

# **BOARD FOR JUDICIAL ADMINISTRATION**



**WASHINGTON  
COURTS**

## **MEETING PACKET**

**FRIDAY, DECEMBER 10, 2010  
9:00 A.M.**

**AOC SEATAC OFFICE  
SEATAC, WASHINGTON**

# Board for Judicial Administration Membership

## VOTING MEMBERS:

**Chief Justice Barbara Madsen**, Chair  
Supreme Court

**Judge Michael Lambo**, Member Chair  
District and Municipal Court Judges'  
Association  
Kirkland Municipal Court

**Judge Marlin J. Appelwick**  
Court of Appeals, Division I

**Judge Rebecca M. Baker**  
Superior Court Judges' Association  
Ferry/Stevens/Pend Oreille Superior Courts

**Judge C. C. Bridgewater**  
Court of Appeals, Division II

**Judge Stephen Brown**, President  
District and Municipal Court Judges'  
Association  
Grays Harbor County District Court

**Judge Ronald Culpepper**  
Superior Court Judges' Association  
Pierce County Superior Court

**Judge Susan Dubuisson**  
District and Municipal Court Judges'  
Association  
Thurston County District Court

**Judge Deborah Fleck**  
Superior Court Judges' Association  
King County Superior Court

**Judge Jack Nevin**  
District and Municipal Court Judges'  
Association  
Pierce County District Court

**Justice Susan Owens**  
Supreme Court

**Judge Kevin Ringus**  
District and Municipal Court Judges'  
Association  
Fife Municipal Court

**Judge Dennis Sweeney**, Presiding Chief  
Judge  
Court of Appeals, Division III

**Judge Stephen Warning**, President  
Superior Court Judges' Association  
Cowlitz County Superior Court

**Judge Chris Wickham**  
Superior Court Judges' Association  
Thurston County Superior Court

## NON-VOTING MEMBERS:

**Mr. Steven Crossland**, President-Elect  
Washington State Bar Association

**Mr. Jeff Hall**  
State Court Administrator

**Judge Laura Inveen**, President-Elect  
Superior Court Judges' Association  
King County Superior Court

**Ms. Paula Littlewood**, Executive Director  
Washington State Bar Association

**Mr. Steven Toole**, President  
Washington State Bar Association

**Judge Gregory Tripp**, President-Elect  
District and Municipal Court Judges'  
Association  
Spokane County District Court

# Board for Judicial Administration

December 10, 2010  
 9:00 a.m. – Noon  
 AOC SeaTac Office  
 SeaTac, Washington

## Agenda

1. Call to Order	Chief Justice Barbara Madsen Judge Michael Lambo	
2. Welcome and Introductions	Chief Justice Barbara Madsen Judge Michael Lambo	
3. Court Manager of the Year Award	Mr. Jeff Hall	
<b>Action Items</b>		
4. November 19, 2010 Meeting Minutes <b>Action: Motion to approve the minutes of the November 19 meeting</b>	Chief Justice Barbara Madsen Judge Michael Lambo	Tab 1
5. Appointments to the BJA Public Trust and Confidence Committee <b>Action: Motion to appoint Judge Elizabeth Martin and Judge Scott Stewart to the BJA Public Trust and Confidence Committee</b>	Ms. Mellani McAleenan	Tab 2
6. Resolution Urging Adequate Funding of the Judicial Branch <b>Action: Motion to approve the proposed resolution urging adequate funding of the judicial branch</b>	Judge Deborah Fleck	Tab 3
<b>Reports and Information</b>		
7. JSTA Discussion	Chief Justice Barbara Madsen	Tab 4
8. GR 31 Discussion	Judge Marlin Appelwick	Tab 5
9. Budget Update	Mr. Ramsey Radwan	Tab 6
10. Court Management Council Update	Mr. Jeff Hall	
11. Access to Justice Board	Mr. M. Wayne Blair	
12. Reports from the Courts Supreme Court Court of Appeals Superior Courts Courts of Limited Jurisdiction	Justice Susan Owens Judge Dennis Sweeney Judge Stephen Warning Judge Stephen Brown	

13. Association Reports Superior Court Administrators Juvenile Court Administrators District and Municipal Court Administrators	Ms. Delilah George Ms. Shelly Maluo Ms. Peggy Bednared	
14. Administrative Office of the Courts	Mr. Jeff Hall	
15. Other Business Next meeting: January TBD Beginning at 9:30 a.m. at the Temple of Justice, Olympia	Chief Justice Barbara Madsen Judge Michael Lambo	



**Board for Judicial Administration  
Meeting Minutes**

**November 19, 2010  
AOC SeaTac Office  
SeaTac, Washington**

**Members Present:** Chief Justice Barbara Madsen, Chair; Judge Michael Lambo, Member Chair; Judge Stephen E. Brown; Judge Ronald Culpepper; Judge Susan Dubuisson; Mr. Jeff Hall; Judge Laura Inveen; Ms. Paula Littlewood; Justice Susan Owens; Judge Jack Nevin; Judge Kevin Ringus; Judge Dennis Sweeney; Mr. Steven Toole; Judge Gregory Tripp; and Judge Stephen Warning

**Guests Present:** Mr. Marc Boman, Mr. M. Wayne Blair, Judge Harold Clarke, Ms. Delilah George (by phone), Ms. Shelly Maluo, Judge Christine Quinn-Brintnall, Mr. Kevin Stock, and Mr. Earl Long

**Staff Present:** Ms. Beth Flynn, Mr. Tom George, Mr. Steve Henley, Mr. Dirk Marler, Ms. Mellani McAleenan, Dr. Carl McCurley, Mr. Ramsey Radwan, and Mr. Chris Ruhl

The meeting was called to order by Chief Justice Madsen.

WSBA Council on Public Defense Resolution

Mr. Marc Boman, Chair of the WSBA's Council on Public Defense, spoke about the Council's resolution encouraging Washington courts to provide written notice to defendants regarding the possible consequences of pleading guilty. There is a failure of some defendants to understand the consequences of pleading guilty and judges have limited time to explore the direct consequences of a plea and can't possibly get to know the individual circumstances of defendants who plead guilty which could include non-citizens being deported, students being disqualified from Pell Grants, sex offender registration, not being able to join the military, etc.

The Council thought it would be helpful to judges to use a two-sided handout that was developed by the Council and urges defendants to consider the consequences of a guilty plea and inform them they have a right to consult with an attorney. The handout is in Word format and could be altered by a court to fit their needs.

The Council prepared a resolution for the Washington State Bar Association (WSBA) regarding the handout and would welcome the support of the BJA in the form of a resolution or whatever the BJA feels is appropriate.

There was some discussion about how the handout would affect appeals and the burden on defense attorneys to explain all the possible guilty plea consequences to defendants. That is not the attorney's area of expertise.

Judge Inveen stated there is a collateral consequences handbook and it is available online.

**It was moved by Judge Sweeney and seconded by Judge Culpepper to give further consideration to this issue at the December meeting. The motion carried with Judge Ringus opposed.**

#### Problem Solving Courts Policy Statement

Judge Clarke, of the Washington State Association of Drug Court Professionals (WSADCP), made a presentation to the BJA in September and introduced a policy statement regarding problem solving courts. There is a need for education and funding across the state for problem solving courts and a need to know and understand best practices. Problem solving courts need to assist each other and measure outcomes.

Hopefully this is the right time and place to seek support from the BJA. It would be from the top down to the local courts throughout the state. The WSADCP is asking for support in the policy statement. It will be difficult as far as funding and it is not the year to ask for additional funding. Problem solving courts need some structure and as they look toward statewide funding in the future and at the local level it will be nice to have the policy statement. It will also help them stay focused as they move forward.

Judge Sweeney's objections to drug courts are fundamental. Judges are not psychologists or social workers, they are trained to apply the law. One problem is what they are set up to do as an institution. The second concern is that he worries about the courts being at the end of a societal pipeline. The social and economic problems are better addressed by the legislative and executive branches. He worries that the judicial branch is now dealing with the problems and the executive and legislative branches will not do anything because the judicial branch is taking care of it.

Judge Nevin stated he has the same concerns as Judge Sweeney but this train has left the station and courts are at the end of the line. That is troubling on a host of levels. Maybe having some guidance and parameters will help the courts deal with this.

Chief Justice Madsen suggested that this issue be set over for a month or two and the BJA can look at the language. Judge Lambo suggested that this be put on as an action item in January.

Justice Owens suggested having a subcommittee wordsmith and shorten the resolution. It is a little ambitious. AOC staff will work with Judge Clarke and get some other volunteers. Mr. Hall would like to be involved.

Mr. Hall would like to have a discussion about resolutions in general at a future meeting.

### Washington State Bar Association

Mr. Toole reported that the next WSBA Board of Governors (BOG) meeting is December 10. GR 31 was discussed at length at their BOG meeting in October. The WSBA does not believe they come under GR 31 or the Public Records Act (PRA) but they do come under GR 12 and they are drafting an amendment that will be presented for action at their December 10 meeting.

They are also getting an update from the Local Rules Task Force at their December meeting.

They made a decision to have the 2011 bar exam in both Spokane and Seattle and will decide if that should be done on a permanent basis.

They held their 50 year member tribute luncheon recently and thanked Chief Justice Madsen for her participation.

### Salary Commission Statement

Mr. Hall stated that in the past, the BJA has taken a position with the Salary Commission that judges want their salaries to keep pace with inflation. They also want parity with the federal bench. The position has not been to ask for a salary increase but they do want the 5% differential between the four levels of court to be maintained.

The Salary Commission's Owen-Portier report established the federal courts as an appropriate benchmark. Also, the BJA provides the Salary Commission with a list of the number of judges who are lost to the federal bench and a list of judges who leave state service to go into private mediation and arbitration services.

Mr. Hall suggested maintaining this position. The judiciary has a good relationship with the Commission and the Commission members are very sympathetic to the salaries of judges.

The Superior Court Judges' Association (SCJA) thought it would be foolish to request a salary increase and if the Salary Commission can see clear to do anything for the judges, they will.

Judge Brown stated the District and Municipal Court Judges' Association (DMCJA) has not taken a formal vote on this but the general consensus is to agree with SCJA. One issue they might be assisting with is to request that the Salary Commission set the salaries for part-time district court judges. Part-time judges might make presentations on their own to the Salary Commission.

There was a comment about the political statement it would make if judges expressly stated they will forego a cost of living. Another comment was that projections are for revenues to increase at a lower level and maybe funds would be available in the future and the BJA should continue with the proposed request. It would be five years without a COLA if they specifically ask not to have a COLA. It is important to take a supportive position on behalf of judges.

**It was moved by Judge Dubuisson and seconded by Judge Nevin that the BJA adopt the proposed Salary Commission position. The motion passed with Judge Quinn-Brintnall opposing.**

#### October 15, 2010 Meeting Minutes

**It was moved by Judge Dubuisson and seconded by Judge Sweeney to approve the October 15 meeting minutes. The motion carried.**

#### Appointments to the BJA Public Trust and Confidence Committee

**It was moved by Judge Quinn-Brintnall and seconded by Justice Owens to appoint Judge Laurel Siddoway and Ms. Kathy Martin to the BJA Public Trust and Confidence Committee. The motion carried.**

#### 2011 BJA Meeting Schedule

**It was moved by Judge Ringus and seconded by Judge Sweeney to approve the proposed 2011 BJA meeting schedule. The motion carried.**

#### Washington State Center for Court Research

Dr. McCurley, manager of the Washington State Center for Court Research (WSCCR), gave an update on the work of the WSCCR. He indicated that Judge Sweeney had recently stepped down as Chair of the WSCCR Advisory Board and that Judge Ann Schindler is the new Chair. Dr. McCurley highlighted the work of his staff.

The WSCCR is working on the following projects and Dr. McCurley gave a brief overview of each of the projects.

- Becca and Truancy Evaluation
- Washington Assessment of Risks and Needs of Students (WARNS)
- Dependent Youth Interviews
- Residential Time Summary Report
- Timeliness of Dependency Case Processing in Washington State
- Judicial Salary Comparison

- Judicial Needs Estimates
- Juvenile Court Case Management and Assessment Process
- Therapeutic Courts – implement drug court case management system and establish performance reporting – evaluate local drug courts
- Thurston county Pretrial Risk Assessment

The WSCCR has been in operation over four years and the WSCCR Advisory board is a key link between court research and the court community. They are continually reviewing the alignment between research priorities and the needs of the judicial branch.

#### Becca/Truancy Funding Study

Mr. George gave a brief presentation regarding the Becca/Truancy Funding Study. The purpose of the study is to investigate the impact of receiving a truancy petition on educational and juvenile offender outcomes.

45,000 kids are eligible to receive a truancy petition. That is about 14% of all high school students. Currently about one-third of the students who should be referred to court are referred. About 18,000 students a year are court-petitioned truants. 470,600 students are non-petitioned students.

Truants do make up a high-risk group that courts should be paying attention to.

#### BJA Legislative Agenda

Ms. McAleenan reported that elections are certified on November 23 and Republicans will pick up a few seats. There are still some races that are too close to call: Representative Kelli Linville, Senator Randy Gordon, Senator Steve Hobbs.

Leadership positions in the House and the Senate should not change much.

The BJA legislative agenda includes the following:

1. A Grant County District Court judicial position.
2. Amendment of RCW 9A.36.031 to make assault of judges and court-related personnel a class C felony (assault 3) rather than a gross misdemeanor (assault 4).
3. Judicial Stabilization Trust Account, amendment to HB 2362, providing support for judicial branch agencies by imposing surcharges on court fees. This will be discussed further on December 10.

4. Changing the election and appointment provisions for municipal court judges.

There is a BJA Legislative/Executive Committee conference call on December 6 and the BJA could make a decision on this at the December 10 BJA meeting.

Washington State Budget Forecast

Mr. Radwan reported that the current biennium revenue forecast went down another \$385 million and this will impact the state judiciary. The shortfall could result in another \$2 million reduction to the judicial branch if across the board cuts are taken. The Governor is calling for the House and Senate to provide general fund budget reduction proposals to her by November 29. The Administrative Office of the Courts (AOC) will try to insert itself into the process so the judicial branch will not be caught by surprise.

For the upcoming biennium, the revenue forecast has been reduced by another \$809 million. Mr. Radwan assumes this forecast will continue to go down.

The caseload forecast usually defines the increase in expenditures over a period of time. At this point in time the caseload forecast looks okay although it does not include the drop-off for the unemployment federal funding.

The rolling deficit for next biennium is about \$5.6 billion. About half of this is due to the loss of federal funding. There is another \$2 billion that is in optional costs.

Resolution Urging Adequate Funding of the Judicial Branch

Ms. McAleenan presented a resolution regarding adequate funding of the judicial branch. The resolution has been circulated to other entities and she has heard back from the SCJA and DMCJA and they approved the resolution. The Access to Justice (ATJ) Board had a small revision and the WSBA is set for action in December and the Washington State Trial Lawyers Association (WSTLA) will consider the resolution in December. Ms. McAleenan would like the BJA to consider signing off on it. It will be an action item at the December meeting.

Access to Justice Board

Mr. Blair said the ATJ Board sees the Resolution Urging Adequate Funding of the Judicial Branch as a way to keep the coalition together and to remind everyone why the coalition needs to stay together instead of all competing against each other for funding.

The ATJ Board approved changes to GR 33.

### Report from the Courts

**Superior Court Judges:** Judge Warning reported that the SCJA will continue a lively discussion about GR 31 and they are getting ready for the legislative session and hope to convince legislators to spend money on a risk assessment tool.

**District and Municipal Court Judges:** Judge Brown reported that the municipal court elections bill is being taken up again. Bainbridge Island Municipal Court is having trouble with the judge's salary being reduced while the judge is in office. The DMCJA supports the risk assessment tool and is working with the other groups supporting the tool to seek modifications on DUI and/or FTA issues which would make the tool useful for courts of limited jurisdiction.

**Superior Court Administrators:** Ms. George reported that the AWSCA met electronically in an online training session on October 20. Ms. Ruth Warren from Pierce County was the presenter and that segment was following the next week with a roundtable presentation. The AWSCA also used eCCL technology a week ago on an AOC survey. They are currently reviewing a caseflow and calendaring requirements document.

**Juvenile Court Administrators:** Ms. Maluo reported that the Juvenile Court Administrators have been approaching legislators as a team to educate them on juvenile issues. They are trying to get JRA funding transferred; especially the QA portion because they think there could be better outcomes for kids. They are trying to hold onto Becca funding and are concerned what will happen to the kids if Becca dollars are reduced or eliminated. Today is National Adoption Day.

### Administrative Office of the Courts

In September, Doug Ford who managed the AOC Court Education Services (CES) section retired. It was just announced internally that Kathy Wyer, who currently works in the Information Services Division (ISD) at AOC will become the CES manager. She begins on December 6.

There being no further business, the meeting was adjourned.



**Board for Judicial Administration  
Nomination Form for BJA Committee Appointment**

**BJA Committee:** Public Trust and Confidence  
(i.e. Best Practices, Court Security, Justice in Jeopardy, Long-Range Planning, and Public Trust and Confidence)

**Nominee Name:** Elizabeth Martin

**Nominated By:** SCJA  
(i.e. SCJA, DMCJA, etc.)

**Term Begin Date:** 1/1/2011

**Term End Date:** 12/31/2012

**Has the nominee served on this subcommittee in the past?**      Yes       No

**If yes, how many terms have been served and dates of terms:** \_\_\_\_\_

**Additional information you would like the BJA to be aware of regarding the nominee:**

Statement from the nominee:

This will confirm my passion for the issue of public trust and confidence which is so critical, especially in the current environment of widespread public distrust and misunderstanding regarding the role of judiciary and the constitutional protections afforded to participants in the judicial process. I was recently appointed to the bench by Governor Gregoire and would be honored to serve on this particular committee if selected. I have spoken at length with Judge Hickman, who has expressed to me his enthusiasm for the projects that this committee is working on.

Please send completed form to:

Beth Flynn  
Administrative Office of the Courts  
PO Box 41174  
Olympia, WA 98504-1174  
[beth.flynn@courts.wa.gov](mailto:beth.flynn@courts.wa.gov)

**Board for Judicial Administration  
Nomination Form for BJA Committee Appointment**

**BJA Committee:** Public Trust and Confidence  
(i.e. Best Practices, Court Security, Justice in Jeopardy, Long-Range Planning, and Public Trust and Confidence)

**Nominee Name:** Scott Stewart

**Nominated By:** DMCJA  
(i.e. SCJA, DMCJA, etc.)

**Term Begin Date:** 1/2011

**Term End Date:** 12/2012

**Has the nominee served on this subcommittee in the past?**      Yes       No

**If yes, how many terms have been served  
and dates of terms:**      1 term, through the end of 12/2010

**Additional information you would like the BJA to be aware of regarding the  
nominee:**

Judge Stewart is looking forward to serving another term.

Please send completed form to:

Beth Flynn  
Administrative Office of the Courts  
PO Box 41174  
Olympia, WA 98504-1174  
[beth.flynn@courts.wa.gov](mailto:beth.flynn@courts.wa.gov)





October 29, 2010

Dear Judicial Branch Stakeholders:

With the economy slow to rebound and continued state and local government budget cuts, justice is truly in jeopardy now more than ever. At the state level, the judicial branch has suffered more than \$18 million in reductions during the 2009-2011 biennium. When the “across-the-board” cuts are added, the amount of funding lost to the Supreme Court, Court of Appeals, Law Library, Administrative Office of the Courts, Office of Public Defense, and Office of Civil Legal Aid tops \$20 million. A significant amount of that funding had been passed through to the trial courts as direct services or funding for programs. When coupled with the losses suffered at the local level, the ability to provide constitutionally necessary access to justice to Washington’s residents is at risk. We have reached the point where additional budget reductions cannot be sustained.

When we started the Justice in Jeopardy Initiative in 2005, we wanted to secure a more equitable state contribution to judicial branch funding. We knew that to achieve adequate, stable and long-term funding for the trial courts and court support operations we would have to commit to a multi-year effort. This effort is perhaps more important now than it was when we first began. Thus, we are asking you to adopt the attached resolution in support of funding for the judicial branch and to urge the state and local governments to provide the funding necessary to maintain meaningful access to our justice system.

If you have any questions about the resolution or about the Justice in Jeopardy Initiative, please do not hesitate to contact us. Additional information can also be found at [www.courts.wa.gov/justiceinjeopardy/](http://www.courts.wa.gov/justiceinjeopardy/). We will also discuss this matter further at the WSBA’s November 5<sup>th</sup> legislative meeting to which you have been invited. Thank you for your consideration.

Sincerely,

Handwritten signature of Barbara Madsen in cursive.

Chief Justice Barbara Madsen  
JIJC Co-Chair

Handwritten signature of Deborah Fleck in cursive.

Judge Deborah Fleck  
JIJC Co-Chair

Enclosure

cc: Justice in Jeopardy Implementation Committee  
Board for Judicial Administration

## **Resolution Urging Adequate Funding of the Judicial Branch**

**Whereas**, funding for the judicial branch constitutes less than one percent of the state general fund and Washington State continues to rank 50th out of 50 in the state's contribution to trial court funding, and

**Whereas**, equal justice under law and access to justice are a fundamental commitment of government and essential to the proper operation of our democracy, and

**Whereas**, the Washington State Constitution directs that "justice in all cases shall be administered openly, and without unnecessary delay," and

**Whereas**, the Court Funding Task Force, created by the Board for Judicial Administration in 2002, recognized that trial court funding was in crisis in Washington State, and

**Whereas**, the Washington State Bar Association's Blue Ribbon Panel on Indigent Defense and the Washington Supreme Court's Task Force on Equal Justice Funding identified critical failures in our indigent defense and civil legal aid systems, and

**Whereas**, the Justice in Jeopardy Initiative was introduced beginning in the 2005 legislative session to secure adequate, stable, and long-term funding for trial court operations, indigent defense and civil legal aid, and

**Whereas**, our state's judicial system cannot effectively and fairly administer "justice in all cases openly, and without unnecessary delay" without adequate and stable funding for core court and court support operations, and

**Whereas**, state funding of the judicial branch has been reduced by more than \$18 million during the 2009-2011 biennium, not including additional "across-the-board" reductions, and

**Whereas**, budget constraints render the Administrative Office of the Courts, Office of Public Defense, and Office of Civil Legal Aid unable to meet the needs of those providing access to justice,

### **Now, Therefore, Be It Resolved:**

The \_\_\_\_\_ commits to the ongoing work of securing a more equitable state contribution to achieve adequate, stable and long-term funding for the trial court and court support operations, and

The \_\_\_\_\_ strongly urges the state and all local governments to provide the funding necessary to maintain meaningful access to our justice system.

**Adopted by the \_\_\_\_\_ on \_\_\_\_\_, 2010.**

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## **RESOLUTION**

### **REGARDING THE JUDICIAL STABILIZATION TRUST ACCOUNT**

Whereas, the timely, open and fair administration of justice is essential to the health and vitality of our democracy; and

Whereas, state and local governments are facing unprecedented funding crises which threaten the vitality and continuity of essential court and court support systems;

Whereas, the Washington State Legislature enacted HB 2632 in the 2009 legislative session which established a dedicated Judicial Stabilization Trust Account (JSTA) and directed that all funds in such account be used to support the Administrative Office of the Courts, the Office of Public Defense and the Office of Civil Legal Aid; and

Whereas, HB 2632 funded the JSTA by imposing surcharges on appellate, superior court, district court and small claims filing fees, established June 30, 2011 as the date on which such surcharges sunset and dedicated 100% of the revenues from such surcharges to the JSTA; and

Whereas, revenues from trial court civil filing fees have historically been split between the local jurisdiction and the state, with the amount depending on the level of court (54% local/46% state in the case of superior court fees and 68% local and 32% state in the case of district court fees), but that the JSTA surcharges imposed in 2009 did not split revenues between the state and local jurisdictions; and

Whereas, in light of the current crisis and shortfall in the state general fund, recent budget reductions at the state and local level, recent staffing and service reductions in state and local court and court support systems and the continuing demands on state and local courts and court support systems, the revenues generated by the JSTA surcharges should continue beyond the June 30, 2011 sunset date; and

Whereas, it is in the interest of both the state and local court and court support systems that the revenues generated by any extension of the JSTA surcharges on superior court and district court filing fees be split with local government on the same percentage basis that underlying filing fees are split on the condition that the local share be used exclusively to help underwrite local trial court and court support services; and

Whereas, the Board for Judicial Administration is the unified policy voice of all levels of court in Washington State and is positioned to request and support proposed legislation to protect and perpetuate sources of fiscal support for the state and trial courts and related court support systems;

**NOW THEREFORE, BE IT RESOLVED THAT:**

1. [Organization Name] hereby endorses and requests that the Board for Judicial Administration sponsor proposed legislation that will:
  - a. Extend [eliminate?] the June 30, 2011 sunset date on the filing fee surcharges established in HB 2632; and
  - b. Direct that money collected from surcharges on superior court and district court filing fees be split in accordance with the existing percentages for the sharing of filing fee revenues within each level of trial court; and
  - c. Direct that the local share of money collected from the JSTA surcharges be retained and used exclusively to support trial court and related court support functions; and
  - d. Direct that the state's share of such money collected from the JSTA surcharges continue to be used to fund the Administrative Office of the Courts, the Office of Public Defense and the Office of Civil Legal Aid, with appropriations allocated in the same relative percentages that obtained in the FY 2010-11 biennial budget.
  
2. [Organization Name] commits to working with the BJA and other stakeholders to secure passage of legislation that meets the criteria outlined above.

Date: \_\_\_\_\_

By: \_\_\_\_\_  
[Authorized Signature]

# FINAL BILL REPORT

## SHB 2362

C 572 L 09

Synopsis as Enacted

**Brief Description:** Providing support for judicial branch agencies by imposing surcharges on court fees and requesting the supreme court to consider increases to attorney licensing fees.

**Sponsors:** House Committee on Ways & Means (originally sponsored by Representative Kessler).

**House Committee on Ways & Means**  
**Senate Committee on Ways & Means**

### **Background:**

#### Overview of Superior Court Fees.

County clerks are elected officials who oversee all record-keeping matters pertaining to the superior courts, including receipting fees, fines, court-ordered moneys, and disbursement of funds. County clerks collect superior court filing fees and other fees for court services as prescribed by statute.

The following table gives the fee schedule for certain fees collected by the county clerks for their official services. These fees are subject to division between the county, the Public Safety and Education Account (PSEA), and the county or regional law library fund, with the exception of the fee for filing a notice of appeal or notice of discretionary review. The fee for filing a notice of appeal or discretionary review is transmitted to the appropriate state appellate court.

<b>Superior Court Filing</b>	<b>Fee</b>
First or initial paper in any civil action	\$200
Unlawful detainer action	\$45
First or initial paper on appeal from a court of limited jurisdiction or any civil appeal	\$200
Petition for judicial review under the Administrative Procedure Act	\$200
Notice of debt due for the compensation of a crime victim	\$200

*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

First paper in a probate proceeding	\$200
Petition to contest a will admitted to probate or petition to admit a will which has been rejected	\$200
Notice of appeal or notice of discretionary review	\$250

Overview of District Court Fees.

District courts are courts of limited jurisdiction. They have concurrent jurisdiction with superior courts over misdemeanor and gross misdemeanor violations and civil cases in which the amount claimed or in dispute is \$75,000 or less. District courts also have jurisdiction over small claims and traffic infractions.

District court clerks are required to collect fees for various services as prescribed by statute. Except for certain costs, all costs, fees, fines, forfeitures, and penalties collected in whole or in part by the district court are remitted by the district court clerk to the county treasurer. The county treasurer must remit 32 percent of the non-interest money received by district courts to the State Treasurer for deposit into the PSEA. The remaining balance of the non-interest money received by the county treasurer is deposited in the county current expense fund and the county or regional law library fund. Expenditures of the district court are paid from the county's current expense fund.

The following table gives the fee schedule for certain fees collected by the district court clerks for their official services.

District Court Filing	Fee
Any civil action at time of commencement or transfer	\$43 + potential \$10 surcharge for dispute resolution centers
Counterclaim, cross-claim, or third-party claim	\$43 + potential \$10 surcharge for dispute resolution centers
Small claims	\$14 + potential \$15 surcharge for dispute resolution centers

**Summary:**

The following temporary surcharges are added to the fees collected by the superior and district courts:

- \$30 for the filings listed in the superior court chart above, except for the filing of a first or initial paper in an appeal from a court of limited jurisdiction, which is subject to a \$20 surcharge;
- \$20 for the filings listed in the district court chart above, excluding small claims; and
- \$10 for small claims filings.

The surcharges are in addition to the existing fees collected by the superior and district courts. The surcharges expire on July 1, 2011. All surcharges collected by the courts must be remitted to the State Treasurer for deposit in the Judicial Stabilization Trust Account.

A Judicial Stabilization Trust Account (Trust Account) is established in the custody of the State Treasurer. The surcharges created by this act must be deposited in this Trust Account. Moneys in the Trust Account may be spent only after appropriation. Expenditures from the Account may be used only for the support of judicial branch agencies.

**Votes on Final Passage:**

House	52	46	
Senate	25	18	(Senate amended)
House	51	42	(House concurred)

**Effective:** July 1, 2009

CERTIFICATION OF ENROLLMENT

SUBSTITUTE HOUSE BILL 2362

Chapter 572, Laws of 2009

61st Legislature  
2009 Regular Session

JUDICIAL BRANCH AGENCIES--FEES

EFFECTIVE DATE: 07/01/09

Passed by the House April 26, 2009  
Yeas 51 Nays 42

FRANK CHOPP

\_\_\_\_\_  
Speaker of the House of Representatives

Passed by the Senate April 25, 2009  
Yeas 25 Nays 18

BRAD OWEN

\_\_\_\_\_  
President of the Senate

Approved May 19, 2009, 4:04 p.m.

CHRISTINE GREGOIRE

\_\_\_\_\_  
Governor of the State of Washington

CERTIFICATE

I, Barbara Baker, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is SUBSTITUTE HOUSE BILL 2362 as passed by the House of Representatives and the Senate on the dates hereon set forth.

BARBARA BAKER

\_\_\_\_\_  
Chief Clerk

FILED

May 20, 2009

Secretary of State  
State of Washington

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**SUBSTITUTE HOUSE BILL 2362**

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AS AMENDED BY THE SENATE

Passed Legislature - 2009 Regular Session

**State of Washington                      61st Legislature                      2009 Regular Session**

**By House Ways & Means (originally sponsored by Representative Kessler)**

**READ FIRST TIME 04/20/09.**

1            AN ACT Relating to providing support for judicial branch agencies  
2 by imposing surcharges on court fees and requesting the supreme court  
3 to consider increases to attorney licensing fees; amending RCW  
4 3.62.060, 12.40.020, and 36.18.018; reenacting and amending RCW  
5 36.18.020; adding a new section to chapter 43.79 RCW; providing an  
6 effective date; and declaring an emergency.

7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

8            **Sec. 1.** RCW 3.62.060 and 2007 c 46 s 3 are each amended to read as  
9 follows:

10            Clerks of the district courts shall collect the following fees for  
11 their official services:

12            (1) In any civil action commenced before or transferred to a  
13 district court, the plaintiff shall, at the time of such commencement  
14 or transfer, pay to such court a filing fee of forty-three dollars plus  
15 any surcharge authorized by RCW 7.75.035. Any party filing a  
16 counterclaim, cross-claim, or third-party claim in such action shall  
17 pay to the court a filing fee of forty-three dollars plus any surcharge  
18 authorized by RCW 7.75.035. No party shall be compelled to pay to the

1 court any other fees or charges up to and including the rendition of  
2 judgment in the action other than those listed.

3 (2) For issuing a writ of garnishment or other writ, or for filing  
4 an attorney issued writ of garnishment, a fee of twelve dollars.

5 (3) For filing a supplemental proceeding a fee of twenty dollars.

6 (4) For demanding a jury in a civil case a fee of one hundred  
7 twenty-five dollars to be paid by the person demanding a jury.

8 (5) For preparing a transcript of a judgment a fee of twenty  
9 dollars.

10 (6) For certifying any document on file or of record in the clerk's  
11 office a fee of five dollars.

12 (7) For preparing the record of a case for appeal to superior court  
13 a fee of forty dollars including any costs of tape duplication as  
14 governed by the rules of appeal for courts of limited jurisdiction  
15 (RALJ).

16 (8) For duplication of part or all of the electronic recording of  
17 a proceeding ten dollars per tape or other electronic storage medium.

18 (9) For filing any abstract of judgment or transcript of judgment  
19 from a municipal court or municipal department of a district court  
20 organized under the laws of this state a fee of forty-three dollars.

21 (10) Until July 1, 2011, in addition to the fees required by  
22 subsection (1) of this section, clerks of the district courts shall  
23 collect a surcharge of twenty dollars on all fees required by  
24 subsection (1) of this section, which shall be remitted to the state  
25 treasurer for deposit in the judicial stabilization trust account.  
26 This surcharge is not subject to the division and remittance  
27 requirements of RCW 3.62.020.

28 The fees or charges imposed under this section shall be allowed as  
29 court costs whenever a judgment for costs is awarded.

30 **Sec. 2.** RCW 12.40.020 and 2005 c 457 s 14 are each amended to read  
31 as follows:

32 A small claims action shall be commenced by the plaintiff filing a  
33 claim, in the form prescribed by RCW 12.40.050, in the small claims  
34 department. A filing fee of fourteen dollars plus any surcharge  
35 authorized by RCW 7.75.035 shall be paid when the claim is filed. Any  
36 party filing a counterclaim, cross-claim, or third-party claim in such  
37 action shall pay to the court a filing fee of fourteen dollars plus any

1 surcharge authorized by RCW 7.75.035. Until July 1, 2011, in addition  
2 to the fees required by this section, an additional surcharge of ten  
3 dollars shall be charged on the filing fees required by this section,  
4 which shall be remitted to the state treasurer for deposit in the  
5 judicial stabilization trust account.

6 **Sec. 3.** RCW 36.18.018 and 2005 c 282 s 43 are each amended to read  
7 as follows:

8 (1) State revenue collected by county clerks under subsection (2)  
9 of this section must be transmitted to the appropriate state court.  
10 The administrative office of the courts shall retain fees collected  
11 under subsection (3) of this section.

12 (2) For appellate review under RAP 5.1(b), two hundred fifty  
13 dollars must be charged.

14 (3) For all copies and reports produced by the administrative  
15 office of the courts as permitted under RCW 2.68.020 and supreme court  
16 policy, a variable fee must be charged.

17 (4) Until July 1, 2011, in addition to the fee established under  
18 subsection (2) of this section, a surcharge of thirty dollars is  
19 established for appellate review. The county clerk shall transmit this  
20 surcharge to the state treasurer for deposit in the judicial  
21 stabilization trust account.

22 **Sec. 4.** RCW 36.18.020 and 2005 c 457 s 19 and 2005 c 374 s 5 are  
23 each reenacted and amended to read as follows:

24 (1) Revenue collected under this section is subject to division  
25 with the state public safety and education account under RCW 36.18.025  
26 and with the county or regional law library fund under RCW 27.24.070,  
27 except as provided in subsection (4) of this section.

28 (2) Clerks of superior courts shall collect the following fees for  
29 their official services:

30 (a) In addition to any other fee required by law, the party filing  
31 the first or initial paper in any civil action, including, but not  
32 limited to an action for restitution, adoption, or change of name, and  
33 any party filing a counterclaim, cross-claim, or third-party claim in  
34 any such civil action, shall pay, at the time the paper is filed, a fee  
35 of two hundred dollars except, in an unlawful detainer action under  
36 chapter 59.18 or 59.20 RCW for which the plaintiff shall pay a case

1 initiating filing fee of forty-five dollars, or in proceedings filed  
2 under RCW 28A.225.030 alleging a violation of the compulsory attendance  
3 laws where the petitioner shall not pay a filing fee. The forty-five  
4 dollar filing fee under this subsection for an unlawful detainer action  
5 shall not include an order to show cause or any other order or judgment  
6 except a default order or default judgment in an unlawful detainer  
7 action.

8 (b) Any party, except a defendant in a criminal case, filing the  
9 first or initial paper on an appeal from a court of limited  
10 jurisdiction or any party on any civil appeal, shall pay, when the  
11 paper is filed, a fee of two hundred dollars.

12 (c) For filing of a petition for judicial review as required under  
13 RCW 34.05.514 a filing fee of two hundred dollars.

14 (d) For filing of a petition for unlawful harassment under RCW  
15 10.14.040 a filing fee of fifty-three dollars.

16 (e) For filing the notice of debt due for the compensation of a  
17 crime victim under RCW 7.68.120(2)(a) a fee of two hundred dollars.

18 (f) In probate proceedings, the party instituting such proceedings,  
19 shall pay at the time of filing the first paper therein, a fee of two  
20 hundred dollars.

21 (g) For filing any petition to contest a will admitted to probate  
22 or a petition to admit a will which has been rejected, or a petition  
23 objecting to a written agreement or memorandum as provided in RCW  
24 11.96A.220, there shall be paid a fee of two hundred dollars.

25 (h) Upon conviction or plea of guilty, upon failure to prosecute an  
26 appeal from a court of limited jurisdiction as provided by law, or upon  
27 affirmance of a conviction by a court of limited jurisdiction, a  
28 defendant in a criminal case shall be liable for a fee of two hundred  
29 dollars.

30 (i) With the exception of demands for jury hereafter made and  
31 garnishments hereafter issued, civil actions and probate proceedings  
32 filed prior to midnight, July 1, 1972, shall be completed and governed  
33 by the fee schedule in effect as of January 1, 1972: PROVIDED, That no  
34 fee shall be assessed if an order of dismissal on the clerk's record be  
35 filed as provided by rule of the supreme court.

36 (3) No fee shall be collected when a petition for relinquishment of  
37 parental rights is filed pursuant to RCW 26.33.080 or for forms and  
38 instructional brochures provided under RCW 26.50.030.

1       (4) Until July 1, 2011, in addition to the fees required by this  
2 section, clerks of superior courts shall collect the surcharges  
3 required by this subsection, which shall be remitted to the state  
4 treasurer for deposit in the judicial stabilization trust account:

5       (a) On filing fees under subsection (2)(b) of this section, a  
6 surcharge of twenty dollars; and

7       (b) On all other filing fees required by this section except for  
8 filing fees in subsection (2)(d) and (h) of this section, a surcharge  
9 of thirty dollars.

10       NEW SECTION. Sec. 5. A new section is added to chapter 43.79 RCW  
11 to read as follows:

12       The judicial stabilization trust account is created within the  
13 state treasury, subject to appropriation. All receipts from the  
14 surcharges authorized by sections 1 through 4, chapter . . . , Laws of  
15 2009 (sections 1 through 4 of this act) shall be deposited in this  
16 account. Moneys in the account may be spent only after appropriation.

17       Expenditures from the account may be used only for the support of  
18 judicial branch agencies.

19       NEW SECTION. Sec. 6. This act is necessary for the immediate  
20 preservation of the public peace, health, or safety, or support of the  
21 state government and its existing public institutions, and takes effect  
22 July 1, 2009.

Passed by the House April 26, 2009.

Passed by the Senate April 25, 2009.

Approved by the Governor May 19, 2009.

Filed in Office of Secretary of State May 20, 2009.

## Multiple Agency Fiscal Note Summary

<b>Bill Number:</b> 2362 P S HB AMS WM GREJ 001	<b>Title:</b> Judicial branch agencies
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### Estimated Cash Receipts

Agency Name	2009-11		2011-13		2013-15	
	GF- State	Total	GF- State	Total	GF- State	Total
Administrative Office of the Courts	0	10,682,251	0	556,367	0	0
Office of State Treasurer	Non-zero but indeterminate cost. Please see discussion."					
Office of Attorney General	0	42,720	0	42,720	0	42,720
<b>Total \$</b>	<b>0</b>	<b>10,724,971</b>	<b>0</b>	<b>599,087</b>	<b>0</b>	<b>42,720</b>

Local Gov. Courts *						
Local Gov. Other **						
Local Gov. Total						

### Estimated Expenditures

Agency Name	2009-11			2011-13			2013-15		
	FTEs	GF-State	Total	FTEs	GF-State	Total	FTEs	GF-State	Total
Administrative Office of the Courts	1.0	0	198,220	.3	0	39,680	.0	0	0
Office of State Treasurer	.0	0	0	.0	0	0	.0	0	0
Office of Attorney General	.0	1,980	44,700	.0	1,980	44,700	.0	1,980	44,700
<b>Total</b>	<b>1.0</b>	<b>\$1,980</b>	<b>\$242,920</b>	<b>0.3</b>	<b>\$1,980</b>	<b>\$84,380</b>	<b>0.0</b>	<b>\$1,980</b>	<b>\$44,700</b>

Local Gov. Courts *						
Local Gov. Other **						
Local Gov. Total						

This bill was identified as a proposal governed by the requirements of RCW 43.135.031 (Initiative 960). Therefore, this fiscal analysis includes a projection showing the ten-year cost to tax or fee payers of the proposed taxes or fees.

<b>Prepared by:</b> Cherie Berthon, OFM	<b>Phone:</b> 360-902-0659	<b>Date Published:</b> Final
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\* See Office of the Administrator for the Courts judicial fiscal note

\*\* See local government fiscal note

# Judicial Impact Fiscal Note

Revised

<b>Bill Number:</b> 2362 P S HB AMS WM GREJ 001	<b>Title:</b> Judicial branch agencies	<b>Agency:</b> 055-Admin Office of the Courts
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## Part I: Estimates

No Fiscal Impact

### Estimated Cash Receipts to:

FUND	FY 2010	FY 2011	2009-11	2011-13	2013-15
Judicial Stabilization Trust Account-State New-1	4,005,844	6,676,407	10,682,251	556,367	
Counties					
Cities					
<b>Total \$</b>	4,005,844	6,676,407	10,682,251	556,367	

### Estimated Expenditures from:

STATE	FY 2010	FY 2011	2009-11	2011-13	2013-15
State FTE Staff Years	1.0	1.0	1.0	.3	
<b>Fund</b>					
Judicial Stabilization Trust Account-State New-1	118,590	79,630	198,220	39,680	
State Subtotal \$	118,590	79,630	198,220	39,680	
COUNTY	FY 2010	FY 2011	2009-11	2011-13	2013-15
County FTE Staff Years					
<b>Fund</b>					
Local - Counties					
Counties Subtotal \$					
CITY	FY 2010	FY 2011	2009-11	2011-13	2013-15
City FTE Staff Years					
<b>Fund</b>					
Local - Cities					
Cities Subtotal \$					
Local Subtotal \$					
<b>Total Estimated Expenditures \$</b>	118,590	79,630	198,220	39,680	

This bill was identified as a proposal governed by the requirements of RCW 43.135.031 (Initiative 960). Therefore, this fiscal analysis includes a projection showing the ten-year cost to tax or fee payers of the proposed taxes or fees.

Request # -2

*The revenue and expenditure estimates on this page represent the most likely fiscal impact. Responsibility for expenditures may be subject to the provisions of RCW 43.135.060.*

Check applicable boxes and follow corresponding instructions:

- If fiscal impact is greater than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete entire fiscal note form Parts I-V.
- If fiscal impact is less than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete this page only (Part I).
- Capital budget impact, complete Part IV.

Contact	Phone:	Date: 04/23/2009
Agency Preparation: Julia Appel	Phone: (360) 705-5229	Date: 04/27/2009
Agency Approval: Dirk Marler	Phone: 360-705-5211	Date: 04/27/2009
OFM Review: Cherie Berthon	Phone: 360-902-0659	Date: 04/27/2009

Request # -2

## Part II: Narrative Explanation

### II. A - Brief Description Of What The Measure Does That Has Fiscal Impact on the Courts

This amendment regarding appropriations to the new account does not affect the following analysis.

This bill would establish surcharges on certain court filing fees. All of the following surcharges would only be in effect until July 1, 2011. All receipts from the surcharges would be deposited into the new Judicial Stabilization Trust Account.

Section 1 amends RCW 3.62.060 to require in addition to the fee under subsection (1) on civil actions, clerks of the district courts shall collect a surcharge of twenty dollars.

Section 2 amends RCW 12.40.020 to require that in addition to the fee on small claims actions, an additional surcharge of ten dollars shall be charged.

Section 3 amends RCW 36.18.018 to require that in addition to the fee under subsection (2) on appellate reviews, a surcharge of thirty dollars is established.

Section 4 amends RCW 36.18.020 to require that in addition to the fees required by the section, clerks of superior courts shall collect a surcharge of twenty dollars on appeals from a court of limited jurisdiction, and on civil appeals. A surcharge of thirty dollars is required on all other filings fees under the section (a variety of civil actions) except for fees on unlawful harassment petitions under subsection (2)(d), and fees on criminal convictions under subsection (2)(h).

Section 5 establishes the judicial stabilization trust account in the custody of the state treasurer. Expenditures from the account may be used only for the support of judicial branch agencies.

Section 6 provides an effective date of July 1, 2009.

### II. B - Cash Receipts Impact

Based on 2008 filings and fees, it is anticipated that the proposed surcharges would generate the following revenue:

135,079 surcharges at \$30 in superior court for potential annual revenue of \$4,052,355.

119,832 surcharges at \$20 in courts of limited jurisdiction for potential annual revenue of \$2,396,640.

22,741 surcharges at \$10 in courts of limited jurisdiction for potential annual revenue of \$227,410.

Total potential annual revenue is \$6,676,407. However, it is expected that revenue would not be receipted and collected at 100% until the second year, FY 2011. Accordingly, FY 2010 revenue is assumed to be \$4,005,844 (60% of total potential revenue). In FY 2012, it is assumed revenue would continue to be collected for one additional month.

### II. C - Expenditures

The provisions in this bill would require changes to the judicial information system. Analysis, programming, documentation, and training would require 258 hours at \$120 per hour for a total one-time cost to the state of \$30,960.

To track and report on revenue collection, one fiscal analyst (1 FTE) would be required in FY 2010 at a cost of \$87,630 and in FY 2011 at a cost of \$79,630. 1/2 FTE would be required in FY 2012 at a cost of \$39,680.

**Part III: Expenditure Detail**

**III. A - Expenditure By Object or Purpose (State)**

State	FY 2010	FY 2011	2009-11	2011-13	2013-15
FTE Staff Years	1.0	1.0	1.0	.3	
Salaries and Wages	64,740	64,740	129,480	32,370	
Employee Benefits	14,890	14,890	29,780	7,445	
Personal Service Contracts					
Goods and Services	30,960		30,960		
Travel					
Capital Outlays	8,000		8,000		
Inter Agency/Fund Transfers					
Grants, Benefits & Client Services					
Debt Service					
Interagency Reimbursements					
Intra-Agency Reimbursements					
<b>Total \$</b>	<b>118,590</b>	<b>79,630</b>	<b>198,220</b>	<b>39,815</b>	

**III. B - Expenditure By Object or Purpose (County)**

County	FY 2010	FY 2011	2009-11	2011-13	2013-15
FTE Staff Years					
Salaries and Benefits					
Capital					
Other					
<b>Total \$</b>					

**III. C - Expenditure By Object or Purpose (City)**

City	FY 2010	FY 2011	2009-11	2011-13	2013-15
FTE Staff Years					
Salaries and Benefits					
Capital					
Other					
<b>Total \$</b>					

**III. D - FTE Detail**

Job Classification	Salary	FY 2010	FY 2011	2009-11	2011-13	2013-15
Fiscal Analyst	64,740	1.0	1.0	1.0	0.3	
<b>Total FTE's</b>	<b>64,740</b>	<b>1.0</b>	<b>1.0</b>	<b>1.0</b>	<b>0.3</b>	<b>0.0</b>

**Part IV: Capital Budget Impact**

# Individual State Agency Fiscal Note

<b>Bill Number:</b> 2362 P S HB AMS WM GREJ 001	<b>Title:</b> Judicial branch agencies	<b>Agency:</b> 090-Office of State Treasurer
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**Part I: Estimates**

No Fiscal Impact

**Estimated Cash Receipts to:**

Non-zero but indeterminate cost. Please see discussion.

**Estimated Expenditures from:**

	FY 2010	FY 2011	2009-11	2011-13	2013-15
<b>Fund</b>					
<b>Total \$</b>					

This bill was identified as a proposal governed by the requirements of RCW 43.135.031 (Initiative 960). Therefore, this fiscal analysis includes a projection showing the ten-year cost to tax or fee payers of the proposed taxes or fees.

*The cash receipts and expenditure estimates on this page represent the most likely fiscal impact. Factors impacting the precision of these estimates, and alternate ranges (if appropriate), are explained in Part II.*

Check applicable boxes and follow corresponding instructions:

- If fiscal impact is greater than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete entire fiscal note form Parts I-V.
- If fiscal impact is less than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete this page only (Part I).
- Capital budget impact, complete Part IV.
- Requires new rule making, complete Part V.

Legislative Contact:	Phone:	Date: 04/23/2009
Agency Preparation: Dan Mason	Phone: 360-902-9090	Date: 04/24/2009
Agency Approval: Dan Mason	Phone: 360-902-9090	Date: 04/24/2009
OFM Review: Mike Woods	Phone: 360-902-9819	Date: 04/24/2009

Request # 207-1

## Part II: Narrative Explanation

### II. A - Brief Description Of What The Measure Does That Has Fiscal Impact

*Briefly describe by section number, the significant provisions of the bill, and any related workload or policy assumptions, that have revenue or expenditure impact on the responding agency.*

PSHB 2362 AMS WM GREJ 001 creates the judicial stabilization trust account. Earnings from investments will be credited to the general fund.

Earnings from investments:

The amount of earnings by an account is a function of the average daily balance of the account and the earnings rate of the investment portfolio. The average daily balance is a function of the beginning balance in the account and the timing & amount of receipts, disbursements, & transfers during the time period in question. Accordingly, even with a beginning balance of zero, two accounts with the same overall level of receipts, disbursements, and transfers can have different average balances, and hence different earnings.

There will be an impact to the earnings; however, the actual earnings will be determined more by the impact to the average daily balance than the amount of increases or decreases in receipts, disbursements, and transfers. Currently, estimated earnings are indeterminable. Without projected monthly estimates of receipts, disbursements, and transfers, OST is unable to estimate the changes to the average balance of the account and the impact to earnings.

Based on the March 2009 Revenue Forecast, the net rate for estimating earnings for FY 10 is 0.62% and FY 11 is 0.74%. Approximately \$6,200 in FY 10 and \$7,400 in FY 11 in net earnings and \$5,000 in OST management fees would be gained or lost annually for every \$1 million increase or decrease in average daily balance.

Debt Limit:

There may be an impact on the debt service limitation calculation. Any change to the earnings credited to the general fund will change, by an equal amount, general state revenues.

### II. B - Cash receipts Impact

*Briefly describe and quantify the cash receipts impact of the legislation on the responding agency, identifying the cash receipts provisions by section number and when appropriate the detail of the revenue sources. Briefly describe the factual basis of the assumptions and the method by which the cash receipts impact is derived. Explain how workload assumptions translate into estimates. Distinguish between one time and ongoing functions.*

PSHB 2362 AMS WM GREJ 001 creates the judicial stabilization trust account. Earnings from investments will be credited to the general fund.

### II. C - Expenditures

*Briefly describe the agency expenditures necessary to implement this legislation (or savings resulting from this legislation), identifying by section number the provisions of the legislation that result in the expenditures (or savings). Briefly describe the factual basis of the assumptions and the method by which the expenditure impact is derived. Explain how workload assumptions translate into cost estimates. Distinguish between one time and ongoing functions.*

## Part III: Expenditure Detail

### III. A - Expenditures by Object Or Purpose

	FY 2010	FY 2011	2009-11	2011-13	2013-15
FTE Staff Years					
<b>Total:</b>					

Request # 207-1

**Part IV: Capital Budget Impact**

**Part V: New Rule Making Required**

*Identify provisions of the measure that require the agency to adopt new administrative rules or repeal/revise existing rules.*

# Individual State Agency Fiscal Note

<b>Bill Number:</b> 2362 P S HB AMS WM GREJ 001	<b>Title:</b> Judicial branch agencies	<b>Agency:</b> 100-Office of Attorney General
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## Part I: Estimates

No Fiscal Impact

### Estimated Cash Receipts to:

FUND	FY 2010	FY 2011	2009-11	2011-13	2013-15
Legal Services Revolving Account-State 405-1	21,360	21,360	42,720	42,720	42,720
<b>Total \$</b>	21,360	21,360	42,720	42,720	42,720

### Estimated Expenditures from:

Fund	FY 2010	FY 2011	2009-11	2011-13	2013-15
General Fund-State 001-1	990	990	1,980	1,980	1,980
Legal Services Revolving Account-State 405-1	21,360	21,360	42,720	42,720	42,720
<b>Total \$</b>	22,350	22,350	44,700	44,700	44,700

This bill was identified as a proposal governed by the requirements of RCW 43.135.031 (Initiative 960). Therefore, this fiscal analysis includes a projection showing the ten-year cost to tax or fee payers of the proposed taxes or fees.

*The cash receipts and expenditure estimates on this page represent the most likely fiscal impact. Factors impacting the precision of these estimates, and alternate ranges (if appropriate), are explained in Part II.*

Check applicable boxes and follow corresponding instructions:

- If fiscal impact is greater than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete entire fiscal note form Parts I-V.
- If fiscal impact is less than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete this page only (Part I).
- Capital budget impact, complete Part IV.
- Requires new rule making, complete Part V.

Legislative Contact:	Phone:	Date: 04/23/2009
Agency Preparation: Tina Kondo	Phone: (206) 464-6293	Date: 04/24/2009
Agency Approval: Sarian Scott	Phone: (360) 586-2104	Date: 04/24/2009
OFM Review: John Shepherd	Phone: 360-902-0538	Date: 04/24/2009

Request # 09-234-1

## Part II: Narrative Explanation

### II. A - Brief Description Of What The Measure Does That Has Fiscal Impact

*Briefly describe by section number, the significant provisions of the bill, and any related workload or policy assumptions, that have revenue or expenditure impact on the responding agency.*

Section 1 amends RCW 3.62.060 to require clerks of district courts to collect a \$20 surcharge for parties filing counterclaims, cross-claims, or third-party claims. These surcharges will be deposited into the Judicial Stabilization Trust Account.

Section 2 amends RCW 12.40.020 to require an additional \$10 filing fee for small claims actions. This act is effective until July 1, 2011. These fees will be deposited into the Judicial Stabilization Trust Account.

Section 3 amends RCW 36.18.018 and 2005 c 282 s 43 to require an additional \$30 surcharge. This act is effective until July 1, 2011. These surcharges will be deposited into the Judicial Stabilization Trust Account.

Section 4 reenacts and amends RCW 36.18.020 and 2005 c 457 s 19 and 2005 c 374 s 5 to require clerks of superior courts to collect surcharges. These surcharges will be deposited into the Judicial Stabilization Trust Account. New surcharges are required from:

- 1) Any party (except criminal case defendants) filing a first or initial paper on an appeal from a court of limited jurisdiction, or any party on any civil appeal. These actions require payment of a \$20 surcharge.
- 2) All clerks of superior court shall collect a \$30 surcharge for all other actions in this section except for petitions for unlawful harassment, and for convictions, guilty pleas, failure to prosecute an appeal, or affirmance of a conviction by a court of limited jurisdiction.

The Attorney General's Office (AGO) estimates direct costs of \$990 for Consumer Protection, and \$21,360 in the Legal Service Revolving Fund for surcharges paid in filing cases with the state Supreme Court (CP estimates 33 cases at \$30 each; 712 cases at \$30 each in LSRF funding).

This bill is assumed effective July 1, 2009.

### II. B - Cash receipts Impact

*Briefly describe and quantify the cash receipts impact of the legislation on the responding agency, identifying the cash receipts provisions by section number and when appropriate the detail of the revenue sources. Briefly describe the factual basis of the assumptions and the method by which the cash receipts impact is derived. Explain how workload assumptions translate into estimates. Distinguish between one time and ongoing functions.*

AGO Consumer Protection activities are funded with General Fund-State dollars.

Funds are assumed to be Legal Service Revolving Account dollars. Legal services costs incurred by the AGO will be billed through the revolving fund to the client agency. Our client agency cost assumptions are listed below.

#### Assumptions

1. We assume the following client agencies will be billed for all fees outlined in this bill, if enacted. We further assume that these costs will be paid by the AGO and billed through the LSRF legal service invoices to those agencies. Cost impact by client agency is as follows:

Department of Health: \$120 (4 cases at \$30 each).

Department of Agriculture: \$180 (6 cases at \$30 each).  
Department of Corrections: \$390 (13 cases at \$30 each).  
Department of Ecology: \$630 (21 cases at \$30 each).  
Department of Education: \$90 (3 cases at \$30 each).  
Department of Social and Health Services: \$300 (10 cases at \$30 each).  
Department of Revenue: \$18,900 (630 cases at \$30 each).

3. We assume that the Spokane Division (SPO) will bill for filing 5 cases each FY. SPO supports client agencies in eastern Washington and doesn't support any single state agency. \$150 (5 cases at \$30 each).

4. We assume that the Government Compliance and Enforcement division (GCE) will bill for filing 20 cases each FY. GCE supports client agencies statewide and doesn't support any single state agency. \$600 (20 cases at \$30 each).

## II. C - Expenditures

*Briefly describe the agency expenditures necessary to implement this legislation (or savings resulting from this legislation), identifying by section number the provisions of the legislation that result in the expenditures (or savings). Briefly describe the factual basis of the assumptions and the method by which the expenditure impact is derived. Explain how workload assumptions translate into cost estimates. Distinguish between one time and ongoing functions.*

The Attorney General's Office (AGO) estimates direct costs of \$990 for Consumer Protection, and \$21,360 in the Legal Service Revolving Fund for surcharges paid in filing cases with the state Supreme Court (CP estimates 33 cases at \$30 each; 712 cases at \$30 each in LSRF funding).

### Assumptions

1. We assume the following client agencies will be billed for all fees outlined in this bill, if enacted. We further assume that these costs will be paid by the AGO and billed through the LSRF legal service invoices to those agencies. Cost impact by client agency is as follows:

Department of Health: \$120 (4 cases at \$30 each).  
Department of Agriculture: \$180 (6 cases at \$30 each).  
Department of Corrections: \$390 (13 cases at \$30 each).  
Department of Ecology: \$630 (21 cases at \$30 each).  
Department of Education: \$90 (3 cases at \$30 each).  
Department of Social and Health Services: \$300 (10 cases at \$30 each).  
Department of Revenue: \$18,900 (630 cases at \$30 each).

3. We assume that the Spokane Division (SPO) will bill for filing 5 cases each FY. SPO supports client agencies in eastern Washington and doesn't support any single state agency. \$150 (5 cases at \$30 each).

4. We assume that the Government Compliance and Enforcement division (GCE) will bill for filing 20 cases each FY. GCE supports client agencies statewide and doesn't support any single state agency. \$600 (20 cases at \$30 each).

### Part III: Expenditure Detail

#### III. A - Expenditures by Object Or Purpose

	FY 2010	FY 2011	2009-11	2011-13	2013-15
FTE Staff Years					
A-Salaries and Wages					
B-Employee Benefits					
C-Personal Service Contracts	22,350	22,350	44,700	44,700	44,700
E-Goods and Services					
G-Travel					
J-Capital Outlays					
M-Inter Agency/Fund Transfers					
N-Grants, Benefits & Client Services					
P-Debt Service					
S-Interagency Reimbursements					
T-Intra-Agency Reimbursements					
9-					
<b>Total:</b>	<b>\$22,350</b>	<b>\$22,350</b>	<b>\$44,700</b>	<b>\$44,700</b>	<b>\$44,700</b>

#### III. C - Expenditures By Program (optional)

Program	FY 2010	FY 2011	2009-11	2011-13	2013-15
Agriculture and Health Division (AHD)	300	300	600	600	600
Corrections Division (COR)	390	390	780	780	780
Consumer Protection Division (CP)	990	990	1,980	1,980	1,980
Ecology Division (ECY)	630	630	1,260	1,260	1,260
Education Division (EDU)	90	90	180	180	180
Government Compliance and Enforcement Division (	600	600	1,200	1,200	1,200
Revenue Division (REV)	18,900	18,900	37,800	37,800	37,800
Social & Health Services Division (SHS)	300	300	600	600	600
Spokane Division (SPO)	150	150	300	300	300
<b>Total \$</b>	<b>22,350</b>	<b>22,350</b>	<b>44,700</b>	<b>44,700</b>	<b>44,700</b>

### Part IV: Capital Budget Impact

None.

### Part V: New Rule Making Required

*Identify provisions of the measure that require the agency to adopt new administrative rules or repeal/revise existing rules.*

None.

# LOCAL GOVERNMENT FISCAL NOTE

Department of Community, Trade and Economic Development

<b>Bill Number:</b> 2362 P S HB AMS WM GREJ 001	<b>Title:</b> Judicial branch agencies
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**Part I: Jurisdiction**-Location, type or status of political subdivision defines range of fiscal impacts.

**Legislation Impacts:**

- Cities:
- Counties: District court and county clerks would collect surcharge on behalf of state; see Administrative Office of the Courts fiscal note for impacts.
- Special Districts:
- Specific jurisdictions only:
- Variance occurs due to:

**Part II: Estimates**

- No fiscal impacts.
- Expenditures represent one-time costs:
- Legislation provides local option:
- Key variables cannot be estimated with certainty at this time:

**Estimated revenue impacts to:**

Jurisdiction	FY 2010	FY 2011	2009-11	2011-13	2013-15
City					
County					
Special District					
<b>TOTAL \$</b>					
<b>GRAND TOTAL \$</b>					

**Estimated expenditure impacts to:**

Jurisdiction	FY 2010	FY 2011	2009-11	2011-13	2013-15
City					
County					
Special District					
<b>TOTAL \$</b>					
<b>GRAND TOTAL \$</b>					<b>0</b>

**Part III: Preparation and Approval**

Fiscal Note Analyst: Anne Pflug	Phone: 509-925-2608	Date: 04/27/2009
Leg. Committee Contact:	Phone:	Date: 04/23/2009
Agency Approval: Steve Salmi	Phone: (360) 725 5034	Date: 04/27/2009
OFM Review: Cherie Berthon	Phone: 360-902-0659	Date: 04/28/2009

## **Part IV: Analysis**

### **A. SUMMARY OF BILL**

*Provide a clear, succinct description of the bill with an emphasis on how it impacts local government.*

Creates a surcharge on certain court fees collected by district court and county clerks to be remitted to the state.

### **B. SUMMARY OF EXPENDITURE IMPACTS**

*Briefly describe and quantify the expenditure impacts of the legislation on local governments, identifying the expenditure provisions by section number, and when appropriate, the detail of expenditures. Delineate between city, county and special district impacts.*

See Administrative Office of the Courts fiscal note.

### **C. SUMMARY OF REVENUE IMPACTS**

*Briefly describe and quantify the revenue impacts of the legislation on local governments, identifying the revenue provisions by section number, and when appropriate, the detail of revenue sources. Delineate between city, county and special district impacts.*

See Administrative Office of the Courts fiscal note.



# Multiple Agency Ten-Year Analysis Summary

<b>Bill Number</b>	<b>Title</b>
2362P S HB AMS WM GREJ 001	Judicial branch agencies

This ten-year analysis is limited to the estimated cash receipts associated with the proposed tax or fee increases.

## Estimated Cash Receipts (Dollars in Thousands)

Agency Name	Fiscal Year 2010	Fiscal Year 2011	Fiscal Year 2012	Fiscal Year 2013	Fiscal Year 2014	Fiscal Year 2015	Fiscal Year 2016	Fiscal Year 2017	Fiscal Year 2018	Fiscal Year 2019	2010-19 TOTAL
Community, Trade and Econ Dev-Local	0	0	0	0	0	0	0	0	0	0	0
Office of Attorney General	0	0	0	0	0	0	0	0	0	0	0
Office of State Treasurer	0	0	0	0	0	0	0	0	0	0	0
Admin Office of the Courts	4,005,845	6,676,407	556,368	0	0	0	0	0	0	0	11,238,620
<b>Total</b>	<b>4,005,845</b>	<b>6,676,407</b>	<b>556,368</b>	<b>0</b>	<b>11,238,620</b>						



# Ten-Year Analysis

<b>Bill Number</b> 2362P S HB AMS WM GREJ 001	<b>Title</b> Judicial branch agencies	<b>Agency</b> 055 Admin Office of the Courts
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This ten-year analysis is limited to the estimated cash receipts associated with the proposed tax or fee increases.

## Estimates

No Cash Receipts

Indeterminate Cash Receipts

## Estimated Cash Receipts

Name of Fee	Acct Code	Fiscal Year 2010	Fiscal Year 2011	Fiscal Year 2012	Fiscal Year 2013	Fiscal Year 2014	Fiscal Year 2015	Fiscal Year 2016	Fiscal Year 2017	Fiscal Year 2018	Fiscal Year 2019	2010-19 TOTAL
Appellate Review Surcharge	New	25,470	42,450	3,538								71,458
Civil Action Surcharge - District Court	New	1,435,659	2,392,765	199,397								4,027,821
Civil Action Surcharge - Superior Court	New	2,405,943	4,009,905	334,159								6,750,007
Civil Appeal Surcharge	New	2,326	3,876	323								6,525
Small Claims Surcharge	New	136,447	227,411	18,951								382,809
<b>Total</b>		<b>4,005,845</b>	<b>6,676,407</b>	<b>556,368</b>								<b>11,238,620</b>
<b>Biennial Totals</b>		<b>10,682,252</b>	<b>556,368</b>	<b>11,238,620</b>								

## Narrative Explanation (Required for Indeterminate Cash Receipts)

It is projected that the surcharges proposed in this bill would generate approximately \$6,676,407 in FY 2011. It is expected that approximately 60% of the total potential revenue will be collected in FY 2010. It is assumed that revenue will continue to be collected for one month in FY 2012. (The surcharges are only in effect from July 1, 2009 through June 30, 2011.)

Appellate Review Fee Surcharge (under RCW 36.18.018) = \$30

Civil Action Fee Surcharge - District Court (under RCW 3.62.060) = \$20

Civil Action Fee Surcharge - Superior Court (under RCW 36.18.020) = \$30

Civil Appeal from Court of Limited Jurisdiction Fee Surcharge (under RCW 36.18.020) = \$20

Small Claims Fee Surcharge (under RCW 12.40.020) = \$10



# Ten-Year Analysis

Revised

<b>Bill Number</b> 2362P S HB AMS WM GREJ 001	<b>Title</b> Judicial branch agencies	<b>Agency</b> 055 Admin Office of the Courts
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Agency Preparation: Julia Appel	Phone: (360) 705-5229	Date: April 27, 2009
Agency Approval: Dirk Marler	Phone: 360-705-5211	Date: April 27, 2009
OFM Review: Cherie Berthon	Phone: 360-902-0659	Date: 4/27/2009 4:55:55PM



# Ten-Year Analysis

<b>Bill Number</b> 2362P S HB AMS WM GREJ 001	<b>Title</b> Judicial branch agencies	<b>Agency</b> 090 Office of State Treasurer
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This ten-year analysis is limited to the estimated cash receipts associated with the proposed tax or fee increases.

## Estimates

**No Cash Receipts**
 **Indeterminate Cash Receipts**

## Estimated Cash Receipts

Name of Fee	Acct Code																			
<b>Total</b>																				

## Biennial Totals

Agency Preparation: Dan Mason	Phone: 360-902-9090	Date: April 24, 2009
Agency Approval: Dan Mason	Phone: 360-902-9090	Date: April 24, 2009
OFM Review: Cherie Berthon	Phone: 360-902-0659	Date: 4/27/2009 4:55:55PM



# Ten-Year Analysis

<b>Bill Number</b> 2362P S HB AMS WM GREJ 001	<b>Title</b> Judicial branch agencies	<b>Agency</b> 100 Office of Attorney General
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This ten-year analysis is limited to the estimated cash receipts associated with the proposed tax or fee increases.

## Estimates

**No Cash Receipts**       **Indeterminate Cash Receipts**

Name of Fee	Acct Code								

Agency Preparation: Tina Kondo	Phone: (206) 464-6293	Date: April 24, 2009
Agency Approval: Sarian Scott	Phone: (360) 586-2104	Date: April 24, 2009
OFM Review: Cherie Berthon	Phone: 360-902-0659	Date: 4/27/2009 4:55:55PM



# FRAMEWORK

## **RECOMMENDATIONS FROM PUBLIC RECORDS WORK GROUP: ISSUES TO BE DECIDED**

### **(1) THRESHOLD ISSUE: Should the judiciary adopt its own set of standards and procedures for public access to judicial documents?**

- The work group was asked to recommend new standards/procedures for public access to judicial documents.
- Concerns have been raised in recent weeks that the work group's recommendation will be too costly for courts to implement, will be too burdensome for staff, especially in small courts, is too confusing for the public to understand, and will result in more public records being requested. See, e.g., the comments from Thurston County Superior Court (see page 36 of the Comments to BJA); Judge Prochnau (see page 33 of the Comments to BJA) and the minority report from Maxwell/Vance (see Section (A)(6)(d) of the work group's report).
- Do the benefits from adopting our own standards/procedures outweigh the risks and costs? Will adoption of "best practices" ease some of these concerns?

### **(2) STRUCTURE OF RULE: Should the work group's new standards/procedures be moved out of GR 31 and into a new stand-alone rule?**

- The work group's recommendation incorporates the new standards/procedures into GR 31, so that the broadest provisions on public access to judicial documents would be located together.
- The JIS Committee and the Washington State Association of County Clerks propose that the new provisions be moved out of GR 31. They maintain that separating the new provisions from GR 31's provisions on case records will eliminate potential confusion and will ensure that the already-established standards/procedures for case records will continue to work as before. (See pages 2 and 25 of the Comments to BJA.)
- The JIS Committee has drafted an approach for moving the work group's new provisions into a separate rule. (See page 12 of the Comments to BJA.)
- If the new provisions are moved into a separate rule, then several questions become moot as to how the new provisions would apply to case files. These questions are set forth at the end of this document.

### **(3) SCOPE OF PROPOSAL: Should any judicial entities be removed from the list of entities covered by the rule?**

- The work group's recommendation lists the wide range of judicial entities that are covered by the rule, § (c)(1).

- The State Bar Association is asking for a partial or full exemption from the rule, and is in the process of drafting revisions to GR 12 to more specifically address public access to the Bar's records. (See page 29 of the Comments to BJA.)
- The Certified Professional Guardian Board is asking for an exemption. (See page 30 of the Comments to BJA.)
- The Capital Case Committee is asking for a partial or full exemption, so that its records relating to the evaluation of attorneys are kept confidential. (See page 27 of the Comments to BJA.)

**(4) SPECIFIC PROVISIONS:**

**(a) Judges' e-mails and other chambers records.**

- The work group's recommendation protects all chambers records from disclosure, § (d)(5).
- "Chambers record" is defined as "any writing that is created by or maintained by any judicial officer or chambers staff, and is maintained under chambers control, whether directly related to an official judicial proceeding or other chambers activities." Recommendation § (d)(5).
- Judges' e-mail was a significant topic of discussion within the work group and within the trial judges' associations.
- The minority report from Maxwell/Vance advocates for broader protection (see section (A)(6)(d) of the work group's report).
- The minority report from Allied Daily Newspaper advocates for narrower protection (see section (A)(6)(e) of the work group's report).

**(b) Minutes from judges' meetings.**

- The work group's recommendation makes confidential the minutes from meetings held within a court, § f(1)(B).
- This was a significant subject of discussion within the work group.
- Spokane County Superior Court had indicated previously that making these documents accessible could be a problem for other courts.
- Judge Becker has asked whether the rule would provide public access to minutes from judges' meetings, and if so, whether the minutes need to keep detailed records of the actual votes (see page 45 of the Comments to BJA).

**(c) People who are the subjects of records – Right to participate and intervene?**

- The work group's recommendation does not include any special procedures for subjects of records to become involved in decisions about release of records.
- The work group discussed this issue (late in its process) but was unable to reach a satisfactory resolution.
- The minority report from the ACLU proposes that the rule: (1) state that agencies may notify these people that a record about them has been

requested; (2) give these people the right to seek review of an agency's decision to release the record, or to intervene in any such review that is otherwise underway. (See section (A)(6)(b) of the work group's report.)

**(d) Common law balancing test.**

- Under the work group's proposal, the balancing test applies only to superior court decisions in resolving ambiguities in the rule's provisions, § (f)(5).
- The Allied Daily Newspaper's minority report advocates that the balancing test should not be used at all. (See section (A)(6)(e) of the work group's report.)
- The ACLU's minority report proposes that the balancing test be expanded so that it would apply more broadly to protect privacy interests. (See section (A)(6)(b) of the work group's report.)

**(e) Recouping the cost of staff time.**

- The work group's recommendation allows fees to be charged for copying or scanning records, but it does not address the charging of fees to compensate for the cost of staff time in responding to the request. See § (h).
- A concern has been raised that some records requests will require significant amounts of staff time to process (e.g., to research what records exist, to gather the records, and to copy the records. (See, e.g., the questions from Paul Sherfey, page 39 in the Comments to BJA.)

**(5) ISSUES THAT BECOME MOOT IF THE RULES ARE SEPARATED UNDER ISSUE (2).**

• **IT servers.**

- The work group's recommendation protects from disclosure documents that are entrusted to others for storage and maintenance, such as documents held on IT servers, § (c)(4).
- Judge Wynne, in his comments to BJA, proposed clarifying this provision so that it does not apply to case records. (See page 44 of the Comments to BJA.) Separating the two rules takes care of this concern.

• **Access to case files.**

- Concerns have been raised whether the work group's recommendation could result in changes for access to case files, including as to the charging of fees for that access. See, e.g., the following pages in the Comments to BJA: pages 2, 25, 46, and 47. Separating the two rules takes care of these concerns.
-

# **FINAL REPORT**

**BOARD FOR JUDICIAL ADMINISTRATION (BJA)  
PUBLIC RECORDS WORK GROUP  
FINAL REPORT  
SEPTEMBER 17, 2010**

**Public Records Final Report**

**A. Work Group Report**

1. Executive Summary
2. Text of Proposed Revision of GR31: Access to Judicial Records
3. Proposed Rule Adoption / Implementation Timeline
4. Best Practices / Readiness Recommendations
5. Roster of Work Group Members and Attendees
6. Minority Reports
  - a. WSBA inclusion under the rule, submitted by Robert Welden, WSBA  
Joined in by: Krista Wiitala, WSBA; Judge Marlin Appelwick, Court of Appeals;  
Jeff Hall, State Court Administrator
  - b. Protection of record subject interests in records requests, submitted by Doug Klunder, ACLU  
Joined in by: Kristal Wiitala, WSBA
  - c. Protection of privacy in records requests, submitted by Doug Klunder, ACLU  
Joined in by: Kristal Wiitala, WSBA
  - d. Concerns regarding implementation and administration impacts on small courts, submitted by Marti Maxwell, AWSCA  
Joined in by: Aimee Vance, DMCMA
  - e. Objections & Dissent to Proposed Revisions, submitted by Rowland Thompson, ADNW

**B. Appendices – Available upon request**

1. Work Group Charge
2. Minutes from the meetings [as approved]
3. Time Line / Activity Plans [for combined work group and proposed rule adoption / implementation timelines]
4. Basic Group Meetings Framework [utilized to organize work; never updated beyond first draft]
5. Basic Work Group Presumptions [utilized to organize work; never updated beyond first draft]
6. City of Federal Way v. Koenig
7. Public Access to Judicial Records: Response to Koenig Decision
8. Telford and Clarke – Functional Equivalent to State Agency Test
9. Staff Presentation/Overview of Public Records Act (PRA) (General history, outline, categories of exemptions)

10. "Access to Judicial Information": COSCA Survey Table, January 2007
11. AOC Administrative Public Records Policy
12. Existing Laws Addressing Access to Court Case Files
13. Overview of How Three States and COSCA Approach Public Access to Administrative Records of the Judiciary
14. Texts of Florida, Minnesota, and Michigan court rules
15. Draft Court Records Diagram (5/21/10; Mr. Crittenden)
16. Framework Options for Rule/Statute on Public Access to Judicial Records [utilized to assist in drafting modifications to the rule]
17. Draft Recommended Applicability of Proposed Rules/Approach to Judicial Entities [note: never updated, as simply used to assist in drafting modifications to the rule]
18. Legal analysis: Overview of test for applying the PRA to "functional equivalents" of public agencies
19. Beginning list of topics to consider for possible new exemptions [note: never updated, as simply used to assist in drafting modifications to the rule]
20. Master List of Judicial Entities [ultimately incorporated, as appropriate, into the draft modifications of the rule]
21. Master List of Judicial Records (short version)
22. Master List of Judicial Records (long version, with initial categorization)
23. Survey e-mails to judicial entities and Survey Summary Chart of answers to the specific questions and significant general comments from entities
24. Survey individual judicial entity responses (full written comments)
25. List of PRA Potentially Relevant Exemptions [not necessarily all inclusive; living document]
26. List of Other Statutes Potentially Relevant Exemptions [not necessarily all inclusive; living document]

Reference materials that were utilized by the work group but which are readily available to any party are not included in this packet in the interest of brevity and cost savings. Those materials include but are not necessary limited to: Public Records Act (PRA); PRA Deskbook, Chapters 2 & 3 ("The Public Records Act: Legislative History and Public Policy" & "Who and What the Public Records Act Covers"); AGO Open Government Manual, Chapters 1 & 2 ("PRA – General and Procedural Provisions" & "PRA – Exemptions from Disclosure"); AGO "Top 15 Tips for Public Records Compliance"; GR22: Access to Guardianship and Family Law Records; RCW 42.40.910 – Whistleblower Act application language; Rule ARLJ 9: Disclosure of Records; Text of Current GR31: Access to Court Records; *Nast v. Michaels*.

## **A. WORK GROUP REPORT**

**A. WORK GROUP REPORT**  
**1. EXECUTIVE SUMMARY**

September 15, 2010

**TO:** Board for Judicial Administration (BJA)

**FROM:** Judge Marlin J. Appelwick, Chair  
BJA Public Records Work Group

**RE:** BJA Public Records Work Group Final Report – Executive Summary

## I. Recommendation

**The Public Records Work Group recommends that the Board for Judicial Administration (BJA) approve the submission of the proposed court rule regulating disclosure of judicial records, and if adopted by the Supreme Court, appoint a committee to develop best practices to facilitate implementation of that rule.**

## II. Introduction

The BJA appointed the Public Records Work Group in December 2009. At the time it appeared the Legislature might take up the question of whether the judicial branch should be subject to the state Public Records Act (PRA) as a response to the Supreme Court decision in City of Federal Way v. David Koenig [Appendix, tab 6]. This case strongly reinforced previous case law that records of the judicial branch of state government are not subject to disclosure under the PRA.

The charge to the Work Group was to:

1. Make recommendations regarding how the Public Records Act (PRA) should apply to the administrative records of the judicial branch as defined in GR 31 (c)(2), with consideration given to:
  - Whether such application should be made via statutory amendments or court rule;
  - What exemptions to the PRA are necessary for the judicial branch;

- Application of existing court rules, statutes and common law.
- 2. Develop a substantive implementation proposal consistent with the recommendations.
- 3. Involve such other stakeholders as the work group determines necessary to develop a realistic and acceptable proposal.

The work group consisted of representatives from the appellate courts, Judge Marlin Appelwick; Superior Court Judges' Association (SCJA), Judge Ronald Culpepper; District and Municipal Court Judges' Association (DMCJA), Judge Susan Dubuisson; Administrative Office of the Courts (AOC), Mr. Jeffrey Hall; Association of Washington Superior Court Administrators (AWSCA), Ms. Marti Maxwell; District and Municipal Court Management Association (DMCMA), Ms. Aimee Vance; Washington Coalition for Open Government (WCOG), Mr. Toby Nixon and Mr. William Crittenden; Washington State Bar Association (WSBA), Mr. Robert Welden and Ms. Kristal Wiitala; Allied Daily Newspapers of Washington (ADNW), Mr. Rowland Thompson; and the Office of Public Defense (OPD), Ms. Sophia Byrd McSherry. Guests who attended one or more meetings included Senator Adam Kline, Mr. James Bamberger (OCLA), Ms. Mellani McAleenan (AOC), Ms. Kathy Kuriyama (OPD), and Mr. Doug Klunder (ACLU). The work group was staffed by three employees of the AOC. See Report, tab 5 and Appendix, tab 2.

### **III. Process**

The work group met in eight half-day working sessions. The ambitious schedule [Appendix, tab 3] was intended to allow the submittal of a proposal before the next Court Rule deadline or legislative session. The recommendation contemplates the new rules be effective in 2012.

The work group reviewed and discussed its charge [Appendix, tab 1], reviewed state case law and court rules related to judicial records disclosure [Appendix, tabs 6, 7 and 12], heard a general overview of the PRA [Appendix 9], heard a general overview of current statutes and case law regarding access to court records and a brief history to our current status [Appendix, tabs 7 and 12], reviewed research materials compiled and analyzed by staff [Appendix, tabs 6, 7, 8, 10, 12, 13, 14, 18, 25 and 26, plus see information on reference materials at end of Report outline], agreed on basic presumptions for their work [Appendix, tabs 4 and 5], created a master list of judicial entities

[Appendix, tabs 20], created a master list of judicial records classifications currently utilized (including initial categorization of exemption status) [Appendix, tab 21 and 22], and reviewed approaches to judicial records disclosure utilized in other states including the review of texts of several states [Appendix, tabs 13 and 14].

The work group also reviewed COSCA surveys and model approaches [Appendix, tab 10], compiled and reviewed potentially applicable exemptions under the PRA [Appendix, tab 25], compiled and reviewed potentially applicable exemptions under "other statutes" [Appendix, tab 26], solicited and compiled input from judicial entities [Appendix, tab 23], reviewed summary responses from judicial entities as well as full texts of responses [Appendix, tabs 23 and 24], and wrote and reviewed analysis on questions that arose during our work (e.g. test for applying the PRA to functional equivalents of public agencies) [Appendix, tabs 7, 12, 13 and 18].

The work group drafted and utilized a "Framework Options for Rule/Statute on Public Access to Judicial Records" [Appendix, tab 16] to assist it in developing its approach to addressing its charge. Once the work group made the determination to address its charge through a proposed rule, rather than through use of the PRA or other statutory changes, the same framework assisted the group in determining components that should be in the rule and approaches to scope, process, exemptions to disclosure, non-compliance, accountability, and procedures.

The minutes of the meetings and the pertinent research materials, surveys and responses are included in the appendix.

The work group attempted, at all times, to utilize consensus for its decision-making. Members were repeatedly encouraged to submit a minority report on any issue or approach with which they disagreed. The significant areas of disagreement focused on four areas: application of PRA vs. court rule; whether the rule was too protective or too broadly provided for disclosure; protection of privacy interests of persons whose personal information may be contained in records disclosed; and impacts on small courts. The report includes those dissenting statements [Report, tab 6].

The work group believes it is very important to develop best practice and a training/implementation plan for the rule and has recommended areas to be developed [Report, tab 4]. However, the work group believed it was not the proper mix of persons to develop those practices. If the Supreme Court of Washington takes favorable action on the proposed rule, then the BJA should sponsor a work group to develop best practices/readiness recommendations, and otherwise oversight and monitor the implementation process for the new revised rule. Some members of the work group volunteered to be members of the new work group, and some members of the work group volunteered to have their represented organization furnish a member for the new work group. These include Toby Nixon of Washington Citizens for Open Government (WCOG), Rowland Thompson of the Allied Daily Newspapers of Washington (ADNW), the Washington State Bar Association (WSBA), the Office of Public Defense (OPD), the Board for Court Education (BCE), the Association of Washington Superior Court Administrators (AWSCA), and the District and Municipal Court Management Association (DMCMA).

#### **IV. Chief Elements of Proposed Amendments to GR 31**

The work group selected a court rule rather than inclusion within the PRA as the appropriate course. Some members outside the judicial branch favored placing the branch under the PRA with exemptions peculiar to the courts being added into that statute. The adoption of a court rule does not guarantee the Legislature will not attempt to cover the judicial branch in the PRA, but it does remove the need for it to do so, and avoids disagreement over separation of powers issues which might lead to awkward litigation.

The decision to present the recommendation in the form of amendments to GR 31 as opposed to a new free standing rule was a decision of the Chair. Even with a free standing rule on administrative records, some amendments to GR 31 would be required. For purposes of understanding how the rules for various types of records interacted, the Chair believed it clearer to integrate. The Supreme Court may take a different approach without doing violence to the substance of the recommendation. The provisions of GR 31 regarding case records have not been changed.

The proposed rule would apply to all judicial agencies, not just courts. The rule lists those agencies. The listing was done for purposes of clarity during

review. It may not be desirable in the final rule to have such a list. The only controversy with respect to inclusion relates to the Washington State Bar Association as to its trade association functions. The WSBA has filed a minority report [Report, tab 6] explaining why it believes it should be excluded from the rule. A judicial officer is not an agency under the rule and is not separately subject to any disclosure request.

Judicial branch records are divided into three general categories: case records, chambers records, and administrative records. Case records continue to fall under existing rules (including appropriate sections of GR 31) and common law.

New rules are proposed for administrative records which have parallels in the PRA. They include the requirement to appoint a public records officer, procedures for making and responding to requests for records, public notice of that contact and procedure, disclosure/nondisclosure provisions, a listing of exemptions in addition to those falling under federal law, state law, and court rule, and the requirement for judicial entities to develop a public records policy. The rule includes an expedited appeals process and limited sanctions. The rule does not allow per diem fines available under the PRA.

Chambers records are a new category of records excluded from disclosure. This is an area of some controversy. Chambers records are neither case records nor administrative records. They are records of the judicial officer and staff, kept under chambers control. They are excluded from the rule to avoid intrusion into the judicial decision making function by virtue of review of those records. The intrusion would occur whether or not a record was ultimately subject to disclosure or not if the rule did not exclude them.

**A. WORK GROUP REPORT**  
**2. TEXT OF PROPOSED REVISION**  
**OF GR31: ACCESS TO JUDICIAL**  
**RECORDS**

# PROPOSED AMENDMENTS TO GR 31 FROM PUBLIC RECORDS WORK GROUP

SEPTEMBER 15, 2010

## GR 31 ACCESS TO ~~COURT~~ JUDICIAL RECORDS

**(a) Policy and Purpose.** It is the policy of the ~~courts~~ judiciary to facilitate access to ~~court~~ judicial records as provided by article I, section 10 of the Washington State Constitution. Access to ~~court~~ judicial records is not absolute and shall be consistent with reasonable expectations of personal privacy as provided by article 1, section 7 of the Washington State Constitution, restrictions in statutes, restrictions in court rules, and as required for the integrity of judicial decision-making. and Access shall not unduly burden the business of the ~~courts~~ judiciary.

*[COMMENT: The work group expanded this provision so that it applies to all judicial records (not only case records) and all judicial agencies (not just courts).]*

**(b) Scope.** This rule governs the right of public access to judicial records. This rule applies to all ~~court~~ judicial records, regardless of the physical form of the ~~court~~ record, the method of recording the ~~court~~ record or the method of storage of the ~~court~~ record. ~~Administrative records are not within the scope of this rule.~~ Court Case records are further governed by GR 22.

*[COMMENT: The work group expanded this provision so that it applies to all judicial records, not just case records.]*

### **(c) Application of Rule.**

- (1) This rule applies to the following judicial agencies:
  - A. The Supreme Court and the Court of Appeals;
  - B. The superior, district, and municipal courts;
  - C. Board for Judicial Administration;
  - D. Administrative Office of the Courts;
  - E. Judicial Information System Committee;
  - F. Minority and Justice Commission;
  - G. Gender and Justice Commission;
  - H. Board for Court Education;

- I. Interpreter Commission;
- J. Certified Professional Guardian Board;
- K. Commission on Children In Foster Care;
- L. Washington State Pattern Jury Instruction Committee;
- M. Pattern Forms Committee;
- N. Court Management Council;
- O. Bench Bar Press Committee;
- P. Judicial Ethics Advisory Committee;
- Q. Office of Public Guardianship;
- R. Washington Center for Court Research;
- S. Office of Civil Legal Aid;
- T. Office of Public Defense;
- U. State Law Library;
- V. Washington State Bar Association;

*[COMMENT: The work group debated the rule's application to the WSBA. The work group applied the Telford factors for determining which entities are the "functional equivalents" for public agencies under the Public Records Act. The Telford factors are (1) governmental function; (2) level of governmental funding; (3) extent of governmental involvement or regulation; and (4) creation by government. The work group concluded that the WSBA was the functional equivalent of a judicial agency for purposes of the proposed rule. The work group considered excluding from the scope of this rule the WSBA's functions as a trade organization (as opposed to its regulatory functions) but rejected this approach because the WSBA's dues are mandatory, making them similar to a government-imposed fee. Existing court rules on public access already address much of the Bar's regulatory activities; it is expected that the existing rules would cover much of the documents for WSBA's regulatory function.]*

*[A minority report has been filed by Bob Welden on behalf of the WSBA on this item. Minority reports are included earlier in the work group's report.]*

- W. County clerk's offices with regard to their duties to the superior court and their custody of superior court records;

*[COMMENT: In most counties, the county clerk is an independently elected position. The county clerk's office acts as the legal custodian of superior court records, and members of the office act under the supervision of judges in the courtroom, but the office also has duties that are outside the judicial arena. This rule would apply only with regard to the office's duties to the court and its records.]*

- X. Superior Court Judges Association, District and Municipal Court Judges Association, and similar associations of judicial officers and employees.

*[COMMENT: The work group debated whether these associations should be governed by this rule. Just as with the WSBA, the work group looked to the Telford factors and determined that these associations are the*

"functional equivalent" of judicial agencies and thus should be covered by the rule.]

- Y. All other judicial entities that are overseen by a court, whether or not specifically identified in this section (c)(1); and
- Z. All subgroups of the entities listed above, including committees, task forces, commissions, boards, offices, and departments.

[COMMENT: The proposal includes a list of specific judicial agencies, along with catch-all provisions in subparagraphs (Y) and (Z). The work group took this approach to make sure there was no mistake as to the original intentions for the rule's scope. BJA and/or the Supreme Court will have the opportunity to replace the list with a more general definition of "judicial agency."]

- (2) This rule does not apply to the Commission on Judicial Conduct. The Commission is encouraged to incorporate any of the provisions in this rule as it deems appropriate.

[COMMENT: The Commission on Judicial Conduct is not governed by a court. The commission has a heightened need for maintaining independence from courts. It would be inappropriate to dictate to the commission its policies on public records.]

- (3) A judicial officer is not an agency.

[COMMENT: This provision protects judges and court commissioners from having to respond personally to public records requests. Records requests would instead go to the court's public records officer.]

- (4) A person or entity entrusted by a judicial agency with the storage and maintenance of its public records, whether part of a judicial agency or a third party, is not a judicial agency. Such person or entity may not respond to a request for access to judicial records, absent express written authority from the judicial agency or separate authority in rule or statute to grant access to the documents.

[COMMENT: Judicial e-mails and other documents sometimes reside on IT servers, some are in off-site physical storage facilities. This provision prohibits an entity that operates the IT server from disclosing judicial records. The entity is merely a bailee, holding the records on behalf of the judicial agency, rather than an owner of the records having independent authority to release them. Similarly, if a court puts its paper records in storage with another entity, the other entity cannot disclose the records. In either instance, it is the judicial agency that needs to make the decision as to releasing the records. The records request needs to be addressed by the judicial agency's public records officer, not by the person or entity having control over the IT server or the storage area. On the other hand, if the judicial agency archives its records with the state archivist, relinquishing its own authority as to disposition of the records, the archivist would have separate statutory authority to disclose the records.]

**(e) (d) Definitions.**

(1) "Access" means the ability to view or obtain a copy of a ~~court~~ judicial record.

(2) "Administrative record" means ~~any record pertaining to the management, supervision or administration of the judicial branch, including any court, board, or committee appointed by or under the direction of any court or other entity within the judicial branch, or the office of any county clerk;~~ any public record created by or maintained by a judicial agency and related to the management, supervision, or administration of the agency.

*[COMMENT: The Public Records Work Group has developed a list of categories of records maintained by judicial agencies. The list is annotated with the Work Group's expectation of whether such records are subject to disclosure. The list is found as an appendix to the work group's report. It is intended for illustrative purposes only.]*

(3) "Bulk distribution" means distribution of all, or a significant subset, of the information in ~~court~~ case records, as is and without modification.

(4) "~~Court~~ Case record" includes, but is not limited to: (i) Any document, information, exhibit, or other thing that is maintained by a court in connection with a judicial proceeding, and (ii) Any index, calendar, docket, register of actions, official record of the proceedings, order, decree, judgment, minute, and any information in a case management system created or prepared by the court that is related to a judicial proceeding. ~~Court Case~~ Case record does not include data maintained by or for a judge pertaining to a particular case or party, such as personal notes and communications, memoranda, drafts, or other working papers; administrative records; chambers records; or information gathered, maintained, or stored by a government agency or other entity to which the court has access but which is not entered into the record.

(5) (a) "Chambers record" means any writing that is created by or maintained by any judicial officer or chambers staff, and is maintained under chambers control, whether directly related to an official judicial proceeding or other chambers activities. "Chambers staff" means a judicial officer's law clerk and any other staff when providing support directly to the judicial officer at chambers.

(b) Chambers records are not public records. Case records and administrative records do not become chambers records merely because they are in the possession or custody of a judicial officer.

[COMMENT: Access to chambers records could necessitate a judicial officer having to review all records to protect against disclosing case sensitive information or other information that would intrude on the independence of judicial decision making. This would effectively make the judicial officer a de facto public records officer and could greatly interfere with judicial functions. Records may remain under chambers control even though they are physically stored elsewhere. However, records that are otherwise subject to disclosure should not be allowed to be moved into chambers control as a means of avoiding disclosure.]

~~(5)~~ (6) "Criminal justice agencies" are government agencies that perform criminal justice functions pursuant to statute or executive order and that allocate a substantial part of their annual budget to those functions.

~~(6)~~ (7) "Dissemination contract" means an agreement between a court case record provider and any person or entity, except a Washington State court (Supreme Court, court of appeals, superior court, district court or municipal court), that is provided court case records. The essential elements of a dissemination contract shall be promulgated by the JIS Committee.

~~(7)~~ (8) "Judicial Information System (JIS) Committee" is the committee with oversight of the statewide judicial information system. The judicial information system is the automated, centralized, statewide information system that serves the state courts.

~~(8)~~ (9) "Judge" means a judicial officer as defined in the Code of Judicial Conduct (CJC) Application of the Code of Judicial Conduct Section (A).

~~(9)~~ (10) "Public" includes an individual, partnership, joint venture, public or private corporation, association, federal, state, or local governmental entity or agency, however constituted, or any other organization or group of persons, however organized.

~~(10)~~ (11) "Public purpose agency" means governmental agencies included in the definition of "agency" in RCW 42.17.020 and other non-profit organizations whose principal function is to provide services to the public.

(12) "Public record" includes any writing, except chambers records, containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any judicial agency regardless of physical form or characteristics.

*COMMENT: The definition is adapted from the Public Records Act. The work group added the exception for chambers records, for consistency with other parts of the proposed rule.]*

(13) "Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.

*[COMMENT: The definition is taken from the Public Records Act.]*

**~~(d)~~ (e) Access- Case Records.**

(1) **Right of Access to Case Records.** The public shall have access to all ~~court~~ case records except as restricted by federal law, state law, court rule, court order, or case law.

**~~(e)~~ (2) Personal Identifiers Omitted or Redacted from ~~Court~~ Case Records**

~~(1)~~ (A) Except as otherwise provided in GR 22, parties shall not include, and if present shall redact, the following personal identifiers from all documents filed with the court, whether filed electronically or in paper, unless necessary or otherwise ordered by the Court.

~~(A)~~ (1) Social Security Numbers. If the social security number of an individual must be included in a document, only the last four digits of that number shall be used.

~~(B)~~ (2) Financial Account Numbers. If financial account numbers are relevant, only the last four digits shall be recited in the document.

~~(C)~~ (3) Driver's License Numbers.

~~(2)~~ (B) The responsibility for redacting these personal identifiers rests solely with counsel and the parties. The Court or the Clerk will not review each pleading for compliance with this rule. If a pleading is filed without redaction, the opposing party or identified person may move the Court to order redaction. The court may award the prevailing party reasonable expenses, including attorney fees and court costs, incurred in making or opposing the motion.

COMMENT

*This rule does not require any party, attorney, clerk, or judicial officer to redact information from a court case record that was filed prior to the adoption of this rule.*

**~~(f)~~ (3) Distribution of Court Case Records Not Publicly Accessible**

~~(1)~~ (A) A public purpose agency may request court case records not publicly accessible for scholarly, governmental, or research purposes where the identification of specific individuals is ancillary to the purpose of the inquiry. In order to grant such requests, the court or the Administrator for the Courts must:

~~(A)~~ (1) Consider: (i) the extent to which access will result in efficiencies in the operation of the judiciary; (ii) the extent to which access will fulfill a legislative mandate; (iii) the extent to which access will result in efficiencies in other parts of the justice system; and (iv) the risks created by permitting the access.

~~(B)~~ (2) Determine, in its discretion, that filling the request will not violate this rule.

~~(C)~~ (3) Determine the minimum access to restricted court case records necessary for the purpose is provided to the requestor.

~~(D)~~ (4) Assure that prior to the release of court case records under section ~~(f)~~ (1) (e)(3)(A), the requestor has executed a dissemination contract that includes terms and conditions which: (i) require the requester to specify provisions for the secure protection of any data that is confidential; (ii) prohibit the disclosure of data in any form which identifies an individual; (iii) prohibit the copying, duplication, or dissemination of information or data provided other than for the stated purpose; and (iv) maintain a log of any distribution of court case records which will be open and available for audit by the court or the Administrator of the Courts. Any audit should verify that the court case records are being appropriately used and in a manner consistent with this rule.

~~(2)~~ (B) Courts, court employees, clerks and clerk employees, and the Commission on Judicial Conduct may access and use court case records only for the purpose of conducting official court business.

*[COMMENT: The work group received a request from the Office of Public Defense to expand the provision above to address access by OPD and OCLA to case*

records. The work group declined to incorporate this request, as it is beyond the scope of the work group's charge to address the public's access to judicial records.]

~~(3)~~ (C) Criminal justice agencies may request ~~court~~ case records not publicly accessible.

~~(A)~~ (1) The provider of ~~court~~ case records shall approve the access level and permitted use for classes of criminal justice agencies including, but not limited to, law enforcement, prosecutors, and corrections. An agency that is not included in a class may request access.

~~(B)~~ (2) Agencies requesting access under this section of the rule shall identify the ~~court~~ case records requested and the proposed use for the ~~court~~ records.

~~(C)~~ (3) Access by criminal justice agencies shall be governed by a dissemination contract. The contract shall: (i) specify the data to which access is granted; (ii) specify the uses which the agency will make of the data; and (iii) include the agency's agreement that its employees will access the data only for the uses specified.

~~(g)~~ **(4) Bulk Distribution of ~~Court~~ Case Records**

~~(1)~~ (A) A dissemination contract and disclaimer approved by the JIS Committee for JIS records or a dissemination contract and disclaimer approved by the court clerk for local records must accompany all bulk distribution of ~~court~~ case records.

~~(2)~~ (B) A request for bulk distribution of ~~court~~ case records may be denied if providing the information will create an undue burden on court or court clerk operations because of the amount of equipment, materials, staff time, computer time or other resources required to satisfy the request.

~~(3)~~ (C) The use of ~~court~~ case records, distributed in bulk form, for the purpose of commercial solicitation of individuals named in the ~~court~~ case records is prohibited.

~~(h)~~ **(5) Appeals Relating to JIS Records.** Appeals of denials of access to JIS records maintained at state level shall be governed by the rules and policies established by the JIS Committee.

**(f) (6) Notice.** The Administrator for the Courts shall develop a method to notify the public of access to court case records and the restrictions on access.

**(f) Administrative Records.**

**(1) Administrative Records—Right of Access.**

- A. ~~The public has a right of access to all administrative records except as exempted by federal laws, state laws, this rule and other court rules, court orders, or case law.~~  
The public has a right of access to judicial agency administrative records unless access is exempted or prohibited under this rule, other court rules, federal statutes, state statutes, court orders, or case law. To the extent that records access would be exempt or prohibited under the Public Records Act, Chapter 42.56 RCW, access is also exempt or prohibited under this rule. In addition, to the extent required to prevent a significant risk to individual privacy or safety, an agency shall delete identifying details in a manner consistent with this rule when it makes available or publishes any public record; however, in each instance, the justification for the deletion shall be provided fully in writing.

*[COMMENT: The paragraph states that administrative records are open to public access unless an exemption or prohibition applies. The paragraph's final sentence allows agencies to redact information from documents based on significant risks to privacy or safety.]*

- B. In addition to exemptions referred to in paragraph (A) above, the following categories of administrative records are exempt from public access:

- (1) Requests for judicial ethics opinions;

*[COMMENT: This exemption was requested by the Judicial Ethics Advisory Committee.]*

- (2) Identity of writing assignment judges in the appellate courts prior to issuance of the opinion;

*[COMMENT: This exemption was suggested by Judge Quinn Brintnall at a BJA meeting.]*

- (3) Minutes of meetings held by judges within a court;

*[COMMENT: The work group discussed whether meeting minutes should be broadly exempted from public access, or whether some smaller subset of such minutes should be exempted. The work group voted in favor of the broad exemption; a minority report may be written on this point.]*

- (4) Evaluations and recommendations for candidates seeking appointment or employment within a judicial agency;

[COMMENT: Requested by the WSBA, with regard to evaluations and recommendations for judicial appointments. The provision has been broadened to cover similar documents maintained by other judicial agencies.]

- (5) Personal identifying information, including individuals' home contact information, Social Security numbers, driver's license numbers, and identification/security photographs;

[COMMENT: The exemption was requested by staff for the Office of Public Defense. The work group considered including private financial information in this provision, but ultimately concluded that financial information is already addressed in the Public Records Act's exemptions. The work group discussed whether dates of birth should be included here, but did not reach consensus.]

- (6) An attorney's request to a judicial agency for a trial or appellate court defense expert, investigator, or social worker, any report or findings submitted to the attorney or judicial agency by the expert, investigator, or social worker, and the invoicing and payment of the expert, investigator or social worker, but only during the pendency of the case;

[COMMENT: The exemption was requested by the Office of Public Defense.]

- (7) Documents, records, files, investigative notes and reports, including the complaint and the identity of the complainant, associated with a judicial agency's internal investigation of a complaint against the agency or its contractors during the course of the investigation. The outcome of the agency's investigation is not exempt.

[COMMENT: The exemption was requested by the Office of Public Defense.]

- (8) Manuals, policies, and procedures, developed by Bar staff, that are directly related to the performance of investigatory, disciplinary, or regulatory functions, except as may be specifically made public by court rule.

[COMMENT: The exemption was requested by the Washington State Bar Association.]

[COMMENT: The work group also received proposals for several additional exemptions, but decided against including them here. The proposals were to exempt:

- Investigative records of regulatory or disciplinary agencies. (The work group lacked sufficient information about the variety of

practices that the judicial agencies use in order to draft appropriate language.)

- Private financial information, including financial account numbers. (The work group determined that this information is already protected under the Public Records Act.)
- Dockets/index information for protected case types. (The work group determined that this information is already protected.)
- Copyrighted information. (The work group lacked sufficient information to draft appropriate language.)
- Testing/screening materials/results. (The work group determined that this information is already protected under the Public Records Act.)
- Performance measures for evaluating court processes. (The work group decided that this information should generally be open to public access, even if the information is subject to public misinterpretation.)

C. **Access to Juror Information.** Individual juror information, other than name, is presumed to be private. After the conclusion of a jury trial, the attorney for a party, or party pro se, or member of the public, may petition the trial court for access to individual juror information under the control of court. Upon a showing of good cause, the court may permit the petitioner to have access to relevant information. The court may require that juror information not be disclosed to other persons.

[COMMENT: This provision was moved here from later in the rule.]

D. **Access to Master Jury Source List.** Master jury source list information, other than name and address, is presumed to be private. Upon a showing of good cause, the court may permit a petitioner to have access to relevant information from the list. The court may require that the information not be disclosed to other persons.

[COMMENT: This provision was moved here from later in the rule.]

## **(2) Administrative Records—Process for Access.**

### **A. Administrative Records—Procedures for Records Requests.**

- (1) AGENCIES TO ADOPT PROCEDURES. Each judicial agency must adopt a policy implementing this rule and setting forth its procedures for accepting and responding to public records requests. The agency's policy must include the designation of a public records officer and must require that requests for access be submitted in writing to the agency's designated public records officer. Best

practices for handling public records requests shall be developed under the authority of the Board for Judicial Administration.

- (2) PUBLICATION OF PROCEDURES FOR REQUESTING PUBLIC RECORDS. Each judicial agency must prominently publish the procedures for requesting access to its records. If the agency has a website, the procedures must be included there. The publication shall include the public records officer's work mailing address, telephone number, fax number, and e-mail address.
- (3) INITIAL RESPONSE. Each judicial agency must initially respond to a written request for access to a public record within five working days of its receipt. The response shall acknowledge receipt of the request and include a good-faith estimate of the time needed to respond to the request. The estimate may be later revised, if necessary. For purposes of this rule, "working days" mean days that the judicial agency, including a part-time municipal court, is open.
- (4) COMMUNICATION WITH REQUESTER. Each judicial agency must communicate with the requester as necessary to clarify the records being requested. The agency may also communicate with the requester in an effort to determine if the requester's need would be better served with a response other than the one actually requested.
- (5) SUBSTANTIVE RESPONSE. Each judicial agency must respond to the substance of the records request within the timeframe specified in the agency's initial response to the request. If the agency is unable to fully comply in this timeframe, then the agency should comply to the extent practicable and provide a new good faith estimate for responding to the remainder of the request. If the agency does not fully satisfy the records request in the manner requested, the agency must justify in writing any deviation from the terms of the request.
- (6) EXTRAORDINARY REQUESTS LIMITED BY RESOURCE CONSTRAINTS. If a particular request is of a magnitude that the judicial agency cannot fully comply within a reasonable time due to constraints on the agency's time, resources, and personnel, the agency shall communicate this information to the requester. The agency must attempt to reach agreement with the requester as to narrowing the request to a more manageable scope and as to a timeframe for the agency's response, which may include a schedule of installment responses. If the agency and requester are unable to reach agreement, then the agency shall respond to

the extent practicable and inform the requester that the agency has completed its response.

**B. Administrative Records—Review of Public Records Officer’s Response.**

- (1) NOTICE OF REVIEW PROCEDURES. The public officer’s response to a public records request shall include a written summary of the procedures under which the requesting party may seek further review.
- (2) TIMELINE FOR SEEKING REVIEW. The timelines set forth in section (f)(2)(A) shall apply likewise to requests for review of the public records officer’s response.
- (3) FURTHER REVIEW WITHIN AGENCY. Each agency shall provide a method for review by the agency’s director or presiding judge. For an agency that is not a court, the presiding judge shall be the presiding judge of the court that oversees the agency. The agency may also establish intermediate levels of review. The agency shall make publicly available the applicable forms. The review proceeding is informal and summary. The review proceeding shall be held within five working days. If that is not reasonably possible, then within five working days the review shall be scheduled for the earliest practical date.

*[COMMENT: The work group discussed whether the rule should authorize the director or the presiding chief judge to designate another person to handle these reviews. The work group did not reach agreement on this question.]*

- (4) ALTERNATIVE REVIEW. As an alternative to review under section (f)(2)(B)(3), a requesting person may seek review by a person outside the judicial agency. If the judicial agency is a court or directly reportable to a court, the outside review shall be by a visiting judicial officer. If the judicial agency is not a court or directly reportable to a court, the outside review shall be by a person agreed upon by the requesting person and the judicial agency. In the event the requesting person and the judicial agency cannot agree upon a person, the presiding superior court judge in the county in which the judicial agency is located shall either conduct the review or appoint a person to conduct the review. The review proceeding shall be informal and summary. In order to choose this option, the requesting person must sign a written waiver of any further review of the decision by the person outside the judicial agency. The decision by the person outside the judicial agency is final and not appealable. Attorney fees and costs are not available under this option.

*[COMMENT: The bifurcated procedures for review are intended to provide flexible, prompt, informal, and final procedures for review of public records decisions. The option for a visiting judge allows a requester to have the review heard by an outside decision-maker; in the interest of obtaining prompt, final decisions, a requester selecting this option would be required to waive further review. If the Legislature creates a new entity to review public records decisions made by agencies of the executive branch, then the work group recommends that the BJA consider using this entity for review of judicial records decisions as well.]*

(5) REVIEW IN SUPERIOR COURT.

- i. A requester may seek superior court review of a decision made under section (f)(2)(B)(3). The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with section (f)(1) which exempts or prohibits disclosure in whole or in part of specific information or records. Judicial review of all agency actions shall be de novo. The superior court shall apply section (f)(1) of this rule in determining the accessibility of the requested documents. Any ambiguity in the application of section (f)(1) to the requested documents shall be resolved by analyzing access under the common law's public-access balancing test.

*[COMMENT: The common law's balancing test is addressed in detail in Cowles Publishing v. Murphy, 96 Wn.2d 584 (1981), and Beuhler v. Small, 115 Wn.App. 914 (2003). Disclosure is balanced against whether it poses a significant risk to individual privacy or safety.]*

- ii. The right of de novo review is not available to a requester who sought review under the alternative process set forth in section (f)(2)(b)(4).

(6) MONETARY SANCTIONS.

- i. In the de novo review proceeding under section (f)(2)(B)(5), the superior court may in its discretion award reasonable attorney fees and costs to a requesting party if the court finds that (1) the agency's response was deficient, (2) the requester specified the particular deficiency to the agency, and (3) the agency did not cure the deficiency.
- ii. Sanctions may be imposed against either party under CR 11, if warranted.
- iii. Except as provided in sections (6)(i) and (ii), a judicial agency may not be required to pay attorney fees, costs, civil penalties, or fines.

[COMMENT: The work group's recommendation is to initially limit the availability of monetary sanctions against judicial agencies. If the experience with this approach were to show that more significant sanctions are merited, then those could be added at an appropriate time. This approach was also used when the Public Records Act was also originally enacted; it makes sense to take the same approach with this rule. It may well be that the limited sanctions that would be available under this rule, coupled with the rule's creation of speedy review procedures, will be sufficient to ensure compliance without the imposition of additional sanctions.]

**(2) (g) Judicial Records—Judicial Agency Rules.** Each court by action of a majority of the judges may from time to time make and amend local rules governing access to ~~court~~ judicial records not inconsistent with this rule. Each judicial agency may from time to time make and amend agency rules governing access to its judicial records not inconsistent with this rule.

**(3) (h) Judicial Records—Charging of Fees.**

(1) A fee may not be charged to view court judicial records at the courthouse.

(2) A fee may be charged for the photocopying or scanning of judicial records. If another court rule or statute specifies the amount of the fee for a particular type of record, that rule or statute shall control. Otherwise, the amount of the fee may not exceed the amount that is authorized in the Public Records Act, Chapter 42.56 RCW.

(3) The agency may require a deposit in an amount not to exceed ten percent of the estimated cost of providing copies for a request. If an agency makes a request available on a partial or installment basis, the agency may charge for each part of the request as it is provided. If an installment of a records request is not claimed or reviewed within 30 days, the agency is not obligated to fulfill the balance of the request.

[COMMENT: Paragraph (3) above incorporates a modified version of the Public Records Act's "deposit and installments" language.]

**(i) Effective Date of Amendment.**

(a) The amendment expanding this rule beyond case records goes into effect on January 1, 2012, and applies to all public records requests submitted on or after that date.

[COMMENT: A rule adopted in early 2011 would usually have an effective date of September 1, 2011. The delayed effective date is intended to allow time for development of best practices and for training.]

(b) Until January 1, 2012, public access to judicial documents shall continue to be analyzed using the existing court rules and statutes, as applicable, and the common law balancing test. The Public Records Act, Chapter 42.56 RCW, may be used as non-binding guidelines.

[Adopted effective October 26, 2004; amended effective January 3, 2006.]

**A. WORK GROUP REPORT**  
**3. PROPOSED RULE ADOPTION /**  
**IMPLEMENTATION TIMETABLE**

**BOARD FOR JUDICIAL ADMINISTRATION (BJA)  
PUBLIC RECORDS WORK GROUP**

**TIME LINE / ACTIVITY PLAN**

- *Supreme Court rules amendments adoption schedule in italics*

<b>MONTH/YEAR</b>	<b>PAST ACTIVITY REPORT / FUTURE ACTIVITY TENTATIVE PLANS</b>
2010 – October	<i>October 15th</i> <ul style="list-style-type: none"> <li>• <i>Deadline for submitting proposed rule amendments to Supreme Court</i></li> </ul>
2010 – November	<i>Early November [or early December]</i> <ul style="list-style-type: none"> <li>• <i>The Supreme Court Rules Committee reviews the proposal and recommends further action by the full Court. A week later, the Court meets en banc and reviews Rules Committee's recommendations. If the Court considers proposal ready for further consideration, then the Court orders the proposal be published for public comment in January</i></li> </ul>
2010 – December	<i>Early December [if not done early November]</i> <ul style="list-style-type: none"> <li>• <i>The Supreme Court Rules Committee reviews the proposal and recommends further action by the full Court. A week later, the Court meets en banc and reviews Rules Committee's recommendations. If the Court considers proposal ready for further consideration, then the Court orders the proposal be published for public comment in January</i></li> </ul>
2011 – January	<i>January 3rd</i> <ul style="list-style-type: none"> <li>• <i>Supreme Court publishes proposed Court Rule(s) for comment</i></li> </ul>
2011 – February	<i>February, Entire Month</i> <ul style="list-style-type: none"> <li>• <i>Supreme Court holds public comment period for proposed Court Rule(s)</i></li> </ul>
2011 – April	<i>April 30th</i> <ul style="list-style-type: none"> <li>• <i>Public comment period on proposed rules amendments closes</i></li> </ul>
2011 – May	<i>May TBD</i> <ul style="list-style-type: none"> <li>• <i>The Supreme Court decides whether to adopt the proposed rule. If adopted, the rule is published a few weeks later</i></li> </ul>
2011 – June	<i>June TBD [If not done in May]</i> <ul style="list-style-type: none"> <li>• <i>The Supreme Court decides whether to adopt the proposed rule. If adopted, the rule is published a few weeks later</i></li> </ul>
2012 - January	<i>January 1st</i> <ul style="list-style-type: none"> <li>• <i>Adopted rule goes into effect</i></li> </ul>

*Some steps in this Supreme Court Rules process can be short-cut, if the Court decides that it is appropriate. For example, the public comment period might be shortened to 30 days, especially if the proposal has already been well-circulated and input has already been received [however, the Court would be unlikely to eliminate the opportunity for a public comment period altogether for a proposal of this nature]. Or, the Court could choose to publish the proposal in December rather than January.*

**A. WORK GROUP REPORT**  
**4. BEST PRACTICES / READINESS**  
**RECOMMENDATIONS**

**BOARD FOR JUDICIAL ADMINISTRATION (BJA)  
PUBLIC RECORDS WORK GROUP  
BEST PRACTICES / READINESS RECOMMENDATIONS**

Judicial agencies have a variety of individual practices for responding to requests for access to non-case records. The proposed rule would provide a standard for all agencies to operate under. Once the court rule is adopted the judiciary leadership will probably consider it important to facilitate an effort to educate and provide resources to the appropriate employees of our branch of the government, in order to:

- (1) Encourage a unified approach,
- (2) Demonstrate our branch's preparedness and commitment to transparency and openness in government,
- (3) Ease the process of implementation of the rule,
- (4) Decrease the likelihood of mistakes occurring, and
- (5) Ease the burden of living under the rule.

To assist them in beginning that process, we believe the following topics/issues may be appropriate ones for them to consider addressing:

Topic/Issue	Needs to be Addressed	Possible Suggestions, and Notes
Overall	<ul style="list-style-type: none"> <li>• Need to ensure as seamless of an implementation as possible</li> <li>• Need to ensure oversight and sustainability on a long-term basis</li> <li>• Need to ensure PRO's gain general familiarization and knowledge of the concept, purpose and need for a process and procedure for public records disclosure (not necessarily judiciary related per se). Many PRO's may be very familiar with this general topic; others may be somewhat unfamiliar.</li> </ul>	<ul style="list-style-type: none"> <li>• Prior to the effective date of the rule, a work group / task force should be appointed by the BJA and presented with a charge to develop practical best practice / readiness recommendations, produce and / or identify useful tools and resources. Act as a standby committee for oversight and monitor the implementation of the rule for the judicial branch for the first year of implementation. Recommend necessary amendments to the rule based on the oversight experience.</li> <li>• On a longer-term basis, the BJA, or a committee of the BJA, or some other central focal point, should be charged with overseeing the topic of judicial records requests and disclosure on a continuing (permanent) basis for the judicial branch.</li> <li>• In some manner, ensure employees of the judicial branch are familiar with resources available on the general topic of public records and how to access those resources [these could include but not be limited to: AG's quarterly PRO meetings and web site / materials; WAPRO membership, training / meetings, and web site / materials; state listserv; appropriate CLE seminars/workshops; WSBA Public Records Act Desk Book; and SofS Records/Archives Office training and web site/materials].</li> </ul>

Topic/Issue	Needs to be Addressed	Possible Suggestions, and Notes
Training / Guidance - General	Need to ensure employees have general familiarization, orientation, and training regarding new rule.	<ul style="list-style-type: none"> <li>• Suggest some sort of "rollout" - perhaps AOC Court Education section working with assigned professionals who work in public records to develop a training / educational program or programs to offer to various levels at various venues, for a period of time. This could potentially be online, DVD, video streaming, or some similar method or combination, as opposed to "live". Goal should be to keep simple and straightforward.</li> <li>• Needs to include historical (even political?) perspective of why/how this came about (How did the state judiciary get where we are now on this topic?)</li> <li>• Mentorship program?</li> </ul>
Training / Guidance – Specific Technical Areas	<p>Need to ensure an understanding of technical aspects of rule, particularly those details that differ from the PRA or traditional approaches to records requests and fulfillment:</p> <ul style="list-style-type: none"> <li>• Definitions of judicial categories of records (chambers records; court case files/court records; judicial administrative records), and exclusion of chambers records;</li> <li>• Public Records Officer (PRO) appointment guidance;</li> <li>• Public notifications (of PRO identification, procedures and court rule, when and how to perform, etc.);</li> <li>• Requests protocols and forms;</li> <li>• Response time;</li> <li>• Procedure for responding to public records requests (e.g. timeliness, clarifications, installments, denial, effective communications);</li> <li>• Appeals procedures - process and options for review and compliance (e.g. two-track approach; notice, how, when, to whom, presentation, result); and</li> <li>• Exemptions and redactions by federal law, state law (PRA, other statutes), and court rules, and use of common law right to privacy balancing test, as needed, to supplement.</li> </ul>	<ul style="list-style-type: none"> <li>• In addition to general resources available to all PRO's / government entities (see first listed topic, above, third bullet) we likely need to develop materials, and potentially technical training, that goes beyond those resources in order to address the aspects of public records that are unique to the judicial branch. There are already a number of resources which have extensive research and draft work complete, including: <ul style="list-style-type: none"> <li>o "List of PRA Potentially Relevant Exemptions"</li> <li>o "List of Other Statutes Potentially Relevant Exemptions"</li> <li>o "Master List of Judicial Records (with classifications)"</li> <li>o "Existing Laws Governing Public Access to Categories of Court Case Files"</li> </ul> </li> </ul> <p>A mechanism/process should be developed and implemented which will continue the research, modifications, and overall maintenance of these documents, as appropriate.</p> <ul style="list-style-type: none"> <li>• As part of this technical training, break out each specific area of the rule that covers each specific area identified in bullets in second column; include the rule comments; and then add additional guidelines, as appropriate.</li> </ul>

Topic/Issue	Needs to be Addressed	Possible Suggestions, and Notes
Resources Development	<p>Ensure judicial entities / public records officers have adequate materials resources to assist them in implementing their public records requests programs. Areas for which obtaining or developing guidelines, templates, and / or forms (beyond general training materials in above category) might include:</p> <ul style="list-style-type: none"> <li>• Implementation guidance</li> <li>• Policies and procedures</li> <li>• Public Records requests forms</li> <li>• Public Records responses wording</li> <li>• Exemptions materials</li> <li>• Redactions materials</li> </ul>	<p>Resources development and/or dissemination could include:</p> <ul style="list-style-type: none"> <li>• Guidelines on implementing a public records program</li> <li>• Sample policy/procedures template/model Rule requires each judicial entity have a policy and procedures. Some currently may have such; some may not</li> <li>• Sampling of policy/procedures from judicial entities and other government entities</li> <li>• Sample public records requests form templates The rule requires requests be made in writing</li> <li>• Sampling of public records requests forms from judicial entities and other government entities</li> <li>• Written guideline for individual judicial entities for selection of PRO Rule requires each judicial entity have an appointed PRO. Some currently have such; some may not</li> </ul>
Exemptions & Redactions	<p>If utilizing BJA Public Records Work Group "Judicial Records Listing (Records Categories) with Disclosure Classifications" as guideline/assistance for judiciary, that document needs to be reviewed and periodically updated</p>	<ul style="list-style-type: none"> <li>• Suggest BJA committee assigned oversight to do so OR suggest AOC assign someone to "own" the document and make periodic revisions. Either way, with an established method / authority to approve revisions</li> <li>• Same approach can be used for any other developed document we believe will be used on a routine basis by the judicial PRO's [see list of documents in #3, above]</li> </ul>
Records management / retention / destruction	<p>Good records management / retention / destruction practices are essential for the development; implementation, and administration of a good public records requests / fulfillment program</p>	<p>Ensure judicial branch of the government is familiar with resources available on the general topic of records management, retention, and destruction, and how to access those resources (e.g. state listserv, CLE and other seminars / workshops, SoFS Records / Archives Office training)</p> <ul style="list-style-type: none"> <li>• Note: It is a matter of uncertainty as to whether the judicial branch is legally subject to 40.14 RCW – "Preservation and Destruction of Public Records Act", as there has not been, and there is unlikely to be, any significant case law developed in this area</li> <li>• Note: Many courts / counties are in very good shape from a technical and knowledge standpoint in this area</li> </ul>
Individuals/organizations who have indicated a willingness to be members of a "BJA Best Practices Work Group"	<p>WCOG (Toby Nixon), ADN (Rowland Thompson), WSBA (TBD), OPD (TBD), BCE (TBD), AWSCA (TBD), DMCMA (TBD)</p>	

**A. WORK GROUP REPORT**  
**5. ROSTER OF WORK GROUP**  
**MEMBERS AND ATTENDEES**

## BOARD FOR JUDICIAL ADMINISTRATION PUBLIC RECORDS ACT WORK GROUP

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<b>Appellate Courts</b>			
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<b>Washington State Bar Association</b>			
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<b>Other Meeting Attendees/Participants</b>	<b>Affiliation</b>
Mr. Jim Bamberger	Office of Civil Legal Aid
Ms. Jeri Cusimano	District and Municipal Court Management Association (replaced by Aimee Vance)
Mr. Doug Ende	Washington State Bar Association (replaced by Bob Welden)
Senator Adam Kline	Washington State Senate
Mr. Doug Klunder	American Civil Liberties Union
Ms. Kathy Kuriyama	Office of Public Defense

**A. WORK GROUP REPORT**

**6. MINORITY REPORTS**

**a. WSBA inclusion under the rule,  
submitted by Robert Welden, WSBA**



WSBA

OFFICE OF THE GENERAL COUNSEL

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## Board of Judicial Administration Public Records Act Work Group

### Minority Report of the Washington State Bar Association

September 14, 2010

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**ISSUE:** The proposed amendments to General Rule 31 should not be made applicable to the Washington State Bar Association (WSBA). Records disclosure of WSBA activities and functions is already regulated by court rules and by the WSBA Bylaws.

At the Work Group meeting held on August 20, 2010, a motion was made to remove the WSBA from the applicable entities in the draft GR 31. The motion failed to get a majority vote. Voting in favor of the motion were the Honorable Marlin Applewick, Jeff Hall, Kristal Wiitala, and Bob Welden.

#### DISCUSSION:

1. The proposed amendments to GR 31 should not be made applicable to the Washington State Bar Association.

The mandatory Washington State Bar Association was established in June 1933 by enactment of the State Bar Act, RCW 2.48.<sup>1</sup> As early as December of that year, the Washington Supreme Court held that it alone had the inherent power to disbar lawyers. The Court has consistently held that, in the regulation of the practice of law, it has the sole and inherent authority to act. See, *The Washington State Bar Association v. The State of Washington*, where the Court held "The ultimate power to regulate court-related functions, including the administration of the Bar Association, belongs exclusively to this court."<sup>2</sup> Applying the factors set forth in *Telford v. Board of Comm'rs*, 95 Wn.2d 149 (1999), ((1) whether the entity performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by government) leads to the conclusion that the WSBA

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<sup>1</sup> The Washington State Bar Association was first established as the Washington Bar Association in 1888 as a voluntary organization.

<sup>2</sup> 125 Wn.2d 901, 909, 890 P.2d 1047 (1995).

and the boards and committees it administers should be excluded from application of General Rule (GR) 31.

**(1) Functions of the WSBA:** The purposes and activities of the WSBA are set forth in GR 12.1. They include a broad range of regulatory and professional activities.

**Regulatory Functions:** The WSBA acts as an arm of the Supreme Court in administering the admission process, the annual licensing of lawyers, and conducting investigations and hearings into disciplinary grievances. "Respondent [WSBA] further expressly recognizes in its brief that 'it is, at least in part, an arm of this court . . .'"<sup>3</sup>

However, the WSBA can only *recommend* to the Supreme Court those bar applicants who seek admission; can only *recommend* to the Supreme Court the suspension of lawyers' licenses for failure to pay their annual fees or otherwise comply with the annual registration; and can only *recommend* to the Supreme Court the disciplinary sanctions of suspension or disbarment. All of these regulatory functions are established by court rules, most of which include a records disclosure/confidentiality provision:

- Bar admission – Admission to Practice Rules (APR) 1-5, 7
- Law Clerk Program – APR 6
- Special admissions – APR 8
- Legal Interns – APR 9
- Mandatory continuing legal education – APR 11
- Limited Practice Officers – APR 12
- Limited Practice Officers Enforcement – Rules for Enforcement of Limited Practice Officer Conduct (ELPOC)
- Foreign Law Consultants – APR 14
- Lawyers' Fund for Client Protection – APR 15
- Reciprocal admission – APR 18
- Lawyers' Assistance Program – APR 19(b)
- Law Office Management Assistance Program – APR 19(d)
- Professional Responsibility Program – APR 19(e)
- Character and Fitness Board – APR 20-25
- Disciplinary Board, disciplinary investigation, disciplinary proceedings – Rules for Enforcement of Lawyer Conduct (ELC)
- Practice of Law Board – General Rule (GR) 25

- **Non-Regulatory Functions:** In addition to these regulatory functions, the WSBA serves as a trade association. It produces continuing legal education programs and publishes desk books and other materials related to the practice of law. It publishes the monthly *Bar News*. WSBA offers services to

<sup>3</sup> *Graham v. Bar Association*, 86 Wn.2d 624, 631, 548 P.2d 310 (1976). See also, *In re Levy*, 23 Wn.2d 607, 619 (1945); *In re Schatz*, 80 Wn.2d 604, 607 (1972); *Wilson v. Board of Bar Examiners*, 90 Wn.2d 649, 657 (1978).

lawyers through the Law Office Management Assistance Program and the Lawyer's Assistance Program. It supports 27 Sections which provide forums for members to pursue their interests in various areas of the law. It supports the Young Lawyers Division, the Council on Public Legal Education, the Council on Public Defense, the Access to Justice Board and several standing committees of the bar. It employs a lobbyist to advocate on behalf of legal issues of interest to the Bar and judiciary and on behalf of Sections.

**(2) Funding of the WSBA:** The WSBA receives no public funding. As the Supreme Court has noted:

It is important to keep in mind . . . that the Bar Association does not receive any appropriation from the Legislature or any other public body. It is funded entirely by mandatory membership licensing fees and various user fees, including continuing legal education (CLE) revenues, bar examination fees, practice section dues and *Washington State Bar News* advertising revenues.<sup>4</sup>

The draft budget for FY 2011 shows projected revenue for the WSBA General Fund of about \$17,000,000 in addition to CLE revenue of nearly \$3,000,000. The bulk of General Fund revenue is from admission and licensing fees. These are not taxes but licensing fees that are charged for the protection of the public. Most of the fees related to regulatory functions are approved by the Supreme Court. The WSBA's operating budget is approved by the Board of Governors pursuant to GR 12.1(b)(22).

**Employee Benefits:** The WSBA offers a wide range of employee benefits, including group insurance programs, which includes life insurance, long-term care insurance, long-term disability insurance, industrial insurance (workers' compensation), social security and Medicare insurance, and unemployment insurance all paid for by the WSBA and, in some instances, with contributions from employees. The WSBA provides employees with paid sick leave, holidays, vacations, etc.

Although WSBA employees are not state employees, the WSBA pays the employer's contribution into the State of Washington medical and dental plans. WSBA employees are also required to participate in the Washington State Public Employees' Retirement System into which the WSBA pays the employer's contribution. And WSBA employees may participate in the state deferred compensation program. A 1994 memorandum from the Office of the Attorney General noted that the WSBA participates in the retirement and health care programs as a "political subdivision" and, as to participation in the deferred compensation program, "the most likely interpretation of the pertinent statutes is that the WSBA employees are not state employees within the meaning of RCW 41.04.250 and .260. Their eligibility, consistent with their eligibility for other employee benefits, is that of an employee of a political subdivision."

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<sup>4</sup> *State Bar Association v. State of Washington*, 125 Wn.2d 901, 907; 890 P.2d 1047 (1995)..

**(3) The Extent of Government Involvement or Regulation:** As noted above, the WSBA as a mandatory bar was originally established by legislation, but the Supreme Court has made clear that it has the sole and inherent authority to regulate the bar, which is done by court rules. See, e.g., GR 12.1, Washington State Bar Association: Purposes.

**(4) Whether the Entity was Created by Government:** See above.

**Records Disclosure:** The WSBA bylaws include a lengthy article on records disclosure and preservation. Attached is that portion of the bylaws with some proposed amendments currently under consideration by the Board of Governors.

**Conclusion:** The fact that the WSBA performs some regulatory functions as an arm of the Supreme Court, but in most instances only with the direct approval of the Court by entry of court orders, receives no public funds, is governed by volunteers elected to the Board of Governors, and also functions as a professional trade association, makes the WSBA different from most other judicial agencies listed in the current draft of GR 31. It has its own bylaw on records disclosure which is consistent with the proposed amendments to GR 31. For these reasons, GR 31 should not be made applicable to the WSBA

#### ***XIV. RECORDS DISCLOSURE & PRESERVATION***

A. Given the important role of the attorney in society and the Bar's singular authority over the provision and providers of legal services, the Bar is committed to maintaining its records in a manner that makes them as open and available to its members and the public as is reasonably possible. Through such openness, the Bar intends to make information available to the people of Washington that will allow them to become informed about matters regarding the provision of legal services and other topics falling under the Bar's authority.

B. The Bar, in accordance with published rules, shall make available for its members and/or public inspection and copying all Bar records, unless the record falls within the specific exemptions of these bylaws or is made confidential by the Rules of Professional Conduct, the Rules for Enforcement of Lawyer Conduct, the Admission to Practice Rules, the Rules for Enforcement of Limited Practice Officer Conduct, GR 25, or any other applicable statute or rule. To the extent required to prevent an unreasonable invasion of personal privacy interests protected by these bylaws or the above-referenced rules or statutes, the Bar shall delete identifying details in a manner consistent with those rules when it makes available or publishes any Bar record; however, in each case, the justification for the deletion shall be explained fully in writing.

1. The Bar shall establish, maintain, and make available for its members and/or public inspection and copying a statement of the actual per page cost or other costs, if any, that it charges for providing photocopies of Bar records and a statement of the factors and manner used to determine the actual per page cost or other costs, if any.
2. No fee shall be charged for the inspection of Bar records. No fee shall be charged for locating Bar records or documents and making them available for copying unless the request entails a substantial use of staff time to locate and gather the documents. In no event may the Bar charge a per page cost greater than an actual per page cost established by the Bar.
3. The Bar shall not distinguish among persons requesting records and such persons shall not be required to provide information as to the purpose for the request except to establish whether inspection and copying would violate a statute, court order, or rule which exempts or prohibits disclosure of specific information or records to certain persons. Bar facilities shall be made available to any person for the copying of Bar records except when and to the extent that this would unreasonably disrupt the operations of the Bar. The Bar shall honor requests received by mail for identifiable Bar records unless exempted by provisions of these bylaws or other rules.
4. Bar records shall be available for inspection and copying during the customary office hours of the Bar.
5. a.—The following are exempt from public inspection and copying:

(1a) Personal information in files maintained for employees, appointees, or elected officials of the Bar to the extent that disclosure would violate their right to privacy.

(2b) Specific information, records, or documents relating to lawyer or Limited Practice Officer discipline that is not expressly classified as public information or confidential information by court rule.

(3c) Information revealing the identity of persons who have assisted a Bar investigation or filed grievances or complaints with the Bar, if disclosure would endanger any person's life, physical safety, or property.

(4d) Test questions, scoring keys, and other examination data used by the Bar to administer a license, employment, or academic examination.

(5e) The contents of real estate appraisals made by the Bar relative to the acquisition or sale of property, until the project or prospective sale is abandoned or until such time as all of the property has been acquired or the property to which the sale appraisal relates is sold, but in no event shall disclosure be denied for more than three years after the appraisal.

(6f) Valuable formulae, designs, drawings, and research data obtained by the Bar within five years of the request for disclosure when disclosure would produce private gain and loss to the Bar.

(7g) Preliminary or intra-Bar memoranda, notes, and e-mails, and other documents in which recommendations or opinions are expressed or policies formulated or recommended, except that a specific record shall not be exempt when referenced during an open meeting or cited by the Bar in connection with any of its actions.

(h) Manuals, policies, and procedures, developed by Bar staff, that are directly related to the performance of investigatory, disciplinary, or regulatory functions, except as may be specifically made public by court rule;

(9i) Applications for employment with the Bar, including the names of applicants, resumes, and other related materials submitted with respect to an applicant.

(10j) The residential addresses and residential telephone numbers of Bar employees or volunteers which are held by the agency in personnel records, employment or volunteer rosters, or mailing lists of employees or volunteers.

(11k) Information that identifies a person who, while a Bar employee:

(1a) Seeks advice, under an informal process established by the Bar, in order to ascertain his or her rights in connection with a potentially discriminatory or unfair employment practice; and

(2b) requests his or her identity or any identifying information not be disclosed.

(12l) Membership information; however

(1) status, business addresses, business telephones, facsimile numbers, electronic mail addresses (unless the member has requested that it not be made public), bar number, and dates of admission, shall not be exempt, provided that, for reasons of personal security or other compelling reason, the Executive Director may, on an annual basis, approve the confidentiality of any such information; and

(2) age information may be used as a criterion for eligibility for membership in a WSBA division or section, but only when used in conjunction with year of admission.

- (13m) Applications for admission to the Bar and related records;
- (14n) Information which would identify bar examiners responsible for writing and/or grading specific bar exam questions;
- (15o) Proceedings and records of the Board of Bar Examiners;
- (16p) Proceedings and records of the Law Clerk Board, including information, records, or documents received or compiled that relate to any application for admission to the Law Clerk program, or to the retention of any current participant in the Law Clerk program;
- (17q) Proceedings and records of the Practice of Law Board, including information, records, or documents received or compiled regarding the investigation, or potential investigation, of any incident or alleged incident of the unauthorized practice of law;
- (18r) Proceedings and records of the Character and Fitness Board, including information, records, or documents received or compiled that relate to any application for admission, special admission, special licensing, or change of membership status or class, except where those proceedings are specifically made public by court rule;
- (19s) Records relating to requests by members for ethics opinions to the extent that they contain information identifying the member or a party to the inquiry,
- (20t) Proceedings and records of the Judicial Recommendation Committee,
- (21u) Records and proceedings of any Fee Arbitration Program, Mediation Program, or other alternative dispute resolution program which may be administered by the Bar,
- (22v) Records and proceedings of the Personnel and Awards Committees,
- (23w) Records and proceedings of the Hearing Officer Selection Panel, except as made public by the Panel;
- (24x) Personnel records of Bar employees, whether permanent, temporary, or contract, except for information relating to compensation for job classifications, verifying periods of employment or, when specifically requested, the Executive Director's current annual compensation; and
- (25y) Any other documents or records made confidential by statute, court rule, or court order.

- b. The above exempted information will be redacted from the specific records sought. Statistical information not descriptive of any readily identifiable person or persons will be disclosed.
6. Responses to requests for Bar records shall be made promptly by the Bar. In acknowledging receipt of a records request that is unclear, the Bar may ask the requestor to clarify what information the requestor is seeking. If the requestor fails to clarify the request, the Bar need not respond to it. Denials of requests must be accompanied by a written statement of the specific reasons therefor.
  7. Whenever the Executive Director concludes that a Bar record is exempt from disclosure and denies a person opportunity to inspect or copy such record for that

reason, the person may appeal that decision to the Board of Governors. The Board of Governors shall provide the person with its written opinion on whether the record is exempt.

8. The disclosure of information under this section should not violate an individual's right to privacy by amounting to a disclosure of information about that person that 1) would be highly offensive to a reasonable person, or 2) is not of legitimate concern to the public.
9. Nothing in this section shall be construed to require publication in the Washington Administrative Code or the maintenance of indexes of records.

**A. WORK GROUP REPORT**

**6. MINORITY REPORTS**

**b. Protection of record subject  
interests in records requests,  
submitted by Doug Klunder, ACLU**



To: Board of Judicial Administration  
Date: September 13, 2010  
Re: Protection of record subject interests in records requests

When public records, including judicial administrative records, contain personal information about individuals, there are three parties with potential interests in those records: a member of the public who requests the records, the agency that controls the records, and the subject of the records. In some cases the interests of two or more parties may be allied, but in other cases each party has its own distinct interests.

The Public Records Act (PRA), Chapter 42.56 RCW, recognizes each of these interests. It is, of course, focused on the interests of a requester, since the entire purpose of the PRA is to effectuate a right of public access to public records. It recognizes the interests of the agency both by ensuring that access procedures do not impede the efficient operations of the agency, and by exempting certain types of information when disclosure of that information would interfere with the agency's work. The interests of record subjects are most clearly recognized in the variety of exemptions from public disclosure for various types of personal information.

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JESSE WING  
BOARD PRESIDENT

KATHLEEN TAYLOR  
EXECUTIVE DIRECTOR

The proposed changes to GR 31 largely mimic the PRA in this regard, recognizing the three different interests. Similarly, the procedures for requesters and judicial agencies to enforce their rights are much the same under the proposed rule as the PRA, including the initial agency determination, an intra-agency appeal, an arbitration process, and review by the courts. (Arbitration is a new addition; the PRA does not currently provide for arbitration, but there have been legislative proposals to add arbitration to the PRA as well.)

There is one area, however, in which the proposed rule falls short: providing a procedure for subjects of records to enforce their rights. There is no procedure for a subject to find out their records have been requested, and no opportunity for a subject to present his or her interests even if the subject does discover a request has occurred. The PRA, in contrast, allows agencies to notify subjects, RCW 42.56.520 and .540, and allows a subject to move for an injunction against disclosure, RCW 42.56.540.

We believe that similar procedures should be incorporated in the draft rule. Without those procedures, record subjects can only hope that judicial agencies will defend their interests. Considering that judicial agencies face potential liability (in the form of attorney fees and costs) for nondisclosure, and face no penalty whatever for disclosing records, it may be a slim hope indeed. This is especially true when the personal information requested falls into a grey area, where reasonable people may disagree about whether the information is covered by one of the exemptions from disclosure.

We therefore suggest the following additions to the proposed rule:

Sec. (f)(2)(A)(7) NOTICE TO RECORD SUBJECTS. Unless otherwise required or prohibited by law, a judicial agency has the option of notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested.

Sec. (f)(2)(B)(6) RIGHTS OF RECORD SUBJECTS. A person who is named in a requested record, or to whom the record specifically pertains, has a right, but not an obligation, to initiate review of an agency decision to disclose the requested record under sections (f)(2)(B)(3)-(5), or to participate as a party in any review initiated by a requester under sections (f)(2)(B)(3)-(5). If either the record subject or the record requester objects to alternative review under section (f)(2)(B)(4), such alternative review shall not be available.

Thank you for your consideration of this additional language to protect the interests of record subjects.

Sincerely,

A handwritten signature in cursive script that reads "Doug Klunder". The signature is written in black ink and is positioned centrally below the word "Sincerely,".

Doug Klunder  
Privacy Counsel

**A. WORK GROUP REPORT**

**6. MINORITY REPORTS**

**c. Protection of privacy in records requests, submitted by Doug Klunder, ACLU**



To: Board of Judicial Administration  
Date: September 14, 2010  
Re: Protection of privacy in records requests

The American Civil Liberties Union of Washington (ACLU) welcomes this opportunity to comment on privacy provisions in the proposed amendments to GR 31. We are a statewide, non-partisan, non-profit organization with over 20,000 members, dedicated to the preservation and defense of constitutional and civil liberties. One of those civil liberties is the right of access to information about our government, necessary to allow public oversight of government workings. Another civil liberty is the right to personal privacy, and the right to control the dissemination of information about one's private life. The ACLU has advanced both of these liberties, participating in numerous cases involving the Public Records Act (PRA) as *amicus curiae*, as counsel to parties, and as a party itself. In addition to litigation, the ACLU has participated in legislative and rule-making procedures surrounding access to a wide variety of public records.

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EXECUTIVE DIRECTOR

Most of the time there is no conflict between these liberties. Indeed, open access to government documents is necessary to ensure that the government respects the privacy guaranteed to and demanded by its constituents. When government maintains personal information, however, disclosure of that information may violate individuals' privacy. When the PRA was passed by initiative in 1972, the voters specifically stated that the purpose was to assure "full access to information concerning the conduct of government" and that access must be "mindful of the right of individuals to privacy." By this reasoning, personal information that does not advance the oversight of government conduct should not be disclosed to the public.

The Washington Supreme Court properly recognized this close to 25 years ago, and established a balancing test for personal information, permitting nondisclosure of public records if the privacy interest in those records outweighs the public interest in disclosure. *In re Rosier*, 105 Wn.2d 606, 717 P.2d 1353 (1986). This test is similar to those prescribed by the Court for determining whether court proceedings and records should be available to the public. *Cowles Publishing Co. v. Murphy*, 96 Wn.2d 584, 637 P.2d 966 (1981); *Seattle Times v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982).

Regrettably, the Legislature chose to amend the PRA in response to *Rosier*, and eliminated both the generalized privacy exemption and the balancing test used to evaluate privacy interests. Laws of 1987, ch. 403 (now codified as RCW 42.56.050). It is quite possible that this legislative amendment has contributed to the proliferation of exemptions added to the PRA over the past 25 years—since there is no longer a generalized privacy exemption, the Legislature has been forced to regularly add specific exemptions when it becomes aware of new types of personal information maintained in public records.

Protection of personal privacy has thus become a cumbersome and haphazard process. In order for the Legislature to act to protect personal information, it must first learn that such information exists in public records, which typically happens only when some individual, agency, or advocacy organization is successful in catching the Legislature's attention.<sup>1</sup> And, of course, even when the Legislature is aware of the existence of personal information (and the need to protect it), passage of a bill is subject to the vagaries of politics and competing priorities. The result is that it may be years before any particular personal information is protected, quite often long after such information has been released to a requester and the damage has already been done.

The ACLU therefore urges the judicial system not to follow the example of the current PRA with respect to privacy as it considers adoption of a rule governing access to judicial administrative records. Instead, the rule should recognize the privacy-protective spirit of the original initiative enacted by the people, and follow the judicial tradition of balancing privacy interests against the public interest in disclosure. It must be remembered that "the basic purpose and policy of [public access to records] is to allow public scrutiny of government, rather than to promote scrutiny of particular individuals who are unrelated to any governmental operation." *Rosier*, 105 Wn.2d at 611.

There are at least two ways the proposed rule could incorporate a balancing test for personal information. Language could be added to section (f)(1)(A), to ensure that the redaction provision is a substantive provision rather than merely procedural. A better solution, however would be the creation of a new subsection in section (f)(1). We suggest the following language:

PROTECTION OF PERSONAL PRIVACY. The basic purpose and policy of public access to judicial agency administrative records is to allow public scrutiny of government, rather than to promote scrutiny of particular individuals who are unrelated to any governmental operation. Consistent with Article 1, Section 7 of the Washington State Constitution, and in order to protect personal privacy, a judicial agency need not allow access to information in administrative records when the personal privacy interest in that information outweighs the public interest in disclosure, whether or not the information is explicitly covered by an exemption in paragraphs (A) and (B) above. Consistent with paragraph (A), access must be provided to the remaining portions of the administrative records, with only as much information deleted as is necessary to protect personal privacy.

Adoption of such a provision would ensure that personal privacy remains protected even when the need arises for new personal information to be collected or maintained by a judicial agency. And it would avoid the need for frequent updating of the court

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<sup>1</sup> There is no proactive mechanism for the Legislature to discover what personal information is held by government agencies and determine whether that information should be protected from public disclosure. The Legislature has so far declined to order a survey of personal information in state-held records, let alone in records held by local governments. *See, e.g.*, Senate Bill 5869 (2007).

rule, which involves a process even more cumbersome than legislative amendments to the PRA.

Thank you for your consideration of this additional language to protect the privacy interests of record subjects.

Sincerely,

A handwritten signature in cursive script that reads "Doug Klunder". The signature is written in black ink and is positioned below the word "Sincerely,".

Doug Klunder  
Privacy Counsel

**A. WORK GROUP REPORT**

**6. MINORITY REPORTS**

**d. Concerns regarding  
implementation and administration  
impacts on small courts, submitted  
by Marti Maxwell, AWSCA**

**Bates, Charles**

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**From:** BJA Public Records Act Work Group [BJAPRA@LISTSERV.COURTS.WA.GOV] on behalf of Marti Maxwell [maxwellm@CO.THURSTON.WA.US]  
**Sent:** Tuesday, September 14, 2010 3:12 PM  
**To:** BJAPRA@LISTSERV.COURTS.WA.GOV  
**Subject:** [BJAPRA]

Ladies and Gentlemen:

I continue to have concerns about the burden this rule change will have on the limited and general jurisdiction courts - especially, small courts where there is only one judge and the 'administrator' is likely to be the court reporter. I am most troubled that we cannot follow other states and exempt judicial officer and employee communications, particularly intra-court e-mail. I foresee misuse of the rule to intimidate judicial officers and employees. I wonder what will happen in small jurisdictions when a judge is trying a case and a party or parties start PRA requests - will the judicial officer have to recuse? Lastly, this will be a significant financial hardship for already underfunded courts.

Marti Maxwell, Administrator  
Superior Court of Washington  
For Thurston County  
2000 Lakeridge Drive SW  
Olympia, WA 98502

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**A. WORK GROUP REPORT**

**6. MINORITY REPORTS**

**e. Objections & Dissent to  
Proposed Revisions, submitted by  
Rowland Thompson, ADNW**

# **OBJECTIONS & DISSENT TO PROPOSED REVISIONS (Sept. 10, 2010) TO GR 31**

## **Board for Judicial Administration Public Records Act Work Group**

By Allied Daily Newspapers of Washington

The purpose of this brief report is to articulate several of the major concerns of Allied Daily Newspaper of Washington (ADNW) in regards to the proposed revisions to GR 31, and to explain the general reasoning of several of its additions to those revisions provided to the Work Group on September 13, 2010. In doing so, ADNW first acknowledges that the vast majority of the Work Group's proposed revisions are to the public's benefit. Specifically, this is because many of the additions are reflective of the fact that Article I, Section 10 of the Washington State Constitution provides the constitutional basis for broad access to all aspects of judicial administration, and that such access should not be limited absent compelling and overriding interests to the counter. ADNW particularly approves of the proposed procedural mechanisms for seeking review of a judicial agency's decision to deny access to requested administrative records, including the multiple alternate avenues for seeking such review, and the substantive requirements placed upon judicial agencies to justify any assertion of an exemption or prohibition on disclosure.

However, there are several areas in which ADNW disagrees with the proposed revisions, most of which are already articulated in the ADNW's edited version of the Work Group's September 10, 2010 revisions provided on September 13, 2010, and seeks here to elaborate on the content of those comments.

### **A. Article I, Section 10**

Because they color and guide the entirety of GR 31 and the proposed revisions, some of the fundamental principles of Article I, Section 10 of the Washington State Constitution, should be articulated as a threshold matter.

Under Article I, Section 10 of the Washington State Constitution, "[j]ustice in all cases shall be administered openly." This provision is mandatory. State v. Duckett, 141 Wn. App. 797, 804, 173 P.3d 948 (2007) (citation omitted). The provision has been interpreted to mean that the public and the press have a right of access to judicial proceedings and court documents—in both civil and criminal cases. Dreiling v. Jain, 151 Wn.2d 900, 908, 915, 93 P.3d 861 (2004) ("[T]he policy reasons for granting public access to criminal proceedings apply to civil cases as well.... These policies relate to the public's right to monitor the functioning of our

courts, thereby insuring quality, honesty and respect for our legal system.”) (citation omitted); **see also** ADNW v. Eikenberry, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993) (affirming that “it is the right of the people to access open courts where they may freely observe the administration of civil and criminal justice”); **see also** Federated Publ’n Inc. v. Kurtz, 94 Wn.2d 51, 60, 615 P.2d 440 (1980) (Article I, Section 10 applies to all judicial proceedings).

The strong policy and rationale behind the public’s constitutional right to open court proceedings and records has been repeatedly recognized by the Washington and United States Supreme Courts. The United States Supreme Court articulated the general policy behind keeping courts open:

The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

**Press-Enterprise Co. v. Superior Court**, 464 U.S. 501, 508 (1984) (“Press-Enterprise I”) (citation omitted); **see also** Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 604 (1980) (Blackmun, J., concurring) (“[T]he public has an intense need and a deserved need to know about the administration of justice in general; about the prosecution of local crimes in particular; about the conduct of the judge, the prosecutor, defense counsel, other public servants, and *all the actors in the judicial arena...*”) (emphasis added) (citation omitted). Further, absence of public scrutiny “breed[s] suspicion of prejudice and arbitrariness, which in turn spawns disrespect for the law[.]” *Id.* at 595 (Brennan, J., concurring). This policy has been echoed by the Washington State Supreme Court:

The open operation of our courts is of utmost public importance. Justice must be conducted openly to foster the public’s understanding and trust in our judicial system and to give judges the check of public scrutiny. Secrecy fosters mistrust. This openness is a vital part of our constitution and our history. The right of the public, including the press, to access trials and court records may be limited only to protect significant interests and any limitation must be carefully considered and specifically justified.

**Dreiling**, 151 Wn.2d at 903-04; **see also** Federated Publication, 94 Wn.2d at 66 (“[T]he judiciary must preserve the public right of access to proceedings to the maximum extent possible.”) (Utter, C.J., concurring and dissenting).

**B. Policy and Purpose of GR 31**

In ADNW's comments accompanying its proposed revisions to the September 10, 2010 version of the revised GR 31, it noted that it is essential that the policy and purpose provision of GR 31 explicitly articulate the text of Article I, Section 10, and the scope of Section 10's protections of the public's right to access all judicial records. Most important, it must be noted within the revised GR 31 that the public's constitutional protections to its right to access extend beyond only case records held by an actual court, see above, but also to all the administration records of those judicial agencies.

There is a dearth of case law within Washington regarding the scope of the prior GR 31, and the vast majority of cases discussing the scope of Article I, Section 10 is relegated to discussing sealing court records and keeping court proceedings open under the five-part test established in Seattle Times v. Ishikawa, 97 Wn.2d 30, 37, 640 P.2d 716 (1982). Because of this, it is imperative that the purpose of policy section of the revised GR 31 clearly articulates that the rule is simply the mechanism by which the public can assert its constitutional interest in accessing judicial records, that the rule itself is not the source of this right to access, and that the scope of the public's interest in the judicial process is not limited to only case records.

The language of Article I, Section 10 specifically refers to the "*administration of justice*", and there is no indication from case law or other interpretation of the provision that the public does not have a constitutional interest in accessing the entirety of the judicial process as a general principle—which necessarily implicates the dozens of judicial agencies that serve their respective roles in allowing this process to function. See Cowles Publ'g. Co. v. Murphy, 96 Wn.2d 584, 637 P.2d 966 (1981) ("Although the informed public concept is generally associated with the legislative and executive branches, it is equally true of those involved in the judicial process."). All of the judicial agencies articulated in the revised GR 31, are all publicly-financed, or require mandatory dues or fees, and are all instrumental in their own way to the judicial process in general—that a judicial agency is not a court should not be dispositive as to the extent to which the public can monitor the activities of agency it subsidizes, even through statutorily created mandatory membership.

**C. Incorporation of PRA Principles**

While ADNW believes that the incorporation of certain aspects of the Public Records Act ("PRA"), ch. 42.56 RCW, is crucial to the proposed revisions to GR 31, particularly in regards to informing the procedural aspects of the judicial review section, it must be noted that it has concerns that the limitations of the PRA will inappropriately be applied to the public's constitutional right of access to judicial records.

Many of ADNW's comments specifically add provisions of the PRA or adopt applicable provisions from the PRA's Model Rules; see WAC 44-14. In reality, many of the requirements placed upon agencies under the PRA translate directly to help ensure the public's constitutional access to records under GR 31, such as the narrow interpretation of exemptions, the policy of broad disclosure, the placing of the burden on the agency to justify any withholding or redaction of requested judicial records, the requirement on agencies to provide timely and written notice to requestors where appropriate, and the requirement that agencies give explicit reasons for the actions it takes, etc.

As indicated by ADNW's suggested additions to subsection (f)(2), the most important area in which the PRA, particularly its Model Rules, provides substantive guidance to the proposed GR 31 is in the provisions articulating the public's access to the administrative records retained by a given judicial agency. Specifically, in the "substantive response" section regarding how a judicial agency is to respond to a request for administrative judicial records, multiple provisions from the Model Rules are appropriate for incorporation to guide both requestors and also judicial agencies. ADNW's proposed additions reflect this fact.

This is especially important in this instance because of the aforementioned dearth of case law (which will be even more bereft in the years following these revisions to GR 31) and also because of the ambiguity within the PRA itself as to how particular provisions apply in practice; in other words, without the guidance of the Model Rules, there are several issues that would otherwise be unaddressed in total. In the interest of expediting the public's access to such records, and in the interest of avoiding litigation that would be both needless and costly to everyone, it would serve all parties best by including as much guidance as feasibly possible within the provisions themselves to avoid any ambiguity.<sup>1</sup> ADNW anticipates that the vast majority of its proposed additions on this issue will not be considered controversial, such as the requirement that the agency make an "objectively reasonable" search for the requested records, or that the judicial agency provide electronic judicial records in electronic format if so requested, or to what extent a judicial agency may charge a requestor for the copying of the records they retain. There is no discernable justification to deviate from the PRA and its attendant interpretations on these topics, especially when many are designed to benefit both the requestor and the agency.

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<sup>1</sup> This need for clarity is addressed throughout ADNW's comments to the proposed revision of GR 31, and not only in the section addressed in the text. Avoiding ambiguity is of paramount importance in the drafting of any rule or statute, and using plain and specific language will best facilitate the will of the rule-making body in adopting the rule or statute. See, e.g., Wash. State Dept. of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002) (when the language within statutes is plain and unambiguous, it must be presumed that the language within them reflects the intent of the Legislature).

In fact, several of the proposed revisions provided by ADNW tend to favor the interests of judicial agencies, including the proposed addition allowing the agency to abandon the records request if the requestor fails to clarify or fails to timely inspect the responsive records on the specified date(s). Such provisions, adapted from corollary provisions within the PRA and its Model Rules, are reflective that requestors too have some minimal obligations in seeking their records, and to the greatest extent possible, that judicial agency resources will not be wasted in responding to a requestor that has been less than diligent in accessing their records.

However, any revised rule must acknowledge that there is a crucial distinction between the basis for GR 31 and the PRA. Language within the revised GR 31 must be unambiguous that the public's right of access to judicial records is constitutional in nature, and therefore necessarily broader in scope and more protected than the public's *statutory* right to access agency records under the PRA. As it stands now, the proposed revisions have a clause indicating that the PRA may be used as non-binding guidance in interpreting GR 31, which makes sense in most circumstances.

More problematic is the proposed provision (struck by ADNW) that incorporates all of the PRA's exemptions and prohibitions into the new GR 31. Automatic incorporation of all the PRA's exemptions, which the Legislature specifically adopted as to agency public records and *not* judicial records, is inappropriate and premature here. There must be a distinction made within GR 31 between using the PRA as guidance (*i.e.*, the fact that a category of record or information is exempt under the PRA may be *persuasive evidence* that access may be limited or denied under GR 31) and automatically adopting each of the over 300 exemptions and prohibitions either written or incorporated into the PRA.

In other words, the express exemptions already listed in the proposed GR 31 as to judicial administrative records, and the generally-applicable exemptions for personal identifying information, should be sufficient until and unless the Supreme Court modifies GR 31 to expressly incorporate more exemptions, or all of the PRA's exemptions. At this point, it would be premature and inconsistent with Article I, Section 10's presumption of openness to judicial records to presume that all of the PRA's exemptions should be adopted without further debate and reasoned analysis from the proper deciding body.

#### D. "Common Law Balancing Test"

One of the more troubling additions to the proposed revisions to GR 31 is the suggested implementation of the "common law balancing test" in deciding the application of exemptions to administrative judicial agency records. First of all, the "common law" route of access described in Cowles Publ'g v. Murphy, 96 Wn.2d 584, 637 P.2d 966 (1981) and later in Beuhler v. Small, 115 Wn. App. 914, 64 P.3d 78 (2003) is separate from that afforded by Article I,

Section 10—both of those cases clearly distinguish between the two. As recognized in federal cases cited in Cowles, the “common law” right of access is largely derived from the First Amendment to the U.S. Constitution, and *not* the law that actually controls these issues in Washington, which is unquestionably more broad. See Cowles Publ’g., 96 Wn.2d at 588 (citing Nixon v. Warner Communications, Inc., 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978)).

Moreover, reliance on the ambiguous “safety and well-being” dicta from Cowles is further made inapplicable here because the Court was specifically discussing how disclosure of the disputed *criminal* records (including search warrants and affidavits from witnesses) “may discourage informants from providing information out of fear for their safety and well-being.” 96 Wn.2d at 590. In other words, the language from Cowles was not establishing any kind of substantive balancing test, but was instead articulating several general reasons against disclosure in a scenario similar to the one before it—reasons that are now subsumed under the five-part constitutional test from Ishikawa, decided two years after Cowles. Related to this point, ADNW has adapted language from the Ishikawa test (“serious and imminent” risk) into the privacy consideration under the “right of access” section for the administrative records held by judicial agencies. Further, the Court in Cowles was discussing a specific category of records that obviously carry a higher inherent risk of putting an individual in physical danger if released in an unredacted form—such a presumption is not present with the vast majority of the administrative judicial agency records to which this “balancing test” would apply.<sup>2</sup> Additionally, the “balancing test” from Cowles is worded very ambiguously, carrying with it a risk of swallowing the presumption of openness if adopted, and it seeks to protect things explicitly addressed in other sections of the revised GR 31—this makes adoption of the rule not only inappropriate, but also superfluous.

There is thus no basis in law to adopt as a “balancing test” the dicta from Cowles, which was not applied in that case as a test of any kind, was later supplanted by Ishikawa, and addressed a category of records covered by different standards than the judicial agency administrative records addressed in the revised GR 31.

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ADNW hopes that this report has provided some guidance and explanation for most of the comments it made to the proposed revision of GR 31. Again, many of the proposed additions are deserving of praise, and will provide additional mechanisms to help ensure the public’s constitutional right to access judicial records if implemented.

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<sup>2</sup> ADNW notes also that the case records at issue in Cowles were ordered disclosed. See Cowles Publ’g., 96 Wn.2d at 590 (“The public’s interest in an open legal process convinces us that our judicial process is best served by ordering that these records should be available to the public.”).

**DRAFT**

**SEPTEMBER 10, 2010**

*The most recent changes, which incorporate the work group's decisions from the September 8<sup>th</sup> meeting, are shown in a blue font.*

*Shown in yellow highlighting are two issues that the work group still needs to address via the listserv:*

- *the common law test on pages 9 and 11, and*
- *a new proposal from the Bar for an exemption on page 10.*

**GR 31 ACCESS TO COURT JUDICIAL RECORDS**

**(a) Policy and Purpose.** It is the policy of the courts judiciary to facilitate access to court judicial records as provided by Article I, Section 10 of the Washington State Constitution, which mandates that "[j]ustice in all cases be administered openly." This policy applies to both civil and criminal cases. Strict enforcement of this policy is fundamental to ensuring quality, honesty, and respect for all aspects of the judiciary. Access to court judicial records is not absolute and shall be consistent with reasonable expectations of personal privacy as provided by article 1, section 7 of the Washington State Constitution. ~~Restrictions derived from statutes and restrictions in court rules, shall also apply and as required for the integrity of judicial decision making.~~ These restrictions and the exemptions described herein shall be narrowly construed, with the burden on the judicial agency to demonstrate that any such restriction or exemption justifies any infringement on the access to judicial records, and Any exemption or restriction on access to a judicial record is inapplicable to the extent that the exempt or restricted information may be redacted. Access shall not unduly burden the business of the courts judiciary.

*[COMMENT: The work group expanded this provision so that it applies to all judicial records (not only case records) and all judicial agencies (not just courts).]*

**(b) Scope.** This rule governs the right of public access to judicial records, including case records, and must be read within the context of Article I, Section 10 of the Washington State Constitution. This rule applies to all court judicial records, regardless of the physical form of the court record, the method of recording the court record or the method of storage of the court

**Comment [A1]:** This sentence is a paraphrasing of quoted language from *Dreiling v. Jain*, 151 Wn.2d 900, 915, 93 P.3d 861 (2004) (citation omitted).

**Comment [A2]:** "[T]he integrity" language was struck because such an ambiguous statement invites an exception that may swallow the general rule.

**Comment [A3]:** This language was largely derived from the Public Records Act, at RCW 42.56.030.

**Comment [A4]:** Aside from the explicit exemptions regarding certain categories of judicial records, the only generally applicable restriction is that for private identifying information—using the PRA's language from RCW 42.56.210(1) is appropriate to clarify that the presence of such identifying information cannot justify a total denial to access.

**Comment [A5]:** It should be made clear that Article I, Section 10's policy is the underlying principle to the access to all judicial records and court proceedings.

record. Administrative records are not within the scope of this rule. Court Case records are further governed by GR 15 and GR 22.

*[COMMENT: The work group expanded this provision so that it applies to all judicial records, not just case records.]*

Comment [A6]: Reference to GR 15 is necessary for clarity's sake.

### (c) Application of Rule.

- (1) ~~This rule applies to the following judicial agencies:~~
- A. ~~The Supreme Court and the Court of Appeals;~~
  - B. ~~The superior, district, and municipal courts;~~
  - C. ~~Board for Judicial Administration;~~
  - D. ~~Administrative Office of the Courts;~~
  - E. ~~Judicial Information System Committee;~~
  - F. ~~Minority and Justice Commission;~~
  - G. ~~Gender and Justice Commission;~~
  - H. ~~Board for Court Education;~~
  - I. ~~Interpreter Commission;~~
  - J. ~~Certified Professional Guardian Board;~~
  - K. ~~Commission on Children in Foster Care;~~
  - L. ~~Washington State Pattern Jury Instruction Committee;~~
  - M. ~~Pattern Forms Committee;~~
  - N. ~~Court Management Council;~~
  - O. ~~Bench Bar Press Committee;~~
  - P. ~~Judicial Ethics Advisory Committee;~~
  - Q. ~~Office of Public Guardianship;~~
  - R. ~~Washington Center for Court Research;~~
  - S. ~~Office of Civil Legal Aid;~~
  - T. ~~Office of Public Defender;~~
  - U. ~~State Law Library;~~
  - V. ~~Washington State Bar Association;~~

Comment [A7]: The list of judicial agencies was moved into the "Definition" section, at part (d), since any list of judicial agencies in the "Application" section could be read to be exclusive, as opposed to a non-exclusive list of examples.

~~*[COMMENT: The work group debated the rule's application to the WSBA. The work group applied the Telford factors for determining which entities are the "functional equivalents" for public agencies under the Public Records Act. The Telford factors are (1) governmental function; (2) level of governmental funding; (3) extent of governmental involvement or regulation; and (4) creation by government. The work group concluded that the WSBA was the functional equivalent of a judicial agency for purposes of the proposed rule. The work group considered excluding from the scope of this rule the WSBA's functions as a trade organization (as opposed to its regulatory functions) but rejected this approach because the WSBA's dues are mandatory, making them similar to a government-imposed fee. Existing court rules on public access already address much*~~

~~of the Bar's regulatory activities; it is expected that the existing rules would cover much of the documents for WCB's regulatory function.]~~

~~[A minority report has been filed by Bob Walden on behalf of the WSBA on this item. Minority reports are included earlier in the work group's report.]~~

W. ~~County clerk's offices with regard to their duties to the superior court and their custody of superior court records;~~

~~[COMMENT: In most counties, the county clerk is an independently elected position. The county clerk's office acts as the legal custodian of superior court records, and members of the office act under the supervision of judges in the courtroom, but the office also has duties that are outside the judicial arena. This rule would apply only with regard to the office's duties to the court and its records.]~~

X. ~~Superior Court Judges Association, District and Municipal Court Judges Association, and similar associations of judicial officers and employees;~~

~~[COMMENT: The work group debated whether these associations should be governed by this rule. Just as with the WSBA, the work group looked to the Telford factors and determined that these associations are the "functional equivalent" of judicial agencies and thus should be covered by the rule.]~~

Y. ~~All other judicial entities that are overseen by a court, whether or not specifically identified in this section (c)(1); and~~

Z. ~~All subgroups of the entities listed above, including committees, task forces, commissions, boards, offices, and departments;~~

~~[COMMENT: The proposal includes a list of specific judicial agencies, along with catch-all provisions in subparagraphs (Y) and (Z). The work group took this approach to make sure there was no mistake as to the original intentions for the rule's scope. BJA and/or the Supreme Court will have the opportunity to replace the list with a more general definition of "judicial agency."]~~

(2) This rule applies to all judicial agencies.

(2)(3) This rule does not apply to the Commission on Judicial Conduct. The Commission is encouraged to incorporate any of the provisions in this rule as it deems appropriate.

~~[COMMENT: The Commission on Judicial Conduct is not governed by a court. The commission has a heightened need for maintaining independence from courts. It would be inappropriate to dictate to the commission its policies on public records.]~~

(3)(4) A judicial officer is not an agency. Record requests shall be directed to the designated public records officer of the judicial agency.

~~[COMMENT: This provision protects judges and court commissioners from having to respond personally to public records requests. Records requests would instead go to the court's public records officer.]~~

**Comment [A8]:** This provision should include reference to WAC 292-10-020, which states in part, "All Commission public records are deemed to be available for public inspection and copying pursuant to these rules, except as otherwise provided by RCW 2.64.111 and 42.17.910."

(4)(5) A person or entity contracted entrusted by a judicial agency with the storage and maintenance of its public records, whether part of a judicial agency or a third party, is not a judicial agency. Such person or entity may not respond to a request for access to judicial records, absent express written authority from the judicial agency, or separate authority in rule or statute to grant access to the documents.

Comment [A9]: "Entrusted" implies a delegation of power or authority, when in reality these third parties are simply contracted to be housing bodies for the public records of a judicial entity.

*[COMMENT: Judicial e-mails and other documents sometimes reside on IT servers, some are in off-site physical storage facilities. This provision prohibits an entity that operates the IT server from disclosing judicial records. The entity is merely a bailee, holding the records on behalf of the judicial agency, rather than an owner of the records having independent authority to release them. Similarly, if a court puts its paper records in storage with another entity, the other entity cannot disclose the records. In either instance, it is the judicial agency that needs to make the decision as to releasing the records. The records request needs to be addressed by the judicial agency's public records officer, not by the person or entity having control over the IT server or the storage area. On the other hand, if the judicial agency archives its records with the state archivist, relinquishing its own authority as to disposition of the records, the archivist would have separate statutory authority to disclose the records.]*

**(e) (d) Definitions.**

(1) "Access" means the ability to view or obtain a copy of a court judicial record.

(2) "Administrative record" means ~~any record pertaining to the management, supervision or administration of the judicial branch, including any court, board, or committee appointed by or under the direction of any court or other entity within the judicial branch, or the office of any county clerk.~~ any public record created by or maintained by a judicial agency or subgroup of a judicial agency and related to the management, supervision, or administration of the agency.

*[COMMENT: The Public Records Work Group has developed a list of categories of records maintained by judicial agencies. The list is annotated with the Work Group's expectation of whether such records are subject to disclosure. The list is found as an appendix to the work group's report. It is intended for illustrative purposes only.]*

(3) "Bulk distribution" means distribution of all, or a significant subset, of the information in court case records, as is and without modification.

(4) "Court Case record" includes, but is not limited to: (i) Any document, information, exhibit, or other thing that is maintained by a court in connection with a judicial proceeding, and (ii) Any index, calendar, docket, register of actions, official record of the proceedings, order, decree, judgment, minute, and any information in a case management system created

or prepared by the court that is related to a judicial proceeding. Court Case record does not include data maintained by or for a judge pertaining to a particular case or party, such as personal notes and communications, memoranda, drafts, or other working papers; administrative records as defined by (d)(2) of this section; chambers records as defined by (5)(a) of this section; or information gathered, maintained, or stored by a government agency or other entity to which the court has access but which is not entered into the record.

~~(5)(6)~~ (a) "Chambers record" means any writing that is created by or maintained by any judicial officer or chambers staff, and is maintained solely within under the judicial officer's chambers control, whether directly related to an official judicial proceeding or other chambers activities, and whether physically stored outside of chambers. "Chambers staff" means a judicial officer's law clerk, judicial intern, judicial extern, and any other staff that when provides support directly to the judicial officer at chambers.

Comment [A10]: Clarity was needed to ensure that this definition is extremely narrow.

Comment [A11]: The rule needs to make clear that the records need to be uniformly under the power of the chambers, but do not need to be physically located within a judicial officer's chambers to be considered "chambers records."

(b) Chambers records are not public records. Case records and administrative records do not become chambers records merely because they are in the possession or custody of a judicial officer or the staff of that officer's chambers. Records that would otherwise be subject to disclosure as administrative records are not immune from public disclosure by reason of being placed solely under the control of a judicial officer or the staff of that officer's chambers.

*[COMMENT: Access to chambers records could necessitate a judicial officer having to review all records to protect against disclosing case sensitive information or other information that would intrude on the independence of judicial decision making. This would effectively make the judicial officer a de facto public records officer and could greatly interfere with judicial functions. Records may remain under chambers control even though they are physically stored elsewhere. However, records that are otherwise subject to disclosure should not be allowed to be moved into chambers control as a means of avoiding disclosure.]*

(5) (6) "Criminal justice agencies" are government agencies that perform criminal justice functions pursuant to statute or executive order and that allocate a substantial part of their annual budget to those functions.

(6) (7) "Dissemination contract" means an agreement between a court case record provider and any person or entity, except a Washington State court (Supreme Court, court of appeals, superior court, district court or municipal court), that is provided court case records. The essential elements of a dissemination contract shall be promulgated by the JIS Committee.

~~(7)~~ (8) "Judicial Information System (JIS) Committee" is the committee with oversight of the statewide judicial information system. The judicial information system is the automated, centralized, statewide information system that serves the state courts.

~~(9)~~ (9) "Judge" means a judicial officer as defined in the Code of Judicial Conduct (CJC) Application of the Code of Judicial Conduct Section (A).

~~(10)~~ This rule applies to the following judicial agencies: "Judicial agency" means an office, board, commission, or other similar entity that is that serves an administrative function for a court. A task force, committee, work group, or sub-group created by a court or judge is a "judicial agency". Judicial agencies include, but are not limited to:

- AA. The Supreme Court and the Court of Appeals;
- BB. The superior, district, and municipal courts;
- CC. Board for Judicial Administration;
- DD. Administrative Office of the Courts;
- EE. Judicial Information System Committee;
- FF. Minority and Justice Commission;
- GG. Gender and Justice Commission;
- HH. Board for Court Education;
- II. Interpreter Commission;
- JJ. Certified Professional Guardian Board;
- KK. Commission on Children in Foster Care;
- LL. Washington State Pattern Jury Instruction Committee;
- MM. Pattern Forms Committee;
- NN. Court Management Council;
- OO. Bench Bar Press Committee;
- PP. Judicial Ethics Advisory Committee;
- QQ. Office of Public Guardianship;
- RR. Washington Center for Court Research;
- SS. Office of Civil Legal Aid;
- TT. Office of Public Defense;
- UU. State Law Library;
- VV. Washington State Bar Association;

Comment [A12]: Although the Supreme Court will likely modify this general definition, this definition should be sufficient.

[COMMENT: The work group debated the rule's application to the WSBA. The work group applied the Telford factors for determining which entities are the "functional equivalents" for public agencies under the Public Records Act. The Telford factors are (1) governmental function; (2) level of governmental funding; (3) extent of governmental involvement or

regulation; and (4) creation by government. The work group concluded that the WSBA was the functional equivalent of a judicial agency for purposes of the proposed rule. The work group considered excluding from the scope of this rule the WSBA's functions as a trade organization (as opposed to its regulatory functions) but rejected this approach because the WSBA's dues are mandatory, making them similar to a government-imposed fee. Existing court rules on public access already address much of the Bar's regulatory activities; it is expected that the existing rules would cover much of the documents for WSBA's regulatory function.]

[A minority report has been filed by Bob Welden on behalf of the WSBA on this item. Minority reports are included earlier in the work group's report.]

WW. County clerk's offices with regard to their duties to the superior court and their custody of superior judicial court records;

[COMMENT: In most counties, the county clerk is an independently elected position. The county clerk's office acts as the legal custodian of superior court records, and members of the office act under the supervision of judges in the courtroom, but the office also has duties that are outside the judicial arena. This rule would apply only with regard to the office's duties to the court and its records.]

Comment [A13]: This was for clarification that the rule applies to Municipal and District courts as well.

XX. Superior Court Judges Association, District and Municipal Court Judges Association, and similar associations of judicial officers and employees.

[COMMENT: The work group debated whether these associations should be governed by this rule. Just as with the WSBA, the work group looked to the Telford factors and determined that these associations are the "functional equivalent" of judicial agencies and thus should be covered by the rule.]

YY. All other judicial entities that are overseen by a court or serve as a functional equivalent, whether or not specifically identified in this section (d)(10)(e)(1); and

ZZ. All subgroups of the entities listed above, including but not limited to committees, task forces, commissions, boards, offices, work groups, and departments. This includes the subgroups of entities that serve as the functional equivalent of a judicial agency.

[COMMENT: The proposal includes a list of specific judicial agencies, along with catch-all provisions in subparagraphs (Y) and (Z). The work group took this approach to make sure there was no mistake as to the original intentions for the rule's scope. BJA and/or the Supreme Court will have the opportunity to replace the list with a more general definition of "judicial agency."]

Comment [A14]: This incorporates the language from *Telford v. Thurston County Bd. of Commrs.*, 95 Wn. App. 149, 974 P.2d 886 (1998).

(9) (10) "Public" includes an individual, partnership, joint venture, public or private corporation, association, federal, state, or local governmental entity or agency, however constituted, or any other organization or group of persons, however organized.

~~(10)~~ (11) "Public purpose agency" means governmental agencies included in the definition of "agency" in RCW 42.17.020~~(2)~~ and other non-profit organizations whose principal function is to provide services to the public.

(12) "Public record" includes any writing, except chambers records, containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any judicial agency regardless of physical form or characteristics. A public record may be considered "used" by the judicial agency even if it does not physically possess the record. Electronic records may be public records, including the metadata of such electronic public records.

*COMMENT: The definition is adapted from the Public Records Act. The work group added the exception for chambers records, for consistency with other parts of the proposed rule.*

Comment [A15]: These additions to the definition of "public record" are based on PRA case law and the Model Rules, and are not controversial.

(13) "Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated. An email, including the metadata embedded within the email in its native form, constitutes a writing.

*COMMENT: The definition is taken from the Public Records Act.*

Comment [A16]: See prior Comment.

~~(d)~~ (e) **Access- Case Records.**

(1) **Right of Access to Case Records.** The public shall have access to all court case records except as restricted by federal law, state law, court rule, or court order, or case law.

Comment [A17]: "Case law" is ambiguous, as it could denote a trial court opinion or something less than a published appellate decision. If case law is to remain part of this provision, elaboration on what case law means should be included.

~~(e)~~ (2) **Personal Identifiers Omitted or Redacted from Court Case Records**

~~(1)~~ (A) Except as otherwise provided in GR 22, parties shall not include, and if present shall redact, the following personal identifiers from all documents filed with the court, whether filed electronically or in paper, unless necessary or otherwise ordered by the Court.

~~(A)~~ (1) Social Security Numbers. If the social security number of an individual must be included in a document, only the last four digits of that number shall be used.

~~(B)~~ (2) Financial Account Numbers. If financial account numbers are relevant, only the last four digits shall be recited in the document.

~~(C)~~ (3) Driver's License Numbers.

(2) (B) The responsibility for redacting these personal identifiers rests solely with counsel and the parties. The Court or the Clerk will not review each pleading for compliance with this rule. If a pleading is filed without redaction, the opposing party or identified person may move the Court to order redaction, but the party that filed the pleading has the primary obligation to correct any failure to redact the specified identifying information. The court may award the prevailing party reasonable expenses, including attorney fees and court costs, incurred in making or opposing the motion. To redact the above personal identifying information, whether in the original filing or upon motion of any party, a party does not need to comply with GR 15.

**COMMENT**

*This rule does not require any party, attorney, clerk, or judicial officer to redact information from a court case record that was filed prior to the adoption of this rule.*

**Comment [A18]:** GR 15 applies to all court records, but clarification is needed that these specific categories of information are an exception to the procedures of GR 15, which in most instances requires also compliance with the constitutional sealing and redaction test from Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982).

**(F) (3) Distribution of Court Case Records Not Publicly Accessible**

~~(1)~~ (A) A public purpose agency may request court case records not publicly accessible for scholarly, governmental, or research purposes where the identification of specific individuals is ancillary to the purpose of the inquiry. In order to grant such requests, the court or the Administrator for the Courts must:

~~(A)~~ (1) Consider: (i) the extent to which access will result in efficiencies in the operation of the judiciary; (ii) the extent to which access will fulfill a legislative mandate; (iii) the extent to which access will result in efficiencies in other parts of the justice system; and (iv) the risks created by permitting the access.

~~(B)~~ (2) Determine, in its discretion, that filling the request will not violate this rule.

~~(C)~~ (3) Determine the minimum access to restricted court case records necessary for the purpose is provided to the requestor.

~~(D)~~ (4) Assume that prior to the release of court case records under section ~~(f)~~ (4) ~~(e)~~(3)(A), the requestor has executed a dissemination contract that includes terms and conditions which: (i) require the requester to specify provisions for the secure protection of any data that is confidential; (ii) prohibit the disclosure of data in any form which identifies an individual; (iii) prohibit the copying, duplication, or dissemination of information or data provided other than for the stated purpose; and (iv) maintain a log of any distribution of court case records which will be open and available for audit by the court or the Administrator of the Courts. Any audit should verify that the court case records are being appropriately used and in a manner consistent with this rule.

~~(2)~~ (B) Courts, court employees, clerks and clerk employees, and the Commission on Judicial Conduct may access and use court case records only for the purpose of conducting official court business.

*[COMMENT: The work group received a request from the Office of Public Defense to expand the provision above to address access by OPD and OCLA to case records. The work declined to incorporate this request, as it is beyond the scope of the work group's charge to address the public's access to judicial records.]*

~~(3)~~ (C) Criminal justice agencies may request court case records not publicly accessible.

~~(A)~~ (1) The provider of court case records shall approve the access level and permitted use for classes of criminal justice agencies including, but not limited to, law enforcement, prosecutors, and corrections. An agency that is not included in a class may request access.

~~(B)~~ (2) Agencies requesting access under this section of the rule shall identify the court case records requested and the proposed use for the court records.

~~(C)~~ (3) Access by criminal justice agencies shall be governed by a dissemination contract. The contract shall: (i) specify the data to which access is granted; (ii) specify the uses which the agency will make of the data; and (iii) include the agency's agreement that its employees will access the data only for the uses specified.

~~(g)~~ (4) Bulk Distribution of Court Case Records

~~(1) (A)~~ A dissemination contract and disclaimer approved by the JIS Committee for JIS records or a dissemination contract and disclaimer approved by the court clerk for local records must accompany all bulk distribution of court case records.

~~(2) (B)~~ A request for bulk distribution of court case records may be denied if providing the information will create an undue burden on court or court clerk operations because of the amount of equipment, materials, staff time, computer time or other resources required to satisfy the request.

~~(3) (C)~~ The use of court case records, distributed in bulk form, for the purpose of commercial solicitation of individuals named in the court case records is prohibited.

~~(h) (5) Appeals Relating to JIS Records.~~ Appeals of denials of access to JIS records maintained at state level shall be governed by the rules and policies established by the JIS Committee.

~~(i) (6) Notice.~~ The Administrator for the Courts shall develop a method to notify the public of access to court case records and the restrictions on access.

**(f) Administrative Records.**

**(1) Administrative Records—Right of Access.**

A. ~~The public has a right of access to all administrative records except as exempted by federal laws, state laws, this rule and other court rules, court orders, or case law. The public has a right of access to judicial agency administrative records unless access is exempted or prohibited under this rule, other court rules, federal statutes, state statutes, or court orders, or case law. The public's right to the open administration of justice under Article I, Section 10 of the Washington State Constitution is not limited to actual case records, but all judicial records of judicial agencies. To the extent that access would be exempt or prohibited under the Public Records Act, Chapter 42.56 RCW, access is also exempt or prohibited under this rule. This rule is to be liberally construed in favor of access to the requestor, and all restrictions to access are to be narrowly construed. To the extent required to prevent an unreasonable invasion of personal privacy interests a significant serious and imminent risk to individual privacy or safety or vital government interests, an agency shall delete identifying details in a manner consistent with this chapter when it makes available or publishes any public record; however, in each instance, the justification for the deletion shall be timely provided fully in writing to the requestor of the judicial agency's administrative records. Any exemption or restriction on access to a administrative record is inapplicable to the extent that the exempt or restricted information may be redacted. Any internal policy or regulation regarding the disclosure or non-disclosure of administrative records adopted previous or subsequent to the adoption of this rule must be consistent with the provisions herein.~~

**Comment [A19]:** The public's access to judicial records is constitutional in nature, and the restrictions to access under the PRA, while construed narrowly, should not be controlling.

**Comment [A20]:** The "serious and imminent" language is derived from Ishikawa, supra.

**Comment [A21]:** Much of this is adapted from corollary rules within the PRA, specifically RCW 42.56.210(1).

*[COMMENT FOR WORK GROUP: The rationale for this change is set forth in yellow highlighting on page 11.]*

B. In addition to exemptions referred to in paragraph (A) above, the following categories of administrative records or information contained therein are exempt from public access:

Comment [A22]: This was added because "[I]dentity of writing assignment judges" is not a category of record but a category of information.

(1) Requests for judicial ethics opinions;

*[COMMENT: This item was requested by the Judicial Ethics Advisory Committee.]*

(2) Identity of writing assignment judges in the appellate courts prior to issuance of the opinion;

*[COMMENT: The exemption was suggested by Judge Quinn Brintnall at a BJA meeting.]*

(3) Minutes of meetings held by judges within a court to the extent release of the minutes would unreasonably endanger the integrity of the decision-making process;

*[COMMENT: The work group discussed whether meeting minutes should be broadly exempted from public access, or whether some smaller subset of such minutes should be exempted. The work group voted in favor of the broad exemption; a minority report may be written on this point.]*

Comment [A23]: "Minutes of meetings" is a broad exemption, and needs a modifying clause.

*[NOTE TO WORK GROUP: We switched the order of exemptions (3) and (5), so that court-related exemptions are kept together.]*

(4) Evaluations and recommendations for candidates seeking appointment or employment within a judicial agency, but only to the extent that redaction of any identifying information would be insufficient to protect the integrity of the appointment or hiring process;

*[COMMENT: Requested by the WSBA, with regard to evaluations and recommendations for judicial appointments. The provision has been broadened to cover similar documents maintained by other judicial agencies.]*

Comment [A24]: This comment is related to the previous one, where some kind of modification is necessary to prevent this exemption from being overbroad and applicable to records that should not be exempt.

(5) Personal identifying information, including individuals' home contact information, financial account numbers, Social Security numbers, driver's license numbers, and identification/security photographs;

*[COMMENT: Requested by staff for the Office of Public Defense. The work group considered including private financial information in this provision, but ultimately concluded that financial information is already addressed in*

the Public Records Act's exemptions. The work group discussed whether dates of birth should be included here, but did not reach consensus.

(6) An attorney's request, in a criminal prosecution, to a judicial agency for a trial or appellate court defense expert, investigator, or social worker, any report or findings submitted to the attorney or judicial agency by the expert, investigator, or social worker, and the invoicing and payment of the expert, investigator or social worker, but only until the time of entry of the judgment and sentence in that proceeding, unless a written waiver is obtained from the requesting attorney.

[COMMENT: Was requested by the Office of Public Defense.]

(7) Documents, records, files, investigative notes and reports, including the complaint and the identity of the complainant, associated with a judicial agency's internal investigation of a complaint against the agency or its contractors during the course of the investigation. This exemption does not apply to such records upon conclusion of the internal investigation within the judicial agency, nor any records related to the outcome of any such investigation. The outcome of the agency's investigation is not exempt.

[COMMENT: Was requested by the Office of Public Defense.]

(8) ~~Manuals, policies, and procedures, developed by Bar staff, that are directly related to the performance of investigatory, disciplinary, or regulatory functions, except as may be specifically made public by court rule.~~

[COMMENT FOR WORK GROUP: The Bar has renewed its request to include this proposed exemption in the rule. The Bar's other proposals for exemptions have been withdrawn. The work group needs to decide whether to include this exemption.]

[COMMENT: The work group also received proposals for several additional exemptions, but decided against including them here. The proposals were to exempt:

- Investigative records of regulatory or disciplinary agencies. (The work group lacked sufficient information about the variety of practices that the judicial agencies use in order to draft appropriate language.)
- Private financial information, including financial account numbers. (The work group determined that this information is already protected under the Public Records Act.)
- Dockets/index information for protected case types. (The work group determined that this information is already protected.)

**Comment [A25]:** The language as it was originally presumed the reader was aware this only applies to criminal cases, but it should be clear.

**Comment [A26]:** Much of this additional language is derived from the PRA and its attendant case law, specifically related to RCW 42.56.240(1).

**Comment [A27]:** This rule is written too broadly and should either be stricken or modified in the same manner that others above were. It is understandable that the WSBA would like to maintain some control over how misbehavior is detected and pursued, but as it stands, the exemption almost certainly encompasses records that do not implicate such things.

- Copyrighted information. (The work group lacked sufficient information to draft appropriate language.)
- Testing/screening materials/results. (The work group determined that this information is already protected under the Public Records Act.)
- Performance measures for evaluating court processes. (The work group decided that this information should generally be open to public access, even if the information is subject to public misinterpretation.)

C. **Access to Juror Information.** Individual juror information, other than name, is presumed to be private. After the conclusion of a jury trial, the attorney for a party, or party pro se, or member of the public, may petition the trial court for access to individual juror information under the control of court. Upon a showing of good cause, the court may permit the petitioner to have access to relevant information. The court may require that juror information not be disclosed to other persons.

*[COMMENT: This provision was moved here from later in the rule.]*

D. **Access to Master Jury Source List.** Master jury source list information, other than name and address, is presumed to be private. Upon a showing of good cause, the court may permit a petitioner to have access to relevant information from the list. The court may require that the information not be disclosed to other persons.

*[COMMENT: This provision was moved here from later in the rule.]*

~~E. **Common Law Test.** If release of particular records could endanger the safety or well-being of an individual or could undermine the discharge of a constitutional or statutory responsibility, the release decision will be governed by the common law's public access-balancing test.~~

*IDECISION STILL TO BE MADE BY WORK GROUP: At the last meeting, the work group discussed a few concerns about the common law test (previously set forth in Paragraph E on the next page), including concerns about keeping the common law test as essentially as its own exemption and concerns about the vague phrase "well-being." Staff was asked to research the origin of the "well-being" phrase in this context. The phrase comes from Cowles Publishing v. Murphy, 96 Wn.2d 584 (1981). The Cowles opinion states on one page that one of the interests to be balanced is the interest of "safety and well-being," but on the next page the opinion frames the interest as individual privacy and safety. (The phrase is also used in Michigan's court rule.)*

*In light of the various concerns discussed at the last meeting, and the inconsistency within Cowles as to "well-being", we propose the following solution:*

**Comment [A28]:** This should be eliminated. It is not appropriate within an exemption list, and should be within the judicial review section if at all. Common law access is largely derived from federal First Amendment law as interpreted by the federal courts. In Washington, Article I, Section 20 is worded much more broadly and is unquestionably more protective of the public's right to access judicial records. The test is already incorporated above in the privacy test and redaction sections, so this seems superfluous.

- Delete Paragraph E above. With this change, the common law test would have only a very limited applicability under this rule – a court could use it as a tie-breaker in de novo review cases under Paragraph (2)(B)(5) below.
- In any event, the rule would be better off not referring to “well-being”.
- Protect safety concerns can be protected by amending paragraph (f)(1)(A) on page 9, so that paragraph (f)(1)(A)’s privacy language (which has already been approved) would be expanded to include safety. This change would allow agencies to redact information based on safety concerns, rather than allowing broader nondisclosure.

**(2) Administrative Records—Process for Access.**

**A. Administrative Records—Procedures for Records Requests.**

- (1) AGENCIES TO ADOPT PROCEDURES. Each judicial agency must adopt a policy or internal regulation implementing this rule and setting forth its procedures for accepting-receiving and responding to public records requests. The agency’s policy must include the designation of a public records officer and may require that requests for access be submitted in writing, and that requests be submitted only to the agency’s designated public records officer. Best practices for handling public records requests shall be developed under the authority of the Board for Judicial Administration.
- (2) PUBLICATION OF PROCEDURES FOR REQUESTING PUBLIC RECORDS. Each judicial agency must prominently publish the procedures for requesting access to its records, its policies regarding access to records, and its organizational information. If the agency has a website, the procedures must be included displayed on that website in a manner reasonably calculated to provide notice there. The publication shall include the public records officer’s work mailing address, telephone number, fax number, and e-mail address. An agency may not invoke any internal policy or regulation that was or is not in compliance with this publication requirement, unless the requestor had actual notice of such policy or regulation.
- (3) INITIAL RESPONSE. Each judicial agency must initially respond to a written request for access to a public record within five working days of its receipt. The response shall acknowledge receipt of the request and include a good-faith estimate of the time needed to respond to the request. The estimate may be

Comment [A29]: Much of this language is adapted from the PRA Model Rules, specifically WAC 44-140-020 and its comments.

Comment [A30]: Although oral requests are less effective and raise several problematic issues that written requests usually do not, the rule should not require a written request.

later revised, if necessary, with reasons for the revised time estimate provided to the requestor by the agency in writing. Any estimated response time less than thirty (30) days from the date of the request is presumptively reasonable unless the request is for a small number of records. For purposes of this rule, "working days" mean days that the judicial agency, including a part-time municipal court, is open.

Comment [A31]: This is adapted from the PRA Model Rules, specifically WAC 44-14-040 and its comments.

- (4) COMMUNICATION WITH REQUESTER. Each judicial agency must communicate with the requestor as necessary to clarify the records being requested. The agency may also communicate with the requestor in an effort to determine if the requestor's need would be better served with a response other than the one actually requested. Any communication by the agency to the requestor seeking clarification or prioritization must be made promptly and in writing.
- (5) SUBSTANTIVE RESPONSE. All judicial agencies are obligated to provide its fullest assistance to requestors in obtaining access to administrative records. A judicial agency may not distinguish between requestors of administrative records or inquire as to the reasons for any request, except to the extent provided herein, statute or court rule. Each judicial agency must respond to the substance of the records request within the timeframe specified in the agency's initial response to the request, or within the timeframe specified in a later revision of that estimate. If the agency is unable to fully comply within this timeframe, then the agency should comply to the extent practicable and provide a new good faith estimate for responding to the remainder of the request. If the agency does not fully satisfy the records request in the manner requested, the agency must justify in writing any deviation from the terms of the request. A response may consist of either allowing inspection of the requested records, or by providing copies of those responsive records. The judicial agency must make an objectively reasonable search for the requested records, but has no obligation under this rule to create a responsive administrative record. The judicial agency only has the obligation to provide an administrative record in existence at the time of the request, and is not required to supplement a response with records that come into existence after the request. The judicial agency must provide any responsive records, even if another judicial agency possesses or retains the record as well. Judicial agencies are encouraged to store administrative records in electronic format to the extent feasible, and must provide electronic administrative records in electronic format if so requested, but are not obligated to provide paper records in an electronic format if doing so would unduly burden the judicial agency. Any cancellation or

clarification of the scope of the request must be confirmed by the requestor in writing before the agency can consider it effective. A judicial agency may consider a request for administrative records abandoned if the requestor does not respond to a written request for clarification or prioritization within thirty (30) days; such abandonment, or a written withdrawal of the request by the requestor, would remove the judicial agency's obligation to further respond to the request. A judicial agency should memorialize when it considers its response fully responsive to the request and the request therefore closed.

Comment [A32]: These additional provisions have been adapted from the PRA Model Rules, and have proven very instructive to courts and agencies in practice.

(6) EXTRAORDINARY REQUESTS LIMITED BY RESOURCE CONSTRAINTS. If a particular request is for a large number of administrative records or otherwise of a magnitude that the judicial agency cannot fully comply within a reasonable time due to constraints on the agency's time, resources, and personnel, the agency shall communicate this information to the requester in writing, in detail sufficient to provide reasonable notice of the reasons for the agency's inability to fully comply. The agency must attempt to reach agreement with the requester as to narrowing the request to a more manageable scope, or for a prioritization of responses and as to a timeframe for the agency's response, which may include a schedule of installment responses. If the agency and requester are unable to reach agreement, then the agency shall respond to the extent practicable and inform the requester that the agency has completed its response. Judicial agencies are encouraged to provide records responsive to such requests in partial installments.

Comment [A33]: The judicial agency should always be required to provide written indication as to why it cannot comply with the letter of the law.

(7) LATER DISCOVERED RECORDS. If after the judicial agency has provided all responsive records it discovers responsive records that were not provided initially, it must promptly provide written notice of such discovery to the requester and provide an reasonable estimate for an expedited inspection or copying of those records.

Comment [A34]: This provision is necessary so as to prevent a judicial agency from delaying providing any access by waiting until all the responsive records have been gathered.

(6)(g) DESTRUCTION OF REQUESTED ADMINISTRATIVE RECORDS. A judicial agency may not destroy a requested administrative record until a pending request for that record is closed, even if the applicable retention schedule or guidelines would otherwise allow for the destruction of such record.

Comment [A35]: Adapted from the PRA and its case law, specifically RCW 42.56.100.

**B. Administrative Records—Review of Public Records Officer's Response.**

(1) NOTICE OF REVIEW PROCEDURES. The public officer's response to a public records request shall include a written summary of the procedures under which the requesting party may seek further review.

(2) TIMELINE FOR SEEKING REVIEW. The timelines set forth in section (f)(2)(A) shall apply likewise to requests for review of the public records officer's response.

(3) FURTHER REVIEW WITHIN AGENCY. Each agency shall provide a method for review by the agency's director or presiding judge. For an agency that is not a court, the presiding judge shall be the presiding judge of the court that oversees the agency. The agency may also establish intermediate levels of review by policy or internal regulation; such policy or regulation must be published. The agency shall make publicly available the applicable forms for seeking review of agency decisions, and is encouraged to the extent possible to post such forms on the agency's website. The review proceeding shall be informal and summary. The review proceeding shall be held within five working days from when the requestor provides proper written indication that he or she is seeking review. If that is not reasonably possible, then within five working days the review shall be scheduled for the earliest practical date; the reasons for the revised estimate must be timely provided to the requestor in writing.

Comment [A36]: "Intermediate levels of review" must have explanatory language as it is so ambiguous that it has no substantive meaning. Requiring publication of what the "review" is would at least provide notice of the requestor of what that process entails, absent inclusion in the rule.

Comment [A37]: language should be added indicating what these terms mean, specifically addressing such things as whether there is a hearing, what evidentiary law applies, etc.

*[COMMENT: The work group discussed whether the rule should authorize the director or the presiding chief judge to designate another person to handle these reviews. The work group did not reach agreement on this question.]*

(4) ALTERNATIVE REVIEW. As an alternative to review under section (f)(2)(B)(3), a requesting person may seek review by a person outside the judicial agency. If the judicial agency is a court or directly reportable to a court, the outside review shall be by a visiting judicial officer. If the judicial agency is not a court or directly reportable to a court, the outside review shall be by a person agreed upon by the requesting person and the judicial agency. In the event the requesting person and the judicial agency cannot agree upon a person, the presiding superior court judge in the county in which the judicial agency is located shall either conduct the review or appoint a person to conduct the review. The review proceeding shall be informal and summary. In order to choose this option, the requesting person must sign a written waiver of any further review of the decision by the person outside the judicial agency. The decision by the person outside the judicial agency is final and not appealable. Attorney fees and costs to the requestor are not available under this option.

*[COMMENT: The bifurcated procedures for review are intended to provide flexible, prompt, informal, and final procedures for review of public records decisions. The*

option for a visiting judge allows a requester to have the review heard by an outside decision-maker; in the interest of obtaining prompt, final decisions, a requester selecting this option would be required to waive further review. If the Legislature creates a new entity to review public records decisions made by agencies of the executive branch, then the work group recommends that the BJA consider using this entity for review of judicial records decisions as well.]

(5) DE-NOVO REVIEW IN SUPERIOR COURT.

- i. A requester may seek superior court review of a decision made by a judicial agency under section (f)(2)(B)(3). The burden of proof shall be on the agency to establish that refusal to permit public inspection and/or copying is in accordance with section (f)(1) which exempts or prohibits disclosure in whole or in part of specific information or records. Judicial review of all agency actions shall be de novo. The superior court shall apply section (f)(1) of this rule in determining the accessibility of the requested documents. Any ambiguity in the application of section (f)(1) to the requested documents shall be resolved by analyzing access under the common law's public access balancing test, where disclosure is balanced against whether it poses a significant risk to individual privacy or safety.]

[COMMENT: The common law's balancing test is addressed in detail in *Cowles Publishing v. Murphy*, 96 Wn.2d 584 (1981), and *Beuhler v. Small*, 115 Wn.App. 914 (2003). Disclosure is balanced against whether it poses a significant risk to individual privacy or safety.]

Comment [A38]: See relevant Comment above. The "common law balancing test" should not be applicable here as the same principles are largely already incorporated into the revised rule.

- ii. The right of deDe novo review in superior court is not available to a requester who sought review under the alternative process set forth in section (f)(2)(b)(4).

Comment [A39]: This is redundant since a requester cannot seek review of the decision under that option.

(6) MONETARY SANCTIONS.

- i. In the de novo review proceeding under section (f)(2)(B)(5), the superior court may in its discretion award reasonable attorney fees and costs to a requesting party if the court finds that the agency fails to show that (1) the agency's response was deficient/sufficient, (2) the requester did not specify the particular deficiency to the agency, or and (3) the agency did/cure not cure the deficiency.

Comment [A40]: The language here has been modified to ensure that if the agency fails any one of the three grounds listed, a court has discretion to award fees and costs to the requestor.

- ii. Sanctions, including attorneys' fees and costs, may be imposed against either party under CR 11, if warranted.
- iii. Except as provided in sections (6)(i) and (ii), a judicial agency may not be required to pay attorney fees, costs, civil penalties, or fines.

*[COMMENT: The work group's recommendation is to initially limit the availability of monetary sanctions against judicial agencies. If the experience with this approach were to show that more significant sanctions are merited, then those could be added at an appropriate time. This approach was also used when the Public Records Act was also originally enacted; it makes sense to take the same approach with this rule. It may well be that the limited sanctions that would be available under this rule, coupled with the rule's creation of speedy review procedures, will be sufficient to ensure compliance without the imposition of additional sanctions.]*

Comment [A41]: This is unnecessary since there is no reason CR 11 would not apply to any particular action in superior court.

Comment [A42]: The utility of this provision is unclear. Part (i) already makes clear that the award of fees and costs to a requestor is discretionary, and this provision only restates that in different language and adds penalties and fines, which if at all applicable, should be mentioned in part (i).

**(2) (g) Judicial Records--Judicial Agency Rules.** Each court by action of a majority of the judges may from time to time make and amend local rules governing access to ~~court~~ judicial records not inconsistent with this rule. Each judicial agency may from time to time make and amend agency rules governing access to its judicial records not inconsistent with this rule.

**(3) (h) Judicial Records--Charging of Fees.**

(1) A fee may not be charged to view ~~court~~ judicial records at the courthouse.

(2) A fee may not be charged for the redaction or gathering of responsive records, nor for any other costs incurred by the agency in preparing the records for inspection.

(2) A fee may be charged for the photocopying or scanning of judicial records. If another court rule or statute specifies the amount of the fee for a particular type of record, that rule or statute shall control. Otherwise, the amount of the fee may not exceed the amount that is authorized in the Public Records Act, Chapter 42.56 RCW. The agency may not charge a requestor for the copying required to redact records in preparation for inspection.

(3) The agency may require a deposit in an amount not to exceed ten percent of the estimated cost of providing copies for a request. If an agency makes a request available on a partial or installment basis, the agency may charge for each part of the request as it is provided. If an installment of a records request is not claimed or

Comment [A43]: Adopted from the PRA and its Model Rules, specifically RCW 42.56.120 and WAC 44-02-070.

Comment [A44]: See Comment above.

reviewed within 30 days, the agency is not obligated to fulfill the balance of the request.

*[COMMENT: Paragraph (3) above incorporates a modified version of the Public Records Act's "deposit and installments" language.]*

**(i) Effective Date of Amendment.**

- (a) The amendment expanding this rule beyond case records goes into effect on January 1, 2012, and applies to all public records requests submitted on or after that date.

*[COMMENT: A rule adopted in early 2011 would usually have an effective date of September 1, 2011. The delayed effective date is intended to allow time for development of best practices and for training.]*

- (b) Until January 1, 2012, public access to judicial documents shall continue to be analyzed using the existing court rules and statutes, as applicable, and the common law balancing test. The Public Records Act, Chapter 42.56 RCW, may be used as non-binding guidelines.

[Adopted effective October 26, 2004; amended effective January 3, 2006.]

# COMMENTS

**COMMENTS SUBMITTED TO BJA  
REGARDING THE PROPOSED AMENDMENTS FOR PUBLIC ACCESS TO JUDICIAL RECORDS:**

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The Supreme Court  
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November 15, 2010

Honorable Marlin Appelwick, Chair  
Board for Judicial Administration Public Records Work Group  
Court of Appeals, Division I  
600 University Street  
One Union Square  
Seattle, WA 98101-1176

Re: Comments on the Public Records Work Group's Proposed  
Amendments to GR 31

Dear Judge  Appelwick:

The Judicial Information System Committee (JISC) recommends that the Board for Judicial Administration (BJA) submit a new and separate court rule to the Washington Supreme Court that incorporates the BJA Public Records Work Group's proposed judicial administrative records policy rather than incorporating the new policy into the existing provisions of GR 31. General Rule 31 was drafted explicitly to facilitate access to court case records and the rule has worked extremely well for that purpose. Adding the proposed new provisions to GR 31 would risk bringing confusion to both the courts and the public on the subject of access to court records.

Having separate court rules for access to court case records (GR 31) and access to judicial administrative records (new court rule) would make it easier for the public and the courts to understand that different laws and procedures apply to access the two distinct types of records. It would also allow the continued use of the term "court records" to refer to court case records, as defined in GR 31(c)(4),

which is the way the term is used extensively in both court rule and statute. *See, e.g.,* GR 15, GR 22, and JISCR 11. There are literally dozens and dozens of statutes that use the term “court records” and all of them are referring to court case records consistent with GR 31(c)(4)’s definition of “court record.”

In addition, the proposed amendments to GR 31, as currently drafted, make some changes to the access provisions for court case records that were apparently unintended (see enclosed memorandum of the JISC Data Dissemination Committee, at 4-6.). Adopting a separate court rule will help to avoid any unintended changes to how the courts provide access to court records under GR 31.

Enclosed please find the following:

(1) A draft new court rule that separates out the new administrative records access provisions from GR 31. There are no substantive changes to the access provisions drafted by the Work Group except for a change in the wording of the effective date in section (h). If the effective date of the new rule should be delayed for one year to allow for court education and the adoption of local policies, that could be addressed to the Supreme Court in the GR 9(e)(2) cover sheet that will accompany the rule proposal, rather than specifying an effective date in the rule.

(2) A draft of changes to GR 31 to synchronize the existing rule and the new court rule.

(3) The JISC Data Dissemination Committee’s memorandum recommending to the JISC that the proposed GR 31 amendments be reworked into a new court rule. The JISC Data Dissemination Committee drafted the court rule that became GR 31 in 2004. The memorandum explains the lengthy drafting and hearing process that the JISC and the Supreme Court went through to finalize GR 31, and the reasons why the Work Group’s proposed amendments should be set forth in a separate new court rule. The JISC adopted the recommendation and supporting memorandum at its meeting on October 27, 2010.

GR 31  
November 15, 2010  
Page 3

Thank you for giving the JISC the opportunity to comment on the BJA Public Records Work Group's proposed amendments to GR 31. If you have any questions, please do not hesitate to contact me.

Very truly yours,



MARY E. FAIRHURST

Enclosures

cc: Judge Thomas Wynne, Chair, JISC Data Dissemination Committee  
Jeff Hall, State Court Administrator  
Veronica Diseth, Director, Information Services Division, AOC  
Rick Neidhardt, AOC  
Charles Bates, AOC  
Vicky Marin, AOC

## **JISC Data Dissemination Committee Memorandum**

### **Proposed Amendments to GR 31**

#### **ISSUE**

A BJA Work Group has proposed amending GR 31 by adding access to court "administrative records" Currently the sole purpose of GR 31 is to address access to court case records. The BJA has solicited comments from stakeholder groups, including the JISC, on the proposal. Comments are due to the BJA by November 30.

At question is whether or not the JISC Data Dissemination Committee should recommend that the JISC pursue amending the proposal by creating a new and separate rule for access to administrative records.

#### **SHORT ANSWER**

YES. GR 31 was specifically written to address access to court case records, not administrative records. Court case records and judicial administrative records are two completely different types of records and are more logically addressed in separate court rules. Combining court records with judicial administrative records will cause confusion to the public and to the clerks and courts who serve them.

#### **DISCUSSION**

##### **Background**

It took approximately four years to draft GR 31 and almost another two years for the Washington Supreme Court to adopt this rule. It went through three different workgroups, the Data Dissemination Committee, and the JISC and two public hearings before the Supreme Court. This rule was specifically drafted to address access to court case records (records generated for cases filed with the court). In fact, GR 31 specifically states at GR 31(b): "Administrative records are not within the scope of this rule."

A BJA Work Group that was formed to draft a policy on access to court administrative records has proposed changes to GR 31 that would add judicial administrative records to GR 31's governance. The proposed changes are lengthy and include many substantive changes. They have taken a rule that addresses one important issue, "Access to Court Records" and combined it to include all records generated by judicial branch agencies, calling them "judicial records."<sup>1</sup> This includes "case records", "administrative records", "chamber records", and other records maintained by the judiciary, even though the records are not associated or linked to a court record.<sup>2</sup>

GR 31 only applies to those entities that maintain records from court proceedings: courts of limited jurisdiction, superior courts, appellate courts, and AOC (JIS records only). Under the proposed amendments, GR 31 would encompass all of the records maintained by 25 different "judicial agencies" that are listed by name plus "all other judicial agencies that are overseen by a court... and all subgroups of the agencies... including committees, task forces, commissions, boards, offices, and departments." *See proposed amendments section (c).*

### **The Proposed Amendments make a Clear Rule Confusing**

While a court rule addressing access to judicial branch administrative records may be necessary, there is no reason to place this new policy into the existing court rule governing access to court records. Such a merger of rules and different principles of law is inconsistent with past practices and will only cause confusion to the courts, court staff, and the public. GR 31 is currently simple to read and understand. It addresses

- 
1. The term "judicial records" is not defined and creates confusion between court records and judicial records.
  2. Changing the name of the records kept by clerks to "case records" from court records means that now state court rules and Washington state statutes are potentially out of sync (see e.g. GR 15, GR 22, JISCR 11, 14, 15, 16, and 18). Throughout legislation, the records kept by clerks are referred to as records of the court. See RCW 2.32.050.

one issue: access to records filed with the court. It is simple, clear, and precise, which results in logical conclusions and proper application.

A court rule that governs access to court records needs to be easily understandable. The public, media, clerks, and court staff currently use GR 31 on a daily basis because it addresses the most sought-after records that the judiciary generates: records that are filed for court proceedings.

This proposed rule is 16 pages long when printed. It attempts to cover "case records" (currently called court records in GR 31), "administrative records", "chamber records" and tries to combine all these categories of records into something called "judicial records." Besides being confusing, records generated for a court case and those generated for administrative reasons have distinctive components and rules that cannot be merged successfully.

### **Public Access To Court Records Is Mandated By The Washington State Constitution**

Article I, section 10 of the Washington Constitution provides, "Justice in all cases shall be administered openly, and without unnecessary delay." Cases involving access to court records are framed around this constitutional provision. See Dreiling v. Jain, 151 Wash.2d 900, 908, 93 P.3d 861 (2004) and State v. Waldon, 148 Wash.App. 952, 202 P.3d 325 (2009). (Article I, section 10 ensures public access to court records as well as court proceedings.) GR 31 was written with Article I, section 10 as the guiding force and the common law decisions surrounding the interpretation of this constitutional provision guided the drafters in writing the rule. See GR 31 (a). There are no cases applying this constitutional provision to administrative records of judicial branch entities.

### **GR 31 Is Based On The Recognized Presumption Of Open Access To Court Records Set Forth In Common Law.**

It must be kept in mind that access to court records is a product of open access to the courtrooms. The common law reasoning behind open access to court case records is based on open access to court proceedings. Such an analogy has not been applied to administrative records.

A long-recognized presumption of public access to court records exists in the common law and the common law presumption in favor of access to court records is fairly strong. *Nast v. Michels*, 107 Wash.2d 300, 730 P.2d 54 (1986), The United States Supreme Court articulated this common law right of public access to court documents in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978): "It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." This right is designed to promote public confidence in the judicial system and to diminish the possibilities for injustice, perjury, and fraud. However, as the Court noted in *Nixon*, the "right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes." The court goes on to state that access legitimately may be denied, but the court must engage in a balancing test, inquiring whether the right of access is outweighed by interests favoring non-disclosure. Both of these leading cases are discussing court records, not administrative records. It is on these cases and others that GR 31 was based.

*Nast v. Michels* held that the state Public Disclosure Act<sup>3</sup> does not govern access to court case files.<sup>4</sup> This conclusion was reaffirmed by the Court in the recent case of *Koenig v. Federal Way*<sup>5</sup>.

By contrast, the proposed amendments to GR 31 conclude with the following section:

---

<sup>3</sup> Now referred to as the "Public Records Act", RCW 42.56.020.

<sup>4</sup> 107 Wash.2d 300, 306.

<sup>5</sup> 167 Wash.2d. 341, 343 (2009).

Until January 1, 2012, public access to judicial documents shall continue to be analyzed using the existing court rules and statutes, as applicable, and the common law balancing test. The Public Records Act, Chapter 42.56, may be used as non-binding guidelines.

*Proposed New GR 31 subsection (l) (b).*

So, although the case law explicitly states that the Public Records Act does not apply to access to court case records, the proposed amendments to GR 31 appear to apply the Public Records Act to all judicial documents until January 1, 2012. In fact, the Work Group's report and its comments on the proposed rule amendments are replete with references to the Public Records Act. This is a clear example of the confusion that the proposed amendments will bring to GR 31, since the Supreme Court has clearly stated that the Public Records Act is inapplicable to access to court case records.

Many aspects of the PRA are unrelated to the concerns regarding disclosure of court records. They simply do not apply and should not govern access to case and court file documents. Despite this fact, the proposed GR 31 amendments incorporate PRA laws, philosophies, and policies into their proposed amendments. See e.g. the proposal regarding the several different "exemptions" for administrative records that has been proposed (f) (1). There is no "exemption" section in the current version of GR 31 as it is not necessary. Issues such as this and "judicial agency application"(c), process for access (f)(2)(A), Public Records Officer's response (f)(2)(B), monetary sanctions (f)(6), fees(h), and references to the Public Records Act (h)(2) are not applicable to court records and should be addressed in a different rule. Another example of where the proposed rule amendments confuse court case records and court administrative records is in proposed new section (h) (1), which states:

A fee may not be charged to view court judicial records at the courthouse.

As proposed by the Work Group, the new section would prohibit courts from charging fees to view online court records. At present, all courts that have placed court records online charge a fee to view those records, so this would be a dramatic change in administrative policy. The Task Force has said that it was not their intent to prohibit courts from charging a fee to view online court case records and that this provision would be changed. However, it shows how easy it will be to unintentionally affect policies relating to court records.

**Court Records And Administrative Records Are Different And Need To Be Addressed Separately Because Of Their Differences.**

It has long been recognized that records generated for a case filed with the court are different than those generated by a judicial branch entity for administrative and internal reasons. One is generated and filed to assist the court in deciding a case, which is the primary function of the judiciary. The other is generated to assist judicial branch agencies with making internal decisions. The two record types are unrelated and the reasons for their existence are completely different. They should be addressed separately. Please note that current court rules and statutes recognize this distinction and do not attempt to combine or merge administrative records and court records in a rule or statute. See e.g. GR15 and RCW 2.32.050, which pertain solely to the clerk's duties with regard to court case records.

**CONCLUSION**

GR 31 was written and adopted with one purpose: To give the courts, court staff, and the public guidance on access to court records, i.e. records filed with the court. The rule was to be simple, clear, and precise because it addressed records that the public, media, and other organizations request on a daily basis: court case records. Furthermore, it addressed the primary function of the judicial branch, the records of the decision-making of a court and the documents that are filed with the court on which court's decisions are based. The Supreme Court recognized that the Washington State

Constitution required open access to court records and adopted a rule that addresses that constitutional mandate.

Administrative records are different. The records are not generated in performance of the judiciary's primary functions. While they are publicly accessible there is not the lengthy history of case law which dictates the requirements for access. Setting forth this policy in a separate rule, and not in GR 31, will facilitate easier understanding that different access rules apply to the two types of records.

[Suggested Changes]

General Rule of Court 31

ACCESS TO COURT RECORDS

1  
2  
3  
4  
5  
6  
7  
8 (a) **Policy and Purpose.** It is the policy of the courts ~~judiciary~~ to facilitate access to court  
9 records as provided by Article I, Section 10 of the Washington State Constitution. Access to  
10 court records is not absolute and shall be consistent with reasonable expectations of personal  
11 privacy as provided by article 1, Section 7 of the Washington State Constitution and shall not  
12 unduly burden the business of the courts.

13  
14 (b) **Scope.** This rule applies to all court records, regardless of the physical form of the court  
15 record, the method of recording the court record or the method of storage of the court record.  
16 Judicial Administrative records are not within the scope of this rule. Access to administrative  
17 judicial records is governed by [new court rule]. Court records are further governed by GR 15  
18 and 22.

19  
20 (c) **Definitions.**

21  
22 (1) "Access" means the ability to view or obtain a copy of a court record.

23  
24 (2) "Administrative judicial record" means ~~any a public record pertaining to the~~ created by or  
25 maintained by a judicial agency and related to the management, supervision or administration  
26 of the judicial branch, including any court, board, or committee appointed by or under the  
27 direction of any court or other entity within the judicial branch, or the office of any county  
28 clerk agency.

29  
30 (3) "Bulk distribution" means distribution of all, or a significant subset, of the information in  
31 court records, as is and without modification.

32  
33 (4) "Court record" includes, but is not limited to: (i) Any document, information, exhibit, or  
34 other thing that is maintained by a court in connection with a judicial proceeding, and (ii) Any  
35 index, calendar, docket, register of actions, official record of the proceedings, order, decree,  
36 judgment, minute, and any information in a case management system created or prepared by  
37 the court that is related to a judicial proceeding. Court record does not include ~~data~~  
38 ~~maintained by or for a judge pertaining to a particular case or party, such as personal notes~~  
39 ~~and communications, memoranda, drafts, or other working papers; or information gathered,~~  
40 ~~maintained, or stored by a government agency or other entity to which the court has access but~~  
41 ~~which is not entered into the record.~~ chambers records as defined in [new court rule.]  
42

1 (5) "Criminal justice agencies" are government agencies that perform criminal justice  
2 functions pursuant to statute or executive order and that allocate a substantial part of their  
3 annual budget to those functions.  
4

5 (6) "Dissemination contract" means an agreement between a court record provider and any  
6 person or entity, except a Washington State court (Supreme Court, court of  
7 appeals, superior court, district court or municipal court), that is provided court records. The  
8 essential elements of a dissemination contract shall be promulgated by the JIS Committee.  
9

10 (7) "Judicial Information System (JIS) Committee" is the committee with oversight of the  
11 statewide judicial information system. The judicial information system is the automated,  
12 centralized, statewide information system that serves the state courts.  
13

14 (8) "Judge" means a judicial officer as defined in the Code of Judicial Conduct (CJC)  
15 Application of the Code of Judicial Conduct Section (A).  
16

17 (9) "Public" includes an individual, partnership, joint venture, public or private corporation,  
18 association, federal, state, or local governmental entity or agency, however constituted, or any  
19 other organization or group of persons, however organized.  
20

21 (10) "Public purpose agency" means governmental agencies included in the definition of  
22 "agency" in RCW 42.17.020 and other non-profit organizations whose principal function is to  
23 provide services to the public.  
24

25 **(d) Access.**  
26

27 (1) The public shall have access to all court records except as restricted by federal law, state  
28 law, court rule, court order, or case law.  
29

30 (2) Each court by action of a majority of the judges may from time to time make and amend  
31 local rules governing access to court records not inconsistent with this rule.  
32

33 (3) A fee may not be charged to view court records at the courthouse.  
34

35 **(e) Personal Identifiers Omitted or Redacted from Court Records**  
36

37 (1) Except as otherwise provided in GR 22, parties shall not include, and if present shall  
38 redact, the following personal identifiers from all documents filed with the court, whether filed  
39 electronically or in paper, unless necessary or otherwise ordered by the Court.  
40

41 (A) Social Security Numbers. If the Social Security Number of an individual must be  
42 included in a document, only the last four digits of that number shall be used.  
43

1 (B) Financial Account Numbers. If financial account numbers are relevant, only the last  
2 four digits shall be recited in the document.

3  
4 (C) Driver's License Numbers.

5  
6 (2) The responsibility for redacting these personal identifiers rests solely with counsel and  
7 the parties. The Court or the Clerk will not review each pleading for compliance with this rule.  
8 If a pleading is filed without redaction, the opposing party or identified person may move the  
9 Court to order redaction. The court may award the prevailing party reasonable expenses,  
10 including attorney fees and court costs, incurred in making or opposing the motion.

11  
12 COMMENT

13  
14 This rule does not require any party, attorney, clerk, or judicial officer  
15 to redact information from a court record that was filed prior to the  
16 adoption of this rule.

17  
18 **(f) Distribution of Court Records Not Publicly Accessible**

19  
20 (1) A public purpose agency may request court records not publicly accessible for scholarly,  
21 governmental, or research purposes where the identification of specific individuals is ancillary  
22 to the purpose of the inquiry. In order to grant such requests, the court or the Administrator  
23 for the Courts must:

24  
25 (A) Consider: (i) the extent to which access will result in efficiencies in the operation of  
26 the judiciary; (ii) the extent to which access will fulfill a legislative mandate; (iii) the extent to  
27 which access will result in efficiencies in other parts of the justice system; and (iv) the risks  
28 created by permitting the access.

29  
30 (B) Determine, in its discretion, that filling the request will not violate this rule.

31  
32 (C) Determine the minimum access to restricted court records necessary for the purpose  
33 is provided to the requestor.

34  
35 (D) Assure that prior to the release of court records under section (f) (1), the requestor  
36 has executed a dissemination contract that includes terms and conditions which: (i) require the  
37 requester to specify provisions for the secure protection of any data that is confidential; (ii)  
38 prohibit the disclosure of data in any form which identifies an individual; (iii) prohibit the  
39 copying, duplication, or dissemination of information or data provided other than for the  
40 stated purpose; and (iv) maintain a log of any distribution of court records which will be open  
41 and available for audit by the court or the Administrator of the Courts. Any audit should verify  
42 that the court records are being appropriately used and in a manner consistent with this rule.

43

1 (2) Courts, court employees, clerks and clerk employees, and the Commission on Judicial  
2 Conduct may access and use court records only for the purpose of conducting official court  
3 business.

4  
5 (3) Criminal justice agencies may request court records not publicly accessible.

6  
7 (A) The provider of court records shall approve the access level and permitted use for  
8 classes of criminal justice agencies including, but not limited to, law enforcement, prosecutors,  
9 and corrections. An agency that is not included in a  
10 class may request access.

11  
12 (B) Agencies requesting access under this section of the rule shall identify the court  
13 records requested and the proposed use for the court records.

14  
15 (C) Access by criminal justice agencies shall be governed by a dissemination contract. The  
16 contract shall: (i) specify the data to which access is granted; (ii) specify the uses which the  
17 agency will make of the data; and (iii) include the agency's agreement that its employees will  
18 access the data only for the uses specified.

19  
20 **(g) Bulk Distribution of Court Records**

21  
22 (1) A dissemination contract and disclaimer approved by the JIS Committee for JIS records  
23 or a dissemination contract and disclaimer approved by the court clerk for local records must  
24 accompany all bulk distribution of court records.

25  
26 (2) A request for bulk distribution of court records may be denied if providing the  
27 information will create an undue burden on court or court clerk operations because of the  
28 amount of equipment, materials, staff time, computer time or other resources required to  
29 satisfy the request.

30  
31 (3) The use of court records, distributed in bulk form, for the purpose of commercial  
32 solicitation of individuals named in the court records is prohibited.

33  
34 **(h) Appeals.** Appeals of denials of access to JIS records maintained at state level shall be  
35 governed by the rules and policies established by the JIS Committee.

36  
37 **(i) Notice.** The Administrator for the Courts shall develop a method to notify the public of  
38 access to court records and the restrictions on access.

39  
40 **(j) Access to Juror Information.** Individual juror information, other than name, is presumed  
41 to be private. After the conclusion of a jury trial, the attorney for a party, or party pro se, or  
42 member of the public, may petition the trial court for access to individual juror information  
43 under the control of court. Upon a showing of good cause, the court may permit the petitioner

1 to have access to relevant information. The court may require that juror information not be  
2 disclosed to other persons.

3  
4 **(k) Access to Master Jury Source List.** Master jury source list information, other than name  
5 and address, is presumed to be private. Upon a showing of good cause, the court may permit a  
6 petitioner to have access to relevant information from the list. The court may require that the  
7 information not be disclosed to other persons.

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**[SUGGESTED NEW RULE]**

**General Rule of Court \_\_\_\_**

**ACCESS TO ADMINISTRATIVE RECORDS**

**(a) Policy and Purpose.** It is the policy of the judiciary to facilitate access to administrative records. Access to administrative records is not absolute and shall be consistent with reasonable expectations of personal privacy as provided by article 1, section 7 of the Washington State Constitution, restrictions in statutes, restrictions in court rules, and as required for the integrity of judicial decision-making. Access shall not unduly burden the business of the judiciary.

**(b) Scope.** This rule governs the right of public access to administrative judicial records. This rule applies to all administrative records, regardless of the physical form of the record, the method of recording the record or the method of storage of the record. Access to court records is governed by GR 15, 22, and 31.

**(c) Application of Rule.**

(1) This rule applies to the following judicial agencies:

- A. The Supreme Court and the Court of Appeals;
- B. The superior, district, and municipal courts;
- C. Board for Judicial Administration;
- D. Administrative Office of the Courts;
- E. Judicial Information System Committee;
- F. Minority and Justice Commission;
- G. Gender and Justice Commission;
- H. Board for Court Education;
- I. Interpreter Commission;
- J. Certified Professional Guardian Board;
- K. Commission on Children in Foster Care;
- L. Washington State Pattern Jury Instruction Committee;
- M. Pattern Forms Committee;
- N. Court Management Council;
- O. Bench-Bar-Press Committee;
- P. Judicial Ethics Advisory Committee;
- Q. Office of Public Guardianship;
- R. Washington Center for Court Research;
- S. Office of Civil Legal Aid;
- T. Office of Public Defense;
- U. State Law Library;
- V. Washington State Bar Association;
- W. County Clerks' offices with regard to their duties to the superior court and their custody of superior court records;

- 1 X. Superior Court Judges' Association, District and Municipal Court Judges'  
2 Association, and similar associations of judicial officers and employees;
- 3 Y. All other judicial entities that are overseen by a court, whether or not  
4 specifically identified in this section (c) (1); and
- 5 Z. All subgroups of the entities listed above, including committees, task forces,  
6 commissions, boards, offices, and departments.

7  
8 (2) This rule does not apply to the Commission on Judicial Conduct. The  
9 Commission is encouraged to incorporate any of the provisions in this rule as  
10 it deems appropriate.

11  
12 (3) A judicial officer is not an agency.

13  
14 (4) A person or agency entrusted by a judicial agency with the storage and  
15 maintenance of its public records, whether part of a judicial agency or a third party, is  
16 not a judicial agency. Such person or agency may not respond to a request for access  
17 to administrative records, absent express written authority from the judicial agency or  
18 separate authority in rule or statute to grant access to the documents.

19  
20 **(d) Definitions.**

21  
22 (1) "Access" means the ability to view or obtain a copy of an administrative record.

23  
24 (2) "Administrative record" means a public record created by or maintained by a  
25 judicial agency and related to the management, supervision, or administration of the  
26 agency.

27  
28 (3) "Court record" is defined in GR 31.

29  
30 (4) (a) "Chambers record" means any writing that is created by or maintained by any  
31 judicial officer or chambers staff, and is maintained under chambers control, whether  
32 directly related to an official judicial proceeding or other chambers activities.  
33 "Chambers staff" means a judicial officer's law clerk and any other staff when  
34 providing support directly to the judicial officer at chambers.

35  
36 (b) Chambers records are not public records. Court records and administrative  
37 records do not become chambers records merely because they are in the  
38 possession or custody of a judicial officer.

39  
40 (5) "Judge" means a judicial officer as defined in the Code of Judicial Conduct (CJC)  
41 Application of the Code of Judicial Conduct Section (A).  
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(6) "Public" includes an individual, partnership, joint venture, public or private corporation, association, federal, state, or local governmental entity or agency, however constituted, or any other organization or group of persons, however organized.

(7) "Public record" includes any writing, except chambers records and court records, containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any judicial agency regardless of physical form or characteristics.

(8) "Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.

**(e) Administrative Records.**

**(1) Administrative Records—Right of Access.**

A. The public has a right of access to judicial agency administrative records unless access is exempted or prohibited under this rule, other court rules, federal statutes, state statutes, court orders, or case law. To the extent that records access would be exempt or prohibited under the Public Records Act, chapter 42.56 RCW, access is also exempt or prohibited under this rule. In addition, to the extent required to prevent a significant risk to individual privacy or safety interests, an agency shall delete identifying details in a manner consistent with this rule when it makes available or publishes any public record; however, in each instance, the justification for the deletion shall be provided fully in writing.

B. In addition to exemptions referred to in paragraph (A) above, the following categories of administrative records are exempt from public access:

- (1) Requests for judicial ethics opinions;
- (2) Identity of writing assignment judges in the appellate courts prior to issuance of the opinion;
- (3) Minutes of meetings held by judges within a court;
- (4) Evaluations and recommendations for candidates seeking appointment or employment within a judicial agency;

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(5) Personal identifying information, including individuals' home contact information, Social Security numbers, driver's license numbers, and identification/security photographs;

(6) An attorney's request to a judicial agency for a trial or appellate court defense expert, investigator, or social worker, any report or findings submitted to the attorney or judicial agency by the expert, investigator, or social worker, and the invoicing and payment of the expert, investigator or social worker, but only during the pendency of the case.

(7) Documents, records, files, investigative notes and reports, including the complaint and the identity of the complainant, associated with a judicial agency's internal investigation of a complaint against the agency or its contractors during the course of the investigation. The outcome of the agency's investigation is not exempt.

(8) Manuals, policies, and procedures, developed by Bar staff, that are directly related to the performance of investigatory, disciplinary, or regulatory functions, except as may be specifically made public by court rule.

**(2) Administrative Records—Process for Access.**

**A. Administrative Records—Procedures for Records Requests.**

(1) AGENCIES TO ADOPT PROCEDURES. Each judicial agency must adopt a policy implementing this rule and setting forth its procedures for accepting and responding to administrative records requests. The agency's policy must include the designation of a public records officer and must require that requests for access be submitted in writing to the agency's designated public records officer. Best practices for handling administrative records requests shall be developed under the authority of the Board for Judicial Administration.

(2) PUBLICATION OF PROCEDURES FOR REQUESTING ADMINISTRATIVE RECORDS. Each judicial agency must prominently publish the procedures for requesting access to its administrative records. If the agency has a website, the procedures must be included there. The publication shall include the public records officer's work mailing address, telephone number, fax number, and e-mail address.

(3) INITIAL RESPONSE. Each judicial agency must initially respond to a written request for access to an administrative record within five working days of its receipt. The response shall acknowledge receipt of the request and include a good-faith estimate of the time needed to respond to the request. The estimate may be later revised, if necessary. For purposes of

1 this provision, "working days" mean days that the judicial agency,  
2 including a part-time municipal court, is open.

3 (4) COMMUNICATION WITH REQUESTER. Each judicial agency must  
4 communicate with the requester as necessary to clarify the records being  
5 requested. The agency may also communicate with the requester in an  
6 effort to determine if the requester's need would be better served with a  
7 response other than the one actually requested.

8 (5) SUBSTANTIVE RESPONSE. Each judicial agency must respond to the  
9 substance of the records request within the timeframe specified in the  
10 agency's initial response to the request. If the agency is unable to fully  
11 comply in this timeframe, then the agency should comply to the extent  
12 practicable and provide a new good faith estimate for responding to the  
13 remainder of the request. If the agency does not fully satisfy the records  
14 request in the manner requested, the agency must justify in writing any  
15 deviation from the terms of the request.

16 (6) EXTRAORDINARY REQUESTS LIMITED BY RESOURCE  
17 CONSTRAINTS. If a particular request is of a magnitude that the judicial  
18 agency cannot fully comply within a reasonable time due to constraints on  
19 the agency's time, resources, and personnel, the agency shall  
20 communicate this information to the requester. The agency must attempt  
21 to reach agreement with the requester as to narrowing the request to a  
22 more manageable scope and as to a timeframe for the agency's response,  
23 which may include a schedule of installment responses. If the agency and  
24 requester are unable to reach agreement, then the agency shall respond  
25 to the extent practicable and inform the requester that the agency has  
26 completed its response.

27 **B. Administrative Records—Review of Public Records Officer's Response.**

28 (1) NOTICE OF REVIEW PROCEDURES. The public records officer's  
29 response to a public records request shall include a written summary of  
30 the procedures under which the requesting party may seek further review.

31 (2) TIMELINE FOR SEEKING REVIEW. The timelines set forth in section (e)  
32 (2) (A) shall apply likewise to requests for review of the public records  
33 officer's response.

34 (3) FURTHER REVIEW WITHIN AGENCY. Each agency shall provide a  
35 method for review by the agency's director or presiding judge. For an  
36 agency that is not a court, the presiding judge shall be the presiding judge  
37 of the court that oversees the agency. The agency may also establish  
38 intermediate levels of review. The agency shall make publicly available the  
39 applicable forms. The review proceeding is informal and summary. The  
40 review proceeding shall be held within five working days. If that is not

1 reasonably possible, then within five working days the review shall be  
2 scheduled for the earliest practical date.

3 (4) ALTERNATIVE REVIEW. As an alternative to review under section (e) (2)  
4 (B) (3), a requesting person may seek review by a person outside the  
5 judicial agency. If the judicial agency is a court or directly reportable to a  
6 court, the outside review shall be by a visiting judicial officer. If the judicial  
7 agency is not a court or directly reportable to a court, the outside review  
8 shall be by a person agreed upon by the requesting person and the  
9 judicial agency. In the event the requesting person and the judicial agency  
10 cannot agree upon a person, the presiding superior court judge in the  
11 county in which the judicial agency is located shall either conduct the  
12 review or appoint a person to conduct the review. The review proceeding  
13 shall be informal and summary. In order to choose this option, the  
14 requesting person must sign a written waiver of any further review of the  
15 decision by the person outside the judicial agency. The decision by the  
16 person outside the judicial agency is final and not appealable. Attorney  
17 fees and costs are not available under this option.

18  
19 (5) REVIEW IN SUPERIOR COURT.

- 20 i. A requester may seek superior court review under  
21 section (e) (2) (B) (3). The burden of proof shall be  
22 on the agency to establish that refusal to permit public  
23 inspection and copying is in accordance with section  
24 (e) (1) which exempts or prohibits disclosure in whole  
25 or in part of specific information or records. Judicial  
26 review of all agency actions shall be novo. The  
27 superior court shall apply section (e) (1) of this rule in  
28 determining the accessibility of the requested  
29 documents. Any ambiguity in the application of  
30 section (e) (1) to the requested documents shall be  
31 resolved by analyzing access under the common  
32 law's public-access balancing test.
- 33 ii. The right of de novo review is not available to a requester who  
34 sought review under the alternative process set forth in section (e)  
35 (2) (b) (4).

36 (6) MONETARY SANCTIONS.

- 37 i. In the de novo review proceeding under section (e)(2)(B)(5), the  
38 superior court may in its discretion award reasonable attorney fees  
39 and costs to a requesting party if the court finds that (1) the  
40 agency's response was deficient, (2) the requester specified the  
41 particular deficiency to the agency, and (3) the agency did not cure  
42 the deficiency.

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- ii. Sanctions may be imposed against either party under CR 11, if warranted.
- iii. Except as provided in sections (6) (i) and (ii), a judicial agency may not be required to pay attorney fees, costs, civil penalties, or fines.

**(f) Administrative Records—Judicial Agency Rules.** Each court by action of a majority of the judges may from time to time make and amend local rules governing access to administrative records not inconsistent with this rule. Each judicial agency may from time to time make and amend agency rules governing access to its administrative records not inconsistent with this rule.

**(g) Judicial Records—Charging of Fees.**

- (1) A fee may not be charged to view administrative records.
- (2) A fee may be charged for the photocopying or scanning of judicial records. If another court rule or statute specifies the amount of the fee for a particular type of record, that rule or statute shall control. Otherwise, the amount of the fee may not exceed the amount that is authorized in the Public Records Act, Chapter 42.56 RCW.
- (3) The agency may require a deposit in an amount not to exceed ten percent of the estimated cost of providing copies for a request. If an agency makes a request available on a partial or installment basis, the agency may charge for each part of the request as it is provided. If an installment of a records request is not claimed or reviewed within 30 days, the agency is not obligated to fulfill the balance of the request.

**(h) Effective Date of This Rule.**

- (1) The provisions of this rule apply to all requests for public administrative records submitted on or after the effective date of this rule.
- (2) Prior to the effective date of this rule, public access to administrative records shall continue to be analyzed using the existing court rules and statutes, as applicable, and the common law balancing test. The Public Records Act, Chapter 42.56 RCW, may be used as non-binding guidelines.



WASHINGTON STATE  
OFFICE OF PUBLIC DEFENSE

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November 12, 2020

Board for Judicial Administration  
Chief Justice Barbara Madsen, Chair  
Judge Michael Lambo, Member Chair  
Temple of Justice  
PO Box 40929  
Olympia, WA 98504-0920

Dear Chief Justice Madsen, Judge Lambo and members of the BJA:

The purpose of this letter is to clarify the Washington State Office of Public Defense (OPD) request for particular language in Proposed Amendments to GR 31 developed by the BJA's Public Records Work Group. All of the documents referenced below were included in the official meeting packet for the BJA meeting on October 15, 2010.

OPD's requested amendatory language is accurately presented in the Work Group's September 15 draft rule, page 9, at (f)(1)(B)(6), which identifies the following category of administrative records as exempt from public access:

"An attorney's request to a judicial agency for a trial or appellate court defense expert, investigator or social worker, any report or findings submitted to the attorney or judicial agency by the expert, investigator or social worker, and the invoicing and payment of the expert, investigator or social worker, but only during the pendency of the case;"

The exemption is intended to cover various types of cases, including criminal cases, juvenile offender cases, dependency and termination cases, and involuntary commitment cases. A minority report and alternative draft rule submitted by Allied Daily Newspapers of Washington erroneously assumes application of (f)(1)(B)(6) to criminal cases only. (See page 13, ADNW draft dated September 10.)

OPD opposes language that would limit the above-referenced exemption to criminal matters. OPD supports the language agreed to during Work Group meetings and presented in the Work Group's September 15 draft rule.

Thank you for the opportunity to clarify OPD's position on this matter.

Sincerely,

Sophia Byrd McSherry,  
Deputy Director

cc: Judge Marlin Appelwick, Chair, BJA Public Records Work Group  
Charles Bates and Rick Neidhardt, Staff to BJA Public Records Work Group  
Mellani McAleenan, Associate Director, AOC Policy and Planning Office





WASHINGTON STATE  
ASSOCIATION OF  
COUNTY CLERKS

**Kevin Stock**  
Pierce County Clerk  
930 Tacoma Ave So. Rm 110  
Tacoma, WA 98402  
253-798-6886  
kstock@co.pierce.wa.us

November 9<sup>th</sup>, 2010

The Honorable Marlin Applewick, Chair  
Public Records Work Group  
c/o Charley Bates and Rick Neidhart  
Administrative Office of the Courts

RE: WSACC Comments to Proposed Changes to GR 31

Dear Judge Applewick:

Thank you for inviting comment of the proposed changes to General Rule 31.

The Washington State Association of County Clerks (WSACC) is concerned about the impacts of the proposed changes on the underlying GR 31 and therefore requests that the subject of your committee's work be categorized under its own rule. Our overall concern is that in adding this new layer of changes to the underlying rule there will be severe confusion and complications that can easily be avoided by simply creating a stand-alone rule with this new substance. We request simply that the two policy areas – court records and judicial records – be kept separate in separate rules.

Some specifics of our concern about melding the two things in one rule:

1. The term "judicial records" is not defined and creates confusion between court records and judicial records.
2. Section c 1 in its entirety is not applicable to the underlying GR 31 and creates much confusion. GR 31 in its underlying form relative to court records is not limited in application to only those entities listed in c1.
3. Section c4 is very misleading and unclear related to the records kept by clerks. Clerks are not an "entity entrusted by a judicial agency....." We are entrusted by the legislature to keep court records. And we have the right and responsibility to respond to a request for court records. This paragraph will certainly confuse and confound the reader.
4. Section f 5 is not appropriate in GR 31. Those are case records already covered in the underlying GR 31 and statute.
5. Section h makes changes to the underlying GR 31 that are not appropriate. Clerks have the ability to charge for internet access to court records.
6. Changing the name of the records kept by clerks to "case records" from court records means that now state court rules and Washington state statutes are potentially out of sync. Throughout legislation, the records kept by clerks are referred to as records of the court.

The list above was created as a list of examples to help describe the confusion and problems we see coming if the two subject matter areas are combined in one rule. Please note that simply fixing the above issues is not our request or intent. The above are just examples of the potential problems, and the easiest, cleanest solution is to have two separate rules.

We commend the work of your committee in addressing the controversial issues of public access to judicial records.

Thank you again for your work and for seeking input.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin Stock". The signature is written in a cursive, flowing style.

Kevin Stock  
President, WSACC

**INPUT RECEIVED FROM THE CAPITAL COUNSEL COMMITTEE**

**From:** Tim Ford [mailto:TimF@MHB.com]  
**Sent:** Thursday, November 18, 2010 12:42 PM  
**To:** Neidhardt, Rick  
**Cc:** Kessler, Ronald  
**Subject:** RE: Proposed GR 31 and the Capital Counsel Committee

Thanks. I heard from two more members of the committee and there remains unanimity in support of Judge Kessler's suggestions.

Tim Ford  
MacDonald Hoague & Bayless  
206 622 1604  
[www.mhb.com](http://www.mhb.com)

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**From:** Tim Ford [mailto:TimF@MHB.com]  
**Sent:** Wednesday, November 10, 2010 7:36 PM  
**To:** Neidhardt, Rick; Kessler, Ronald  
**Cc:** Mark Vovos; Tom Hillier; Moreno, Maryann; Theodore Spearman; 'POffenbecher@skellengerbender.com'; Linda Sullivan  
**Subject:** RE: Proposed GR 31 and the Capital Counsel Committee

Mr. Neidhardt,

I have heard from most but not all members of the committee about this, and of those I have heard from support Judge Kessler's proposal (which I take it to be that our committees records should be protected as evaluations of candidates, etc.) I am copying this e mail to all the committee members in order to get additional input. Assuming I receive confirmation that this is our (likely unanimous) position, can I simply convey that to you by another e mail, or is there something more formal we need to do to submit that request?

Tim Ford  
MacDonald Hoague & Bayless  
206 622 1604  
[www.mhb.com](http://www.mhb.com)

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**From:** Kessler, Ronald  
**Sent:** Tuesday, November 09, 2010 8:09 AM  
**To:** Fleck, Deborah  
**Subject:** FW: Board for Judicial Administration Public Records Work Group Final Report

I'm on the Supreme Court capital counsel committee, SPRC 2. This committee's deliberations and communications should be included in the exclusion.

**From:** Kessler, Ronald  
**Sent:** Tuesday, November 09, 2010 8:06 AM  
**To:** 'Tim Ford'; Tom Hillier; 'POffenbecher@skellengerbender.com'; Judge Spearman; Moreno, Maryann; Mark Vovos  
**Cc:** Faulk, Camilla  
**Subject:** RE: Board for Judicial Administration Public Records Work Group Final Report

I think we should pitch for our inclusion in proposed GR 31(c)(1). While the comment says that BJA may be proposing a more inclusive rule

*[COMMENT; The proposal includes a list of specific judicial agencies, along with catch-all provisions in subparagraphs (Y) and (Z). The work group took this approach to make sure there was no mistake as to the original intentions for the rule's scope. BJA and/or the Supreme Court will have the opportunity to replace the list with a more general definition of "judicial agency."]*

if we are not expressly listed, the trend of courts to disclose rather than restrict gives me pause. We're dealing with lawyers; some disappointed applicant will demand our records if he or she can. That will change the nature of the debate.

## **INPUT RECEIVED REGARDING THE STATE BAR ASSOCIATION'S POSITION**

**From:** HALL, JEFF  
**Sent:** Monday, November 01, 2010 11:26 AM  
**To:** mja; Neidhardt, Rick; Bates, Charles  
**Subject:** WSBA BOG Action on PRA Workgroup

Just a quick heads up – the WSBA Board of Governors voted on Friday to establish a workgroup to draft revisions to GR 12 regarding public access to Bar records for consideration at their December meeting. A good conversation and debate by the BOG in general. The thrust of this new approach was the view that it might not just be a question of whether they are “in” or “out” under the proposed rule, but that a third approach which recognizes that they are a rather unique entity among the other “judicial branch agencies” and therefore a different approach may be the best approach.

**Jeff Hall**  
State Court Administrator  
Administrative Office of the Courts

Office: 360.357.2120  
Fax: 360.956.5711  
[jeff.hall@courts.wa.gov](mailto:jeff.hall@courts.wa.gov)



## *Certified Professional Guardian Board*

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October 25, 2010

Honorable Barbara A. Madsen  
Chair, Board for Judicial Administration  
Washington State Supreme Court  
PO Box 40929  
Olympia, WA 98504-0929

Honorable Michael J. Lambo  
Member-Chair, Board for Judicial Administration  
Kirkland Municipal Court  
P O Box 678  
Kirkland, WA 98083-0678

Dear Chief Justice Madsen and Judge Lambo:

Re: BJA Public Records Work Group

The Certified Professional Guardian Board (Board) reviewed the BJA Public Records Work Group's proposed changes to General Rule (GR) 31. The Board respectfully requests that the proposed amendments to GR 31 not be made applicable to the Board.

The Board, like the Interpreter's Commission, is unique among the judicial branch boards and commissions because it is a regulatory agency. It functions very much like the Washington State Bar or Commission on Judicial Conduct. It administers the application process, the appeal when an application is denied, the annual dues and disclosure, the disciplinary process, and the continuing education process. All of these regulatory functions are established by either GR 23 or by the Board's regulations. Under GR 23(c)(c)(xi) the Board may adopt regulations pertaining to the disclosure of records in the Board's possession.

The Board's regulations include many provisions regarding records disclosure and/or confidentiality. Regulation 003 lists those records that are disclosed and the exemptions to disclosure.

### 003 Public Records

003.1 Disclosure. Existing records that are prepared, owned, used, or retained by the Board shall be disclosed upon request using established procedures for inspection, copying, and disclosure except as otherwise provided in rules, regulations of the Board, or other authority.

003.2 Exemptions from Disclosure. The following records are exempt from public inspection, copying, and disclosure:

003.2.1 Test questions, scoring keys, test results, test answers test scores

and other examination data used to administer a certification or license examination.

003.2.2 Investigative records compiled by the Board as a result of an investigation conducted by the Board as part of the application process, while a disciplinary investigation is in process under the Board's rules and regulations, or as a result of any other investigation conducted by the Board while an investigation is in process.

003.2.3 Investigative records compiled by the Board, the nondisclosure of which is essential to effective law enforcement.

003.2.4 Deliberative records compiled by the Board or a panel or committee of the Board as part of a disciplinary process.

003.2.5 Deliberative records of the Board, a hearing officer or hearing panel, review panel, or board committee made confidential by a court order.

003.2.6 Personal information, including, but not limited to, home address, home telephone number, financial information, health information, Social Security number, and date of birth.

003.2.7 Certain personal and other records of an individual such that disclosure would be highly offensive to a reasonable person and is not of legitimate concern to the public.

003.2.8 Other records related to the Certified Professional Guardian Board that are required by law, rule, regulation, court order, or other authority to be confidential.

### 003.3 Other Records.

003.3.1 Dismissed grievances shall be disclosed upon written request using established procedures for inspection, copying, and disclosure with identifying information about the grievant, incapacitated person, and professional guardian and/or agency redacted. A request for dismissed grievances shall cover a specified time period of not less than 12 months.

003.3.2 The identity of a person requesting an ethics advisory opinion is confidential and not subject to public disclosure.

003.4 Records Retention. Records related to the Certified Professional Guardian Board shall be retained in accordance with records retention schedules for the judicial branch and the Washington State Administrative Office of the Courts (AOC).

Many of these exemptions are not in the proposed language of GR 31. The Board has worked with confidentiality regulations and records disclosure provisions similar to the ones above since its inception in 2000. The Board has complied with records requests and found its public record regulations to be effective for the regulatory nature of the Board.

The Board supports transparency, openness, and public access to documents. The Board also respects the legitimate privacy interests of professional guardians, incapacitated persons, and those filing grievances. The Board's regulations serve public disclosure policies and should not be set aside for newer, less mature and less specific rules. The Board requests that it be exempted from the changes to GR 31.

Sincerely,

Honorable Christopher Wickham  
Chair, Certified Professional Guardian Board

cc: Mr. Rick Neidhardt  
Honorable Stephen Warning  
Ms. Regina McDougall

## INPUT RECEIVED FROM JUDGE PROCHNAU

**From:** Prochnau, Kimberley [<mailto:Kimberley.Prochnau@kingcounty.gov>]  
**Sent:** Thursday, October 21, 2010 5:56 PM  
**To:** [rculpep@co.pierce.wa.us](mailto:rculpep@co.pierce.wa.us); mja  
**Subject:** FW: Prochnau memo re: public records rule---scja meeting

I want to thank you for the work you have put into this important subject. You may recall that I previously contacted you about my concerns about creating a new unfunded mandate; I understand the opposing argument is that if we do nothing the legislature may step in. I wonder why we could not propose a middle ground--we work out the rule, but if we believe the fiscal and workload concerns are serious, that the rule would not take effect until the legislature appropriated the funding.

I have not had the opportunity to attend any lengthy discussions of this rule so I am basing my understanding of it simply by reading the rule. Here are my questions/concerns:

It seems to me that before any rule is passed, there should be consideration given to the following interests:

- 1) transparency in government
- 2) public confidence in government
- 3) safety and privacy concerns
- 4) additional staff workload as well as judicial time for oversight of staff needed to implement the rule
- 5) fiscal costs of the rule

Notice that I distinguish transparency in government from public confidence. A rule that provides for broad disclosure of records but yet is confusing to the average layperson and difficult to implement may not inspire public confidence even if it ultimately provides for more disclosure of records.

And given the budget cuts all of our courts are facing, as well as AOC, it is critical that we understand what a new rule is going to cost us. The staff who would be responsible for implementing this rule are the very staff who are being tasked to do more and more given staff layoffs and budgetary decisions. (This is particularly timely given that I spoke to the County Council earlier this week about what it would mean for us to lose Family Court Services, a program we have had since 1949 but is now imperiled due to proposed budget cuts.)

Here is why I am concerned that the proposed rule does not meet the goals above.

- 1) It is retroactive and appears to apply some email communications. That raises a red flag in my mind as to fiscal/staff workload concerns since there must be millions of emails in the system. While the rule exempts "chambers records", it includes most "administrative records" and appears to create a right to access to these records. There has been a suggestion that we don't expect staff to comb through emails to identify requested administrative records, but I don't see anything in the rule that is consistent with that suggestion. My understanding of the experience that state and local governments with the Public Disclosure Act that the time spent on responding to requests, identifying and potentially redacting applicable records is a significant time and fiscal concern. Requestors, including the media, are likely to expect the same research and effort applied in identifying disclosable records from the court as from state

and local governments. (I have spoken at some length to Patty Shelledy who is responsible for responding to King County Sheriff public disclosure requests who has stressed the increased workload as well as our staff who handle public disclosure requests pursuant to our current policy).

2) I believe the rule should not be retroactive and that either a finite list of disclosable records be enumerated (so that there is little ambiguity) or that the exemptions and/or the definition of chambers records be more clearly defined to avoid disputes between requestors and courts and additional litigation. While (5)(a) states that chambers records are not disclosable and defines chamber records to include any "writing that is created or maintained by any judicial officer or chambers staff, and is maintained under chambers control." such definition is modified by "whether directly related to an official judicial proceeding or other chambers activities". The definition of "chambers records" is further modified by (5)(b) - "case records and administrative records do not become chambers records merely because they are in the possession or custody of a judicial officer at chambers". If I were a requestor I would argue normal principles of statutory construction requires us to give meaning to every phrase and not render any phrase superfluous; therefore not all emails initiated by or responded to by a judicial officer are chambers records. What about a request that asks for all emails from Judge X to Lawyer Y that are not related to a case or administrative issue but as to a social occasion? See *Morgan v Federal Way*, \_\_\_ Wash. \_\_\_ and the Impeachment Trial of Federal Judge Poteus (Now proceeding in Congress) for an example of why the Supreme Court might be sympathetic to this request. And if that interpretation is correct, how do we expect our staff to sift through all of the emails generated or responded to by judicial officers and distinguish among those AND do we want our staff to be doing that?

Let me give another example.

Requestor requests all records including email related to a recent staff-judge party. See *Morgan v Federal Way*, \_\_\_ Wash. \_\_\_ for an example of why the Supreme Court might be particularly sympathetic to such a request.

Judge X has had a series of email exchanges with the court administrator about plans for the party. They discuss who is going to bake the pies for the party, the court administrator offers to help Judge X pick up the supplies. Judge X responds by giving the court administrator her address. How will staff be expected to identify all emails concerning the staff party? Will the court be required to provide this email string? How will Judge X be able to ensure that the Judge's address is not inadvertently disclosed?

Judge X also has a series of email exchanges with her bailiff about the party. Judge X sends the bailiff an email telling her to let staff know when the party will be but in the same email discusses a case with the bailiff. Judge is concerned about whether to give a lesser included instruction and tells the bailiff her concerns; asks the bailiff to do some research on the issue. Bailiff responds and in the same email mentions an issue concerning another case.

Judge X also sends a courtesy invitation about the party to a former bailiff, now a lawyer in private practice who does not appear before her, inviting her to the party. Is that email disclosable?

Now who will be going through all of the emails to determine whether they are a case, chambers or administrative record? How much time will this take us? Will the requestor be satisfied with the results or feel that we are engaging in a coverup?

Finally, I would note that the rule proposes to also cover records maintained by the Certified Professional Guardian board which is charged with licensing and regulating professional guardians. You should be hearing more about this from J Wickham who is currently chair of the board but as past chair I would like to chime in: The CPG board already has a well developed set of rules for public disclosure that were enacted after substantial discussion, public comment, and approval by the Supreme Court. The report

does not indicate that the proponents of the proposed rule find the existing rules inadequate. I would urge BJA to recommend that the CPG rules stay in place -they are clearer than the proposed rule, have been tested and provide some important exemptions not allowed in the rule such as non-disclosure of testing results and non-disclosure of unfounded grievances. (Founded grievances against professional guardians are not only subject to disclosure but are posted on the AOC website; the reasons for not disclosing unfounded grievances are similar as to why we don't disclose unfounded grievances against judges and attorneys).

*[NOTE: Judge Warning asked that the following document from Thurston County Superior Court be included in the materials for BJA's consideration.]*

**SUPERIOR COURT OF WASHINGTON**  
**FOR**  
**THURSTON COUNTY**

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We are opposed to responding to an appellate decision finding that courts are not agencies subject to the PRA by implementing a rule change to contradict the holding. It appears the impetus for a rule change is in anticipation of legislative action to include the courts in the PRA as agencies. We do not think this is appropriate, from both a legal and policy bases for the reasons set forth below.

**Resources**

Our court currently addresses a limited number of PRA requests. If courts voluntarily decide that their records are public records, then the PRA statutory language and case law will apply to courts—including the extremely limited and outdated ability to collect for the massive costs required as well as the mandatory penalties. Even if this is not seen as the courts voluntarily including themselves under the PRA, it is our opinion that it will be inevitable that the PRA's provisions will be cited to as authority in interpreting this proposed court rule.

In this court we have seen small agencies completely unable to perform their normal functions in order to timely respond to PRA requests. The burden can be stifling regardless of whether any records are actually provided to the requestor. Under the PRA, all agency staff have the obligation to search for records, not just public information or public records, not just public information or public records staff. Similarly, there is no way that individual judges can be practically shielded from the work of looking for documents and assisting in determining exemptions. [The proposal's attempt to shield certain staff in (c) (3) and (c) (4) on page 3 is inconsistent with the PRA as currently understood] The additional duties imposed on all staff of agencies subject to the PRA have ballooned exponentially as requests have increased, and there is no reason to think courts would be any different. Some state agencies have compiled information on the resources utilized to respond to PRA requests that would be eye-opening to most judges. Additionally, county and municipal risk managers

can attest to skyrocketing litigation costs for PRA cases in which any liability results in mandatory daily fines.

## **Credibility**

If the concern is that the legislature would not be sympathetic to courts in modifying the PRA, there is no basis to believe that. Even if that were true, imagine how unsympathetic the legislature will be to courts' budget woes (which are severe) when those same courts have voluntarily agreed to perform additional functions at a huge potential cost in terms of dollars and personnel. It is one thing to have an additional burden thrust upon the courts after having an opportunity to testify at a legislative hearing as to the potential consequences, but it is another thing altogether to agree to take on additional responsibilities, than complain that the courts are overburdened. The scope and applications sections make clear this proposal intends to place burdens on non-judicial entities and cover many non-judicial records. Specifically, we agree with the minority report of Mr. Weldon. This rule would impose many obligations on entities far outside the BJA.

With respect to the sub-committee, it is our general concern that the committee does not understand the practicality of the proposal. For instance, stating that counsel would have the responsibility for redacting information ((2) (B) on page 6) assumes that counsel is involved and can access the document to perform that function—a very unrealistic assumption. Another example is that the section on charging of fees (page 15, section (h)), which is more restrictive than the PRA.

We are of the opinion that the BJA would not be successful in its attempt to create its own exemptions by rule (see pages 9-11). Moreover, one workgroup member (Allied Newspapers) has expressed the view that the PRA exemptions should not apply at all and that exceptions to providing records under this rule should be much more narrow than the narrow exceptions of the PRA. We also note that Allied Newspapers' minority report suggestions include deleting any reference to judicial integrity which we believe is important to BJA members.

The records of the Washington courts are already available since the executive branches of local governments hold the originals and/or copies of court budgets, expenditures, and other administrative records. Our case files are fully open to inspection. The work of the judges is done in open court and on the record. Our work is subject to appeal and review. The Judicial Conduct Commission is available to

citizens who find objection to our behavior. Finally, as elected officials we are ultimately responsible to people.

## QUESTIONS RECEIVED FROM PAUL SHERFEY, KING COUNTY SUPERIOR COURT

(Mr. Sherfey's questions are shown without underlining.)

(Judge Appelwick's responses are shown with underlining.)

Here is a quick and dirty response to your questions. We assumed that some additional details would be included in any final rule, but that much of the logistics and guidance for handling of specific situations would be developed and documented in the best practices phase in order to provide uniform treatment of those issues.

In reviewing proposed changes to GR 31, a comparison was made with the King County Superior Court adopted policy on access (copy attached). Questions/concerns on specific proposed changes to GR 31 include:

- In general, proposed GR 31 changes divide records into three groups – case; chambers; and administrative. Our own adopted policy makes no distinction between chambers and administrative records, treating all equally. The proposed GR 31 amendments appear to protect Judge e-mails/telephone records. Is this protection still in place, for example, if e-mail/telephone calls are made to/from administration to a judge?

- Generally, records in the possession of chambers are not accessible. If a judge communicates with someone outside of chambers, the record in the possession of that person may be subject to disclosure. An email to a legislator would be disclosed by the legislator under the PRA, but not by the judge under this rule. Communications to a court administrator from a judge would likely be subject to disclosure under the rule as administrative records, unless one of the exemptions applied, and subject to the redaction provisions.

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- Section **(c)(1)(w)** indicates the rule covers the County Clerks, "with regard to their duties to the Superior Court and their custody of Superior Court records." This is unclear. And if provisions of GR 31 and the Public Disclosure Act differ, which controls with regards to Clerk's Office information/disclosure.

- County Clerks are already subject to the rule as it applies to case records. In all other respects they are subject to the PRA. The rule would now indicate that with respect to judicial case records and judicial administrative records the County Clerk is subject to this rule, not the PRA.

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- Section **(c)(4)** provides: ***A person or entity entrusted by a judicial agency with the storage and maintenance of its public records, whether part of a judicial agency or a third party, is not a judicial agency. Such person or entity may not respond to a***

**request for access to judicial records, absent express written authority from the judicial agency or separate authority in rule or statute to grant access to the documents.** This provision appears to mirror the agreement we have with our County Executive. The proposed rule amend specifies in the comments that "The records request needs to be addressed by the judicial agency's public records officer, not by the person or entity having control over the IT server or the storage area." This appears to specify that the court has the ultimate control over records maintained by central county departments which maintain telephones, servers, etc., and associated records. Further elaboration is needed here, specifically regarding when records, such as payroll records, are involved, since the other branches also must use that same data contained in the central system, for other purposes, such as creating paychecks.

\* I do not know whether elaboration is required or not. If payroll information is available from an executive branch agency under the PRA, it would be available as an administrative record under this rule, subject to applicable redaction. If more than one agency "owns" the records, the disclosure is controlled by which agency is asked to disclose and which disclosure rules apply. The example of communication by a judge with a legislator above is an example of differing results under different rules. This provisions says that YOUR records don't become subject to disclosure in the hands of a third party to whom you entrust them for storage.

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\* Section (d)(5)(b) indicates chamber records are not public records, but does not answer questions such as how to treat correspondence (written, e-mail or telephone) which may occur between chambers and administration. Currently our court provides no such records, and draws no distinction between chamber and administrative records.

\* See response to first question.

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\* Section (f)(1)(A) Administrative Records – Right of Access, describes the public's right of access to all administrative records. Records are exempt to the extent such records are exempt under the PRA, and "to the extent required to prevent a significant risk to individual privacy and safety..." No definition of or standard relating to what constitutes a "significant risk" is contained in this section or anywhere in the rule.

\* This language is lifted from case law. We presumed the Supreme Court would apply it in any appeal that reached them. They did not define it further and we did not presume to do so. The open government and media representatives objected to the inclusion. It is meant to provide a basis, at the discretion of the judicial agency to deny disclosure or redact certain information not expressly covered. The risk is that on subsequent judicial review that decision may be unacceptable. The presiding judge or

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agency head has an opportunity to veto the assertion of this provision prior to any exposure to judicial review and to fee sanctions. Failure to exercise this option does not expose the judicial agency to appeal or sanction.

- Section **(f)(1)(B)(3)** Exceptions, includes among the exemptions “Minutes of meetings held by judges within a court”. This was apparently the subject of some disagreement among members, and it is noted that “a minority report may be written on this point”, although the work group did vote in favor of the broad exemption. Assumedly this section would cover all standing and ad hoc committee meeting minutes as well; also project committees such as Criminal Caseflow? CJ Council?

- The meetings of judges and committees to which this applies are not discussions of cases, but of administrative matters. Exemptions of certain types of information from disclosure would allow its redaction. Otherwise, no principled basis for exempting this type of administrative record was articulated. Open government and media members felt there is no difference between judges and other elected officials when it comes to administrative matters. Officials subject to the PRA voice the same types of objections to disclosure of their minutes and records. The level of detail in the minutes and records of meetings is within the discretion of the agency.

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- Section **(f) (1) (B) (5)** Exempts personal identifying information, including individuals’ home contact information, SSN, driver’s license numbers and id/security photographs. There was also discussion as to whether DOB information should also be exempted, but the work group did not reach consensus on this point so it was not included as an exemption. This could be problematic.

- DOB is a big issue with the media. It becomes critical to identifying the correct John Doe.

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- Section **(f)(1)(B)(6)** Exempts an attorney’s request to a judicial agency for a trial or appellate court defense expert, investigator, or social worker, any report or findings submitted to the attorney or judicial agency by the expert.....*but only during the pendency of the case* (emphasis added). This may have an impact on FCS social files, which include SW reports and notes. Currently, FCS has a program-specific file access policy that restricts access to such records to parties only, and only during the pendency of the case. Thereafter, the social file is available to no one.

- The workgroup felt that disclosure during the pendency of the case could affect the case, but that after the fact disclosure should be made. Whether the particular files you reference should be further exempt is not an issue we specifically addressed.

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- Section **(f)(1)(B)(7)** Exempts documents, records, files, investigative notes and reports.....associated with a judicial agency's internal investigation of a complaint against the agency or its contractors during the course of the investigation. The outcome of the agency's investigation is not exempt. Our own court's policy does not address this scenario. Also the work group considered additional requests for exemption but decided not to include them in their revision. One such request was to exempt "performance measures for evaluating court processes." Even though our court's practice is to provide performance measures information, it brought to mind the request of the Open Data Initiative for us to provide *raw data sets* on a public-facing website. Our primary concern was that, unless context and additional information to accompany the data (provided by someone like Shiquan) could be provided, the information could very easily be misinterpreted, etc. Interestingly, "the work group decided that this information should generally be open to public access, even if the information is subject to public misinformation." Why?

- The workgroup was aware that internal performance measure might be subject to misinterpretation. However, the public has an interest in the effective administration of the courts. To the extent the agency does evaluations, the group felt the public had a right to access. The agency has the opportunity to interpret the evaluations in the process as part of the record.

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- Section **(2)(B) Administrative Records – Review of Public Records Officer's Response.** This section would require development of a protocol for an "appeal" of the public records officer's response to requests, and indicates that this protocol must be clearly described in all correspondence. This method for review may involve "review by the agency's director or presiding judge," and indicates that the agency may also have intermediate levels of review", as well as prescribed forms. It notes that the review proceeding shall be held within five working days (I assume that is from the time the request for review is received). Correct. There is an additional description of an "alternative review" process by which a requester may seek review by a person outside the judicial agency – in the case of the court, this review shall be by a "visiting judicial officer". If choosing this option, the requestor shall waive further review of the decision made by the outside arbiter.

There is yet another section (5), p. 14, that describes "Review in Superior Court." It is unclear as to whether this is the next level of appeal following the initial review of the public records officer's decision by PJ/CAO, but does call for a process by which "a requester may seek superior court review of a decision". Such review shall be de novo.

Monetary sanctions may be awarded through this process, and is also described on p. 14. In general, these provisions will significantly add to Administrative overhead costs.

(Remember this applies to all judicial agencies, not just superior courts.) Review in Superior Court is taken only from the decision of the Presiding Judge or Agency Head. A public records officer makes the initial response. This of course may be done with prior consultation with superiors. A dissatisfied requestor may request review by the presiding judge or agency head. In the alternative, the dissatisfied requestor who fears being "hometowned" may invoke the alternative review by a visiting judge or arbiter. That review is to be done within five working days of receipt of the request. If the requestor is dissatisfied with the result of the review by the presiding judge or agency head, they may petition in superior court for de novo review. Only in this last instance is the discretionary fee provision available. The expectation is that when any response is made to a requestor, they will be reminded of the provisions of the rule for review with specifics of to whom the request will be made and how.

- Section **(h) Judicial Records – Charging of Fees**. This section appears to be consistent with the PRA; however there is no reimbursement for administrative time spent researching specific requests for records, which I believe is allowable under the PRA.

- We did not add a fee for research.

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## INPUT RECEIVED FROM JUDGE WYNNE

**From:** Wynne, Thomas [<mailto:Thomas.Wynne@co.snohomish.wa.us>]  
**Sent:** Wednesday, September 22, 2010 2:57 PM  
**To:** Ronald Culpepper  
**Cc:** 'Trickey, Michael'; 'Alfasso, Lynne'; 'Siri Woods'; 'Miner, Barbara'; Jim Heller  
**Subject:** Public Records Act Work Group proposed GR 31 amendments

I have had an opportunity to review the proposed amendments to GR 31 implementing the recommendations of the Public Records Work Group. Congratulations on the good work you and other members of the workgroup have done in such a short timeline. I had one concern I thought I should discuss with you, from my perspective a Superior Court member of JISC. The concern is with the language of (c) (4) (attached). That section appears to be intended to deal primarily with E-mail and administrative records on County or City servers. However the present language appears to include *Case Records*. It appears to me that the current language could be interpreted as requiring AOC and JISC to discontinue providing access to *Case Records* on AOC servers and to shut down public access to *Case Records* on it's website, despite the fact that AOC and JISC are otherwise defined as a judicial agencies. *Judicial Agency* is not otherwise defined. The Case Records all originate with District or Municipal, Superior, or Appellate Courts. Shouldn't (c) (4) be clarified to indicate it applies to Administrative Records only and not to *Case Records*? As it applies to Administrative Records, the proposed (c) (4) is an excellent provision.

## INPUT RECEIVED FROM JUDGE BECKER

**From:** mja  
**Sent:** Thursday, September 23, 2010 11:40 AM  
**To:** Neidhardt, Rick  
**Subject:** RE: PRA

. . .

Judge Becker asks whether minutes from judges meetings would be disclosed, whether those minutes must identify who voted how, whether they must indicate the actual vote (ie, 7-2) or merely that something passed? This was triggered by an article indicating that Justice C. Johnson stated the votes by justices on committees are confidential.

## INPUT RECEIVED DURING BJA'S MEETING ON SEPTEMBER 17TH

**From:** BJA Public Records Act Work Group [<mailto:BJAPRA@LISTSERV.COURTS.WA.GOV>] **On Behalf Of** mja  
**Sent:** Friday, September 17, 2010 1:58 PM  
**To:** [BJAPRA@LISTSERV.COURTS.WA.GOV](mailto:BJAPRA@LISTSERV.COURTS.WA.GOV)  
**Subject:** [BJAPRA] update

Greetings:

I thought I would update you on the presentation to BJA. Generally, the report was well received. Questions addressed what a chambers record was for a superior court judge, what the vote was for inclusion of the WSBA, if we weren't changing the rules for case records why did we strike "in the courthouse" in the fee section. On the last one, I don't remember that we discussed restricting the county clerks from charging fees for on-line subscription access, which that deletion apparently eliminated.

...

## INPUT RECEIVED FROM SIRI WOODS

**From:** Siri Woods [<mailto:siri.a.woods@co.chelan.wa.us>]

**Sent:** Wednesday, September 15, 2010 8:26 AM

**To:** Flynn, Beth; HALL, JEFF; Miner, Barb new; Wynne, Thomas; Fairhurst, Justice Mary

**Subject:** RE: [BJAPRA] Public Records Work Group -- Updated Court Rule -- YOUR RESPONSES ARE NEEDED

Beth, if their intention was to address administrative records, they did, but they also included all case records which are the records that clerks keep for the benefit of the public and to which access is provided by clerks. I think this proposed rule completely changes the rules regarding court records and throws out *Nast vs. Michaels* which says that PRA does not apply to court records because courts are not agencies. I renew my concern. Records of court proceedings and pleadings are filed with the clerk who is an executive branch officer and not a judicial officer intentionally to provide open access and the legislature set fees for copying those records. This court rule would overrule the legislative mandate of specific fees and would permit anyone wanting copies to claim they wanted Public Disclosure records and get them for 15 cents. This wouldn't even permit us to require them to print them at home for that price, we could be pulling files, printing on purchased paper and selling over the counter at county expense. THIS IS VERY SERIOUS.

*Siri*

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# WSBA

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To: The President, President-Elect, Immediate Past President and Board of Governors  
From: Robert D. Welden, General Counsel  
Date: December 1, 2010  
Re: GR 12.4 WSBA Access to Records

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**ACTION REQUESTED:** Approve new General Rule (GR) 12.4 for submission to the Supreme Court regarding access to WSBA records.

**DISCUSSION:** At the October Board of Governors meeting, the Board reviewed suggested amendments to GR 31 drafted by the Board of Judicial Administration Public Records Act Work Group. Kristal Wiitala and I were the WSBA representatives on the Work Group. At issue was whether the Board supported the proposal in that draft rule to make it applicable to the WSBA. After discussion of the ways in which the WSBA is different from most judicial agencies to which the rule would apply, it was proposed that the WSBA submit to the Supreme Court a new rule, GR 12.4, specifically addressing access to WSBA records.

A work group was appointed consisting of Steve Crossland, Lee Kerr, Roger Leishman, Marc Silverman, Kristal Wiitala, Paula Littlewood, Jean McElroy, Doug Ende, Elizabeth Turner and me. The attached draft rule is based in part on the current WSBA bylaw provision on records disclosure. It recognizes that many of the Bar's regulatory functions, including admissions, regulation and discipline, have existing court rules on records disclosure.

There are some policy issues that the Board needs to determine.

- **Law Clerks and law school history:** It has long been the policy that where and whether a member of the Bar went to law school is not disclosed by the WSBA. I do not know when this policy arose, but it has been the policy at least since I began working for the WSBA in 1981. I was told that the reason for it was to avoid any implication that members who qualified for admission by completing the Law Clerk Program are somehow differently qualified than graduates of law schools. The work group recommends continuing this policy.

- Appeals: Paragraph (g) in this draft GR 12.4 says that an appeal from a decision of the Executive Director on records disclosure shall be to the Board of Governors. The draft of GR 31 provides that, for a judicial agency that is not a court, any appeal shall be to the presiding judge of the court that oversees the agency, which in the case of the WSBA would be the Chief Justice. The Board needs to determine (1) whether it should be in the appellate process and (2) whether, if so, any appeal to the Board is final, or whether the requestor may appeal to the Chief Justice. A majority of the work group recommends that the Board be in the appeals process and that any appeal from the Board's decision may be submitted to the Chief Justice.

**DRAFT 12/2/10**

**(revised)**

**GR 12.4 WASHINGTON STATE BAR ASSOCIATION ACCESS TO RECORDS**

**(a) Policy and Purpose.** It is the policy of the Washington State Bar Association to facilitate access to Bar records. Access to Bar records is not absolute and shall be consistent with reasonable expectations of personal privacy, restrictions in statutes, restrictions in court rules, or as provided in court orders or protective orders issued under court rules. Access shall not unduly burden the business of the Bar.

**(b) Scope.** This rule governs the right of public access to Bar records. This rule applies to the Washington State Bar Association and its subgroups operated by the Bar including the Board of Governors, committees, task forces, commissions, boards, offices, councils, divisions, sections, and departments. This rule also applies to boards and committees under GR 12.2 administered by the Bar. A person or entity entrusted by the Bar with the storage and maintenance of Bar records is not subject to this rule and may not respond to a request for access to Bar records, absent express written authority from the Bar or separate authority in rule or statute to grant access to the documents. The Bar Executive Director serves as the public records officer to whom all records requests shall be submitted.

**(c) Definitions.**

(1) "Access" means the ability to view or obtain a copy of a Bar record.

(2) "Bar record" means any writing containing information relating to the conduct of any Bar function prepared, owned, used, or retained by the Bar regardless of physical form or characteristics. Bar records include only those records in the possession of the WSBA and its staff or stored under Bar ownership and control in facilities or servers and do not include records solely in the possession of members of boards, committees, task forces, commissions, sections, councils, and divisions. Nothing in this rule requires the Bar to create a record that is not currently in possession of the Bar at the time of the request.

(3) "Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation in paper, digital or other format.

**(d) Bar Records - Right of Access.**

1. The Bar shall make available for its members and/or public inspection and copying all Bar records, unless the record falls within the specific exemptions of this rule or is made confidential by the Rules of Professional Conduct, the Rules for Enforcement of Lawyer Conduct, the Admission to Practice Rules, the Rules for Enforcement of Limited Practice Officer Conduct, General Rule 25, court orders or protective orders issued under those rules, or any other applicable state or federal statute or rule. To the extent required to prevent an unreasonable invasion of personal privacy interests or threat to safety or by the above-referenced rules, statutes or orders, the Bar shall delete identifying details in a manner consistent with those rules when it

makes available or publishes any Bar record; however, in each case, the justification for the deletion shall be explained in writing.

2. In addition to exemptions referenced above, the following categories of Bar records are exempt from public access:

- a. Personal information in files maintained for employees, appointees, members, volunteers, or elected officials of the Bar to the extent that disclosure would violate their right to privacy.
- b. Specific information and investigative records, relating to lawyer or Limited Practice Officer admissions or discipline that are not expressly categorized as public information by court rule.
- c. Test questions, scoring keys, and other examination data including individual scores, used by the Bar to administer a license, employment, or academic examination.
- d. The contents of real estate appraisals made by or for the Bar relative to the acquisition or sale of property, until the project or prospective sale is abandoned or until such time as all of the property has been acquired or the property to which the sale appraisal relates is sold, but in no event shall disclosure be denied for more than three years after the appraisal.
- e. Research data, protected intellectual property and proprietary

information.

- f. Preliminary or intra-Bar memoranda, notes, and e-mails, and other documents in which recommendations or opinions are expressed or policies formulated or recommended, except when referenced during an open meeting or cited by the Bar in connection with any of its actions.
- g. Manuals, policies, and procedures, developed by Bar staff, that are directly related to the performance of investigatory, disciplinary, or regulatory functions, except as may be specifically made public by court rule.
- h. Applications for employment with the Bar, including the names of applicants, resumes, and other related materials submitted with respect to an applicant.
- i. Personal identifying information, including individuals' home contact information, Social Security numbers, driver's license numbers, dates of birth, and identification or security photographs held in Bar records or mailing lists of employees or volunteers.
- j. Information that identifies a person who, while a Bar employee:
  - 1) seeks advice, under an informal process established by

the Bar, in order to ascertain his or her rights in connection with a potentially discriminatory or unfair employment practice; and

2) requests his or her identity or any identifying information not be disclosed.

- k. Personal data of individual members, including but not limited to ethnicity, race, disability status, gender, sexual orientation, and law school history; however membership status, bar number, dates of admission, and business addresses, telephones, facsimile numbers, and electronic mail addresses (unless the member has requested that electronic mail addresses not be made public), shall not be exempt, provided that, for reasons of personal security or other compelling reason, the Executive Director may, on an annual basis, approve the confidentiality of any such information in which case it shall be exempt.
- l. Applications for admission to the Bar and annual licensing forms and related records.
- m. Information which would identify bar examiners responsible for writing and/or grading specific bar exam questions.
- n. Proceedings and records of the Board of Bar Examiners except as made public by the Board.

- o. Information, records, or documents of the Law Clerk Board that relate to any application for admission to or completion of the Law Clerk program, or to the retention of any current participant in the Law Clerk program, except as made public by the Board.
- p. Information, records, or documents of the Practice of Law Board regarding the investigation, or potential investigation, of any incident or alleged incident of the unauthorized practice of law, except material submitted to other agencies after a finding of unauthorized practice of law or except as made public by the Board.
- q. Information, records, or documents of the Character and Fitness Board that relate to any application for admission, special admission, special licensing, or change of membership status or class, except where those proceedings are specifically made public by court rule.
- r. Records relating to requests by members for ethics opinions to the extent that they contain information identifying the member or a party to the inquiry.
- s. Proceedings and records of the Judicial Recommendation Committee.
- t. Records and proceedings of any Fee Arbitration Program, Mediation Program, or other alternative dispute resolution

program which may be administered by the Bar.

- u. Records and proceedings of the Personnel Committee except as made public.
- v. Records and proceedings of the Awards Committee except as made public. Records and proceedings of the Hearing Officer Selection Panel, except as made public by the Panel;
- w. Personnel records of Bar employees, whether regular, temporary, or contract, except for information relating to compensation for job classifications, verifying periods of employment or, when specifically requested, the Executive Director's current annual compensation;
- y. Applications for license fee hardship waivers and any decision or determination on them;
- z. Continuing Legal Education attendance rosters;
- aa. Copyrighted material.
- bb. Any material which is subject to attorney/client privilege.

The above exempted information will be redacted from the specific records sought.

Statistical information not descriptive of any readily identifiable person or persons may be disclosed.

**(e) Bar Records—Procedures for Access.**

The Washington State Bar Association shall adopt a policy implementing this rule and setting forth its procedures for accepting and responding to records requests.

**(f) EXTRAORDINARY REQUESTS LIMITED BY RESOURCE CONSTRAINTS.** If

a particular request is of a magnitude or burden on resources that the Bar cannot fully comply within a reasonable time due to constraints on the time, resources, and personnel, the Bar shall communicate this information to the requester. The Bar must attempt to reach agreement with the requester as to narrowing the request to a more manageable scope and as to a timeframe for the Bar's response, which may include a schedule of installment responses. If the Bar and requester are unable to reach agreement, the Bar shall respond to the extent practicable and may decline to process the remainder of the request.

**(g) Review of denials.** Requests for review of denials may be made to the WSBA Executive Director. Appeals from the decision of the WSBA Executive Director shall be to the Board of Governors. [should there be a subsequent appeal process to the Chief Justice?]

