

Faulk, Camilla

From: Richard Pope [rp98007@gmail.com]
Sent: Sunday, April 29, 2012 5:35 PM
To: Faulk, Camilla
Cc: Richard Pope
Subject: Comments on Proposed GR 12.4, Public Records Access for Washington State Bar Association
Attachments: Crossland2.pdf

Back on November 30, 2011, I previously submitted comments on proposed GR 31A, which included comments on proposed GR 12.4. Since the two proposed rules are interrelated, I am appending a copy of my prior GR 31A comments, so that these can be incorporated by reference.

Also, on February 6, 2012, I gave public testimony before the Supreme Court at a public rulemaking hearing on proposed GR 31A. During my remarks, I also commented on proposed GR 12.4. I would reiterate those remarks as well, including my belief that the best way to deal with records in the judicial branch would be to amend the Washington Public Records Act, Chapter 42.56 RCW, so that all judicial branch records -- including those of the Washington State Bar Association -- are covered under the PRA, as opposed to court rulemaking which will give the public far less records access rights and procedural review rights.

Looking at the text of proposed GR 12.4, and trying to address matters in sequential order, I would make the following comments:

First, proposed GR 12.4(b) purports to have the WSBA control the public records access and procedure for "boards and committees under GR 12.2 administered by the Bar". However, these boards and committees are established by Supreme Court rules or orders, and anything in these Supreme Court rules or orders should control, to the exclusion of any WSBA powers. For example, the Practice of Law Board is appointed by the Supreme Court and established under GR 25. However, the Practice of Law Board already has regulations which have been approved by the Supreme Court under GR 25. Regulation 3.R grants the general public considerable public records access rights (and also makes meetings open to the public), while the WSBA now wants to minimize these same rights (previously approved by the Supreme Court) under proposed GR 12.4.

Second, there are a lot of proposed exemptions to public records access under proposed GR 12.4(d) which go far beyond anything currently provided to executive or legislative agencies under Chapter 42.56 RCW or have been proposed for other judicial agencies under GR 31A. There is no logical reason, or sound public policy reason, to make the WSBA more secretive or less accountable than any other public agency in the State of Washington. Lawyers are not the only people interested in or impacted by the WSBA. The general public should have the same interest in and rights to access the public records of the WSBA (which licenses and regulates lawyers), as they currently have to those of the Department of Health (which regulates physicians and other health care providers) or the Department of License (which licenses real estate agents, notaries, and many other professionals), for example.

Proposed GR 12.4(d)(2)(s), concerning the Practice of Law Board, expressly conflicts with Regulation 3.R adopted by the Practice of Law Board and approved by the Supreme Court, and purports to considerably narrow public records access rights to the Practice of Law Board. Interestingly enough, Article XIV.B.5.q of the WSBA By-Laws, which currently governs WSBA public records access rights, purports to totally prohibit public records access to the Practice of Law Board, even though the Supreme Court has mandated broad public records access rights under Regulation 3.R. I would suggest totally eliminating proposed GR 12.4(d)(2)(s), so that there is no doubt that Regulation 3.R governs public records access (and open public meetings) of the Practice of Law Board.

Proposed GR 12.4(d)(2)(aa) would totally prohibit public records access to any records relating to WSBA personnel, except for job classification, length of employment, and the salary of the Executive Director (with all other salaries remaining confidential). This is an extremely broad exemption, which no other public agency in Washington possesses. Why shouldn't lawyers and the general public be able to know the salary of any public employee, or what expenses have been claimed by the employee? Also, the WSBA spends considerable money each year on outside counsel and other contract employees or contract services. Since the proposed rule covers "contract" employees, presumably such information would be totally excluded from public access.

Another commenter on the current proposed rule, John Jay, stated that WSBA employees recently traveled to places such as Cuba, Vietnam, and Australia. However, Mr. Jay was apparently unable to get any information regarding whether these employees were traveling on WSBA-paid time, or what travel expenses were paid by the WSBA, due to a similar rule restricting public records access in the existing WSBA By-Laws.

On a website maintained by proponents of the recently successful WSBA referendum to reduce licensing fees from \$450 to \$325, I found a heavily redacted WSBA public records response regarding travel expenses by WSBA President Stephen R. Crossland. The WSBA redactions kept one of Mr. Crossland's WSBA-paid travel destinations completely secret and exempt from public disclosure -- saying that the general public had no right to know where the WSBA paid its President to travel to, or why the WSBA paid for this travel. Moreover, the WSBA decided to keep the cost of Mr. Crossland's WSBA-paid meals and lodging totally secret, even for the one travel destination that the WSBA granted public disclosure for. I have attached a copy of the WSBA public disclosure response to these comments, and the referendum proponents maintain this document at:

<http://www.legalez.com/Crossland2.pdf>

In the recent WSBA referendum, Washington lawyers were apparently so outraged at the secret expenses that the WSBA refuses to publicly disclose, that they voted 52% to make a substantial reduction in licensing fees -- despite the dire warnings given that valuable services of the WSBA would have to be cut as a result. Presumably, a lot of the 48% of lawyers who opposed the referendum would also support greater public records access -- especially since the licensing fees reduction could result in the WSBA eliminating programs beneficial to its members and the general public, and would not mandate any increased public records access to the WSBA, or prevent the WSBA from secretly spending its funds for questionable purposes without public accountability.

Public disclosure is essential for public accountability and honesty. There are some specialized functions of the WSBA that may require special exemptions -- such as those which currently apply to disciplinary and related matters. But when it comes to general financial records, employee records, expense records, and outside services contracts -- the WSBA should have the same public records access as any other public agency. I would suggest that proposed GR 12.4(d)(2)(aa) be rejected in its entirety. There is no need for this special and unique exemption for the WSBA. The other proposed exemptions -- many of which do actually mirror the Public Records Act (such as proposed GR 12.4(d)(2)(a), exempting disclosure of information that would violate privacy rights) are quite sufficient to protect legitimate privacy and public policy interests.

I also think that the general public should have at least a little more public information about lawyers, than what is currently available. For example, under proposed GR 12.4(d)(2)(1), the general public also should be able to know the institution and date that a lawyer obtained their law degree (and other degrees for that matter), other jurisdictions where the lawyer has been licensed, and discipline imposed in other jurisdictions (not just Washington).

One thing I did note, looking at the comments of W.L. Jones (a non-lawyer member of the general public), is how disciplinary records of lawyers are subject to much less public disclosure than those of all other licensed

professions. Complaints against lawyers that do not result in discipline are not subject to public disclosure, and are generally destroyed after three years. If a public disciplinary charge is filed against a lawyer, that becomes public, but only a portion of the WSBA files are subject to public disclosure (as opposed to the entire WSBA files).

By contrast, complaints against health care professionals are retained permanently, and are subject to public disclosure even if dismissed. For example, a person can call the Washington Department of Health and they will provide a summary of the dates and general subject matter of dismissed complaints against a health care professional over the telephone. And DOH will provide the entire file (with considerable privacy redactions) on public disclosure, even for dismissed complaints. The Department of Licensing keeps dismissed complaints against real estate brokers and other professionals licensed by DOL for at least six years, and will provide public records disclosure of both dismissed and disciplined complaints. Also, DOH and DOL will provide public disclosure of all professional license applications (including persons denied a license), while the WSBA will not disclose license applications (for both admitted lawyers and denied applicants) or even anything that would reveal whether someone was ever denied a law license.

These topics may be beyond the topic of the current debate over proposed GR 12.4, but it is interesting that all lawyer license application records and most lawyer complaint records (unless discipline is actually imposed) are completely exempt from public disclosure, while similar records for all other licensed professionals, including all applications (even for those persons denied licenses) and all complaints (including those dismissed without discipline) are completely subject to public disclosure (with certain privacy redactions in appropriate cases).

Finally, proposed GR 12.4(h) does not provide for effective review of denials of requests for WSBA records. While every executive and legislative agency under Chapter 42.56 RCW is presently subject to judicial review by both a trial and appellate court of public records decisions, and the proposed GR 31A would make every other part of the judicial branch subject to trial and appellate court review of public records decisions, proposed GR 12.4(h) seems to completely insulate the WSBA from any judicial review of public records denials.

At the present time, Article XIV.B.7 of the WSBA By-Laws provides that the decision of the WSBA Executive Director on a public records denial is subject to appeal to the WSBA Board of Governors. Presumably, a decision of the WSBA Board of Governors would be subject to superior court review (and subsequent appellate court review) under the writ of certiorari process, which is available for the review of all governmental agency decisions that are not subject to a specific statutory review procedure (such as the Public Records Act, or Administrative Procedures Act, for example).

Instead, proposed GR 12.4(h) strips away all meaningful review of the WSBA Executive Director's decision. The WSBA Board of Governors is totally stripped of its current role in reviewing public records decisions. The possibility of judicial review in an orderly process is instead replaced with review by the Chief Justice of the Supreme Court. There are no procedural or substantive standards specified in GR 12.4(h) as to how the Chief Justice would conduct this review, or any indication whether the Chief Justice would be doing so in her judicial or administrative capacity. There is no indication as to whether judicial review of the Chief Justice's decision would be available, or to what forum such review would be presented (i.e. the superior court, or the Supreme Court en banc).

Moreover, the Chief Justice, acting alone, lacks subject matter jurisdiction to do anything whatsoever -- at least not in a judicial capacity. Among other things, Article IV, Section 2 of the Washington Constitution provides that "a majority of [the Supreme Court justices] shall be necessary to form a quorum, and pronounce a decision". This constitutional provision cannot be altered by court rule to allow the Chief Justice to act alone under any circumstances.

I would propose two changes to reviews of the WSBA Executive Director's decision on public records requests:

(1) The Executive Director's decision should be subject to an internal appeal to the WSBA Board of Governors, just as is presently provided in Article XIV.B.7 of the WSBA By-Laws. This is similar to the internal review of the public records officer response for other judicial agencies under proposed GR 31A(e)(3)(B)(3).

(2) The WSBA Board of Governors decision should be subject to superior court judicial review, in the same manner that final decisions of other judicial agencies would be subject to superior court judicial review under proposed GR 31A(e)(3)(B)(5) and attorney fees under proposed proposed GR 31A(e)(3)(B)(6).

Sincerely,

Richard Pope
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On Wed, Nov 30, 2011 at 4:53 PM, Richard Pope <rp98007@gmail.com> wrote:
First of all, the numbering system within the proposed rule is unwieldy -- especially in GR 31A(e), entitled "Administrative Records". As it is, one has to go through several layers of subsections, sub-subsections, and sub-sub-subsections, etc., to get to the operative rules. For example, the procedure for reviewing a Public Records Officer response starts out at GR 31A(e)(3)(B) and then has as many as two more sublevels -- for example GR 31A(e)(3)(B)(5)(i) describes the procedure for review in Superior Court and GR 31A(e)(3)(B)(6)(i) deals with an award of attorney fees to the requesting party.

I would propose breaking subsection GR 31A(e) down into three different subsections, as follows:

(1) **GR 31A(e) -- Administrative Records—Right of Access.** This sub-section would contain everything in proposed sub-subsections GR 31A(e)(1) and GR 31A(e)(2)

(2) **GR 31A(f) -- Administrative Records—Procedures for Records Requests.** This sub-section would contain everything in proposed sub-sub-subsection GR 31A(e)(3)(A)

(3) **GR 31A(g) -- Administrative Records—Review of Public Records Officer's Response.** This sub-section would contain everything in proposed sub-sub-subsection GR 31A(e)(3)(B)

Then proposed subsections GR 31A(f) to GR 31A(i) can be renumbered to GR 31A(h) to GR 31A(k).

This way, the superior court review procedure would fall under GR 31A(g)(5)(A), instead of GR 31A(e)(3)(B)(5)(i), saving two levels of sub-organization, and making for much easier citations. Likewise, the attorney fee provision would fall under GR 31A(g)(6)(A), instead of GR 31A(e)(3)(B)(6)(i). As a result, GR 31A will be much easier to read, as well as make citations to.

Second, I would abolish the exemption for the Washington State Bar Association contained in proposed GR 31A(c)(3). This makes reference to a supposed GR 12.4, which does not presently exist. There was a proposed GR 12.4 that was published in November 2011, with a comment period expiring on April 30, 2012. Adopting proposed GR 31A(c)(3) would make no sense, unless GR 12.4 was adopted at the same time (or before).

I will submit comments on GR 12.4 during the April 30, 2012 expiration time frame, but I am strongly opposed to that rule. Among other things, the existing definition of public records contained in Article XIV of the WSBA By-Laws makes more sense and is much more oriented towards public disclosure of WSBA records,

that what the Supreme Court has proposed in GR 12.4. In addition, the procedure for WSBA Board of Governors review in Article XIV of the WSBA By-Laws should be retained, instead of being abolished as proposed by the Supreme Court in GR 12.4. It would be appropriate to add the superior court review procedure in proposed GR 31A(e)(3) for review of WSBA Board of Governors decisions under Article XIV of the WSBA By-Laws. The review by the Chief Justice (only) in proposed GR 12.4 seems to be, frankly, patently ridiculous. There are neither procedural nor substantive guidelines for the Chief Justice to conduct review of the WSBA Executive Director's decision. Moreover, the Chief Justice, acting alone, lacks subject matter jurisdiction to do anything whatsoever. Among other things, Article IV, Section 2 of the Washington Constitution provides that "a majority of [the Supreme Court justices] shall be necessary to form a quorum, and pronounce a decision". This constitutional provision cannot be altered by court rule to allow the Chief Justice to act alone under any circumstances.

In any event, regardless of whether a special rule is adopted for the WSBA, the Supreme Court should preserve everything currently contained in Article XIV of the WSBA By-Laws regarding public records. Article XIV was duly approved by the WSBA Board of Governors, a body elected by the active membership of the WSBA. The WSBA Board of Governors is responsible to the lawyers of Washington in general, and influenced by further application of initiative, referendum and recall procedures in the WSBA By-Laws. The Supreme Court should not disturb the decisions made by the WSBA regarding public records and access, absent compelling reasons. If the WSBA was making access to public records too restrictive, or review of public records decisions too ineffective, then the Supreme Court would be justified in intervening. Instead, in proposing GR 12.4, the Supreme Court wishes to greatly narrow the access of public records of the WSBA to considerably less than what Washington attorneys have already decided through WSBA democratic processes, and moreover, the Supreme Court wishes to basically emasculate review of the WSBA Executive Director's decisions on public records, by entirely eliminating review the WSBA Board of Governors (the body elected by Washington attorneys), foreclosing any review of a WSBA decision in a normal adversary proceeding in superior court, and instead substituting a novel, mysterious, arbitrary, and constitutionally defective (for many reasons) process conducted by the Chief Justice alone.

Third, the exemption in proposed GR 31A(c)(4) for the Certified Professional Guardian Board should be eliminated. There is nothing of either substance or procedure in existing GR 23 that defines either the public records maintained by the Certified Professional Guardian Board, the procedures to obtain access to these, or the procedures to review public records decisions. There is no logical reason why the policies and procedures generally applicable in proposed GR 31A should not cover the Certified Professional Guardian Board as well.

Sincerely,

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2011
Expense Report



WSBA

Washington State Bar Association
1325 4th Avenue, Suite 600
Seattle WA 98101-2539
A/P desk 206-727-8274

To expedite your reimbursement, mail this form directly to your staff liaison at the WSBA. Liaison Name: Margaret Shane

Make check payable to: Stephen R. Crossland
Address: P.O. Box 566, Cashmere WA 98815

Signature: *[Signature]* Date: 5/5/11
Signature printed: Stephen R Crossland Bar #: 5083

Check here if this is a new address from prior expense reports

Business phone: 509-782-4418
E-mail address: steve@crosslandlaw.net
(Only used to contact you if there are questions concerning this request.)

*Original, signed expense report required.
See reverse side for summary of WSBA Expense Policies.*

| Meeting Date(s): | | | | | | 3/20-4/3 | | | | Category Totals |
|---|--|--|-------|-----------|-------|-------------|-------|-------|--------|-----------------|
| Board/Committee/Section/Event | | | | | | Week on San | | | | |
| Meeting Location (required) | | | | | | Ma. | | | | |
| Transportation | Auto Mileage Total (\$ 0.510 per mile) | | miles | 360 miles | miles | miles | miles | miles | | |
| | Ground Transportation, Parking, Tolls Receipt required if over \$25* | | | 183.60 | | | | | | |
| | Air (coach/economy only) Detailed receipt required* | | | 84.80 | | | | | | |
| | | | | 200.16 | | | | | 205.04 | |
| Lodging (up to \$150/night [\$180 in Seattle] + tax) Detailed receipt required* | | | | | | | | | | |
| Meals: Detailed receipts required. Otherwise, the federal per diem rate for the meeting location may apply. * | | | | | | | | | | |
| Breakfast (up to \$14 w/ receipt) | | | | | | | | | | |
| Lunch (up to \$20 w/ receipt) | | | | | | | | | | |
| Dinner (up to \$30 w/ receipt) | | | | | | | | | | |
| Other Expenses (itemize): | | | | | | | | | | |
| Totals | | | | | | | | | | |

* Original receipts required if available. Copies accepted if originals are not available.

Submitted by: *[Signature]* For WSBA Use Only Date: 05-12-11 V463

Approved by: *[Signature]* Date: 5/13/11 Rush Approval:

| Account Name | Account # | Dept. | Job Code | Amount |
|--------------|------------|------------|------------|---------------|
| [Redacted] | [Redacted] | [Redacted] | [Redacted] | \$ [Redacted] |
| [Redacted] | [Redacted] | [Redacted] | [Redacted] | \$ [Redacted] |
| [Redacted] | [Redacted] | [Redacted] | [Redacted] | \$ [Redacted] |

Vendor # [Redacted] Date Rec'd in AP: REC'D MAY 18 2011 To: [Redacted]