Thank you for allowing me to submit the following comments concerning proposed GR 12.4.

I have reviewed the letter dated November 28, 2012 from the Supreme Court Rules Committee to the Washington State Bar Association, together with amendments to the text of GR12.4, as proposed by the Rules Committee. The letter and text proposed by the Rules Committee addressed nearly all of the problems identified by comments made concerning previous drafts of GR 12.4. The best aspects of that draft were 1) a good effort to harmonize GR 12.4 with GR 31, and 2) preservation of the right to independent, judicial review. The letter and draft text also, quite importantly, recognized that any review by the Chief Justice would be administrative in character, rather than judicial.

The WSBA's latest draft ignores the strong stand taken by the Rules Committee in favor of preserving the public's right to independent judicial review. The WSBA draft strikes Rules Committee language that specifically preserved a right to such review, and also strikes the word "administrative", used in the Rules Committee draft to describe the review option involving the Chief Justice. It appears that the WSBA will eventually try to argue that review by the Chief Justice, acting alone, is somehow "judicial review". However, the Chief Justice is not a Court, and cannot, acting alone, render a judicial decision. The Rules Committee's characterization of this form of review as being "administrative" was accurate and should be retained in the final draft. To avoid needless litigation in the future between the WSBA and record-seekers, GR 12.4 should clearly state whether the Court intends for judicial review of the Chief Justice's decision to be available, or not.

Making the Chief Justice review "discretionary" upon a decision of the full Court is a bad idea for two reasons. First, the underlying administrative process provides no method for development of a record for the Supreme Court to review i.e. no witnesses, no discovery, and not even certifications from WSBA officials which provide assurance that all requested records have been provided. If the amount of a fee is disputed, it appears that the record upon review would contain nothing more than the bald assertions of WSBA officials concerning the cost, with no mechanism for the appellant to discover or present opposing cost data. A second problem is that a vote by the full Court does not change the constitutional fact that the Chief Justice lacks independent judicial power. Thus, any decision of the Chief Justice in this context would retain a purely administrative character. It is a waste of time for the full Supreme Court to act as gatekeeper for an administrative process.

Since the decision of the Chief Justice would merely be the last of four levels of administrative review, under the WSBA's draft, judicial review would then be available by means of means of a writ under RCW 7. But the previous involvement of the Chief Justice would put a Superior Court judge in an awkward position i.e. being requested to overrule an administrative decision of the Chief Justice. This awkwardness would be unfair to the judge and would tend to discredit any decision made against the litigant, thus undermining respect for both that Superior Court and the Supreme Court. This awkwardness was wisely avoided in the Rules Committee draft by requiring a litigant to waive judicial review if that litigant elected Chief Justice review. The current WSBA draft omits this wisdom.

Use of the term "External Review" to characterize several of the inferior levels of review is inaccurate. All of these reviewers are paid by and serve at the pleasure of the WSBA Board of Governors, and all of them will have a conflict of interest if information concerning the compensation, bonuses, and perquisites of WSBA employees is requested. Why not label these reviewers according to what they are actually doing i.e. "internal review".

To provide for some form of credible External Review, I propose that the Supreme Court appoint, for a fixed term of years, one or more volunteer hearing officers with previous employment experience in the AG's public records office, a federal FOIA office, or a related non-profit organization, such as WCOG. Since it would obviously be inappropriate to seek nominees for these positions by means of WSBA nomination, WCOG and non-profit organizations for journalists might be appropriate substitutes.

Respectfully submitted,

Edward Hiskes