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No. 61466-5-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

Hon. MICHAEL F. MORGAN, Individually and in his Official Capacity
as Presiding Judge of the Municipal Court of Federal Way,

Petitioner/Appellant/Cross-Respondent

v.

CITY OF FEDERAL WAY, a code municipality; and the CITY
ATTORNEY FOR FEDERAL WAY,

Respondents/Cross-Appellants

and

TACOMA NEWS, INC. d/b/a THE NEWS TRIBUNE,

Intervenor/Respondent

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Kimberly Prochnau)

BRIEF OF APPELLANT

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I. SUMMARY INTRODUCTION

All levels of the Washington state courts are and must remain independent of the executive and legislative branches of state, county, and municipal governments. To this end, the Washington Supreme Court enacted GR 29, which establishes a presiding judge as the administrative heads of all superior, district, and municipal courts in this state. GR 29(f) makes presiding judges responsible for the supervision of “[a]ll personnel employed under the judicial branch of government including but not limited to working conditions, hiring, discipline, and termination decisions except wages, or benefits directly related to wages.” Presiding judges are explicitly forbidden from delegating these responsibilities “to persons in either the legislative or executive branches of government.”

Judge Michael Morgan has been Presiding Judge of the Federal Way Municipal Court since 2006. In December 2007, the Municipal Court’s other judge, Colleen Hartl, hosted a holiday party for Municipal Court staff at her home. Judge Hartl and another Municipal Court employee ultimately resigned as a result of events that occurred at that party. In January 2008, acting in her capacity as the Municipal Court’s attorney, Federal Way City Attorney Patricia Richardson recommended to Presiding Judge Morgan that the Municipal Court retain a private attorney, Amy Plenefisch, to investigate misconduct stemming from the events at

Judge Hartl's holiday party. Judge Morgan agreed, and Plenefisch conducted an investigation and prepared a report.

While Plenefisch was conducting her investigation, another Municipal Court employee made a "hostile workplace" allegation. City Attorney Richardson, again acting in her capacity as the Municipal Court's attorney, recommended to Presiding Judge Morgan that the Municipal Court retain another private attorney, Amy Stephson, to investigate the allegation. Judge Morgan once again agreed, and Stephson conducted her investigation. On February 5, however, Judge Morgan determined that Municipal Court staffing changes made Stephson's investigation unnecessary, and he instructed City Attorney Richardson to terminate Stephson's investigation. Richardson ignored this instruction from her client, and Stephson prepared a report regarding her investigation (the "Stephson Report").

Later in February 2008, *The News Tribune*, a Tacoma newspaper, submitted a public records request to the City of Federal Way asking for a copy of the Stephson Report. The City Attorney agreed to produce a copy of the report to the newspaper. Presiding Judge Morgan, acting on behalf of himself and the Municipal Court, objected to production of the Stephson Report and filed a petition for protective order in the King County Superior Court to prohibit the City and the City Attorney from

producing the report. After briefing and argument, the Superior Court denied Judge Morgan's motion for protective order, and Judge Morgan appealed to this Court.

This Court should reverse and prohibit the City of Federal Way and City Attorney Richardson from producing the Stephson Report on three independent bases, any one of which alone is sufficient to protect the Stephson Report from disclosure:

- *First*, the Stephson Report is a Municipal Court document—not a City document—and court documents are not subject to Public Records Act disclosure. The Stephson Report addresses Municipal Court workplace issues that are not related to wages, and, under GR 29(f), these topics fall squarely within the purview of Judge Morgan's non-delegable authority as Presiding Judge of the Municipal Court. The executive/legislative branch of the City had no legitimate interest in the Stephson Report, nor could it have taken any action in response to the report. As such, the Stephson Report is a Municipal Court document, it is not subject to the Public Records Act, and it should not be disclosed.

- *Second*, even if it could be considered a City document, the Stephson Report is protected by the work product doctrine and exempted from disclosure under the Public Records Act. The Stephson Report was prepared by an attorney in anticipation of possible litigation regarding the

hostile workplace complaint, placing it squarely within the realm of work product.

- *Third*, the Stephson Report is protected by attorney-client privilege and also exempt from disclosure under the Public Records Act on that basis. The report consists primarily of communications between clients (Municipal Court employees) and their attorney (Stephson) and is itself a communication from Stephson to her co-counsel, City Attorney Richardson, and ultimately to the Municipal Court. This makes the Stephson Report privileged, and it should not be disclosed.

Judge Morgan respectfully requests that this Court reverse the Superior Court on any or all of these three bases and hold that the Stephson Report is either not subject to the Public Records Act or exempt from disclosure under the Public Records Act. Additionally, if this Court determines that the Stephson Report is neither a Municipal Court document, work product, or attorney-client privileged, Judge Morgan respectfully requests that this Court reverse the Superior Court based on the Supreme Court's July 31, 2008 decision in *Bellevue John Does 1-11 v. Bellevue School Dist. #405* and find that the Stephson Report is protected from disclosure as a "personal record." Judge Morgan also respectfully requests that this Court reverse the Superior Court's order allowing a privileged document to be filed unsealed. Attorney-client privileged

documents should be filed under seal, and the Superior Court improperly deemed a privileged document unprivileged and refused to seal it.

II. ASSIGNMENTS OF ERROR

Judge Morgan makes the following assignments of error:

1. The King County Superior Court erred when it entered an order denying Judge Morgan's Motion for Protective Order on March 27, 2008. *See* CP 101-03.

2. The King County Superior Court erred when it entered an order unsealing Document 10 (as identified in the sealing order) on April 1, 2008. *See* CP 133-36.

3. The King County Superior Court erred when it entered an order denying Judge Morgan's motion to reconsider on June 2, 2008. *See* CP 386-87.

III. STATEMENT OF ISSUES

Judge Morgan's appeal raises the following issues:

1. **Separation of powers and GR 29(f).** Under GR 29(f) and principles of judicial independence and separation of powers, the presiding judge of every trial court in Washington has responsibility for and authority over all non-wage court employment matters. Presiding judges cannot delegate this responsibility to members of the executive or legislative branches. Stephson, an employment attorney was retained to conduct an investigation regarding non-wage workplace issues in the Federal Way Municipal Court. Is the report prepared by Stephson exclusively the property of the Municipal Court and the Presiding Judge? (Assignments of Error Nos. 1 & 3)

2. **The work product doctrine.** Material prepared by an attorney or an attorney's agent in anticipation of litigation is protected under the work product doctrine. The Stephson Report was prepared by an attorney in anticipation of litigation. Is the Stephson Report protected as work product? (Assignments of Error Nos. 1 & 3)
3. **Attorney-client privilege.** Communications between a client and an attorney for the purpose of obtaining legal advice are privileged, and only the client may waive that privilege. The Stephson Report is itself a communication from Stephson, an attorney, to her co-counsel and ultimately to her client, the Municipal Court, and the report consists of records of communications between Municipal Court employees and Stephson. Is the Stephson Report protected by attorney-client privilege if the Municipal Court does not waive the privilege? (Assignments of Error Nos. 1 & 3)
4. **The PRA's personal records exemption.** Unsubstantiated allegations in employment files are protected from disclosure by the PRA's personal records exemption. The Stephson Report consists largely of unsubstantiated allegations regarding employee conduct. Is the Stephson Report protected by the PRA's personal records exemption? (Assignments of Error Nos. 1)
5. **Sealing documents.** When attorney-client privileged documents are filed with courts and privilege is not waived, the documents are typically filed under seal. A document filed with the Superior Court contains communications between clients, their attorney, and parties with a "common interest." Did the Superior Court err by not filing this document under seal? (Assignments of Error Nos. 2 & 3)

IV. STATEMENT OF THE CASE

A. The parties.

Respondent the City of Federal Way is a code city located in King County with a council-manager form of government and approximately 85,000 residents. The City Attorney of Federal Way, Patricia Richardson, is also a named Respondent; the King County Superior Court (the

“Superior Court”) has disqualified her from representing the City in connection with this matter. *See* CP 104-05. Richardson typically acts as the primary attorney for all branches and agencies of the City of Federal Way, including the Municipal Court and all parts of the executive/legislative branch. It is not disputed that, as part of her official duties, Richardson acted as an attorney for the Municipal Court. *See, e.g.*, CP 80-81, 92-93, 176, 189, 390, 393, 396, 399. Intervenor and Respondent Tacoma News Inc. (“Tacoma News”), publishes a daily newspaper called *The News Tribune* in Tacoma.

The City of Federal Way has chosen to establish a Municipal Court. Petitioner and Appellant Michael Morgan took office as the first elected judge of the Federal Way Municipal Court (the “Municipal Court”) on January 1, 2006 and has served as Presiding Judge of that court since then. *See* CP 10. Under GR 29(f), Presiding Judge Morgan has a number of powers and responsibilities as the administrative head of the Municipal Court, and he is not permitted to delegate these powers and responsibilities to members of the executive or legislative branches. *See infra* § V.B.1.c.

Because judicial independence is just as vital to the courts of limited jurisdiction as it is to the courts of general jurisdiction and the appellate courts, it is important to clarify the distinction between the

parties. Judge Morgan brought this action both individually and in his official capacity as Presiding Judge of the Municipal Court; as Presiding Judge, he has the sole authority to represent the interests of the Municipal Court, which is the judicial branch of the City of Federal Way. *See* GR 29. The entity referred to as the “City” in these proceedings is actually the combined executive/legislative branch of the City of Federal Way, which is governed by the elected City Council and the appointed City Manager.¹

B. Following the resignation of former Municipal Court Judge Colleen Hartl, City Attorney Richardson, acting as the Municipal Court’s attorney, retained Attorney Amy Plenefisch to conduct an investigation regarding Municipal Court staff issues.

In early 2007, the City appointed Colleen Hartl to a newly-created second judgeship on the Municipal Court. In December 2007, Judge Hartl hosted a holiday party at her home for Municipal Court staff. *See* CP 70, 83, 179-87. As a result of “revelations and conduct” that occurred at Judge Hartl’s holiday party, which have since been widely reported in the media and addressed by the Commission on Judicial Conduct, Judge Hartl resigned from the Municipal Court the week of December 17. *See* CP 70,

¹ In council-manager cities like Federal Way, the city council is the only elected governing body, and the council has ultimate authority over both the executive and legislative branches. *See* Ch. 35A.13 RCW. Consequently, there is no separation of powers between the executive and legislative branches in council-manager cities. This lack of separation between the two political branches, however, in no way diminishes the independence of the judicial branch from the political branches.

83; *see also In re Hartl*, No. 5578-F-137 (Wash. Comm'n on Judicial Conduct Aug. 1, 2008).

On January 14, 15, and 16, 2008, several Municipal Court employees reported to Presiding Judge Morgan allegations of employee misconduct stemming from the events at Judge Hartl's party. *See* CP 83-84, 181-82. On January 15, Judge Morgan authorized the City Attorney to hire a private attorney, Amy Plenefisch, to investigate and provide guidance regarding this alleged misconduct. *See* CP 11, 70. Plenefisch issued her report on January 23. *See* CP 179-87. The City and Judge Morgan agreed that the report prepared by Plenefisch is confidential and subject to attorney-client privilege, *see* CP 11-12, 82, and it has been filed under seal with the Superior Court, *see* CP 134; *see also* CP 179-87.

C. In January 2008, the City Attorney retained Amy Stephson, a private employment attorney, to conduct an investigation regarding hostile workplace allegations made by a Municipal Court employee.

Also during January 2008, a Municipal Court employee complained about "hostile work conditions at the court." CP 70-71, 189. On January 17, Richardson sent Judge Morgan a memorandum informing him of the hostile workplace allegation and recommending hiring an

investigator to address that allegation. *See* CP 71, 189.² Judge Morgan authorized Richardson, in her capacity as the Municipal Court's attorney, to retain Amy Stephson, a private employment attorney, to investigate the allegations. *See* CP 11, 81.³ Judge Morgan "authorized Ms. Stephson's investigation in anticipation of potential litigation in order to evaluate the legal exposure of the Court and to evaluate possible settlement packages in lieu of potential litigation." CP 13.

In the course of conducting her investigation, Stephson interviewed several Municipal Court employees, including Judge Morgan. On February 5, 2008, Judge Morgan instructed Richardson to terminate Stephson's investigation because, in his judgment, the Municipal Court staffing situation had changed and the investigation was no longer

² The hostile workplace "allegation" or "complaint" itself is not in the record. In her declaration, Richardson refers to the communication as both an "allegation" and a "complaint." CP 70-71. According to Judge Morgan, "a court clerk mentioned ongoing stress and a hostile workplace environment following a counseling session scheduled by the Court." CP 11. The name of the clerk who made the initial allegation is not in the record (sealed or unsealed), and it is not apparent from the record whether the clerk was making specific or general allegations or what any particular allegations might have been.

³ Although the Superior Court referred to a dispute between the City and the Municipal Court as to whether Judge Morgan authorized the City Attorney to hire Stephson, *see* RP (Mar. 19, 2008, Decision) at 9, the record plainly shows that the City Attorney had requested and received Judge Morgan's permission as administrative head of the Municipal Court to retain Stephson, *see* CP 11, 189, 191, 279. (There are two separate reports of proceedings from March 19, 2008. "RP (Mar. 19, 2008, Ruling)" refers to the transcript prepared by J. Dan Lavielle, which consists of the Superior Court's oral ruling; "RP (Mar. 19, 2008, Argument)" refers to the transcript prepared by Michael Townsend, which consists of the parties' oral arguments.)

necessary. *See* CP 14, 71, 81; *see also* Supplemental Memorandum ¶ 1.⁴ Richardson disregarded Judge Morgan's instructions and asked Stephson to prepare a report with the findings of her investigation and analysis. *See* CP 71; *see also* CP 160-74. Although Richardson acknowledges disregarding Judge Morgan's instructions, *see* CP 71, it is not clear from the record *why* Richardson felt it was appropriate to disregard the explicit instructions of her client, the Municipal Court, given to her through Judge Morgan, the Court's administrative head and "official spokesperson," *see* GR 29(f)(10); RPC 1.2(a).

D. Tacoma News requested a copy of the Stephson Report, and the City Attorney informed Judge Morgan that she intended to release the report. Judge Morgan sought a protective order to prevent the report's release.

Stephson issued her report (the "Stephson Report") later in February 2008, and Tacoma News, as well as several other requesters, submitted a public records requests asking for copies of the Stephson Report. *See* CP 19, 21, 23-25, 72. City Attorney Richardson informed Judge Morgan that she would release the Stephson Report on March 6 if

⁴ Judge Morgan is submitting a short Proposed Supplemental Memorandum in Support of Opening Brief together with a motion asking this Court to file that memorandum under seal. The Supplemental Memorandum quotes and discusses documents that are filed under seal. This material is important to Judge Morgan's ability to argue his appeal but cannot be discussed in an unsealed document without revealing the contents of sealed documents. Judge Morgan does not object to the City filing a similar supplemental memorandum under seal.

he did not obtain an injunction. *See* CP 72, 399. Judge Morgan asserted that the Stephson Report is work product and subject to attorney-client privilege that only Richardson's and Stephson's client—the Municipal Court—could waive. *See* CP 14-15, 86.⁵

Judge Morgan, acting individually and in his official capacity as Presiding Judge of the Municipal Court, filed a petition for protective order in the Superior Court on March 5. *See* CP 1-9. The Superior Court temporarily enjoined the release of the Stephson Report. *See* CP 41-42. On March 17, the Superior Court entered an order allowing Tacoma News to intervene in this proceeding. *See* CP 57. The parties briefed and argued Judge Morgan's motion for a permanent protective order, and Superior Court Judge Kimberly Prochnau entered an order on March 27 denying the motion and allowing the Stephson Report to be released. *See* CP 101-03; *see also* RP (Mar. 19, 2008, Ruling). Judge Prochnau stayed the effect of her order and kept the Stephson Report from being released until April 16 to allow Judge Morgan to seek a stay pending appeal from this Court. *See id.* Judge Morgan filed his notice of appeal on March 27. CP 106-12.

⁵ Richardson has acknowledged that only Judge Morgan has the authority to waive attorney-client privilege on behalf of the Municipal Court. *See* CP 390.

E. The Superior Court ordered an attorney-client privileged document unsealed.

Ten documents and an unredacted brief quoting from some of those documents were submitted to the Superior Court for *in camera* review in connection with the parties' briefing of the motion for protective order. On March 27, 2008, the City submitted a motion to file some of those documents under seal and to file the remaining documents unsealed. *See* CP 88-100. Judge Morgan and the City agreed on the sealing status of all but two of these documents, which Judge Morgan believes are privileged and the City believes are not privileged. *See id.* The two disputed documents were identified as "Document 8" and "Document 10" in the City's motion and the Superior Court's sealing order. *See* CP 88-100, 133-37, 195, 215-17. On March 31, following a telephonic hearing, the Superior Court entered an order unsealing the two disputed documents, also staying the effect of this order until April 16. *See* CP 133-37; *see also* RP (Mar. 31, 2008). Judge Morgan filed a supplemental notice of appeal challenging the unsealing of these two documents on April 1. *See* CP 143-45. Judge Morgan is challenging the unsealing of Document 10 on appeal but is no longer challenging the unsealing of Document 8.

F. This Court stayed the effect of the Superior Court's orders pending the outcome of this appeal; the Superior Court denied Judge Morgan's motion to reconsider.

On April 1, Judge Morgan filed a motion asking this Court to stay the effect of the Superior Court's orders pending the outcome of this appeal. The City did not oppose a stay, and Tacoma News did not oppose staying the release of the Stephson Report. This Court granted the stay on April 15. Judge Morgan also filed a motion to reconsider both the order denying the protective order and the sealing order, *see* CP 231-40, which the Superior Court denied, *see* CP 386-87. Judge Morgan filed a supplemental notice of appeal challenging the denial of reconsideration. *See* CP 358-85.

V. ARGUMENT

A. Standard of review.

This Court reviews the Superior Court's decision to allow the City to disclose the Stephson Report to Tacoma News *de novo*. *See Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 731, 174 P.3d 60 (2007); *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 744, 958 P.2d 260 (1998) (internal citations omitted). Because "the record before the trial court consisted entirely of documentary evidence, affidavits, and legal memoranda," this Court "stand[s] in the same position as the trial court," and factual and legal issues are both reviewed under the same *de novo*

standard. *Spokane & Eastern Lawyer v. Tompkins*, 136 Wn. App. 616, 159-60, 150 P.3d 158, *rev. denied* 162 Wn.2d 1004 (2007); *Dragonslayer, Inc. v. Wash. State Gambling Comm'n*, 139 Wn. App. 433, 441-42, 161 P.3d 428 (2007). While a trial court's decision sealing or unsealing court records is generally reviewed for abuse of discretion, "if the trial court rested its decision on an improper legal rule, the appropriate course of action is to remand to the trial judge to apply the correct rule." *Dreiling v. Jain*, 151 Wn.2d 900, 907, 93 P.3d 861 (2004) (internal citations omitted).

B. The Stephson Report is not subject to Public Records Act disclosure.

The Stephson Report should not be produced under the Public Records Act, Ch. 42.56 RCW (the "PRA"),⁶ for three independent reasons: (1) it is a Municipal Court document not subject to the PRA, (2) it is protected by the work product doctrine, and (3) it is protected by attorney-client privilege. This Court need only accept one of these three arguments to reverse the Superior Court and protect the Stephson Report from disclosure.

⁶ The PRA is sometimes referred to as the "Public Disclosure Act," or the "PDA," because it was previously codified within the broader PDA at Ch. 42.17 RCW.

1. **As a Municipal Court document, the Stephson Report is not subject to Public Records Act disclosure.**
 - a. **Respect for separation of powers and judicial independence is critical to the integrity of the court system, and, to this end, the judicial branch must have the power to govern itself.**

“One of the fundamental principles of the American constitutional system is that the governmental powers are divided among three departments—the legislative, the executive, and the judicial—and that each is separate from the other.” *Carrick v. Locke*, 125 Wn.2d 129, 134, 882 P.2d 173 (1994) (quoting *State v. Osloond*, 60 Wn. App. 584, 587, 805 P.2d 263 *rev. denied*, 116 Wn.2d 1030 (1991), in turn citing 16 Am. Jur. 2d *Constitutional Law* § 294 (1979)). The Washington Supreme Court has called the separation of powers doctrine “one of the cardinal and fundamental principles of the American constitutional system, both state and federal” *Wash. State Bar Ass’n v. State*, 125 Wn.2d 901, 906, 890 P.2d 1047 (1995) (quoting *Wash. State Motorcycle Dealers Ass’n v. State*, 111 Wn.2d 667, 674-75, 763 P.2d 442 (1988)). Indeed, the court explained that

the division of governmental powers into the executive, legislative, and judicial represents probably the most important principle of government declaring and guaranteeing the liberties of the people, and preventing the exercise of autocratic power, and that it is a matter of fundamental necessity, and is essential to the maintenance of a republican form of government.

Id. at 906-07 (quoting *Motorcycle Dealers Ass'n*, 111 Wn.2d at 674-75, in turn quoting 16 Am. Jur. 2d *Constitutional Law* §§ 296, 309).

“Although no specific provision is made for a separation of powers in either the U.S. Constitution or the Washington Constitution, the creation of three separate spheres of government operates as an apportionment of the powers.” *Osloond*, 60 Wn. App. at 587. Indeed, “[t]he very division of our government into different branches has been presumed throughout our state’s history to give rise to a vital separation of powers doctrine.” *Carrick*, 125 Wn.2d at 135 (citing *In re Juvenile Director*, 87 Wn.2d 232, 238-40, 552 P.2d 163 (1976), and *Osloond*, 60 Wn. App. at 587). “The doctrine serves mainly to ensure that the fundamental functions of each branch remain inviolate.” *Id.* “In furtherance of this principle of separation of powers, [the Supreme Court] has refused to interfere with the executive and legislative branches of government while at the same time insisting that those branches of government not usurp the functions of the judicial branch of government.” *Bar Ass’n*, 125 Wn.2d at 907 (citing *Zylstra v. Piva*, 85 Wn.2d 743, 754, 539 P.2d 823 (1975) (Utter, J., concurring)). This principle applies as strongly to municipal courts as it does at other levels of the state court system. See *In re Hammermaster*, 139 Wn.2d 211, 248-50, 985 P.2d 924 (1999) (Talmadge, J., concurring).

The Washington Supreme Court has “expressed [its] vigilance against two dangers: first, that the Judicial Branch neither be assigned nor allowed ‘tasks that are more properly accomplished by [other] branches,’ and, second, that no provision of law ‘impermissibly threatens the institutional integrity of the Judicial Branch.’” *Carrick*, 125 Wn.2d at 136 (quoting *Mistretta v. United States*, 488 U.S. 361, 383, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989)). Although “many other constitutional violations . . . directly damage rights retained by the people, the damage caused by a separation of powers violation accrues directly to the branch invaded.” *Id.* Therefore, “[t]he maintenance of a separation of powers protects institutional, rather than individual, interests.” *Id.* (citing *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851, 106 S. Ct. 3245, 3257, 92 L. Ed. 2d 675 (1986)).

While “[h]armonious cooperation among the three branches is fundamental to our system of government,” *Zylstra*, 85 Wn.2d at 750, “a legislative enactment may not impair [the Supreme Court’s] functioning or encroach upon the power of the judiciary to administer its own affairs.” *Bar Ass’n*, 125 Wn.2d at 908-09. “The ultimate power to regulate court-related functions . . . belongs exclusively to [the Supreme Court].” *Id.* at 909 (citing *Zylstra*, 85 Wn.2d at 749-50). Although this Court should “attempt to read [a conflicting court rule and statute] in such a way that

they can be harmonized,” “where they cannot be harmonized, the court rule will prevail.” *Id.* (internal citations omitted). Put another way, if the executive or legislative branches attempt to “interfere with the ultimate power of the judiciary to administer its own affairs,” “the ultimate power to administer the courts clearly rests with the judiciary.” *Zylstra*, 85 Wn.2d at 749-50.

b. Municipal Court documents are not subject to Public Records Act disclosure.

In *Spokane & Eastern Lawyer*, 136 Wn. App. at 622, this Court explicitly held that courts are not “agencies” under the PRA and therefore are not subject to any of the PRA’s provisions. The PRA’s definition of “public record” “includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function *prepared, owned, used, or retained by any state or local agency* regardless of physical form or characteristics.” RCW 42.56.010(2) (emphasis added). A document, therefore, is not a public record if it is not “prepared, owned, used, or retained by any state or local agency.” Since courts—including the Municipal Court—are not “agencies,” court documents are not public records and are not subject to disclosure or release under the PRA.

In this case, Judge Morgan bears no burden in establishing that the

Stephson Report is not a public record. If a document is a public record and an agency is asking a court to *exempt* the public record from disclosure based on one of the PRA's *exemptions*, "[a]gencies bear the burden of establishing that a particular public disclosure exemption applies." *Soter*, 162 Wn.2d at 731. "However, this burden of proof only applies when a party seeks to disclose a *public record*"; the party opposing disclosure does not bear the burden in "the initial inquiry [into] whether the [document] meet[s] the definition of 'public record.'" *Dragonslayer*, 139 Wn. App. at 440-41. Here, because the Municipal Court is not an "agency," it is not Judge Morgan's burden to establish that the Stephson Report is not a public record.

c. Under GR 29(f), presiding judges are ultimately and exclusively responsible for supervising their courts' workplaces and all court employees.

The Federal Way Municipal Court—the judicial branch of the City of Federal Way—is a separate entity from the executive/legislative branch of the City. Judge Morgan is the head of the Municipal Court/judicial branch, and as Presiding Judge he has a number of "judicial and administrative duties [that] *cannot* be delegated to persons in either the legislative or executive branches of government." GR 29(f) (emphasis added). Judge Morgan has a non-delegable duty to "[s]upervise the daily operation of the court including . . . [a]ll personnel employed under the

judicial branch of government including but not limited to working conditions, hiring, discipline, and termination decisions *except* wages, or benefits directly related to wages.” GR 29(f)(5)(b) (emphasis added). The commentary to this rule explains that “[t]he trial courts must maintain control of the working conditions for their employees.” Commentary to GR 29(f)(5). Although “the executive branch maintains control of wage issues” (and, in some cases, the executive branch also maintains “control over some wage-related benefits such as vacation time”), the drafters’ comments are clear that “the courts must assert their control in all other areas of employee relations.” *Id.* The drafters intended GR 29 to be clear regarding presiding judges’ duties and responsibilities for fear that any ambiguity in the rule “could subject some municipal and district court judges to pressure from their executive and/or legislative authority to relinquish authority over areas such as budget and personnel.” Commentary to GR 29(f)(13).

GR 29(f) did not formalize presiding judges’ non-delegable roles as the administrative heads of Washington’s trial courts until 2002, but the principle that court employees work for the judicial branch—not the executive or legislative branches—existed long before the Supreme Court adopted that rule. In *Crossler v. Hille*, 136 Wn.2d 287, 961 P.2d 327 (1998), the Supreme Court, in holding that Adams County’s personnel

handbook did not apply to employees of the Adams County District Court, explained that “County Commissioners have no authority to impose employment policies on a district court judge.” *Id.* at 294. Ultimately, the Supreme Court found that the Adams County commissioners were not the “employer” of the deputy district court clerk “because they have no connection with [her] employment other than to budget money enabling the judge to fill the position of deputy clerk.” *Id.*

Two decades earlier, in *Zylstra*, 85 Wn.2d 743, the Supreme Court articulated essentially the same framework for court employees’ status that the Supreme Court later formally established in GR 29(f). The court explained that court employees “are employees of the county for purposes of negotiating matters relating to wages, including benefits relating directly to wages such as medical insurance.” *Id.* at 748. “However, for purposes of hiring, firing, working conditions, and other matters necessarily within the statutory responsibility of the juvenile court judges, plaintiffs are employees of the court and thus of the State’s judicial branch.” *Id.*

Under GR 29(f), the principle of separation of powers and the requirement that presiding judges not delegate their duty to supervise all non-wage “working conditions, hiring, discipline, and termination decisions” applies as strongly to the municipal courts as it does to the

superior courts and district courts. GR 29 explicitly applies to “[e]ach superior court district and each limited jurisdiction court district (including municipalities operating municipal courts).” Although separation of powers is typically thought of as a doctrine that applies primarily to federal and state governments, to the extent judicial independence is concerned, the separation of powers doctrine is just as important at the county and municipal levels. *See, e.g., Hammermaster*, 139 Wn.2d at 248-50 (Talmadge, J., concurring). The Federal Way Municipal Court is therefore as independent of the executive/legislative branch of the City of Federal Way as the Washington Supreme Court is independent of the governor’s office. As such, the Municipal Court, through Presiding Judge Morgan, must maintain control over all non-wage “working conditions, hiring, discipline, and termination decisions” concerning its employees.

d. The Stephson Report addresses Municipal Court employment and workplace matters, making it a court document, not an executive/legislative branch document. Any City ordinances or policies to the contrary conflict with GR 29(f) and are invalid.

Every issue addressed by the Stephson Report falls squarely within the rubric of “working conditions, hiring, discipline, and termination decisions,” responsibilities GR 29(f) gives to presiding judges. *See* CP 161-74. The report was prepared for the purpose of investigating

allegations of a hostile workplace made by a Municipal Court employee about the Municipal Court's workplace. *See* CP 70-71, 161, 189, 191. Judge Morgan has sole authority to take remedial measures in response to these allegations; under GR 29(f), only the Presiding Judge may adjust working conditions or terminate or otherwise discipline a Municipal Court employee. The Stephson Report could only have been prepared for the benefit of the Municipal Court because the City had no authority or obligation to take any measures in response to the report. *See* GR 29(f). Since the Stephson Report exclusively addresses issues within the Municipal Court's scope of authority over its employees—issues that only the Municipal Court has the power to address—the executive/legislative branch of the City had no interest whatsoever in the report or its contents and should not have had a copy. The Stephson Report, therefore, was never “prepared, owned, used, or retained by” the City, RCW 42.56.010(2), and, under *Spokane & Eastern Lawyer*, it is neither a public record nor subject to the PRA.

This analysis would begin and end here had the City not argued that the City's official “Antidiscrimination Policy” somehow trumped GR 29(f) and turned the Stephson Report into an executive/legislative branch document. *See* CP 400-03 (requiring “Human Resources [to] determine the appropriate course of action” in response to a workplace complaint);

see also CP 70-71 (“[A] court employee complained to the City about hostile work conditions at the court. In accordance with its discrimination policy, the City hired attorney Amy Stephson to conduct a factual investigation so the City could address any substantiated complaints.”); CP 153 (“The City of Federal Way’s policy governing workplace harassment specifically requires the City’s human resources department—not its legal department—to investigate complaints of harassment and hostile work environment.”).⁷ The Superior Court accepted this argument, explaining as follows:

The findings to base this ruling are, first of all, the city’s antidiscrimination policy provides that the human resources division is responsible for investigating allegations of harassment. *Now that may be contrary to the general rules of the court* but that is certainly what the city attorney was

⁷ In its Opposition to Protective Order, the City expressed its desire “to comply with case law that makes ‘an employer—the City—automatically liable for a supervisor’s discriminative conduct unless the employer has an antidiscrimination policy and promptly conducts an investigation of any claims.’” CP 153 (quoting *Sangster v. Alberston’s, Inc.*, 99 Wn. App. 156, 164-65, 991 P.2d 674 (2000), in turn quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 2270, 141 L. Ed. 2d 633 (1998)). As explained, however, the executive/legislative branch of the City is not the “employer” of Municipal Court employees in any traditional sense—under GR 29(f) the City has no control whatsoever over any working conditions, hiring, firing, or discipline other than wages. And to the extent the City would be financially liable for a lawsuit brought by a Municipal Court employee, the City’s position would be closer to that of a liability insurer than to that of an employer. An employer has control over its employees’ working conditions; the City has no control over the working conditions of Municipal Court employees. Along these lines, the Superior Court speculated that the City could have offered an employee raising a hostile workplace allegation “a different job outside the court but within another city branch.” RP (Mar. 19, 2008, Ruling) at 13. There is no support for this speculation in the record; the City offering a Municipal Court employee a job in the transportation department as a remedy for a hostile workplace allegation would be akin to a private employer’s liability insurer offering an employee of the insured a job with the insurance company as a hostile workplace remedy.

proceeding on and I don't read the general rules to mean that the individual judge has to personally investigate every allegation of harassment, particularly when the allegation is directed toward himself.

RP (Mar. 19, 2008, Ruling) at 8 (emphasis added).

Both the City and the Superior Court misunderstood GR 29(f). The rule is explicit that presiding judges have a non-delegable duty to supervise the “working conditions, hiring, discipline, and termination decisions” of “all personnel employed under the judicial branch.” The City’s Antidiscrimination Policy requires “Human Resources [to] determine the appropriate course of action” in response to a workplace complaint. CP 402. To the extent the City believes this policy applies to Municipal Court employees, it conflicts directly with GR 29(f). Although Judge Morgan “may delegate the performance of ministerial duties to court employees,” GR 29(f) explicitly prohibits him from delegating any of these “judicial and administrative duties” “to persons in either the legislative or executive branches of government.”

As explained in Section V.B.1.a, “[t]he ultimate power to regulate court-related functions . . . belongs exclusively to [the Supreme Court].” *Bar Ass’n*, 125 Wn.2d at 908-09 (internal citations omitted). When a court rule and statute conflict, this Court should “attempt to read [them] in such a way that they can be harmonized,” but “where they cannot be

harmonized, the court rule will prevail.” *Id.* (internal citations omitted). Here, there is an irreconcilable conflict between the City’s policy and GR 29(f), and the court rule prevails.

In *Washington State Council of County & City Employees v. Hahn*, 151 Wn.2d 163, 86 P.3d 774 (2004), the Supreme Court determined that it could “harmonize” GR 29 with a state statute requiring collective bargaining for all state employees (including judicial branch employees). In the Supreme Court’s view, “a requirement that the Judges collectively bargain with their employees does not eliminate or interfere with the court’s ability to supervise its employees.” *Id.* at 169. The Supreme Court explained as follows:

Although GR 29 precludes judges from bargaining away their inherent power to control the daily operation of the courts on which they serve, the mere requirement that judges engage in good faith collective bargaining does not, in our view, reduce their control over the working conditions of the courts’ employees. We say that because the requirement that a party engage in good faith bargaining does not mean that the party [i.e., the court] must agree to all proposals that are submitted to it in the course of bargaining.

Id. at 169-70. Because the courts—not the executive branch—retain the power to actually engage in the required collective bargaining and “the ability to supervise their employees under the bargained conditions,” *Hahn* could reconcile the statute and GR 29(f) without undermining the

separation of powers doctrine. *Id.* at 170.

More recently, in *City of Spokane v. County of Spokane*, 158 Wn.2d 661, 146 P.3d 893 (2006), the Supreme Court held that GR 29 does not extend to the legislative transfer of jurisdiction from one court of limited jurisdiction to another. Until 2007, the City of Spokane had operated its municipal court as a municipal department of the Spokane County District Court, as permitted by Ch. 3.46 RCW. *See id.* at 666. In 2004, the City of Spokane announced that it would create its own municipal court as of January 1, 2007, and, based on a cost-sharing agreement the city reached with Spokane County, stated that all open municipal cases would be transferred from the former municipal department to the new municipal court as of that date. *See id.* at 666-68. The Spokane County District Court argued that it was a necessary party to any case transfer agreement under GR 29. *See id.* at 677-78. The Supreme Court rejected this argument, reasoning that, “[w]hile GR 29 charges the presiding judge of a district court with supervising the day-to-day administration of court business and with serving as a spokesperson for the court,” the political branches of local governments have the authority to “determine the existence of independent municipal courts, or alternatively, municipal departments of district courts.” *Id.* at 680 (citing *Spokane County v. State*, 136 Wn.2d 663, 668, 966 P.2d 314 (1998)). In

other words, “[a] local legislative determination of which court will hear municipal criminal cases does not infringe upon the fundamental administrative functions of a district court’s presiding judge, nor does it infringe upon the fundamental functions of the judiciary.” *Id.*

Although it involved GR 12, not GR 29, the Supreme Court’s decision in *Bar Association* illustrates an example of a “direct and unavoidable” conflict between a court rule and a statute. There, the then-current version of GR 12(b)(6) explicitly gave the WSBA’s Board of Governors “discretion to determine whether to collectively bargain with its employees.” *Bar Ass’n*, 125 Wn.2d at 909. The Legislature enacted a statute, RCW 41.56.020, that explicitly required the WSBA to collectively bargain with its employees. *See Bar Ass’n*, 125 Wn.2d at 909. The Supreme Court determined that “[t]he court rule, which gives the Board of Governors discretion to determine whether to collectively bargain with employees, cannot be reconciled with legislation that nullifies that discretion and makes collective bargaining mandatory” and held: “The rule therefore prevails.” *Id.*

Here, GR 29(f) and the City of Federal Way’s Antidiscrimination Policy directly conflict as in *Bar Association*; no *City of Spokane* or *Hahn*

“harmonization” is possible.⁸ GR 29(f) makes Judge Morgan, as Presiding Judge, the supervisor of “working conditions, hiring, discipline, and termination decisions” of “all personnel employed under the judicial branch.” He can delegate “ministerial” aspects of these duties to Municipal Court staff, but he may not delegate any of these duties to members of the executive/legislative branch of the City. *See id.* The City’s Antidiscrimination Policy, in contrast, requires a supervisor who receives a workplace complaint to “immediately notify the department director and Human Resources” and states that “Human Resources will determine the appropriate course of action.” CP 402. This presents a direct and irreconcilable conflict between the Antidiscrimination Policy and GR 29(f). Under GR 29(f), therefore, enforcing the City’s policy or acting pursuant to the City’s policy in response to Municipal Court

⁸ Although the City’s Antidiscrimination Policy is a “policy” rather than a statute or ordinance, the City has argued—and the Superior Court has agreed—that this “policy” is the City’s basis for claiming an interest in the Stephson Report. *See* CP 146-48, 153-54; RP (Mar. 19, 2008, Ruling) at 8, 12-13. If a statute or ordinance that conflicts with a court rule is invalid, a City “policy” that conflicts with a court rule is certainly invalid. That said, to the extent the City claims RCW 3.50.080 governs Municipal Court employees, that statute is also invalid insofar as it directly conflicts with GR 29(f). RCW 3.50.080 states as follows: “All employees of the municipal court shall, for all purposes, be deemed employees of the city or town. They shall be appointed by and serve at the pleasure of the court.” This statute is consistent with GR 29(f) insofar as it grants municipal courts hiring and firing power of court employees, but the “deemed employees of the city . . . for all [other] purposes” language directly conflicts with GR 29(f). On its own, RCW 3.50.080 would appear to make cities responsible for, among other things, the “working conditions” of municipal court employees, contrary to GR 29(f). Pursuant to *Bar Association, Hahn*, and *City of Spokane*, GR 29(f) trumps RCW 3.50.080 to the extent there is any dispute over who is responsible for Municipal Court employees’ working conditions.

employment issues would be an improper delegation of “working conditions” supervision to the executive/legislative branch of the City, and the court rule must trump the policy.

To summarize: The Stephson Report exclusively addresses issues that fall within Judge Morgan’s non-delegable areas of authority under GR 29(f). As such, the Stephson Report is a Municipal Court document not subject to disclosure under the PRA. The City’s Antidiscrimination Policy cannot trump GR 29(f) and give the executive/legislative branch of the City an interest in the Stephson Report, because court rules are the final authority in matters of judicial administration. Consequently, when the Superior Court upheld the City’s “policy” despite acknowledging that it “may be contrary to the general rules of the court,” RP (Mar. 19, 2008, Ruling) at 8, the Superior Court ignored the long-established rule that court rules trump statutes (and certainly “policies”) when it comes to court employees.⁹ The Stephson Report is a Municipal Court document—not an

⁹ The Superior Court stated that it did not “read [GR 29(f)] to mean that the individual judge has to personally investigate every allegation of harassment, particularly when the allegation is directed toward himself.” RP (Mar. 19, 2008, Ruling) at 8. Judge Morgan does not disagree with this statement as far as it goes; GR 29(f) certainly does not prevent a presiding judge from consulting with the court’s attorney (e.g., City Attorney Richardson) regarding “working conditions” issues, nor does it prevent the court’s attorney from engaging a private attorney (e.g., Plenefisch or Stephson) to investigate allegations regarding “working conditions” for court staff. GR 29(f) does, however, prohibit presiding judges from delegating or assigning investigative responsibilities to members of the executive or legislative branches. The fact that the Municipal Court engaged City Attorney Richardson and Stephson to investigate and

executive/legislative branch document—and it should not be produced to Tacoma News.

- e. **The City Attorney’s possession of the Stephson Report does not make the report an executive/legislative branch document subject to the Public Records Act.**

The Superior Court determined that it was “probably correct” “that the Public [Records] Act does not apply to court administrative records” but nonetheless decided that the Stephson Report is a “public record” because it “is in the possession of the city” and because the report “was commissioned jointly by the city and the court” RP (Mar. 19, 2008, Ruling) at 17. There is no evidence in the record that the Stephson Report was “commissioned jointly by the city and the [Municipal Court]”; as explained, the report only concerns matters within Presiding Judge Morgan’s exclusive responsibility and authority under GR 29(f), and City Attorney Richardson’s communications with Judge Morgan regarding retaining Stephson show that the report was commissioned by Richardson in her capacity as attorney for the Municipal Court. *See* CP 189, 191.

As for the Superior Court’s conclusion that the Stephson Report “is in the possession of the city,” the City Attorney’s possession of the report does not make it a public record. Formally, of course, City Attorney

provide advice regarding the hostile workplace allegations does not transform the Stephson Report into an executive/legislative branch document.

Richardson is an employee of the City's executive/legislative branch, but her status as legal counsel for all branches of the City's government distinguishes her from other executive/legislative branch employees. The only reason Richardson had a copy of the Stephson Report was her status as the Municipal Court's attorney, and turning a court document into a "public record" once a government attorney sees a copy would make it impractical for attorneys employed by any executive branch to serve as attorneys for any judicial branch. *Cf.* 1 Paul R. Rice, *Attorney-Client Privilege in the United States* § 3:12 (2d ed. 1999) (For purposes of establishing an attorney-client relationship between a government agency and a government attorney, "it is irrelevant whether the attorney is in-house within the same agency, is part of the Department of Justice, or is retained from the outside.") (citing cases).

Indeed, if the Stephson Report became subject to PRA disclosure simply because Richardson had a copy in her capacity as the Municipal Court's attorney, a report regarding an investigation of employment issues at the Supreme Court would also be subject to PRA disclosure if the division of the Attorney General's Office advising the Supreme Court on personnel issues had a copy. The fact that an attorney advising a court on personnel issues happens to work for the executive branch of the state, a county, or a municipality cannot transform judicial branch documents into

executive branch documents for purposes of the PRA. To hold otherwise would require every court in this state to obtain its own independent counsel for all judicial branch legal matters and would prevent courts from using the Attorney General's Office, county prosecuting attorneys, or city attorneys as their counsel. Whether or not they use executive branch attorneys, court documents are not subject to the PRA.¹⁰

2. The Stephson Report is exempt from Public Records Act disclosure because it is protected by the work product doctrine and attorney-client privilege.

Even if the Stephson Report were a "public record" under the PRA's definition, it is still protected from disclosure under the PRA's exemptions for work product and attorney-client privileged documents. These arguments address exemptions from the PRA. If this Court agrees with Judge Morgan's first argument and determines that the Stephson Report is a Municipal Court document not subject to the PRA, it is unnecessary to reach the next two arguments. The applicability of work product protection and attorney-client privilege are only relevant if this Court determines that the Stephson Report is a "public record" within the

¹⁰ Courts in this state regularly use executive branch attorneys as their counsel without subjecting documents seen by those attorneys to the PRA. *See, e.g., Spokane & Eastern Lawyer*, 136 Wn. App. at 618 & 618 n.3 (noting that the Spokane County Chief Civil Deputy Prosecuting Attorney wrote a letter denying a public records request on behalf of the Spokane County Superior Court, the court's administrator, and Presiding Judge Linda Tompkins).

meaning of the PRA.

Work product and attorney-client privilege are distinct doctrines that apply in somewhat different circumstances. That said, the doctrines often overlap and apply to the same material. As explained below, it is Judge Morgan's position that each doctrine independently covers the Stephson Report and protects it from disclosure. If, however, this Court determines that only one of the two doctrines protects the Stephson Report, or if only a combination of the two doctrines cover the Stephson Report, it is still exempt from disclosure. *See Soter*, 162 Wn.2d at 749 ("We conclude that all of the documents sought are either protected work product or that they contain privileged information. These documents are exempt from public disclosure under RCW 42.56.290, which incorporates CR 26(b).").

a. The Stephson Report is protected under the work product doctrine.

Under RCW 42.56.290, "Records that are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts are exempt from disclosure under [the PRA]." This provision exempts documents that constitute "work product" from the PRA, and the Supreme Court has repeatedly held that "[t]his exemption

from public disclosure ‘relies on the rules of pretrial discovery to define the parameters of the work product rule for purposes of applying the exemption.’” *Soter*, 162 Wn.2d at 731 (quoting *Limstrom v. Ladenburg*, 136 Wn.2d 595, 605, 963 P.2d 869 (1998)).

The U.S. Supreme Court first announced the work product doctrine in *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947). There, a tugboat capsized, killing several members of the crew. *See Soter*, 162 Wn.2d at 734 (citing *Hickman*, 329 U.S. at 498). The boat’s owners hired an attorney, who interviewed witnesses in anticipation of litigation. *Id.* The family of one of the deceased crewmembers sued the tugboat owners and demanded copies of the statements the witnesses had given to the owners’ attorney. *Id.* The U.S. Supreme Court held that “the attorney’s notes reflecting witness statements in that case were not discoverable.” *Id.* at 735 (citing *Hickman*, 329 U.S. at 513).

In refusing to allow discovery of the attorney’s notes and establishing the work product doctrine, the Court explained that “it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.” *Hickman*, 329 U.S. at 510. Because “[p]roper preparation of a client’s case demands that [a lawyer] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his

strategy without undue and needless interference,” the Court reasoned that allowing disclosure of work product would mean that “much of what is now put down in writing would remain unwritten.” *Id.* at 511. Without the work product doctrine, “[i]nefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial.” *Id.* In essence, according to *Hickman*, “The effect on the legal profession [of not protecting work product] would be demoralizing[, a]nd the interests of the clients and the cause of justice would be poorly served.” *Id.*

The Stephson Report is work product because it is “relevant to a controversy” and “would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts.” RCW 42.56.290. As used in the PRA, the term “controversy” includes “completed, existing, or reasonably anticipated litigation,” and its “protection is triggered prior to the official initiation of litigation and extends beyond the official termination of litigation.” *Soter*, 162 Wn.2d at 732. Work product protection, both in the discovery context and the PRA context, “applies to materials created in anticipation of litigation, even after that litigation has terminated,” *id.*, and even if litigation never actually takes place (the controversy in *Soter*, for example, was resolved without either party filing a lawsuit), *see id.* at 726, 733. Indeed, the state

Supreme Court has explained that “the work product protection can be preserved *only* if it continues even after the prospect of litigation has terminated.” *Id.* at 732 (citing *Harris v. Drake*, 152 Wn.2d 480, 489-90, 99 P.3d 872 (2004)). Work product protection cannot “distinguish between completed and pending cases, in part because the looming possibility of disclosure, even disclosure after termination of the lawsuit, would cause clients and witnesses to hesitate to reveal details to the attorneys, and it would cause attorneys to hesitate to reduce their thoughts or understanding of the facts to writing.” *Id.* (internal quotations omitted).

The Stephson Report was prepared in anticipation of litigation. In his declaration, Judge Morgan explained that “City Attorney Pat Richardson asked [Judge Morgan] to authorize the investigation conducted by Ms. Stephson to evaluate a possible legal cause of action for a hostile work environment,” CP 12, and Judge Morgan “authorized Ms. Stephson’s investigation in anticipation of potential litigation in order to evaluate the legal exposure of the Court and to evaluate possible settlement packages in lieu of potential litigation,” CP 13; *see also* Supplemental Memorandum ¶ 2.

Moreover, the City and Tacoma News have both acknowledged that Stephson conducted her investigation and prepared her report to establish an affirmative defense to vicarious liability pursuant to

Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998). See CP 65, 153, 279. Under *Faragher* and *Ellerth*, employers are vicariously liable for a hostile workplace created by a supervisor. See *Sangster v. Albertson's, Inc.*, 99 Wn. App. 156, 164-65, 991 P.2d 674 (2000). If, however, an employer establishes (a) that it “exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise,” the employer escapes liability. See *id.* (quoting *Faragher* and *Ellerth*). To raise this defense, employers typically hire an investigator (often an attorney) to investigate the hostile workplace complaint. See Daniel Blanchard, *The Faragher-Ellerth Affirmative Defense as Implied Waiver of Privileges: Is the Defense a Shield or a Double-Edged Sword?*, 14 S. Carolina Lawyer 38 (2003).

As all parties agree, the Stephson Report is by all appearances a *Faragher-Ellerth* investigation. This establishes that the Stephson Report was prepared in anticipation of litigation; there is no purpose to a *Faragher-Ellerth* investigation unless there is at least some anticipation of litigation. While *Faragher-Ellerth* investigation reports can become

subject to disclosure in discovery *if* an employer is sued and chooses to raise a *Faragher-Ellerth* affirmative defense, *see, e.g., id.*, no lawsuit was ever filed in this case, and, without a lawsuit, no *Faragher-Ellerth* affirmative defense was ever raised. As such, the work product doctrine, which might have been waived under different circumstances, was not waived here and continues to protect the Stephson Report from disclosure.

Finally, the City has argued that the Stephson Report is not work product because Stephson was treated as an “investigator” rather than an attorney. This argument is mistaken for at least three reasons. First, there is no dispute that Stephson is an attorney, and she is consistently identified as an attorney in the course of her work for the Municipal Court and the City Attorney. *See* CP 83; *see also* Supplemental Memorandum ¶ 3. Second, Judge Morgan believed that Stephson was retained “to evaluate a possible legal cause of action for a hostile work environment,” CP 12; *see also* Supplemental Memorandum ¶ 3, and “the existence of the attorney-client relationship turns largely on the client’s subjective belief that it exists,” *see In re Egger*, 152 Wn.2d 393, 410, 98 P.3d 477 (2004) (internal quotations omitted). Third, in *Soter*, the Supreme Court rejected this same argument, as the investigator whose work product was at issue in that case was *not* an attorney. *See Soter*, 62 Wn.2d at 725, 739 n.9. *Soter* held that, “[b]y its plain language, CR 26(b) applies equally to the impressions,

conclusions, [and] opinions of other representatives of a party,” including non-attorney “member[s] of the legal team” *Id.* at 739 n.9. Therefore, even if Stephson were deemed an “investigator” rather than an attorney, her report is protected as work product and is not subject to disclosure.

b. The Stephson Report is protected by attorney-client privilege.

Attorney-client privileged information and documents are protected from disclosure under the PRA regardless of whether they are related to a “controversy.” *See Soter*, 62 Wn.2d at 745, n.15 (citing *Hangartner v. City of Seattle*, 151 Wn.2d 439, 452-53, 90 P.3d 26 (2004)). Attorney-client privilege prohibits attorneys from revealing the contents of “communications made by the client to [the attorney], or [the attorney’s] advice given thereon in the course of professional employment” without the client’s consent. *Dietz v. Doe*, 131 Wn.2d 835, 842, 935 P.2d 611 (1997) (quoting RCW 5.60.060(2) and citing RPC 1.6(a)). “The attorney-client privilege exists to allow clients to communicate freely with their attorneys without fear of later discovery,” and “privilege applies to communications and advice between an attorney and client *and extends to documents that contain a privileged communication.*” *Soter*, 62 Wn.2d at 745 (citing and quoting *Dietz*, 131 Wn.2d at 842) (emphasis in *Soter*).

Documents that “contain notes regarding privileged communications between the legal team and their clients” are protected by attorney-client privilege. *Id.*

Here, the Stephson Report is protected by attorney-client privilege. The report was labeled “privileged and confidential” and addressed from Stephson to Richardson, *see* CP 161, and Richardson then gave the report to Judge Morgan, her client, *see* CP 10-11.¹¹ The report consists entirely of records of communications between Stephson and Municipal Court employees (including Judge Morgan). *See* CP 161-74. All of the Municipal Court staff who met with Stephson did so in the context of their work as employees of the Municipal Court, and their communications with Stephson were ultimately to assist Stephson acting in her capacity as an attorney. *See* Supplemental Memorandum ¶ 3. All available evidence shows that the City Attorney was acting as the attorney for the Municipal Court when she proposed that Stephson be retained. *See* CP 189, 191, 390, 393, 396, 399.¹² Consequently, as a “subcontracting” attorney hired

¹¹ Richardson notes in her declaration that Judge Morgan was not her client in his individual capacity. *See* CP 71-72. This is not in dispute. The Municipal Court, however, was Richardson’s client, and communications between Judge Morgan and Richardson are therefore privileged in the same way that communications between a corporation’s CEO and its counsel are privileged even when the counsel does not represent the CEO personally.

¹² Not all of these documents pertain directly to the Stephson Report and the hiring of Stephson, but they all evidence an attorney-client relationship between the City Attorney and the Municipal Court around the time of Stephson’s hiring and investigation.

by the Municipal Court's primary attorney to perform legal services for the Court, Stephson was the Court's attorney, and attorney-client privilege prohibits disclosure of her communications with the Court or the Court's primary attorney (the City Attorney). As the head of the Municipal Court under GR 29(f) and as is apparent from the cited communications between the City Attorney and Judge Morgan, *see, e.g.*, CP 390, Judge Morgan is the individual who has the power to waive privilege on behalf of the Court, he has not done so, and the Stephson Report is privileged. The Stephson Report is therefore attorney-client privileged, and it is not subject to disclosure.

c. Even if Richardson and Stephson jointly represented both the Municipal Court and the City, the Stephson Report is still subject to work product protection and attorney-client privilege.

As explained, the Municipal Court was the *only* client of City Attorney Richardson for purposes of Stephson's investigation of hostile workplace allegations raised by Municipal Court staff about the Municipal Court's workplace. *See supra* § V.B.1.d. If, however, this Court ultimately determines, to the contrary, that the executive/legislative branch of the City was *also* the City Attorney's client for purposes of the hostile workplace allegations, the Stephson Report is still exempt from disclosure

They also show that Judge Morgan was the representative of the Municipal Court for purposes of receiving legal advice and making legal decisions.

as both work product and attorney-client privilege. Neither work product protection nor attorney-client privilege has been waived by either the Municipal Court or the City. In the context of a joint representation, Richardson is still the attorney and does not have the power to waive either protection. *See, e.g., Dietz*, 131 Wn.2d at 850 (“The attorney-client privilege can ordinarily be waived only by the client, to whom the privilege belongs.”) (internal citation omitted). As the Stephson Report has not been disclosed to the public, both protections are still in place.

Even if the executive/legislative branch of the City sought to waive work product protection or attorney-client privilege as to the Stephson Report (although, to be clear, the record reflects no waiver on the part of the City), it should not be permitted to do so here.¹³ While Richardson might have viewed both the Municipal Court and the executive/legislative branch of the City as her joint clients in connection with the hostile workplace allegation and investigation, she never made any joint representation disclosure that attorneys typically make when representing multiple clients with potential conflicts of interest in the same matter. *See* RPC 1.7(b)(4). An undisclosed joint representation of two clients by an

¹³ It is also unclear *why* the executive/legislative branch of the City would want to waive privilege or work product protection. Although the City has argued that, in its view, neither attorney-client privilege nor work product protection applies to the Stephson Report, the City has never stated that it would waive privilege or work product protection if either or both did apply.

attorney might *expand* the scope of work product and privilege protections in order to protect all of the clients, but allowing the City to unilaterally waive privilege based on an undisclosed joint representation would be manifestly unfair to the Municipal Court, which had a reasonable belief based on GR 29(f) and the lack of any joint representation disclosure or agreement that City Attorney Richardson and Stephson were acting exclusively as attorneys for the Court.

d. Given that it is protected by the work product doctrine and attorney-client privilege, producing the Stephson Report would not be in the public interest.

Producing the Stephson Report “would not be in the public interest and would substantially and irreparably damage a person or a vital government interest.” *Soter*, 162 Wn.2d at 757 (citing RCW 42.56.540). The Stephson Report is protected by both attorney-client privilege and the work product doctrine. Both of those doctrines are central to the integrity of the litigation process, the legal profession, and the attorney-client relationship. Attorney-client privilege “exists in order to allow the client to communicate freely with an attorney without fear of compulsory discovery.” *Dietz*, 131 Wn.2d at 842. In addition, the privilege “promote[s] broader public interests in the observance of law and the administration of justice,” and has been sustained for centuries because of

the fundamental benefits that accrue to society at large.” *In re Schafer*, 149 Wn.2d 148, 160, 66 P.3d 1036 (2003) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)). Work product protection is also important. The U.S. Supreme Court has explained that “it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel,” and reasoned that “the interests of the clients and the cause of justice would be poorly served” without work product protection. *Hickman*, 329 U.S. at 510-11.

While in PRA cases a “court must find that a specific exemption [to PRA disclosure] applies and that disclosure would not be in the public interest and would substantially and irreparably damage a person or a vital government interest” before enjoining the release of a public record, the state Supreme Court reasoned that “[i]t may be that in most cases where a specific exemption applies, disclosure would also irreparably harm a person or a vital government interest.” *Soter*, 162 Wn.2d at 757-58.¹⁴ Here, if the Stephson Report is attorney-client privileged, work product, or both, disclosing it would not be in the public interest, and it would

¹⁴ To be clear: The “public interest” and “irreparable damage” requirements in the PRA only come into play if this Court deems the Stephson Report a public record. If this Court agrees with Judge Morgan’s primary argument and determines that the Stephson Report is a Municipal Court document and not a public record, the PRA’s statutory requirements are immaterial.

irreparably harm a vital government interest. If the Stephson Report were produced to Tacoma News despite being privileged and work product, government entities, such as the Municipal Court, could never seriously rely on attorney-client privilege or the work product doctrine to protect legal material. Attorney-client privilege and the work product doctrine are both important to governments' abilities to work with their attorneys, and government entities should have the same rights to rely on these doctrines as private clients have. Using RCW 42.56.540's "public interest" provision as a loophole to require production of privileged and work product material would eviscerate attorney-client privilege and the work product doctrine, and this Court should not allow it in this case.

3. The Stephson Report contains personal information exempt from Public Records Act disclosure under the Supreme Court's decision in Bellevue John Does.

The PRA exempts from disclosure "[p]ersonal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy." RCW 42.56.230(2). If this Court determines that the Stephson Report is subject to the PRA *and* that the Stephson Report is neither work product nor attorney-client privileged, this Court should reverse the Superior Court and find that the Stephson Report constitutes "personal information in files maintained for employees, appointees, or elected officials" and that

disclosure of the Stephson Report “would violate their right to privacy.”

In *Bellevue John Does 1-11 v. Bellevue School Dist. #405*, No. 78603-8, 2008 WL 2929683, __ Wn.2d __, __ P.3d __ (July 31, 2008), the Supreme Court explained that a document is protected from disclosure by the PRA’s privacy exemption if disclosure of the document “(1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public.” *Id.* at *6 (citing former RCW 42.17.255, now codified at RCW 42.56.050). The Stephson Report meets both criteria— disclosure of the report “[w]ould be highly offensive to a reasonable person,” *see* Supplemental Memorandum ¶ 4, and, under *Bellevue John Does*’ reasoning, the report is not of legitimate concern to the public” because it consists primarily of unsubstantiated allegations, *see* Supplemental Memorandum ¶¶ 5-6.¹⁵

C. “Document 10” is protected by “common interest” attorney-client privilege and should be filed under seal.

The City submitted several documents to the Superior Court for *in camera* review in connection with Judge Morgan’s petition for protective

¹⁵ Although the majority of the allegations in the Stephson Report are unsubstantiated and therefore protected from disclosure by *Bellevue John Does*, the allegations in the report that are not disputed could be released under *Bellevue John Does*. *See* Supplemental Memorandum ¶¶ 5-6. Because the court records, work product, and attorney-client privilege arguments presented in Sections V.B.1 and V.B.2 would protect the *entire* Stephson Report from disclosure while the personal records argument presented in this section would only protect the majority of the report from disclosure, this Court should only reach this argument if it finds that the report is not a court document, not work product, and not attorney-client privileged.

order. When the Superior Court held a hearing regarding whether these documents should be filed under seal, the parties agreed as to the sealing status of all but two documents. *See* CP 88-100; RP (Mar. 29, 2008). The Superior Court determined that neither of the disputed documents was privileged and ordered both unsealed. However, one of those two documents, Document 10 (as identified in the sealing order, *see* CP 135), is subject to “common interest” attorney-client privilege and should be filed under seal.

Based on the Superior Court’s reasoning, a valid claim of attorney-client privilege justifies filing documents under seal. Only the first of the five factors courts consider when deciding whether to seal documents was disputed as to Document 10: “The proponent of closure and/or sealing must make some showing of the need therefor.” *Dreiling*, 151 Wn.2d at 913 (internal citations and quotations omitted). In considering whether Document 10 should be sealed, the substantive question the Superior Court addressed was whether this document is privileged, *see* RP (Mar. 28, 2008) at 24-27, and a valid claim of attorney-client privilege is a “need” that justifies sealing a document. *See Dreiling*, 151 Wn.2d at 918.

Document 10 is an email from Judge Morgan to City Attorney Richardson. *See* CP 215-17. Judge Morgan then forwarded the email to City Councilmember Linda Kochmar, and Kochmar re-forwarded it to

Richardson. *See id.* There is no dispute that the communication between Judge Morgan and Richardson is privileged, but the City has argued that Judge Morgan waived privilege by forwarding the email to Councilmember Kochmar. In this case, however, privilege was not waived, and the email remains protected by “common interest” privilege.

“When two or more clients consult or retain an attorney on particular matters of common interest, the communications between each of them and the attorney are privileged against third parties.” 3 *Weinstein’s Fed. Evid.* (2d ed. 2008) § 503.21[1] (citing cases). “[E]ach joint client’s communications with the attorney may be shared among the others without destroying either their confidentiality or the privilege protection premised upon it.” Rice, *supra*, § 9:68. This email is privileged because the email addresses information contained in and relating to the Plenefisch Report, which the City has acknowledged is privileged. *See* CP 93. The Municipal Court and the City have a common interest as to disclosure of information addressed in the Plenefisch Report, making the contents of this email privileged. *See* Supplemental Memorandum ¶ 7. As such, this Court should find as a matter of law that Document 10 is protected by attorney-client privilege and remand to the Superior Court so that the Superior Court can apply the five factors stated in *Dreiling* based on the document’s status as privileged.

VI. CONCLUSION

The Stephson Report is a Municipal Court document not subject to the PRA, and even if it is subject to the PRA, it is exempt as work product, attorney-client privilege, and a personal records. It should not be disclosed to Tacoma News. Additionally, Document 10 is privileged and should be filed under seal. This Court should reverse the Superior Court and remand with instructions to enter an order protecting the Stephson Report from disclosure to file Document 10 under seal.

RESPECTFULLY SUBMITTED, this 6th day of August, 2008.

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By  _____
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DECLARATION OF SERVICE

On August 6, 2008, I caused true and correct copies of the Revised Brief of Appellant, Appellant's Motion for Leave to File 51-Page Brief, Appellant's Revised Motion to File Supplemental Memorandum Under Seal, and Letter to Clerk to be served on the following counsel of record via U.S. Mail and e-mail (by consent):

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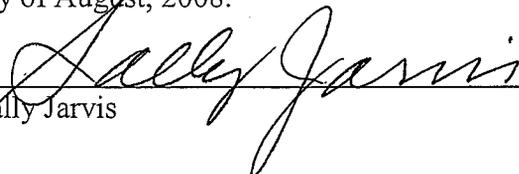
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On August 6, 2008, I caused a true and correct copy of Appellant's Revised [Proposed] Supplemental Memorandum in Support of Opening Brief to be served on P. Stephen DiJulio and Ramsey Ramerman of FOSTER PEPPER PLLC, 1111 Third Avenue, Suite 3400, Seattle, WA 98101-3299, attorneys for Respondents, via U.S. Mail and e-mail (by consent). I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 6th day of August, 2008.



Sally Jarvis

General Rule 29
PRESIDING JUDGE IN SUPERIOR COURT DISTRICT AND
LIMITED JURISDICTION COURT DISTRICT

(a) Election, Term, Vacancies, Removal and Selection Criteria--Multiple Judge Courts.

(1) Election. Each superior court district and each limited jurisdiction court district (including municipalities operating municipal courts) having more than one judge shall establish a procedure, by local court rule, for election, by the judges of the district, of a Presiding Judge, who shall supervise the judicial business of the district. In the same manner, the judges shall elect an Assistant Presiding Judge of the district who shall serve as Acting Presiding Judge during the absence or upon the request of the Presiding Judge and who shall perform such further duties as the Presiding Judge, the Executive Committee, if any, or the majority of the judges shall direct. If the judges of a district fail or refuse to elect a Presiding Judge, the Supreme Court shall appoint the Presiding Judge and Assistant Presiding Judge.

(2) Term. The Presiding Judge shall be elected for a term of not less than two years, subject to reelection. The term of the Presiding Judge shall commence on January 1 of the year in which the Presiding Judge's term begins.

(3) Vacancies. Interim vacancies of the office of Presiding Judge or Acting Presiding Judge shall be filled as provided in the local court rule in (a) (1).

(4) Removal. The Presiding Judge may be removed by a majority vote of the judges of the district unless otherwise provided by local court rule.

(5) Selection Criteria. Selection of a Presiding Judge should be based on the judge's 1) management and administrative ability, 2) interest in serving in the position, 3) experience and familiarity with a variety of trial court assignments, and 4) ability to motivate and educate other judicial officers and court personnel. A Presiding Judge must have at least four years of experience as a judge, unless this requirement is waived by a majority vote of the judges of the court.

Commentary

It is the view of the committee that the selection and duties of a presiding judge should be enumerated in a court rule rather than in a statute. It is also our view that one rule should apply to all levels of court and include single judge courts. Therefore, the rule

should be a GR (General Rule). The proposed rule addresses the process of selection/removal of a presiding judge and an executive committee. It was the intent of the committee to provide some flexibility to local courts wherein they could establish, by local rule, a removal process. Additionally, by delineating the selection criteria for the presiding judge, the committee intends that a rotational system of selecting a presiding judge is not advisable.

(b) Selection and Term - Single Judge Courts. In court districts or municipalities having only one judge, that judge shall serve as the Presiding Judge for the judge's term of office.

(c) Notification of Chief Justice. The Presiding Judge so elected shall send notice of the election of the Presiding Judge and Assistant Presiding Judge to the Chief Justice of the Supreme Court within 30 days of election.

(d) Caseload Adjustment. To the extent possible, the judicial caseload should be adjusted to provide the Presiding Judge with sufficient time and resources to devote to the management and administrative duties of the office.

Commentary

Whether caseload adjustments need to be made depends on the size and workload of the court. A recognition of the additional duties of the Presiding Judge by some workload adjustment should be made by larger courts. For example, the Presiding Judge could be assigned a smaller share of civil cases or a block of time every week could be set aside with no cases scheduled so the Presiding Judge could attend to administrative matters.

(e) General Responsibilities. The Presiding Judge is responsible for leading the management and administration of the court's business, recommending policies and procedures that improve the court's effectiveness, and allocating resources in a way that maximizes the court's ability to resolve disputes fairly and expeditiously.

(f) Duties and Authority. The judicial and administrative duties set forth in this rule cannot be delegated to persons in either the legislative or executive branches of government. A Presiding Judge may delegate the performance of ministerial duties to court employees; however, it is still the Presiding Judge's responsibility to ensure they are performed in accordance with this rule. In addition to exercising general administrative supervision over the court, except those duties assigned to clerks of the superior court pursuant to law, the Presiding Judge shall:

(1) Supervise the business of the judicial district and judicial officers in such manner as to ensure the

expeditious and efficient processing of all cases and equitable distribution of the workload among judicial officers;

(2) Assign judicial officers to hear cases pursuant to statute or rule. The court may establish general policies governing the assignment of judges.;

(3) Coordinate judicial officers' vacations, attendance at education programs, and similar matters;

(4) Develop and coordinate statistical and management information;

(5) Supervise the daily operation of the court including:

(a) All personnel assigned to perform court functions; and

(b) All personnel employed under the judicial branch of government including but not limited to working conditions, hiring, discipline, and termination decisions except wages, or benefits directly related to wages; and

(c) The court administrator, or equivalent employee, who shall report directly to the Presiding Judge.

Commentary

The trial courts must maintain control of the working conditions for their employees. For some courts this includes control over some wage-related benefits such as vacation time. While the executive branch maintains control of wage issues, the courts must assert their control in all other areas of employee relations.

With respect to the function of the court clerk, generally the courts of limited jurisdiction have direct responsibility for the administration of their clerk's office as well as the supervision of the court clerks who work in the courtroom. In the superior courts, the clerk's office may be under the direction of a separate elected official or someone appointed by the local judges or local legislative or executive authority. In those cases where the superior court is not responsible for the management of the clerk's office the presiding judge should communicate to the county clerk any concerns regarding the performance of statutory court duties by county clerk personnel.

A model job description, including qualification and experience criteria, for the court administrator position shall be established by the Board for Judicial Administration. A model job description that generally describes the knowledge, skills, and abilities of a court administrator would provide guidance to Presiding

Judges in modifying current job duties/responsibilities or for courts initially hiring a court administrator or replacing a court administrator.

(6) Supervise the court's accounts and auditing the procurement and disbursement of appropriations and preparation of the judicial district's annual budget request;

(7) Appoint standing and special committees of judicial officers necessary for the proper performance of the duties of the judicial district;

(8) Promulgate local rules as a majority of the judges may approve or as the Supreme Court shall direct;

(9) Supervise the preparation and filing of reports required by statute and court rule;

(10) Act as the official spokesperson for the court in all matters with the executive or legislative branches of state and local government and the community unless the Presiding Judge shall designate another judge to serve in this capacity;

Commentary

This provision recognizes the Presiding Judge as the official spokesperson for the court. It is not the intent of this provision to preclude other judges from speaking to community groups or executive or legislative branches of state or local government.

(11) Preside at meetings of the judicial officers of the district;

(12) Determine the qualifications of and establish a training program for pro tem judges and pro tem court commissioners; and

(13) Perform other duties as may be assigned by statute or court rule.

Commentary

The proposed rule also addresses the duties and general responsibilities of the presiding judge. The language in subsection (d), (e), (f) and (g) was intended to be broad in order that the presiding judge may carry out his/her responsibilities. There has been some comment that individual courts should have the ability to change the "duties and general responsibilities" subsections by local rule. While our committee has not had an opportunity to discuss this fully, this approach has a number of difficulties:

- It would create many "Presiding Judge Rules" all of which are different

- It could subject some municipal and district court judges to pressure from their executive and/or legislative authority to relinquish authority over areas such as budget and personnel
- It would impede the ability of the BJA through AOC to offer consistent training to incoming presiding judges

The Unified Family Court subgroup of the Domestic Relations Committee suggested the presiding judge is given specific authority to appoint judges to the family court for long periods of time. Again the committee has not addressed the proposal; however, subsections (e) and (f) do give the presiding judge broad powers to manage the judicial resources of the court, including the assignment of judges to various departments.

(g) Executive Committee. The judges of a court may elect an executive committee consisting of other judicial officers in the court to advise the Presiding Judge. By local rule, the judges may provide that any or all of the responsibilities of the Presiding Judge be shared with the Executive Committee and may establish additional functions and responsibilities of the Executive Committee.

Commentary

Subsection (g) provides an option for an executive committee if the presiding judge and/or other members of the bench want an executive committee.

(h) Oversight of judicial officers. It shall be the duty of the Presiding Judge to supervise judicial officers to the extent necessary to ensure the timely and efficient processing of cases. The Presiding Judge shall have the authority to address a judicial officer's failure to perform judicial duties and to propose remedial action. If remedial action is not successful, the Presiding Judge shall notify the Commission on Judicial Conduct of a judge's substantial failure to perform judicial duties, which includes habitual neglect of duty or persistent refusal to carry out assignments or directives made by the Presiding Judge, as authorized by this rule.

(i) Multiple Court Districts. In counties that have multiple court districts, the judges may, by majority vote of each court, elect to conduct the judicial business collectively under the provisions of this rule.

(j) Multiple Court Level Agreement. The judges of the superior, district, and municipal courts or any combination thereof in a superior court judicial district may, by majority vote of each court, elect to conduct the judicial business collectively under the provisions of this rule.

(k) Judicial Services Contracts. A judicial officer may contract with a municipal or county authority to serve as a judicial officer. The personal service contract shall not contain provisions which conflict with this rule, the Code of Judicial Conduct or statutory judicial authority, or which would create an impropriety or the appearance of impropriety concerning the judge's activities. The employment contract should acknowledge the court is a part of an independent branch of government and that the judicial officer or court employees are bound to act in accordance with the provisions of the Code of Judicial Conduct and this rule.

Commentary

The Board for Judicial Administration should establish a model judicial services contract.

[Adopted effective April 30, 2002.]
