

Foster, Denise

From: Donald Horowitz [don.horowitz@gmail.com]
Sent: Monday, December 31, 2012 12:58 PM
To: Foster, Denise
Cc: Johnson, Justice Charles W.
Subject: Comments by Donald J Horowitz Relative to Proposed General Rule 31.1
Attachments: GR 31.1 Draft as published by Supreme Court Rules Committee, with Don Horowitz suggestions 12-30-12.docx

To the Clerk of the Washington State Supreme Court.
Attention Denise Foster

The below comments and the attachment are submitted by me in my individual capacity. In addition, I have received authorization from Brian Rowe, current Chair of the Access to Justice Board's Technology Committee and Mike Katell, former Chair of that Committee, as am I, to advise those who read this message and material, that they join in the views and suggestions expressed, also in their individual capacities.

This submission is made with the intent of being a friend of the Court and its Rules Committee. We express no opinion relative to the other comments heretofore made, which we have read, except to say that many of them raise issues worthy of consideration.

The purpose of this message is to improve the draft as it was published, to make the rule as clear and effective as possible, address areas of potential confusion, lack of clarity, omissions, and such. This is a very important rule in a very important area; the rule should be as clear and as effective as possible both in substance and process. The attachment to this message uses the MS Word Tracking tool, and shows suggestions that we believe will improve the draft, and makes comments which we believe should be considered and addressed in any further drafts or in the rule as adopted.

I have considerable experience in the drafting of General Rules of this court, having participated in the drafting of the amendment of GR 15 and GR 22, the initial adoption and subsequent amendment of GR 31 and GR 33, and the initial adoption of GR 34.

Without going into each suggestion or comment, there are a few general comments I would make relative to the suggestions and comments in the attachment.

At various points in the proposed rule, the concept of personal and institutional safety or security is mentioned - and very properly so. Safety issues are on their own very important, but in addition inappropriate lack of privacy can and often does lead to safety and security issues. I've therefore suggested some places in the draft where the word or concept of safety should be added. Security is a part of safety, but not all of it, and therefore when the word "safety" is or should be added, that does not mean the the word "security" should be deleted.

A second and very important drafting issue is the use of the word "rules" in many parts of this prospective rule.

Whose rules or what rules are almost never designated or made clear. For example, does that include local court rules, WAC rules, etc.? I have suggested that in most instances when the word "rule" or "rules" is used, it should be rules of this court, the State Supreme Court. This is not a subject that should allow for lack of consistency or uniformity, either in substance or in process or procedure, or in cost, and therefore local rules should not be allowed to govern any part of this. If you strongly disagree and want to allow a limited use of local rules, then not only should there be a clear provision that any local rule cannot be inconsistent with, contrary to or violative of any Supreme Court rule, but the proposed local rule must be reviewed and approved by the Supreme Court Rules Committee before it takes effect. We have already seen, in other contexts, the insufficiency in actual practice of not having a pre-review of potential local rules even where there is Supreme Court language prohibiting inconsistency, contrariness or violation of Supreme Court rules. The inconsistency or violation is often ignored in the local rule or is hidden in the procedure. That shouldn't happen in any rule, and certainly not in this one.

There are places in the draft where something can either be included or excluded, allowed or prohibited if a rule or statute includes or excludes, allows or prohibits it. What if there's both a Supreme Court rule and a state statute, and they're inconsistent? Which takes precedence? This Rule 31.1 is about courts and their administrative records, not about case records. There is certainly an argument that this court's rule would have precedence in such circumstances. Federal statutes are also mentioned. There may be federal law that validly completely covers this territory and takes precedence, but there are a lot of federal statutes that would not and should not. This needs to be addressed.

Lastly, let me make an offer. In the attachment, relative to Section (h), Charging of Fees, we have stated that a section on Fee Waiver or Reduction and procedures for same must be included in the Rule, to include a provision for online as well as in person ability to apply for and obtain fee waiver or reduction. I further stated that I have specific experience relative to drafting such provisions, and if the Court committee wishes, I would be happy to do a draft of such a provision for this rule. Please let me know.

These are some but not all of what you'll find in the attachment.

Thank you and the Court for the careful consideration I know will be given.

I would appreciate if you would, by return e-mail, acknowledge receipt of this message and the attachment.

Donald J Horowitz

Brian Rowe
Mike Katell