

**NO. 53116-0-II**

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

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STATE OF WASHINGTON,

Respondent,

v.

**WESTON MILLER,**

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR LEWIS COUNTY

The Honorable Andrew J. Toynee, Judge

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**BRIEF OF APPELLANT**

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LISA E. TABBUT  
Attorney for Appellant  
P. O. Box 1319  
Winthrop, WA 98862  
(509) 996-3959

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in denying Miller’s motion to compel production of his client file and redacted discovery under RPC 1.16(d) and CrR 4.7(h)(3).

2. The trial court erred in not entering post-hearing written findings of fact and conclusions of law.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether, under RPC 1.16(d) and CrR 4.7(h)(3), the trial court erred in failing to order Miller’s trial counsel to turn over Miller’s appropriately redacted client file to Miller at the conclusion of counsel’s representation and at Miller’s request?

2. Whether the trial court’s failure to enter written post-hearing findings of fact and conclusions of law on Miller’s motion to compel the production of his client file and discovery materials requires remand for entry of findings and conclusions?

**C. STATEMENT OF THE CASE**

The state charged Miller with murder in the first degree. Supplemental Designation of Clerk’s Papers, Amended Information. A jury found Miller guilty. Supp. DCP, Verdict (first-degree murder). The court sentenced Miller to 360 months and entered its judgment and

sentence on June 5, 2013. Supp. DCP Judgment and Sentence. Court-appointed attorney Joseph Enbody represented Miller. RP 1-8.

Miller appealed his conviction in state and federal court. See *State v. Miller*, No. 44966-8-II (December 2, 2014); *Miller v. Key*, No. 3:18-cv-5700 BHS-JRC, 2019 WL 2504369 (W.D. Washington May 20, 2019).

Neither decision reversed Miller's convictions.

Post-conviction, and as early as March 2015, Miller wrote letters to attorney Enbody requesting his trial court file. CP 6, 9, 12-13. Enbody replied to Miller's requests but steadfastly declined to provide Miller with the requested material. CP 7, 10, 14. In his letters to Miller, attorney Enbody told Miller he did store a criminal defense file "for a period of time." CP 7, 10. Enbody did not object to the characterization that he destroyed the file. RP 2-7; CP 10, 14. Enbody also asserted none of the discovery material in the file belonged to Miller. CP 14.

Miller persisted in his request to receive the file from attorney Enbody. CP 6, 9, 12-13.

Repeatedly stymied in his requests to attorney Enbody, Miller, on December 10, 2018, filed a motion with the trial court to "compel production of client file and discovery materials." CP 1-17.

Lewis County Judge Toynee heard the motion on February 13, 2019. RP 1-8. Attorney Enbody appeared in person. RP 2. Miller appeared telephonically. RP 2.

Attorney Enbody told the court "I have portions [of the file] but they are not complete." RP 3. Enbody said nothing to the court about giving clients notice of their right to have the file. RP 1-9.

Miller assured the court he welcomed any available material from his file to include an "empty" file folder. RP 2. The court refused to order attorney Enbody to give Miller his property, i.e., the court file. RP 4-5. The trial court was even hostile to Miller and responded,

That is not a proper use of either the discovery rules or enforcement of the rules of professional conduct, and arguably not a proper use of the Freedom of Information Act and Washington's version of it. So I also don't believe that it's a basis for compelling Mr. Enbody to provide incomplete documents, so I'm denying the motion to compel.

RP 4-5.

During the hearing, Miller told the court he needed a written judicial finding of fact concerning attorney Enbody's destruction of his file. RP 2. The court told Miller he could request the written findings and

conclusions be mailed to him by the court. RP 6-7. To date, there are no findings and conclusions in the court file.<sup>1</sup>

Miller appealed the trial court's denial of his motion. CP 19-20.

This court found Miller's appeal an appeal of right. See Court's Ruling of May 23, 2019.

#### **D. ARGUMENT**

**Issue 1: Miller is entitled to his trial file, and the trial court erred in refusing to order defense counsel to release whatever remained of it.**

Miller sought to obtain his case file and discovery materials relating to his conviction for review and preparation of a personal restraint petition. Because he is entitled to the materials requested both under the applicable rules governing discovery and the Rules of Professional Conduct governing ownership of his file, the order denying Miller's motion was erroneous.

**A. The plain language of CrR 4.7(h)(3) reflects Miller is entitled to a copy of defense counsel's case file.**

Miller is entitled to the file created by his trial counsel in defending Miller on criminal charges. The judge, hearing Miller's motion for release of what remained of Miller's file still held in defense counsel's possession,

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<sup>1</sup> This counsel reviewed the court file. There are no post-hearing written findings and conclusions in the court file.

abused its discretion in failing to order defense counsel Enbody to release what is Miller's property - Miller's client file - to Miller.

Under the rules governing discovery in Superior Court criminal cases, materials provided in discovery must generally remain in the exclusive custody of the attorney and only be used for purposes of conducting the party's case. CrR 4.7(h)(3). However, the rule also provides that "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." *Id.* The discovery rules also permit the entering of protective orders affecting discovery for cause shown, and the imposition of sanctions for failing to comply with an applicable discovery rule or order. CrR 4.7(h)(4), (7).

A trial court reviews rulings on discovery motions based on the court rules for abuse of discretion, which occurs when the trial court makes its decisions based on untenable grounds or for untenable reasons. *State v. Vance*, 184 Wn. App. 902, 911, 339 P.3d 245 (2014). In interpreting the requirements of a court rule, the courts apply ordinary principles of statutory construction, looking first to the plain language of the rule. *City of Seattle v. Holifield*, 170 Wn.2d 320, 327, 240 P.3d 1162 (2010). It is well established that use of the word "shall" imposes a mandatory requirement

unless a contrary intent is apparent. *State v. Gonzales*, 198 Wn. App. 151, 155, 392 P.3d 1158 (2017).

Applying these principles, the plain language of CrR 4.7(h)(3) requires the trial court to permit the defense attorney to provide a copy of the discovery to the defendant, subject to appropriate redactions. This rule arises at least in part from due process considerations, as access to evidence is a crucial element of the right to a fair trial. *State v. Grenning*, 169 Wn.2d 47, 58, 234 P.3d 169 (2010). Denying the defendant access to the evidence imposes “an impossible burden on the defendant since the defendant could only speculate what exculpatory evidence it might reveal.” *Id.*

Legal precedent mandating the release of trial counsel’s file to Miller existed on February 13, 2019, the date the trial court heard Miller’s request. See, *State v. Padgett*, 4 Wn. App. 2d 581, 424 P.3d 1235 (2018).<sup>2</sup>

Due process concerns are heightened when, as here, the defendant wishes to evaluate grounds for post-conviction review. RP 3, 5. Because grounds for relief include constitutional deprivations as well as material facts that have not been previously presented, review of the discovery

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<sup>2</sup> The *Padgett* court issued its unpublished opinion on July 17, 2018. The opinion reissued as a published opinion on August 23, 2018.

materials is generally critical to evaluating the effectiveness of trial counsel in investigating the case and raising or preserving potential challenges to the State's acquisition of evidence. RAP 16.4(c)(2), (3). Miller told the court he wanted and needed the material for a PRP. RP 3, 5.

In a PRP, the petitioner must also present the evidence supporting his factual allegations. RAP 16.7(a)(2). Thus, denying a post-conviction petitioner access to the underlying discovery materials imposes the same kinds of unfair burdens that raise due process concerns by requiring him to present the evidence supporting his claim of error while simultaneously preventing him from obtaining it. Without access to the discovery, a defendant will probably never find out if his attorney failed to interview an exculpatory witness, or move to suppress unlawfully obtained evidence, nor would he be able to show the deficiency without demonstrating to the court how the error was apparent in the discovery materials and should have alerted trial counsel to the need to act.

Nothing in the rule terminates the mandatory obligation to provide an appropriately redacted copy of the discovery materials to the defendant after conviction. To the contrary, the rules are to be interpreted “to provide for the just determination of every criminal proceeding.” CrR 1.2. CrR 4.7(h)(3) contains no temporally limiting language suggesting that

the obligation to provide a copy of materials relating to the case is terminated once a judgment is entered.

Where discovery materials are provided in a criminal case according to the court rules, and the defendant requires the materials for use in post-conviction review of the same case, fairness demands that the requested copy be provided. Any concern from the State about control over and dissemination of the discovery materials can be adequately addressed by redacting sensitive information, requesting an appropriate protective order, or seeking sanctions for inappropriate use of the materials. The concerns do not warrant depriving the defendant of the documentation he needs to evaluate and substantiate his claim for relief.

Because CrR 4.7(h)(3) governs the discovery materials provided in Miller's case and his right to a copy of them, the trial court erred in concluding that he was not entitled to a copy of the discovery under the rule. As such, its ruling denying his motion was based upon untenable reasons and constituted an abuse of discretion. The order denying the motion should, therefore, be reversed.

**B. Miller is the owner of his client file under RPC 1.16(d) and is entitled to receive it.**

Furthermore, the trial court entirely failed to address Miller's arguments under RPC 1.16(d). Under that rule, Miller is the owner of his file, and his former attorney was ethically required to take reasonably practicable steps to protect his interests, including returning the file to him. Because Miller was entitled to the file, including the appropriately redacted discovery materials, the trial court erred in denying his motion to obtain it.

The Washington State Bar Association examined the requirements of RPC 1.16 in an advisory opinion issued in 1987. Under that opinion, a client is generally entitled to the entire client file upon termination of representation. WSBA Formal Ethics Opinion 181, at 2-3 (1987), attached hereto as Appendix. While this obligation is superseded by legal obligations that limit the distribution of documents in the file, such as CrR 4.7(h)(3)'s restriction on the custody of discovery materials, the rule also requires reasonably practicable action to protect the client's interests. *Id.* at 3. Where CrR 4.7(h)(3) provides a mandatory obligation to provide redacted copies of the materials to the defendant, counsel's professional responsibility upon receipt of a request for the file and discovery materials

includes an effort to obtain the required permission from the prosecuting attorney or the court order permitting the copy to be provided. See also RPC 1.15A(g) (when lawyer possesses property in which there are competing interests, lawyer “must take reasonable action to resolve the dispute.”).

“A superior court has the authority and duty to see to the ethical conduct of lawyers in proceedings before it.” *State v. Sanchez*, 171 Wn. App. 518, 546, 288 P.3d 351 (2012). Here, the required ethical conduct of Miller’s trial counsel included returning the client file to Miller, at Miller’s request. Apart from the discovery materials, dissemination of which is governed by the court rule, Miller was entitled to receive the entire file, including the notes and records relating to his representation, subject only to specific limitations for materials that are unlikely to cause prejudice if withheld, such as drafts of documents, duplicate copies, or notes about the lawyer’s personal impressions of identifiable persons. WSBA Formal Ethics Opinion 181 at 3. The trial court accordingly erred in denying Miller’s motion for his file under RPC 1.16(d).

Finally, these identical considerations have already been raised and considered by Division III of the Court of Appeals in *Padgett*, 4 Wn. App. 2d at 854-56. The reasoning of *Padgett* should be followed. The *Padgett* court

determined that under RPC 1.16(d), the defendant had a right to his file excepting materials that should be withheld under CrR 4.7(h)(3), and the trial court erred in denying his motion to obtain those materials. *Padgett*, 4 Wn. App. 2d at 855-56. Accordingly, the *Padgett* court reversed the order and remanded the case for further proceedings. *Id.* at 856.

The present case is indistinguishable from *Padgett* in every material respect. Miller properly requested his file, to which he was entitled under RPC 1.16(d). To the extent the discovery cannot be summarily provided in response to his request, CrR 4.7(h)(3) requires it to be provided to him with appropriate redactions. Because Miller is entitled to the materials, it was error for the trial court to deny his motion to obtain them. Accordingly, the order should be reversed, and the case remanded.

Miller knows attorney Enbody disposed of a large part of his file as per Enbody's statement at the motion hearing. RP 3-4. Nonetheless, counsel remains obligated to provide Miller with appropriately redacted copies of what exists.

**Issue 2: The trial court must enter written findings of fact and conclusions of law.**

At the end of the hearing, Mr. Miller asked the court for a draft of written findings of fact and conclusions of law on the hearing. RP 6. The

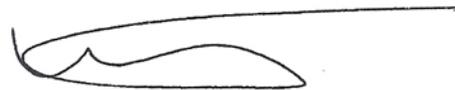
prosecutor indicated she would send Miller a courtesy copy. RP 6-7. Miller has not received, proposed, or entered, written findings and conclusions. This counsel's review of the court file found no entry of written findings and conclusions.

Miller requests a copy of what, if anything, the prosecutor prepared so he can approve or challenge the content prior to their entry.

**E. CONCLUSION**

Miller respectfully requests this court reverse the trial court's oral ruling denying his motion to provide him with his client file and discovery and to remand his case to the trial court for further action. Remand will also afford Miller the opportunity to ensure entry of appropriate written findings of fact and conclusions of law which address his needs and concerns.

Respectfully submitted October 4, 2019.



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LISA E. TABBUT/WSBA 21344  
Attorney for Weston Miller

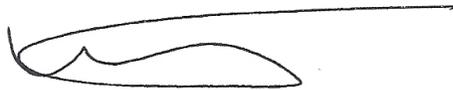
**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares as follows:

On today's date, I filed the Brief of Appellant to (1) Lewis County Prosecutor's Office, at [appeals@lewiscountywa.gov](mailto:appeals@lewiscountywa.gov) and [sara.beigh@lewiscountywa.gov](mailto:sara.beigh@lewiscountywa.gov); (2) the Court of Appeals, Division II; and (3) I mailed it to Weston Miller, DOC#366767, Airway Heights Corrections Center, PO Box 2049, Airway Heights, WA 99001.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed October 4, 2019, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344  
Attorney for Weston Miller, Appellant

# WASHINGTON STATE BAR ASSOCIATION

**Advisory Opinion:** 181

**Year Issued:** 1987

**RPC(s):** 1.16

**Subject:** Asserting Possessory Lien Rights and Responding to Former Client's Request for Files

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.

[amended 2009]

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Advisory Opinions are provided for the education of the Bar and reflect the opinion of the Committee on Professional Ethics (CPE) or its predecessors. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official position of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The Committee's answer does not include or opine about any other applicable law other than the meaning of the Rules of Professional Conduct.

**LAW OFFICE OF LISA E TABBUT**

**October 04, 2019 - 1:18 PM**

**Transmittal Information**

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