

BOARD FOR JUDICIAL ADMINISTRATION



**WASHINGTON
COURTS**

MEETING PACKET

**WEDNESDAY, JANUARY 12, 2011
11:00 A.M.**

**RECEPTION ROOM
TEMPLE OF JUSTICE
OLYMPIA, 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 Deborah Fleck
Superior Court Judges' Association
King County Superior Court

Judge Janet Garrow
District and Municipal Court Judges'
Association
King County District 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

January 12, 2011
11 a.m. – 4 p.m.
Temple of Justice
Olympia, Washington

Agenda

1. Call to Order	Chief Justice Barbara Madsen Judge Michael Lambo	
2. Welcome and Introductions	Chief Justice Barbara Madsen Judge Michael Lambo	
Action Items		
3. December 10, 2010 Meeting Minutes Action: Motion to approve the minutes of the December 10 meeting	Chief Justice Barbara Madsen Judge Michael Lambo	Tab 1
4. Appointments to the BJA Public Trust and Confidence Committee Action: Motion to appoint Judge Elizabeth Stephenson and Mr. Michael Killian to the BJA Public Trust and Confidence Committee	Ms. Mellani McAleenan	Tab 2
5. Resolution Regarding Notice of Potential Consequences of Guilty Pleas Action: Motion to approve the proposed resolution encouraging Washington Courts to advise defendants in writing to consult with an attorney regarding the consequences of a guilty plea	Mr. Jeff Hall	Tab 3
6. Reconsideration of Position on Judicial Salaries Action: Motion to approve a position on judicial salaries	Chief Justice Barbara Madsen Mr. Jeff Hall	Tab 4
Reports and Information		
7. BJA Resolution Guidelines	Ms. Mellani McAleenan	Tab 5
8. GR 31A Discussion	Judge Marlin Appelwick	Tab 6
9. Diversifying the Bench Guidebook	Judge Deborah Fleck	
10. Access to Justice Board	Mr. M. Wayne Blair	

<p>11. Reports from the Courts Supreme Court Court of Appeals Superior Courts Courts of Limited Jurisdiction</p>	<p>Justice Susan Owens Judge Dennis Sweeney Judge Stephen Warning Judge Stephen Brown</p>	
<p>12. Association Reports Superior Court Administrators County Clerks District and Municipal Court Administrators</p>	<p>Ms. Delilah George Ms. Betty Gould Ms. Peggy Bednared</p>	
<p>13. Administrative Office of the Courts</p>	<p>Mr. Jeff Hall</p>	
<p>14. Other Business Next meeting: February 18 Beginning at 9:30 a.m. at the Temple of Justice, Olympia</p>	<p>Chief Justice Barbara Madsen Judge Michael Lambo</p>	

**Board for Judicial Administration
Meeting Minutes**

**December 10, 2010
AOC SeaTac Office
SeaTac, Washington**

Members Present: Chief Justice Barbara Madsen, Chair; Judge Michael Lambo, Member Chair; Judge Marlin Appelwick; Judge Stephen E. Brown; Judge Ronald Culppepper; Judge Susan Dubuisson; Judge Deborah Fleck; Mr. Jeff Hall; Judge Laura Inveen; Justice Susan Owens; Judge Jack Nevin; Judge Kevin Ringus; Judge Dennis Sweeney; Judge Gregory Tripp; Judge Stephen Warning; and Judge Chris Wickham

Guests Present: Mr. Jim Bamberger, Ms. Peggy Bednared, Ms. Roni Booth, Mr. M. Wayne Blair, Mr. Ron Carpenter (by phone), Ms. Delilah George, Ms. Lynne Jacobs, Mr. Doug Klunder, Ms. Kathy Kuriyama, Ms. Shelly Maluo, Ms. Marti Maxwell, Ms. Sharon Paradis, Judge Christine Quinn-Brintnall, Mr. Rowland Thompson, Ms. Renee Townsley (by phone), Ms. Kristal Wiitala, and Judge Thomas Wynne

Staff Present: Mr. Charley Bates, Ms. Beth Flynn, Mr. Steve Henley, Ms. Shannon Hinchcliffe, Mr. Dirk Marler, Ms. Mellani McAleenan, Mr. Rick Neidhardt, and Mr. Ramsey Radwan

The meeting was called to order by Judge Lambo.

Recognition of Judge Dubuisson

In recognition of Judge Dubuisson's service on the Board for Judicial Administration (BJA), Chief Justice Madsen and Judge Lambo presented Judge Dubuisson with a signed Temple of Justice print. Judge Dubuisson has served on the BJA since 2007 and is retiring at the end of December. Judge Dubuisson said she has appreciated working with the BJA and will miss this group.

Court Manager of the Year Award

Mr. Hall gave a brief history of the Court Manager of the Year Award which was established in 1987 to honor outstanding court managers who exemplify the leadership and ideals of their chosen profession. This year's nominees were Mr. N. F. Jackson, Whatcom County Superior Court; Ms. Delilah George, Skagit County Superior Court; Mr. Ron Miles, Spokane County Superior Court; Ms. Rafaela Selga, Clark County District Court; Mr. Chuck Ramey, Pierce County District Court; Ms. Sharon Paradis, Benton/Franklin Juvenile Court; Ms. Tiziana Morgan, Federal Way Municipal Court; and Mr. Gary Carlyle, Thurston County Juvenile Court. As a group, they are incredible and it was difficult to choose one.

Mr. Hall announced that Ms. Paradis was the 2010 Court Manager of the Year because of her exemplary leadership skills and her efforts to improve the quality of service for youth in Washington's courts. Mr. Hall presented a vase to Ms. Paradis.

Ms. Maluo congratulated Ms. Paradis on behalf of the Washington Association of Juvenile Court Administrators. She said Ms. Paradis's steady leadership and guiding force have been beneficial for the Association. Ms. Paradis has been admired, a mentor, and a role model while leading the Association and very delicately balanced the needs of courts statewide to serve the most vulnerable kids in our state.

Ms. Pat Austin of Benton/Franklin Superior Court and other management staff joined the award ceremony by video and phone and congratulated Ms. Paradis on the well-deserved award.

Ms. Paradis thanked everyone for the incredible honor and stated that she has an amazing job with exceptional staff and she was honored to be recognized.

November 19, 2010 Meeting Minutes

It was moved by Judge Ringus and seconded by Judge Dubuisson to approve the November 19, 2010 meeting minutes. The motion carried.

Appointments to the Public Trust and Confidence Committee

It was moved by Judge Appelwick and seconded by Judge Brown to appoint Judge Elizabeth Martin and reappoint Judge Scott Stewart to the BJA Public Trust and Confidence Committee. The motion carried.

Resolution Urging Adequate Funding of the Judicial Branch

Judge Fleck reported that a letter was sent to 15-20 judicial branch stakeholders requesting support for a resolution urging adequate funding of the judicial branch. A number of them have signed onto this resolution. Judge Fleck seeks the BJA's support for this resolution.

It was moved by Judge Fleck and seconded by Judge Warning that the BJA support the Resolution Urging Adequate Funding of the Judicial Branch. The motion carried.

Mr. Blair commented that the resolution came before the Access to Justice (ATJ) Board and they approved it with one modification. At end of the second paragraph of the "Resolved" section of the resolution, they added, "without resorting to additional user fees". Judge Fleck said she appreciated having that particular wording in the ATJ resolution but she thinks it would be confusing to do it for the BJA. Chief Justice

Madsen appreciates the ATJ board adding the language but doesn't think it is necessary in this instance. Ms. McAleenan said stakeholders were told they could amend the resolution but does agree with Chief Justice Madsen and Judge Fleck that now that people have signed it, it might be confusing to change their tune now.

JSTA Discussion

Chief Justice Madsen explained that a group of stakeholders has been discussing what route to take with the Judicial Stabilization Trust Account filing fee surcharge which will expire next year. She would like the BJA to discuss the issues and decide how to proceed.

Mr. Hall gave a brief overview of the issue. In 2009 the Legislature created the Judicial Stabilization Trust Account (JSTA) and added filing fee surcharges to fund the account. The surcharges on filing fees expire on June 30, 2011 which will eliminate the revenue stream into the JSTA. The question is what do we do? The potential outcomes are:

1. The funding will expire if the Legislature takes no action this session.
2. The surcharges will be extended for a period of time, maintaining the status quo.
3. The filing fee surcharges will become permanent, maintaining the status quo from here on out.
4. Surcharges will be kept at their current level but split with the local courts. This would result in having to backfill the JSTA or reduce the three state judicial agency budgets that benefit from the JSTA (AOC, OPD, and OCLA).
5. The surcharge will increase to a level that would ensure the current level of state funding and also allow the split to be added for local courts.

Another item to consider is if the BJA takes a position on the JSTA filing fee surcharges will the BJA be responsible for pushing this policy position forward? Chief Justice Madsen asked the stakeholder group for volunteers to lead the effort but no one stepped forward. Mr. Hall and Chief Justice Madsen discussed the situation and determined it probably would be the BJA to move forward on this.

Chief Justice Madsen said the consensus of the stakeholder group was to simply say to the Legislature that the courts need to be funded and if the Legislature wants the state/local split, then the Legislature needs to step up and fund courts. Chief Justice Madsen had the sense that people were willing to lock arms and go forward and put the weight of their associations behind this issue. During the recent legislative dinners the message to legislators was that the judiciary wants the sunset clause removed but they also urge the implementation of the state/local split.

Mr. Hall stated there are some issues surrounding the filing fee surcharges but because the surcharges go to a dedicated account it should be okay to eliminate or extend the sunset date or raise the fee or surcharge to backfill for the split even with the passage of

I-1053. Mr. Hall said it will not be known for sure if I-1053 affects filing fees and surcharges until it gets to the Legislature. It can be put forward either way and if wrong, someone will correct it. The key for the BJA is to understand whether or not there is any non-supplant language included in the proposed legislation. If so, the counties will probably not support it.

Mr. Hall commented that the resolution included in the materials was not proposed by or vetted by the stakeholder group. It was drafted by Mr. Bamberger to capture the essence of what came out of the stakeholder meeting.

There was some concern regarding the BJA taking a position on increasing the cost to access courts. The BJA has previously stated to the Legislature that courts should not be funded with filing fees. As the BJA moves forward with this, how is this contradiction dealt with?

It was moved by Judge Wickham and seconded by Judge Appelwick to draft legislation with language to extend the sunset date at least through the 2011/2013 biennium and implement the state/local split. The motion carried with ten votes. Judge Culpepper and Judge Dubuisson opposed and Judge Lambo abstained.

The BJA Legislative/Executive Committee will work on appropriate language.

GR 31 Discussion

Judge Appelwick presented the draft rule created by the Public Records Act Work Group which was discussed by the BJA previously. Judge Appelwick discussed the proposed rule with some stakeholder groups and all the comments that have been received so far were included in the meeting materials. Judge Appelwick walked the BJA through the outstanding issues regarding the proposed rule.

1. Should the work group's new standards/procedures be moved out of GR 31 and into a new stand-alone rule?

It was moved by Judge Fleck and seconded by Judge Culpepper to make the standards and procedures for public access to judicial documents a freestanding rule. The motion carried.

2. Should any judicial entities be removed from the list of entities covered by the rule?

The WSBA has proposed to amend GR 12 and that they be exempted from GR 31. The Certified Professional Guardian Board and the Capital Case Committee would also like to be exempted.

Judge Appelwick explained that the work group started with the presumption that everyone is in who can be in. The work group took out the Commission on Judicial Conduct and the vote to delete WSBA was a tie but some members were missing. The WSBA was created by statute, has regulatory functions, is a trade association, and has members in the pension system. It meets a lot of criteria for "looking like a state agency." The dues are paid by private members and the WSBA has taken a position that they are a regulatory agency.

It was moved by Judge Dubuisson and seconded by Judge Culpepper to remove the WSBA from the proposed access to court records rule and make them subject to their proposed amendments to GR 12. The motion carried with Chief Justice Madsen abstaining.

Judge Wickham commented that he would like the Certified Professional Guardian Board removed from the rule because they deal with applications and licensing issues and are governed by GR 23 and have their own disclosure rules which were set out in the meeting materials.

It was moved by Judge Wickham and seconded by Judge Sweeney to remove the Certified Professional Guardian Board from the rule. The motion carried with Judge Culpepper opposing.

By consensus, it was agreed that the Capital Case Committee will get an exemption for the evaluation of its attorneys.

By consensus, it was agreed that the list under "Application of Rule" will be condensed and everything that can fall under "(c)Z" on page 3 of the draft rule will be eliminated from the list of entities covered under the rule.

Judge Appelwick walked the BJA through the revisions submitted by the Superior Court Judges' Association (SCJA).

The first change was adding the wording near the end of (a) "Access to judicial records by persons who are subject to a court's judgment and sentence or whose civil rights have not been restored is not covered by this rule."

There was much discussion about this revision and Judge Appelwick stated this issue was not discussed by the work group. Associations that participate in this discussion with the BJA may not agree with all points and can speak directly with the Supreme Court during the rule comment period.

It was determined that this issue should be taken off the table for now.

The SCJA asked that the draft rule not refer to courts as judicial agencies but include "courts and" or "courts or" before "judicial agency" throughout the draft.

Another request of the SCJA was to add (13) on page 12 of the SCJA revised rule, "Raw datasets supporting court performance measures" as an exemption. Judge Appelwick suggested that this be included in a comment under (4) (page 10 of the SCJA revised rule) and that (13) not be amended to make clear that metadata and e-mails are subject to disclosure. Judge Fleck would like this information in both locations and pointed out the definition of chambers records at the bottom of page 4 of the SCJA revision.

Judge Appelwick indicated he would bring back a draft amendment at the next meeting that clarified the status of metadata and phone records, but not necessarily amending that section.

(5)(a) (Page 4) Anything that is in chambers is exempt and anything that is not a chambers record is presumptively discloseable. If a copy is somewhere other than under the chambers' control, it can be disclosed if it is not exempt.

By consensus it was determined not to include the SCJA's request to add "bailiff" to (5)(a) (page 4) because of the language at the end of the section.

On page 5 of the SCJA proposal in (5)(a) at the top of the page, it was the consensus of the BJA to restore "to the management of the court" which was removed during the September 15 meeting.

The deliberative policy exception should be drafted for the next meeting. (This is a protection afforded under the PRA and imported here, but could be stated explicitly. It protects drafts and communications during the deliberative process, but not after a final decision.)

Judge Appelwick clarified that the "experts" included in the rule would not be available until a final disposition of the case. The SCJA proposal is that they are never released (on page 10, section 10 of the SCJA proposal).

Judge Appelwick stated it should not be a problem to enumerate an exemption for family court, juvenile court mediation and juvenile court probation's social files (see page 10, sections 5, 6, 7 in the SCJA proposal).

There was a request that birthdates not be disclosed. This issue was not resolved during the meeting.

The BJA will continue this discussion during the January BJA meeting. A draft of the standalone rule will be sent to the BJA prior to the January meeting.

The January meeting date has not yet been determined. It will coincide with the State of the Judiciary Address. As soon as a date is known, the BJA will be notified.

Because of time constraints, 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 Stephenson, KCDC

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

Term Begin Date: 1/2010

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: _____

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

Please send completed form to:

Beth Flynn
Administrative Office of the Courts
PO Box 41174
Olympia, WA 98504-1174
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: Michael Killian

Nominated By: WSACC
(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:**

Please send completed form to:

Beth Flynn
Administrative Office of the Courts
PO Box 41174
Olympia, WA 98504-1174
beth.flynn@courts.wa.gov

**A RESOLUTION ENCOURAGING WASHINGTON COURTS TO ADVISE
DEFENDANTS IN WRITING TO CONSULT WITH AN ATTORNEY REGARDING
THE CONSEQUENCES OF A GUILTY PLEA**

WHEREAS, the consequences of a guilty plea include, but often go far beyond, the legal disabilities imposed at the time of sentencing.

WHEREAS, these consequences can be permanent and life-changing. The list of potential consequences is long and can include, among other disabilities, deportation, disqualification from military service, ineligibility for certain types of employment, loss of rights with respect to children, loss of public benefits, required registration as a sex offender and denial of housing.

WHEREAS, the Washington Court Rules state, "The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea." Criminal Rule 4.2(d)

WHEREAS, busy court dockets limit the time available to explore defendants' understandings of the consequences of guilty pleas,

WHEREAS, many, if not most, defendants considering entering a guilty plea will not be aware of the range of potential consequences to them of a guilty plea without consulting with an attorney prior to entering a plea.

WHEREAS, in order to encourage defendants to become aware of the consequences of a guilty plea before entering a guilty plea and the importance of consulting with counsel, the Washington State Bar Association Council on Public Defense has created a notice entitled, "Consider the Possible Effects of Pleading Guilty." A copy of the notice is attached to this resolution.



ArraignmentCard-R1
.pdf



ArraignmentCard-Sp
anish.pdf

NOW, THEREFORE, BE IT RESOLVED that the Washington State Bar Association Council on Public Defense urges all Washington courts to provide to each defendant a copy of the above-referenced notice and to maintain copies in a conspicuous place so that defendants considering pleading guilty will have a visual reminder of the importance of consulting with an attorney before entering a guilty plea.

Adopted at Seattle, Washington this 10th day of September, 2010.

Marc Boman, Chair, Council on Public Defense

Approved by the Washington State Bar Association Board of Governors this ____ day of December, 2010.

Paula C. Littlewood, Secretary

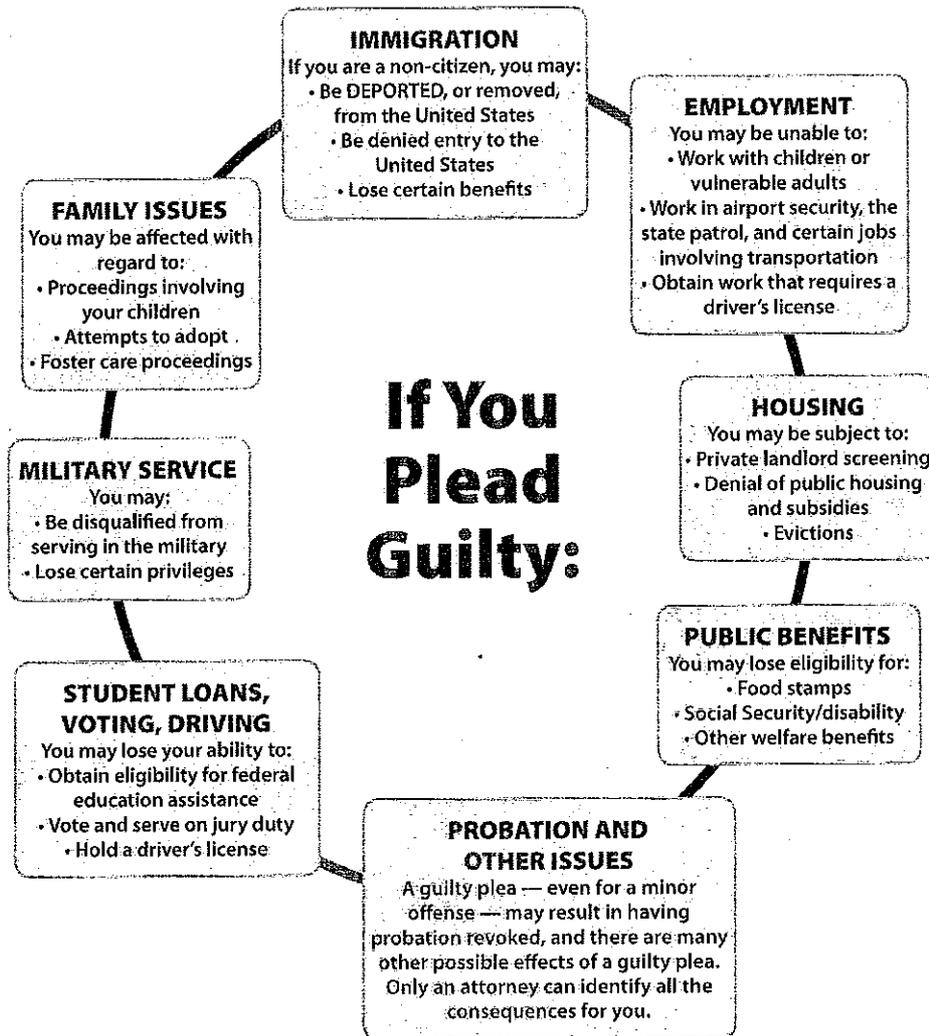


Before you enter your plea

Consider the Possible Effects of Pleading Guilty

You have a right to see a defense attorney, even if you can't pay for one. Your attorney will explain what can happen because of your plea and help you decide what to do.

In addition to possible penalties such as jail time and fines, examples of issues you may want to discuss with an attorney include:



REMEMBER

- You have a RIGHT to an attorney right now.
- ONLY an attorney can explain the potential consequences of your plea.
- If you cannot afford an attorney, an attorney will be provided at NO COST to you.
- If you don't have an attorney, ask for one to be appointed and for a continuance until you can meet with your attorney.



Antes de que usted se declare

Considere las consecuencias de admitir culpabilidad.

Usted tiene el derecho de consultar a un abogado, incluso si no tiene los recursos para pagar sus servicios. Su abogado le explicará lo que puede suceder a consecuencia de su declaración y le aconsejará a decidir lo que puede hacer.

Además de posibles condenas tales como encarcelamiento y multas, ejemplos de asuntos a discutir con un abogado incluyen los siguientes:



RECUERDE:

- Usted tiene derecho a los servicios de un abogado inmediatamente.
- Solamente un abogado le puede explicar las consecuencias potenciales de su admisión.
- Si usted no puede pagar a un abogado, se le proporcionarán los servicios de uno.
- Si aún no tiene un abogado, pida que se le asigne uno y que se le otorgue una "continuación" hasta que usted pueda contar con los servicios de un abogado.

Proposed 2011 BJA Position on Judicial Salaries

Historically, the judiciary has maintained a consistent position on salaries:

- In order to attract and retain experienced and highly qualified attorneys to the bench, salaries must **keep pace with inflation** - at a minimum. Ongoing, regular increases which reflect the cost of living are preferable to irregular "catch-up" increases.
- To reflect the unique and important role of judges at each level of court, the difference in salary between the four levels should be equal and small. We support maintaining the **5% differential**. It reinforces the important collaboration and collegiality among judges throughout the system
- Salaries of the **federal bench** are the most realistic standard to use in establishing salaries for Washington State judges because the duties of federal judges are directly comparable. Salaries of federal judges establish the "market" for the state judiciary as evidenced by judges leaving state positions for better paid federal jobs.
- Normalized salaries of **judges in other states** provide another point of reference, though oftentimes jurisdiction over case types vary considerably among general and limited jurisdiction court judges across the states.



STATE OF WASHINGTON

December 14, 2010

Tom Huff, Chair
Commission on Salaries
PO Box 43120
Olympia, WA 98504-3120

Dear Chairman Huff:

We face unprecedented challenges as a state. As you know, the Legislature just completed a historic Special Session in which it approved \$583 million in revisions to our supplemental budget to bring our expenditures in line with reduced anticipated revenues for the remainder of the 2009-2011 biennium. Many critical programs face substantial reductions and important state services will be reduced or eliminated.

In addition, following the November revenue forecast, the Director of the Office of Financial Management declared the agreements reached with our employee unions for the 2011-2013 biennium to be economically infeasible. As a result of the November revenue forecast, Governor Gregoire asked the employee representatives to come back to the negotiating table to discuss further revisions to their contracts. The Administration is currently negotiating with the unions and the Governor is hopeful that an agreement will be reached. Whether an agreement is reached or not, however, the Governor has indicated that the 2011-2013 budget she proposes to the Legislature must include some financial sacrifice for all state employees, including reduced compensation and a greater share of health care costs shifted to employees. It is our firm belief that we should be subject to the same salary and benefit reductions as all other state employees.

As you know, the salaries of statewide elected officials are, appropriately, set by the independent Washington Citizen's Commission on Salaries for Elected Officials. By this letter we request that you adjust our salaries by reducing our respective compensation to reflect whatever level of reduction the Legislature applies to state employees.

Thank you for your service to the state of Washington.

Sincerely,

Handwritten signatures of Christine O. Gregoire, Brad Owen, Sam Reed, and Brian Sonntag with their respective titles: Governor, Lieutenant Governor, Secretary of State, Auditor.

Handwritten signatures of Rob McKenna, Randy Dorn, and Peter Goldmark with their respective titles: Attorney General, Superintendent of Public Instruction, Commissioner of Public Lands.

Opinion



Christine O. Gregoire

Attorney General of Washington

**WASHINGTON CITIZENS' COMMISSION ON SALARY FOR ELECTED OFFICIALS
- SALARIES AND WAGES - PUBLIC OFFICERS - Authority of Citizens' Commission
to consider economic and budget issues in setting elected officials' salaries.**

The Citizens' Commission on Salary for Elected Officials may consider such factors as the state of the economy and the size of the state budget when setting the salaries for state elected officials.

March 3, 2003

RECEIVED
MAR 04 2003
WCCSEO

Sue Byington, Chair
Citizens' Commission on Salaries for Elected Officials
P. O. Box 43120
Olympia, WA 98504-3120

Cite As:
AGO 2003 No. 2

Dear Ms. Byington:

By letter previously acknowledged, you have requested our opinion on the following question:

In developing a salary schedule pursuant to article XXVIII of the Washington Constitution and RCW 43.03.300-.310, may the Salary Commission consider economic and budgetary issues?

For the reasons set forth more fully below, we conclude that the Commission has the discretion to determine how, or whether, economic and budgetary issues affect the appropriate level of state officer salaries.

ANALYSIS

The Washington Citizens' Commission on Salaries for Elected Officials is established, pursuant to the state constitution, to establish salary schedules for members of the Legislature, elected officials of the executive branch, and state court judges. Const. art. XXVIII, § 1. The constitution describes it as an "independent" body but otherwise does not prescribe the standards or practices the Commission is to use in setting salaries.

Washington voters approved the establishment of the Commission in 1986. Amendment 78. Prior to that time, salaries for these officials were determined by the Legislature. AGO 1994 No. 8, at 2 (citing former Const. art. XXVIII, § 1). The purpose of amending the constitution to

ATTORNEY GENERAL OF WASHINGTON

Sue Byington

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AGO 2003 No. 2

establish the Commission, as explained in the official Voters' Pamphlet,¹ was to give an independent citizens' commission, rather than the Legislature, the authority to set salaries for elected officials. Voters Pamphlet 12 (1986) ("Statement for" House Joint Resolution 49).

The constitution does not directly state what standards the Commission can or should use in setting salaries, beyond using the word "independent" to describe the Commission. Const. art. XXVIII, § 1. The statutes enacted to implement the constitutional provision and to organize the Commission similarly provide only minimal guidance as to what the Commission may or may not consider. RCW 43.03.300-.310.

The statutes begin with a legislative statement proclaiming a "policy of this state to base salaries of elected state officials on realistic standards in order that such officials may be paid according to the duties of their offices and so that citizens of the highest quality may be attracted to public service." RCW 43.03.300. The Legislature has further explained that the establishment of the Commission is designed to remove "political considerations" from the salary process. *Id.*

The standard the Commission is to apply is stated in general terms in RCW 43.03.310. That statute begins by providing that the Commission shall "study the relationship of salaries to the duties of [the applicable elected offices] and shall fix the salary for each respective position." RCW 43.03.310(1).²

The legislative history underlying the constitutional and statutory provisions adds little or no additional specificity.³ The Voters Pamphlet materials accompanying Amendment 78 simply stressed the independent nature of the Commission. The ballot title and summary used the word "independent" a total of five times. Voters Pamphlet 12-13 (1986). The "Statement for" the amendment stressed both its independent nature and its citizen composition, and it additionally repeated the statutory preference for "realistic standards" and disdain for "political considerations". *Id.* at 12. The legislative history behind the implementing statutes reiterated terms set forth directly in the statutes but set forth no further detail as permissible criteria. Final

¹ "In interpreting a constitutional amendment, the court . . . examines legislative history and material in the official voters' pamphlet." *Zachman v. Whirlpool Fin. Corp.*, 123 Wn.2d 667, 671, 869 P.2d 1078 (1994).

² The other section governing the Commission, RCW 43.03.305, deals only with the composition of the Commission. Two provisions of that section reinforce the independent nature of the Commission: (1) a provision that the Governor cannot remove members of the Commission during their terms; and (2) a prohibition on certain people with arguably vested interests serving on the Commission. RCW 43.03.305 (4), (5). The constitution also includes the latter limitation. Const. art. XXVIII, § 1.

³ Washington courts turn to legislative history, among other sources, for assistance in construing an ambiguous statute. *Harmon v. Dep't of Social and Health Serv.*, 134 Wn.2d 523, 530, 951 P.2d 770 (1998). We accordingly have reviewed the legislative bill files (accessioned into the Washington State Archives) for HJR 49 of 1986 (which the voters approved as Amendment 78) and for the bills by which the Legislature enacted RCW 43.03.300-.310, including later amendments. The Legislature initially enacted the implementing statutes at the same legislative session at which it referred Amendment 78 to the ballot. Laws of 1986, ch. 155 (conditioned upon the approval of the constitutional amendment). The Legislature has amended the statutory provisions several times since then, but none of those amendments specifically relate to the standard to be applied in developing a salary schedule.

ATTORNEY GENERAL OF WASHINGTON

Sue Byington

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AGO 2003 No. 2

Legislative Report, 49th Leg., Reg. Sess. (1986), at 43-44; bill files for SHB 1331 (1986) in the collection of the Washington State Archives.

The applicable statutes begin with a declaration of public policy, RCW 43.03.300, followed by a substantive provision that describes the manner in which the Commission is to proceed. RCW 43.03.310. When the Legislature prefaces a substantive statute with a statement of purpose, that declaration does not have independent operative force but serves as an important guide in understanding the intended effect of substantive sections of the statute. *Hartman v. Washington State Game Comm.*, 85 Wn.2d 176, 179, 532 P.2d 614 (1975); *see also In re Detention of R.W.*, 98 Wn. App. 140, 145, 988 P.2d 1034 (1999). Consistent with these case authorities, we conclude that RCW 43.03.300 does not directly govern the conduct of the Commission and certainly should not be regarded as providing it with an exclusive list of standards, but it does help to explain the operative language of RCW 43.03.310.

The operative statute provides that the Commission shall "study the relationship of salaries to the duties of [the applicable elected offices] and shall fix the salary for each respective position." RCW 43.03.310. The Legislature's declared purpose in creating the Commission is to "remov[e] political considerations in fixing the appropriateness of the amount of such salaries." RCW 43.03.300. Further, the declared policy is to base salaries on "realistic standards" in order that officials "may be paid according to the duties of their offices". *Id.* This legislative declaration of purpose and policy reinforces the operative section that the salaries are to be set based upon the relationship between the salary levels and the duties of office. However, in declaring a purpose of "removing political considerations" from the salary setting process, we find nothing by the Legislature prohibiting the Commission from considering economic conditions generally, and in state government specifically, as they affect that relationship.

The term "political considerations" is not defined and may have widely varying meanings depending on context. Reviewing the legislative history here, it appears that the "political interests" the Legislature had in mind in enacting the statute and putting the constitutional amendment before the people was to distance the salary setting process from the very elected officials whose salaries are to be set by the Commission. *See* Voters Pamphlet 12-13 (stressing the "independent" nature of the Commission and its citizen composition); *see also In re Randolph*, 101 N.J. 425, 433, 502 A.2d 533, 537 (1986) (describing the policy of encouraging an independent judiciary in terms of, *inter alia*, "free[dom] from all ties with political interests, free[dom] from all fears of reprisal or hopes of reward"); *Marshall Cy. Bd. of Educ. v. State Tenure Comm.*, 291 Ala. 281, 280 So.2d 130, 133-34 (1973) (state statute prohibiting termination of teachers' employment for "political reasons" meant termination based on political party membership, voting or political preference in any political race, a teacher's candidacy for public office, or similar political activity). There is no apparent reason in this legislative policy that would preclude the Commission from taking economic and budgetary circumstances into consideration, provided, of course, that it is done without a view to electoral politics or consequences.

The legislative declaration of policy also refers to "realistic standards". RCW 43.03.300. Like the use of the term "political considerations" in the policy statement, this phrase may help to enlighten the operative statutory directive to base salaries upon the duties of the respective

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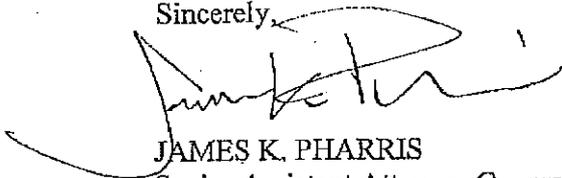
AGO 2003 No. 2

offices. See *Hartman*, 85 Wn.2d at 179. The statement explains that the Commission is to use "realistic standards" in light of the objective of attracting "citizens of the highest quality" to public office. RCW 43.03.300. In any particular salary setting context, the Commission may draw the conclusion that the overall state of the economy and budgetary circumstances may influence the determination of "realistic standards". Nothing in either the applicable statutes or the constitution prohibits the Commission from acknowledging these circumstances in an assessment of the levels at which the salaries should be fixed.⁴ The basis for the Commission's decision must remain the relationship of salaries to the duties of the offices, which is the substantive statutory touchstone. See RCW 43.03.310(1).

Based upon the requirement that the Commission study the relationship of salaries to the duties of an office, the Legislature evidently expected that the results of these studies would determine, in some way, the Commission's salary-setting decisions. The statute stops short of expressly setting forth any exclusive list of factors that the Commission can consider as relevant to the relationship between salaries and duties. The Commission's constitutional independence from the political process underscores that the Commission has some discretion to decide which factors to consider, given the broad general standards set forth in the statute, and how to weigh these factors in making any particular salary-setting decision.

For these reasons, we conclude that there is nothing which precludes the Commission, if it chooses, from considering economic and budgetary circumstances in developing a salary schedule. We trust that this analysis will be helpful.

Sincerely,


JAMES K. PHARRIS
Senior Assistant Attorney General
(360) 664-3027



⁴ We note that at the federal level, consideration of general pay schedules for federal employees is one factor the Citizens' Commission on Public Service and Compensation is to consider in making annual recommendations of appropriate salary increases for various high-level federal officials. These include members of Congress, the Vice-President, cabinet members, and federal judges. The Commission is explicitly instructed to consider both the appropriate pay levels and relationships between and among such offices and positions covered by such review and the appropriate pay relationships between such offices and positions and the offices and positions subject to the general pay schedules for federal employees. 2 U.S.C. § 356(i), (ii). This statute reflects the congressional judgment that one aspect of appropriate pay relationships for such officials takes into account the relationship between the duties and the pay of other public employees.



Christine O. Gregoire

ATTORNEY GENERAL OF WASHINGTON

1125 Washington Street SE • PO Box 40100 • Olympia WA 98504-0100

October 15, 2002

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The Honorable Michael D. Hewitt
State Senator, 16th District
P. O. Box 40416
Olympia, WA 98504-0116

Dear Senator Hewitt:

By letter previously acknowledged, you have asked for an opinion on the following question, which I have paraphrased for clarity:

Recognizing that the citizens' commission on salaries may not decrease the salary of a public officer during the officer's current term in office, does the commission have authority to stagger a salary decrease, so that no officer's salary is actually decreased until the beginning of the next term for that office?

BRIEF ANSWER

If the salary commission adopts a salary schedule that includes a decrease in salary for some category of elected officer, such a decrease will be effective only as of the beginning of the next succeeding term for that office, thus achieving the "staggered" result you have asked about.

ANALYSIS

By virtue of the enactment of article XXVIII, § 1 of the Washington Constitution, the salaries of members of the Legislature, elected officials of the executive branch of state government, and judges of the state's Supreme Court, Court of Appeals, superior courts, and district courts are fixed by an independent commission. RCW 43.03.300 through .310 has been enacted by the Legislature to implement this constitutional provision. RCW 43.03.305 establishes a citizens' commission on salaries for elected officials, consisting in part of citizens selected by lot by the Secretary of State from among registered voters and in part by persons experienced in personnel management, selected by the presiding officers of the two houses of the Legislature. The commission is directed to file a schedule of salaries for the offices within its jurisdiction on a biennial basis. RCW 43.03.310(5). The salary schedules adopted take the same form as legislative bills and take effect in the same manner as acts passed by the Legislature, but they are subject to the filing of a referendum measure. *Id.* See also Const. art. XXVIII, § 1.

Neither the constitution nor the statutes provide very precise standards for the commission, but RCW 43.03.310(1) directs the commission to "study the relationship of salaries to the duties" of the various offices under its jurisdiction. The Legislature also "declares it to be the policy of this state to base salaries of elected state officials on realistic standards in order that such officials may be paid according to the duties of their offices and so that citizens of the

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highest quality may be attracted to public service." RCW 43.03.300. From this language, it appears that the commission is intended to study the relationship of the duties of each office to the existing salary attached to that office and to adjust the salary every two years as needed to align the salary with the duties attached to the position. The commission's study could lead to the conclusion that the current salary for a given office is too low, too high, or just right. Thus, there is the theoretical possibility (at least) the commission could conclude that the salary for an office, or for several offices, should be adjusted downward.

As you note in your opinion request, we have previously advised that the citizens' commission lacks the authority to decrease the salary for a position and apply the reduced salaries during the current term of a particular office. In AGO 1994 No. 8 (copy enclosed), we explained the reasons for that conclusion. To summarize our earlier opinion, we found that when article XXVIII was adopted in 1986 as Amendment 78 to the constitution, it explicitly amended and superseded several other sections of the constitution. However, it did not amend article II, § 25 or article III, § 25, both of which prohibit midterm decreases in the compensation of public officers.¹ Therefore, we concluded that the constitutional prohibition on midterm decreases survives the adoption of article XXVIII, § 1, and it is still unconstitutional to reduce the compensation of any public officer during his or her current term of office.

With that in mind, you ask whether the commission could adopt a "staggered" salary schedule providing that compensation for certain officers, such as legislators, would be reduced effective with the next term for a given position. On a strictly technical level, the answer to this question is probably "no" in the sense that neither article XXVIII, § 1 nor RCW 43.03.310 authorizes the commission to adopt salaries for various officers which will take effect at different times. The statute flatly states that such "schedules shall become effective ninety days after the filing thereof" unless they are suspended by the filing of a referendum measure. RCW 43.03.310(5). The implication of this language is that each biennial commission is to adopt a salary schedule, attaching a proposed salary to each office subject to its jurisdiction, with that schedule to take effect ninety days after filing (assuming no referendum).

However, this is essentially a technical quibble. Assuming that the citizens' commission determines that the salary for one or more offices is out of line with the duties for the office, I can see nothing in the constitution or the statutes which would prevent the commission from adopting a salary schedule which includes salary reductions. However, because of the constitutional bar on midterm decreases, the actual effect of any salary reductions included in the schedule would be delayed until the beginning of the next ensuing term for each officer affected. In the case of legislators, this would necessarily result in a "staggered" implementation, because state senators serve four-year terms, with half of the terms expiring at the end of each two-year period.²

This conclusion is consistent with case law. In *State ex rel. Wyrick v. City of Ritzville*, 16 Wn.2d 36, 132 P.2d 737 (1942), the Washington Supreme Court found that an ordinance

¹ Article II, § 25 relates to "public officers", while article III, § 25 applies to the narrower category of "state officers". In their original form, both of these provisions prohibited both midterm decreases and midterm increases in the compensation of elected officers. However, with the adoption of Amendment 54 to the constitution as article XXX, § 1, public officers were permitted to receive midterm increases in compensation unless they set their own salaries. Because of article XXVIII, § 1, none of the elected officials in state government set their own compensation, because the compensation for all these offices is set by the citizens' commission.

² The same would happen if the commission reduced the compensation for appellate court judges, since these officers also have terms which end at varying times.

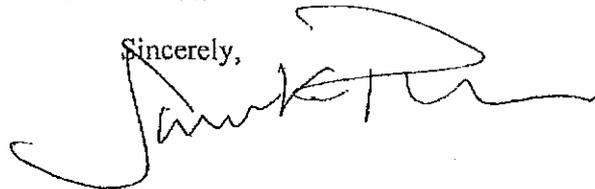
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changing the compensation of council members would take effect only with the beginning of the next term for each council position (including the next term for a council member appointed to serve an unexpired term). *State ex rel. Jaspers v. West*, 13 Wn.2d 514, 125 P.2d 694 (1942) reached a similar conclusion. *Accord* AGO 1999 No. 1 and AGO 1955-57 No. 191. Although all of these authorities concerned increases (rather than decreases) in compensation and date to a time when midterm increases were also unconstitutional, the principle they adopt is consistent. When a statute or ordinance is adopted which would change public officer compensation in a manner inconsistent with the constitution, the statute or ordinance is not completely void or ineffective. It simply does not immediately apply to those offices where the constitution requires a delayed effect. As soon as a new term for the affected office begins, the salary set forth in the most recently adopted salary schedule will apply.³

I hope the foregoing will prove helpful. This informal opinion will not be published as an official opinion of the Attorney General's Office.

Sincerely,



JAMES K. PHARRIS
Senior Assistant Attorney General
(360) 664-3027

:pmd
enclos. (AGO 1994 No. 8)

³ I can conceive only two other ways of answering your question: to conclude that (1) article XXVIII, § 1 supersedes the earlier constitutional language prohibiting midterm decreases in compensation, or that (2) the combined action of the earlier and later constitutional prohibitions results in a situation where the commission can never decrease salaries because the ninety-day implementation requirements of the statute would always violate the prohibition against midterm increases. We rejected the first of these two ideas in AGO 1994 No. 8 for reasons fully explained in that opinion. As to the second, it makes more sense to harmonize the language of the constitutional provisions in the manner indicated above than to conclude they are inherently in conflict. Article II, § 25 and article III, § 25 do not prohibit *all* salary decreases, only midterm decreases; nor does article XXVIII, § 1 foreclose salary reductions. It would be anomalous to read these together to foreclose an option not inconsistent with any of them taken separately. I recognize that if a biennial salary commission adopted salary decreases, some of the officers affected would not actually see their salaries change until almost the time for the next salary commission to convene, or even after the next salary commission has convened, deliberated, and acted (if they are in the early part of four or six-year terms). However, this situation seems to arise directly from the interaction of article XXVIII, § 1 with the older constitutional limitations on salary decreases.

Opinion

Attorney General of Washington

STATE OFFICERS—SALARIES—ELECTED OFFICIALS—Authority of the Washington Citizens' Commission on Salaries for Elected Officials to decrease salaries during term; effect of change in number of congressional districts on composition of the Commission

1. The Washington Citizens' Commission on Salaries for Elected Officials may not decrease the salaries of elected officials during their current terms of office.
2. If the Washington Citizens' Commission on Salaries for Elected Officials fails to timely adopt a new salary schedule, the last one adopted continues in effect.
3. The Washington Citizens' Commission on Salaries for Elected Officials may continue to operate lawfully notwithstanding Washington's gain of a ninth representative in Congress after the 1990 census; pending amendatory legislation commission members must be selected from the pre-1990 congressional districts.
4. A member of the Washington Citizens' Commission may be reappointed to a second term if his or her name is again drawn by lot for the position, or if nominated for a second term pursuant to RCW 43.03.305.

April 29, 1994

Leonard Nord, Chairman
Washington Citizens' Commission on
Salaries for Elected Officials
1210 Eastside Street, MS 43120
Olympia, WA 98504

Cite as:
AGO 1994 No. 8

Dear Mr. Nord:

By letter previously acknowledged, you requested our opinion regarding four questions we paraphrase as follows:

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Leonard Nord

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1. May the Citizens' Commission on Salaries for Elected Officials decrease the salaries of elected officials during the officials' current terms of office?
2. What salaries are paid to elected officials if members of the Commission fail to adopt a salary schedule within the time set by statute?
3. May the Commission, which is composed in part of members chosen by lot from each of the eight congressional districts existing at the time the members were chosen, continue to operate lawfully now that Washington has nine congressional districts? If so, from which geographical areas are new commission members chosen by lot to be selected?
4. May a member of the Commission who was chosen by lot be reappointed? If so, how, by whom, and in accordance with what criteria is the member to be reappointed?

BRIEF ANSWERS

The Commission (hereafter Commission) does not have authority to reduce the salary of any elected official during that official's current term of office. If the Commission fails to adopt a new salary schedule in the time set by statute, the salaries of elected officials remain at the levels specified in the last schedule properly adopted. Until the Legislature amends RCW 43.03.305, eight members of the Commission must be chosen by lot from the eight congressional districts as they existed before the 1990 reapportionment. No member of the Commission, including persons chosen by lot, is eligible for appointment to more than two terms in office. Our answers are more fully explained in the analysis below.

ANALYSIS

All of your questions concern the membership and duties of the Commission. The Commission was created in 1986 to set salaries for all legislators, state court judges, and state elected officials. Const. art. 28, § 1 (amend. 78). Before the Commission existed, salaries for these officials were fixed by the Legislature. Former Const. art. 28, § 1.

Composed of eight members whose names are selected randomly from voter registration lists and seven members selected for their experience in the field of personnel management, the Commission must prepare a new salary schedule for state elected officials every two years. Neither the Legislature nor the governor may disapprove of the schedule; it takes effect automatically 90 days after filing by the Commission. Salary schedules are, however, subject to referendum petition by the voters. RCW 43.03.305(1), (2), .310(5); Const. art. 28, § 1.

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With the foregoing background, we turn to your specific questions.

Question 1:

May the Citizens' Commission on Salaries for Elected Officials decrease the salaries of elected officials during the officials' current terms of office?

Washington's constitution has always prohibited decreasing the salaries of elected officials during their current terms of office. Article 2, section 25 provides in part:

The legislature shall never grant any extra compensation to any public officer, agent, employee, servant, or contractor, after the services shall have been rendered, or the contract entered into, nor shall the compensation of any public officer be increased or diminished during his term of office.⁰¹

(Emphasis added.) The Washington Supreme Court has described the purpose of this prohibition in two of its cases as follows:

The command of the Constitution that the salary of no public officer shall be increased or diminished during his term of office, is a wise and salutary mandate. Its purpose is to establish definiteness and certainty in the salaries of public officers and to protect and safeguard the independence, the security, and the efficiency of the occupant of every public office. It assures the people that those who serve them as public officers shall give their services during their terms for the amount of compensation for which they were willing to serve and

¹Article 3, section 25 of the Washington Constitution independently prohibits increasing or decreasing the salary of statewide elected officials during their terms. The term "public officer" is not specifically defined in the constitution, but has been defined in case law as follows:

(1) It must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred and the duties to be discharged must be defined, directly or impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office created or authorized by the legislature and by it placed under the general control of a superior officer or body; [and] (5) it must have some permanency and continuity and not be only temporary or occasional.

State ex rel. Brown v. Blew, 20 Wn.2d 47, 51, 145 P.2d 554 (1944), quoting State ex rel. McIntosh v. Hutchinson, 187 Wash. 61, 63-64, 59 P.2d 1117 (1936). All of the elected state officials for whom the Commission sets salaries appear to be "public officers" under this definition and are covered by either article 2, section 25, or article 3, section 25 of the constitution.

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have been selected, and for which they were expected by the people to serve at the time of their entrance upon the performance of their duties. . . . The benefits which result from the operation of this provision of the Constitution promote sound and orderly administration of government, and this provision may not be dispensed with, circumvented, or ignored.

Everett v. Johnson, 37 Wn.2d 505, 507-08, 224 P.2d 617 (1950), quoting Harbert v. Harrison Cy. Court, 129 W. Va. 54, 62, 39 S.E.2d 177, 185 (1946). In State ex rel. Port of Seattle v. Wardall, 107 Wash. 606, 612-13, 183 P. 67 (1919), the court further observed, with respect to provisions such as article 2, section 25, that:

Other courts have stated that such provisions also have an additional purpose, namely, to prevent the salary-fixing body from rewarding their friends and punishing their enemies, which they were sometimes wont to do, by increasing the salaries of those in favor and decreasing the salaries of those whose actions did not meet with the approval of that body.

The aforementioned portions of the constitution were amended in part by the enactment of article 30, section 1 of the constitution, in Amendment 54 (1968). It provides as follows:

The compensation of all elective and appointive state, county, and municipal officers who do not fix their own compensation, including judges of courts of record and the justice courts may be increased during their terms of office to the end that such officers and judges shall each severally receive compensation for their services in accordance with the law in effect at the time the services are being rendered.

The provisions of section 25 of Article II (Amendment 35), section 25 of Article III (Amendment 31), section 13 of Article IV, section 8 of Article XI, and section 1 of Article XXVIII (Amendment 20) insofar as they are inconsistent herewith are hereby repealed.

(Emphasis added.)

Amendment 54 authorized mid-term increases in the salaries of certain public officials, but there is no language in article 30, section 1, that explicitly or implicitly repeals the preexisting constitutional prohibitions against mid-term ~~decreases~~ in such salaries. We reached this conclusion in AGO 1981 No. 17, in which we stated that the Legislature had no authority to rescind a salary increase that had already gone into effect.

With all the foregoing amendments in mind, we arrive at Amendment 78 to the constitution, the provision that created the Commission and authorized it to set the salaries for certain public officers. That provision, now codified as article 28, section 1 of the Washington

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Constitution, states that "[s]alaries . . . shall be fixed by an independent commission created and directed by law to that purpose". While it explicitly supersedes several other provisions of the constitution,² it does not purport to repeal or amend article 2, section 25, or article 3, section 25. The express mention of several constitutional provisions superseded by Amendment 78 implies that any other provisions not so mentioned were intended to be left unaffected. See, e.g., Yelle v. Bishop, 55 Wn.2d 286, 295, 347 P.2d 1081 (1959). In other words, we must presume that the drafters of the constitutional amendment were intentionally silent with respect to those provisions of the constitution that prohibit mid-term decreases in the salaries of elected officials, allowing the preexisting prohibitions in those sections to continue in effect.

We note also that the policy concerns that motivated the original drafters of our state constitution to prohibit salary decreases during an officer's term of office still exist, despite the creation of the Commission. That is, the "independence, the security, and the efficiency" of an elected official would be jeopardized if his or her salary were subject to change during the current term of office. See Everett v. Johnson, 37 Wn.2d at 507-08; State ex rel. Port of Seattle v. Wardall, 107 Wash. at 612-13.

Information contained in the official voter's pamphlet distributed before the election at which Amendment 78 was approved may be used to determine the purpose and intent of the amendment. See Estate of Turner v. Department of Rev., 106 Wn.2d 649, 654, 724 P.2d 1013 (1986). The "statement for" adoption of the amendment noted that "[t]he salaries of elected officials should be based on realistic, objective standards and not on political considerations". Voter's Pamphlet 12 (1986). Salaries of popular incumbents should therefore not be raised, just as salaries of unpopular incumbents should not be lowered. Members of the Commission theoretically are as vulnerable to the temptation to set salaries based on their opinion of the current officeholder as would be the Legislature if it were still setting salaries.

The only way to ensure that salaries will be set at levels appropriate to the duties and demands of the office is to have them apply exclusively to future occupants of that office. Consequently, we conclude that the continued application of the constitutional prohibition on salary decreases during a current term of office is both consistent with, and unchanged by, the creation of a citizens commission that establishes elected officials' salaries.³

²Amendment 78 states in part that:

The provisions of section 14 of Article IV, sections 14, 16, 17, 19, 20, 21, and 22 of Article III, and section 23 of Article II, insofar as they are inconsistent herewith, are hereby superseded. The provisions of section 1 of Article II, relating to referendum procedures, insofar as they are inconsistent herewith, are hereby superseded with regard to the salaries governed by this section.

³An argument could be raised that the prohibition against salary decreases in article 2, section 25, applies only to decreases effected by the Legislature. This argument would be based on the wording of the provision, which may appear to constrain only the actions of the Legislature. Article 2, section 25,

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Question 2:

What salaries are paid to elected officials if members of the Commission fail to adopt a salary schedule within the time set by statute?

RCW 43.03.310(5) states that the Commission "shall file its initial schedule of salaries for the elected officials with the secretary of state no later than the first Monday in June, 1987, and shall file a schedule biennially thereafter". This provision clearly requires the Commission to adopt a salary schedule every two years. If, for some reason, the Commission failed to meet this obligation, however, the question would arise as to the amount that should be paid to the elected officials.

Unless the salary schedule last adopted by the Commission set salaries for only the next two years, the elected officials would continue in succeeding years to be paid the amount set forth in that schedule. For example, the schedule adopted in 1993 establishes salaries for elected officials "[e]ffective September 1, 1993". See Laws of 1993, 1st Sp. Sess., ch. 26, §§ 1-3, pp. 3059-61. No language in this law limits the time during which these salaries continue in effect; that is, there is no expiration date for the salaries set here. Consequently, this salary schedule will remain in effect until replaced by a new schedule, whether that occurs in two years or at some later time.

Question 3:

May the Commission, which is composed in part of members chosen by lot from each of the eight congressional districts existing at the time the members were chosen, continue to operate lawfully now that Washington has nine congressional districts? If so, from which geographical areas are new commission members chosen by lot to be selected?

Eight of the 15 Commission members are chosen by lot from among the names of registered voters. These eight comprise one member from each congressional district. RCW 43.03.305(1). Washington had eight congressional districts when this statute was enacted in 1986.

provides in part that "[t]he legislature shall never grant any extra compensation . . . nor shall the compensation of any public officer be . . . diminished during his term of office".

The Washington Supreme Court has determined, however, that this provision of the constitution is "self-executing, binding alike upon the authority empowered to fix salaries or compensation of public officers, whether that authority be the legislature, a board or commission, or . . . the legislature with the concurrence of the electorate affected by the increase". State ex rel. Port of Seattle v. Wardall, 107 Wash. at 611. Thus, the Commission may not decrease the salaries of elected officials during their current terms of office.

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Federal law requires that seats in the House of Representatives be apportioned among the states according to their respective numbers. See U.S. Const. art. 1, § 2; United States Dep't of Commerce v. Montana, 503 U.S. ___, 118 L. Ed. 2d 87, 112 S. Ct. 1415 (1992). Because of population growth that was detected during the decennial census in 1990, Washington subsequently gained a ninth congressional seat. Nine new congressional districts were created following the 1990 census, none precisely following the boundaries of any of the old districts in effect at the enactment of RCW 43.03.305.

Your question is whether the creation of this new congressional district makes it impossible to lawfully constitute the Commission. In our opinion, the answer is no. As explained above, the new district was established to ensure that Washington was adequately represented in the House of Representatives. The effect of adding another seat for the Washington delegation is to increase Washington's power, relative to the other states, in the House of Representatives.

However, nothing in RCW 43.03.305(1), or in any other statute we could find, authorizes a change in the membership of the Commission to reflect a change in the number of congressional districts in the state. RCW 43.03.305(1) plainly provides that eight members of the Commission are to be chosen by lot, one from each congressional district. Furthermore, the eight members chosen by law are evidently part of a scheme in which the Legislature intended that the Commission have an odd number of members, with a slight majority constituting the members drawn by lot. This scheme would be unbalanced if the Commission were to seat nine members drawn by lot rather than eight.

The Legislature's failure to amend RCW 43.03.305 to reflect the changed number of congressional districts leads to the problem posed by your third question: From which eight districts are new citizen members to be selected? This question requires us to construe RCW 43.03.305(1). The objective of statutory construction is, of course, to ascertain the Legislature's intent. E.g., Ski Acres, Inc. v. Kittitas Co., 118 Wn.2d 852, 827 P.2d 1000 (1992). To understand what the Legislature intended when it enacted the statute in 1986, we must "place ourselves in the light that legislature enjoyed". Linn v. Reid, 114 Wash. 609, 615, 196 P. 13 (1921).

In 1986 Washington had only eight congressional districts. Logically, it must have been those eight districts the Legislature had in mind when it drafted RCW 43.03.305(1). Since the Legislature neither authorized an increase in the number of citizen members to nine (reflecting the increase in the number of congressional districts) nor drew eight new districts to serve as constituencies for the eight citizen members of the Commission, we conclude that, absent further amendment by the Legislature, the congressional districts as they existed in 1986 are the districts from which new citizen members of the Commission are to be drawn.

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We recognize that this answer may present practical problems for the secretary of state, who must compile lists of eligible voters from the current congressional districts and reassemble the voters' names to fit the old district boundaries. No other interpretation of the statute, however, is justified. The plain language of the statute does not permit the selection of a citizen member from each of the nine congressional districts, since only eight such members may be chosen. Furthermore, there is no reasoned basis for choosing members from only eight of the nine currently existing congressional districts. Thus, until the Legislature amends the statute, citizen members must be selected from the eight prior districts.⁴

Question 4:

May a member of the Commission who was chosen by lot be reappointed? If so, how, by whom, and in accordance with what criteria is the member to be reappointed?

RCW 43.03.305(4) provides that no person may be appointed to serve more than two four-year terms on the Commission. Your question is whether this provision implies that any member may be reappointed for a second term.

Members of the Commission may be chosen in one of two ways: either they may be selected jointly by the speaker of the House of Representatives and the president of the Senate, or they may be selected by lot. RCW 43.03.305(1), (2). The seven members who are jointly selected by representatives of the Legislature are to have experience in the field of personnel management, and are to be drawn from specified sectors or recommended by particular entities. RCW 43.03.305(2).

The eight remaining members of the Commission are chosen by lot from the list of registered voters in this state. RCW 43.03.305(1). They are selected not for their expertise, but wholly at random.

Names of members chosen in both manners described above are forwarded to the governor, who must appoint these persons to the Commission. RCW 43.03.305(3). The governor has no discretion to refuse to appoint any person selected under RCW 43.03.305(1) or (2).

⁴Although the eight congressional districts, as they were constituted in 1986, were nearly equal in population, their population has since changed at different rates, such that their populations have grown more and more disparate over time. This process can be expected to continue. We express no opinion as to whether the members of the Commission, who are appointed and not elected officers, are required to be chosen from districts substantially equal in population. It certainly would be preferable for the Legislature to clear up all doubts by amending the law as soon as possible.

ATTORNEY GENERAL OF WASHINGTON

Leonard Nord

9

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From this scheme, it is clear that citizen members — those whose names are drawn by lot — may be chosen only by chance. Neither the secretary of state, who selects the members' names, nor the governor, who must appoint any person whose name is forwarded, has any power to establish criteria that citizen members must meet. In other words, the statute provides no authority for anyone to select citizen members in any manner other than randomly.

Given the foregoing provisions, a member of the Commission originally chosen by lot for one of the eight congressional districts could be reappointed only under one of the following two circumstances: (1) if, by unlikely coincidence, his or her name were again drawn randomly from the list of registered voters in the congressional district in question; or (2) if a member who had previously served a term after being selected by lot were selected jointly by the Speaker of the House of Representatives and the President of the Senate, and nominated by them to serve an additional term. In the latter case, such a person could serve a second term but would, because of language previously quoted from RCW 43.03.305(4), be barred from serving a third term.

We trust this opinion will be of assistance to you.

Very truly yours,

CHRISTINE O. GREGOIRE
Attorney General



TANYA BARNETT
Assistant Attorney General

:aj

BOARD FOR JUDICIAL ADMINISTRATION

PROCESS AND GUIDELINES FOR RESOLUTION REQUESTS

The Board for Judicial Administration (BJA) was established to adopt policies and provide strategic leadership for the courts at large, enabling the Washington State judiciary to speak with one voice. To fulfill these objectives, the BJA may consider adopting resolutions on substantive topics relating to the administration of justice in accordance with the Principal Policy Goals of the Washington Judicial Branch:

1. **Fair and Effective Administration of Justice in All Civil and Criminal Cases.** Washington courts will openly, fairly, efficiently and effectively administer justice in all criminal and civil cases, consistent with constitutional mandates and the judiciary's duty to maintain the highest level of public trust and confidence in the courts.
2. **Accessibility.** Washington courts, court facilities and court systems will be open and accessible to all participants regardless of cultural, linguistic, ability-based or other characteristics that serve as access barriers.
3. **Access to Necessary Representation.** Constitutional and statutory guarantees of the right to counsel shall be effectively implemented. Litigants with important interest at stake in civil judicial proceedings should have meaningful access to counsel.
4. **Commitment to Effective Court Management.** Washington courts will employ and maintain systems and practices that enhance effective court management.
5. **Appropriate Staffing and Support.** Washington courts will be appropriately staffed and effectively managed, and court personnel, court managers and court systems will be effectively supported.

In order to help ensure timely and thorough consideration of proposed resolutions, the BJA has established these guidelines regarding procedure, form and content. Care must also be taken not to dilute the importance of resolutions by adopting too many or without proper consideration.

Resolution requests may be initiated by BJA members or by outside parties. The requestor shall submit the resolution, in writing, with a request form containing a brief statement of purpose and explanation, to the BJA Associate Director.

The Associate Director shall refer properly submitted resolutions to appropriate AOC staff, and/or to an appropriate standing committee (or committees) for

review and recommendation, or directly to the BJA's Executive Committee, as appropriate. Review by the BJA's Executive Committee will precede review by the full BJA membership. Such review may be done via e-mail communication rather than in-person discussion when practical. Resolutions may be reviewed for style and content. Suggestions and comments will be reported back to the initiating requestor as appropriate.

Review should include discussion of priorities relative to existing strategic or long-range plans, whether resources are available to properly act upon the resolution, and any recommended language changes. Resolutions must be consistent with the Principal Policy Goals and long-range goals.

The report and recommendation of the Executive Committee shall be presented to the BJA membership at the next reasonably available meeting, at which time the resolution may be considered. Action on the proposed resolution will be taken in accordance with the BJA's rules and bylaws. The BJA may approve or reject proposed resolutions and may make substantive changes to the resolutions.

This process will ensure that (1) BJA members receive a written explanation of the resolution; (2) resolutions are screened in order to avoid last minute emergency debates and possible mistakes of fact or inaccurate statements; (3) when feasible, a thoughtful recommendation as to the resolution can be provided by the Executive Committee or a responsible committee; (4) a clear description is provided to requestors regarding how to proceed to obtain BJA consideration; and (5) a simple, expedited process exists, where time allows, for referral to the Executive Committee or other committee, followed by full membership consideration.

Resolutions should not be more than two pages in length. An appropriate balance must be struck between background information and a clear statement of action. Traditional resolution format should be followed. Resolutions should cover only a single subject unless there is a clear and specific reason to include more than one subject. Resolutions must be short-term, stated in precise language, and include a specific call to action. They are not long-term policy statements.

Resolutions must include a specific expiration date or will automatically expire in five years. Resolutions will not be automatically reviewed upon expiration of their term, but may be reviewed upon request for reauthorization. Resolutions may be terminated prior to their expiration date as determined by the BJA.

Approved resolutions will be numbered, maintained on the BJA section of the AOC website, and disseminated as determined by the BJA.

BOARD FOR JUDICIAL ADMINISTRATION

RESOLUTION REQUEST COVER SHEET

(INSERT PROPOSED RESOLUTION TITLE HERE)

SUBMITTED BY: (INSERT NAME HERE)

(1) **Name(s) of Proponent(s):**

(2) **Spokesperson(s):** (List who will address the BJA and their contact information.)

(3) **Purpose:** (State succinctly what the resolution seeks to accomplish.)

(4) **Desired Result:** (Please state what action(s) would be taken as a result of this resolution and which party/-ies would be taking action.)

(5) **Expedited Consideration:** (Please state whether expedited consideration is requested and, if so, please explain the need to expedite consideration.)

(6) **Supporting Material:** (Please list and attach all supporting documents.)

RECOMMENDATIONS FROM PUBLIC RECORDS WORK GROUP AND FURTHER ISSUES RAISED TO BE DISCUSSED AND DECIDED

(1) DELIBERATIVE PROCESS EXEMPTION/CHAMBERS RECORDS EXCLUSION

(a) Deliberative process – temporary

- The work group recommended that all exemptions existing under the PRA, which presumably includes case law addressing a specific exemption under the PRA, be incorporated as available exemptions under proposed Rule 31A. [The work group recommended that exemptions existing under other state statutes, federal law, and court rule be incorporated as available exemptions under Rule 31A as well.]
- In the PRA the “deliberative process exemption”, RCW 42.56.280 exempts “Preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended...” The PRA does not statutorily address clearly whether draft records are discloseable once the deliberative process is complete, or continues on permanently.
- In *Progressive Animal Welfare Society v. University of Washington (PAWS II)*, 1994, 125 Wn.2d 243, 257 the court clarified that this exemption only pertains to draft records during the deliberative process; once the deliberative process is complete the draft records, unless otherwise exempt, are discloseable (“Once the policies or recommendations are implemented, the records cease to be protected under this exemption. *Brouillet*, 114 Wash.2d at 799-800, 791 P.2d 526”).

In *West v. Port of Olympia*, 146 Wn.App.108, 192 P.3d 926 (Wash.App.Div.1 2008) the court stated at 112 “Once an agency implements a policy or recommendation, records pertaining to that policy or recommendation no longer fall within the ambit of the deliberative process exemption of the public records act (PRA).” and at 117: “However, once the agency implements the policies or recommendations such records are no longer exempt under the deliberative process exemption.”

- The work group did not discuss this exemption from the context of either eliminating or modifying the exemption.

(b) Deliberative process – permanent

- The work group did not discuss refining the result of this PRA exemption and clarifying case law for Rule 31A to further restrict disclosure of draft records once the deliberative process is complete.
- The SCJA has recommended that Rule 31A refine this exemption to restrict disclosure of draft records permanently.

(c) Meetings – Minutes and staff products

- Meeting minutes would already be exempt from disclosure under the proposed Rule: “Minutes of meetings held by judges within a court;” [§(e)(1)B.(3)]. 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.
- 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).
- SCJA would like to add the words “and staff products prepared for judicial discussion or decision making” following “...within a court”.
- Questions: Is the SCJA wording too broad? Does it include any staff products prepared for any discussion or any decision making, whether connected to a meeting or not? Does the staff product become discloseable once the meeting is concluded? Does the staff product become discloseable once the “decision making” is completed, whether at a meeting or not? How does this interface with the deliberative process exemption?

(d) Communications between judges and administrative staff

- In the draft, the definition of a “Chambers record” is indicated in §(d)(4)A. as: “‘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, the management of the court, 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.”
- The SCJA proposes to expand this definition to include communications between judicial officers and court administration by adding the following sentence as the second sentence: “Chambers records include all writing between judicial officers, between judicial officers and chambers staff, and between judicial officers and court administration.”

(2) NEW REQUESTS - OTHER POTENTIAL EXEMPTIONS FOR DISCUSSION

(a) Family Court evaluation/DV files

- The SJCA has recommended that “Family court evaluation and domestic violence files when no legal action is pending” should be specifically listed as exempt under Rule 31A.

- Current practice (at least in King County) is that attorneys of record and parties may review the information contained in Family Court Services (FCS) evaluation and domestic violence files when a legal action is pending. If there is no legal action pending, the parties cannot review FCS files unless all parties to the case sign releases, or the court directs FCS to release the information. Child Protective Services and Dependency CASA also may review FCS evaluation and domestic violence files. Other third parties such as evaluators, GALs and Family Law CASAs may review the file if all parties sign releases or the court directs FCS to release the information.

(b) Family Court mediation

- The work group recommended, and the draft Rule 31A indicates that all exemptions existing under the PRA, other state statutes, federal law, and court rule be incorporated as available exemptions under Rule 31A as well.
- The SJCA has recommended that Family Court mediation files be specifically listed as exempt under Rule 31A.
- These files appear to already be exempt under RCW 7.07 (Uniform Mediation Act) and RCW 5.60.070.
- Should some exemptions that already exist under the PRA or other statutes be listed specifically in Rule 31A while others are not listed?

(c) Date of Birth

- The proposed Rule 31A listed exemptions includes “Personal identifying information, including individuals’ home contact information, Social Security numbers, driver’s license numbers and identification/security photographs.”
- Birth dates are not specifically listed as an example in the proposed wording, but the word “including” is arguably not limiting. The decision made regarding the common law balancing test for privacy could influence how a PRO would respond to a request for a birth date.
- The work group discussed photographs and birth dates, both of which are discloseable under the PRA. There is one recently enacted exception on these, for law enforcement agencies. The consensus was to include identification/security photographs, but no consensus was reached on birth dates, so it was left as not included. There was some discussion regarding the judicial branch utilizing the recently enacted exception for law enforcement agencies.
- The media supports birth dates not being exempt from disclosure so that information can be utilized as a marker for verifying the identify of specific employees. PRO’s tend to argue there are less intrusive methods to accomplish this verification, if needed, including *confirming* birth dates.

(d) Juvenile Court probation’s social files

- The work group recommended, and the draft Rule 31A indicates that all exemptions existing under the PRA, other state statutes, federal law, and court rule be incorporated as available exemptions under Rule 31A as well.
- The SJCA has recommended that Juvenile Court mediation files be specifically listed as exempt under Rule 31A.
- These files appear to already be exempt under RCW 13.50.050.
- Should some exemptions that already exist under the PRA or other statutes be listed specifically in Rule 31A while others are not listed?

(e) Expert/investigator requests (permanent)

- Language in the draft Rule 31A [§(e)(1)B.(6) states:
“An attorney’s request to a court or judicial agency for a trial or appellate court defense expert, investigator, or social worker, any report or findings submitted to the attorney or court 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.”
- SCJA has proposed deletion of the phrase “...but only during the pendency of the case” at the end of the paragraph.

(f) Raw datasets supporting court performance measures

- SCJA has proposed to add this to the list of administrative records that would be exempt, indicating raw datasets supporting internal performance measures are open to significant misinterpretations.
- At present there do not appear to be any exemptions in the PRA, other state statutes, or federal law based in whole or in part upon the requester’s perceived ability to interpret the requested records accurately. It does not appear to be uncommon for at least some public records requesters (of any type) to interpret records inaccurately. Public entities attempt to mitigate this in a variety of ways, to a variety of degrees, depending upon their available resources, abilities, and opportunities.

(3) ISSUES DELIBERATED IN WORK GROUP - POTENTIAL DISCUSSION

(a) Intervention by third party affected by record

- 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 §(A)(6)(b) of the work group's report.)

- Required notification to third parties named in records that are used to fulfill a public records request was discussed by the work group and it was decided, as with the PRA, that a requirement for notification is too costly and time consuming to be feasible. However, as under the PRA, notification may be provided on a voluntary basis, as the responding agency deems appropriate and has the resources to do so.

(b) Common law balancing test for privacy

- 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 §(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 §(A)(6)(b) of the work group's report.)
- Most judicial entities appear to currently use the common law balancing test for privacy as one of its criteria to determine discloseability.
- The PRA does not have any general privacy exemption, per se, although it does incorporate privacy as one of the elements of some specific exemptions (i.e. personal information in files, taxpayer related, and law enforcement investigatory). If it does not fall under one of these then the disclosure would need to result in a violation of personal privacy or vital governmental interests. The information to be disclosure would need to be both (1) highly offensive to a reasonable person, and (2) of no legitimate public concern.
- The common law balancing test for privacy is generally considered to be less restrictive/narrow than the above process and criteria utilized under the PRA and its relevant case law.

(c) Prospective application

- The work group discussed prospective versus retrospective application, with some differences of opinion. The work group ultimately decided to recommend, and the draft Rule 31A reflects, that the rule would be applied retrospectively.
- When the PRA was implemented it applied to all records retrospectively.
- The SJCA recommends that the rule be applied only prospectively to records created on or after the adoption of the rule.
- Records created prior to adoption of the rule could still be voluntarily disclosed at the discretion of the judicial entity if permissible under their policies and procedures.

(4) NEW REQUESTS – OTHER ISSUES FOR DISCUSSION

(a) Bar to incarcerated individuals making requests

- The SCJA has recommended a bar preventing direct access to judicial records by the class of individuals subject to a court's judgment: "Access to judicial records by persons who are subject to a court's judgment and sentence or whose civil rights have not been restored is not covered by this rule."
- There was a brief discussion on this proposal at the last BJA meeting but no final resolution. Much of the discussion centered on whether to limit the restriction to only incarcerated individuals.
- The PRA does not bar incarcerated individuals from requesting and obtaining public records; however in recent years there have been some provisions statutorily added to address vexatious requesters, whether incarcerated or not.
- Would an approach that continues to allow incarcerated individuals to request judicial public records, but which clarifies the process for those in detention facilities and incorporates a modification of the procedure for fee payments, sufficiently address the concerns raised regarding incarcerated individuals? See new comment under (e)(3)(A.)

(b) Should "Best Practices" be cited in rule?

- Should there be a commitment in the rule to create a "Best Practices" work group to create the practical details of implementation?
- Should the rule include a provision that states a standard along the lines of "Best Practices Guidelines approved by the Supreme Court shall be prima facie evidence of compliance with the rule"?

(c) Should the County Clerks be removed from the rule?

- With the creation of an administrative records rule separate from the court **case** files rule, and the County Clerk's own records being covered by the PRA, is there no longer a necessity to mention County Clerks in the draft Rule 31A?
- Do County Clerks actually hold and maintain any Superior Court administrative records? If so, would the County Clerks consider those administrative records already subject to the PRA with that status not subject to modification by court rule?

(d) Records of appointed defense counsel

- The Washington Association of Criminal Defense Lawyers (WACDL) has requested that proposed GR 31A be amended to preserve the confidentiality of appointed defense attorneys' client records. WACDL's suggestions are to revise the definitions of "judicial agency," "administrative record," and "case record."

- For the definition of “judicial agency,” WACDL requests the addition of the following language: “The definition of ‘judicial agency’ does not include an attorney or agency appointed by a judicial agency to provide representation to an individual in accordance with the State or a municipality’s obligation to provide counsel to a litigant under [a series of specified constitutional and statutory provisions], or any other proceeding in which the right to appointment of counsel attaches as a constitutional or a statutory mandate.”
- For the definition of “administrative record,” WACDL requests the addition of the following language: “The definition of ‘administrative record’ does not include any files, materials, information, and/or records that are maintained by or in the possession of an attorney or agency appointed by a judicial agency to provide representation to an individual in accordance with the State or a municipality’s obligation to provide counsel to a litigant under [[a series of specified constitutional and statutory provisions], or any other proceeding in which the right to appointment of counsel attaches as a constitutional or a statutory mandate, relating to the representation of a client.”
- (WACDL suggests a similar revision to the definition of “case record,” but the current draft of GR 31A no longer defines that term.)
- Judge Appelwick suggests that this issue be addressed with different language: “An attorney or entity appointed by a court or judicial agency to provide legal representation to a litigant in a judicial or administrative proceeding does not become a judicial agency by virtue of that appointment.” He believes that an additional amendment to the definition of “administrative record” is unnecessary, as the attorney/entity would no longer be subject to the rule’s disclosure provisions in any event.

(5) FEES

(a) Research Programming

- 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.)

- The SCJA has proposed adding the following language to the draft Rule 31A:
 - “A fee of \$30 per hour may be charged for research services required to fulfill a request taking longer than one hour. The fee shall be assessed from the second hour onward.”
- \$30 per hour accords with the allowable rate charged by clerk’s offices for court records searches indicated in RCW 36.18.016:
 - “For clerk’s services such as performing historical searches, compiling statistical reports, and conducting exceptional record searches, the clerk may collect a fee not to exceed thirty dollars per hour.”
- The PRA does not currently provide for recouping expenses for searching and compiling records on behalf of records requesters, other than a partial indirect reimbursement through photocopying and scanning charges production, photocopying and scanning charges labor, mailing costs, and costs of materials furnished (disks, flash drives). [These final three items not addressed by the work group]. The opposition expressed by prominent requesters, the media, and open government/public interest groups to charging for time searching for records generally falls along the lines of the requester should not be charged more money or less money on the basis of the government agency’s expertise in the area of classifying, storing, and retrieving records, or the degree of records officer’s/searcher’s efficiency or skill at retrieving records. You would be rewarding government entities in an inverse correlation to their commitment to excellence in records management.

(b) Related Note

- The draft rule provides for some protection of excessively large and cumbersome requests in §(e)(2)A.(6) EXTRAORDINARY REQUESTS LIMITED BY RESOURCE CONSTRAINTS.

(c) Fees beyond photocopying, scanning, and research fees

- The suggested new rule, as currently drafted indicates what charges may not be applied for costs of fulfilling public records requests, in (g)(1); and what charges may be applied for costs of fulfilling public records requests, in (g)(2).
- However, the suggested new rule, as currently drafted, is silent on three expenses for which charging is allowable under the PRA, are charged to requesters under AOC’s current policy, and for which many government agencies charge: (1) mailing/shipping costs, (2) costs of materials necessary to supply some records (e.g. CD’s, USB units), and (3) direct labor cost (e.g. hourly wage) for the employee’s time spent for preparing the records.

- Should these three expenses be chargeable under the suggested new rule? If so, for the sake of clarity should that be mentioned in the suggested new rule?
-

Update: 1-10-11

1 **[NOTE TO BJA MEMBERS: This draft incorporates the BJA's decisions from the December 10th**
2 **meeting, as indicated with the stricken-through and underlined wording. The draft also includes a**
3 **few clean-up changes, adds several new comments, and notes some new issues that have arisen**
4 **since the December 10th meeting.]**

5
6
7 **[SUGGESTED NEW RULE]**

8
9 **General Court Rule 31A**

10
11 **DRAFT dated January 7, 2011**

12
13 **ACCESS TO ADMINISTRATIVE RECORDS**

14
15 **(a) Policy and Purpose.** It is the policy of the judiciary to facilitate access to administrative
16 records. Access to administrative records is not absolute and shall be consistent with
17 reasonable expectations of personal privacy as provided by article 1, section 7 of the
18 Washington State Constitution, restrictions in statutes, restrictions in court rules, and as
19 required for the integrity of judicial decision-making. Access shall not unduly burden the
20 business of the judiciary.

21 **(b) Scope.**

22 This rule governs the right of public access to administrative judicial records. This rule
23 applies to all administrative records, regardless of the physical form of the record, the method of
24 recording the record, or the method of storage of the record. Access to court records is
25 governed by GR 15, 22, and 31.

26 COMMENT: "Court records" is a term of art, defined in GR 31 as meaning case files
27 and related documents.

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

29 (1) This rule applies to the Supreme Court, the Court of Appeals, the superior courts, the
30 district and municipal courts, and the following judicial branch agencies:

- 31 A. All judicial entities that are overseen by a court, including entities that are
32 designated as agencies, departments, committees, boards, commissions, task
33 forces, and similar groups;
34 B. County Clerks' offices with regard to their duties to the superior court and their
35 custody of superior court records;

36 ISSUE FOR BJA: County clerks may no longer need to be included under this
37 rule, now that it is a stand-alone rule that does not apply to case files. County
38 clerks often point out that they are governed by the Public Records Act. Do
39 county clerks possess any of the judiciary's administrative records? If they
40 possess only case files and related documents, then they would not need to be
41 covered by this rule on administrative documents.
42

- 1 C. The Superior Court Judges' Association, the District and Municipal Court Judges'
2 Association, and similar associations of judicial officers and employees; and
3 D. All subgroups of the entities listed in this section (1).

4 *COMMENT: At the December meeting, the BJA decided to collapse the list of*
5 *applicable agencies so that each committee, board, and agency would not be*
6 *separately listed.*
7
8

9 ~~(1) This rule applies to the following judicial agencies:~~

- 10 ~~A. The Supreme Court and the Court of Appeals;~~
11 ~~B. The superior, district, and municipal courts;~~
12 ~~C. Board for Judicial Administration;~~
13 ~~D. Administrative Office of the Courts;~~
14 ~~E. Judicial Information System Committee;~~
15 ~~F. Minority and Justice Commission;~~
16 ~~G. Gender and Justice Commission;~~
17 ~~H. Board for Court Education;~~
18 ~~I. Interpreter Commission;~~
19 ~~J. Certified Professional Guardian Board;~~
20 ~~K. Commission on Children in Foster Care;~~
21 ~~L. Washington State Pattern Jury Instruction Committee;~~
22 ~~M. Pattern Forms Committee;~~
23 ~~N. Court Management Council;~~
24 ~~O. Bench-Bar Press Committee;~~
25 ~~P. Judicial Ethics Advisory Committee;~~
26 ~~Q. Office of Public Guardianship;~~
27 ~~R. Washington Center for Court Research;~~
28 ~~S. Office of Civil Legal Aid;~~
29 ~~T. Office of Public Defense;~~
30 ~~U. State Law Library;~~
31 ~~V. Washington State Bar Association;~~
32 ~~W. County Clerks' offices with regard to their duties to the superior court and their~~
33 ~~custody of superior court records;~~
34 ~~X. Superior Court Judges' Association, District and Municipal Court Judges'~~
35 ~~Association, and similar associations of judicial officers and employees;~~
36 ~~Y. whether or not specifically identified in this section (c) (1); and~~
37 ~~Z. All subgroups of the entities listed above, including committees, task forces,~~
38 ~~commissions, boards, offices, and departments.~~

39
40 (2) This rule does not apply to the Commission on Judicial Conduct. The
41 Commission is encouraged to incorporate any of the provisions in this rule as it
42 deems appropriate.

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

1 (3) This rule does not apply to the Washington State Bar Association. Public access
2 to the Bar Association's records is governed by GR 12.4.

3 COMMENT: The Bar Association is drafting a proposal for a new GR 12.4.

4 (4) This rule does not apply to the Certified Professional Guardian Board. Public
5 access to the board's records is governed by GR 23.

6 ~~(3)~~ (5) A judicial officer is not an a court or judicial agency .

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

10
11 New (6) and renumber: : "An attorney or entity appointed by a court or judicial agency to
12 provide legal representation to a litigant in a judicial or administrative proceeding does
13 not become a judicial agency by virtue of that appointment."

14 NEW COMMENT: The Washington Association of Criminal Defense Lawyers
15 (WACDL) has proposed an amendment specifying that the term "judicial agency"
16 does not include attorneys appointed by a judicial agency to provide legal
17 representation under specified constitutional and statutory provisions. See
18 WACDL's memo to the BJA. Judge Appelwick proposes rewording WACDL's
19 proposal, along the lines indicated.

20
21
22
23 (4) (6) A person or agency entrusted by a judicial officer, court, or judicial agency with the
24 storage and maintenance of its public records, whether part of a judicial agency or a
25 third party, is not a judicial agency. Such person or agency may not respond to a
26 request for access to administrative records, absent express written authority from the
27 judicial agency or separate authority in court rule or statute to grant access to the
28 documents.

29
30 [COMMENT FROM WORK GROUP: Judicial e-mails and other documents
31 sometimes reside on IT servers, some are in off-site physical storage facilities.
32 This provision prohibits an entity that operates the IT server from disclosing
33 judicial records. The entity is merely a bailee, holding the records on behalf of a
34 court or judicial agency, rather than an owner of the records having independent
35 authority to release them. Similarly, if a court puts its paper records in storage
36 with another entity, the other entity cannot disclose the records. In either
37 instance, it is the judicial agency that needs to make the decision as to releasing
38 the records. The records request needs to be addressed by the judicial agency's
39 public records officer, not by the person or entity having control over the IT server
40 or the storage area. On the other hand, if a court or judicial agency archives its
41 records with the state archivist, relinquishing by contract its own authority as to
42 disposition of the records, the archivist would have separate statutory authority to
43 disclose the records.

44
45 COMMENT: Because of the broad definition of "public record" appearing later in
46 this rule, this paragraph (6) would apply to electronic records, such as e-mails
47 (and their meta-data) and telephone records, among a wide range of other
48 records.

1
2 **(d) Definitions.**
3

4 (1) "Access" means the ability to view or obtain a copy of an administrative record.
5

6 (2) "Administrative record" means a public record created by or maintained by a court or
7 judicial agency and related to the management, supervision, or administration of the
8 court or judicial agency.

9 *[COMMENT FROM WORK GROUP: The work group has developed a list of*
10 *categories of records maintained by judicial agencies. The list is annotated*
11 *with the work group's expectation of whether such records are subject to*
12 *disclosure. The list is found as an appendix to the work group's report. It is*
13 *intended for illustrative purposes only.]*
14

15 *NEW COMMENT: "Administrative record" does not include (1) "court records"*
16 *as defined in GR 31, (2) chambers records as set forth later in this rule, or (3)*
17 *an attorney's client files that would otherwise be covered by the attorney-*
18 *client privilege or the attorney work product privilege.*
19

20 *NEW COMMENT: WACDL has requested that the definition of "administrative*
21 *record" be amended to clarify that the definition does not include client files of*
22 *an appointed defense attorney. See WACDL's memo to the BJA. Client files*
23 *are not defined. Judge Appelwick recommends that this particular change not*
24 *be made, but that the issue instead be addressed earlier in this rule by*
25 *specifying that appointed defense counsel and their entities are not covered by*
26 *the rule.*
27

28 (3) "Court record" is defined in GR 31.
29

30 *NEW COMMENT: WACDL has requested that the definition of "case record" be*
31 *amended to clarify that the definition does not include client files of an*
32 *appointed defense attorney. See WACDL's memo to the BJA. The current*
33 *version of GR 31A no longer defines this term, leaving the definition to GR 31.*
34

35 (4) A. "Chambers record" means any writing that is created by or maintained by any
36 judicial officer or chambers staff, and is maintained under chambers control, whether
37 directly related to an official judicial proceeding, the management of the court, or other
38 chambers activities. "Chambers staff" means a judicial officer's law clerk and any
39 other staff when providing support directly to the judicial officer at chambers.
40

41 *COMMENT: In December, the BJA decided not to add the words "received by,"*
42 *as these words are not needed. Similarly, the BJA decided not to add specific*
43 *reference to "bailiffs," as bailiffs have different duties in different courts. Still*
44 *pending before BJA is a proposal to expand the definition to include*
45 *communications between judicial officers and court administration was held*
46 *over for another meeting.*
47

48 B. Chambers records are not public records. Court records and administrative records
49 do not become chambers records merely because they are in the possession or
50 custody of a judicial officer or chambers staff.

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

10
11 (5) "Judge" means a judicial officer as defined in the Code of Judicial Conduct (CJC)
12 Application of the Code of Judicial Conduct Section (A).

13
14 (6) "Public" includes an individual, partnership, joint venture, public or private corporation,
15 association, federal, state, or local governmental entity or agency, however
16 constituted, or any other organization or group of persons, however organized.

17
18 (7) "Public record" includes any writing, except chambers records and court records,
19 containing information relating to the conduct of government or the performance of any
20 governmental or proprietary function prepared, owned, used, or retained by any court
21 or judicial agency regardless of physical form or characteristics. "Public record" also
22 includes meta-data for electronic administrative records.

23
24 [COMMENT FROM WORK GROUP: The definition in paragraph (7) is adapted
25 from the Public Records Act. The work group added the exception for
26 chambers records, for consistency with other parts of the proposed rule.]

27
28 COMMENT: Pending before BJA is a proposal that the rule use the definition of
29 "record" from the Uniform acts: "'Record' means information that is inscribed
30 on a tangible medium or that is stored in an electronic or other medium and is
31 retrievable in perceivable form."
32

33
34 (8) "Writing" means handwriting, typewriting, printing, photostating, photographing, and
35 every other means of recording any form of communication or representation
36 including, but not limited to, letters, words, pictures, sounds, or symbols, or
37 combination thereof, and all papers, maps, magnetic or paper tapes, photographic
38 films and prints, motion picture, film and video recordings, magnetic or punched cards,
39 discs, drums, diskettes, sound recordings, and other documents including existing data
40 compilations from which information may be obtained or translated.

41 COMMENT: E-mails and telephone records are included in this broad definition
42 of "writing."

43
44 [COMMENT FROM WORK GROUP: The definition in paragraph (8) is taken from
45 the Public Records Act.]

46
47 **(e) Administrative Records.**

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

49 A. The public has a right of access to court and judicial agency administrative records
50 unless access is exempted or prohibited under this rule, other court rules, federal

1 statutes, state statutes, court orders, or case law. To the extent that records
2 access would be exempt or prohibited under the Public Records Act, chapter 42.56
3 RCW, access is also exempt or prohibited under this rule. In addition, to the extent
4 required to prevent a significant risk to individual privacy or safety interests, an a
5 court or judicial agency shall delete identifying details in a manner consistent with
6 this rule when it makes available or publishes any public record; however, in each
7 instance, the justification for the deletion shall be provided fully in writing.

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

12 *COMMENT: Any public-access exemptions or prohibitions from the PRA and*
13 *from other statutes or court rules would also apply to the judiciary's*
14 *administrative records. For example, GR 33(b) provides that certain medical*
15 *records relating to ADA issues are to be sealed; the sealed records would not*
16 *be subject to access under this proposed GR 31A.*

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

19 (1) Requests for judicial ethics opinions;

20 *[COMMENT FROM WORK GROUP: This exemption was requested by the*
21 *Judicial Ethics Advisory Committee.]*

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

24 *[COMMENT FROM WORK GROUP: This exemption was suggested by Judge*
25 *Quinn Brintnall at a BJA meeting.]*

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

27 *COMMENT: Still pending before BJA is a proposal to expand (3) to add "and*
28 *staff products prepared for judicial discussion or decision making."*

29 *[COMMENT FROM WORK GROUP: The work group discussed whether meeting*
30 *minutes should be broadly exempted from public access, or whether some*
31 *smaller subset of such minutes should be exempted. The work group voted in*
32 *favor of the broad exemption; a minority report may be written on this point.]*
33
34

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

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

41 *COMMENT: Paragraph (4) is intended to encompass documents such as those*
42 *of the Supreme Court's Capital Counsel Committee, which evaluates attorneys*
43 *for potential inclusion on a list of attorneys who are specially qualified to*
44 *represent clients in capital cases.*

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

4 COMMENT: Still pending before BJA is a proposal to expand paragraph (5) to
5 include birth dates.

6
7 [COMMENT FROM WORK GROUP: The exemption was requested by staff for
8 the Office of Public Defense. The work group considered including private
9 financial information in this provision, but ultimately concluded that financial
10 information is already addressed in the Public Records Act's exemptions. The
11 work group discussed whether dates of birth should be included here, but did
12 not reach consensus.]
13

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

19 COMMENT: Still pending before BJA is a proposal to delete from paragraph (6)
20 the phrase "but only during the pendency of the case."

21
22 [COMMENT FROM WORK GROUP: The exemption was requested by the Office
23 of Public Defense.]
24

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

30 [COMMENT FROM WORK GROUP: The exemption was requested by the Office
31 of Public Defense.]
32

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

36 COMMENT: Exemption (8) is no longer needed; the BJA has already decided
37 that the Bar Association would not be covered by the rule at all.

38
39 COMMENT: Also pending before BJA are proposals to add new exemptions for:

40 "Any writing between judicial officers, between judicial officers and chambers
41 staff, and between judicial officers and court administration";

42 "Family court evaluation and domestic violence files when no legal action is
43 pending";

44 "Family court mediation files";

45 "Juvenile court probation's social files";

1 "Raw datasets supporting court performance measures."

2 [COMMENT FROM WORK GROUP: The work group received proposals for several
3 additional exemptions, but decided against including them in the recommended rule.
4 Does anybody at BJA move for inclusion of any of these? The proposals were to
5 exempt:

- 6 • Investigative records of regulatory or disciplinary agencies. (The work group
7 lacked sufficient information about the variety of practices that the judicial
8 agencies use in order to draft appropriate language.)
- 9 • Private financial information, including financial account numbers. (The work
10 group determined that this information is already protected under the Public
11 Records Act.)
- 12 • Dockets/index information for protected case types. (The work group
13 determined that this information is already protected.)
- 14 • Copyrighted information. (The work group lacked sufficient information to
15 draft appropriate language.)
- 16 • Testing/screening materials/results. (The work group determined that this
17 information is already protected under the Public Records Act.)
- 18 • Performance measures for evaluating court processes. (The work group
19 decided that this information should generally be open to public access, even
20 if the information is subject to public misinterpretation.) (This issue is
21 addressed in the proposals from SCJA to add new exemptions, see above on
22 this page.)

23 **(2) Chambers Records.** Chambers records are not subject to disclosure.

24 COMMENT: By definition, chambers records are not public records. See
25 §(d)(4)(B) above. The addition of this section (2) just makes explicit that
26 chambers records are not subject to disclosure under this rule.

27 **-(2) (3) Administrative Records—Process for Access.**

28
29 **A. Administrative Records—Procedures for Records Requests.**

- 30 (1) AGENCIES TO ADOPT PROCEDURES. Each court and judicial agency must
31 adopt a policy implementing this rule and setting forth its procedures for
32 accepting and responding to administrative records requests. The agency's
33 policy must include the designation of a public records officer and must require
34 that requests for access be submitted in writing to the agency's designated
35 public records officer. Best practices for handling administrative records
36 requests shall be developed under the authority of the Board for Judicial
37 Administration.
- 38 (2) PUBLICATION OF PROCEDURES FOR REQUESTING ADMINISTRATIVE
39 RECORDS. Each court or judicial agency must prominently publish the
40 procedures for requesting access to its administrative records. If the court or
41 judicial agency has a website, the procedures must be included there. The
42 publication shall include the public records officer's work mailing address,
43 telephone number, fax number, and e-mail address.
- 44 (3) INITIAL RESPONSE. Each court and judicial agency must initially respond to
45 a written request for access to an administrative record within five working days

1 of its receipt. The response shall acknowledge receipt of the request and
2 include a good-faith estimate of the time needed to respond to the request.
3 The estimate may be later revised, if necessary. For purposes of this provision,
4 "working days" mean days that the court or judicial agency, including a part-
5 time municipal court, is open.

6 (4) COMMUNICATION WITH REQUESTER. Each court or judicial agency must
7 communicate with the requester as necessary to clarify the records being
8 requested. The court or judicial agency may also communicate with the
9 requester in an effort to determine if the requester's need would be better
10 served with a response other than the one actually requested.

11 (5) SUBSTANTIVE RESPONSE. Each court and judicial agency must respond to
12 the substance of the records request within the timeframe specified in the
13 court's or judicial agency's initial response to the request. If the court or judicial
14 agency is unable to fully comply in this timeframe, then the court or judicial
15 agency should comply to the extent practicable and provide a new good faith
16 estimate for responding to the remainder of the request. If the court or judicial
17 agency does not fully satisfy the records request in the manner requested, the
18 court or judicial agency must justify in writing any deviation from the terms of
19 the request.

20 (6) EXTRAORDINARY REQUESTS LIMITED BY RESOURCE CONSTRAINTS.
21 If a particular request is of a magnitude that the court or judicial agency cannot
22 fully comply within a reasonable time due to constraints on the court or judicial
23 agency's time, resources, and personnel, the court or judicial agency shall
24 communicate this information to the requester. The court or judicial agency
25 must attempt to reach agreement with the requester as to narrowing the
26 request to a more manageable scope and as to a timeframe for the court's or
27 judicial agency's response, which may include a schedule of installment
28 responses. If the court or judicial agency and requester are unable to reach
29 agreement, then the court or judicial agency shall respond to the extent
30 practicable and inform the requester that the court or judicial agency has
31 completed its response.

32 NEW COMMENT: As a potential assist to address concerns that incarcerated
33 individuals may utilize the rule as a means of harassment, consider adding an
34 additional subsection:

35 (7) REQUESTS BY INCARCERATED INDIVIDUALS.

36 Incarcerated individuals may make public records requests through the
37 mail to the appropriate Public Records Officer. All responses by the
38 PRO in which records are provided will be fulfilled by providing a
39 hard/paper copy of the records, unless written confirmation is received
40 from the appropriate staff at the respective detention facility that the
41 requester is authorized to receive the records in an electronic or other
42 format. Fees may be charged the incarcerated individual as outlined in
43 (g)(2), however, the court or judicial agency may require the advance
44 full payment of the estimated cost of providing copies for a request,
45 prior to fulfillment of the request, rather than only the deposit outlined
46 in (g)(3).

1
2 **B. Administrative Records—Review of Public Records Officer's Response.**

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

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

9 (3) FURTHER REVIEW WITHIN COURT OR AGENCY. Each court and judicial
10 agency shall provide a method for review by the judicial agency's director or
11 presiding judge. For ~~an agency that is not a court~~ a judicial agency, the
12 presiding judge shall be the presiding judge of the court that oversees the
13 agency. The court or judicial agency may also establish intermediate levels of
14 review. The court or judicial agency shall make publicly available the applicable
15 forms. The review proceeding is informal and summary. The review
16 proceeding shall be held within five working days. If that is not reasonably
17 possible, then within five working days the review shall be scheduled for the
18 earliest practical date.

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

23 *[ISSUE: Does BJA want the option for the presiding judge to designate another*
24 *judicial officer to perform this function?*

25 (4) ALTERNATIVE REVIEW. As an alternative to review under section (e) (2) (B)
26 (3), a requesting person may seek review by a person outside the court or
27 judicial agency. If the ~~judicial agency is a court or directly reportable to a court~~
28 the requesting person seeks review of a decision made by a court or made by
29 a judicial agency that is directly reportable to a court, the outside review shall
30 be by a visiting judicial officer. If the ~~judicial agency is not a court or the~~
31 requesting person seeks review of a decision made by a judicial agency that is
32 not directly reportable to a court, the outside review shall be by a person
33 agreed upon by the requesting person and the judicial agency. In the event the
34 requesting person and the judicial agency cannot agree upon a person, the
35 presiding superior court judge in the county in which the judicial agency is
36 located shall either conduct the review or appoint a person to conduct the
37 review. The review proceeding shall be informal and summary. In order to
38 choose this option, the requesting person must sign a written waiver of any
39 further review of the decision by the person outside the court or judicial agency.
40 The decision by the person outside the court or judicial agency is final and not
41 appealable. Attorney fees and costs are not available under this option.

42 *[COMMENT FROM WORK GROUP: The bifurcated procedures*
43 *for review are intended to provide flexible, prompt, informal,*
44 *and final procedures for review of public records decisions.*
45 *The option for a visiting judge allows a requester to have the*

1 review heard by an outside decision-maker; in the interest of
2 obtaining prompt, final decisions, a requester selecting this
3 option would be required to waive further review. If the
4 Legislature creates a new entity to review public records
5 decisions made by agencies of the executive branch, then the
6 work group recommends that the BJA consider using this
7 entity for review of judicial records decisions as well.]
8

9 (5) REVIEW IN SUPERIOR COURT.

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

21 *[COMMENT FROM WORK GROUP: The common law's balancing*
22 *test is addressed in detail in Cowles Publishing v. Murphy, 96*
23 *Wn.2d 584 (1981), and Beuhler v. Small, 115 Wn.App. 914*
24 *(2003). Disclosure is balanced against whether it poses a*
25 *significant risk to individual privacy or safety.]*
26

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

29 (6) MONETARY SANCTIONS.

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

40 *[COMMENT FROM WORK GROUP: The work group's recommendation is to*
41 *initially limit the availability of monetary sanctions against judicial*
42 *agencies. If the experience with this approach were to show that more*
43 *significant sanctions are merited, then those could be added at an*
44 *appropriate time. This approach was also used when the Public Records*
45 *Act was also originally enacted; it makes sense to take the same approach*
46 *with this rule. It may well be that the limited sanctions that would be*
47 *available under this rule, coupled with the rule's creation of speedy review*

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

3
4 *COMMENT: Should the rule include a provision that directly calls for the*
5 *development of best practices? One option would be to indicate that*
6 *compliance with best practices, once approved by the Supreme Court, would*
7 *be prima facie evidence of compliance with the applicable portion of the rule.*

8
9 **(h) Effective Date of This Rule.**

- 10 (1) This rule goes into effect on January 1, 2012, and applies to all public records requests
11 submitted on or after that date.

12 *[COMMENT FROM WORK GROUP: A rule adopted in early 2011 would usually*
13 *have an effective date of September 1, 2011. The delayed effective date is*
14 *intended to allow time for development of best practices and for training.]*
15 *[ADDENDUM: A date later than January 1, 2012, may now be needed to*
16 *ensure enough time for implementation.]*

17 *COMMENT: Still pending before BJA is a proposal to have the rule apply*
18 *prospectively only, so that the rule would apply only to records that are*
19 *created on or after the rule's effective date.*

- 20
21 (2) Until January 1, 2012, public access to administrative records shall continue to be
22 analyzed using the existing court rules and statutes, as applicable, and the common
23 law balancing test. The Public Records Act, Chapter 42.56 RCW, may be used as
24 non-binding guidelines.



Washington Association of
Criminal Defense Lawyers

Robert M. Quillian
President

Teresa Mathis
Executive Director

December 29, 2010

TO: Board of Judicial Administration
The Honorable Barbara Madsen, chair
The Honorable Michael Lambo, co-chair

FROM: Bob Quillian, WACDL President
Greg Link, WACDL PRA Task Force Member

RE: Proposed Changes to GR 31

The Washington Association of Criminal Defense Lawyers (WACDL) would like to offer the followings comments and proposed changes to the current draft amendment of GR 31. WACDL has always been a strong voice for protecting the constitutional rights of criminal defendants WACDL and its members have also been strong advocates for open access of government records, believing open access fits hand in glove with ensuring a just and fair process. But WACDL believes the current case law and the PRA do not adequately address the interplay between the defendant's right to a fair trial and the public's right to open records. WACDL believes the current version of GR 31 similarly fails to strike a proper balance between these two important governmental interests and fails to give the clerks and trial judges the proper guidance.

WACDL's first concern in the proposed amendment arises from §(f)(1)(B)(6) which exempts from disclosure information revealed by defense counsel concerning matters such as expert funding requests and reports received by experts. The subsection exempts this information from disclosure "but only during the pendency of the case." As a practical reality that information is only in the hands of a judicial agency by virtue of a client's indigency. Unlike clients with financial means, indigent clients must disclose this information as a precondition for receiving sufficient funding for experts and services that are a fundamental component of constitutionally sufficient representation. To the extent the required factual support is based upon information provided directly from a client, that information may also be protected by the Fifth Amendment. In a case involving retained counsel, this information would also plainly be covered by the work-product exemption, the attorney-client privilege, and perhaps a host of other constitutional and statutory privileges. As a practical matter, no one would think to compel disclosure of such information from the client or his counsel. So too, such information would have similar protection in the file of a prosecutor or state attorney on the other side of the litigation. And for both retained counsel and the state attorney those protections would endure indefinitely as the work-product privilege continues beyond the completion of the litigation. But, as the rule is now written, in a case involving

appointed counsel any exemption from disclosure would expire with the end of the litigation.

Further, while other litigants may disclose sensitive personal or privileged information to a judicial agency as a litigation strategy, and may even harbor some hope that it will remain sealed, indigent litigants are alone in that they must disclose such information in order to receive the representation to which they are constitutionally entitled. As an example of this problem, an appointed attorney representing a defendant in a criminal matter may disclose sexual abuse suffered by the client as justification for funding of an expert to discuss with the attorney the possible link between the abuse and adult criminal behavior. Regardless of whether that information is ever revealed in court or provided to the prosecution, once the case is closed, following, for example an acquittal, that information will be made public under the current draft of the rule. Under the proposed rule, this litigant must choose between the effective assistance of counsel and the desire to protect highly sensitive personal information about herself. If that client were able to afford retained counsel and experts that information would only become public if the client decided to reveal it as a part of her litigation strategy, it would otherwise never be open to public view. Thus, unlike an indigent client, a client with financial means will never be forced to decide between allowing her attorney to fully prepare for litigation and maintaining the privacy of sensitive information.

To ensure indigent litigants are treated the same as litigants with means, WACDL proposes elimination of the words "but only during the pendency of the case" from §(f)(1)(B)(6).

WACDL's second concern is that the definition of "judicial agency" might be interpreted to include an agency or attorney appointed to represent a client in cases in which appointment of counsel is constitutionally or statutorily required. Specifically, the definition provided in §(c)(1) includes both "The Office of Public Defense" and "all other judicial entities overseen by a court." Public defense in Washington is delivered in one of three ways. The first means is by attorneys employed by a municipal or county public defense agency. The second method relies on attorneys or agencies that contract with a municipal, county, or state public defense agency to provide client representation. The third alternative is a combination of the two.

WACDL recognizes that where an attorney is retained by a government agency to represent that agency, the Public Records Act applies to that portion of the attorney's file which is not exempt from disclosure pursuant to some other exception. While they are appointed and paid by the government, public defenders are not like an attorney retained by a government agency to represent that agency. Public defenders are unique in that they are appointed by the government to represent an individual whom the government wishes to criminally sanction, or otherwise impede a constitutional right. Because public defenders do not act on the government's behalf they should not be viewed the same as an attorney who does.

Under a broad interpretation of "judicial agency" which includes some or all public defenders, individual client files may be subject to disclosure under the proposed rule. This is because while §(f)(1) of the proposed rule makes clear that exemptions applicable under the Public Records Act would apply to "administrative files" there is no similar provision in the rule to apply those exemptions to "case records." If a public defender office which provides direct representation of a client, or an individual attorney, is deemed a judicial agency it is not clear whether the attorney's case file is an "administrative file" as opposed to a "case record." If it is the latter, allowing public access to client case files, even after litigation has ended, grossly intrudes upon the attorney-client relationship.

With these concerns in mind, WACDL requests the following three changes in the proposed rule.

WACDL requests a clarification in §(c)(1) defining "judicial agencies" to provide:

The definition of "judicial agency" does not include an attorney or agency appointed by a judicial agency to provide representation to an individual in accordance with the State or a municipality's obligation to provide counsel to a litigant under the Sixth Amendment of the United States Constitution, 14th Amendment of the United States Constitution, Article I, § 22 of the Washington Constitution; RCW 10.73.150, RCW 10.101, RCW 13.32A, RCW 13.34, RCW 13.40, RCW 71.05, RCW 71.09, or any other proceeding in which the right to appointment of counsel attaches as a constitutional or a statutory mandate.

WACDL requests similar language be added to §(d)(2) regarding the definition of "administrative record" to provide:

The definition of "administrative record" does not include any files, materials, information, and/or records that are maintained by or in the possession of an attorney or agency appointed by a judicial agency to provide representation to an individual in accordance with the State or a municipality's obligation to provide counsel to a litigant under the Sixth Amendment of the United States Constitution, 14th Amendment of the United States Constitution, Article I, § 22 of the Washington Constitution; RCW 10.73.150, RCW 10.101, RCW 13.32A, RCW 13.34, RCW 13.40, RCW 71.05, RCW 71.09, or any other proceeding in which the right to appointment of counsel attaches as a constitutional or a statutory mandate, relating to the representation of a client.

WACDL requests the definition of "case record" in §(d)(4) include the following

The definition of "case record" does not include any files, materials, information, and/or records that are maintained by or in the possession of an attorney or agency appointed by a judicial agency to provide representation to an individual in accordance with the State or a municipality's obligation to provide counsel to a litigant under the Sixth Amendment of the United States Constitution, 14th Amendment of the United States Constitution, Article I, § 22 of the Washington Constitution; RCW 10.73.150, RCW 10.101, RCW 13.32A, RCW 13.34, RCW 13.40, RCW 71.05, RCW 71.09, or any other proceeding in which the right to appointment of counsel attaches as a constitutional or a statutory mandate, relating to the representation of a client.

WACDL appreciates the opportunity to comment on the proposed amendment. Please feel free to contact us if we can provide any additional comments or information to assist the workgroup in its task. We have members available who would be happy to meet with the workgroup:



To: Board of Judicial Administration
Date: January 6, 2011
Re: Prisoner requests for records

The American Civil Liberties Union of Washington (ACLU) welcomes this opportunity to comment on the SCJA proposal to exclude prisoners¹ from the proposed rule regarding access to administrative records. 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, including the right of access to public records. It is only through access to public records that Washingtonians can adequately oversee the conduct of government operations. The ACLU has participated 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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The ACLU understands that SCJA's proposal is motivated by a legitimate concern that some individuals will warp the proposed rule on access for their own improper purposes, rather than the legitimate purpose of public oversight of government operations—just as some individuals warp the Public Records Act. We fear, however, that the proposed categorical exclusion of prisoners from the rule both fails to solve the problem and unfairly limits legitimate requests.

First, we do not believe that it makes sense to single out prisoners. A long-standing principle of the Public Records Act is that "agencies shall not distinguish among persons requesting records." RCW 42.56.080. This principle should apply equally to the proposed court rule. Judicial agencies should not be able to pick and choose among requesters, making judgments based on the status of those requesters, rather than on the merits of the request itself. The ACLU also believes that there are practical difficulties in making the proposed distinction between incarcerated and unincarcerated individuals; what happens if a records request is pending at the time an individual is released from custody, or at the time of conviction?

The problem SCJA is attempting to solve has nothing to do with the *status* of those who make improper records requests; it has to do with their *conduct*. Malicious and harassing records requests can be made by unincarcerated individuals as well as incarcerated ones, and this rule should be written to curtail the practice by anybody, not just those in custody. It also seems likely that fewer problematic requests will be made under the proposed rule than are made under the PRA; unlike the PRA, the rule

¹ The original SCJA proposal goes far beyond prisoners to encompass all those who have not had their civil rights restored, regardless of whether they are currently incarcerated. We understand, however, from the December BJA meeting that only the exclusion of current prisoners is still under consideration.

does not provide for penalties for improper withholding, so there is no “jackpot” incentive for filing numerous requests in the hopes one will be improperly denied.

Second, the proposal appears to presume that all records requests by prisoners are improper. The reality is much different. Many prisoners have legitimately used the PRA, as has been recognized in lawsuits over the years. *See, e.g., Prison Legal News v. Dep't of Corr.*, 154 Wn.2d 628, 115 P.3d 316 (2005) (request for information related to medical treatment of prisoners). The fundamental purpose of access to public records is to enable public oversight of governmental conduct—and misconduct. Prisoners, just like other members of the public, have a legitimate interest in learning about specific instances of misconduct by public officials. Indeed, only full disclosure of public records can assure adequate public oversight of the treatment of a vulnerable and oft-hidden population.

The ACLU therefore respectfully urges the Board of Judicial Administration to reject SCJA’s proposal to exclude prisoners from the scope of the proposed rule providing public access to judicial administrative records.

Sincerely,

A handwritten signature in cursive script that reads "Doug Klunder". The signature is written in black ink and is positioned above the typed name and title.

Doug Klunder
Privacy Counsel