo* that Mr. Karstetter’s employment agreement violated RPC 1.16, the trial court would need to conduct a separate factual inquiry outside the context of the Guild’s 12(b)(6) motion.<sup>38</sup> Like the inquiry in *LK Operating*, there will be relevant facts, documents and witness perspectives that are more appropriate for consideration by the trial court in the context of a CR 56 summary judgment motion. *LK Operating*, 181 Wn.2d at 73 (e.g., *What was the contractual intent of the Guild officers when contracting with its attorney-employee and repeatedly extending his contracts?*). An attorney’s compliance or non-compliance with ethical

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<sup>37</sup> CP 1-16.

<sup>38</sup> CP 17-30.

rules is likely a factual inquiry that cannot be resolved easily on summary judgment, let alone a 12(b)(6) motion to dismiss. *See e.g., Simburg, Ketter, Sheppard & Purdy, LLP v. Olshan*, 109 Wn.App. 436, 445-46, 988 P.2d 467 (Div. I, 1999).

For the same reasons, the other decisions relied upon by the Guild are equally inapplicable to the facts of Mr. Karstetter's employment. *See generally Belli v. Shaw*, 98 Wn.2d 569, 657 P.2d 315 (1982); *see also Valley/50th Ave. LLC v. Stewart*, 159 Wn.2d 736, 153 P.3d 186 (2007). In *Belli*, the Washington Supreme Court considered whether the execution of a second fee agreement amounted to a termination an attorney identified in the first fee agreement. The case also involved an ethical analysis of a fee splitting agreement, but this decision does not discuss the enforcement of an employment contract, as is relevant to the analysis herein. *Belli*, 98 Wn.2d at 577-78. In *Valley/50th Ave.*, the Washington Supreme Court considered the ethical implications of enforcing a deed of trust between and attorney and client. It determined that a violation of RPC 1.8 might render the deed of trust void or voidable, but there remained material issues of genuine fact as to whether the law firm fully abided by its ethical duties. *Valley/50th Ave.*, 159 Wn.2d at 743-47. Again, this decision offers nothing when considering the dual status of a client-employer union organization and its attorney-employee who seeks to enforce an enforceable employment contract.

It is undisputed that a client may terminate a traditional attorney-client relationship for a variety of reasons, or no reason at all. *Fetty v.*

*Wenger*, 110 Wn.App. 598, 600, fn. 4, 36 P.3d 1123 (2001); *Kimball v. Public Util. Dist. 1*, 64 Wn.2d 252, 257, 391 P.2d 205 (1964). Mr. Karstetter's employment contract requires a different analysis, however. His situation is layered with an employer-employee relationship and is fundamentally different from a claim to enforce a fee agreement for representing an heir in an estate action, or to seek the reasonable value of services as outside counsel on a dam project. *Fetty*, 110 Wn.2d at 599-600; *Kimball*, 64 Wn.2d at 253-56. The fact that a client retains the right to sever an attorney-client relationship simply does not equate to a conclusion that an employer possesses an unfettered legal privilege under Washington law to void an employment contract. If such were the case, the retention of employees and the validity of their employment contracts would be in jeopardy.

Finally, the Guild argues that just cause protections are inconsistent with the norms of an attorney-client relationship.<sup>39</sup> Indeed, it is inconsistent for a fee agreement, but is not uncommon in employment contracts. Mr. Karstetter's interest to enforce his just cause standard for termination is based on his relationship to the Guild as its attorney-employee. Although just cause language is inconsistent with a typical attorney-client relationship, the California Supreme Court found no reason to prohibit an attorney-employee from pursuing contract-based claims, especially when any other type of employee is able to enforce the same

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<sup>39</sup> Appellant's Amended Opening Brief at 19-20.

contractual provision. *General Dynamics Corp., v. Superior Court*, 7 Cal.4th 1164, 876 P.2d 487, 490 (1994). The *General Dynamics* decision further emphasized that “contract and tort claims in wrongful termination cases are analytically distinct from the circumstances” involved with contingent fee agreements. *General Dynamics*, 876 P.2d at 493-94. To hold otherwise will “*compel us to embrace an intuitively unjust, even outrageous, result*” based upon other precedents that are expressly limited to clients with contingent fee agreements. *Id.* (emphasis supplied).

3. Washington law permits attorney-employees to negotiate compensation and to enter into employment agreements with their client-employers and, therefore, the trial court did not err.

It is undebatable that the act of negotiating an unfair contract or taking an unreasonable fee can result in a client’s avoidance of a contract and disgorgement of fees. This Court found that counsel’s disqualification prior to trial, combined with his breach of fiduciary duties and the taking an unreasonable fee by accepting a transfer of the client’s property, violated ethics rules and rendered the fee arrangement unenforceable. *Cotton v. Kronenberg*, 111 Wn.App. 258, 270-71, 44 P.3d 878 (Div. I, 2002). Such circumstances are totally incongruent with Mr. Karstetter’s employment contract and experience with the Guild; it is implausible to argue that his employment agreements, negotiated with an elected Executive Board, were unethical or unfair to his client-employer. Where the facts demonstrate fairness, proper disclosure of terms and voluntary assent to a contract, the possibility of undue influence and coercion by

counsel are negated. *Kennedy v. Clausing*, 74 Wn.2d 483, 492, 445 P.2d 637 (1968).

Considering the unique circumstances of employment as an in-house counsel (*i.e.* simultaneous status as legal counselor and employee), the very limited number of Washington cases on this subject is not unsurprising. The Washington Supreme Court only recently decided, in a case of first impression, that discussions between corporate counsel and former employee witnesses are not entitled to the protection of privilege. It is the employment relationship that is *essential to the legal analysis* and former employees are fundamentally different from those persons that are currently employed. *See Newman v. Highland School Dist. No. 203*, 186 Wn.2d 769, 776-80, 381 P.3d 1188 (2016). Here too, Mr. Karstetter's employment relationship with the Guild is fundamental to the analysis of this case.

In the *Chism* decision, this Court considered the interplay between the Rules of Professional Conduct and the breach of contract claims brought by an attorney-employee of a construction company. *See generally Chism v. Tri-State Constr., Inc.*, 193 Wn. App. 818, 374 P.3d 193 (Div. I, 2016). When considering the application of RPC 1.5 and 1.7, there existed a lack of clear guidance on the issue of attorney-employee wage contracts, and inferring a conclusion from this lack of clear guidance can lead to absurd results. For example, a finding that an ethical conflict exists inherently between an attorney-employee and client-employer when negotiating compensation, "would cast doubt on the wage negotiations of

scores of Washington attorneys – not only in-house corporate counsel like Chism, but also government attorneys and numerous nonprofits attorneys.” See *Chism*, 193 Wn. App. at 848. Advocating for a result that will garner short-term results, the Guild readily disregards this warning.

When evaluating RPC 1.8, this Court reached a conclusion to avoid disastrous long-term consequences. Because there is a fundamental difference between an employment contract and a fee agreement, there is a risk of applying RPC 1.8 to the disruption of a variety of employment arrangements. A broad interpretation would render each compensation agreement of an attorney-employee as *prima facie* fraudulent, thus “disturbing the settled expectations of many lawyer-employees.” See *Chism*, 193 Wn. App. at 852. Notably, Mr. Chism also relied on a WSBA advisory opinion stating that RPC 1.8 does not apply to the negotiation of an employment contract as in-house legal counsel.<sup>40</sup> *Id.* at 853. Likewise, Mr. Karstetter’s employment agreement with the Guild does not violate RPC 1.8, and should not be applicable to RPC 1.16 because an employment agreement is fundamentally different from a fee agreement and does not violate public policy.

The Guild’s preferred interpretation of RPC 1.16 would yield untenable and absurd results like those contemplated and rejected in

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<sup>40</sup> Appx. 89 (a true and correct copy of the WSBA Rules of Pro’l Conduct Comm., Advisory Op. 1045 (1986) is included in the Appendix for ease of reference.) Respondent’s counsel could not locate any relevant advisory opinions on RPC 1.16. Advisory Op. 2219 (2012) addresses the responsibilities of in-house counsel regarding supervision of others, but does not provide any meaningful guidance on the issues contested herein.

*Chism. Id.* at 852. For example, a client-employer may simply preempt any potential liability on statutory or contractual claims by specifying a decision to terminate the attorney-client portion of their relationship and, therefore, enable the employer to disregard its legal responsibilities. Notably, the Guild cannot point to any Washington authority to suggest that an employer may sever unilaterally a contracted employment relationship, even if it does possess the right to terminate the co-existing attorney-client relationship. Assuming that RPC 1.16 applies to an employment relationship with an attorney-employee, which it should not, the Court should recognize that the Guild still had options to avoid a breach of the employment agreement; it could have placed Mr. Karstetter on administrative leave through the end of his contract, provided him the opportunity to meet and respond to the concerns of the Executive Board, or limited his work responsibilities to non-legal, non-representational tasks.

The *Corey* decision is equally instructive here. *See Corey v. Pierce Co.*, 154 Wn.App. 752, 225 P.3d 367 (Div. I, 2009). Ms. Corey faced the decision to accept a promotion, but lose her job security as a consequence of this advancement. Before she accepted the position as the third-highest ranking deputy prosecutor for her employer-client, Pierce County, Ms. Corey secured an agreement for just cause protections applicable to her position. *Corey*, 154 Wn.App. at 757. At issue in this case is a similar just cause contractual provision, upon which Mr.

Karstetter has relied.<sup>41</sup> Although the *Corey* court found a lack of consideration for an express or implied contract to provide due process, it allowed her to pursue a promissory estoppel claim using the same evidence. *Corey*, 154 Wn.App. at 768. Similar to the facts in *Corey*, Mr. Karstetter received a clear and definite promise of employment security and just cause protections.<sup>42</sup> *Id.* at 768-70.

The *Chism* and *Corey* decisions are both Division I cases that permit attorney-employee actions against their client-employers. As such, the trial court did not err and Mr. Karstetter should be permitted to prosecute his claims.

4. Washington courts have permitted on repeated occasions attorney-employees to bring wrongful discharge actions and, therefore, the trial court did not err.

The law of wrongful discharge in Washington provides a comprehensive remedy and there exist no exceptions to attorney-employees bringing such actions. Despite the Guild's bold assertions that attorney-employees are somehow "exempt" from bringing wrongful termination actions, no Washington court has issued such a decision. The tort of wrongful discharge is available to both at-will employees and those under contract, because it "embodies a strong state interest in protecting against violations of public policy." *Wilson v. City of Monroe*, 88 Wn.App. 113, 115-16, 943 P.2d 1134 (Div. I, 1997); accord: *Smith v. Bates Tech. College*, 139 Wn.2d 793, 807, 991 P.2d 1135 (2000). In Mr.

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<sup>41</sup> CP 1-16.

<sup>42</sup> *Id.*

Karstetter's case, there exist public policy implications because he asked his employer with assistance to fend off complaints from several Guild members, responded professionally and under compulsion to an Ombudsperson during an investigation of a public agency, and he participated in a King County whistleblower case. While there are various sources of public policy, whistleblower protection and non-retaliation are chief among them. *See e.g.*, RCW 42.41.010; 49.60.210. Mr. Karstetter need only assert that his actions were reasonable and taken in furtherance of the public policy. *Rickman v. Premera Blue Cross*, 184 Wn.2d 300, 313, 358 p.3d 1153 (2015).

Washington courts have permitted attorney-employees to bring wrongful discharge claims in a number of cases. *See Weiss v. Lonnquist*, 173 Wn.App. 344, 359-60, 293 P.3d 1264 (2013) (wrongful termination trial verdict overturned on appeal), *review denied*, 178 Wn.2d 1025, 312 P.3d 652 (2013), *abrogated by Becker v. Cmty. Health Sys., Inc.*, 182 Wn.App. 935, 332 P.3d 1085 (2014); *see also Wise v. City of Chelan*, 133 Wn.App. 167, 135 P.3d 951 (Div. III, 2006) (municipal judge bringing breach of contract action following position elimination). In *Muhl*, the reviewing court found more than enough disputed facts to warrant reversal of summary judgment on the attorney's wrongful termination and retaliation claims. *Muhl v. Davies Pearson, P.C.*, 2015 Wash. App. LEXIS 2522, 14-28 (Div. II, 2015).<sup>43</sup>

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<sup>43</sup> The *Muhl* case is cited pursuant to GR 14.1(a) as nonbinding authority that this Court may consider for its relevant persuasive value.

Still other cases offer insight when attorney-employees bring claims to enforce contracts or for wrongful termination. The Montana Supreme Court denied the notion that a client may discharge its attorney with absolute impunity and without considering the nature of the attorney-client relationship. *Burkhart v. Semitool, Inc.*, 300 Mont. 480, 5 P.3d 1031, 1039 (2000). It rejected the “universal rule” (giving the client the right to terminate her attorney) in the context of an attorney-employee relationship because special statutory protections are extended to an employee and are not otherwise enjoyed by independent contractors. *Id.* The Tennessee Supreme Court also recognized that in-house attorneys are typically dependent on their employer-client for their livelihood; to deny this reality fails to “present an accurate picture of modern in-house practice.” *Crews v. Buckman Labs. Int’l, Inc.*, 78 S.W.3d 853, 860-64 (2002). An employee-lawyer should not be cheated out of his wrongful discharge action simply because it involves his client-employer. *Fox Searchlight Pictures, Inc. v. Paladino*, 89 Cal.App.4th 294, 314-15, 106 Cal.Rptr.2d 906 (2001); *see also* RPC 1.6(b)(5) (resolving the issue concerning the use of attorney-client privilege in a claim by a lawyer against a client). Recognizing that a second relationship of employer-employee co-habits with that of attorney-client in an in-house counsel role, another court found that the Kansan equivalent of RPC 1.16 does not give a client a cloak of immunity and permitted a wrongful discharge claim brought by the attorney-employee. *Heckman v. Zurich Holding Co. of Am.*, 242 F.R.D. 606, 610 (D.Kan. 2007).

5. The Guild relies errantly on non-binding authority to suggest a public policy override that requires dismissal of Mr. Karstetter's claims.

As justification for its position on appeal, the Guild relies on non-authoritative decisions from Illinois that prohibit actions brought by persons identified as attorney-employees. See Appellant's Amended Opening Brief at pp. 17-18. In *Herbster*, an Illinois appellate court barred an attorney-employee's retaliation action, even where the employee opposed an order to destroy discoverable documents and a violation of his ethical obligations if he followed the order. *Herbster v. N. Am. Co. for Life & Health Ins.*, 150 Ill.App.3d. 21, 26-29, 501 N.E.2d 343 (1986). In the *Balla* decision, the Illinois Supreme Court held that in-house attorneys are unable to bring claims for wrongful termination or retaliatory discharge, largely due to sanctity of the attorney-client relationship and the need to protect the privileged information that one obtains in the course of performing duties as in-house counsel. *Balla v. Gambro, Inc.*, 145 Ill.2d 492, 502-05, 584 N.E.2d 104 (1991). The court prohibited Mr. Balla's claim despite evidence that his employer's alleged sale of misbranded or adulterated dialyzers posed a risk to public safety. *Balla*, 145 Ill.2d at 501-502.

Several years later, the Illinois Supreme Court reaffirmed its narrow construction of retaliatory discharge claims and the prohibition against attorney-employees obtaining relief under this tort. Even where an attorney is employed by a law firm and raises concerns about the firm's debt collections work, an employee-attorney is denied any remedy for his

subsequent discharge. *Jacobson v. Knepper & Moga, P.C.*, 185 Ill.2d 372, 376-78, 706 N.E.2d 491 (1998). Chief Justice Freeman noted his long-standing concern by stating the following in dissent:

“[M]y colleagues today now extend the *Balla* holding to law firms and their employee attorneys. Thus, ***one class of employees in this state, attorneys, has been stripped of a remedy*** which Illinois clearly affords to all other employees in such “whistle-blowing” situations. Today’s opinion serves as yet another reminder to the attorneys in this state that, in certain circumstances, it is economically more advantageous to keep quiet than to follow the dictates of the Rules of Professional Responsibility.”

*Jacobson*, 185 Ill.2d at 379 (*dissenting opinion, emphasis supplied*).

This dissent is more closely aligned with liberal construction of Washington employment law, as the *Balla* decision has been widely rejected in other courts and never adopted by any court of Washington.

The 9th Circuit specifically considered and rejected the *Balla* decision. See *Van Asdale v. Int’l Game Tech.*, 577 F.3d 989, 994-96 (9th Cir. 2009). When reviewing the claims of the Van Asdales, husband and wife that worked as in-house counsel in the same company, the court found the issue of attorney-client privilege as an insufficient basis to bar their claims, and found that in-house counsel were not exempted from protections against retaliation. *Id.* at 995-96.

For several reasons, the Guild’s reliance on Illinois law is both misguided and conflicts directly with the established employment law jurisprudence in Washington. First, the ethics rules in Washington permit an attorney to bring a lawsuit against a former client, even when that

former client is also an employer. RPC 1.6(b)(5) (ethics rule that governs the potential use of attorney-client privileged materials in a claim by a lawyer against a former client). Second, Washington employment law is to be construed liberally for the purpose of vindicating the rights of employees where appropriate. *See e.g.*, RCW 49.60.020. Third, the Guild is unable to point to any authority that carves out a classification of “attorneys” as being exempt from the workplace remedies available under Washington law.

6. The trial court must be afforded the opportunity to evaluate the material facts and consider in equity whether the Guild may avoid Mr. Karstetter’s claims.

It is undisputed that, after a series of employment agreements and an inducement of Mr. Karstetter’s reliance on the same, the Guild terminated the contract in the fifth year of the most recent contract.<sup>44</sup> If the Guild believes the contract to violate public policy or ethics rules, it waited an awfully long time to assert its position. Considering the significant delay to suggest that multiple voluntary agreements are void as a matter of public policy, the trial court must necessarily confront the doctrines of waiver, laches, unclean hands, promissory estoppel or equitable estoppel. As discussed *supra*, promissory estoppel is a viable equitable remedy for an attorney-employee. *Corey*, 876 P.2d at 493-94.

The doctrine of equitable estoppel will deny a late assertion of a right when, by reason of the delay, the Guild placed Mr. Karstetter in an

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<sup>44</sup> CP 11-13; Appx. 5-6.

untenable position and is injured as a result. *Young v. Jones*, 72 Wash. 277, 130 P. 90 (1913). Also, the Guild's untimely assertions might be so harmful that equity will operate as an estoppel against this desperate maneuver to repudiate the employment agreements it had entered into with Mr. Karstetter. *Amende v. Pierce County*, 70 Wn.2d 391, 398, 423 P.3d 634 (1967) (examining the doctrine of laches/equitable estoppel).

This case involves a fact-laden history and requires an in-depth examination by the trier of fact. When considering Mr. Karstetter's claims for wrongful termination and breach of contract, the trial court should also be afforded the opportunity to consider whether any equitable doctrines apply to these facts. Because returning this case to the trial court will promote justice and permit consideration of equity, this Court should affirm and remand.

**V. KARSTETTER REQUESTS AN AWARD OF REASONABLE ATTORNEY FEES AND COSTS FOR SUCCESSFULLY OPPOSING THE GUILD'S APPEAL**

Instead of litigating the disputed issues of material fact pertaining to Mr. Karstetter's claims in the court below, the Guild delayed, obstructed and maneuvered with its pursuit of this interlocutory foray. It did so with little, if any, meaningful discovery of the underlying factual history of Mr. Karstetter's employment, which influences much of the analysis herein. Even if this appeal satisfies the intellectual itch pertaining to Mr. Karstetter's unique status as an attorney-employee for the Guild, it brings him no closer to the resolution of his claims in the trial court. For this reason, Mr. Karstetter respectfully requests an assessment of his

attorney fees and costs should he oppose successfully this appeal. RAP 18.1.

An award of attorney fees and costs is available to a successful party on appeal when the law governing the claims at issue will typically permit the party to receive such recovery at the trial court level. RAP 18.1(a). Pursuant to statute, an employer is obligated to pay the attorney fees and costs in any action where an employee is able to recover wages or salary owed. RCW 49.48.030. In a recent case considered by Division I, the court identified the strong remedial underpinnings of this wage recovery statute, a decision of which the Washington Supreme Court later affirmed. *Arnold v. City of Seattle*, 185 Wn.2d 510, 520-21, 374 P.3d 111 (2016). Because Mr. Karstetter is entitled to recover his fees and costs a statutory claim that provides for recovery of salary owed under his employment contract, this Court should likewise permit him to recover his fees for this appeal. RAP 18.1(a); RCW 49.48.030.

## VI. CONCLUSION

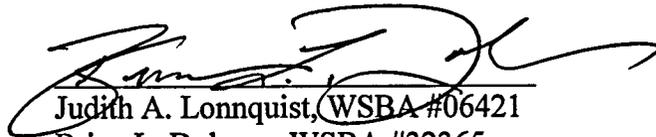
Based on the foregoing, the Guild cannot rely on any direct authority to support its assertion that RPC 1.16 should be given a widespread interpretation and application to the employment of an attorney-employee. Contracts that regulate the employment of attorney-employees neither violate RPC 1.8, nor are they harmful to the public. Further, because Division I issued rulings in other cases that permit attorney-employees to prosecute claims for breach of contract and

wrongful termination, Mr. Karstetter should be granted a similar opportunity to conduct discovery and pursue his claims against the Guild.

Mr. Karstetter respectfully requests this Court reject the Guild's appeal, award him fees and costs, and remand this case for further proceedings consistent with the opinion of this Court.

RESPECTFULLY SUBMITTED this 26<sup>th</sup> day of April, 2017.

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**CERTIFICATE OF SERVICE**

I, Kathy Olivarez, an employee of the Law Offices of Judith A. Lonnquist, P.S., declare under penalty of perjury that on the date below, I caused to be served upon the below-listed parties, via the method of service listed below, a true and correct copy of the foregoing document.

Party	Method of Service
Dmitri Iglitzin Katelyn Sypher Schwerin Campbell Barnard Iglitzin & Lavitt LLP 18 W. Mercer Street, Suite 400 Seattle, WA 98119	<input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Regular Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail
Patrick N. Rothwell Davis Rothwell Earle & Xóchihua, PC 520 Pike Street, Suite 2500 Seattle, WA 98101	<input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Regular Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail

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Dated: April 26, 2017

  
Kathy Olivarez