

FILED  
Court of Appeals  
Division II  
State of Washington  
8/2/2018 2:01 PM

NO. 51178-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

---

STATE OF WASHINGTON,

Respondent,

vs.

ROBERT WOODWARD,

Appellant.

---

BRIEF OF APPELLANT

---

John A. Hays, No. 16654  
Attorney for Appellant

1402 Broadway  
Suite 103  
Longview, WA 98632  
(360) 423-3084

**TABLE OF CONTENTS**

	Page
A. TABLE OF AUTHORITIES .....	iii
B. ASSIGNMENT OF ERROR	
1. Assignment of Error .....	1
2. Issue Pertaining to Assignment of Error .....	1
C. STATEMENT OF THE CASE .....	2
D. ARGUMENT	
<b>THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT’S MOTION UNDER RPC 1.16(d) AND CrR 4.7(a)(1) TO COMPEL THE DEFENDANT’S TRIAL ATTORNEY AND THE PROSECUTOR TO PROVIDE HIM DISCOVERY FOR THE PURPOSES OF PURSUING HIS PERSONAL RESTRAINT PETITION .....</b>	<b>5</b>
E. CONCLUSION .....	14
F. APPENDIX	
1. RPC 1.16(d) .....	15
2. CrR 1.1 .....	15
3. CrR 4.7(a)&(h) .....	15
4. WSBA Ethics Advisory Opinion 181 .....	19
G. AFFIRMATION OF SERVICE .....	23

**TABLE OF AUTHORITIES**

Page

***State Cases***

*State v. Padgett (unpublished)*, No. 35034-7-III,  
2018 WL 3455726 (Wn.App. July 17, 2018) ..... 10-12

***Statutes and Court Rules***

CrR 1.1 ..... 9

CrR 4.7 ..... 5-12

CrR 7.8(b) ..... 10

RAP 16.18 ..... 9

RPC 1.16(d) ..... 5, 6, 8, 11, 13

***Other Authorities***

Washington State Bar Association,  
Ethics Advisory Opinion 181 (1987) ..... 5, 6, 13

## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

The trial court erred when it denied the defendant's motion under RPC 1.16(d) and CrR 4.7(a)(1) to compel the defendant's trial attorney and the prosecutor to provide him discovery for the purposes of pursuing his personal restraint petition.

### ***Issues Pertaining to Assignment of Error***

Does a trial court err if it denies a defendant's motion under RPC 1.16(d) and CrR 4.7(a)(1) to compel that defendant's trial attorney and the prosecutor to provide discovery for the purposes of pursuing a personal restraint petition?

## STATEMENT OF THE CASE

On June 4, 2012, the Mason County Superior Court sentenced the defendant Robert Woodward to life in prison on one count of first degree rape of a child and two counts of second degree rape of a child following a jury's verdict of guilty on all three of these crimes. CP 4-18. At the time Mr. Ronald Sergi was the defendant's appointed trial attorney. CP 12. The defendant thereafter filed timely notice of appeal. CP 19-33. By unpublished decision filed February 11, 2014, this division of the Court of Appeals affirmed the defendant's convictions but remanded for resentencing. *Id.* On September 8, 2014, the Mason County Superior Court resentenced the defendant. CP 44-48. The defendant's trial attorney for the second sentencing was Ms. Jeanette W. Boothe. CP 42.

On August 7, 2017, the defendant, acting *pro se*, filed a Motion and Affirmation with the trial court to compel production of his discovery materials for the purpose of aiding him in the argument of his pending Personal Restraint Petitions (PRPs). CP 49, 50-71. The defendant's first request involved his prior trial attorney. CP 49. It stated:

COMES NOW Robert Woodward, appearing Pro se, and moves this court for an order to compel attorney Ronald E. Sergi to provide Mr. Woodward with his attorney work product and Discovery that was generated by the State at trial.

CP 49.

The defendant's second request was to require the prosecutor under CrR 4.7(a) to provide him with discovery. CP 53-55. It stated:

Robert Woodward, the defendant herein, moves this court for an order pursuant to (CrR 4.7(a)) and the constitutional due process mandates enunciated in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and its progeny, directing the prosecution to permit discovery and inspection or copying of each of the following general items:

1) The physical or tangible objects in the possession of the prosecuting attorneys or their agents which may be relevant to the guilt or innocence of the defendant.

2) Any documents or records of any kind which in any way question or raise doubts about the accuracy or reliability of any scientific and/or expert testing.

3) The criminal record of the witnesses called by the prosecution including arrests, indictments, convictions, acquittals or charges now pending against said witnesses.

4) Any evidence, documentary or otherwise, which might undermine or tend to undermine the credibility of any state's witness.

5) All exculpatory evidence which the prosecuting attorneys and their agents may have in their files.

6) Any evidence of any kind which is in any way mitigating.

7) Statements of witnesses not called by the prosecution as witnesses during the State's Case-in-Chief.

CP 53-55.

The defendant's former trial attorney Mr. Sergi filed a responsive pleading essentially indicating that he did not know where the defendant's file was. CP 72-73. Specifically, he stated that "[i]t may have been destroyed after the final appeal after its course or turned over to Jeannette Booth's office when the defendant retained her for, I think, re-sentencing." CP 72. As far as appellate counsel can tell from the trial record, the state did not file a responsive pleading to the defendant's motion. CP 1-86; RP 1-4.

Following a very, very brief hearing during which the defendant appeared *pro se*, the trial court denied the defendant's motion and entered the following order:

Defendant's motion is denied. Mr. Sergi does not have the file. Court finds it may have been turned over to another attorney.

CP 74.

Following entry of this order the defendant filed timely notice of appeal. CP 79-80. This Notice of Appeal states:

I, Robert Woodward, appearing *pro se*, seek review by the designated appellate court of the Mason County Superior Court's decision, dismissing Mr. Woodward's request for discovery.

CP 79.

## ARGUMENT

**THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION UNDER RPC 1.16(d) AND CrR 4.7(a)(1) TO COMPEL THE DEFENDANT'S TRIAL ATTORNEY AND THE PROSECUTOR TO PROVIDE HIM DISCOVERY FOR THE PURPOSES OF PURSUING HIS PERSONAL RESTRAINT PETITION.**

Washington Rule of Professional Conduct 1.16(d) recognizes that an attorney has a number of duties to his or her client upon termination of representation, including the duty to surrender at least portions of a client's file. This rule states:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, *surrendering papers and property to which the client is entitled and* refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

RPC 1.6(d) (emphasis added).

The Washington State Bar Association ethics advisory opinion 181 interpreting RPC 1.16(d), addresses an attorney's duty to turn over the file generated during representation to the client. It states:

At the conclusion of a representation, unless there is an express agreement to the contrary, the file generated in the course of representation, with limited exceptions, must be turned over to the client at the client's request, and if the lawyer wishes to retain copies for the lawyer's use, the copies must be made at the lawyer's expense.

WSBA Ethics Advisory Opinion 181 at 2 (1987).

While both RPC 1.16(d) and Ethics Advisory Opinion 181 indicate that a client is entitled to his or her file upon the termination of representation, both the opinion or the rule recognize that a former client is not necessarily entitled to each and every document in the file. Ethics Opinion 181 recognizes that a lawyer may withhold certain papers or documents if that action does not prejudice the client. For example, an attorney may withhold “drafts of papers, duplicate copies, photocopies of research material, and lawyers’ personal notes containing subjective impressions” without violation of the rule. Ethics Advisory Opinion 181 at 3.

In criminal cases an attorney’s duty to provide a client with a copy of his or her file is also controlled by CrR 4.7. Thus, prior to turning over discovery and other materials in a criminal case, an attorney must evaluate what documents or information in the file may be properly withheld until the prosecutor makes any allowable redactions. However, what is clear from both RPC 1.6(d) and Ethics Opinion 181, is that an attorney has an affirmative duty to retain and provide a copy of a client’s file to the client; summary refusal does not meet the requirements of either the rule or opinion.

While RPC 1.6(d) and Ethics Opinion 181 recognize an attorney's duty to maintain and provide a client with a copy of his or her file, a prosecutor's duty to provide discovery to a defendant in a criminal case is governed by CrR 4.7(a)(1), which states as follows:

(1) Except as otherwise provided by protective orders or as to matters not subject to disclosure, the prosecuting attorney shall disclose to the defendant the following material and information within the prosecuting attorney's possession or control no later than the omnibus hearing:

(i) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witnesses;

(ii) any written or recorded statements and the substance of any oral statements made by the defendant, or made by a codefendant if the trial is to be a joint one;

(iii) when authorized by the court, those portions of grand jury minutes containing testimony of the defendant, relevant testimony of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, and any relevant testimony that has not been transcribed;

(iv) any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and scientific tests, experiments, or comparisons;

(v) any books, papers, documents, photographs, or tangible objects, which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belonged to the defendant; and

(vi) any record of prior criminal convictions known to the

prosecuting attorney of the defendant and of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial.

(2) The prosecuting attorney shall disclose to the defendant:

(i) any electronic surveillance, including wiretapping, of the defendant's premises or conversations to which the defendant was a party and any record thereof;

(ii) any expert witnesses whom the prosecuting attorney will call at the hearing or trial, the subject of their testimony, and any reports they have submitted to the prosecuting attorney;

(iii) any information which the prosecuting attorney has indicating entrapment of the defendant.

(3) Except as is otherwise provided as to protective orders, the prosecuting attorney shall disclose to defendant's counsel any material or information within the prosecuting attorney's knowledge which tends to negate defendant's guilt as to the offense charged.

(4) The prosecuting attorney's obligation under this section is limited to material and information within the knowledge, possession or control of members of the prosecuting attorney's staff.

CrR 4.7(a)(1).

As with both RPC 1.16(d) and Ethics Opinion 181, CrR 4.7 does not require the prosecutor to turn over all discovery materials without redaction to a defendant. Rather, under CrR 4.7(h)(3) a prosecutor is entitled to make some redactions. This rule states:

Any materials furnished to an attorney pursuant to these rules

shall remain in the exclusive custody of the attorney and be used only for the purposes of conducting the party's side of the case, unless otherwise agreed by the parties or ordered by the court, and shall be subject to such other terms and conditions as the parties may agree or the court may provide. Further, a defense attorney shall be permitted to provide a copy of the materials to the defendant after making appropriate redactions which are approved by the prosecuting authority or order of the court.

CrR 4.7(h)(3).

While this rule allows the state to make redactions of discoverable materials, it does not allow either the prosecutor or the court to summarily refuse a defendant's request for discovery. In addition, there is nothing within CrR 4.7 specifically or within the criminal rules generally that cuts off a defendant's right to discovery materials in a criminal case once the trial and direct appeal are terminated. In fact, CrR 1.1 specifically recognizes that the duties created under the rule continue during any and all types of criminal proceedings, including post judgment actions. This rule states:

These rules govern the procedure in the courts of general jurisdiction of the State of Washington in all criminal proceedings and supersede all procedural statutes and rules that may be in conflict and shall be interpreted and supplemented in light of the common law and the decisional law of this state. These rules shall not be construed to affect or derogate from the constitutional rights of any defendant.

CrR 1.1.

As CrR 1.1 states, the rules of criminal procedures apply "in all

criminal proceedings.” Since Personal Restraint Petitions filed under RAP 16.18 and Motions for Relief from Judgment filed under CrR 7.8(b) are by nature (1) post-conviction proceedings and (2) “criminal” proceedings, they are also governed by the Rules of Criminal Procedure generally and RCW 4.7 specifically. Consequently, in this case the defendant was entitled to both his client file from his attorney as well as discovery from the prosecutor. Although counsel has been unable to find a published Washington opinion directly relating to these issues, the recent unpublished opinion in *State v. Padgett*, No. 35034-7-III, 2018 WL 3455726 (Wn.App. July 17, 2018) does address the issues raised in this appeal. The following examines this case.

In *Padgett, supra*, an indigent defendant appealed a trial court’s summary refusal to (1) order his prior attorney to provide him with his file, and (2) order the prosecutor to provide him with all discovery material. At the time the defendant’s case was on direct appeal with a court-appointed appellate attorney. However, he had brought the motion *pro se* before the trial court in order to gather the material he needed to effectively prepare a PRP. The trial court had denied the defendant’s motion to compel because: (1) it was not brought by appellate counsel, (2) any issues the defendant wanted to raise were already being addressed in the direct appeal, and (3) the defendant did not specify why he wanted the requested

materials.

On review, Division III of the Court of Appeals first pointed out the limitations on discovery found in CrR 4.7(h)(3) and RPC 1.16(d). The court stated as follows on these limitations:

While CrR 4.7(h)(3) and RPC 1.16(d) require disclosure, they do not entitle a defendant to unlimited access to an attorney's file or discovery. Counsel may withhold materials if doing so would not prejudice the client. WSBA Advisory Op. 181 ("Examples of papers the withholding of which would not prejudice the client would be drafts of papers, duplicate copies, photocopies of research material, and lawyers' personal notes containing subjective impressions such as comments about identifiable persons."). In addition, materials may be redacted as approved by the prosecuting attorney or court order, in order to protect against dissemination of sensitive or confidential information. See CrR 4.7(h)(3). A protective order may also be entered, if appropriate. CrR 4.7(h)(4).

*State v. Padgett*, No. 35034-7-III, 2018 WL 3455726, at 2 (Wn.App. July 17, 2018).

After explaining these limitations, the court went on to reverse the decision of the trial court, finding that the defendant was entitled to both his file from his former attorney as well as discovery from the prosecutor.

The court held:

Given the foregoing rules, the trial court was obliged to grant Mr. Padgett's motion for disclosure of his client file and discovery materials, subject to nonprejudicial withholdings under RPC 1.16(d) and redactions under CrR 4.7(h)(3). Because Mr. Padgett filed his motion pro se, as part of his investigation of a possible personal restraint petition (PRP), he need not have involved appellate

counsel in his request. Unlike a direct appeal, there is no constitutional right to counsel with respect to a PRP. A convicted person seeking to file a PRP need not wait until the conclusion of a direct appeal. Accordingly, because Mr. Padgett sought his trial counsel's file, not that of appellate counsel, there was no need for Mr. Padgett's appellate counsel to be involved in his request for the client file.

It is worth noting that although CrR 4.7(h)(3) and RPC 1.16(d) require disclosure without a showing of need, the ends of justice are best served by timely disclosure of a client file to an individual investigating the possibility of postconviction relief through a PRP. A PRP is a defendant's avenue for presenting facts and materials outside the record on direct appeal. If a defendant is denied access to his client file and related discovery materials, he will be deprived of a critical resource for completing a viable PRP. By summarily denying Mr. Padgett's motion in full, the trial court prevented Mr. Padgett from accessing the type of information that he may need to complete his PRP. Corrective action is warranted.

*State v. Padgett*, No. 35034-7-III, 2018 WL 3455726, at 2 (Wn.App. July 17, 2018) (some authorities omitted).

The reasoning of the court in *Padgett* is sound and provides a logical application of the duties and requirements found in both CrR 4.7(h)(3) and RPC 1.16(d). In addition, the relevant facts of *Padgett* and the case at bar are strikingly similar. In both cases a defendant appeared *pro se* before the trial court upon a motion to compel his trial attorney to provide him a copy of his file. In both cases the same defendant also moved to compel the prosecutor to provide him a copy of discovery under CrR 4.7. In both cases the defendant needed the materials in order to prepare to file or argue a

PRP. Thus, in the same matter that the trial court erred in *Padgett* when it denied the defendant's motion to compel the production of documents from his trial attorney and the prosecutor, so the trial court erred in the case at bar when it denied the defendant's motion to compel the production of documents from his trial attorney and the prosecutor.

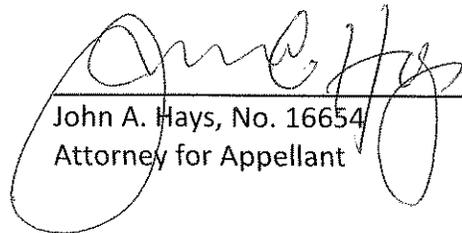
In making this argument, it should also be noted that both RPC 1.16(d) and Ethics Opinion 181 impose an affirmative duty upon trial counsel to both preserve a file and to provide it to the client upon demand. It does not provide that this duty is nullified simply because the trial attorney, without any evidence of a diligent search, doesn't know where that file is located. At a minimum, the trial court should compel the trial attorney to undergo a diligent search for the file and provide the court with an adequate explanation if the file cannot be produced. The trial court erred when it did not take this action in the case at bar and when it denied the motion to provide the requested discovery.

## CONCLUSION

The trial court erred when it refused the defendant's motion for an order compelling his prior attorney to produce and hand over the defendant's client file and when it refused to enter an order compelling the prosecuting attorney to provide discovery to the defendant.

DATED this 2<sup>nd</sup> day of August, 2018.

Respectfully submitted,



John A. Hays, No. 16654  
Attorney for Appellant

## **APPENDIX**

### **RPC 1.16(d)**

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of another legal practitioner, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

### **CR 1.1**

These rules govern the procedure in the courts of general jurisdiction of the State of Washington in all criminal proceedings and supersede all procedural statutes and rules that may be in conflict and shall be interpreted and supplemented in light of the common law and the decisional law of this state. These rules shall not be construed to affect or derogate from the constitutional rights of any defendant.

### **CrR 4.7(a)&(h)**

#### **(a) Prosecutors Obligations.**

(1) Except as otherwise provided by protective orders or as to matters not subject to disclosure, the prosecuting attorney shall is close to the defendant the following material and information within the prosecuting attorney's possession or control no later than the omnibus hearing:

(i) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witnesses;

(ii) any written or recorded statements and the substance of any oral statements made by the defendant, or made by a codefendant if the trial is to be a joint one;

(iii) when authorized by the court, those portions of grand jury minutes containing testimony of the defendant, relevant testimony of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, and any relevant testimony that has not been transcribed;

(iv) any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and scientific tests, experiments, or comparisons;

(v) any books, papers, documents, photographs, or tangible objects, which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belonged to the defendant; and

(vi) any record of prior criminal convictions known to the prosecuting attorney of the defendant and of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial.

(2) The prosecuting attorney shall disclose to the defendant:

(i) any electronic surveillance, including wiretapping, of the defendant's premises or conversations to which the defendant was a party and any record thereof;

(ii) any expert witnesses whom the prosecuting attorney will call at the hearing or trial, the subject of their testimony, and any reports they have submitted to the prosecuting attorney;

(iii) any information which the prosecuting attorney has indicating entrapment of the defendant.

(3) Except as is otherwise provided as to protective orders, the prosecuting attorney shall disclose to defendant's counsel any material or information within the prosecuting attorney's knowledge which tends to negate defendant's guilt as to the offense charged.

(4) The prosecuting attorney's obligation under this section is limited to material and information within the knowledge, possession or control of members of the prosecuting attorney's staff.

. . .

(h) Regulation of Discovery.

(1) Investigations Not To Be Impeded. Except as is otherwise provided with respect to protective orders and matters not subject to disclosure, neither the counsel for the parties nor other prosecution or defense personnel shall advise persons other than the defendant having relevant material or information to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor shall they otherwise impede opposing counsel's investigation of the case.

(2) Continuing Duty To Disclose. If, after compliance with these rules or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, the party shall promptly notify the other party or their counsel of the existence of such additional material, and if the additional material or information is discovered during trial, the court shall also be notified.

(3) Custody of Materials. Any materials furnished to an attorney pursuant to these rules shall remain in the exclusive custody of the attorney and be used only for the purposes of conducting the party's side of the case, unless otherwise agreed by the parties or ordered by the court, and shall be subject to such other terms and conditions as the parties may agree or the court may provide. Further, a defense attorney shall be permitted to provide a copy of the materials to the defendant after making appropriate redactions which are approved by the prosecuting authority or order of the court.

(4) Protective Orders. Upon a showing of cause, the court may at any time order that specified disclosure be restricted or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled must be disclosed in time to permit the party's counsel to make beneficial use thereof.

(5) Excision. When some parts of certain material are discoverable under this rule, and other parts not discoverable, as much of the material shall be disclosed as is consistent with this rule. Material excised pursuant to judicial order shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

(6) In Camera Proceedings. Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosure, or portion of such showing, to be made in camera. A record shall be made of such proceedings. If the court enters an order granting relief following a showing in camera, the entire record of such showing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

(7) Sanctions.

(i) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.

(ii) Willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

**WSBA Ethics Advisory Opinion 181  
(1987 - Amended 2009)**

At the conclusion of the representation of a client, the client often requests a copy of the “file.” If the lawyer’s fees remain unpaid, the lawyer may want to assert lien rights. If no lien rights are claimed, a question often arises as to what parts of the file must be provided and whether the lawyer can charge the client for the expense of copying the file. The Rules of Professional Conduct shed light on both questions.

I. The attorney’s possessory lien.

A. Issue: What are the ethical limitations on a lawyer’s right to assert a lien on the papers or money of a client or former client?

B. Conclusion: A lawyer cannot exercise the right to assert a lien against files and papers when withholding these documents would materially interfere with the client’s subsequent legal representation. Nor can the lien be asserted against monies held in trust by the lawyer for a specific purpose or subject to a valid claim by a third party.

C. Discussion: Attorneys have a “retaining” or a “possessory” lien under RCW 60.40.010 against papers or money in the lawyer’s possession. In contrast to a “charging” lien under RCW 60.40.010(4) on a judgment obtained for a client, the retaining lien on papers or money cannot be foreclosed. *Ross v. Scannell*, 97 Wn.2d 598, 647 P.2d 1004 (1982). The lien “may merely be used to embarrass the client, or, as some cases express it to ‘worry’ him into the payment of the charges.” *Gottstein v. Harrington*, 25 Wash. 508, 511, 65 P. 753 (1901).

The client, however, retains an absolute right, in civil cases at least, to terminate the lawyer at any time for any reason, or for no reason at all. RPC 1.16(a)(3); *Belli v. Shaw*, 98 Wn.2d 569, 657 P.2d 315 (1983). Upon termination of the relationship, RPC 1.16(d) requires that:

A lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as . . . surrendering papers and property to which the client is entitled. . . . The lawyer may retain papers relating to the client to the extent permitted by other law.

If assertion of the lien would prejudice the former client, the duty to protect the former client's interests supersedes the right to assert the lien.

A client's need for the files will almost always be presumed from the request for the files. But this need does not mean that in every case the assertion of a lien will prejudice the client. If there is no dispute about fees and the client has the ability to pay the outstanding charges, it is proper for the lawyer to assert the lien. In this situation, it is the former client's refusal to pay that will cause any injury. When, however, there is a dispute about the amount owed, or the client does not have the ability to pay, the lawyer cannot assert lien rights if there is any possibility of interference with the former client's effective self-representation or representation by a new lawyer.

The right to assert the lien against funds of the client in the lawyer's control is also limited. For example, a lawyer may not assert a lien against monies which constitute, or which have been commingled with, child support payments. *Fuqua v. Fuqua*, 88 Wn.2d 100, 558 P.2d 801 (1977). Similarly, if a lawyer accepts funds from a client for a specific purpose, such as for posting a bond or paying a court imposed penalty, the failure to use the funds for the agreed purpose may constitute misrepresentation, failure to carry out a contract of employment, or failure to properly handle client funds. See, e.g., *In re McMurray*, 99 Wn.2d 920, 665 P.2d 1352 (1983). Funds held by a lawyer over which a third party has an enforceable lien may not be subject to the attorney's possessory lien. See, e.g., *Department of Labor and Industries v. Dillon*, 28 Wn. App. 853, 626 P.2d 1004 (1981). When the funds are not held in trust for a specific purpose or subject to a valid claim by a third party, the lawyer may hold the funds subject to the lien even though the client may direct that the funds be transferred to a new attorney and claim that a refusal to transfer will prevent the client from obtaining effective representation.

If there is a dispute about the amount of fees owed, the prudent course would be for the lawyer to immediately institute court action to resolve the issue, to limit the lien to the undisputed amount, and to release the balance of funds.

Since the retaining or possessory lien cannot be foreclosed, any

funds held pursuant to the lien must be held in the lawyer's trust account. The lawyer can apply those funds against what is owed only by obtaining a judgment against the client and enforcing the judgment by the normal judgment enforcement processes.

## II. Responding to a former client's request for files

A. Issue: When a former client requests the file and no lien is asserted, what copying costs can a lawyer charge and what papers and files must be delivered?

B. Conclusion: At the conclusion of a representation, unless there is an express agreement to the contrary, the file generated in the course of representation, with limited exceptions, must be turned over to the client at the client's request, and if the lawyer wishes to retain copies for the lawyer's use, the copies must be made at the lawyer's expense.

C. Discussion: In analyzing this question a lawyer's file assembled in the course of representing a client can be broken down as follows:

(a) Client's papers – the actual documents the client gave to the lawyer or papers, such as medical records, the lawyer has acquired at the client's expense.

(b) Documents the disposition of which is controlled by a protective order or other obligation of confidentiality;

(c) Miscellaneous material that would be of no value to the client; and

(d) The balance of the file, including documents stored electronically.

Client's papers - the actual documents the client caused to be delivered to the lawyer or papers, such as medical records that the lawyer has acquired at the client's expense—must be returned to the client on the termination of the representation at the client's request unless a lien is asserted. If the lawyer wants to retain copies, the lawyer must bear the copying expense, and would hold the copies subject to the duty of

confidentiality imposed by RPC 1.6.

Aside from principles of ownership, RPC 1.16(d) requires the lawyer, upon termination of representation, to take steps to the extent reasonably practical to protect a client's interests including surrendering papers and property to which the client is entitled. Subject to limited exceptions, this Rule obligates the lawyer to deliver the file to client. If the lawyer wants to retain copies for the lawyer's own use, the lawyer must pay for the copies.

While the client's interests must be the lawyer's foremost concern, if the lawyer can reasonably conclude that withholding certain papers will not prejudice the client, the lawyer may withhold those papers. Examples of papers the withholding of which would not prejudice the client would be drafts of papers, duplicate copies, photocopies of research material, and lawyers' personal notes containing subjective impressions such as comments about identifiable persons.

A protective order or confidentiality obligation that limits the distribution of documents or specifies the manner of their disposition may supersede a conflicting demand of a former client.

The lawyer and client can make an arrangement different from that outlined above. A lawyer and client could agree that the files to be generated or accumulated will belong to the lawyer and that the client will have to pay for all copies sent to the client. Similarly, if the client wishes the lawyer to retain copies it would be appropriate to charge the copying expense to the client.

COURT OF APPEALS OF WASHINGTON, DIVISION II

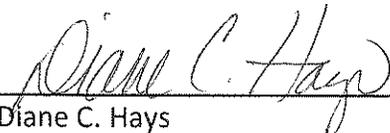
STATE OF WASHINGTON,  
Respondent,  
  
vs.  
  
ROBERT WOODWARD,  
Appellant.

NO. 51178-9-II  
  
AFFIRMATION  
OF SERVICE

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. Timothy Higgs  
Mason County Prosecuting Attorney  
P.O. Box 639  
Shelton, WA 98584  
timh@co.mason.wa.us
2. Robert Woodward, No.357466  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98520

Dated this 2<sup>nd</sup> day of August, 2018, at Longview, WA.

  
Diane C. Hays

**JOHN A. HAYS, ATTORNEY AT LAW**

**August 02, 2018 - 2:01 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 51178-9  
**Appellate Court Case Title:** State of Washington, Respondent v. Robert Woodward, Appellant  
**Superior Court Case Number:** 11-1-00088-5

**The following documents have been uploaded:**

- 511789\_Briefs\_20180802140031D2454341\_4257.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was Woodward Brief of Appellant.pdf*

**A copy of the uploaded files will be sent to:**

- timh@co.mason.wa.us

**Comments:**

---

Sender Name: Diane Hays - Email: jahayslaw@comcast.net

**Filing on Behalf of:** John A. Hays - Email: jahayslaw@comcast.net (Alternate Email: jahayslaw@comcast.net)

Address:  
1402 Broadway  
Longview, WA, 98632  
Phone: (360) 423-3084

**Note: The Filing Id is 20180802140031D2454341**