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72337-5-I

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

**ARTHUR WEST,
appellant,**

Vs.

**DISTRICT AND MUNICIPAL COURT JUDGES ASSOCIATION,
A WASHINGTON CORPORATION
respondents,**

On appeal from the rulings of the Honorable
King County Superior Court Judge Jean Reitschel

**APPELLANT'S
OPENING BRIEF**

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FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2015 MAR 13 AM 10:12

TABLE OF CONTENTS

Table of Contents.....1-2

Table of Authorities.....3-5

Summary of Argument.....6-7

Assignments of Error.....7-8

Statement of the Case.....9-12

Argument.....12

I The Court erred in finding that the DMCJA was immune from the Sunshine and Campaign reporting laws and in failing to compel disclosure and assess penalties under the PRA when it was essentially a publicly funded lobbying and advocacy organization similar to WACO, WSAC and the AWC.....**12**

II The Court erred in finding that a nonprofit corporation could exercise special privileges and immunities as an arm of the judiciary in violation of Articles II and III of the Constitution of the State of Washington.....**19**

III The Court erred in failing to interpret the PDA liberally to effectuate the express intent of the people “that... lobbying contributions and expenditures be fully disclosed to the public and that secrecy is to be avoided” by all governmental organizations.....**27**

IV The Court erred in failing to interpret the PRA liberally to effectuate the express intent of the people that full access to information concerning the conduct

of government on every level be assured as a fundamental and necessary precondition to the sound governance of a free society.....33

V The Court erred in finding that an unimplemented Court Rule trumped substantive remedies in duly enacted State Law in violation of the Doctrine of the Separation of Powers and the clearly established precedent of Sibbach and Petrarcha.....37

VI The Court erred in issuing sanctions for a violation of a local rule without the required previous objection of counsel in violation of the provisions of LCR 7(b)(4) (G), and in failing to recuse itself when its impartiality might reasonably have been questioned by an impartial observer due to the Court's previous membership in the DMCJA and participation in lobbying activities as part of the DMCJA legislative Committee42

Conclusion.....49-50

TABLE OF AUTHORITIES

Bainbridge Island Police Guild v. City of Puyallup, 172 Wn.2d 398, 408, 259 P.3d 190 (2011).....	39
Bour v. Johnson, 122 Wn.2d 829, 836, 864 P.2d 380 (1993).....	21
Brown v. Owen, 165 Wn.2d 706, 718, 206 P.3d 310 (2009).....	36
Buehler v. Small, 115 Wash.App. 914 64 P.3d 78 (2003).....	15-16
Caperton v. A. T. Massey Coal Co. 129 S.Ct. 2252 (2009).....	44
Carrick v. Locke, 125 Wn.2d 129, 135, 882 P.2d 173 (1994).....	38-9
Cowles Publishing Company v. Murphy, 637 P. 2d 966, (1981).....	15
Diversified Inv. P'ship v. Dep't of Soc. and Health Servs., 113 Wash.2d 19, 24, 775 P.2d 947 (1989).....	40
Emwright v. King County, 96 Wn.2d 538, 637 P.2d 656 (1981).....	39
Freedom Foundation v. Gregoire, 178 Wn.2d 686, 310 P. 3d 1252 (2013).....	24
Hearst Co. v. Hoppe, 90 Wn.2d 123, 138, 580 P.2d 246 (1978).....	29-34
Kendall v. United States, 107 US 123, (1883).....	26
Kilbourne v Thompson, 103 US 168, 190.....	26
Manus v. Snohomish County Justice Court, 44 Wash.2d 893, 895-96, 271 P.2d 707 (1954).....	40
Merriwether v. Garret 102 US 472, 515.....	26
Mugler v. Kansas 123 U.S. 623, 662, (1887).....	26-7

Nast v. Michels, 107 Wn.2d 300,730 P.2d 54 (1986).....	16
Neighborhood Alliance of Spokane County v. County of. Spokane, 172 Wn.2d 702, 715, 261 P.3d 119 (2011).....	34
Nucleonics Department v. WPPS, 101 Wn.2d 24, 677 P.2d 108, (1984).....	29
O'Neill v. City of Shoreline, 170 Wn.2d 138, 146, 240 P.3d 1149 (2010).....	34
Sibbach v. Wilson & Co., Inc., 312 U.S. 1 (1941).....	39
Spokane & E. Lawyer v. Tompkins, 136 Wn. App. 616, (2007).....	15
Telford v. Thurston County Bd. of Comm'rs, 95 Wn. App. 149, 162, 974 P.2d 886,(2000) rev. den., 138 Wn.2d 1015.....	12-14
Thomas v. Railroad Co. 101 U.S. 71, (1880).....	20
Utter v. BIAW, ___ Wn.2d ___, ___ P.2d ____ (2015).....	28
Washington Bar Association v. State, 125 Wn.2d 901, (1995).....	24-5
Washington Natural Gas Co. v. PUD. No. 1, 77 Wn.2d 94, 98, 459 P.2d 633 (1969).....	21
Wash. State Motorcycle Dealers Ass'n v. State, 111 Wn.2d 667, 674, 763 P.2d 442 (1988).....	38
West v. Washington Association of County Officials, 162 Wn. App. 120, (2011).....	12,17

CONSTITUTIONAL PROVISIONS

Article IV, section 1.....	19,23
Article IV, section 3.....	20

Article I, Section 12.....	22
The 14 th Amendment.....	44

LAWS

RCW 3.70.040.....	17-18
RCW 42.17.....	33-34
RCW 42.17.010.....	34
RCW 42.56.....	33
RCW 42.56.070(1).....	34
RCW 42.56.550(4).....	12,14
RCW 42.56.030.....	35
RCW 42.17A.0001.....	28

RULES

GR 31A.....	38-41
LCR 7.....	46
CJC 2.11.....	45

ARTICLES

The history and intent of Initiative 276, which was passed by voters in Washington state to create the Public Disclosure Act By David Cuillier, David Dean & Dr. Susan Dente RossAccessNorthwest, Edward R. Murrow School of Communication, Washington State University May 4, 2004.....	28-35
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SUMMARY OF ARGUMENT

This appeal concerns the Public Disclosure and Public Records Acts and how they apply to a publicly funded lobbying organization, the District and Municipal Court Judges Association, as well as a claim for disclosure of public records and per diem penalties under RCW 42.56.550(4) for unreasonable withholding of records by the DMCJA.

Significantly, the DMCJA is not fairly within the judicial entities described in Article IV, section 1 of the Constitution of the State of Washington, and is, instead, incorporated as a private corporation.

Although “Courts” and repositories of case records have been found to be exempt from the Public Records Act, the DMCJA with its lobbying activities is much more akin to administrative publicly funded lobbying organizations such as WSAC, WACO, and the AWC, all organizations found by the Courts to be subject to both the PRA and PDA, which it must be remembered were originally passed in 1972 by the People of the State of Washington acting in their Legislative capacity under the aegis of Initiative 276.

The remedial intent of the Public Disclosure Act is clear and unambiguous...“that... lobbying contributions and expenditures be fully disclosed to the public and that secrecy is to be avoided”.

For the intent and letter of the law to be effectuated it is imperative that administrative entities such as the DMCJA that lobby with public funds be subject to the disclosure and reporting requirements of both the Public Disclosure and Public Records Acts.

ASSIGNMENTS OF ERROR

I The Court erred in finding that the DMCJA was immune from the Sunshine and Campaign reporting laws and in failing to compel disclosure and assess penalties under the PRA when it was essentially a publicly funded lobbying and advocacy organization similar to WACO, WSAC and the AWC

II The Court erred in finding that a nonprofit corporation could exercise special privileges and immunities as an arm of the judiciary in violation of Articles I and IV of the Constitution of the State of Washington.

III The Court erred in failing to interpret the PDA liberally to effectuate the express intent of the people “that... lobbying contributions and expenditures be fully disclosed to the public and that secrecy is to be avoided” by all governmental organizations

IV The Court erred in failing to interpret the PRA liberally to effectuate the express intent of the people that full access to information concerning the conduct of government on every level be assured as a fundamental and necessary precondition to the sound governance of a free society

V The Court erred in finding that an unimplemented Court Rule trumped substantive remedies in duly enacted State Law in violation of the Doctrine of the Separation of Powers

and the clearly established precedent of Sibbach and Petrarcha

V I The Court erred in issuing sanctions for granting a continuance for violation of a local rule without the required previous objection of counsel in violation of the provisions of LCR 7(b)(4)(G), and in failing to recuse itself when its impartiality might reasonably have been questioned by an impartial observer due to the Court's previous membership in the DMCJA and participation in lobbying activities as part of the DMCJA legislative Committee

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

I Did the Court err in finding that the DMCJA was immune from the Sunshine and Campaign reporting laws and in failing to compel disclosure and assess penalties under the PRA when it was essentially a publicly funded lobbying and advocacy organization similar to WACO, WSAC and the AWC ? **Yes**

II Did the Court err in finding that a nonprofit corporation could exercise special privileges and immunities as an arm of the judiciary in violation of Articles I and IV of the Constitution of the State of Washington? **Yes**

III Did the Court err in failing to interpret the PDA liberally to effectuate the express intent of the people "that... lobbying contributions and expenditures be fully disclosed to the public and that secrecy is to be avoided" by all governmental organizations? **Yes**

IV Did the Court err in failing to interpret the PRA liberally to effectuate the express intent of the people that full access to information concerning the conduct of government on every level be assured as a fundamental and necessary precondition to the sound governance of a free society? **Yes**

V Did the Court err in finding that an unimplemented Court Rule trumped substantive remedies in duly enacted State Law in violation of the Doctrine of the Separation of Powers and the clearly established precedent of Sibbach and Petrarcha? Yes

VI Did the Court err in issuing sanctions for violation of a local rule without the required previous objection of counsel in violation of the provisions of LCR 7(b)(4)(G), and in failing to recuse itself when its impartiality might reasonably have been questioned by an impartial observer due to the Court's previous membership in the DMCJA and participation in lobbying activities as part of the DMCJA legislative Committee? Yes

STATEMENT OF THE CASE

This case involves a Washington State corporation, the District And Municipal Court Judges' Association, and the question of whether the Public Disclosure Act and the Public Records Act apply to this organization, which coordinates administrative functions and lobbies the legislature. (CP 6)

On March 12, 2013 West submitted a Public Records Request for the following records:

1. All records of income to and expenditures by the Association, 2011 to present.
2. Any records related to any audit or review of Association finances or practices 2011 to present

3. All records of lobbying by the Association, January of 2012 to present
4. All communications to and records of DMCJA lobbyist Sam Meyer, January of 2012 to present
5. All lobbying related expenditures January of 2012 to present
6. Any refunds to Thurston County for Pro tem commissioners employed to allow Meyer to Lobby for the Association.
7. Any records related to PRA compliance by the Association, to include policies for responding to requests. (CP 4-8)

Well after the 5 business day time limit for responding to a PRA request, the DMCJA responded 14 days later by a letter dated March 26. (CP 8-10)

In the letter the DMCJA stated... “the PRA does not apply to the DMCJA” (CP at 8)

None of the requested records were produced. (CP 8-9)

On April 9, 2013, plaintiff filed the instant action.(CP at 1-8)

On June 20, 2014, a hearing was scheduled on defendant's motion for summary judgment. Although the plaintiff had served and filed a timely response to the defendants motion and everyone besides the Court was prepared to argue the court sanctioned him \$620 under CR 56 as a

result of its failure to review the file prior to the hearing and a technical error that resulted in the Court not receiving a bench copy of plaintiff's response. (CP 122)

Curious as to the Court's possible prejudice, plaintiff subsequently investigated and discovered that the presiding judge was a former member of the DMCJA and a long term member of its Legislative Committee directly responsible for the very same type of lobbying activity that the DMCJA refused to disclose records about. (CP 133-153)

Plaintiff believed this was a potential conflict of interest thatn should have been disclosed, and which implicated rights recognized in Caperton v. Massey Coal Co. (CP 133-153)

On June 27, 2014 the Court held another hearing (CP 154) and issued 3 orders: 1 order awarding sanctions, (CP 157-158), 2 an Order denying plaintiff's motion to recuse, (CP 155-156), and 3 an Order granting defendant's motion for summary judgment of dismissal. (CP 159-160). (See also Transcript of June 27 hearing)

On July 7, 2014, plaintiff filed a motion for reconsideration.(CP 161-177)

On July 9 the Court entered an order denying reconsideration.(CP at 189)

On August 7, 2014, a notice of appeal was filed. (CP at 190-199)

ORDERS ON APPEAL

Appellant seeks review of the 3 Orders of June 27, 2013 1. Granting Sanctions (CP 157-158), 2. (Denying Recusal) (CP 155-156), and 3. Granting Summary Judgment (CP 159-160) and the Order Denying Reconsideration of August 2014. (CP 110-112)

STANDARD OF REVIEW

De Novo

ARGUMENT

I The Court erred in finding that the DMCJA was immune from the Sunshine and Campaign reporting laws and in failing to compel disclosure and assess penalties under the PRA when it was essentially a publicly funded lobbying and advocacy organization similar to WACO, WSAC and the AWC (Order at CP 159-160)

This case concerns a corporate, publicly funded lobbying association similar to the Associations of public officials that the honorable Judge Hicks described in Telford as neither fish nor fowl, nor good red herring, and which were ultimately found to be subject to the Sunshine laws in Telford v. Thurston County Bd. of Comm'rs, 95 Wn. App. 149, 162, 974 P.2d 886, review denied, 138 Wn.2d 1015 and West v. Washington Association of County Officials, 162 Wn. App. 120, (2011).

In the present case it is apparent that the arguments of the respondents before the Trial Court were not good red herring either, and should not have distracted the court from ruling in accord with Telford, WACO, the manifest intent of the people in adopting I-276 in 1972, the constitutional restrictions inherent in the separation of powers, the limitations upon the Judicial power in Article IV, section 1, and, last but not least, Article I, Section 12 which prohibits the granting of the special privileges and immunities sought by the respondents to corporations like the DMCJA.

Plaintiff assigns error to the Court's determination that the DMCJA was immune from both the PDA and the PRA, and to its refusal to compel disclosure of the records requested by West or award the costs and per diem penalties required under RCW 42.56.550(4).

As the Honorable Judge Richard Hicks ruled in Telford v. Thurston County, et al, over a decade ago, that public agencies that coordinate administrative functions, like the WSAC and WACO, (or the DMCJA), are required to comply with all of the sections of law enacted under I-276, the Public Disclosure Act.

The Honorable Judge Hicks pointed out in Telford that the campaign laws and the records disclosure laws (that were all adopted in I-276)

“complement each other” in a very telling way.

On an appeal brought by WACO and WSAC, Division II of the Court of Appeals subsequently ruled in the case, upholding the ruling of Judge Hicks in respect to the PDA...

Although WSAC and WACO retain some characteristics of private entities, their essential functions and attributes are those of a public agency. They serve a public purpose, are publicly funded, are run by government officials, and were created by government officials. Analyzing these factors in the context of the intent of the PDA and the other relevant statutes reinforces the conclusion that the associations are public. The PDA is to be construed broadly to promote disclosure and accountability. The WSAC/WACO statutes are intended to restrict public funding of the associations to statutorily mandated services. Allowing WSAC/WACO to use their public funds to support private political agendas would contravene both policies. Therefore, the trial court correctly ruled that, for purposes of the PDA, WSAC and WACO are "agencies."

Significantly, under the “Telford Test” the DCMJA is undeniably the “functional equivalent” of WACO, WSAC, or the AWC, and not the functional equivalent of the courts or court file repositories in *Nast*, *Beuhler*, *Spokane Lawyer* or *Koenig*. The DMCJA is simply neither a “Court” nor an arm of the Judiciary under the Constitution of the State of Washington.

Significantly, all of the cases excluding courts and judicial agencies

from the PRA can be easily distinguished from the circumstances that apply to administrative lobbying organizations like the DMCJA.

The decision in *Koenig* makes it clear that the term “Judiciary” was used narrowly to apply to “courts”...

Under *Nast*, the courts are not included in the definition of agency, and thus, the PRA does not apply to the judiciary. As a result, the court records requested by *Koenig* are not subject to disclosure under the PRA. *City of Federal Way v. Koenig*, 167 Wn.2d 341, (2008)

Similarly, Division III ruled in *Spokane & E. Lawyer v. Tompkins*, 136 Wn. App. 616, (2007)

We conclude that under *Nast*'s reasoning, the Spokane County Superior Court is not an agency under the PDA

Cowles Publishing Co. v. Murphy concerned search warrant records in court files and was decided on even narrower grounds...

indiscriminate disclosure of these records may unnecessarily embarrass the subject of an unfruitful search, may allow a suspect to escape arrest or destroy evidence, and may discourage informants from providing information out of fear for their safety and well-being. These and other interests must be weighed carefully by judges in exercising their discretion. *Cowles Publishing Company v. Murphy*, 637 P. 2d 966, (1981)

Buehler v. Small, also dealt with judicial records of a court, a

judges' personal case notes relating to sentencing. Not surprisingly, the Court in Buehler held...

In light of the strong public policy supporting the court's authority to control its proceedings and the inherent desirability of protecting the court's subjective thought processes, we find no common law basis to access Judge Small's personal work related computer files. Buehler v. Small, 115 Wash.App. 914 64 P.3d 78 (2003)

Nowhere in the duties of the DMCJA is there anything approaching or implicating the interests expressed in Koenig, Nast, Spokane Layers, or Bueller, or even the "custodian for court case files" functions of the King County Department of Judicial Administration that were the determining factor in Nast v. Michaels...

The Department, however, is a unique institution. Although its funding and directives place it within the elective realm, its function as custodian for court case files places it within the judicial realm. Nast v. Michels, 107 Wn.2d 300,730 P.2d 54 (1986)

The DMCJA has no such "unique function" as a custodian of court case files, and as such it is far more appropriate to follow the precedent of Telford v. Thurston County Commissioners, West v. WACO, West v. AWC and West v. WSAC, which all hold that publicly funded lobbying and coordinating agencies created by the legislature to perform governmental functions other than being the custodian of court files are the functional

equivalents of public agencies subject to both the campaign disclosure and the public records sections of the Public Disclosure Act. (since re-codified under a separate chapters as the Public Disclosure and Public Records Acts) As the Court of appeals recognized in *West v. WACO*...

Accordingly, we need not decide whether the *Telford* functional equivalent test is appropriate in this case to determine whether WACO is a public agency subject to the OPMA **because WACO satisfies the statutory definition of "public agency" outright.** See *West v. WACO*, supra, (emphasis added)

Just like WACO, the DMCJA is a creature of Statute, RCW 3.70.010-040, and it was created just two years after WACO.

Significantly, the duties of the Association are purely administrative and do not include court related activities of the kind referenced in *Nast* and its inbred progeny.

RCW Title 3.70.40 provides...

The Washington state district and municipal court judges' association shall: (1) Continuously survey and study the operation of the courts served by its membership, the volume and condition of business of such courts, the methods of procedure therein, the work accomplished, and the character of the results; (2) Promulgate suggested rules for the administration of the courts of limited jurisdiction not inconsistent with the law or rules of the supreme court relating to such courts; (3) Report annually to the supreme court as well as the governor and the legislature on the condition of business in the courts of limited jurisdiction, including the

association's recommendations as to needed changes in the organization, operation, judicial procedure, and laws or statutes implemented or enforced in these courts.

The DMCJA has no adjudicative or case file retention functions and is not a “court”. It was established not by the Constitution or the Supreme Court, but by an act of the Legislature, and has no grant of authority or existence in Article IV. Its activities are virtually identical to those of its sister publicly funded lobbying organizations the WSAC, WACO, and the AWC.

The DMCJA, as a domestic corporation, is regulated by the executive and is not subject to the control of the Supreme Court. It cannot be reasonably described as either a “court” or “arm of the judiciary” as these terms have been developed in precedent or lawfully defined in Article IV of the State Constitution.

It is beyond reasonable dispute that the DMCJA is a domestic nonprofit corporation (CP 165) that conducts publicly funded lobbying activities and which is much more functionally equivalent to the WSAC, AWC, and WACO corporations than it is to a court of law, or any entity that might be properly recognized as a functional or constitutional arm of the judiciary. Under these circumstances it was reversible error for the Superior Court to fail to recognize that the PDA and PRA both required disclosure of the

DMCJA's publicly funded lobbying activities and for it to fail to compel disclosure of the requested public records and assess any appropriate penalties for unreasonable withholding as required by RCW 42.56.550(4).

II The Court erred in finding that a nonprofit corporation could exercise special privileges and immunities as a “court” or an arm of the judiciary in violation of Articles II and IV of the Constitution of the State of Washington.

The foremost reason that defendants cite to support their proposition that the DMCJA is immune from both the PDA and the PRA is that they claim it is a “court” or branch of the judiciary akin to the “courts” in *Nast* and *Koenig*. However, Article IV of the Constitution clearly defines the “judicial power” and this definition does not fairly include organizations like the DMCJA within its ambit.

Article IV, section 1 of the constitution of the State of Washington states...

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

Any possible application of the precedent of *Nast* or *Koenig* to the DMCJA must be based upon the constitutional definition of “inferior courts”, which simply cannot be stretched to encompass a domestic

publicly funded lobbying corporation such as the DMCJA that neither adjudicates cases or controls and maintains court case files. This is the essence of a true functional equivalence test.

Vesting the DMCJA with extra-stutory powers is especially problematic in that it has long been held that the general doctrine in this country is that...

...the powers of corporations organized under legislative statutes are such and such only as those statutes confer.
Thomas v. Railroad Co. 101 U.S. 71, (1880)

The Statute creating the DMCJA simply does not (and could not) convey any constitutional judicial branch or court powers. Even more problematic for the DMCJA's hypothetical corporate judicial branch status is that another agency which is properly an arm of the judiciary, the Commission on Judicial Conduct, is expressly mentioned as an agency of the Judicial Branch in Article IV, section 3.

There shall be a commission on judicial conduct, existing as an independent agency of the judicial branch,...

The rule that the expression of one subject, object or idea operates to exclude other subjects, objects or ideas, expressed in the Latin maxim *Expressio Unius Est Exclusion Alterus*, is widely recognized as “One of the most important rules of construction of statutes constitutions and

similar instruments” In this State, the Supreme Court has repeatedly recognized this principle...

"Legislative inclusion of certain items in a category implies that other items in that category are intended to be excluded." *Bour v. Johnson*, 122 Wn.2d 829, 836, 864 P.2d 380 (1993). "Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim *expressio unius est exclusio alterius*--specific inclusions exclude implication." *Washington Natural Gas Co. v. Public Util. Dist. No. 1*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969).

Thus it can be seen that the specific inclusion of the “Courts” in Article IV of the Constitution and the Commission on Judicial Conduct as a branch of the judiciary excludes alternate administrative publicly funded lobbying agencies such as the DMCJA from the fold.

The respondents attempt to obscure the fact that this case is about a corporation, and disclosure of it’s lobbying related information, information that is required to be disclosed under the manifest intent of both the PRA and the PDA. They would have this court trample with hobnailed jackboots upon the manifest intent of the people in adopting I-276 which included both the PDA and PRA. They would have this court grossly transgress the legitimate boundaries of the doctrine of separation of powers, ignore the restrictive definition of “Judiciary” in Article VII,

section 1, and invidiously grant a publicly funded lobbying corporation special privileges and immunities in Violation of Article I, section 12.

Article I, Section 12 provides...

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

In stark contrast to such special privileges and immunities, the court in Telford properly stressed the interrelated nature of the obligations of WSAC and WACO under both the PDA and the PRA.

Respondents would stand the doctrine of separation of powers on its head by allowing the judiciary to encroach upon the legislative and the executive branches, and they would define the term “court” as it appears in Article IV of the State constitution in a manner at variance with the well reasoned ruling of the Honorable Jean Reitschel of December 12, 2013 on the constitutional definition of Charter Schools.

As the Honorable Jean A. Reitschel ruled on December 12 2013, in League of Women Voters v. State...

The legislature cannot by any designation or definition establish a common school that does not meet the minimum constitutional requirements.

A Charter school cannot be defined as a common school because it is not under the control of the Voters of the school district. The statute places control under a

private non profit corporation...

Similarly, it should be seen in this case...

The judiciary cannot by any designation or definition establish a “court” or branch of the judiciary that does not meet the minimum constitutional requirements.

The DMCJA cannot be defined as a “court” because it is not under the control of the Supreme Court. Unlike the bar association which is defined by GR 12, The DMCJA statute places control under a private non profit corporation regulated by the Secretary of State, as are all domestic corporations.

As was the case with common schools, in the League case determined by Judge Reitschel, the Constitution clearly defines “courts” and the Judiciary in Article 4 section 1

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

To allow this definition to be stretched beyond reasonable bounds to include private corporations would not only be bad policy, it would violate the Doctrine of Separation of Powers. As the Supreme Court has repeatedly held...

The division of our state government into three separate but coequal branches has been "presumed throughout our state's history to give rise to a vital separation of powers doctrine." Our state constitution contains separate provisions establishing the Legislative Department (the Executive, and the Judiciary and, as such, provides for this separation of functions. *Freedom Foundation v. Gregoire*, 178 Wn.2d 686, 310 P. 3d 1252 (2013)

Respondents have attempted to rely upon *Washington Bar Association v. State* case, but have failed to quote from its reasoning, or address the fact that in this case it is the judiciary which seeks to amend statutes by adopting a court rule, rather than the legislature which seeks to amend a court rule by adopting a law.

In this case the same separation of powers principle that guided the court in the *Bar Association* case compels a determination that corporations such as the DMCJA are subject to State law like all of the similar publicly funded corporate lobbying "associational" organizations.

In *Washington Bar Association v. State*, the Court stated...

Washington's constitution, Const. art. 4, § 1 vests the judicial power of the State in a separate branch of government - the judiciary. *Washington Bar Association v. State*, 125 Wn.2d 901, (1995)

The importance of the separation of powers doctrine was stated by the *Bar Association* court as follows:

The importance of the case before us is that it deals directly with one of the cardinal and fundamental principles of the American constitutional system, both state and federal: the separation of powers doctrine. "It has been declared 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." . . . In this same connection, it is also the law that "American courts are constantly wary not to trench upon the prerogatives of other departments of government or to arrogate to themselves any undue powers, lest they disturb the balance of power; and this principle has contributed greatly to the success of the American system of government and to the strength of the judiciary itself." *Washington Bar Association v. State*, 125 Wn.2d 901, (1995)

In the matter of the same separation of powers, no lesser luminary that James Madison pointed out on the floor of Congress that:

"If there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive and Judicial powers. 1 *Annals of Congress*, 581.

Montesquieu's view that the maintenance of independence as between the legislative, the executive and the judicial branches was a security for the people had their full approval. Madison in the Convention, 2 *Farrand, Records of the Federal Convention*, 56.

Accordingly, the Constitution was so framed a v. s to vest in the Congress all legislative powers therein granted, to vest in the President the executive power, and to vest in one Supreme Court and such inferior courts as Congress might establish, the judicial power. From this division on principle, the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires. Madison, 1 Annals of Congress, 497. This rule of construction has been confirmed by this Court in Meriwether v. Garrett, 102 U.S. 472, 515; Kilbourn v. Thompson, 103 U.S. 168, 190; Mugler v. Kansas, 123 U.S. 623, 662.

The lobbying activities of the DMCJA (CP 169-173) place it squarely within the ambit of both the PDA and the PRA. If it were really a “court” or branch of the judiciary, the PDC, as an executive branch, could not investigate it. Yet they did so in response to West's PDC Complaint, an executive investigatory action that could not have constitutionally taken place in regard to a “court” or an arm of the Judiciary.

In Kendal v. United States the Supreme Court held...

The theory of the constitution undoubtedly is, that the great powers of the government are divided into separate departments; and so far as these powers are derived from the constitution, the departments may be regarded as independent of each other. But beyond that, all are subject to regulations by law, touching the discharge of the duties required to be performed. Kendall v. United States, 107 US 123 , (1883)

Similarly, in *Mugler v. Kansas*, the Supreme Court held...

Those rights are best secured, in our government, by the observance, upon the part of all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare.

All officers and citizens are subject to regulations by law touching on the discharge of their duties and responsibilities. No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare. *Mugler*, supra

The DMCJA in the present case seeks a ruling that they are immune from lawful regulation requiring the reporting and disclosure of the records of their lobbying activities, and that they may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare, lobby as a public entity without filing L-5 reports and disclosing to the public the public records of their lobbying activities.

This Court should deny these special privileges and immunities that this domestic corporations seeks in violation of Article 1, Section 14 and the Separation of Powers Doctrine.

III The Court erred in failing to interpret the PDA liberally to effectuate the express intent of the people “that... lobbying contributions and expenditures be fully disclosed to the

public and that secrecy is to be avoided” by all governmental organizations.....

The Supreme Court recently reaffirmed the intent of the Public Disclosure Act expressed in RCW 42.17A.001¹, and the requirement that the Act ...be liberally construed to promote complete disclosure of all information respecting the financing of...lobbying...and full access to public records so as to assure continuing public confidence..and so as to assure that the public interest will be fully protected...

The provisions of the FCPA, moreover, "shall be liberally construed to promote complete disclosure of all information respecting the financing of political campaigns and lobbying, and the financial affairs of elected officials and candidates, and full access to public records so as to assure continuing public confidence of fairness of elections and governmental processes, and so as to assure that the public interest will be fully protected." RCW 42.17A.001. Utter et al. v. Building Industry Association of Washington, No. 89462-1, January 22, 2015 Slip Opinion at 5-6

The Superior Court erred in the Orders of June 27, 2013 and August 22, 2014 in failing to interpret the Public Disclosure Act liberally to ensure that political campaign and lobbying contributions and

¹RCW 42.17A.0001.1 provides...It is hereby declared by the sovereign people to be the public policy of the state of Washington: (1) That political campaign and lobbying contributions and expenditures be fully disclosed to the public and that secrecy is to be avoided.

expenditures be fully disclosed to the public and that secrecy is to be avoided, and to effectuate the remedial and hands on intent of the people in adopting what was, in 1974, billed as “The Spirit of I-(2)76”.

The basic rule is that a statute should be construed in light of the legislative purpose behind its enactment... being remedial in nature, (a statute) is entitled to a liberal construction to effect its purpose. *Nucleonics Department v. WPPS*, 101 Wn.2d 24, 677 P.2d 108, (1984)

As the Supreme Court ruled on the PDA only 4 years after it was overwhelmingly approved by the Voters..

A policy requiring liberal construction is a command that the coverage of an act's provisions be liberally construed and that its exceptions be narrowly confined. *Hearst Co. v. Hoppe*, 90 Wn.2d 123, 138, 580 P.2d 246 (1978), (cited in WPPS)

As will be shown from citation to the attached Article, the manifest intent of the People's Initiative billed as the Spirit of I (2)76” was to provide accessible, hands on, citizen driven remedies for campaign finance violations and secrecy.

The Spirit of Initiative (2) 76

It was the early 1970s, and the time was right for government reform. Even before Watergate became common knowledge in late 1972, the League of Women Voters, Common Cause and other national groups were calling for government accountability, particularly in campaign

finance.[2]

In Washington state, concern arose regarding political contributions for candidates, whether it involved Seattle city politics or utility boards in Eastern Washington. Interested citizens came together under the group called the Coalition for Open Government. The group would become a broad-based cooperative effort, operating from 1971 until 1975, representing a variety of organizations: League of Women Voters, American Association of University Women, Municipal League of Seattle and King County, Washington

Environmental Council, Common Cause, Young Republicans of King County, Metropolitan Democratic Club, Washington State Council of Churches, Citizens for Better Government, Young Lawyers, Washington Democratic Council, and 18 individuals, including Jolene Unsoeld, a leader of Common Cause who later went on to become a state legislator and U.S. representative for the 3rd District in Southwest Washington.[3]

Bennett Feigenbaum, coalition chairman, remembered the overall feeling of the times: “The concern was where do you draw the line between a campaign contribution and a bribe,” said Feigenbaum, who lives in New Jersey. “Very early on there was a meeting of the minds. We

were at the forefront nationally. This was to be a classic use of the initiative process because asking the Legislature to adopt laws to regulate themselves is asking a lot. It's human nature.”[4]

In 1971 the Legislature approved public disclosure laws but they were not to the satisfaction of the coalition. So the coalition started its own initiative, drafting its final version by April 1972. The coalition hired a staff member, Michael T. Hildt of Seattle, to organize their efforts. Hildt, Feigenbaum and others traveled the state to hold forums and talk to civic organizations about the initiative.[5] They gathered 162,710 signatures, far more than the 101,229 needed to put the measure on the ballot.[6] Early on the measure was termed in the media as the “Spirit of Initiative (2) 76” for its intention on opening government.

It was hailed in the press as the “toughest campaign and lobbying disclosure law in the nation.”[7]

The Legislature put its own measures on the ballot, Referendums 24 and 25, but they were discounted in newspaper stories and editorials as weaker. Feigenbaum was quoted in a news story as saying, “Initiative 276 fills in the loopholes left by Referendums 24 and 25. Our initiative requires everything the referendums require and more.”[8] A clause in Initiative 276 stated that if it passed it would supercede the two

referendums, which it did.

Campaign-finance disclosure

The impetus and main focus of the initiative was on campaign finance disclosure, according to Feigenbaum, newspaper reports, and the memorandum and meeting minutes from the Coalition for Open Government.[9] Newspaper articles typically labeled Initiative 276 in headlines as the “campaign-finance disclosure measure.”[10]

In a letter to the editor in *The Seattle Times*, Feigenbaum thanked the paper for its editorial support and thanked the signature gatherers for “giving Washington voters an opportunity in November to vote on disclosure of campaign financing and lobbyist activities.”[11]

In the voters pamphlet the initiative was labeled as “**Disclosure – campaign finances, lobbying, records.**”

The first three parts of the four-part initiative related to campaign finance, including the establishment of the Public Disclosure Commission. Specifically, the initiative required that campaign contributions be made public, including the name of the contributor and amount. The initiative also required lobbyists to register and report their expenditures, and required all elected officials and candidates to disclose substantial financial and ownership interests.

The statement for the initiative started with this paragraph:...

The People Have the Right to Know

Our whole concept of democracy is based on an informed and involved citizenry. Trust and confidence in governmental institutions is at an all time low. High on the list of causes of this citizen distrust are secrecy in government and the influence of private money on governmental decision making. Initiative 276 brings all of this out into the open for citizens and voters to judge for themselves.

In light of the manifest intent of the People in adopting I-276, it is evident that the Superior Court erred in failing to give a liberal interpretation to both the PDA and the PRA, to ensure that political campaign and lobbying contributions and expenditures be fully disclosed to the public and that secrecy is to be avoided. This was reversible error capable of being reviewed under the De Novo standard of review.

IV The Court erred in failing to interpret the PRA liberally to effectuate the express intent of the people that full access to information concerning the conduct of government on every level be assured as a fundamental and necessary precondition to the sound governance of a free society

In addition to violating the intent of the campaign related sections of law that now comprise the Public Disclosure Act under RCW 42.17, the Court also violated the severed section of I-276 that is now codified under RCW chapter 42.56 as the Public Records Act.

Initially passed as a citizen's initiative in 1972, the PRA serves to ensure governmental transparency in Washington State. *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 146, 240 P.3d 1149 (2010). The PRA embodies "a strongly worded mandate for broad disclosure of public records." *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). To effectuate this mandate, the PRA directs each agency to allow public access to "all public records, unless the record falls within the specific exemptions of subsection (6) of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records." RCW 42.56.070(1) (reviser's note omitted). Under the PRA, the agency bears the burden of showing that records fall within a statutorily specified exemption. *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 715, 261 P.3d 119 (2011) To preserve the PRA's broad mandate for disclosure, this court construes its provisions liberally and its exemptions narrowly. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 408, 259 P.3d 190 (2011).

42.17.010 provides...

(5) That public confidence in government at all levels is essential and must be promoted by all possible means.
and

(6) That public confidence in government at all levels can best be sustained by assuring the people of the

impartiality and honesty of the officials in all public transactions and decisions.

(10) That the public's right to know of the financing of political campaigns and lobbying and the financial affairs of elected officials and candidates far outweighs any right that these matters remain secret and private.

Similarly, RCW 42.56.030 states...

The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know . The people insist on remaining informed so that they may maintain control over the instruments that they have created. RCW 42.56.030, (emphasis added)

In recent years, some legal scholars and court rulings have interpreted the Public Disclosure Act to exclude judicial records, but that is not the understanding of the initiative's proponents or what is portrayed in news articles written at the time.

Initiative 276 was considered to apply to all government entities, executive, legislative and judicial, at the state and local level. As one of the drafters, Feigenbaum, said... "It applied to everyone. Absolutely. It didn't really have to come up and be discussed because it was assumed." Karin Gates Hildt, who worked on the initiative with her husband, initiative organizer Michael T. Hildt, agreed.[15]

Then-state Sen. Charles E. Newschwander, who co-wrote the

opposition statement for the voters pamphlet, said in 2004 that he does not remember specific discussions about whether the law would apply to the judiciary, but it was his belief that it should. “It should involve judges. Judges are a pain the butt as far as I’m concerned and if the law applied to me (as a legislator) it should apply to them.”[16]

The voters pamphlet included language that implied oversight over **all government agencies**: “Initiative 276 makes **all public records and documents in state and local agencies** available for public inspection and copying.” (emphasis added). Further, in the pamphlet’s statement against the initiative, one stated drawback was the “added cost of government. Virtually every office of State and Local Government will incur added expenses... It is impossible to estimate the potential cost to State, County and City Government of making all public records available for inspection and copying.”

In a Seattle Times story four days before the election, the implications of the public records section of the initiative were discussed in relationship to a variety of different kinds of records and agencies, **including court records**. Harold Potter, chief deputy to the clerk at the King County Courthouse, lamented in the article that the initiative would cost his department \$100,000 a year because he would no longer be able

to charge \$1 per page to photocopy court records. The Public Disclosure Act limits photocopying costs of applicable public records to 15 cents per page.[17]

Feigenbaum said he remembers specifically that the courts would be subject to the law because after the election he and other coalition organizers met to figure out how to handle the legal challenge of the measure's constitutionality. Because the law, in their mind, applied to the judicial system and every other government agency, they discussed how the matter could be litigated fairly in Washington.

“A few of us discussed the issue of conflict of interest for the judiciary because the law applied to the judges. We talked through where that would lead us, whether we should have the entire state judiciary recused from the case. Ultimately, we said we'll let's see what happens and let the chips fall.”[18]

In the case of the sunshine laws and the DMCJA, the “chips” fell in the court of the honorable former DMCJA Legislative Committee member Jean Reitschel. This Court should reverse her rulings.

V The Court erred in finding that an unimplemented Court Rule trumped substantive remedies in duly enacted State Law in violation of the Doctrine of the Separation of Powers and the clearly established precedent of Sibbach and Petrarcha

The Court further erred in the 3 Orders of June 27 and the Order

denying Reconsideration of July 9, 2014 in basing its ruling on the ex post facto application of an unimplemented Court Rule (GR 31A) that violated the separation of Powers by intruding into the powers of the Legislature to set substantive remedies.

The separation of powers has been repeatedly recognized as one of the "cardinal and fundamental principles" of our state constitutional system. *Wash. State Motorcycle Dealers Ass'n v. State*, 111 Wn.2d 667, 674, 763 P.2d 442 (1988). See also *Freedom Foundation v. Gregoire*, 178 Wn.2d 686, 310 P. 3d 1252 (2013)

"Our constitution does not contain a formal separation of powers clause." *Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310 (2009). "Nonetheless, the 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." *Id.* (quoting *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)).

Our separation of powers jurisprudence guards the balance of powers between branches. While we have acknowledged the important role that separation of powers principles play in maintaining individual liberty, our separation of powers jurisprudence directly "protects institutional, rather than individual, interests." *Carrick*, 125 Wn.2d at 136

This recognizes that

"the damage caused by a separation of powers violation accrues directly to the branch invaded," weakening its ability to check the other branches. *Id.* Consequently, we

test for separation of powers violations by asking "whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another." *Brown*, 165 Wn.2d at 718 (internal quotation marks omitted) (quoting *Carrick*, 125 Wn.2d at 135).

The trial Court also erred in placing the cart before the foal in basing its ruling on an unimplemented Rule as an authority to be applied retroactively even before it was implemented and given any prospective effect. This was improper and unconstitutional in that the Rule did not exist at the time of the request and denial, and represented an ex post facto substantive amendment by the Courts that encroached upon the province of the people and the legislature in violation of the separation of powers.

As both the Supreme Courts have held, a substantive matter of law cannot be amended by a procedural court rule. See *Emwright v. King County*, 96 Wn.2d 538, 637 P.2d 656 (1981), *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1 (1941)

GR 31A redefines both substantive remedies under the PRA and the substantive status of the DMCJA, thus flunking both the *Sibbach* test, as well as the standards set forth in *Emwright* and *Petrarcha*, as it clearly removes substantive rights under the Public Records Act and is not merely "procedural" in nature. It also leaves PDA lobbying and OPMA issues unresolved.

As the Supreme Court ruled in *Sacket v. Santilli*...

This Court cannot, however, contradict the state constitution by court rule. Similarly, the legislature may not grant this Court authority to perform a function that is reserved exclusively to the legislature by the constitution. Under principles of separation of powers, “[t]he Legislature is prohibited from delegating its purely legislative functions.” *Diversified Inv. P’ship v. Dep’t of Soc. and Health Servs.*, 113 Wash.2d 19, 24, 775 P.2d 947 (1989); see also *Manus v. Snohomish County Justice Ct. Dist. Comm.*, 44 Wash.2d 893, 895-96, 271 P.2d 707 (1954) (unconstitutional to delegate power to local justice of the peace committees to determine number of justices of the peace); 16A Am.Jur.2d Constitutional Law § 295

GR 31A contradicts the State Constitution by redefining the Judiciary in a manner at variance with Article VII, section 1, to encompass an administrative advocacy and lobbying organization incorporated as a nonprofit corporation.

GR 31A purports to amend substantive law (the PRA) to deprive citizens of their substantive remedy under the statute. This is simply beyond the legitimate power of the “Judiciary” to adopt “procedural” Court Rules.

Professor Linda Mulinex in her law review Article on The Politics of Rulemaking has compared the political gerrymandering of the civil rulemaking process to the actions of the French aristocracy before the

Revolution, and in the case of the un-implemented provisions of GR 31A this may be an apt metaphor.

The respondent's plea of "let them eat GR 31A" is just as unworkable as the suggestion attributed to Marie Antoinett or that attributed by Carlyle to French Finance Minister Foulon.

GR 31A is unworkable for many reasons: It is a judicial encroachment into the legislative powers of both the people and the Legislature in enacting the substantive provisions of the PRA, PDA, and establishing by law the DMCJA. It blatantly violates the manifest intent of both the PRA and the PDA. It violates common sense and this courts reasoning in the League case. It violates Article I, section 12 by granting the DMCJA special privileges and immunities when it does not fall within the definition of a "court" or a necessary ancillary to a court performing "judicial" functions as all of the entities previously found to be exempt from the sunshine and campaign reporting cited cases do.

GR 31A is an unimplemented ex post facto exercise in judicial overreaching in violation of the same separation of Powers that the Supreme Court recognized in EFF v. Gregoire to justify executive privilege. A fair application of this fundamental doctrine would invalidate GR 31A, and this is possibly one reason why it has not yet been

implemented.

As an unconstitutional, unimplemented rule that alters substantive rights ex post facto, and a rule that materially contradicts the intent of the People in adopting I-276, GR 31A should not have been considered dispositive by the Superior Court, as it conflicts with the Constitution and separation of powers, both of which, it must be remembered, have been implemented and are in full force and effect.

VI The Court erred in issuing sanctions for the violation of a local rule without the required previous objection of counsel in violation of the provisions of LCR 7(b)(4)(G), and in failing to recuse itself when its impartiality might reasonably have been questioned by an impartial observer due to the Court's previous membership in the DMCJA and participation in lobbying activities as part of the DMCJA legislative Committee (Orders at 155-156 and 157-158)

This is an action for and disclosure of the public records of lobbying by the Washington State District and Municipal Court Judges Association (DMCJA). It necessarily involves the activities of the legislative committee of the DMCJA as a central focus of the dispute, and the present director of the DCMJA's Legislative Committee is a key witness in the case as well as a subject of a pending review of unreported lobbying activity by the PDC. This assignment concerns CP 155-6 and CP 157-8.

By fate or serendipity, out of over 50 judges on the King County bench, the Superior Court Judge assigned to this case, the Honorable Jean Rietschel, was a former member not only of the DMCJA, but, a 5 year veteran of the DMCJA's Legislative and Court Rules Committees. (CP 145)

As such, Judge Reitschel served in government employment in, and in such capacity participated personally and substantially as, a public official concerning this proceeding, and had personal knowledge of the facts that are in dispute in this case to a degree that (to the plaintiff's knowledge and belief) exceeds any of the 51 other departments of the King County Superior Court. It is the improbable and unhappy circumstance that of the over 50 Judges available in the King County Superior Court, Judge Rietschel was uniquely unsuited to the objectively impartial adjudication of this issues of this case.

In addition to being a member of the same legislative committee of the DMCJA whose actions form the gravamen of the lobbying and disclosure issues of this case, The Honorable Judge Rietschel had issued a public statement that prejudged the Separation of Powers issue plaintiff asserts in this case, as demonstrated by her statement that "the courts need to continue to work with the state legislature..." (presumably through the

offices of the DMCJA that she served as an officer of when making the statement)

While appellant does not seek to impugn the integrity or honesty of the honorable Judge Reitschel, for she is an honorable judge, the potential for bias, even unconscious in nature, is raised by these professional associations and statements and is sufficient to meet the standard of *Caperton v. Massey Coal Co.* 129 S.Ct. 2252 (2009) requiring recusal or disqualification under the 14th Amendment Due Process clause.

As Justice Kennedy of the Supreme Court, writing for the majority in *Caperton v. A. T. Massey* and concurring in *Republican Party of Minnesota v. White*, noted...

Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.

To further this substantial State interest Washington has adopted Canons of Judicial Conduct that strongly encourage recusal or disqualification in potentially compromising situations such as where a magistrate has a previous membership in the very organization before the court as a defendant, conducting the very activities complained of by the

plaintiff, and where their prejudgment of a central issue in the case might combine to provide an objective basis in a disinterested observer for legitimate disqualification from adjudicating the interests of the organization they may have participated in and represented on many of its important committees.

The preamble to the Code of Judicial Conduct provides as follows:

Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.

It might well appear to a disinterested observer that the Court, on June 20 and 27, 2014 failed to avoid the appearance of impropriety by failing to disclose their association with, failing to recuse themselves from adjudicating, and ruling on behalf of the DMCJA, a lobbying organization that the Court had failed to disclose their membership in or participation on the Legislative Board of to coordinate the very type of lobbying activities the appellant had been seeking disclosure of.

CJC 2.11 provides, in pertinent part...

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality* might reasonably be questioned, including but not limited to

the following circumstances:

(1) The judge has... personal knowledge* of facts that are in dispute in the proceeding....

The judge...

(b) served in governmental employment, and in such capacity participated personally and substantially as a public official concerning the proceeding,

The Honorable Judge Reitschel, despite being a former member of the DMCJA, a representative of the Association, and despite having being prominently involved in 3 separate committees of the Association, including its Legislative Committee, and despite having made public statements indicative of prejudgment of the fundamental issue of the case, (See CP 133-145) failed to disclose these material facts or disqualify herself from adjudicating the interests of the very same association she had been a member of for so long in such an influential and important role.

In addition to these objective indicia of prejudice, the Honorable Judge Rietschel, on June 20, 2014 fined plaintiff West sua sponte-without the required objection of counsel that LCR 7 mandates as a prerequisite for sanctions-over \$600 for a technical violation of a local King County Rule which requires delivery of “working Copies” to an unspecified address, despite the fact that West had acted in good faith to provide a

bench copy to the Court Clerk and despite the fact that counsel for the DMCJA had not, and could not, object to a technical imbroglio concerning a pernicious King County Local Rule.

By so acting, the Honorable Judge Rietschel acted arbitrarily and capriciously, and violated a basic tenet of Due Process dating back nearly 800 years to King John and the Magna Carta, that...

*Communia placita non sequantur curiam nostram, set teneantur in aliquo loco certo*²

Ironically, Judge Reietschel had claimed in her 2008 response to the King County Democrats' questionnaire that she would work to "recommend simplification of the local court rules which are often a trap for pro se litigants in the civil arena."

While the Court undoubtedly believed itself to be acting impartially and properly, for the Honorable Judge Rietschel to so blatantly contradict the representations made in her campaign and act so partially to reward counsel defending an organization she belonged to for defending conduct which she was undoubtedly a party to demonstrates a possible unconscious bias that might be seen by paranoid or suspicious disinterested parties in a light to diminish the public respect for the judiciary as a whole.

Further, had the Court adequately prepared for the June 20th Hearing and reviewed the court file, as would be necessary in any event, the Court would have been aware of and familiar with all of the pleadings filed in the case, particularly those which had been on file in a court of record for nearly a month.

The honorable Judge could not possibly been unaware of the existence of West's response either, since the both defendant DMCJA and the Attorney General had responded to the plaintiff's reply.

Regardless, although the Honorable Judge Reitschel undoubtedly believed that all of her actions were appropriate and free from bias or prejudice, and acted with the upmost integrity and a sincere conscious belief in her impartiality, for the Honorable Judge to continue to preside to determine the proper scope of the DMCJA's lobbying activities when she had previously directed the selfsame activities as a member of the DMCJA Legislative Committee for many years raises precisely the same issues of potential bias identified by the drafters of I-276 these many decades past, and the manner in which the "chips have fallen as they will" should be sufficient to raise concerns in a disinterested observer concerning the impartiality of the Court, as the drafters of the Initiative that was billed as

“the Spirit of Initiative (2) 76” originally anticipated back in 1972.

CONCLUSION AND RELIEF SOUGHT:

In enacting and amending the Public Disclosure Act, now codified as Chapters 42.56 and 42.17 RCW, both the people and the Legislature of this state have declared and affirmed a policy of open government. (*See* RCW 42.56.030, RCW 42.17A.0001).

For the open government provisions of the PRA and PDA to be enforced in the spirit of their adoption it is imperative that that administrative lobbying and advocacy organizations like the DMCJA be required to both disclose and report their lobbying expenditures.

The respondents in this case believe that they have the right to decide that it is not good for the people to know and what is not good for them to know. They believe that the rights of the DMCJA to lobby and finance lobbying secretly far outweighs the public’s rights to know. They believe it is acceptable to deny disclosure of the records of the financing and lobbying of a nonprofit corporation acting as the functional equivalent of a public entity.

As the Supreme Court recognized in *Mugler v. Kansas*,...It is not for the courts, upon their views as to what is best and safest for the

community, to disregard the legislative determination of that question.
Mugler v. Kansas, 123 U.S. 623 (1887)

A decision to allow the DMCJA to evade both the PRA and the PDA while spending public funds and resources lobbying the Legislature would utterly contravene the “Spirit of Initiative (2) 76”, as well as the constitutional mandate assigning such policy decisions to the legislature. (or in this case, the people acting in their legislative capacity)

The manifest intent of the people acting in their Legislative capacity in enacting I- 276, common sense, the precedent of Telford and WACO, the Doctrine of Separation of Powers and Article I section 12 and Article VII Section 1 of the Constitution all require that the DMCJA, as a publicly funded lobbying and advocacy organization incorporated as a nonprofit corporation, must be subject to both the Public Records and Public Disclosure Acts.

The decision of the Trial Court should be vacated, and this case remanded back for further proceedings, with instructions for the award of appropriate costs and penalties for the unlawful withholding of records.

Respectfully submitted this day of March 13, 2015.

s/Arthur West
ARTHUR WEST

CERTIFICATE OF SERVICE

I certify this document was transmitted to and served on counsel for the State and DMCJA on March 13, 2015 at the office of the Attorney General of the State of Washington and the private lair of record of counsel for the DMCJA.

s/Arthur West
ARTHUR WEST

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Initiative 276

The history and intent of Initiative 276, which was passed by voters in Washington state to create the Public Disclosure Act

By David Cuillier, David Dean & Dr. Susan Dente Ross
AccessNorthwest, Edward R. Murrow School of Communication, Washington State University
May 4, 2004 – updated Aug. 24, 2004

Abstract

Initiative 276 was overwhelmingly approved by voters in 1972, leading to what would become the Washington Public Disclosure Act. This summary of the initiative's history, based on newspaper accounts from the time, initiative organizers' documents and memorandum housed at the University of Washington Special Collections, and interviews with principal players involved in the initiative, describes how the measure was publicly described, debated, and organized. The initiative focused primarily on campaign-finance disclosure. However, the general tenor of the public discussion also expressed a societal interest in open records for all government entities, including the executive, legislative and judicial branches at the state and local levels.

“Spirit of Initiative (2) 76”

It was the early 1970s, and the time was right for government reform. Even before Watergate became common knowledge in late 1972, the League of Women Voters, Common Cause and other national groups were calling for government accountability, particularly in campaign finance.[2]

In Washington state, concern arose regarding political contributions for candidates, whether it involved Seattle city politics or utility boards in Eastern Washington. Interested citizens came together under the group called the Coalition for Open Government. The group would become a broad-based cooperative effort, operating from 1971 until 1975, representing a variety of organizations: League of Women Voters, American Association of University Women, Municipal League of Seattle and King County, Washington Environmental Council, Common Cause, Young Republicans of King County, Metropolitan Democratic Club, Washington State Council of Churches, Citizens for Better Government, Young Lawyers, Washington Democratic Council, and 18 individuals, including Jolene Unsoeld, a leader of Common Cause who later went on to become a state legislator and U.S. representative for the 3rd District in Southwest Washington.[3]

Bennett Feigenbaum, coalition chairman, remembered the overall feeling of the times: “The concern was where do you draw the line between a campaign contribution and a bribe,” said Feigenbaum, who lives in New Jersey. “Very early on there was a meeting of the minds. We were at the forefront nationally. This was to be a classic use of the initiative process because asking the Legislature to adopt laws to regulate themselves is asking a lot. It’s human nature.”[4]

In 1971 the Legislature approved public disclosure laws but they were not to the satisfaction of the coalition. So the coalition started its own initiative, drafting its final version by April 1972. The coalition hired a staff member, Michael T. Hildt of Seattle, to organize their efforts. Hildt, Feigenbaum and others traveled the state to hold forums and talk to civic organizations about the initiative.[5] They gathered 162,710 signatures, far more than the 101,229 needed to put the measure on the ballot.[6]

Early on the measure was termed in the media as the “Spirit of Initiative (2) 76” for its intention on opening government. It was hailed in the press as the “toughest campaign and lobbying disclosure law in the nation.”[7]

The Legislature put its own measures on the ballot, Referendums 24 and 25, but they were discounted in newspaper stories and editorials as weaker. Feigenbaum was quoted in a news story as saying, “Initiative 276 fills in the loopholes left by Referendums 24 and 25. Our initiative requires everything the referendums require and more.”[8] A clause in Initiative 276 stated that if it passed it would supercede the two referendums, which it did.

Campaign-finance disclosure

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In a letter to the editor in The Seattle Times, Feigenbaum thanked the paper for its editorial support and thanked the signature gatherers for “giving Washington voters an opportunity in November to vote on disclosure of campaign financing and lobbyist activities.”[11]

In the voters pamphlet the initiative was labeled as “Disclosure – campaign finances, lobbying, records.” The first three of the four-part initiative related to campaign finance, including the establishment of the Public Disclosure Commission. Specifically, the initiative required that campaign contributions be made public, including the name of the contributor and amount. The initiative also required lobbyists to register and report their expenditures, and required all elected officials and candidates to disclose substantial financial and ownership interests. The statement for the initiative started with this paragraph:

The People Have the Right to Know

Our whole concept of democracy is based on an informed and involved citizenry. Trust and confidence in governmental institutions is at an all time low. High on the list of causes of this citizen distrust are secrecy in government and the influence of private money on governmental decision making. Initiative 276 brings all of this out into the open for citizens and voters to judge for themselves.

Open public records

A less talked about part of the initiative regarded public records in general. Feigenbaum recalls that most of the initiative discussion focused on campaign-finance disclosure but a section was added stating that public records shall be open. “I can’t remember exactly why we put it in there. It was really uncontroversial. I don’t remember any opposition.”[12]

The voters pamphlet included discussion of this fourth section: “Initiative 276 makes all public records and documents in state and local agencies available for public inspection and copying. Certain records are exempted to protect individual privacy and to safeguard essential government functions.”

Public discussion included references to open records in general. For example, a letter to the editor in The Seattle Times praised the initiative because "The people – all the people – have a right to know and to participate in government." [13] Another letter writer the same day stated, "This strong legislation drafted by the people, not the politicians, will open government. And an open government must be a cleaner, better government than one locked in secrecy."

The limited discussion regarding this section of the initiative was the focus of a Seattle Times story explaining the implications of the measure. The story started:

Talk about Initiative 276 and it rings two bells with the average voter: the disclosure of campaign financing and lobbyists' funding.

But another section in the initiative concerning access to public records has been the least discussed aspect of the open-government measure with appears on the November 7 ballot.

It may prove to be a "sleeper" for the public. [14]

The article then described the public records section and its implications, particularly regarding copying and retrieval costs. Also, concerns were raised in the article regarding the vague wording of the exemptions covering privacy and working papers.

For all government entities

In recent years, some legal scholars and court rulings have interpreted the Public Disclosure Act to exclude judicial records, but that is not the understanding of the initiative's proponents or what is portrayed in news articles written at the time.

Initiative 276 was considered to apply to all government entities, executive, legislative and judicial, at the state and local level, Feigenbaum said. "It applied to everyone. Absolutely. It didn't really have to come up and be discussed because it was assumed." Karin Gates Hildt, who worked on the initiative with her husband, initiative organizer Michael T. Hildt, agreed. [15] Then-state Sen. Charles E. Newschwander, who co-wrote the opposition statement for the voters pamphlet, said in 2004 that he does not remember specific discussions about whether the law would apply to the judiciary, but it was his belief that it should. "It should involve judges. Judges are a pain the butt as far as I'm concerned and if the law applied to me (as a legislator) it should apply to them." [16]

The voters pamphlet included language that implied oversight over all government agencies: "Initiative 276 makes all public records and documents in state and local agencies available for public inspection and copying." (emphasis added). Further, in the pamphlet's statement against the initiative, one stated drawback was the "added cost of government. Virtually every office of State and Local Government will incur added expenses... It is impossible to estimate the potential cost to State, County and City Government of making all public records available for inspection and copying."

In a Seattle Times story four days before the election, the implications of the public records section of the initiative were discussed in relationship to a variety of different kinds of records and agencies, including court records. Harold Potter, chief deputy to the clerk at the King County Courthouse, lamented in the article that the initiative would cost his department \$100,000 a year because he would no longer be able to charge \$1 per page to photocopy court records. The Public Disclosure Act limits photocopying costs of applicable public records to 15 cents per page. [17]

Feigenbaum said he remembers specifically that the courts would be subject to the law because after the election he and other coalition organizers met to figure out how to handle the legal challenge of the

measure's constitutionality. Because the law, in their mind, applied to the judicial system and every other government agency, they discussed how the matter could be litigated fairly in Washington.

"A few of us discussed the issue of conflict of interest for the judiciary because the law applied to the judges. We talked through where that would lead us, whether we should have the entire state judiciary recused from the case. Ultimately, we said we'll let's see what happens and let the chips fall." [18]

Overwhelming approval

While most groups and politicians endorsed Initiative 276, some opposed it. Opponents said the initiative was "overkill" and "would threaten individual privacy." They also said it would be costly to enforce. [19] Then-state Sen. Charles E. Newschwander, who co-wrote the opposition statement for the voters pamphlet, said in a 2004 interview that he opposed the initiative because it would add more regulations and more costs to government. "I don't think we need the damn thing anyway. We don't need more regulations. Too many RCW's as it is. Book after book of them." [20]

State Rep. James P. Kuehnle of Spokane challenged the constitutionality of the initiative, asking Attorney General Slade Gorton for an opinion. Kuehnle stated that the initiative was unconstitutional because it included more than one subject. [21] The constitutionality of the measure would eventually be taken to court following the election, but the measure would stand.

In the state general election, Nov. 7, 1972, voters approved the initiative with 959,143 votes in favor and 372,693 opposed, a 72 percent approval rate.

The battle after the battle

Following the passage of Initiative 276 the Coalition for Open Government worked for three more years to battle efforts to repeal or gut the Public Disclosure Act.

Dozens of amendments were proposed to the Legislature by the Association of Washington Business. School districts throughout the state wrote articles in education publications and newspapers explaining how the campaign finance disclosure requirements scared away potential school board members and caused some current board members to resign to avoid reporting who funded their campaigns. Corporate and business interests lobbied for changes to the campaign finance reporting laws. [22]

Lee Sanders, a Common Cause leader from California and an initiative proponent, wrote following the election: "It is obvious that a well-financed campaign is underway to change public opinion in Washington. Misleading statements have been made by lobbyists and some legislators... The battle for the public mind continues although the election has passed. The special interests are uniformly aligned against 276. Virtually all their wealth and power are combined. Typical examples of the financiers of this campaign include, but are not limited to, the Boeing Company, Port of Seattle, Seattle First National Bank and the Association of Washington Business. The proponents of 276 are not financed and are suffering as a result of this campaign. If the efforts of the critics of 276 go unmatched, then it is reasonable to anticipate that public opinion will be reversed. Once the polls show a change in popular support, then the legislators will feel inclined to seriously alter or actually repeal 276... the capacity of the people to govern themselves hangs in the balance." [23]

Four lawsuits were filed against the initiative, but the initiative was upheld by the state Supreme Court in *Fritz v. Gorton* (83 Wn.2d 275, *Fritz v. Gorton*, January 4, 1974). Since the passage of Initiative 276 in 1972, hundreds of exemptions and changes to the Public Disclosure Act have been made and court rulings have modified its application. The Act in 2004 included more than 80 exemptions (RCW 42.17.310).

Endnotes

[1] AccessNorthwest is committed to providing research and education regarding access to public records and meetings. David Cuillier is a doctoral student and research assistant, David Dean was an undergraduate intern who graduated May 2004, and Dr. Susan Dente Ross is executive director. For more information, contact Cuillier at davidc@wsu.edu, accessnw@wsu.edu or 509-335-2979. The Web site is at www.wsu.edu/~accessnw.

[2] Common Cause was launched in 1970 to revitalize government and push for accountability. The press release announcing its beginning is at http://www.commoncause.org/about/jg_letter.htm

[3] Coalition for Open Government Organizational Representatives membership list, Dec. 1, 1974, University of Washington Libraries, Special Collections, Coalition for Open Government Records, 1972-1976.

[4] Telephone interview with Bennett Feigenbaum on April 30, 2004.

[5] Ibid.

[6] Final number available at the Secretary of State Web site:
http://www.secstate.wa.gov/elections/initiatives/statistics_initiatives.aspx:

[7] "3 to 1 OK for 276," Seattle Post-Intelligencer, Nov. 8, 1972, p. A8.

[8] "Court battle predicted on '276'," The Seattle Times, Nov. 8, 1972, p. A16.

[9] Coalition for Open Government records, 1972-1975, University of Washington Libraries, Special Collections.

[10] "150,000 sign campaign-finance petition," The Seattle Times, July 6, 1972, p. A1.

[11] "Initiative 276" The Seattle Times, July 26, 1972, p. A13.

[12] Interview with Feigenbaum, April 30, 2004.

[13] "Smoke screen against 276," The Seattle Times, Oct. 20, 1972, p. A13.

[14] "Initiative 276 may have a 'sleeper'," The Seattle Times, Nov. 3, 1972, p. A8.

[15] Interview with Karin Gates Hildt on May 3, 2004. Michael T. Hildt, of Port Townsend, died in 1999.

[16] Interview with Charles E. Newschwander, May 4, 2004.

[17] "Initiative 276 may have a 'sleeper'," The Seattle Times, Nov. 3, 1972, p. A8.

[18] Interview with Feigenbaum, April 30, 2004.

[19] "Campaign financing, access to records," The Seattle Times, Nov. 5, 1972.

[20] Interview with Charles E. Newschwander, May 4, 2004.

[21] "Gorton's office responds to constitutionality query," The Seattle Times, Oct. 22, 1972, p. E11.

[22] Historical sketch of 276 and Common Cause, written by Jolene Unsoeld, 1973. University of Washington Libraries, Special Collections, Coalition for Open Government Records, 1972-1975.

[23] Ibid, p. 2.