SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

BRYAN CHUSHCOFF, Judge
Susan Winnie, Judicial Assistant
Department 4
(253) 798-7574

334 COUNTY-CITY BUILDING
930 TACOMA AVENUE SOUTH
TACOMA, WA 98402

December 18, 2012

Clerk of the Supreme Court
ATTN: Ronald Carpenter
P.O. Box 40929
Olympia, WA 98504-0929

Re: *Proposed Rule GR 31.1. – Access to Administrative Records*

Dear Mr. Carpenter:

Pierce County Superior Court believes an open judiciary is essential to maintain the public's confidence and trust that the court's administrative operations, as well as its courtroom actions, are performed competently and with integrity. For these reasons, Pierce County Superior Court provides responsible and full responses to public records requests even when not mandated to do so. Proposed GR 31.1 is a substantial improvement to previously proposed GR 31A. We would like to make a few comments.

I.

Judge Sara B. Derr, President of the DMCJA Board, raises important issues regarding "Bad Faith Decisions" in her letter to Justice Charles Johnson of November 30, 2012 ("DMCJA letter"). Proposed GR 31.1(f) provides:

> **(f) Bad Faith Decisions.** Records decisions made in bad faith are grounds for discipline.
>
> 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;

> 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;
> If the decision maker is a judicial employee, sanctions may be imposed through personnel actions.

Judge Derr points out that "[j]udges do not have immunity when acting in an administrative capacity and are potentially personally liable for these decisions." She goes on to note that proposed GR 31.1 contains provisions that provide in certain instances that 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." DMCJA letter, p. 3.

***

Two assumptions underlie these legitimate concerns. First, is the assumption proposed GR 31.1 broadens judicial officers' obligations beyond the Code of Judicial Conduct. Does it?

> [G]enerally, a judge is not subject to discipline for "appealable errors of law or abuses of discretion," *In re King,* 409 Mass. 590, 601, 568 N.E.2d 588 (1991), and "[j]udicial error alone is not a sufficient basis upon which to found violations of the Code of Judicial Conduct...." *In re Elliston,* 789 S.W.2d 469, 477 (Mo., 1990).

Matter of Hocking, 546 N.W.2d 234, 239 (1996). We know that a judge may nonetheless be responsible for the *manner* in which they conduct a hearing if not for the decision itself. *See, In re Disciplinary Proceeding Against Eiler,* 169 Wn.2d 340 (2010). So can a judicial officer's *extrajudicial* conduct. *See, In re Disciplinary Proceedings Against Turco*, 137 Wn.2d 227 (1999).

Presumably, actions taken in "bad faith" would already implicate Canons 1 and 2. "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and

the appearance of impropriety." CJC Rule 1.2 "A judge shall uphold and apply the law, and shall perform all duties of a judicial officer fairly and impartially." CJC Rule 2.2

If the "bad faith" language of proposed GR 31.1 does broaden judicial duties or ethical obligations, then Judge Derr's concern about its being undefined is pertinent. If it does no more than reiterate obligations that judicial officers already bear under the CJC, then the bad faith language of proposed GR 31.1 is superfluous and should be discarded.

***

A second assumption in Judge Derr's letter is that administrative decision-making contemplated by GR 31.1(d)(3) and (4) is an administrative and not a judicial act thus excepting it from judicial immunity. If that be the case, one must take seriously Judge Derr's point that administrative decision-making by a visiting judge would be unworkable.[1]

If Judge Derr's fears prove true, it is a loophole in the Supreme Court's effort that monetary awards not be allowed (proposed GR 31.1 (d)(iii)) and that judicial officers not have to personally respond to records requests. (proposed GR 31.1(k)(4))

The argument would be that proposed GR 31.1 does not *create* a new cause of action against judicial officers but that holding such officers personally liable for administrative decisions made under proposed GR 31.1 is merely another instance of those situations in which there is no judicial immunity.

Judicial immunity arose because it is in the public interest to have judges exercise independent and impartial judgment about the merits of a case free from exposure from potential damages liability and from frivolous actions prosecuted by disappointed litigants. Other salutary reasons for judicial immunity include: discouraging collateral attacks; protecting the finality of judgments; encouraging review of judicial decision-making through established channels of appellate review; avoiding waste of judicial time; and, reducing impediments to competent persons becoming judges.

[1] Administrative decision-makers may, of course, be protected by judicial immunity when acting in a judicial capacity. *E.g, Layne v. Hyde*, 54 Wash.App. 125, 131-132, (1989).

Public confidence in the courts is jeopardized and the efficacy of judicial decision-making is harmed should the courts be compelled to disclose records that threaten a court's ability to deliberate on its policies or on its judicial decisions. Laudably, proposed GR 31.1 attempts to balance these concerns for effective governmental functioning with the public's interest in open government. Extending judicial immunity to such decisions would be helpful to such interests. Why? First, for the reasons cited in Judge Derr's letter, without immunity the administrative decision scheme is unworkable. Second, all the positive values of judicial immunity discussed above remain pertinent here. Finally, to not have judicial immunity incentivizes disclosure in all cases - to avoid personal liability - rather than only those meritorious instances contemplated by proposed GR 31.1.

The absence of judicial immunity defeats the balance proposed GR 31.1 crafts. There should be an express declaration that administrative reviews under proposed CR 31.1(d) are part of the judicial function and immune from civil liability.

II.

The Cover Sheet for the proposed rule provides "Deliberative Process Exemption. The Supreme Court changed the exemption so that it mirrors the PRA provision. Previously, the rule's exemption for deliberative process documents continued to apply even after a final decision was made on the issue that was under deliberation; as revised, the rule's exemption applies only until a final decision is made." (Emphasis added.)

Discussion. Proposed GR 31.1, provides, in part, as follows:

> **(l) Exemptions.** In addition to exemptions referred to in section (j), the following categories of administrative records are exempt from public access:
>
> (3) 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;

> *COMMENT: Paragraph (3) is identical to the "deliberative process" exemption from the Public Records Act, RCW 42.56.280. The PRA's deliberative process exemption applies only until a final decision is made, see* Progressive Animal Welfare Soc'y v. University of Wash., *125 Wn.2d 243, 257, . . . (1994), at which point the deliberative documents become publicly accessible.*

(Emphasis added)

As the comment implies, the construction of this language comes from case law interpretation of the PRA. It is not obvious from the language of the RCW 42.56.280 alone that all such records would lose their exemption once the policy is adopted. This is compared to just those records "publicly cited by a court or agency in connection with any court or agency action" that expressly do lose their exemption by this language.

As the Supreme Court is acting in its rule-making capacity, rather than in its capacity of interpreting legislative intent, it is not bound to case law interpretations in formulating rules that are best for the judiciary. Consider, for instance, the conflicting policy considerations that the trial court wrestled with and mentioned in *West v. Port of Olympia*, 146 Wash.App. 108, 117-118 (2008). The salutary reasons for exemption of the expression of policy opinions do not disappear with the adoption of a policy choice.

We offer no opinion on which formulation the Supreme Court should adopt as to this but observe that there are important values implicated whether the disclosure be limited to those cited by the court in its final policy outcome or include all those considered by the court in formulating the policy. We only suggest that the Supreme Court be intentional in its policy choice.

***

The language of Proposed GR 31.1(l)(3) should add email and other electronic media by which are expressed opinions and/or policies formulated or recommended to the means that are exempt from disclosure.

III.

Pursuant to proposed GR 31.1(h)(1) there is no fee to view documents. In order to provide a requester a view of a document it may be necessary to print documents,

especially those that are electronically maintained. Printing may be necessary to assure that there is no tampering with the court's records, to safeguard documents that are not subject to disclosure and/or to limit disclosure to those records requested.

In addition, responding to broad requests such as "all email for the last five years" may or may not take much time to locate but will certainly take hundreds of hours to vet. The records will have to be examined with care for identifying details, chambers records or other exempted or prohibited documents under the Public Records Act or other state or federal statutes or court orders. This takes time.

Proposed GR 31.1(h)(2) and (4) authorize a fee for copying/scanning records and for research services taking longer than one hour. It would seem that such fees would be authorized even for those requesters who say they merely wish to view the documents and not want a copy. We would like to see the authority to assess fees in such circumstances explicitly addressed in the rule for otherwise it seems certain to be a point of contention.

***

Please extend our thanks to the drafters of GR 31A and proposed GR 31.1 for the evident hard work and care that they have taken in crafting this rule.

Respectfully,

Bryan Chushcoff
Presiding Judge