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No. 96132-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MATTHEW S. WOODS,
Appellant,

v.

SEATTLE'S UNION GOSPEL MISSION,
Respondent.

Brief of Legal Educators as Amicus Curiae in Support of Respondent

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Identity and Interest of Amici

Identity of Amici¹

Amici are current or retired professors of law.

David K. DeWolf is Professor Emeritus at Gonzaga University.

George W. Dent, Jr., is the Schott - van den Eynden Professor of Law Emeritus at Case Western Reserve University School of Law.

Steven D. Smith is Warren Distinguished Professor of Law at the University of San Diego.

Amici collectively represent decades of teaching experience committed to the formation of lawyers to serve the highest ideals of the profession. In addition, the amici have extensive experience practicing law, giving them practical as well as theoretical knowledge of the highest standards of professional excellence.

Interest of Amici

The parties in this case have focused on the constitutionality of the religious employer exemption to Washington's Law Against Discrimination ("WLAD"), RCW 49.60.040, and the scope of a religious employer's right to employ religious criteria in making hiring decisions. Additional issues include the allocation of the burden of proof in

¹ Listing the institutions with which the amici are affiliated is for identification purposes only and does not imply authority to represent those institutions.

establishing either a violation of the WLAD or the application of the religious employer exemption.

Central to the resolution of this dispute, but not directly addressed by either of the parties, is the Appellant's claim that a lawyer would violate the Rules of Professional Conduct (RPCs) if he or she allowed religious beliefs to influence the way in which the lawyer practiced law. Rejecting this claim, amici urge this Court to recognize that the practice of law benefits from the lawyer's development of a moral compass and the integration of that moral compass into the practice of law. Having spent their professional careers committed to the formation of future lawyers, amici urges this Court to ensure that the practice of law is not defined simply as assisting the client in accomplishing what the client wants. Instead, the profession of law calls lawyers to promote justice, which is a more complex assignment than simply helping the client achieve his or her objectives. While serving the client is an important aspect of the promotion of justice, other values, including the lawyer's own moral compass, must be taken into account.

Introduction

"About half of the practice of a decent lawyer is telling would be clients that they are damned fools and should stop." *Watson v. Maier*, 64 Wash. App. 889, 827 P.2d 311 (Div. 2 1992), quoting Elihu Root, as reported in

in: *McCandless v. Great Atlantic & Pac. Tea Co.*, 697 F.2d 198, 201-02 (7th Cir.1983). Although this description of the practice of law was invoked in the context of affirming the imposition of CR 11 sanctions against a lawyer, it is a vivid illustration of the way in which the practice of law is more than a narrowly instrumental vision of assisting the client achieve his or her objectives.

Appellant's Opening Brief claims that there is an inherent conflict between the religious beliefs promoted by Seattle's Union Gospel Mission ("SUGM") and the Rules of Professional Conduct ("RPCs"): "[T]he RPCs demand that ODLS staff attorneys perform their jobs without allowing religious beliefs to override their fundamental and secular obligations to their clients." Appellant's Opening Brief at 24 n.4. This characterization of the practice of law truncates the understanding of legal practice to that of a mere instrument of the client's wishes. It fails to take into account the lawyer's right and duty to exercise independent judgment about how to promote justice.

This truncated view of the legal profession has been captured by the metaphor of the lawyer as "taxi driver," who exercises no judgment about the fare's choice of a destination, but concentrates solely on how to get to

the destination as efficiently as possible.² In contrast to this image of the lawyer's proper role in society, amici urge this Court to recognize the right and duty of a lawyer to hold personal beliefs and integrate those beliefs into the practice of law.

Argument

I. The law recognizes that a moral compass—"conscience"—is required to prevent the law from becoming merely instrumental

To be sure, the practice of law often consists of analyzing rules and procedures in order to assist the client in achieving his or her objectives. In devising an estate plan for a client, or pursuing a claim for compensation after a motor vehicle accident, or opposing a zoning change that would affect the client's neighborhood, the lawyer must exercise technical skill to evaluate which avenues are likely to achieve the client's objective in a cost-effective way. To this extent, the lawyer does function in a way analogous to the "taxi driver"—taking for granted the client's choice of a goal and working diligently to achieve it. But just as the law is more than a collection of rules to determine winners and losers—it aspires to promote justice—the lawyer is more than a technician who manipulates the rules to the client's advantage. As the quotation from Elihu Root reminds us, lawyers occasionally must redirect the client's focus from what the client thinks will

² See, for example, 1 G. HAZARD & W. HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 17 (1985).

be in his or her best interest to a path that reflects a more just outcome.

A. Judges are required to apply conscience—their moral compass—in performing their duties

Appellants suggest that there is something unique (and insidious) about lawyers who allow “religious beliefs to override their fundamental and secular obligations to their clients.” Appellant’s Opening Brief at 24, n.4. But judges are expected to have a moral compass and follow it in applying the law. RCW 62A.2-302 requires a judge to refuse to enforce a contractual provision that the court finds to be “unconscionable.” Similarly, a judge is required to set aside a jury verdict if it “shocks the conscience” of the court. *Bunch v. King County Dep’t of Youth Servs.*, 155 Wash.2d 165, 175, 116 P.3d 381 (2005). Judges are expected to have a moral compass that alerts them to a result that may be technically correct, but will result in grave injustice. While the judge is expected to invoke this authority rarely, without it the law would lose its claim to be the pursuit of justice.

B. Lawyers, like judges, need a moral compass to practice effectively

It might be thought that judges hold a position that is fundamentally different from that of the lawyer. After all, the judge has the right and duty to ensure that justice is done, whereas the lawyer in our adversarial system is thought to represent only the interests of his or her client.

But the experience of amici is otherwise. Effective advocacy requires

that the lawyer anticipate what a reasonable judge or jury would view as a just outcome. A lawyer who thought of himself or herself as a pure technician, who had no moral compass, would be ill-equipped to anticipate the outcome of a dispute and thereby provide sound advice to the client.

In addition, the practice of law is fraught with ethical conflicts that judges do not face. In addition to struggling with one's personal demons—the tendencies toward addiction, the effect of past trauma, self-doubt, etc.—as all human beings must, the practicing lawyer is bound by a variety of competing obligations. The desire to provide zealous advocacy to the client competes with other obligations, such as: the expectation that one will act as an officer of the court as well as an advocate; the need to be fairly paid; commitments to one's family and friends (particularly when needs arise unexpectedly); duties to other lawyers with whom one practices; pro bono service; and personal health and self-care. It is often difficult for the lawyer to discern which obligations should take precedence over the others. Only by maintaining and following a moral compass can the lawyer avoid finding himself or herself adrift, buffeted about by the most aggressive demands on his or her loyalty.

C. All lawyers say “No” to certain clients and cases

The quotation from Elihu Root at the beginning of this brief does not suggest that the lawyer who says “No” to a client will be motivated by a

religious belief. Religious belief is but one source of the moral compass that allows the lawyer to recognize that the client's perception of what is in his or her best interest may in fact cause injury, either to the client or to others whose interests should be taken into account. If the lawyer is unsuccessful in persuading the client to change direction, the lawyer may determine that it is the lawyer's duty not to carry out the client's wishes.

As will be discussed below, the most difficult time to say "No" is when the client has already invested in the lawyer's representation. But long before the lawyer represents an individual client, the lawyer makes decisions about the kinds of cases and the kinds of clients the lawyer will say "Yes" to, as well as the clients and cases to which the lawyer will say "No."

In a recognition of his or her own strengths and weaknesses, a lawyer may refuse to take on certain types of cases or clients. The lawyer may specialize in certain types of law, and turn down a client who needs assistance in an area outside the lawyer's specialty. The lawyer may prefer representing injured parties instead of insurance companies, or vice versa, and confine his or her practice to a particular type of client.

A lawyer's moral compass may also lead the lawyer to represent one viewpoint to the exclusion of an opposing viewpoint: for example, a lawyer may specialize in advocating for clients who favor gun control, or for those

who oppose it. One's moral compass may be formed by religious beliefs, or by other types of beliefs that animate the lawyer in a similar fashion. For example, when Daniel Seeger claimed the right to avoid military service and be treated as a conscientious objector, he could not meet the statutory requirement that his objection be based on "religious training and belief." *United States v. Seeger*, 380 U.S. 163 (1965). Nonetheless, the United States Supreme Court found that "the beliefs which prompted his objection occupy the same place in his life as the belief in a traditional deity holds in the lives of his friends, the Quakers." *Id.* at 865. In reversing Seeger's conviction the Court recognized that while religious beliefs may motivate some to refuse to lend their aid to a practice or cause they find morally objectionable, other types of strongly held beliefs can operate in an analogous fashion.

A lawyer's commitment to eliminating an injustice may lead the lawyer to represent only those clients whose cases will advance what the lawyer believes is the cause of justice. The celebrated career of Thurgood Marshall is a good example.³ In order to dismantle *Plessy v. Ferguson*, 163 U.S. 537 (1896), Marshall had to be strategic in choosing which sequence of cases, in which venues, would achieve the goal. To be sure, a lawyer with a cause

³ See, for example, MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961 (1994).

must be careful not to view his or her clients simply as pawns in an ideological campaign. But the fact that the lawyer has an agenda, and fashions his or her law practice around the advancement of that agenda, is perfectly consistent with the Rules of Professional Conduct, and may represent the highest ideals of the profession. In short, good lawyers are guided by a moral compass that makes them more than taxi drivers who take the client wherever he or she wishes to go.

D. The Client's consent is paramount

As the previous paragraph recognizes, the lawyer's fidelity to his or her moral compass must be accompanied by equal respect for the client's autonomy as a moral agent. Whenever a lawyer advises a client to pursue a different path from the one the client would otherwise choose, the client must make the decision of whether to accept or reject the lawyer's advice. Even assuming Elihu Root was correct in estimating the frequency with which a "decent lawyer" advises a client to abandon the client's chosen objective, the lawyer must always be aware that it may be the lawyer who is a "damned fool," not the client. As much as the lawyer needs to be guided by his or her moral compass, the client's autonomy as a moral agent requires that the lawyer honor the client's right to decide what is best for him or her.

As basic as the principle of client autonomy may be, amici recognize that honoring it, while maintaining one's moral compass, is far from easy.

The client may certainly benefit from hearing the lawyer's perspective, and as a result the client may accept the lawyer's professional judgment. But the client may not. If the client is not persuaded that he is being a "damned fool" and wishes to proceed notwithstanding the lawyer's advice, it poses a serious ethical dilemma. This is particularly true if the conflict of visions occurs after the client has invested in the lawyer's preparation of the case. Far from being rare and avoidable, such conflicts are actually quite common.⁴ In proposing that the lawyer's moral compass should be acknowledged along with the client's expressed desires, amici make no claim that their model of professional responsibility avoids ethical dilemmas. In fact, they may be intensified. Nonetheless, the proper conclusion to be drawn about the nature of legal practice is not that a lawyer's ethical values or deeply held principles should prevail over client choice—any more than that client choice dictate how a lawyer should proceed regardless of the lawyer's moral compass. Instead, only by acknowledging the proper place of both values can the profession live up to

⁴ For example, the lawyer representing a personal injury client may receive an offer of settlement from the insurance company that the lawyer thinks is reasonable, even generous. The client, on the other hand, may believe it inadequate and may instruct the lawyer to decline the offer and proceed to trial. Or a client in a dissolution case may oppose a parenting plan based on what the lawyer believes is animosity toward the ex-spouse rather than the best interests of the children. In such situations the lawyer must balance respect for the client's autonomy with the lawyer's professional judgment about what will be not only in the client's long-term best interest, but in the interest of those affected by the client's decisions.

its commitment to the promotion of justice. Good lawyers must be willing to wrestle with these competing values and strive for a solution that harmonizes them, rather than reducing their role to that of a mere technician.

II. If individual lawyers can and should incorporate a moral compass in their practice, so may an employer of lawyers

This case is focused on the question of whether a religious institution may impose constraints upon a lawyer who is employed by the religious institution to provide legal services. Appellant argues that any such constraints would interfere with the lawyer's duty to provide legal services as defined by the RPCs. The previous sections of this brief explained why an individual lawyer's obedience to his or her moral compass is not only compatible with the highest standards of the profession, but actually promotes such excellence.

This section of the brief extends that same logic to a firm of lawyers and others who employ lawyers. If it is true of individual lawyers that the development and integration of a moral compass enhances a lawyer's professionalism, it follows that lawyers who join together to advance a shared set of beliefs also serve the legal profession and society. For example, some lawyers share a belief in the need for greater environmental protection;⁵ others share opposition to the death penalty; still others advance

⁵ For example, EarthJustice, <http://earthjustice.org>

other causes. They enhance their effectiveness by banding together to pursue the cause to which their moral compass points them. In order to do so, they may impose upon one another an obligation to conform to the beliefs of the organization as a condition of employment. The ability to reject those who disagree with the organization's belief is a key component of being able to maintain the coherence of one's viewpoint. As the Supreme Court recognized in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), a speaker's right to expression carries with it the freedom of the speaker to exclude views inconsistent with the speaker's message. If a firm of lawyers were prevented from making fidelity to their cause a condition of employment, that firm's ability to advocate for a particular vision of justice would be substantially diminished.

This principle is particularly true of nonprofit organizations that promote unpopular causes. If an organization were unable to establish and maintain fidelity to its principles as a condition of employment, it could easily be dismantled from within. The freedom to speak has as its corollary the freedom from being compelled to express a view with which one disagrees.⁶

⁶ Amici acknowledge that there is an additional issue in this case concerning the how a requirement of fidelity to beliefs is reflected in conduct requirements for an employee. Since this issue is addressed in the briefing of Respondent, amici will not repeat it here.

Conclusion

To resolve this case, this Court must determine the proper scope and constitutionality of the religious employer exemption contained in the Washington Law Against Discrimination. In doing so, the unique demands of the profession of law should not be overlooked. Lawyers are not merely technicians who serve the will of the client, but officers of the Court whose calling is to promote the interests of justice. As legal educators devoted to promoting the ideals of the profession, amici ask the Court to affirm that good lawyers hold personal beliefs that form their moral compass, and reflect that moral compass in the way that they practice law.

August 26, 2019

Respectfully Submitted,



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Certificate of Service

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

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