WASHINGTON COURTS

District and Municipal Court Judges' Association

November 30, 2012

Honorable Charles Johnson
Washington State Supreme Court
PO Box 41174
Olympia, WA 98504-1174

Dear Justice Johnson:

RE: Comments on Supreme Court's Proposed General Rule 31.1

Background

Work on a proposed rule regarding access to court administrative records began several years ago with a Board for Judicial Administration [BJA] work group chaired by Judge Appelwick of the Court of Appeals. That work group, which included representatives from the judiciary, a person with expertise on Washington's Public Records Act [PRA], judicial agency representatives and the media, developed a draft rule, GR 31A. The work group's product was extensively deliberated before the BJA. The BJA made numerous revisions to the proposed rule and that product, GR 31A, was submitted to the Supreme Court's Rules Committee in spring 2011.

The District and Municipal Court Judges Association's [DMCJA] initial comment letter on GR 31A, attached to this memorandum, supported the proposed rule but requested the Supreme Court amend GR 31, Access to Court Records, to clarify that certain records created by judges do not fall within the definition of court records or court administrative records. When the Supreme Court issued its proposed revisions to GR 31A, now enumerated as GR 31.1, it indicated that any amendments to GR 31 would follow the adoption of GR 31.1. The DMCJA urges the Supreme Court to adopt its previously recommended amendment to GR 31 and offers the following comments and recommendations on proposed GR 31.1.

DMCJA Comments and Recommendations on Proposed GR 31.1

The DMCJA recognizes and supports the overarching goal of providing clarity as to what constitutes court administrative records and which records are open to public view and which records are exempt from public view. DMCJA also supports the goal of establishing a procedure for all Washington courts to utilize when responding to requests for court administrative records. The

Supreme Court's revisions to proposed GR 31.1 include both organizational and substantive changes to GR 31A. Several of the proposed revisions raise concerns for the DMCJA.

A. The "Bad Faith Decisions" Section Should Be Deleted

The DMCJA is particularly concerned about the new section (f), "Bad Faith Decisions," and strongly recommends this section be deleted from proposed GR 31.1. This new section provides:

> **(f) Bad Faith Decisions.** Records decisions made in bad faith are grounds for discipline.
>
> (1) If the decision maker is a judge, sanctions may be imposed by the Commission on Judicial Conduct for violations of the Code of Judicial Conduct;
>
> (2) If the decision maker is an attorney, other than a judge, sanctions may be imposed by the Washington State Bar Association for violations of the Rules of Professional Conduct;
>
> (3) If the decision maker is a judicial employee, sanctions may be imposed through personnel actions.

The DMCJA believes that the Supreme Court may have included this new section because the Court deleted the previous section allowing for the recovery of attorneys fees in a civil action seeking disclosure of court administrative records. The Supreme Court indicated in its publication comments to GR 31.1 that it concluded that "separation of powers" precluded it from establishing a cause of action for attorneys' fees. The attorneys' fees provision of GR 31A had been included to provide some remedy to a successful appellant where *a reviewing court* [emphasis supplied] found a court or judicial agency wrongfully withheld court administrative records. The PRA provides for the recovery of a daily penalty when records are unlawfully withheld. The work group and the BJA did not support a penalty provision.

The concept of "bad faith decisions" under the PRA has been limited. "Bad faith" is only mentioned once in the PRA, in the context of requests made by incarcerated persons. (Such persons may not receive PRA penalties unless the reviewing court determines the agency acted in bad faith in denying the request.) In interpreting the penalty provisions of the PRA, courts have determined that the presence or absence of bad faith is a factor to consider when setting the penalty amount for a PRA violation. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 460, 229 P.3d 735 (2010); *see also Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wash.2d 702, 717, 261 P.3d 119 (2011).

Proposed GR 31.1 includes an internal and external administrative review process. If an aggrieved records seeker wants to skip the external administrative review, he or she may seek review through the court. The revisions to the rule suggest that judicial review would be via some type of writ. GR 31.1(d). The new "Bad Faith Decisions" section essentially suggests to persons who feel aggrieved by a court or agency's decision that they can also file a complaint with the Commission on Judicial Conduct (CJC), the Washington State Bar Association, or request that the employee

who made the decision be subject to discipline. The proposed rule fails to provide a definition of bad faith decisions, nor does it indicate which Canon(s) of Judicial Conduct are potentially implicated by this type of judicial administrative decision. The lack of a definition of "bad faith" makes the application of this provision very difficult. Under the proposed rule, the CJC would be substituted for a reviewing court in administrative records decisions, a significant expansion of its role.

CJC decisions over the past ten years reveal that the Commission has considered just four cases of alleged judicial misconduct arising from administrative conduct, i.e., conduct outside of a case but which involved court operations. Three of the cases involved inappropriate behavior with court staff and the other case involved falsifying paperwork. None of these decisions discussed a "bad faith" standard.

The DMCJA thinks it is helpful to provide for an administrative review process for administrative records requests, but has serious concerns about the structure of the external administrative review process. Judges do not have immunity when acting in an administrative capacity and are potentially personally liable for these decisions. Given the "Bad Faith Decisions" provision, it's unlikely other courts will want to assist in an external administrative review process.

The administrative appeal provisions of (d)(4)(ii) provide that in certain instances the "outside review shall be conducted by a visiting judicial officer." The inclusion of the "Bad Faith Decisions" section creates a disincentive for judges from another court to conduct these administrative appeals. If the deciding court is unable to obtain the cooperation of another reviewing court, this administrative appeal option cannot be fulfilled. The consequences of this happening are unanticipated in the proposed rule.

B. Additional Exemptions Should Be Included in GR 31.1

During the DMCJA's review of the proposed revisions to GR 31.1 and its review of ARLJ 9 [Disclosure of Records in Courts of Limited Jurisdiction], it was discovered that there are several types of records that contain personal private information that are not "court records" and would probably fall within the definition of "court administrative record". Those records include probation files and financial records associated with a criminal or infraction case.

While a probation officer may submit occasional probation reports to the court that become part of the court record, most probation records are maintained separately in the probation office. These records contain personal private information of a sensitive nature, counseling notes, evaluations and compliance reports. These probation records are similar to the social file for juvenile cases. Proposed GR31.1(1)(10) contains an exemption for juvenile court probation social files. The DMCJA recommends a similar exemption be included for adult probation files.

Courts of limited jurisdiction are involved in the collection of monetary penalties for infraction and criminal cases. Due to statutory changes, the complexity of the collection process has expanded over the years. While some CLJ courts still conduct the collection process internally, many courts contract with outside vendors to handle payment plans and collections. These payment and collection records contain personal and financial information about individuals. These records

probably fall within the classification of "court administrative records." Due to the personal and financial information contained within these records, the DMCJA recommends an exemption be included for these types of records.

C. Other Changes Would Enhance the Clarity of the Proposed Rule

The DMCJA has the following additional comments and recommendations:

1. The DMCJA recommends that the definitions section currently in section (i) be moved to the beginning of the rule so the key definitions are more easily understood as one reads the rule. The Supreme Court's revision places the definitions at the end of the rule. Most court rules and statutes provide the definitions at the beginning. Placing the definitions at the end of the rule makes it difficult for the reader.

2. The definition of "Chambers Records" is still somewhat ambiguous as it does not address the reality of how Courts of Limited Jurisdiction operate. Judges in smaller courts often lack "chambers staff". Judges in larger district courts may share information but not the same physical location. Further clarification of this definition would be helpful.

3. The terms "judicial agency" and "judicial entity" are both used in the rule but it is unclear whether they are intended to have the same meaning. For example, the first sentence of section (j) refers to "court and judicial agency administrative records." Does this include judicial "entity" records? The use of the terms is sometimes confusing.

4. The DMCJA recommends amending the last sentence of section (j), Administrative Records – General Right of Access, so the court "may" (rather than "shall") delete identifying details in court records, to be consistent with the comment and GR 31. If the rule remains "shall delete" and the court failed to delete these identifying details and allowed public review, would that be a "bad faith decision"?

5. With regard to section (d), Review of Records Decisions, the DMCJA recommends:

    a. Shortening the time period set forth in section (d)(2) within which administrative review can be requested from 90 days to 30 days so requests may be resolved in a more timely manner.

    b. Clarifying the review process described in (d)(3), Internal Review Within Court or Agency. What is the standard of review? Is the "proceeding" supposed to be some type of hearing? What notice is required to interested parties? What is meant by the proceeding shall be "informal and summary"?

    c. Subsection (d)(4)(ii), Administrative Review by Visiting Judge or Other Outside Decision Maker, refers to a "judicial agency that is directly reportable to a court." Which agencies are included in this definition?

6. The scope of certain exemptions under section (l), Exemptions, needs clarification:

    a. Are all "deliberative process" records under subsection (l)(3) open to public review after a final decision is made? The comment suggests so, but the language of subsection (a)(3) states: "Preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended are exempt under this rule, *except that a specific record is not exempt when publicly cited by a court or agency in connection with any court or agency action.*" If the court or agency did not cite a preliminary draft, note, recommendation or report, does the material retain its exempt status?

    b. Is "financial information" under subsection (l)(5) open to public access or is access restricted? The reference to the PRA in the comment is confusing, especially given the exemptions that are provided in subsections (l)(8)-(10).

    c. Subsections (l)(8)-(10) list exemptions for: "Family court evaluation and domestic violence files when no action is legally pending"; "Family court mediation files"; and "Juvenile court probation social files". The inclusion of these records, some of which may be court records and some of which have a statutory exemption, confuses the definition of an administrative court record. The comment to (l)(5) further confuses the exemptions because it references financial information already addressed in the PRA's exemptions.

        Subsection (l)(8) lists an exemption for "[f]amily court evaluation and domestic violence files when no action is legally pending". What does "legally pending" mean? Are these records subject to public review under GR 31.1 if an action is legally pending or does access to these court records fall within GR 31 or GR 22? Are "domestic violence files" only those associated with family court?

Summary

Proposed GR 31.1 may help clarify access to administrative records in some regards but creates confusion in others. The Bad Faith Decisions section in particular creates uncertainty for judges and a new realm for CJC review and potential discipline for judicial administrative decisions. It will likely have a chilling effect on administrative review and diminish the likelihood that other courts or judges will volunteer to assist with external administrative review. The DMCJA strongly recommends that this section be deleted from the proposed rule.

The DMCJA recommends the rule include two additional exemptions: probation files and financial records associated with the payment of court-imposed financial obligations. These types of records contain personal and often sensitive private information concerning individuals.

The proposed rule contemplates that courts and judicial agencies will develop policies implementing GR 31.1 and procedures for accepting and responding to administrative records

requests. It is likely that the adoption of GR 31.1 will create greater interest in public access to court administrative records. After the rule is adopted, courts and judicial agencies will need sufficient time and resources to implement the rule's requirements.

Sincerely,

Sara B. Derr, Judge
President, DMCJA Board

Enclosures:

- November 9, 2011, DMCJA comment letter on GR 31A (proposed revision to GR 31)
- DMCJA recommended revision to GR 31.1 exemptions

cc: Judge Janet Garrow, Chair, DMCJA Rules Committee
Shannon Hinchcliffe, AOC
Nan Sullins, AOC

WASHINGTON COURTS

District and Municipal Court Judges' Association

November 9, 2011

Honorable Charles W. Johnson, Chair
Supreme Court Rules Committee
Washington State Supreme Court
PO Box 40929
Olympia, WA 98504-0929

Dear Justice Johnson:

Re: Proposed Adoption of GR 31A, Access to Administrative Records
Proposed Amendments to GR 31, Court Records

The District and Municipal Court Judges' Association (DMCJA) Board has reviewed and discussed the Board for Judicial Administration's (BJA) proposed rule GR 31A, Access to Administrative Records, and the Judicial Information System Committee's suggested amendments to GR 31, Access to Court Records. The DMCJA acknowledges the extensive work that was conducted under the leadership of the BJA to develop proposed GR 31A. The DMCJA supports the underlying policy and purpose of access to court records and court administrative records as articulated in GR 31 and proposed GR 31A:

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

One of the key concerns of the DMCJA membership is the ability to preserve the integrity and privacy of a judge's work product related to judicial proceedings. To ensure that those types of materials are not subject to disclosure, the DMCJA has drafted an amendment to GR 31(c)(4), the definition of "court record". A copy of the proposed amendment is included with these comments. The DMCJA has specific concerns about the following items:

1. Definition of chambers records. While this definition may be more easily understood in the context of appellate and superior court, the DMCJA finds the definition ambiguous when applied to courts of limited jurisdiction. Proposed rule GR 31A governs "administrative records", yet the inclusion of the phrase "whether directly related to an official judicial proceeding" in the definition creates ambiguity.

2. Work product of judges. There was considerable discussion among the DMCJA members whether the draft work product of judges in courts of limited jurisdiction that is shared with judges outside the judge's chambers would be subject to disclosure. Sometimes a judge may want to share a draft decision with a judge in another court in order to receive feedback regarding the judge's analysis of legal issues. The "chambers record" definition does not appear to protect this type of work product if it is shared outside the judge's chambers. Moreover, the current definition of "court record" in GR 31 does not address this situation.

It seems the privacy of such records would be maintained and not be subject to disclosure if kept under chambers control within a judge's courthouse, or if shared with judges within the same courthouse [similar to appellate chambers sharing draft opinions with other appellate chambers]. There is a difference, however, in that judges in courts of limited jurisdiction do not typically co-author opinions or decisions within a courthouse. If a judge shared this draft information outside the judge's chambers it appears those materials would be subject to disclosure. This issue is of particular concern for judges in smaller courts who request assistance from judges in other courts.

There are times when a judge is in need of immediate information or an opinion regarding a legal issue and seeks assistance from other members of the DMCJA. Judges, especially those in smaller courts, utilize the ListServ to seek such information, comments, and legal analysis on cases they are handling. The DMCJA strongly believes it is important to clarify that those types of judicial materials and communications are not "chambers records" and are not "court records". The privacy of those judicial materials and communications should be protected from disclosure.

The DMCJA respectfully requests that the Supreme Court consider these comments and adopt its proposed amendment to GR 31(c)(4), the definition of "court record". The purpose of the amendment is to clearly indicate what is not considered a "court record". The amendment will achieve the purpose and policy of protecting the integrity of judicial decision-making and not unduly burden the business of the judiciary.

3. Training and Best Practices. The adoption of proposed GR 31A will generate a significant need for training of clerks, judges, and the public. While the rule contemplates best practices being adopted to assist the courts, it's unknown when those practices and the necessary training would occur in relationship to the effective date of the rule. Sufficient time for training prior to the effective date of the rule is very important.

We hope these comments are helpful to the Supreme Court as it reviews these rules. If you have any questions regarding these comments, please do not hesitate to contact me.

Sincerely,

Gregory J. Tripp

Judge Gregory J. Tripp
President DMCJA

Enclosure: Proposed Amendment to GR 31(c)(4)

cc: Judge Janet E. Garrow, Chair, DMCJA Rules Committee
DMCJA Board Members
Ms. Camilla Faulk, AOC
Mr. Jeff Hall, AOC
Ms. Shannon Hinchcliffe, AOC
Ms. Jennifer Krebs, AOC
Ms. Nan Sullins, AOC

N:\Programs & Organizations\DMCJA\Presidents Correspondence\11-12 Tripp\2011.11.08 Ltr Johnson GR 31A.doc

GR 31. ACCESS TO COURT RECORDS

(c) Definitions.

* * *

(4) Court Record

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

(B) Court record does not include any record or data maintained by or for a ~~judge~~ judicial officer pertaining to a particular case, party~~,~~ or judicial proceeding, ~~such as~~ including but not limited to: personal notes and communications, memoranda, drafts,~~or~~ working papers~~;~~, legal research, deliberative discussions among judicial officers, regardless of medium or court; or information gathered, maintained, or stored by a government agency or other entity to which the court has access but which is not entered into the record. Court record does not include "chamber records" as defined in GR 31A.

DMCJA Recommended Revision to GR 31.1 Exemptions:

1. Probation files for courts of limited jurisdiction.

2. Personal information associated with the court's collection of financial obligations.