

Superior Court of the State of Washington For Thurston County

Paula Casey, Judge
Department No. 1
Thomas McPhee, Judge
Department No. 2
Christine A. Pomeroy, Judge
Department No. 3
Gary R. Tabor, Judge
Department No. 4



Chris Wickham, Judge
Department No. 5
Anne Hirsch, Judge
Department No. 6
Carol Murphy, Judge
Department No. 7
Lisa L. Sutton, Judge
Department No. 8

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November 30, 2011

Supreme Court Clerk
Attention: Camilla Faulk
P.O. Box 40929
Olympia, Washington 98504-0929

Sent via email to Camilla.Faulk@courts.wa.gov

Re: Proposed GR 31A

Dear Ms. Faulk,

The Thurston County Superior Court judges strongly support open and transparent courts and court processes. We strive to provide timely and complete responses to all requests for public court documents, even when we are not legally mandated to do so. However, we feel it is necessary to publicly state some anticipated consequences of the proposed rule. We are primarily concerned about the proposed rule's budget impact and appeals process, as well as the creation of a cause of action by court rule.

Our Court's Current Process

We understand the crucial role of sunshine laws and know that courts are accountable to the public. Our court has consistently allowed public access to administrative court records. Our court responds to requests for information and public records promptly by providing information, responsive documents, or a referral to the appropriate agency that can provide the records (usually the Clerk's Office). This practice has caused little administrative or financial hardship because it has never involved litigation. We hope the public is served well by this approach.

Budget Impact

The Supreme Court is well aware of the fiscal crisis that Washington courts face. Chief Justice Barbara Madson has eloquently stressed this concern in her 2010 and 2011 State of the Judiciary Addresses. "Washington continues its unfortunate ranking of last in the nation—50th out of 50 states for its percentage of state funding for the courts, prosecution and criminal indigent defense."¹ Moreover, "[t]he financial crisis is taking a serious toll. Funded primarily at the local level, our superior courts have taken the brunt

¹ C.J. Barbara Madson, State of the Judiciary Address, January 13, 2011 (available at <http://www.courts.wa.gov/newsinfo/?fa=newsinfo.pressdetail&newsid=1791>) (last visited October 24, 2011).

of cuts to date."² Courts across the state struggle daily with inadequate staffing and financial resources.

Given this court's lack of resources, we must prioritize our workload. We balance constitutional rights of the accused, statutory mandates for rapid hearings and resolution of motions, and knowledge that delays of trial dates and rulings affect access to justice.

Proposed GR 31A will have an unfortunate and unintended consequence of shifting priorities and increasing the resources dedicated to providing responses. Because our budgets are all shrinking rather than growing, this shift will necessarily take resources away from the court's other priorities. No other work that the court does has such strict penalties for non-compliance. Although the proposed rule does not include penalties, the cost of litigation and possible liability for attorney fees alone would be an overwhelming burden for the court and county.

There is no budget allocation to absorb the additional costs and workload this rule would create. Although the proposed rule allows reimbursement for a small portion of the staff time required, it would add the element of billing and receiving funds, as well as additional job duties that court staff do not currently perform. Budget constraints have forced this court to cut staff and services to the public, and this proposed rule will require additional shifting of resources. Moreover, the court would have to develop procedures and train staff. The standards and procedures in the proposed rule are unique, and are not necessarily consistent with materials developed for Public Records Act training or record retention materials prepared by the State Archivist.

Unfortunately, there has been no research or data on proposed GR 31A's fiscal ramifications. It differs from the Public Records Act in significant ways, and so data regarding the PRA's impact on other agencies does not allow us to prepare for this rule's impact. We have not seen any data regarding the projected fiscal impact of this proposed rule. We know that defense litigation costs, not penalties, are the most significant liability for Thurston County agencies under the PRA. Yet our court must prepare our 2012 budget with no money to defray this rule's costs. It seems that courts and the public would benefit from some research or data collection regarding the fiscal impact of the proposed rule.

Appeals Process

This court is also concerned about the appeal process. The process is confusing and, apparently, unprecedented. It sets forth two types of appeals, each with a host of issues.

The first type of review is an internal, summary review by the presiding judge or his or her designee, followed by a superior court action. The internal review process lends no guidance. It is unclear whether this is a hearing or purely administrative review. The rule allows intermediate levels of review, without any clarity on how to establish such

² C.J. Barbara Madson, State of the Judiciary Address, January 22, 2010 (available at <http://www.courts.wa.gov/content/PublicUpload/Supreme%20Court%20News/State%20of%20the%20Judiciary%20Address%202010.pdf>) (last visited October 24, 2011).

Intermediate review or the parameters for conducting either the initial or intermediary review. This section of the proposed rule invites more questions than answers.

The proposed rule's model for superior court action also presents challenges for implementation. Because the court or its subsidiary would be the defendant in such an action, every judge would likely be required to recuse due to an actual conflict of interest or the appearance of impropriety. For this reason, each case would require a visiting judge. The process of securing visiting judges is extremely resource-intensive for court administration and clerks, and stresses limited judicial resources by adding judicial time and travel costs. This could be resolved simply by setting venue in a neighboring county. However, we believe the most significant cost is not the increase in caseload, but the cost of an attorney representing the court in these proceedings if even one case results in litigation.

The second type of review is named "alternative review." It presents the same challenges described above. The process is confusing, the rule lacks necessary guidance, and this type of review explicitly requires visiting judges in most cases. It also places the court in an adversarial role that judges are inclined to avoid because it is contrary to our role as neutral arbitrators of the law.

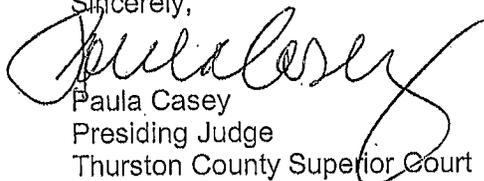
The proposed rule seems to acknowledge some issues by allowing courts to rely on best practices guidelines adopted by the Supreme Court. This is welcome. However, there is no guarantee that best practices will be adopted at all, or in time to prevent confusion in implementing this rule, or in a manner that allows adequate public participation and comment. Moreover, every new rule should be written in a manner that unrepresented members of the public can easily navigate without additional materials. This rule is far from meeting that ideal, and non-lawyers are unlikely to consult best practices, if they ever become available. Nonexistent best practices guidelines should not be relied upon to remedy a proposed rule.

Creation of Cause of Action

Finally, we are concerned about the authorization of a new cause of action by court rule rather than by statute. If this proposal were passed by the legislature, a potential separation of powers challenge would be avoided. Also, the legislative process would involve a fiscal note that is absent here.

We appreciate the opportunity to share these concerns about proposed GR 31A. This is an important process to ensure a timely and practical method for providing administrative court records to the public. We support the rule's ultimate goals and thank the drafters for their diligent effort in creating this rule.

Sincerely,


Paula Casey
Presiding Judge
Thurston County Superior Court