95831-9

NO. 75828-4

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

STATE OF WASHINGTON,

Respondent,

v.

EARL ROGERS, JR.,

Appellant.

# APPELLANT DAVID A. TRIEWEILER'S MOTION TO FILE PETITION FOR REVIEW UNDER SEAL

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## TABLE OF AUTHORITIES

## I. IDENTITY OF MOVING PARTY & STATEMENT OF RELIEF SOUGHT

David A. Trieweiler ("Trieweiler") brings this motion to file an unredacted copy of his petition for review to the Supreme Court under seal.

## II. FACTS RELEVANT TO MOTION

Trieweiler appealed a contempt order entered against him for his failure to comply with a subpoena ordering him to produce a potentially incriminating letter allegedly written by his former client, Earl Rogers. CP at 151-57. Before being held in contempt, Trieweiler objected to the subpoena and the trial court allowed him to file a motion to quash the subpoena ex parte and under seal. CP at 74-91, 122-28, 142-46; David A. Trieweiler's Motion to Quash Subpoena Duces Tecum and supporting Declaration of David A. Trieweiler (filed under seal).

In his appellate brief, Trieweiler relied in part on the privileged recitation of facts contained in his sealed motion to quash and supporting declaration. *See* unredacted Brief of Appellant David A. Trieweiler (filed under seal). As such, Trieweiler filed a redacted version of that brief with the Court of Appeals and moved to file an unredacted version of the brief under seal. *See* Appellant David A. Trieweiler's Motion to File Brief of Appellant Under Seal, attached to this motion as Exhibit A. On February

16, 2017, the Court of Appeals granted the motion to file the unredacted brief under seal but ordered Trieweiler to file an amended redacted brief with more limited redactions. *See* February 16, 2017 notation ruling by Commissioner Mary Neel, attached to this motion as Exhibit B. On March 9, 2017, Trieweiler filed an amended redacted brief in compliance with the Court of Appeals' order. *See* Amended Brief of Appellant David A. Trieweiler (redacted version).

On February 20, 2018, the Court affirmed the trial court's contempt order. *State v. Rogers*, No. 75722-9-I and 75828-4-I (Feb. 20, 2018). Trieweiler seeks review of that decision by the Supreme Court, but has filed a redacted petition for review in conjunction with this motion to seal because the petition for review relies on the same privileged facts cited in Trieweiler's motion to quash in the trial court and in his brief on appeal. To the extent possible, the redactions are consistent with the Court of Appeals' order granting Trieweiler's motion to seal his appellate brief. *See* Exhibit B.

In order to adequately review Trieweiler's petition for review, the Supreme Court should be provided with an unredacted copy of the petition. Accordingly, Trieweiler respectfully requests that the Court

allow him to submit an unredacted version of his petition for review under seal to be viewed by the Court on an ex parte basis.[1]

## III. GROUNDS FOR RELIEF AND ARGUMENT

GR 15 authorizes the Court to order that particular records be filed under seal "if the court makes and enters written findings that the specific sealing or redaction is justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record." GR 15 (c)(2). Privacy or safety concerns sufficient to outweigh the public interest include, *inter alia*, a "compelling circumstance" requiring the sealing. GR 15(c)(2)

In *Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 549, 114 P.3d 1182 (2005), the Washington State Supreme Court held that court records may be sealed if there is "a compelling interest which overrides the public's right to the open administration of justice" in maintaining the confidentiality of the documents. To order that a document be sealed, the Court must (1) find that the party seeking sealing has shown a need for

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[1] Trieweiler will submit an unredacted copy of his petition for review to the Court in conjunction with this motion. If the Court denies Trieweiler's motion to seal the unredacted petition, however, Trieweiler requests that the Court return the unredacted petition to him. *See State v. McEnroe*, 174 Wn.2d 795, 804, 808, 279 P.3d 861 (2012) ("GR 15 contemplates that documents filed contemporaneously with a motion to seal will not be open to the public while the court considers the motion" and "a party may withdraw documents submitted to the court in connection with a motion to seal if the court denies the motion.").

sealing; (2) provide an opportunity for other parties to object; (3) find that sealing is the least restrictive means available to protect the interests at stake and will be effective; (4) weigh the interests of the parties and the public; and (5) find that the sealing is no broader than necessary. *Id.* at 543 n.7 (citing *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982)).

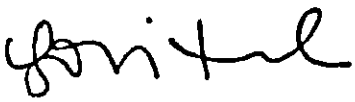
The Court of Appeals has already analyzed the foregoing factors and granted Trieweiler's petition to file his unredacted appellate brief under seal. The privileged facts contained in Trieweiler's appellate brief are the same facts upon which he relies in his petition for review. For the same reasons as set forth in Trieweiler's motion to seal his appellate brief (*see* Exhibit A), the Court should allow Trieweiler to file an unredacted version of his petition for review under seal.

## IV. CONCLUSION

For the foregoing reasons, Trieweiler respectfully requests that the Court permit him to file an unredacted version of his petition for review under seal.

Respectfully submitted this 2nd day of May, 2018.

BETTS, PATTERSON & MINES, P.S.



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Attorneys for David A. Trieweiler

## CERTIFICATE OF SERVICE

I, Karen L. Pritchard, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts Patterson & Mines, One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on May 2, 2018, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Appellant David A. Trieweiler's Motion to File Petition for Review Under Seal; and**
- **Certificate of Service.**

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 2nd day of May, 2018

*s/ Karen L. Pritchard*
Karen L. Pritchard

# EXHIBIT A

11-2-81G

No. 75828-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION I

| | |
|---|---|
| STATE OF WASHINGTON,<br><br>Plaintiff,<br><br>vs.<br><br>EARL ROGERS JR.,<br><br>Defendant. | APPELLANT DAVID A. TRIEWEILER'S MOTION TO FILE BRIEF OF APPELLANT UNDER SEAL |

## I. IDENTITY OF MOVING PARTY & STATEMENT OF RELIEF SOUGHT

Appellant David A. Trieweiler brings this motion to file an unredacted copy of his Brief of Appellant under seal.

## II. FACTS RELEVANT TO MOTION

Criminal defense attorney David A. Trieweiler appeals a contempt order[1] entered against him for his failure to comply with a subpoena ordering him to produce a potentially incriminating letter allegedly written by his former client, Earl Rogers. The State claimed that Trieweiler had a copy of the letter and that it contained incriminating information relating to Rogers. CP at 8-9. Trieweiler objected to the subpoena and moved for

[1] Contempt orders are subject to direct appeal. *See* RCW 7.21.070.

an order allowing him to file a motion to quash the subpoena ex parte and under seal, stating that in order to explain his opposition to the subpoena, he would be required to disclose information protected by the attorney-client privilege. CP at 74-91, 122-28.

After analyzing the *Ishikawa*[2] factors, the trial court granted the motion to seal. CP at 142-46. Trieweiler filed the motion to quash and supporting declaration under seal and submitted the documents to the trial court for viewing on an ex parte basis. David A. Trieweiler's Motion to Quash Subpoena Duces Tecum and supporting Declaration of David A. Trieweiler (filed under seal). The trial court nevertheless denied the motion to quash in relevant part and ordered Trieweiler to produce the letter. CP at 135-36. When Trieweiler failed to produce the letter by the deadline set by the trial court, the trial court found Trieweiler in contempt of court. CP at 147-51.

At issue on appeal is whether the trial court abused its discretion in finding Trieweiler in contempt of court for failure to comply with the State's subpoena, an issue that turns on whether the subpoena was improper. An evaluation of that issue, in turn, requires analysis of the privileged facts contained in the motion to quash and supporting declaration. Trieweiler's appellate brief therefore contains significant analysis of the privileged facts as applied to the relevant law such that a substantial portion of his brief had to be redacted in order to preserve his

[2] *Seattle Times Co. v. Ishikawa*, 97 Wn. 2d 30, 640 P.2d 716 (1982).

former client's privilege. In order to adequately review Trieweiler's position on appeal, however, the court of appeals should be provided with an unredacted copy of Trieweiler's brief. Accordingly, Trieweiler respectfully requests that the Court permit him to submit an unredacted version of his appellate brief for filing under seal to be viewed by the court on an ex parte basis.[3]

## III. GROUNDS FOR RELIEF AND ARGUMENT

GR 15 authorizes the Court to order that particular records be filed under seal "if the court makes and enters written findings that the specific sealing or redaction is justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record." GR 15(c)(2). Privacy or safety concerns sufficient to outweigh the public interest include, *inter alia*, a "compelling circumstance" requiring the sealing. GR 15(c)(2)

In *Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 549, 114 P.3d 1182 (2005), the Washington State Supreme Court held that court records may be sealed if there is "a compelling interest which overrides the public's right to the open anistration of justice" in maintaining the confidentiality of the documents. To order that a document be sealed, the Court must (1) find that the party seeking sealing has shown a need for

[3] Trieweiler will submit an unredacted copy of the brief to the Court in conjunction with this motion. If the Court denies Trieweiler's motion to seal the unredacted brief, however, Trieweiler requests that the Court return the unredacted brief to him. *See State v. McEnroe*, 174 Wn.2d 795, 804, 808, 279 P.3d 861 (2012) ("GR 15 contemplates that documents filed contemporaneously with a motion to seal will not be open to the public while the court considers the motion" and "a party may withdraw documents submitted to the court in connection with a motion to seal if the court denies the motion.").

sealing; (2) provide an opportunity for other parties to object; (3) find that sealing is the least restrictive means available to protect the interests at stake and will be effective; (4) weigh the interests of the parties and the public; and (5) find that the sealing is no broader than necessary. *Id.* at 543 n.7 (citing *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982)). Each of the five factors is satisfied in this case.

**A. Protecting Privilege Constitutes Sufficient Need for Sealing**

The attorney-client privilege is codified at RCW 5.60.060(2)(a), which 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." As set forth in Trieweiler's motion to file ex parte briefing and motion to seal, the information necessary for the trial court to evaluate his motion to quash was privileged, and Rogers did not waive the privilege. CP at 77-81, 85; 123-27. Further, the materials ultimately submitted to the trial court in support of the motion to quash were clearly privileged, as they contained descriptions of Trieweiler's communications with his former client. *See* David A. Trieweiler's Motion to Quash Subpoena Duces Tecum and supporting Declaration of David A. Trieweiler (filed under seal). Moreover, in analyzing the first *Ishikawa* factor, the trial court found: "There is sufficient need for sealing the motion to quash in this case. Mr. Trieweiler will need to disclose privileged information obtained from his former client in order to support his motion, and protecting his former client's privilege is a sufficient need

for sealing the motion to quash." CP at 142-43. This finding has not been challenged.

The redacted portions of Trieweiler's brief apply the facts already determined by the trial court to be privileged to the relevant law and arguments on appeal. Accordingly, the brief sets forth privileged information necessary for the court of appeals to review the trial court's rulings that should not be disclosed to the public. There is thus a sufficient need for sealing of Trieweiler's unredacted brief in this case. *See Dalsing v. Pierce County*, 190 Wn. App. 251, 268, 357 P.3d 80 (2015) (review of materials under seal and in camera is appropriate means for the court to determine whether privilege applies).

**B. State Did Not Object Below**

Regarding the second factor, the trial court found: "The State has not objected to filing the motion to quash under seal and has already provided briefing to the Court regarding its position with respect to the privilege asserted by Trieweiler." CP at 143. Instead of opposing Trieweiler's motion to file the motion to quash under seal, the State submitted briefing stating its position on the law governing the attorney-client privilege as applied to potentially incriminating physical evidence. *See* CP at 125. Accordingly, the State had the opportunity below to object to both the sealing of the brief and to state its position on the applicable law. Trieweiler's appellate brief contains an analysis of the same privileged facts submitted to the trial court under seal. Accordingly,

Trieweiler does not anticipate that the State will object to the same facts being filed under seal in the court of appeals.

**C. Sealing Is the Least Restrictive Means of Protecting Privilege**

In the trial court, sealing the entire brief was the least restrictive means of protecting the privilege because all of the arguments contained in the motion to quash were inextricably intertwined with the privileged facts. CP at 125-26; *see also* David A. Trieweiler's Motion to Quash Subpoena Duces Tecum and supporting Declaration of David A. Trieweiler (filed under seal). The trial court found: "Sealing is the least restrictive means of protecting privilege. Mere redaction of the motion to quash will be insufficient in this case, as the legal analysis in the motion will depend on privileged facts." CP at 143.

On appeal, filing of a redacted version of the brief is possible because there are certain unprivileged facts discussed throughout and an additional argument based on the scope of appropriate discovery in a criminal matter that does not rely on privileged facts. The vast majority of the analysis of the privilege issue, however, has necessarily been redacted as it describes and analyzes the privileged facts set forth in the motion to quash and supporting declaration. This analysis is necessary in order for Trieweiler to effectively communicate his arguments to the court of appeals. Accordingly, sealing of an unredacted version of the brief, while also filing a redacted copy for viewing by the State and the public, is the

least restrictive means necessary for effective review of the issues in this case.

**D. Rogers's Privilege Outweighs Interests of State and Public**

The Washington Supreme Court, in discussing the importance of the attorney-client privilege, has explained:

> To require the counsel to disclose the confidential communications of his client to the very court and jury which are to pass on the issue which he is making, would end forever the possibility of any useful relation between lawyer and client. It is essential for the proper presentation of the client's cause that he should be able to talk freely with his counsel without fear of disclosure.... [A]ny rule that interfered with the complete disclosure of the client's inmost thoughts on the issue he presents would seriously obstruct the peace that is gained for society by the compromises which the counsel is able to advise.

*Dike v. Dike*, 75 Wn.2d 1, 10–11, 448 P.2d 490 (1968) (quoting H. Drinker, *Legal Ethics*, at 133 (1953)). Accordingly, Rogers's interest in his privileged communications with his former counsel is significant. Because Trieweiler is prohibited from unilaterally waiving that privilege, his interest in complying with the applicable law and his ethical duties is also significant.

By contrast, the State's and the public's interests in the information is not substantial. At issue here is not whether the information requested in the State's subpoena will ultimately be disclosed but, rather, whether the appellate briefing on the issue will be made public. That interest is minimal and is certainly insufficient to warrant an invasion of Rogers's privilege in this case. As the trial court found: "Mr. Trieweiler's former

client's interest in protecting his privilege and Mr. Trieweiler's obligation to maintain the same outweigh the interests of the State and the public in the information contained in the motion to quash." CP at 143. This Court should similarly rule that Rogers's interest in maintaining his privilege outweighs any public interest in reviewing the information contained in a portion of Trieweiler's appellate brief.

**E. Sealing Is No Broader than Necessary**

Disclosing privileged facts in Trieweiler's appellate brief is essential to providing the Court with Trieweiler's justifications for failing to comply with the trial court's order to comply with the State's subpoena. As discussed above, Trieweiler has carefully redacted the privileged materials from the brief in order to provide the State and the public with as much information as possible on appeal. Trieweiler requests only that he be permitted to provide the Court with an unredacted version of the brief in order to specifically address the privileged facts contained in the two sealed documents below, which go to the heart of his opposition to the State's subpoena and, ultimately, to the contempt decision currently on review. As in the briefing submitted to the trial court, Trieweiler's analysis of the privilege issue on appeal is inextricably intertwined with privileged facts. With respect to that briefing, the trial court found: "Sealing the motion to quash is no broader than necessary to protect the privilege at issue in the motion, as it requires sealing only the motion itself and the supporting declaration." CP at 143. Similarly, here, sealing the

unredacted appellate brief is no broader than necessary to protect the privilege because a redacted version will be made public.

## 5. CONCLUSION

For the foregoing reasons, Trieweiler respectfully requests that the Court permit him to file an unredacted appellate brief under seal.

DATED this 28th day of November, 2016.

Respectfully submitted,

BETTS, PATTERSON & MINES, P.S.

By _____

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## CERTIFICATE OF SERVICE

I, Karen Pritchard, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts Patterson & Mines, One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on November 28, 2016, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **APPELLANT DAVID A. TRIEWEILER'S MOTION TO FILE BRIEF OF APPELLANT UNDER SEAL; and Certificate of Service.**

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☐ Overnight
☐ E-mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 28th day of November 2016.

Karen Pritchard

# EXHIBIT B

RICHARD D. JOHNSON,
*Court Administrator/Clerk*

*The Court of Appeals*
of the
*State of Washington*

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February 17, 2017

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CASE #: 75828-4-I
State of Washington, Respondent v. Earl R. Rogers, Appellant

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on February 16, 2017, regarding appellant's motion to seal:

"This case is an appeal by attorney David Trieweiler of a trial court order finding him in contempt for failing to comply with an order requiring him to produce a letter written by his former client, Earl Rogers. Trieweiler has filed a motion to allow him to file an unredacted copy of his brief under seal (for the court's consideration), and a redacted copy for the public record and opposing counsel. The motion to file the unredacted brief under seal is granted, but because the redactions appear to go beyond what is privileged information, appellant shall file an amended redacted brief, as outlined below.

In November 2015 the State charged Earl Rogers with felony telephone harassment based on allegations that he left threatening messages for his girlfriend's mother. David Trieweiler was appointed to represent Rogers. While in jail Rogers wrote a letter to his girlfriend that allegedly contains incriminating information. During a defense interview Trieweiler obtained the letter. (The parties appear to dispute how/when this occurred). The State learned about the letter and asked Trieweiler to provide it; he did not do so. The State filed a motion to compel Trieweiler to either provide the letter to the State or return it to the alleged victim and sought a subpoena duces tecum. Trieweiler filed a motion seeking to file a response to the motion to compel ex parte/under seal.

The State filed a motion to resolve a potential conflict, noting that in light of the letter, Trieweiler was now a potential witness in the criminal trial. The trial court found an irreconcilable conflict that disqualified Trieweiler and appointed new counsel for Rogers, Daniel Felker. Felker filed an objection to issuance of a subpoena duces tecum. The trial court granted the State's request for a subpoena duces tecum.

Trieweiler objected, and subsequently filed a notice of appearance of counsel, who filed a motion to allow Trieweiler to file a motion to quash the subpoena ex parte/ under seal. In its response the State asserted that it took no position regarding Trieweiler's request to file his motion to quash under seal and instead addressed why it believed the letter is not protected by attorney-client privilege.

The trial court requested further briefing addressing the Ishikawa factors. See Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982) (First, a party seeking to seal or redact must make some showing of the need therefor. The moving party should state the interests or rights that give rise to the need as specifically as possible without endangering those interests. If sealing/redacting is meant to protect an interest other than a right to a fair trial, the proponent must show a serious and imminent threat to some other important interest. Second, anyone present when the motion to seal/redact is made must be given an opportunity to object. Third, the court, proponents and objectors should carefully analyze whether the requested method to curtail access is both the least restrictive means available and effective in protecting the interests threatened. Fourth, the court must weigh the competing interests of the proponent and consider the alternatives suggested. Fifth, the order must be no broader in application or duration than necessary to serve its purpose.). Trieweiler filed a motion addressing the Ishikawa factors, noting that the State did not object.

The trial court granted Trieweiler's motion to file his motion to quash under seal, ruling that each of the Ishikawa factors was met:

a. There is sufficient need for sealing the motion to quash in this case. Mr. Trieweiler will need to disclose privileged information obtained from his former client in order to support his motion, and protecting his former client's privilege is a sufficient need for sealing the motion to quash.
b. The State has not objected to filing the motion to quash under seal and has already provided briefing to the Court regarding its position with respect to the privilege asserted by Mr. Trieweiler.
c. Sealing is the least restrictive means of protecting the privilege. Mere redaction of the motion to quash will be insufficient in this case, as the legal analysis in the motion will depend on privileged facts.
d. Mr. Trieweiler's former client's interest in protecting his privilege and Mr. Trieweiler's obligation to maintain the same outweigh the interests of the State and the public in the information contained in the motion to quash.
e. Sealing the motion to quash is no broader than necessary to protect the privilege at issue in the motion, as it requires sealing only the motion itself and the supporting declaration.

CP 142-43. In a separate order the court denied Trieweiler's motion to quash as to Rogers' letter and granted it as to broader language in the State's subpoena duces tecum. CP 135-36.

Rogers filed a notice of discretionary review of the trial court order denying the motion to quash. The case was assigned No. 75722-9-I.

When Trieweiler failed to comply with the subpoena duces tecum, the State moved to find him in contempt. The trial court granted the motion and entered an order of contempt, imposing a sanction of $100/day, stayed pending review in this court. Trieweiler filed a notice of appeal of the contempt order. The case was assigned No. 75828-4-I. This court granted discretionary review in No. 75722-9-I and linked Rogers' and Trieweiler's appeals. Rogers' opening brief in No. 75722-9-I is due.

In No. 75828-4-I, Trieweiler has filed two versions of his opening brief, an unredacted brief filed under seal (for the court's consideration), and a redacted brief for the public record and the State, along with a motion to allow the briefs, addressing the Ishikawa factors. Trieweiler noted his motion to seal for hearing, as required by this court's General Order. The State did not file a written answer to Trieweiler's motion, but appeared at the hearing and objected. The State argued that the letter is not a protected confidential communication, that Trieweiler is attempting to prosecute a one-sided appeal, and that his brief should have no redactions. Alternatively, the State reasoned that in other cases where materials were redacted in the trial court, on appeal the brief referred to the redacted material without going into the substance. No other person at the hearing objected to Trieweiler's briefs.

I have reviewed the briefs and conclude that, as in the trial court, the Ishikawa factors are met. Trieweiler's motion to file his unredacted brief under seal is granted. But the following redactions do not appear to involve privileged information, and the redactions should be removed or restated such that they are limited to only privileged information:

P. 1, lines 11-14
P. 2, lines 2 -5, beginning with "(2)"
P. 2, lines 9-12
P. 2, lines 19-21
P. 4, lines 9-11
P. 12, lines 16-18
P. 13, lines 5-6
P. 13, lines 11-14 (beginning with "As such. . ."
P. 19, lines 1-7
P. 19, footnote 5
P. 23, lines 11-12 (beginning with "and because")
P. 26, lines 4-6
P. 26, lines 8-9

Therefore, it is

ORDERED that appellant Trieweiler's motion to file his unredacted brief under seal is granted; and it is

ORDERED that by March 9, 2017, appellant should file an amended redacted brief that complies with the changes listed above."

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

emp