Re: Proposed General Rule 12.4

Cleary, the Washington State Bar Association (WSBA) should be commended for the efforts it has put forth in this endeavor, albeit a self-initiated endeavor that followed on the heels of the WSBA's questionable activities around the *WSBA v. Hiskes* case. (for case summary see, for example, *Hiskes* appellate briefs (No. 39224-1-11 Court of Appeals, Division II of the State of Washington)). It also now more than ever appears very arguable that the WSBA pulled its appeal of the lower court's ruling in the *Hiskes* matter, a case that found the WSBA, as an agency of the state, is not released from the dictates of the Public Records Act (Chapter 42.56 RCW), so that the WSBA could congregate, essentially, out of sight of the public or the due process mechanism of an independent judiciary and devise a set of rules that the WSBA obviously hopes will ultimately inoculate itself against any further irritating and meddlesome court rulings that the WSBA is indeed subject to the Public Records Act. In fact, in one of the greatest ironies of this whole matter, the WSBA, in proposed General Rule 12.4, actually has the audacity to claim the protections of the Public Records Act without having the character to take on its responsibilities. (See proposed General Rule 12.4(d)(1)). But then this whole affair has had a terribly bad smell from the beginning.

I already have put forth, during an earlier comment period concerning proposed General Rule 12.4, a detailed legal explanation as to why the WSBA, as an "agency" of the state, and granted its powers by the Washington State Legislature, is subject to the Public Records Act. I will not repeat that argument here. I will repeat, as briefly touched on above, that in the *Hiskes* matter the WSBA dropped its appeal of the ruling that the WSBA was not free from the dictates of the Public Records Act. *Federal Way v. Koenig* affirms the legislature's power to designate or not designate an entity an agency of the state.

It also must be pointed out that, contrary to proposed General Rule 12.4, the Public Records Act grants aggrieved parties the right to challenge in Superior Court a denial of access to records. RCW 42.56.550(1). Nowhere does the RCW say anything about the WSBA being some special breed of "agency" that gets to write itself out of the dictates of the RCW. In addition, nowhere in the RCW does it say there is anything "special" about the WSBA that somehow makes it an "agency of the state" not subject to the Public Records Act.

The Executive, Legislative, and Judicial branches all have external checks on their actions. Does the mere WSBA, as an agency of the state, consider itself so special that the only "external" check on it in the public records arena, and I use the term external very loosely, is a check by one person—the Chief Justice of the Washington State Supreme Court—who also works very closely with the WSBA on many issues as a matter of course? Where does the WSBA find any authority for the proposition that it is such a unique and special agency that, frankly, no normal checks and balances apply to it unless the WSBA deigns to assent. Such autonomy was never the intention of the State Bar Act. In fact, the legislature, in its capacity as grantor of the WSBA's existence,

dictated many things about the WSBA's form, including the fact that the WSBA could be sued. RCW 2.48.010. The legislature put this in the second sentence of the extensive State Bar Act. No one should have delusions regarding any purported WSBA sovereignty.

Furthermore, RCW 42.56.530 grants a party who has been denied access to records the right to request from the Washington State Attorney General an opinion on the matter. In addition, RCW 42.56.550(4) allows for penalties to be assessed against an agency of the state found in violation of the Public Records Act. However, the WSBA states, in proposed General Rule 12.4(i), "Attorney fees, costs, civil penalties, or fines may not be awarded under this rule." What authority grants the WSBA, as an agency of the state, the right to insulate itself from penalties for violation of the Public Records Act?

If the WSBA were smart it would concede, while it is in a position of strength on this matter, that it is governed by the Public Records Act. That way the WSBA could proceed to write exemptions as it sees fit and exemptions that it feels will pass court muster if challenged. Furthermore, with the quality of legal talent that the WSBA can access combined with the fact that few are going to choose to challenge the WSBA on anything, the WSBA has little to fear. The alternative is that the WSBA loses its ability to write these rules unchecked. For example, there are certain WSBA records—not covered by any current court rule—that I am certain the WSBA would have an *extremely* difficult time trying to legitimately shield from the public if challenged in a Public Records Act action. Furthermore, and perhaps even more importantly, I cannot imagine under any circumstances that these are records the WSBA would want to be seen publically trying to keep from the citizenry.

As discussed above, I can see that the WSBA is making an effort, within a certain context, to make proposed General Rule 12.4 more palatable than its previous proposed incarnations. Certainly stating right from the beginning of proposed General Rule 12.4 that there is a "presumption of public access" for WSBA records is laudable. However, what the King giveth the King can taketh when the King is not, ultimately, governed by external parameters such as, in this case, adherence to the Public Records Act.

Proposed General Rule 12.4 contravenes the Public Records Act, the State Bar Act, the Washington State Constitution, recent court action, and the WSBA's response to this recent court action.

Yours Very Truly,

Michael Kaiser, JD.