7-2-2007

Reply in Support of Motion for Protective Order 07-2-02323-2-33

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

MATHEW & STEPHANIE MCCLEARY, on their own behalf and on behalf of KELSEY & CARTER MCCLEARY; ROBERT & PATTY VENEMA, on their own behalf and on behalf of HALIE & ROBBIE VENEMA; and NETWORK FOR EXCELLENCE IN WASHINGTON SCHOOLS ("**NEWS**"),

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

Honorable Paris K. Kallas

Hearing Date (without oral argument): July 3, 2007

No. 07-2-02323-2 SEA

REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

Original

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I. CUT-TO-THE-CHASE REPLY

When all is said and done, one simple fact remains. The State does not dispute that it already has the evidentiary documents it is requesting. It accordingly fails to establish any legitimate purpose for demanding those documents from the Petitioners. Petitioners' motion for a Rule 26 protective order should therefore be granted.

The State's opposition seeks "in the alternative" a ruling that would condition the protective order on (1) delaying the trial date for the amount of time Petitioners' May 4 summary judgment motion is pending and (2) conducting a Rule 16 conference after the Court's summary judgment rulings to address how this case should proceed in light of those rulings.

Petitioners do not object to the State's alternative request. The pending summary judgment motion's 1st and 2nd issues are pure questions of law, the resolution of which will establish the legal standard that governs this case (i.e., the legal meaning of the State's Constitutional duty under Article IX, §1). And the ruling requested on the summary judgment motion's 3rd and 4th legal issues would effectively end this trial court proceeding. Petitioners therefore agree that a Rule 16 conference after this Court rules on the four issues presented in the pending summary judgment motion would facilitate the efficient processing of this case. This "alternative" relief requested by the State is also consistent with the case law cited at 7:16-8:2 & n.7 of the protective order motion that holds the State's document demands should, at the very least, be stayed pending this Court's ruling on the pending summary judgment motion. This Reply accordingly attaches a Revised Proposed Order that adds the trial date delay and Rule 16 conference that the State's opposition requested in the alternative.

II. POINT-BY-POINT REPLY

1. The State's Ad Hominem Accusations About The Petitioners' Document Request Responses Are Neither True Nor Relevant.

The State's opposition refers to the Supplemental Responses previously submitted by the Petitioners, but does not provide a copy. The State's papers then make several incorrect

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statements and ad hominem accusations about those responses and their underlying discovery conferences that are neither true nor relevant to the three categories of documents at issue in the pending Rule 26 motion. The accompanying Reply Declaration In Support Of Protective Order attaches a copy of those previously submitted Supplemental Responses because they confirm the *incorrectness of the State's accusations.*

2. The State Has The Evidentiary Documents It Demands.

As the State's opposition papers repeatedly note – and the Petitioners' previously submitted Supplemental Responses repeatedly confirm – the only evidentiary documents currently possessed by the Petitioners that the State is demanding are the documents that Petitioners counsel obtained from the State itself. Since it is the State's own documents that are at issue here, there is no dispute that the State already has those documents. The State accordingly has no actual need for the document production it demands.

3. The State Does Not Refute That The "Funding" Documents It Demands Are Neither Relevant Nor Material To The Disposition Of This Case.

The State demands that Petitioners review the over ½ million pages of the State's documents and then produce back to the State those relating to education funding.

But as the protective order motion explains, this lawsuit does not ask the Court to determine the funding necessary to comply with the education mandate in Article IX, §1. Instead, the disposition of this case rests on the following four questions presented by the pending Motion For Summary Judgment Concerning Legal Interpretation:

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1. Do the words "paramount", "ample", and "all" in Article IX, §1 have their common English meaning? *The State's opposition does not dispute that this is a pure question of law.*

2. Is the basic "education" mandated by Article IX, §1 currently defined by the substantive content specified in RCW 28A.150.210 and its corresponding Essential Academic Learning Requirements (EALRs). *The State's opposition does not dispute that this too is a pure question of law.*

3. Is the Respondent State currently complying with its Constitutional duty under the above interpretation of Article IX, §1. *The State's opposition does not refute that this is a binary yes-or-no question about educational output (i.e., is the State currently equipping all Washington children with the basic education required under this Court's interpretation of Article IX, §1?). It is not a matter-of-degree question or one about funding input (e.g., what is the appropriate size and type of education funding that should be appropriated?).*

4. Should judicial enforcement of Article IX, §1 begin by ordering the State to take two steps in the next 12 months: (1) determine the actual dollar cost of providing all children in our State with the education mandated by this Court's legal interpretation of Article IX, §1, and (2) determine how the State will fully fund that actual cost with stable and dependable State sources. *The State's opposition does not dispute that this enforcement issue does **not** ask the Court to determine the funding amount or funding sources required to comply with the Court's legal interpretation of Article IX, §1. Nor does the State dispute that it has not taken these first two steps. Nor does the State dispute that if this relief is granted, this trial court proceeding is over.*

See Protective Order Motion at 3:7-4:8. In short, the State's opposition nowhere refutes that its request that Petitioners comb through the State's documents to identify the State documents that relate to funding or other "input" issues serves no purpose relevant or material to the disposition of this case. (Moreover, to the extent that any "funding" fact issue is created by this Court's ruling on the above issues, discovery relating to that funding issue would be best addressed at the Rule 16 conference that, pursuant the alternative proposed by the State's opposition, the Petitioners have added to the revised proposed Order attached to this Reply.)

4. The State Does Not Refute That The Work Product Doctrine Protects The Identity Of The Documents That Petitioners' Counsel Selected From The State's Own Documents As Part Of Counsel's Litigation Preparation.

As the protective order motion explains, Petitioners' counsel maintains a full set of the State documents at issue organized the same way they were made available by the State. In other words, the same way they are kept in the usual course of the State's business. And as that protective order motion also explains, Petitioners are willing to produce those State documents in

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that same usual-course-of-business organization they are kept. That complies with the State's own description of CR 34(b).[1]

But the State demands more. It demands that Petitioners' counsel produce (or submit a log identifying) the specific State documents that Petitioners' counsel selected from that full set of State documents and compiled into subsets as part of their litigation preparation in this case.

The State does not provide any Washington authority to dispute the Washington authority discussed at 9:4-26 of Petitioners' protective order motion, which establishes that the identity of previously produced documents selected by counsel in pursuit of the litigation is protected work product (e.g., *Limstrom*, 136 Wn.2d at 614 ("factual documents gathered by the prosecutor and which [the requester] had already ... are part of the prosecutor's fact-gathering process and are work product")).

The so-called "ordinary course of business" cases noted at Opposition page 6 do not even discuss – never mind refute – that legal conclusion. Instead, they simply note that a document prepared by a client in its ordinary course of business is not usually work product in itself.

Nor does the *Harris* case cited at Opposition page 6 refute Petitioners' work product argument. Indeed, that case's discussion of the work product rule confirms Petitioners' conclusion.[2]

Nor do the non-Washington cases cited by the State overrule the Petitioners' Washington authority. Those non-Washington cases also do not refute the logic of the non-Washington cases

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[1] *Opposition at 8:7-9 ("The rule mandates that documents be produced 'as they are kept in the usual course of business **or** must be organized and labeled to correspond to the categories requested.' " (emphasis added).*

[2] *See Harris, 116 Wn.2d at 269 & n.18 ("The goal of that privilege is 'to protect the adversary process' by insuring that neither party pirates the trial preparation of another party", that it "protects against litigation 'on wits borrowed from the adversary", that "fundamental fairness requires that discovery not be used to probe opponent's trial preparation", and that the privilege "prevents exploitation of a party's efforts in preparing for litigation") (citations omitted).*

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discussed in footnote 12 of Petitioners' protective order motion (*Allen*, *Shelton*, and *Sporck*). And most actually support the Petitioners' work product conclusion.[3]

In short, the State does not refute that the identity of the State documents selected by Petitioners' attorneys in their pursuit of this litigation is protected work product. And the State does not even attempt to show it has any need – substantial or otherwise – for such documents because the State already has them by virtue of the fact that they are the State's own documents.

5. The State Does Not Establish Any Right To Periodicals, Internet Webpages & Emails, Articles, & Other Non-Evidentiary Documents Routinely Received By Opposing Counsel As Part Of Their General Legal Practice.

The State provides no argument to support its demand with respect to this category of documents (which are not even evidence). See protective order motion at 10:5-11:2 & n.13. This third aspect of the protective order motion should therefore be granted as well.

RESPECTFULLY SUBMITTED this 25th day of June, 2007.

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[3] *E.g.*, ***Dupont Plaza Hotel Fire*** *was an MDL (Multi-District Litigation) consolidation of about 2000 separate cases with literally thousands of depositions governed by a detailed 45-page case management order – and in that context held that even though counsel's document selection can ordinarily be protected work product, the extraordinary demands of that complicated MDL proceeding justified the case management order's protocol requiring counsel to disclose the identity of planned deposition exhibits 5 days before the applicable deposition. See 859 F.2d at 1009 & 1018. The State does not (because it cannot) even claim such substantial needs or demands in this case. The* ***FDIC*** *case held that if an attorney has selected documents from many that are not available to the other party, those documents should be produced despite work product concerns – but also acknowledged that that reasoning does not automatically apply if a party is asking for counsel's selection from documents that have already been produced (which is the case here). 241 F.R.D. at 106-108.* ***Central Valley Chrysler-Jeep*** *similarly recognized that discovery of an attorney's selection of documents that reveals legal strategy, intended lines of proof, or contemplated strengths and weaknesses of the case are protected work product that cannot be produced under Rule 26(b) "unless the party seeking them demonstrates 'substantial need for the materials' and 'undue hardship in obtaining the substantial equivalent of the materials by other means.' " Slip Op. at *3. And while* ***Mead*** *broadly asserts that evidentiary material in an attorney's file is ordinarily discoverable, it also recognizes the exception recognized in Sporck and Shelton governing the identity of documents selected by counsel from a multitude of documents equally available to the requesting party. 145 F.R.D. at 517-518.*

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MATHEW & STEPHANIE MCCLEARY, on their own behalf and on behalf of KELSEY & CARTER MCCLEARY; ROBERT & PATTY VENEMA, on their own behalf and on behalf of HALIE & ROBBIE VENEMA; and NETWORK FOR EXCELLENCE IN WASHINGTON SCHOOLS ("**NEWS**"), Petitioners, v. STATE OF WASHINGTON, Respondent.	***Honorable Paris K. Kallas*** *Hearing Date (without oral argument): July 3, 2007* No. 07-2-02323-2 SEA ***[Alternative Proposed]*** PROTECTIVE ORDER

THIS MATTER came before this Court on Petitioners' Motion For A Protective Order. This Court has considered the pleadings and files in this case, including that Motion, the Certificate Of Compliance Concerning Discovery Conferences, the Respondent State's opposition papers, and the Petitioners' reply papers.

Having reviewed the above, this Court hereby ORDERS, ADJUDGES, and DECREES that Petitioners' Motion For A Protective Order is GRANTED with respect to the three categories of documents at issue in that motion. Specifically:

1. The Civil Rules do not entitle the State to impose upon Petitioners the burden and expense of searching for, reviewing, and producing documents on an issue not material to the disposition of this case – in this instance, documents concerning the funding that the State should appropriate to comply with this Court's yet-to-be-issued interpretation of the scope of the education that Article IX, §1 requires the State to provide to all Washington children.

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2. The Civil Rules do not entitle the State to discovery that reveals opposing counsel's work product, mental impressions, and theories about this case – in this instance, discovery that reveals which of the State's documents Petitioners' counsel does (and does not) select or compile into subsets as helpful to, harmful to, or otherwise relevant to counsel's litigation of this suit.

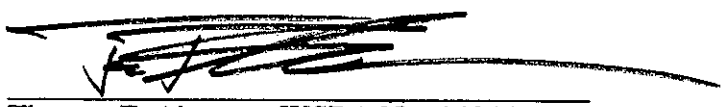
3. The Civil Rules do not entitle the State to force Petitioners' attorneys to search through the periodicals, internet webpages & emails, articles, and other materials they routinely receive as part of their general legal practice to find materials that relate to the topics the State is interested in researching for this case.

4. Consistent with the alternative relief requested in the State's opposition papers, (1) this action's trial date will be delayed for the amount of time Petitioners' May 4 Motion For Summary Judgment Concerning Legal Interpretation is pending, and (2) this Court will conduct a Rule 16 conference after its summary judgment rulings to address how this case should proceed in light of those rulings.

DONE IN OPEN COURT this _____ day of July, 2007.

_____
The Honorable Paris K. Kallas
Washington Superior Court Judge

Presented by:
FOSTER PEPPER PLLC



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