Superior Court of the State of Washington
for Snohomish County

SNOHOMISH COUNTY COURTHOUSE
M/S #502
3000 Rockefeller Avenue
Everett, WA 98201-4060
(425) 388-3421

November 30, 2011

Clerk of the Supreme Court
P.O. Box 40929
Olympia, WA 98504-09209

Re: Proposed GR 31A

To Whom It May Concern:

The following comments are submitted in my capacity as Administrator of the Snohomish County Superior Court Administrator. These comments should not be regarded as representing legal conclusions of the Superior Court or of any individual Snohomish County Superior Court Judge.

Rule-making authority

Generally speaking, court rules are adopted by the Supreme Court to govern practice and procedure in Washington courts. At least two elements of proposed GR 31A are prescriptive and present questions of consistency with the Supreme Court's rule-making authority. These include proposed GR 31(c)(1)(B), which would impose substantive legal requirements on incorporated and unincorporated associations that are not overseen by a court,[1] and GR 31A(e)(3)(B)(6), which would provide for assessment of costs, attorney fees, and other monetary sanctions against "judicial agencies" that are found to have violated the rule.

The comment after proposed GR 31A(e)(3)(B)(6)(iv) suggests that responsibility for payment of sanctions would lie with a state or local government but offers no guidance as to which would be responsible in specific circumstances.[2] Monetary sanctions could have substantial impacts on individual courts and, if premised on delegated legislative authority, could conceivably run afoul of the statutory prohibition of unfunded state mandates. Providing for attorney fees also runs counter to judicial precedent that bars such awards absent a private agreement, statute, or recognized ground in equity.

Gaps in coverage

The GR 9 Cover Sheet states that "[t]he suggested rule fills a gap in the existing laws." Unfortunately, the proposed rule can be read as not covering a substantial body of records that are not covered by existing laws.

GR 9 Cover Sheet divides judicial branch records into three categories: court files (governed by GR 31), chambers records, and administrative records (both governed by GR 31A). This conclusion is presumably based on a list of judicial records prepared by the BJA Public Records Work Group. Having reviewed the long version, it appears that the list omits numerous records relating to programs administered by my court, including the County's juvenile detention facility, detention alternatives programs, truancy programs, guardianship monitoring programs,

---

[1] For example, The Washington State District and Municipal Court Judges' Association is a Washington nonprofit corporation.

[2] Superior Courts are state courts but are administered locally. Sorting our responsibility for sanctions imposed on judicial associations could also be problematic.

and guardian ad litem programs. This may well require local court rules that delineate what functions are covered by GR 31 A or the PRA as each court is different.

Proposed GR 31A applies to "judicial branch agencies," which Proposed GR 31A(c)(1)(A) defines as "[a]ll judicial entities that are overseen by a court." (Emphasis added). Some of these programs are administered through entities that might be characterized as executive or administrative in nature (rather than "judicial").

The juvenile detention system is run by the court in Snohomish County. I suggest that the term "judicial" be deleted from the first line of proposed GR 31A(c)(1)(A), which would then include all "entities" that are overseen by a court within the meaning of "judicial agency," presumably including Snohomish County's juvenile detention program.[3]

Another possible gap concerns non-business records, such as personal email messages, that are not within the definition of "administrative record" or "court record," or that constitute protected "chambers records." It is my understanding that such records are often made available under the PRA, subject to balancing any privacy interests against the public interest in disclosure. See WAC 44-14-03001(2) (personal email on agency computer). It appears that such records are either not addressed or would be confidential under the proposed rule.

Court Clerks

The comment to proposed GR 31A(c)(1) states that elected court clerks are not covered by the rule because they are covered by the PRA and generally "do not generally maintain" administrative records. Does this mean that court records maintained by elected clerks are subject to the PRA? Since not all court clerks are elected, is the rule meant to apply to some court clerks?[4] There are also six home rule charter counties in which the clerk's functions and placement within county government is controlled by the charter. In addition, it seems possible that communications with a clerk's office could constitute what the term "chambers record" is intended to protect. Wholesale exclusion of clerk's records from application of the rule may thus be inappropriate.

"Chambers records"

The definition of "chambers records" in proposed GR 31A(d)(4) is not a function of content and thus goes well beyond the purpose of avoiding intrusion into the decision-making process stated in the GR 9 Cover Sheet. Compare GR 31(c)(4) (defining "court record"). The definition is also unclear. The references to judicial officers and law clerks are clear but the phrase "any other staff when providing support directly to the judicial officer at chambers" is not. Who is included in "any other staff" -- court reporters, at-will employees? What does "providing support directly to the judicial officer at chambers" mean? The reference to "management of the court" seems to cover many records that are really administrative. A more targeted formulation can be found in the exception to the definition of "court record" currently in GR 31(c)(4).

Waiver of privilege

The PRA does not bar release of documents that are not required to be disclosed. For example, a document that is privileged can be released if the privilege is properly waived. It is not clear if a similar mechanism is available under the proposed rule and, if so, who is the final decision-maker.

Timelines

The proposed July 1, 2012, implementation date is unrealistic because six months is probably not enough time to develop, adopt, and implement the necessary best practice guidelines called for in the rule. It would not be a best practice for public access to judicial records to vary significantly depending on physical location within Washington.

---

[3] The term "judicial agency" (rather than "judicial entity") is used elsewhere in the rule.

[4] King, Pierce, Clallam and Whatcom Counties have appointed court clerks.

Several other deadlines are missing or impractical. There should be a requirement to adopt the policies required by proposed GR 31A(e)(3)(A)(1) within a set period of days after the effective date of the rule. The timeline for the review proceeding under proposed GR 31A(e)(3)(B)(3) needs to be measured from a specific event, such as the date the notice of review procedures is issued. As drafted, that five-day deadline does not say when to start counting. A timeline for commencing review should also be included in proposed GR 31A(e)(3)(B)(4).

The reference to local "rules" in proposed GR 31A(f) should be squared with the requirement of local "policies" required by proposed GR 31A(e)(3)(A)(1). A timeline for adoption of best practice guidelines should be added to proposed GR 31A(h).

Other/Technical

The rule should call for development of a standard form contract or memorandum of understanding that courts could enter into with their respective information services agencies to govern access and control of records stored on central storage hardware.

The cost to implement this rule will be particularly costly and burdensome for mid-size to small courts (six or fewer judges). Will there be funds to assist those courts? Most rely completely on local information services agencies or prosecuting attorneys to respond to public records requests. This rule would shift that responsibility to the court.

There are cross-references to the PRA which can become problematical if and when the PRA is amended. If the court intends to incorporate future amendments, that intention should be made explicit.

The proposed rule assumes the development of a records retention schedule for court records which will take time to create. (Consultation with the State Archivist may be helpful in this area).

The meaning of the first sentence of proposed GR 31A(e)(3)(A)(6) is not clear since the amount of time that is reasonable to respond to an extraordinary request depends on the scope of the request. If the rule contemplates a specific period of time (based on the request and available time, resources, and personnel) when courts and judicial agencies are to be let off the hook, then it should say so.

Proposed GR 31A(e)(3)(5) requires courts and judicial agencies to "justify in writing" any deviation from the terms of a request. The term "justify" (as opposed to "state") suggests that the writing must satisfy some sort of threshold. Would failure to provide sufficient justification be subject to appeal, and will judicially-imposed sanctions be available for insufficient justification, regardless of whether additional records are made available to the complaining party?

Thank you for the opportunity to comment on the proposed rule GR 31 A.

Very truly yours,

Bob Terwilliger

Bob Terwilliger
Superior/Juvenile Court Administrator

cc: Hon. Ellen J. Fair, Presiding Judge
Hon. Thomas J. Wynne
Rick Robertson, DPA