Redacted petition pursuant to Court's order dated 7/13/2018

Temporarily Sealed pending decision on Motion to Seal

95831-9

No. 75828-4

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

STATE OF WASHINGTON,

Respondent,

v.

EARL R. ROGERS, JR.,

Appellant.

APPELLANT DAVID A. TRIEWEILER'S PETITION FOR REVIEW

Lori Worthington Hurl, WSBA #40647
BETTS PATTERSON & MINES
One Convention Place, Suite 1400
701 Pike Street
Seattle WA 98101-3927
Telephone: (206) 292-9988
Facsimile: (206) 343-7053
Attorneys for Appellant David A. Trieweiler

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

I. IDENTITY OF PETITIONER

Appellant David A. Trieweiler ("Trieweiler") asks this Court to accept review of the Court of Appeals' decision terminating review designated in Part B of this petition.

II. COURT OF APPEALS DECISION

Trieweiler requests review of the Court of Appeals' consolidated decision in *State v. Rogers*, No. 75722-9-I and 75828-4-I, filed on February 20, 2018, in which the Court affirmed the trial court's order finding Trieweiler in contempt for failing to produce a letter allegedly provided to him by his former client, Earl Rogers ("Rogers") (No. 75828-4-I). *See* Appx. at A-1 through A-9. In the same opinion, the Court of Appeals ruled on Rogers's appeal of the trial court's denial of his motion to quash the State's subpoena ordering Trieweiler to produce the letter (No. 75722-9-I). The Court of Appeals held that the letter at issue was not protected by the attorney-client privilege, a decision that conflicts with the Supreme Court's decision in *State ex rel. Sowers v. Olwell*, 64 Wn.2d 828, 833, 394 P.2d 681 (1964), the leading Washington decision governing the scope of the attorney-client privilege as applied to physical evidence provided to an attorney by a client.

On March 12, 2018, Rogers filed a motion for reconsideration, in which Trieweiler joined, and Trieweiler filed a motion to publish. On

March 19, 2018, the Court denied the motion for reconsideration. *See* Appx. at A-10 through A-11. On April 2, the Court of Appeals granted Trieweiler's motion to publish. *See* Appx. at A-12 through A-13.

III. ISSUES PRESENTED FOR REVIEW IF REVIEW IS GRANTED

1. Did the trial court abuse its discretion in ordering compliance with the State's subpoena, where the subpoena was defective because it required Trieweiler to disclose evidence he may have obtained as the result of a confidential attorney-client communication and Rogers's interest in maintaining his privilege outweighs the public's interest in obtaining the letter?

2. Did the trial court abuse its discretion in ordering compliance with the State's subpoena, where the subpoena would require Trieweiler to violate his obligations under RPC 1.6?

IV. STATEMENT OF THE CASE

Trieweiler represented Rogers for a charge of felony telephone harassment. CP at 1-7. Rogers was accused of calling a woman named Mansebia Pierce and threatening to kill her. CP at 1. On January 13, 2016, the State filed a motion to compel Trieweiler to produce a letter allegedly written by Rogers that the State believed had come into Trieweiler's possession. CP at 8. The State's motion stated that it had

learned that Rogers sent a letter to Pierce's daughter while he was in jail in which he "offered to pay Ms. Pierce money if she would stop pursuing the case." CP at 8. The State's motion further stated that Pierce's daughter sent a copy of the letter to Pierce, and that during Trieweiler's defense interview with Pierce, she "handed the letter to Mr. Trieweiler" and that "Mr. Trieweiler kept the letter when he left." CP at 9.

Trieweiler's version of the facts surrounding the letter are as follows.[1] [redacted] Decl. of Trieweiler in Support of Mot. to Quash (filed under seal) ("Sealed Trieweiler Decl.")[2], ¶ 4. [redacted], ¶¶ 4, 12. The investigator made multiple phone calls to Marshall and left multiple voicemails regarding the letter, but Marshall did not return the calls. Id.

---

[1] These facts are protected by the attorney-client privilege and, therefore, the trial court granted Trieweiler's motion to seal the documents containing them (Trieweiler's Motion to Quash Subpoena Duces Tecum and Declaration of David A. Trieweiler in Support of Motion to Quash). CP at 122-34; 142-46. References to the facts contained in those pleadings have therefore been redacted from this brief.

[2] Because the unredacted filings below were sealed, they are not part of the numbered Clerk's Papers.

Trieweiler subsequently conducted an in-person interview of Pierce, at which time she provided Trieweiler with a photocopy of the letter. Sealed Trieweiler Decl., ¶ 5. Pierce informed Trieweiler that Marshall had given her a copy of the letter to give to Trieweiler. Id. Pierce placed no conditions on providing the copy of the letter to Trieweiler and did not state she wanted Trieweiler to return it. Id. Although Trieweiler did not interview Pierce for the purpose of obtaining the letter from her (as he was unaware that she had a copy of the letter before the interview), it appeared to Trieweiler that Marshall told Pierce to give him a copy of the letter because she learned, presumably from Rogers, that Trieweiler wanted to see it. Id., ¶ 12.

In the letter, Rogers offered to pay Pierce in exchange for having the charges against him dropped. Sealed Trieweiler Decl., ¶ 6. Trieweiler believed that if the State obtained a copy of the letter and could lay a foundation for its authenticity, the State would use Rogers's offer of money to support a new criminal charge against Rogers for attempting to bribe or tamper with a witness. Id.

During Trieweiler's interview with Pierce, she stated that she did not want Rogers to be convicted of a felony or to serve any jail time for the offense. Sealed Trieweiler Decl., ¶ 7. Trieweiler therefore attempted to engage the prosecutor in plea negotiations to reduce Rogers's charge to

a misdemeanor, but was informed that the charge could not be reduced without Pierce's consent. Id., ¶¶ 7-8. When Trieweiler contacted Pierce regarding the issue, she agreed to call the prosecutor to express her consent to a reduction in the charge against Rogers and that she did not want Rogers to go to jail. Id., ¶ 8-9.

Pierce ultimately called the prosecutor. Sealed Trieweiler Decl., ¶ 10. The prosecutor informed Trieweiler, however, that during the call, Pierce told the prosecutor about the letter and stated that she wanted Rogers to go to jail and that she objected to a reduction in the charge. Id. After learning of the letter, the prosecutor demanded that Trieweiler provide the State with a copy. *Id.* Trieweiler did not respond to the demand because he believed that the document was protected by the attorney-client privilege, his client's Fifth Amendment rights against self-incrimination and to effective representation, and RPC 1.6(a). *Id.*, ¶¶ 10-11. [redacted]

On January 22, 2016, the State moved to have Trieweiler removed as Rogers's counsel because a potential conflict of interest existed as a result of the State's demand for the letter. CP at 27-33. While the motion to disqualify was pending, the State obtained a subpoena duces tecum directing Marshall to "[p]rovide the letter written and mailed from the

Pierce[3] County Jail by Earl Rogers, Jr., in which he offered to pay money to your mother, Mansebia Pierce, if she would drop the charges against him." Suppl. Clerk's Papers[4], Subpoena Duces Tecum to "Timothia [sic]" Marshall, filed February 17, 2016.

On March 4, Marshall filed a declaration stating that at some point, Rogers mailed her a letter and that she gave the original letter to her mother, Pierce. Suppl. Clerk's Papers, Marshall Decl., ¶¶ 7-8. That same day, the trial court granted the motion to disqualify Trieweiler and new counsel was appointed for Rogers. CP at 36. The court did not, however, rule on the State's previously-filed motion to compel production of the letter at that time. *Id.* Rather, that matter lay fallow for the next 6 months.

In June, as the trial date approached, the State moved for a subpoena duces tecum requiring Trieweiler to produce the letter. CP at 39. On June 29, Rogers filed an objection to issuance of the subpoena. CP at 38-46. On June 30, the court granted the State's motion for a subpoena and the State served a subpoena on Trieweiler that same day. CP at 51-54. The subpoena ordered Trieweiler to produce "all letters,

---

[3] Although the subpoena requests a letter mailed from the Pierce County Jail, this appears to be a typographical error, as it appears that Rogers was confined in the King County Jail during the relevant time period. *See* CP at 28 (State's motion to disqualify Trieweiler) (stating that Rogers was "booked into the King County Jail")).

[4] On November 22, 2016, Trieweiler filed a supplemental designation of clerk's papers containing the subpoena duces tecum issued to Marshall and Marshall's declaration.

notes, memorandum or writings obtained at 103 S. 339th Circle, Unit B, Federal Way, WA 98003, from or in the presence of Mansebia Pierce, by David Trieweiler and/or his investigator, during the fall or winter of 2015." CP at 51. Trieweiler served an objection to the subpoena and requested a hearing date for the motion to quash. CP at 55.

Treiweiler also retained counsel. CP at 72-73. On July 20, Trieweiler noted a motion for August 12 seeking the court's permission to move to quash the subpoena *ex parte*, arguing that facts protected by the attorney-client privilege needed to be disclosed to the court in support of the motion to quash. CP at 74-76, 80, 85, ¶ 3. The court granted the motion. On August 15, Trieweiler moved to quash the State's subpoena and a motion to file that motion under seal. CP at 122-128; Trieweiler's Mot. to Quash Subpoena (filed under seal). The court granted Trieweiler's motion to seal but denied the motion to quash in part, limiting the broad scope of the subpoena's request as written, but nevertheless ordering that the alleged letter at issue be produced by noon on August 25, 2016. CP at 135-36; CP at 142-146. On August 25, Rogers filed a notice of discretionary review of the order on the motion to quash.

Trieweiler did not produce the letter by August 25. On August 26, the court found Trieweiler in contempt. CP at 147-150. Trieweiler appealed the contempt order (CP at 151), arguing that: (1) the letter was

protected by the attorney-client privilege under *State*4 Wn. 2d 828, 833, 394 P.2d 681 (1964) *ex rel. Sowers v. Olwell*, 6; (2) he was prohibited from disclosing the letter due to his duty of confidentiality under Rule of Professional Conduct (RPC) 1.6; and (3) the subpoena was improper because it was issued outside the scope of the criminal discovery rules.

On February 20, 2018, the Court of Appeals issued an unpublished opinion in which it ruled on both Rogers's and Trieweiler's appeals. *See* Appx. at A-1 through A-9 (*State v. Rogers*, No. 74722-9-I and 75828-4-I (Feb. 20, 2018)). The Court affirmed both the trial court's denial of Rogers's motion to quash the subpoena and the trial court's contempt order against Trieweiler. Rogers moved for reconsideration on March 12, 2018, and Trieweiler joined in the motion. Trieweiler also moved to publish the Court of Appeals' decision. On March 20, the Court of Appeals denied Rogers's motion for reconsideration. Appx. at A-10 through A-11. On April 2, 2018, the Court of Appeals granted Trieweiler's motion to publish. Appx. at A-12 through A-13.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Standard of Review

Under Rule of Appellate Procedure (RAP) 13.4(b), the Supreme Court will accept review of a Court of Appeals decision if, among other things, "the decision of the Court of Appeals is in conflict with a decision

of the Supreme Court" or "the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(1) and (4). Here, the Court of Appeals affirmed the contempt order against Trieweiler based on his failure to produce the letter, holding that the letter was not protected by the attorney-client privilege. Appx. at A-6. The Court also held that even if the letter was privileged, its disclosure was required based on a balancing of the public's interest in the letter and Roger's interest in his privilege. *Id.* In so holding, the Court of Appeals departed from the Supreme Court's decision in *State ex rel. Sowers v. Olwell* ("Olwell"), 64 Wn.2d 828, 833, 394 P.2d 681 (1964), rendering review by the Supreme Court appropriate. *See* RAP 13.4(b)(1).

Further, the Court's ruling on whether the letter was protected by the attorney-client privilege and/or RPC 1.6 and the balancing of interests associated with its determination of whether disclosure was required are all issues of substantial public interest that should be reviewed by the Supreme Court under RPC 13.4(b)(4).

B. Ruling that Letter Is Not Protected by Attorney-Client Privilege Is Inconsistent with *Olwell* and is a Matter of Substantial Public Interest

In Washington, the attorney-client privilege protects not only communications between an attorney and client, but also physical evidence. *Olwell*, 64 Wn. 2d at 833; *see* RCW 5.60.060(2)(a). In *Olwell*,

the Washington Supreme Court reversed a contempt order entered against a criminal defense attorney, David Olwell, for violating a subpoena duces tecum ordering him to produce a knife given to him by his client, Henry Gray. 64 Wn.2d at 836-37. The coroner issued the subpoena because the knife was a possible murder weapon. *Id.* at 830. Olwell obtained the knife after he had a conference with his client while his client was in jail. *Id.* Although it was not clear to the Supreme Court from the record whether Olwell came into possession of the knife through his own investigation or whether he obtained the knife as the result of communications with his client, the court concluded from the record that the knife made its way into Olwell's possession as the result of information received from Gray during their conference. *Id.* at 831.

Based on that assumption, the court held that the knife itself and the circumstances surrounding the attorney's receipt of the knife were privileged. *Id.* at 833. The court explained:

> To be protected as a privileged communication, information or objects acquired by an attorney must have been communicated or delivered to him by the client, and not merely obtained by the attorney while acting in that capacity for the client. . . . This means that the securing of the knife in this case must have resulted directly from information given to Mr. Olwell by his client when they conferred to come with the attorney-client privilege.

Id. at 831-32.

Because the court determined that Olwell obtained the knife based on a confidential attorney-client communication, the court held that the subpoena "is defective on its face because it requires the attorney to give testimony concerning information received by him from his client in the course of their conferences." *Id.* at 832. The court reasoned that the subpoena's requirement that the attorney present the privileged evidence in open court was "tantamount to requiring the attorney to testify against the client without the latter's consent." *Id.* *Olwell* distinguishes evidence obtained as a "direct result" of client confidences and evidence obtained through the attorney's own investigation. *See id.* at 831-32. Gray was confined in jail when he communicated with Olwell and, therefore, could not have directly provided the knife to him. Rather, although the court concluded from the facts that Olwell could locate the evidence as a "direct result" of information obtained from his client, the evidence itself must have been provided to him by another source.

Here, as in *Olwell*, Trieweiler obtained the letter because of confidential communications with Rogers. [redacted]

[redacted]

The Court of Appeals in this case nevertheless held that the letter was not privileged under *Olwell* because Trieweiler "did not obtain the letter as a result of direct or confidential communication with Rogers," basing its ruling in part on its conclusion that Trieweiler "obtained the letter from third parties." Appx. at A-6. In so holding, the Court of Appeals departs from *Olwell*. As set forth above, Trieweiler did obtain the letter as a direct result of his communications with Rogers. *See* Sealed Trieweiler Decl., ¶¶ 4, 5, 12. Further, although the Supreme Court in *Olwell* held that "[i]f the knife were obtained from a third person with whom there was no attorney-client relationship, the communication would not be privileged," the client in *Olwell* was in jail at the time the privileged conversation regarding the knife took place, meaning that Olwell must have obtained the knife from some other source,

64 Wn.2d at 832. Accordingly, the Court's ruling that the letter was not privileged because Trieweiler obtained it from a third party, regardless of any additional circumstances, constitutes a conflict with the Supreme Court's decision in *Olwell* and renders the Court of Appeals' opinion appropriate for review under RAP 13.4(b)(1).

The Court of Appeals' decision also impacts the contours of the attorney-client privilege, which is a matter of substantial public interest. The purpose of the attorney-client privilege is "'to encourage free and open attorney-client communication by assuring the client that his communications will be neither directly nor indirectly disclosed to others.'" *Pappas v. Holloway*, 114 Wn.2d 198, 203, 787 P.2d 30 (1990) (internal quotation marks omitted) (quoting *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 404, 706 P.2d 212 (1985)). The privilege "exists in order to allow the client to communicate freely with an attorney without fear of compulsory discovery." *Dietz v. Doe*, 131 Wn.2d 835, 842, 935 P.2d 611 (1997) (citing *Olwell*, 64 Wn.2d at 832). It is well-recognized that the preservation of the attorney-client privilege is a significant issue of public interest. "The attorney-client privilege 'recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client.'" *Newman v. Highland Sch. Dist. No. 203*, 186 Wn.2d 769, 778, 381 P.3d 1188 (2016)

(quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)). Further, the attorney-client privilege "promote[s] broader public interests in the observance of law and administration of justice." *Upjohn*, 449 U.S. at 389.

Here, the Court of Appeals held that the receipt of evidence from a third party at the client's direction eliminates any privilege in that evidence, notwithstanding the fact that the attorney in *Olwell* obtained the evidence at issue from his client indirectly, as did Trieweiler in this case. Appx. at A-6. Whether the attorney-client privilege protects evidence obtained by an attorney at the client's direction, albeit finding its way into the attorney's possession physically via another source, is an important question implicating the privilege. The Court of Appeals' decision renders the answer to this question unclear in light of the seemingly contradictory result in *Olwell*. Clarification of the contours of the doctrine is therefore an important matter of public interest, particularly where no significant cases addressing this topic have been issued in the more than 50 years since *Olwell*. *See* RAP 13.4(b)(4).

C. Application of Balancing Test is Inconsistent with *Olwell* and Constitutes a Matter of Substantial Public Interest

In determining whether the subpoena was valid, the *Olwell* court engaged in a "balancing process" under which it weighed the attorney-

client privilege against "the public's interest in the criminal investigation process." 64 Wn.2d at 832. The court held that although Olwell could not be compelled to testify regarding the knife, he was required to produce it to the prosecution after a reasonable time because the public's interest in criminal investigation outweighed the client's privilege. *Id.* at 833-34.

1. Evaluation of Public Interest Is Inconsistent with *Olwell* on the Facts and Is a Matter of Substantial Public Interest

The "public interest" element of the balancing test described in *Olwell* reflects the Rules of Professional Conduct governing the special duties of a prosecutor with respect to issuing subpoenas to a defendant's attorney or former attorney. *See* RPC 3.8(e). RPC 3.8(e) provides:

> The prosecutor in a criminal case shall:
> . . . .
> e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
> (1) the information sought is not protected from disclosure by any applicable privilege;
> (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
> (3) there is no other feasible alternative to obtain the information.

Comment 4 to the rule states that Section (e) is intended to limit the issuance of lawyer subpoenas to those situations in which there is a genuine need to intrude on the attorney-client relationship.

Application of these concepts to the present case produces a different result because unlike the knife in *Olwell*, the public's interest in the letter in this case is minimal. Both Marshall, who allegedly received the letter, and Pierce, who allegedly received a copy of it, can presumably testify to the letter's origin and contents. There is thus a "feasible alternative to obtain the information" contained in the letter.[5] RPC 3.8(e)(3). By contrast, in *Olwell*, there appear to have been no additional witnesses who could have testified regarding the murder weapon. Additionally, while testing and examination of the knife itself may have been a legitimate State and public interest in *Olwell*, no such interest exists in documentary evidence like the letter in this case. These factual distinctions between the present case and *Olwell* require a different result and render the Court of Appeals' decision in this case in conflict with *Olwell*. *See* RAP 13.4(b)(1).

Further, while the knife in *Olwell* was evidence of murder, a class A felony (*see* RCW 9A.32.030(2), 9A.32.050(2)) the letter is allegedly evidence of witness tampering, a class C felony (*see* RCW 9A.72.120(2)). The public's interest in prosecuting an accused murderer is higher than the public's interest in prosecuting Rogers for witness tampering. The Court

[5] Trieweiler takes no position on any arguments by Rogers that might arise at a subsequent trial as to the admissibility of any testimonial or documentary evidence.

of Appeals nevertheless held: "Any suggestion that the severity of the crime impacts the legitimacy of the State's interest is not compelling. The State has as legitimate an interest in prosecuting harassment as it does for murder." Appx. at A-8. But the issue here is not the "legitimacy" of the State/public interest in evidence of the purported crime but, rather, the *strength* of that (admittedly legitimate) interest. The division of crimes into certain classes is a public policy determination based on the severity of those crimes which, in turn, is a direct reflection of the strength of the State/public interest in prosecuting them. In ruling to the contrary, the Court of Appeals' decision is incorrect and conflicts with basic principles underlying our criminal justice system. As such, the Court of Appeals' decision constitutes a matter of substantial public interest that the Supreme Court should review under RAP 13.4(b)(4).

2. Harm to Attorney-Client Relationship Is a Matter of Substantial Public Interest

Roger's interest in maintaining the confidentiality of his communications with his former counsel is significant and well-recognized. *See Dietz*, 131 Wn.2d at 842; *Olwell*, 64 Wn.2d at 832.

[redacted]

[redacted]

The Court of Appeals nevertheless held that the impact of disclosure of the letter on the attorney-client privilege was "minimal" and that "[n]either Rogers nor Trieweiler establish any meaningful harm to their attorney-client relationship." Appx. at A-9. But Trieweiler and Rogers's attorney-client relationship was not only "harmed" by the State's persistence in attempting to obtain the privileged letter; it was incontrovertibly *destroyed*, as Trieweiler was disqualified as Rogers's counsel against Rogers's will. This harm is exactly the type of intrusion that the applicable rules were intended to prevent. As such, the Court's holding that Trieweiler and Rogers's attorney-client relationship was not harmed in this case is a significant ruling affecting the public interest that should be reviewed under RAP 13.4(b)(4).

Further, in its ruling, the Court of Appeals made a critical determination that the public's interest in the criminal investigation process (i.e., obtaining evidence of a crime) outweighs the impact of the required disclosure on the attorney-client relationship. This determination implicates a matter of substantial public interest because it signals where courts should land when confronted with balancing public interests in

cases where intruding on the attorney-client privilege will assist the State in recovering evidence of a purported crime. *See* RAP 13.4(b)(4).

3. Required Disclosure of Letter under RPC 1.6 Is an Issue of Substantial Public Interest

RPC 1.6(a)'s purpose is consistent with the attorney-client privilege, as it "contributes to the trust that is the hallmark of the client-lawyer relationship," under which the client is "encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter." RPC 1.6, cmt. 2. The rule protects not only information protected by the attorney client privilege, but also "secrets," which "refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." *Id.*, cmt. 21.

Even if information is not protected by the attorney-client privilege, "it may be unethical and a violation of RPC 1.6(a) for the attorney to reveal information involving 'secrets.'" *Dietz*, 131 Wn.2d at 842 n.3. When determining whether "secrets" must be divulged, the court "must balance the necessity of the disclosure against the effect such disclosure might have on the attorney-client relationship." *Seventh Elect Church in Israel v. Rogers*, 102 Wn.2d 527, 534-35, 688 P.2d 506 (1984).

As set forth above, the Court of Appeals applied this balancing test and held that the State's interest in obtaining evidence of a purported crime outweighed any interest in preserving attorney-client confidentiality. *See* Appx. at A-8 to A-9. For the same reasons that the balancing test is a matter of substantial public interest in the context of the attorney-client privilege, it is similarly a matter of substantial public interest in the context of an attorney's ability to disclose client "secrets" under RPC 1.6. Accordingly, this matter is appropriate for review by the Supreme Court under RPC 13.4(b)(4).

VI. CONCLUSION

In holding that the letter is not protected by the attorney-client privilege and that the letter must be produced, the Court of Appeals' decision is in conflict with the Supreme Court's decision in *Olwell,* warranting the Supreme Court's review under RAP 13.4(b)(1). Further, the Court's rulings on privilege, production of the letter under the Rules of Professional Conduct, and the balancing of public interests are all issues of substantial public interest that should be determined by the Supreme Court under RAP 13.4(b)(4). Accordingly, Trieweiler requests that the Supreme Court grant review of the Court of Appeals' decision in *State v. Rogers*, No. 75722-9-I and 75828-4-I, filed on February 20, 2018.

RESPECTFULLY SUBMITTED this 2nd day of May, 2018.

BETTS, PATTERSON & MINES, P.S.

By_____
Lori Worthington Hurl, WSBA #40647
BETTS PATTERSON & MINES
One Convention Place, Suite 1400
701 Pike Street
Seattle WA 98101-3927
Telephone: (206) 292-9988
Facsimile: (206) 343-7053
Attorneys for David A. Trieweiler

APPENDIX: [copy of court of appeals decision; order denying motion for reconsideration; order granting motion to publish]

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 Petition for Review; and**
- **Certificate of Service.**

Counsel for Plaintiff State of Washington
Susan I. Harrison
Violent and Economic Crimes Unit
Maleng Regional Justice Ctr
401 4th Ave N Ste 2A
Kent, WA 98032-4429

☐ U.S. Mail
☒Hand Delivery
☐ Facsimile
☐ Overnight
☐ E-mail

Counsel for Defendant Earl R. Rogers, Jr.
Daniel K. Felker
Law Office of Daniel K. Felker
860 SW 143rd St
Burien, WA 98166-1515

☐ U.S. Mail
☐Hand Delivery
☐ Facsimile
☐ Overnight
☒ E-mail per telephonic agreement

Counsel for Defendant Earl R. Rogers, Jr.
Gregory C. Link
Washington Appellate Project
1511 3rd Avenue, Suite 701
Seattle, WA 98101-3657

☐ U.S. Mail
☐Hand Delivery
☐ Facsimile
☐ Overnight
X 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 2nd day of May, 2018

s/ Karen L. Pritchard
Karen L. Pritchard

Appendix A

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

STATE OF WASHINGTON, Respondent, v. EARL RONALD ROGERS, JR. Appellant.	No. 75722-9-I
STATE OF WASHINGTON, Respondent, v. EARL RONALD ROGERS, JR., Appellant.	No. 75828-4-I UNPUBLISHED OPINION FILED: February 20, 2018

VERELLEN, C.J. — These appeals concern the State's attempt to compel attorney David Trieweiler to produce a letter written by his former client, Earl Rogers, to the victim of his alleged felony telephone harassment.

In No. 75828-4-I, Trieweiler appeals the trial court's order finding him in contempt for failing to produce the letter. He argues the court's subpoena duces tecum is invalid because it exceeds the scope of criminal discovery and seeks privileged or protected information. In No. 75722-9-I, Rogers challenges the

court's denial of the motion to quash the subpoena on the same grounds. Because the two cases involve the same legal issues and facts, we issue a single opinion.

The subpoena was not challenged before the trial court on the basis that it exceeded the scope of criminal discovery. We decline to reach this unpreserved claim of error.

Trieweiler was not the recipient of the letter. He obtained the letter from a third party. Even assuming the client mentioned the letter to his attorney, the attorney-client privilege does not extend to objects obtained from third parties. The letter is not protected by attorney-client privilege.

RPC 1.6 does not preclude Trieweiler from producing the letter to comply with a court order. Because the State has a legitimate interest in the letter and disclosure has little impact on the attorney-client relationship, the trial court did not abuse its discretion when it ordered Trieweiler to disclose the letter.

Therefore, we affirm.

FACTS

Rogers was charged with felony telephone harassment for threatening to kill Manesbia Pierce, his girlfriend's mother. He was represented by Trieweiler.

While the case was pending, the State became aware of a letter Rogers had written and mailed to Pierce's daughter, Timothea Marshall. Marshall gave the original letter to Pierce. Pierce gave a copy of the letter to Trieweiler. Pierce told the prosecutor Rogers apologized in the letter and offered to pay her to drop

the charges. It is undisputed that neither Marshall nor Pierce possess the original or a full copy of the handwritten letter.

In March 2016, the court removed Trieweiler as Rogers' attorney. In June 2016, the trial court issued a subpoena duces tecum for Trieweiler to produce documents, including the letter. On Trieweiler's motion to quash, the court narrowed the scope of the subpoena but still required Trieweiler to produce the letter. When he failed to produce it, the court found him in contempt.

Trieweiler appeals the contempt order. Rogers appeals the denial of the motion to quash.

ANALYSIS

Rogers argues the trial court abused its discretion when it denied the motion to quash the subpoena. Trieweiler contends the trial court abused its discretion when it found him in contempt for failing to produce the subpoenaed letter.

We review contempt findings and discovery orders for abuse of discretion.[1]

I. Scope of Discovery

For the first time on appeal, Trieweiler and Rogers contend the subpoena exceeded the scope of criminal discovery because CrR 4.7 does not allow the State to subpoena materials from any third party. We generally do not consider

[1] In re Interest of M.B., 101 Wn. App. 425, 454, 3 P.3d 780 (2000); State v. Yates, 111 Wn.2d 793, 797, 765 P.2d 291 (1988); State v. Boehme, 71 Wn.2d 621, 633, 430 P.2d 527 (1967) (quoting State v. Mesaros, 62 Wn.2d 579, 587, 384 P.2d 372 (1963)).

issues raised for the first time on appeal.[2] This rule encourages "'the efficient use of judicial resources' . . . by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals."[3]

Trieweiler concedes the error was not preserved and, in a conclusory footnote, requests review under RAP 2.5(a). Given the lack of objection below and the limited argument before us, we decline to review this unpreserved claim.[4]

II. Attorney-Client Privilege

Trieweiler and Rogers contend the letter is protected by attorney-client privilege.

The attorney-client privilege is codified in RCW 5.60.060(2)(a), which provides "[a]n 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." Information protected by the attorney-client privilege includes objects acquired by an attorney through a direct and confidential communication with the client, along with literal communications.[5] But the statutory privilege is not absolute and an

---

[2] RAP 2.5(a); State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995).

[3] State v. Robinson, 171 Wn.2d 292, 304-05, 253 P.3d 84 (2011) (quoting State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)).

[4] We note there is authority supporting the ability of the State or defendants to subpoena items from third parties. See, e.g., State v. White, 126 Wn. App. 131, 134-35, 107 P.3d 753 (2005) (addressing the notice required to be given by the State when subpoenaing evidence from a third party); CrR 4.8(b)(2) (addressing notice required of "a party" who seeks to subpoena a third party.)

[5] State ex rel. Sowers v. Olwell, 64 Wn.2d 828, 831, 394 P.2d 681 (1964).

object obtained from a third party with whom there was no attorney-client relationship is not privileged.[6]

In State ex rel. Sowers v. Olwell, an attorney refused to comply with a subpoena duces tecum requiring him to produce any knives relating to his client.[7] Our Supreme Court assumed the attorney must have obtained the knife as a direct result of information given to the attorney by his client.[8] For this reason, the court concluded the attorney-client privilege was implicated and the subpoena was defective on its face.[9]

But the Supreme Court expressly recognized "[i]f the knife were obtained from a third person with whom there was no attorney-client relationship, the communication would not be privileged, and the third person could be questioned concerning the transaction."[10] Additionally, the court acknowledged that even if a piece of evidence was protected by the attorney-client privilege, "the attorney, after a reasonable period, should, as an officer of the court, on his own motion turn the same over to the prosecution."[11]

---

[6] Id. at 832.

[7] 64 Wn.2d 828, 829, 394 P.2d 681 (1964)).

[8] Id. at 831-32 ("Although there is no evidence relating thereto, we think it reasonable to infer from the record that appellant did, in fact, obtain the evidence as the result of information received from his client during their conference. Therefore, for the purposes of this opinion and the questions to be answered, we assume that the evidence in appellant's possession was obtained through a confidential communication from his client.").

[9] Id. at 833.

[10] Id. at 832.

[11] Id. at 834.

Here, Trieweiler did not obtain the letter as a result of direct or confidential communication with Rogers. Rogers originally sent the letter to Marshall. Marshall gave the letter to Pierce, who then gave a copy to Trieweiler. Even if Rogers had some discussion with Trieweiler about the existence of the letter, Trieweiler still obtained the letter from third parties. And unlike Olwell, the subpoena in this case is limited to production of the letter. The State has not sought and assured this court it will not seek testimony from Trieweiler regarding the letter. It would be an odd standard if a defendant could shield a material item from discovery merely by communicating its existence to his or her attorney.[12] The letter is not subject to the attorney-client privilege.

III. RPC 1.6

Trieweiler and Rogers also argue RPC 1.6 precludes Trieweiler from disclosing the letter.

RPC 1.6(a) provides "[a] lawyer shall not reveal information relating to the representation of a client unless . . . the disclosure is permitted by paragraph (b)." The information protected by the rule includes confidences and secrets. "'Confidence' refers to information protected by the attorney client privilege under applicable law, and 'secret' refers to other information gained in the professional

[12] In Matter of Det. of Williams, 147 Wn.2d 476, 494, 55 P.3d 597 (2002) (a client "cannot create a privilege simply by giving [crime related] records to his attorney.").

relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."[13]

"Confidences," for purposes of RPC 1.6, is coextensive with the statutory attorney-client privilege.[14] But because the rule also extends to "secrets," the rule "is considerably broader than the statutory attorney-client privilege."[15]

As previously discussed, the letter is not within the attorney-client privilege and therefore is not a confidence. And even if the letter is a secret, the duty of nondisclosure is not absolute. RPC 1.6(a) expressly provides that its limits on disclosure do not apply if "the disclosure is permitted by paragraph (b)." Pursuant to RPC 1.6(b)(6), a lawyer "may reveal information relating to the representation of a client to comply with a court order." Since the court ordered disclosure of the letter, Trieweiler will not violate the RPCs by divulging the information.[16]

That leaves the question of whether the trial court abused its discretion in ordering Trieweiler to disclose the letter.[17] "In ordering disclosure of 'secrets', the trial court must balance the necessity of the disclosure against the effect such

---

[13] RPC 1.6 cmt. 21.

[14] Seventh Elect Church in Israel v. Rogers, 102 Wn.2d 527, 534, 688 P.2d 506 (1984).

[15] Id.; Dietz v. Doe, 131 Wn.2d 835, 842 n.3, 935 P.2d 611 (1997).

[16] See Seventh Elect Church, 102 Wn.2d at 534 ("Since the two trial courts involved in this appeal have ordered disclosure of the information sought by the Church, Betts, Patterson will not violate the disciplinary rule by divulging the information").

[17] See id. ("We must next determine whether either trial court abused its discretion in ordering Betts, Patterson to disclose its client's 'secret.'").

disclosure might have on the attorney-client relationship."[18] The purpose of the duty of confidentiality is to preclude disclosure of secrets when disclosure would have a "significant adverse effect on open and free-flowing communications which are so important to the attorney-client relationship."[19]

Here, the State has a legitimate interest in the letter because it is not disputed that the letter contains evidence of the crime charged (the apology for admitted acts), along with evidence of other criminal activity (offer to bribe the victim). Any suggestion that the severity of the crime impacts the legitimacy of the State's interest is not compelling. The State has as legitimate an interest in prosecuting harassment as it does for murder.

The impact of disclosure on the attorney-client relationship depends on all the circumstances. Here, the impact is minimal because the order is limited to the letter itself, and the State assures us that it will not seek any testimony from Trieweiler, including how he gained possession of the letter.[20] Any suggestion that production of the letter alone chills open and free-flowing communication with an attorney is not persuasive. Although compelling an attorney to disclose evidence of a client's criminal conduct may generally implicate protected confidences or

---

[18] Id. at 534-35.

[19] Id. at 536.

[20] See Olwell, 64 Wn.2d at 834 ("By thus allowing the prosecution to recover such evidence, the public interest is served, and by refusing the prosecution an opportunity to disclose the source of the evidence, the client's privilege is preserved and a balance is reached between these conflicting interests.").

secrets, a client does not establish an adverse impact on the attorney-client relationship solely because the item obtained may have detrimental consequences in current or future criminal proceedings. Neither Rogers nor Trieweiler establish any meaningful harm to their attorney-client relationship. The trial court did not abuse its discretion in ordering Trieweiler to disclose the letter.

Therefore, we affirm the trial court's order compelling the production of the letter and denying the motion to quash the subpoena. Because Trieweiler asserted a claim of privilege in good faith, we vacate the contempt finding contingent on Trieweiler providing the letter within 30 days of issuance of the mandate in No. 75828-4-I.[21]

WE CONCUR:

[21] See Seventh Elect Church, 102 Wn.2d at 536-37 ("When an attorney makes a claim of privilege in good faith, the proper course is for the trial court to stay all sanctions for contempt pending appellate review of the issue. According we vacate the finding of contempt against Betts, Patterson contingent on their [compliance with the court order] within 30 days of issuance of the mandate in this case.").

FILED
3/19/2018
Court of Appeals
Division I
State of Washington

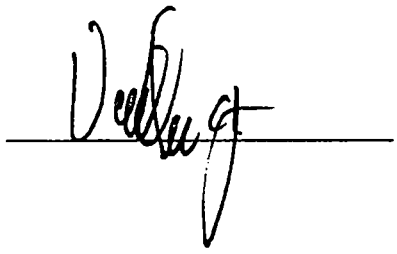
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. EARL RONALD ROGERS, JR. Appellant.	No. 75722-9-I
STATE OF WASHINGTON, Respondent, v. EARL RONALD ROGERS, JR., Appellant.	No. 75828-4-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant filed a motion for reconsideration of the court's February 20, 2018 opinion. Following consideration of the motion, the panel has determined it should be denied. Now, therefore, it is hereby

ORDERED that the appellant's motion for reconsideration is denied.

FOR THE PANEL:



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

STATE OF WASHINGTON, Respondent, v. EARL RONALD ROGERS, JR. Appellant.	)	No. 75722-9-I
STATE OF WASHINGTON, Respondent, v. EARL RONALD ROGERS, JR., Appellant.	)	No. 75828-4-I ORDER GRANTING MOTION TO PUBLISH OPINION

Appellant filed a motion to publish the court's February 20, 2018 opinion. Respondent has filed a response stating it has no opposition to the motion. Following consideration of the motion, the panel has determined the motion should be granted. Now, therefore, it is hereby

ORDERED that the appellant's motion to publish is granted.

FOR THE PANEL: