

NO. 72337-5

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

ARTHUR WEST,

Appellant,

v.

WASHINGTON STATE ASSOCIATION OF DISTRICT AND
MUNICIPAL COURT JUDGES, a state agency, and the STATE OF
WASHINGTON,

Respondents.

**BRIEF OF RESPONDENT, WASHINGTON STATE
ASSOCIATION OF DISTRICT AND MUNICIPAL COURT
JUDGES**

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I. INTRODUCTION

This case poses the question of whether an association of judges is subject to the Public Records Act, or whether it is part of the judiciary that is excluded from the definition of “agency” pursuant to *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986). The Washington State District and Municipal Court Judge’s Association (hereafter “the Association”) is part of the judicial branch that is not included within the statutory definition of an “agency”. Therefore, the trial court correctly dismissed West’s Public Records Act claims. The Court also correctly dismissed his Public Disclosure Act claims, because West lacks standing due to his failure to file statutory notices and because the Association is not subject to “agency” lobbying restrictions in RCW 42.17A.635.

II. STATEMENT OF ISSUES

1. Whether an association of judges from courts of limited jurisdiction organized to perform administrative tasks on behalf of courts is part of the judicial branch of government that is not subject to the Public Records Act under *Nast v. Michaels* and its progeny?
2. Whether the provisions of the Public Disclosure Act concerning “agency” lobbying apply to a judicial branch entity that is not included in the definition of “agency” under *Nast*.
3. Whether a party who fails to provide notice under RCW 42.17A.765 has standing to raise illegal lobbying claims under the Public Disclosure Act?
4. Whether Appellant has abandoned his illegal lobbying claims by failing to challenge an independent ground for dismissal of such claims in his opening brief?

5. Whether the trial court abused its discretion by failing to recuse itself after making a discretionary decision to award terms against Appellant for violating local rules requiring submission of bench copies to the Court.
6. Whether the trial court abused its discretion by awarding terms where Appellant violated local rules requiring submission of bench copies to the court.

III. COUNTERSTATEMENT OF FACTS

A. THE DMCJA IS AN ASSOCIATION OF JUDGES ORGANIZED PURSUANT TO RCW 3.70 TO CARRY OUT ADMINISTRATIVE FUNCTIONS FOR COURTS OF LIMITED JURISDICTION.

The Washington State District and Municipal Court Judge's Association ("Association") is a part of the judicial branch of government. The Association was originally incorporated in October 1953, but was recognized and established by the Legislature in 1961. Laws of 1961, Ch. 299, codified as Chapter 3.70 RCW. Originally the Association was known as the "Magistrate's Association". As the courts have evolved, the Association's enabling statute has been amended from time to time and the name was changed to the Washington District and Municipal Court Judge's Association in 1994. Laws of 1994, Ch. 32.

The Association's mandate is to monitor and report on the activities of courts of limited jurisdiction. By statute, its members are exclusively judges from courts of limited jurisdiction. RCW 3.70.010. Pursuant to RCW 3.70.020, the Association's activities are regulated by its bylaws. CP 48. The bylaws provide for membership for active judges, magistrates and court commissioners, and associate membership for former or retired judges. The Association's bylaws establish that there are four

elected officers and nine members at large on the Association's board of governors. The president at the time of West's request was Spokane County District Court Judge Sara B. Derr.

In addition to the elective officers, the Association has numerous standing committees comprised of member judges. These include the Legislative Committee, which is in charge of fulfilling the statutory mandate to report to the Legislature concerning the activities of courts of limited jurisdiction and recommend ways to improve, organize and operate these courts. CP 56. The chair of the legislative committee is Judge Samuel Meyer of the Thurston County District Court. CP 44.

From time to time members of the Association, including Judge Meyer as the Chair of the Legislative Committee, will appear before the legislature to report on the Association's findings and recommendations concerning courts of limited jurisdiction. The Association also retains a paid registered lobbyist to contact legislators on matters concerning courts of limited jurisdiction. CP 44. The Association's registered lobbyist is Melanie Stewart of Stewart and Associates. CP 44.

B. APPELLANT'S RECORDS REQUEST

On or about March 15, 2013, Arthur West requested information from the District Municipal Court Judge's Association seeking information on several different categories concerning the Association's expenditures for lobbying before the state legislature. CP 63. The request was directed to former Association President Judge Gregory Tripp of the Spokane

District Court and was sent to him at the Spokane District Court's case management web mailbox. *Id.* Judge Tripp forwarded the request to then President, Judge Sara B. Derr, President-Elect Judge David Svaren and Sharon Hinchcliffe at the Administrative Office of the Courts. *Id.*

On March 26, 2013 the Association President, Judge Derr responded by sending a letter to West explaining that the Association is a judicial entity and not subject to the Public Records Act. CP 66. The Association informed him that the Public Records Act does not apply to the judicial branch of government including entities such as the DMCJA. Her letter cited to the case of *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986), and quoted from *City of Federal Way v. Koenig*, 167 Wn. 2d 341, 217 P.3d 1172 (2009) which affirmed *Nast's* holding that the judicial branch is not subject to the PRA. Judge Derr also quoted RCW 3.70.040 which demonstrates that the Association is part of the judicial branch of government. *Id.*

Even though the Association, as a judicial branch entity, had no formal process for dealing with information requests such as that submitted by Mr. West, the Association nevertheless responded by directly providing the information sought. CP 67. Judge Derr's letter informed him of the amounts spent on the Association's lobbyist, Melanie Stewart, who was paid \$35,000 for lobbying from July 2012 to March 2013. *Id.* Her expenditures of \$626.01 during this period were also disclosed to Mr. West. *Id.* Additionally the Association disclosed reimbursements to

participating jurisdictions to compensate for time spent by judges testifying before the legislature and therefore being absent from the bench. These amounts were to pay expenditures for pro tem judges. CP 66

C. PROCEDURAL HISTORY

Plaintiff Arthur West filed this lawsuit on March 28, 2013. Prior to commencing this action, West did not send any notice letters to the Attorney General or Prosecuting Attorney as required by RCW 42.17A.765 (4). West also did not immediately serve the Association. On June 20, 2013, West served a Summons dated January 24, 2013 and a Complaint dated March 28, 2013 by delivering a copy of these documents to Ms. Hinchcliffe, a staff member at the Administrative Office of the Courts assigned as the liaison to the DMCJA.¹ CP 46. The lawsuit contained allegations of a violation of the Public Records Act and violation of the Public Disclosure Act provisions concerning agency lobbying, RCW 42.17A.635. CP 6. The Association retained counsel who appeared on June 28, 2013. CP 11.

After receiving the Notice of Appearance, West sent an email to defense counsel in which he acknowledged that he had “forgotten something” and attached a letter purporting to send notice to the Attorney General’s office, the Thurston County Prosecuting Attorney, and the Washington State Public Disclosure Commission. CP 71. West did not actually send the purported notice letter to the Public Disclosure

¹ The Summons is dated January 24, 2013, two months prior to submission of any records request to the Association. CP 2.

Commission, the Attorney General or the Thurston County Prosecutor. None of these offices had any record of receiving a June 28, 2013 notice letter from West. CP 34-42.

The notice letter detailed the basis of West's allegation of illegal agency lobbying activity against Thurston County District Court Judges Sam Meyer and Brett Buckley who had appeared before the Legislature to testify on issues affecting courts of limited jurisdiction during the 2012 and 2013 legislative sessions. CP 72-73. The notice letter acknowledges the requirement to make a second 10 day notice to the Attorney General and Prosecuting Attorney prior to initiating a citizen's enforcement action. *Id.* However, West made no further efforts to notify the PDC, the Prosecuting Attorney, or the Attorney General's Office as required by RCW 42.17A.765(4)(a)(ii). CP 34-42.

IV. ARGUMENT

A. THE DMCJA IS PART OF THE JUDICIAL BRANCH OF GOVERNMENT AND IS NOT AN AGENCY UNDER THE DEFINITION USED BY THE PUBLIC DISCLOSURE ACT AND THE PUBLIC RECORDS ACT.

1. The definition of "agency" in the PRA does not include the judiciary or judicial branch agencies.

It is well settled law that the definition of "agency" in the Public Records Act does not apply to the entities within the judicial branch of government. This principle was established by *Nast v. Michels*, 107 Wn. 2d 300, 306-07, 730 P.2d 54, 58 (1986) and reaffirmed by the Supreme Court in *City of Federal Way v. Koenig*, 167 Wn. 2d 341, 347-48, 217 P.3d

1172, 1175 (2009) where the Court rejected arguments urging that *Nast* be overruled.

The principle that courts are not an “agency” has been relied on to reject public records requests, such as West’s request, in numerous cases including both court files and administrative records of courts. *Nast, supra; Spokane and Eastern Lawyer v. Tompkins*, 136 Wn.App. 616, 621–22, 150 P.3d 158 (2007), *review denied*, 162 Wn.2d 1004, 175 P.3d 1092 (upholding denial of public records request for correspondence from county judges to the Bar Association regarding local lawyers). Likewise, the personal records, notes and files of individual judges are not subject to the Public Record Act. *Buehler v. Small*, 115 Wn.App. 914, 918, 64 P.3d 78 (2003) (upholding denial of public records request for a computer file containing a judge’s notes on prior sentences he had imposed).

City of Federal Way v. Koenig, supra, is conclusive in its holding that the Public Records Act does not apply to the judicial branch. There, a citizen made a Public Records Act request for records concerning the resignation of a municipal court judge and sought correspondence to and from the presiding municipal court judge. *Koenig*, 146 Wn.2d at 344. Additional records requests sought documents related to job-related exemptions from jury duty and the appointment of pro tempore judges. *Id.* The City of Federal Way refused to disclose the requested correspondence and sued for injunctive relief and a declaratory judgment that the PRA did

not apply to municipal court records, which was granted by the trial court.

The Supreme Court affirmed on appeal, stating:

This case requires us to consider the extent to which the PRA applies to the judiciary and judicial records. We previously considered this issue in *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986), where we held that the PRA does not apply to court case files because the judiciary is not included in the PRA's definition of "agency." *Id.* at 305–06, 730 P.2d 54. We conclude that *Nast* continues to stand for the principle that the PRA does not apply to the judiciary and that the appellant has not demonstrated a compelling reason to overturn *Nast*.

Koenig, 167 Wn.2d at 343 (emphasis added).

The Court's decision holds that the definition of agency does not include the "judiciary", not merely courts which adjudicate cases. Thus, it squarely rejects the argument presented by West that the "judiciary" is limited to "courts". Brief at 15.

Instead, the test is found in *Nast* itself which distinguishes entities within the "elective realm" from those within the "judicial realm". *Nast*, 107 Wn.2d at 305. Contrary to West's contentions, the functions of the Association under RCW 3.70.040 all are judicial in nature, as the Association is responsible for 1) monitoring the operation and activities within courts of limited jurisdiction; 2) promulgating rules for the administration of such courts subject to the edicts of the Supreme Court; and 3) reporting its findings to the Supreme Court, as well as to other branches of government that provide funding or adopt laws affecting courts of limited jurisdiction. RCW 3.70.040(1-3). These administrative and

rulemaking functions all are uniquely judicial in character, as they serve judicial interests and are carried out by the judges of these same courts.²

In support of his contention that the Association is a state agency, West points to cases holding the Washington Association of County Officials and Washington Association of Counties to be “agencies”. *Telford v. Thurston County Board of County Commissioners*, 95 Wn. App. 149, 974 P.2d 886 (2000) (Public Disclosure Act) and *West v. WACO*, 162 Wn.App. 120 (2011) (WACO is an agency under Open Public Meetings Act).³ Neither case is on point as the associations in those cases were not comprised of judicial officers nor did they carry out functions to serve the judiciary.

West misses the point. Unlike *Telford* and *WACO*, where the associations contended they were not agencies because they were private nonprofit corporations, the Association here concedes that it is a public entity created by statute, but contends that it is part of the judicial branch to which the definition of agency in the PRA and PDA does not apply.

² West further cites to an unpublished paper allegedly discussing the history of the adoption of Initiative 276. This paper does not address the holding of *Nast* and *Koenig* that courts were not included in the definition of an agency. As such these writings concerning what proponents of the initiative in 1972 may have intended are irrelevant to deciding this case and do not support overruling of long established precedent.

³ *Telford* applied the definition in the Public Disclosure Act, former RCW 42.17.020(1). 95 Wn.App. at 156. This definition was adopted to define agencies under both the financial reporting and lobbying sections and the public records portions of the PDA. The definition of “agency” has been recodified in the current Public Disclosure Act as RCW 42.17A.005 (2) and in the Public Records Act as RCW 42.56.010(1). The holding in *Telford* supports the proposition that if an entity such as the judiciary is not an “agency” under the Public Records Act, as held in *Nast and Koenig*, it is also not an “agency” under the agency lobbying provisions of the Public Disclosure Act that West alleges were violated. RCW 42.17A.635. See *Telford*, 95 Wn.App. at 159.

2. The PRA does not apply to the judiciary or judicial branch agencies which perform administrative functions on behalf of the courts which are governed by GR 31.1.

The Appellant's contention that the Association is not a judicial branch entity, but a "state agency" or "local agency" subject to the Public Records and Public Disclosure Act is also repugnant to its treatment under current court rules. Under GR 31.1, the Association is treated as part of the judicial branch and its records are available as specified in the court rule, not pursuant to the Public Records Act. This court rule, although adopted after the filing of this matter is conclusive that the Association is not subject to the PRA.

GR 31.1 was adopted on October 18, 2013 by the Supreme Court, but is not yet effective. It was adopted to provide public access to administrative records of the courts. Its inclusion of the Association and provision for access to the Association's records clearly establishes that the Association is part of the judicial branch, subject to the Supreme Court's rulemaking authority under Article IV of the State Constitution. Thus, it is not an "agency" under the Public Records Act, as established by *Nast, Spokane and Eastern Lawyer* and *Koenig, supra*.

GR 31.1(k) defines the entities subject to the rule, which are "judicial branch agencies", stating:

(k) Entities Subject to Rule.

- (1) This rule applies to the Supreme Court, the Court of Appeals, the superior courts, the district and municipal courts, and the following judicial branch agencies:

- (i) All judicial organizations that are overseen by a court, including entities that are designated as agencies, departments, committees, boards, commissions, task forces, and similar groups;
- (ii) The Superior Court Judges' Association, the District and Municipal Court Judges' Association, and similar Associations of judicial officers and employees; and
- (iii) All subgroups of the entities listed in this section (k)(1).

COMMENT: The elected court clerks and their staff are not included in this rule because (1) they are covered by the Public Records Act and (2) they do not generally maintain the judiciary's administrative records that are covered by this rule.

(Emphasis Added).

GR 31.1 thus characterizes the Association as part of the judicial branch and will provide a means to obtain records from the Association in the future. It is not applied ex post facto, as West contends.

West also contends that it violates the “precedents of *Sibbach* and *Petrarcha*”. Brief at 37. He cites *Sibbach v. Wilson & Co. Inc.*, 312 U.S. 1 (1941) for the proposition that a substantive matter of law cannot be modified by a procedural court rule.⁴ However, he then characterizes GR 31.1 as “substantive” and contends that it removes substantive rights under the PRA. However, given the precedent established by *Nast* and affirmed under the doctrine of stare decisis in *Koenig*, there was no “right” under the PRA to obtain records from judicial branch entities such as the Association. Hence, his contention fails.

⁴ West does not cite any case involving “*Petrarcha*”.

3. The DMCJA is part of the judiciary.

The Association is indisputably part of the judiciary to which the Public Records Act does not apply. It was created by legislation in 1961 to be known as the “Washington State Magistrate’s Association”. Laws of 1961, Ch. 299, Section 123. That legislation was part of a comprehensive bill, SSB 111, whose title was “An Act relating to the judiciary; and to justices of the peace and other inferior courts.” *Id.*

Originally the Association was directed to survey and study the operation of the courts served by its membership, and to promulgate suggested court rules for the administration of justice in such courts. See RCW 3.70.040(1), (2). This enabling legislation was amended in 1980 to require the Association to report at least annually to the Supreme Court, the governor and legislature on the condition of business in the courts of limited jurisdiction. Laws of 1980, Ch. 162, Section 10. The statute was amended again by the Court Improvement Act of 1984 to reflect membership from all judges in courts of limited jurisdiction. Laws of 1984, Ch. 258, Sections 50-53. The 1984 legislation specifically authorized reimbursement of judge’s travel expenses while participating in Association activities. In 1994, the name of the Association was changed to the Washington State District and Municipal Court Judge’s Association. Laws of 1994, Ch. 32, Section 3.

The fact that the Association was created pursuant to legislation does not mean that it is not part of the judicial branch. The Washington

Constitution recognizes the legislature's role in creating agencies within the judiciary, including inferior courts in Article IV, Section 1, which reads:

The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide.

Likewise, Article IV, Section 12 assigns to the legislature the role of specifying the jurisdiction and authority of inferior courts, stating:

The legislature shall prescribe by law the jurisdiction and powers of any of the inferior courts which may be established in pursuance of this Constitution.

The creation of the court of appeals, inferior courts, and other judicial organizations thus flows from the same constitutional authority vested in the Legislature under Article IV. The status of the Association as a judicial branch entity applies with equal force to the courts of appeal, which were created by RCW 2.06.010, to the Superior Court Judges Association created under RCW 2.16, to district courts created under RCW 3.30; and to municipal courts created under RCW 3.50.010.

The Association's membership is exclusively comprised of judges in courts of limited jurisdiction. This is prescribed by RCW 3.70.010. The Association's Constitution and by-laws, adopted pursuant to RCW 3.70.020, also authorize former judges in courts of limited jurisdiction to become non-voting associate members. CP 49.

Under its enabling legislation, the function of the Association is exclusively judicial. It surveys and studies the operation of the courts of limited jurisdiction that its membership serves. RCW 3.70.040(1). The Association promulgates suggested rules for the administration of the

courts of limited jurisdiction for adoption by the Supreme Court. RCW 3.70.040(2).

Finally, the Association reports on its findings and monitoring of courts of local jurisdiction, first to the Supreme Court, and also to the other branches of government. RCW 3.70.040(3). West's contention that the Association is not subject to the supervision of the Supreme Court ignores this statutory mandate. Such reports concern the condition of business in the courts of limited jurisdiction, including the Association's recommendations as to needed changes in the organization, operation, judicial procedure, and laws or statutes implemented or enforced in these courts. *Id.* Thus, the Association has an express statutory duty and is mandated by law to speak to the Legislature to report on the activities and business of courts of limited jurisdiction so that these other branches can exercise their prerogatives and make any necessary changes in how these courts are organized, operated, and are funded.

Pursuant to these statutory provisions, the Association serves as the collective voice of the courts of limited jurisdiction. All of the Association's functions and roles serve the judicial branch. It is the basis for why it was created, how it operates and who its members are. West's contention that it is not part of the judicial branch is not supported by authority or any logical analysis of the functions and structure of the Association.

West argues that the DMCJA is not a “court” and therefore the reasoning of *Nast* does not apply. Brief at 18-19. This argument was rejected by both the reasoning in *Nast* and more explicitly by *Spokane & Eastern Lawyer v. Tompkins*. There, the court of appeals stated:

The *Nast* court could have decided the issue on the narrow grounds that court files are not subject to the PDA because other avenues provide access to the files. But it did not. Rather, the court defined the issue more broadly as “whether the judiciary and its court files are under the realm of the PDA.” *Nast*, 107 Wn.2d at 306, 730 P.2d 54. In addition, the court specifically addressed whether the Department of Judicial Administration (Administration) was an agency within the PDA. *Nast*, 107 Wn.2d at 305, 730 P.2d 54. And although the court conceded that technically the Administration fell within the PDA's definition of agency, it characterized the Administration as a “unique institution” because it served the judiciary, suggesting that the judiciary's immunity from the PDA extended to the Administration.

136 Wn.App. 616, 621, 150 P.3d 158 (2007).

4. The DMCJA did not violate restrictions on “agency” lobbying because judicial branch entities are not “agencies” under the identical definitions found in the Public Disclosure Act and Public Records Act.

Because both the Public Records Act and Public Disclosure Act were adopted together as Initiative 276 in 1972, they used the same definitions to define an “agency”. The definition considered in *Nast* in former RCW 42.17.020 is the same definition of agency now codified in the Public Disclosure Act in RCW 42.17A.005(2).

Telford interpreted this common definition to identify whether an association of county officials was an “agency” under the campaign financing and lobbying provisions of the Public Disclosure Act. It noted

that the “PDA not only requires disclosure of public records, but also it restricts the use of public funds for political purposes, clearly delineating the circumstances under which such expenditures are permissible.”

Telford, 95 Wn.App. at 159.

Because the two statutes identically interpret the definition to exclude the judiciary, the DMCJA is not an agency under either statute. West’s contention that the Association violated RCW 42.17A.635’s regulations on “agency lobbying” necessarily fails because the judiciary is not an “agency” under the holding in *Nast*, and *Koenig, supra*.

West contends that the Association is seeking a ruling that they are immunized from reporting and disclosure of their lobbying activities. Brief at 27. West’s contention is baseless and ignores his own complaint. First the agency is alleged to have violated the “agency lobbying” restrictions in RCW 42.17A.635. The DMCJA contends here that it is not an agency within the meaning of that section. However, the DMCJA does report its lobbying activities when it maintains a lobbyist. The Association retains a paid lobbyist who fully complies with lobbying reporting requirements as is established in the record and conceded in West’s Motion for Reconsideration. CP 44, 163. The district court found that the testimony of such judges does not violate agency lobbying regulations. Transcript at 23. In any event, it is unnecessary to reach this determination because West failed to comply with statutory notice requirements necessary to give him standing to sue under the Public Disclosure Act. Plaintiff’s statement of

the law in the Complaint also appears to misconstrue RCW 42.17A.635. Even if the Association were considered an “agency”, which it is not under *Nast*, the Public Disclosure Act does not forbid agencies from “lobbying”. Indeed, under RCW 42.17A.635(3), agencies are expressly authorized to lobby. The law states, in relevant part:

- (1) Any agency, not otherwise expressly authorized by law, may expend public funds for lobbying, but such lobbying activity shall be limited to (a) providing information or communicating on matters pertaining to official agency business to any elected official or officer or employee of any agency or (b) advocating the official position or interests of the agency to any elected official or officer or employee of any agency.

The Complaint alleges that the Association engages a paid lobbyist and a legislative director who frequently appear before the legislature to lobby for specific bills. CP 4-5. This is not a violation of the Public Disclosure Act, and is allowed under RCW 42.17A.635(3).

B. APPELLANT WEST LACKS STANDING TO SUE UNDER THE PUBLIC DISCLOSURE ACT BECAUSE HE FAILED TO FILE REQUIRED NOTICES OF HIS INTENT TO SUE.

1. West failed to comply with notice provisions of RCW 42.17A.765.

A citizen's action may be brought in the name of the State under the Public Disclosure Act only if the State has failed to commence an action after notification of possible violations. *Utter v. Building Industry Ass'n of Washington*, 176 Wn.App. 646, 673, 310 P.3d 829 (2013). Where a citizen fails to show that the attorney general or local prosecuting attorney had received notice of alleged violations of the Public Disclosure Act (PDA), the citizen is not entitled to bring a private action to enforce the

statute. *Vance v. Offices of Thurston County Com'rs*, 117 Wn.App. 660, 71 P.3d 680 (2003) (dismissing action where plaintiff failed to provide notice required under Public Disclosure Act citizen enforcement section); *Crisman v. Pierce County Fire Protection Dist. No. 21*, 115 Wn.App. 16, 22, 60 P.3d 652 (2002) (citizen enforcement action may be brought “only after notice to and failure by the attorney general and the prosecuting attorney to act.”).

A private person may bring a citizen's action for violations of the Public Disclosure Act only after: (1) the person gives notice to the Attorney General (AG) and the prosecuting attorney that there is reason to believe that some provision of the Act is being or has been violated; (2) if, 45 days after this first notice, the prosecuting attorney and AG have not commenced an action, the person files a second notice with the AG and prosecuting attorney notifying them that the person will commence a citizen's action within 10 days if neither the prosecutor nor the AG acts; and (3) the AG and the prosecuting attorney fail to bring such an action within 10 days of receiving the second notice. *State ex rel. Evergreen Freedom Foundation v. Washington Educ. Ass'n*, 111 Wn.App. 586, 49 P.3d 894(2002).

The terms of RCW 42.17A.765 provide as follows:

(4) A person who has notified the attorney general and the prosecuting attorney in the county in which the violation occurred in writing that there is reason to believe that some provision of this chapter is being or has been violated may himself or herself bring in the name of the state any of the actions (hereinafter referred to as a citizen's action) authorized under this chapter.

(a) This citizen action may be brought only if:

(i) The attorney general and the prosecuting attorney have failed to commence an action hereunder within forty-five days after the notice;

(ii) The person has thereafter further notified the attorney general and prosecuting attorney that the person will commence a citizen's action within ten days upon their failure to do so;

(iii) The attorney general and the prosecuting attorney have in fact failed to bring such action within ten days of receipt of said second notice; and

(iv) The citizen's action is filed within two years after the date when the alleged violation occurred.

Here, West did not file either of the required notices prior to commencing this action. After filing his Complaint, he falsely claimed to have filed a belated notice letter to the Attorney General and Thurston county prosecutor, which was clearly untimely. CP 72-73.⁵ Thus, when he commenced this lawsuit, he lacked standing and was not authorized to sue under RCW 42.17A.765 (4).

Finally, West never complied with the statutory requirement to file a second "10 day" notice letter as required under RCW 42.17A.765 (4)(a)(ii). This notice gives the requisite state authorities 10 days to commence an action before the citizen may file a lawsuit. Absent the required notice letters, West was not authorized to sue under the Public

⁵ West did not actually send the purported 45 day notice letter to its stated recipients. Instead, he misrepresented having done so by sending Defendant's counsel a copy of a letter never sent to the Attorney General, Thurston County Prosecutor and Public Disclosure Commission. By sending this letter to the Association's counsel, he sought to mislead the Association and, by logical inference, the Court into believing that he had provided notice. Such a misrepresentation confirms the frivolous nature of this action.

Disclosure Act. Hence, the trial court correctly dismissed his lobbying claims under the Public Disclosure Act because absent the required notices, he is not a person authorized to sue under RCW 42.17A.765 (4) and he lacks standing to bring these claims.

2. West has abandoned claims alleging illegal lobbying activities by failing to address an independent basis for the trial court's granting of the association's summary judgment motion in his opening brief.

A party abandons an issue by failing to pursue it on appeal by (1) failing to brief the issue or (2) explicitly abandoning the issue at oral argument. *State v. Wood*, 89 Wn.2d 97, 99, 569 P.2d 1148 (1977); *Talps v. Arreola*, 83 Wn.2d 655, 657, 521 P.2d 206 (1974) (holding that it was evident the appellant had abandoned a claim on appeal because she failed to include argument or cites to authority on the issue in her opening brief or in her reply brief). *Holder v. City of Vancouver*, 136 Wn. App. 104, 107, 147 P.3d 641, 643 (2006).

Here, the trial court granted summary judgment on West's illegal lobbying claims because he failed to provide the statutory notice required to be sent to the Attorney General and local Prosecuting Attorney. Transcript at 23:1-15. By failing to address this basis for dismissal of his lobbying claims, West has abandoned any challenge to dismissal of the statutory claim under the Public Disclosure Act. This effectively concedes that West lacks standing to file claims under the citizen suit provisions of the PDA. As such, the Court should affirm the trial court's granting of summary judgment to the Association.

C. THE TRIAL JUDGE DID NOT ABUSE HER DISCRETION BY FAILING TO RECUSE HERSELF AFTER MAKING DISCRETIONARY DECISIONS IN THIS CASE.

1. West failed to timely request recusal by delaying until after adverse discretionary decisions were made.

West seeks to have Judge Jean Rietschel recuse herself following her discretionary rulings at a hearing conducted on June 20, 2014. At this hearing, which was to consider Defendant's Motion for Summary Judgment, Judge Rietschel questioned Mr. West as to whether he had provided bench copies as required by LCR 7(b)(4)(F). Mr. West indicated that he had filed copies with the clerk's office but had not insured that the bench copies reached Judge Rietschel. Judge Rietschel inquired of the Defendant who stated a preference for proceeding despite Mr. West's failure to provide these copies. Despite the Defendant's preference, Mr. West orally moved for a continuance of one week. Judge Rietschel, preferring to take the time to review Mr. West's materials and prepare for the hearing, granted the one week continuance he requested, but imposed terms to compensate the Association for the delay caused by his failure to provide working copies to the bench. The judge has the discretion to award appropriate terms under the express provisions of LCR 7 (b)(4)(G).

West did not make a motion for recusal prior to the date for consideration of the summary judgment motion. He filed his "affidavit of prejudice and motion for recusal" on June 23, 2010, after the court granted his request for a continuance. A motion to remove a judge for prejudice is untimely, such that statute governing such motions requires the movant to

show actual prejudice, if it is filed after the judge makes a discretionary ruling in the case and the moving party received adequate notice of that ruling. *In re Welfare of R.S.G.*, 174 Wn.App. 410, 299 P.3d 26 (2013); *State v. Hawkins*, 164 Wn.App. 705, 265 P.3d 185 (2011). A motion is untimely made when, prior to filing of affidavit of prejudice, the court granted defendant's request for a continuance, since this invoked the discretion of court. *State v. Maxfield*, 46 Wn.2d 822, 285 P.2d 887 (1955); See also *In re Recall of Lindquist*, 172 Wn.2d 120, 258 P.3d 9 (2011) (affidavit of prejudice untimely in pro se action for recall of county prosecuting attorney, where filed after the court made a discretionary ruling denying a request for continuance).

West's Motion for Recusal was prepared and filed after Judge Rietschel announced her decision and granted the continuance, imposing terms as allowed by local rule. West clearly had notice of the judge's decision as announced in open court, as evidenced by his discussion of the decision in his motion. CP 133. The postponement of the June 20, 2014 hearing provided Mr. West the relief which he requested. As such, Mr. West's contention that Judge Rietschel decided the matter adversely to Mr. West is incorrect. Judge Rietschel could have adopted more drastic sanctions, such as striking the pleadings, but did not do so. Instead, she balanced the inequity and cost created by West's failure to comply by requiring that he shoulder the costs for the defendant's appearance at the

hearing. This is not prejudicial to West, but is a routine application of the local rules.

West then attempts to cast himself in the role of a pro se litigant unfamiliar with court procedures. West is a recurring litigant who is very familiar with court rules and procedure. The Court of Appeals recognized West's experience as a pro se litigator in *West v. Washington Ass'n of Cnty. Officials*, 162 Wn.App. 120, 137 n. 13, 252 P.3d 406, 415 (2011) (affirming trial court's denial of demand for recusal after imposition of sanctions). Regardless, as in the *WACO* case, as a pro se litigant, West is held to the same standard as an attorney. *Id.*

Finally, West waited over a year to raise any objection based on acts that took place over five years ago. Judge Rietschel was assigned this case on April 9, 2013 when it was originally filed. West introduces a judicial questionnaire from 2008 to contend an appearance of bias exists. This information has long been available, but was not timely raised. Such a claim must be raised before any discretionary decisions are made under RCW 4.12.050. See *In re Welfare of R.S.G.*, supra. Having affirmatively sought a continuance from this judge at the June 20 hearing, West has waived any right to object to her impartiality.

2. West fails to demonstrate any actual bias or prejudice of the trial judge.

West contends that Judge Rietschel must recuse herself pursuant to Code of Judicial Conduct Canon 2.11 which states:

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality* might

reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge* of facts that are in dispute in the proceeding.

The rule also provides for that a judge should disqualify themselves if the judge:

Served in governmental employment, and in such capacity participated personally and substantially as a public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy.

CJC Rule 2.11(A)(6).

Neither of these circumstances applies in this case or warrants recusal. To begin with, in considering a request for recusal, courts have established background principles of who carries the burden of proof when seeking a judge's recusal. A judge is presumed to perform his functions "regularly and properly and without bias or prejudice." *Jones v. Halvorson-Berg*, 69 Wn.App. 117, 127, 847 P.2d 945 (1993) (citing *Kay Corp. v. Anderson*, 72 Wn.2d 879, 885, 436 P.2d 459 (1967)). There is a presumption that a trial judge properly discharged her official duties without bias or prejudice. *In re Personal Restraint of Davis*, 152 Wn.2d 647, 692, 101 P.3d 1 (2004).

In deciding the motion for recusal, West must provide evidence of a judge's actual or potential bias to overcome the presumption against bias.⁶

⁶ West failed to produce any evidence of actual bias by Judge Reitschel to support his motion for recusal. He produced only copies of judicial questionnaires from 2008 showing that Judge Rietschel served on DMCJA committees from 2000-2008, including

State v. Post, 118 Wn.2d 596, 619 n. 9, 826 P.2d 172 (1992); *State v. Carter*, 77 Wn. App. 8, 888 P. 2d 1230 (1995); *State v. Eastabrook*, 58 Wn. App. 805, 816, 795 P.2d 151 (1990). Bias or prejudice on the part of a judge is never presumed and must be affirmatively shown by the party alleging such bias. *Williams & Mauseth Ins. Brokers, Inc. v. Chapple*, 11 Wn. App. 623, 524 P.2d 431 (1974). A party claiming bias or prejudice must support the claim with evidence of the trial court's actual or potential bias. *State v. Gamble*, 168 Wn.2d 161, 187–88, 225 P.3d 973 (2010). “Judicial rulings alone almost never constitute a valid showing of bias.” *In re Pers. Restraint of Davis*, 152 Wn.2d at 692 (citing *Liteky v. United States*, 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994)). Moreover, the Court should be wary of allegations of bias filed immediately in response to a decision that appears to be adverse to the complaining party.

West fails to demonstrate any actual bias or prejudice sufficient to justify recusal. His allegations are hollow attempts to besmirch the Court’s reputation and delay the dismissal of his case. They were properly rejected. West failed to show that any of Judge Rietschel’s actions while a municipal court judge have anything to do with this case. As an initial matter Judge Rietschel was over six years removed from her tenure as a Seattle Municipal Court Judge, and any participation in the DMCJA. She

the Legislative Committee from 2003-2008. He submitted no evidence of personal participation in the alleged unlawful testimony by Judges Meyer and Buckley in 2012, which he contends violated the agency lobbying provisions of the PDA.

has no personal stake in the outcome of this case. Her actions as a member of the DMCJA are not at issue in this case.

In alleging illegal lobbying, West identified certain activities by Thurston County District Judges Meyer and Buckley as the basis for his allegations. He did not allege or present any evidence of involvement by Judge Rietschel in the testimony that West claims constituted illegal agency lobbying. Indeed, the alleged lobbying occurred in 2012, four years after Judge Rietschel was elected to the Superior Court and was no longer part of the DMCJA.

Secondly, Judge Rietschel has expressed no opinions either publicly or privately which indicate how she will decide this case. As evidence of bias, West points to the imposition of terms in granting his request for a continuance of the summary judgment hearing, which is not a basis under *In re Pers. Restraint of Davis and Liteky*. There is no basis to believe that Judge Rietschel has any relationship with any of the parties in this case or the attorneys in this matter or has any existing bias or prejudice. Nor is there any basis to believe that she has personal knowledge of the facts alleged in the complaint, specifically the actions of Judges Meyer and Buckley or of the public records requests identified in the Complaint.

By contrast, what is clear is that Judge Rietschel made a decision to impose terms on West's requested continuance, a decision with which Mr. West disagreed. Immediately after this decision, he filed the motion to recuse. As explained in *Liteky* above, his remedy to contest the award of

terms was to appeal, not to seek disqualification of the judge and delay of adjudication of the merits of his claim.

West compares Judge Rietschel's situation to the undue influence identified in *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009) which held that a state Supreme Court Appeals Judge who had recently received 3 million dollars in campaign contributions from the president and CEO of a corporation should have recused himself as a matter of due process in considering an appeal involving that corporation. In *Caperton*, the court recognized that not every campaign contribution would create a probability of bias requiring recusal. *Caperton* was characterized as "an exceptional case", 129 S. Ct. at 2263, and has no application here. Judge Rietschel did not receive anything of value from the litigants and even West is forced to concede that "she is an honorable judge", Brief at 44, who "acted with the utmost integrity and a sincere conscious belief in her impartiality". Brief at 48.

West's position demands that judges recuse themselves where they are not conscious of any bias, based on objections raised only after he has allowed the court to make discretionary decisions. This is inconsistent with established precedent and is unworkable in reality. An unbiased trial judge who has not personally participated in the events of the complaint need not recuse herself on the insistence of a party disgruntled by her rulings.

3. Any failure to recuse is harmless because the issues decided are pure matters of law.

Finally, any error here is harmless because this court will review the trial court's legal determinations de novo. The determination as to whether the Association is part of the judicial branch is a question of law. No challenge has been raised to any member of this Court, so its determination will govern without any alleged taint.

D. THE TRIAL JUDGE DID NOT ABUSE HER DISCRETION BY IMPOSING TERMS FOR VIOLATION OF LOCAL RULES REQUIRING FILING OF BENCH COPIES.

1. West caused delay of the summary judgment hearing by violating LR 7 (b)(4) requiring timely filing of bench copies.

The imposition of terms covering the Association's legal expense for attending the June 20, 2014 hearing was not abuse of discretion under the facts and circumstances of this case. It was a fully considered, measured sanction for West's violation of local rules.

Local Rule LCR 7 (b)(4)(F) requires parties to submit working copies to the hearing judge. It is the responsibility of the parties themselves to comply with this, not the responsibility of the court to obtain working copies from the clerk's office as West contends. West's failure to deliver working copies to Judge Rietschel prevented her from being prepared to participate in the hearing of the summary judgment motion on June 20. Give the need for the judge to be prepared, to as informative questions, and to probe the parties' positions, Judge Rietschel decided to continue the summary judgment hearing for one week so that she could read the briefs and be prepared for the hearing.

LCR 7 (b)(3)(g) provides that when material is offered at a time later than required by this rule it will not be considered except upon the imposition of appropriate terms. Moreover the Court has ample authority to award terms when violation of local rules causes unfair expense and hardship upon the opposing parties. See, *State v. S.H.*, 95 Wn.App. 741, 977 P.2d 621 (1999); *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn.App. 918, 928, 982 P.2d 131, 136 (1999).

2. Imposition of terms covering the opposing party's legal expense caused by violation of local rules is not an abuse of discretion.

The decision to impose terms as a condition to grant of a continuance is within discretion of trial court and will be overturned by Supreme Court only if there exists a manifest abuse of discretion. *State v. Ralph Williams' N. W. Chrysler Plymouth, Inc.*, 87 Wn. 2d 298, 553 P.2d 423 (1976).

In this case, the Court's award of the attorney fees incurred to attend the June 20 hearing was a limited and direct sanction for the expense caused by West's failure to provide working copies in a timely fashion. Indeed, West invited what he now alleges is error by requesting the week's continuance. The Court's decision to continue the matter was within her discretion and the hardship caused upon the Association was mitigated by the requirement to pay terms.

West cites no authority holding that a sanction of attorney's fees of the court's order imposing terms upon the Plaintiff. The Court reviewed the declaration of counsel and found that the Association reasonably

incurred three hours of attorney time and \$10 in parking expenses to attend the hearing. CP 123-124. This brought the award of terms to \$625. *Id.* This amount was reasonable to compensate the Association for having to send its attorney to court for a hearing that could not proceed due to West's violation of local rules and for which West sought a continuance.

3. Appellant has failed to present an adequate record on appeal.

Plaintiff does not appear to have provided an adequate to review his claim that the Court abused its discretion in awarding terms. The Plaintiff has not provided a transcript of the colloquy between the parties at the June 20, 2014 hearing. At this hearing, the Court indicated the prejudice it suffered based on West's failure to provide working copies.

The Court also indicated its reasoning for continuing the hearing as opposed to allowing argument to continue. Indeed, West then moved for the continuance that precipitated the imposition of terms. None of this material was included in the record by Mr. West. As such the Court lacks a sufficient record to consider this issue and it should deny the appeal on this issue for his failure to provide an adequate record.

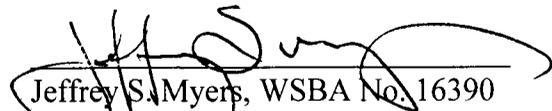
V. CONCLUSION

This case turns on a pure question of law – whether an association of judges, created by statute to serve administrative and rulemaking functions for courts is a part of the judiciary. Because the trial court correctly ruled that it is part of the judicial branch to which the Public Records Act and agency lobbying regulations in the Public Disclosure Act

do not apply, the dismissal of this action should be affirmed. Moreover, the trial court correctly dismissed the lobbying claims because the plaintiff failed to provide statutory notice of his intent to bring a citizen suit prior to instituting this action. Dismissal was proper.

DATED this 13th day of April, 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jeffrey S. Myers", is written over a horizontal line. The signature is stylized and cursive.

Jeffrey S. Myers, WSBA No. 16390
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CERTIFICATE OF SERVICE

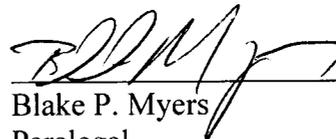
I certify under penalty of perjury under the laws of the United States of America and the State of Washington that on the date specified below, I have caused to be served via personal delivery the Brief of Respondent Washington State Association of District and Municipal Court Judges in this matter, upon the pro se at the address below:

Arthur West
120 State Avenue N.E., #1497
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and by electronic mail to jeff.even@atg.wa.gov and first class mail, postage prepaid to:

Jeffrey T. Even
Deputy Solicitor General
Office of the Attorney General
PO Box 40100
Olympia, WA 98504-0100

DATED this 13th day of April, 2015.



Blake P. Myers
Paralegal