

WSBA NWSidebar
Posted: June 5, 2018

Appeals Court Considers Prosecutor's Subpoena For Letter Held by Former Defense Counsel

By Mark J. Fucile
Fucile & Reising LLP

Division I of the Washington Court of Appeals recently addressed a subpoena duces tecum to former counsel in *State v. Rogers*, ___ Wn. App. ___, 414 P.3d 1143, 2018 WL 1602957 (2018). The lawyer had represented the criminal defendant. On his own, the defendant had written a letter to the victim apologizing and offering to pay her to drop the charges. The victim gave the lawyer a copy of the letter. The victim, however, did not retain the handwritten original. After the lawyer left the case, the prosecutor subpoenaed the lawyer's copy of the letter. The lawyer and new counsel for the defendant both moved to quash the subpoena. The trial court denied both motions. When the lawyer still declined to produce the letter, the trial court also held the lawyer in contempt. The lawyer appealed the contempt order and the defendant appealed the denial of the motion to quash.

The Court of Appeals consolidated both appeals and affirmed. In doing so, the Court of Appeals discussed both the attorney-client privilege and the lawyer confidentiality rule—RPC 1.6.

On the former, the Court of Appeals held that the letter was simply a piece of evidence and did not reflect any attorney-client communications. Therefore, the Court of Appeals concluded that the attorney-client privilege did not apply:

“The State has not sought and assured this court it will not seek testimony from . . . [the lawyer] . . . 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. The letter is not subject to the attorney-client privilege.” 2018 WL 1602957 at *3 (footnote omitted).

On the latter, the Court of Appeals classified the letter as a “secret” under Comment 21 to RPC 1.6: “[S]ecret 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.* (quoting the referenced comment). The Court of Appeals then balanced need for disclosure against the harm it would have on the attorney-client relationship. The Court of Appeals found that the State had a legitimate interest in seeking the letter as evidence of a crime and under the circumstances would not harm the attorney-client relationship. The Court of Appeals also noted that RPC 1.6(b)(6) permits a lawyer to disclose otherwise confidential information in response to a court order.

In affirming the trial court, the Court of Appeals found that the lawyer had acted in good faith in asserting privilege. Therefore, it vacated the contempt finding contingent on the lawyer producing the letter.

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the quarterly Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB *Ethical Oregon Lawyer*, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.