WSR 12-19-022
RULES OF COURT
STATE SUPREME COURT
[September 7, 2012]

IN THE MATTER OF THE STANDARDS FOR INDIGENT DEFENSE AND CERTIFICATION OF COMPLIANCE	))))	ORDER NO. 25700-A-1008

The Office of Public Defense having recommended amendments to the Standards for Indigent Defense and Certification of Compliance, and the Court having considered the amendments submitted thereto, and having determined that the proposed amendments will aid in the prompt and orderly administration of justice;

Now, therefore, it is hereby

ORDERED:

(a) That the standards and certificate as shown below are adopted.

(b) That the Standards for Indigent Defense, including the new Preamble, amendments to Standard 3.1, Standard 3.5, and Standard 5.2 will be published in the Washington Reports and become effective on October 1, 2012. The new subsection (e) of the Certification Form will be published in the Washington Reports and become effective on September 1, 2013.

DATED at Olympia, Washington this 7th day of September, 2012.

Madsen, C.J.

Chambers, J. Stephens, J.

Fairhurst, J. Wiggins, J.

Owens, J. Gonzales, J.

STANDARDS FOR INDIGENT DEFENSE

[New]

Preamble

The Washington Supreme Court adopts the following Standards to address certain basic elements of public defense practice related to the effective assistance of counsel. The Certification of Appointed Counsel of Compliance with Standards Required by CrR 3.1/CrRLJ 3.1/JuCR 9.2 references specific "Applicable Standards." The Court adopts additional Standards beyond those required for certification as guidance for public defense attorneys in addressing issues identified in *State v. A.N.J.*, 168 Wash.2d 91 (2010), including the suitability of contracts that public defense attorneys may negotiate and sign. To the extent that certain Standards may refer to or be interpreted as referring to local governments, the Court recognizes the authority of its Rules is limited to attorneys and the courts. Local courts and clerks are encouraged to develop protocols for procedures for receiving and retaining Certifications.

Standard 1. Compensation

[Reserved.]

Standard 2. Duties and Responsibilities of Counsel

[Reserved.]

Standard 3. Caseload Limits and Types of Cases

Standard 3.1. The contract or other employment agreement ~~or government budget~~ shall specify the types of cases for which representation shall be provided and the maximum number of cases which each attorney shall be expected to handle.

Standard 3.1 adopted effective October 1, 2012

Standard 3.2. The caseload of public defense attorneys shall allow each lawyer to give each client the time and effort necessary to ensure effective representation. Neither defender organizations, county offices, contract attorneys, nor assigned counsel should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation. As used in this Standard, "quality representation" is intended to describe the minimum level of attention, care, and skill that Washington citizens would expect of their state's criminal justice system.

Standard 3.2 adopted effective October 1, 2012

Standard 3.3. General Considerations. Caseload limits reflect the maximum caseloads for fully supported full-time defense attorneys for cases of average complexity and effort in each case type specified. Caseload limits assume a reasonably even distribution of cases throughout the year.

The increased complexity of practice in many areas will require lower caseload limits. The maximum caseload limit should be adjusted downward when the mix of case assignments is weighted toward offenses or case types that demand more investigation, legal research and writing, use of experts, use of social workers, or other expenditures of time and resources. Attorney caseloads should be assessed by the workload required, and cases and types of cases should be weighted accordingly.

If a defender or assigned counsel is carrying a mixed caseload including cases from more than one category of cases, these standards should be applied proportionately to determine a full caseload. In jurisdictions where assigned counsel or contract attorneys also maintain private law practices, the caseload should be based on the percentage of time the lawyer devotes to public defense.

The experience of a particular attorney is a factor in the composition of cases in the attorney's caseload.

The following types of cases fall within the intended scope of the caseload limits for criminal and juvenile offender cases in Standard 3.4 and must be taken into account when assessing an attorney's numerical caseload: partial case representations, sentence violations, specialty or therapeutic

courts, transfers, extraditions, representation of material witnesses, petitions for conditional release or final discharge, and other matters that do not involve a new criminal charge.

Definition of case. A case is defined as the filing of a document with the court naming a person as defendant or respondent, to which an attorney is appointed in order to provide representation. In courts of limited jurisdiction multiple citations from the same incident can be counted as one case.

Standard 3.3 adopted effective October 1, 2012

Standard 3.4. Caseload Limits. Effective October 1, 2013.

Standard 3.5. Case Counting. ~~The local government entity responsible for employing, contracting with, or appointing public defense attorneys should adopt and publish written policies and procedures to implement a numerical case weighting system to count cases. If such policies and procedures are not adopted and published, it is presumed that attorneys are not engaging in case weighting.~~ Attorneys may not engage in a case weighting system, unless pursuant to written policies and procedures that have been adopted and published by the local government entity responsible for employing, contracting with, or appointing them. A ~~numerical case~~ weighting system must:

A. recognize the greater or lesser workload required for cases compared to an average case based on a method that adequately assesses and documents the workload involved;

B. be consistent with these Standards, professional performance guidelines, and the Rules of Professional Conduct;

C. not institutionalize systems or practices that fail to allow adequate attorney time for quality representation;

D. be periodically reviewed and updated to reflect current workloads; and

E. be filed with the State of Washington Office of Public Defense.

Cases should be assessed by the workload required. Cases and types of cases should be weighted accordingly. Cases which are complex, serious, or contribute more significantly to attorney workload than average cases should be weighted upward. In addition, a case weighting system should consider factors that might justify a case weight of less than one case.

Notwithstanding any case weighting system, resolutions of cases by pleas of guilty to criminal charges on a first appearance or arraignment docket are presumed to be rare occurrences requiring careful evaluation of the evidence and the law, as well as thorough communication with clients, and must be counted as one case.

Standard 3.5 adopted effective October 1, 2012

Standard 3.6. Case Weighting. The following are some examples of situations where case weighting might result in representations being weighted as more or less than one case. The listing of specific examples is not intended to suggest or imply that representations in such situations should or must be weighted at more or less than one case, only that they may be, if established by an appropriately adopted case weighting system.

A. Case Weighting Upward. Serious offenses or complex cases that demand more-than-average investigation, legal research, writing, use of experts, use of social workers, and/or expenditures of time and resources should be weighted upward and counted as more than one case.

B. Case Weighting Downward. Listed below are some examples of situations where case weighting might justify representations being weighted less than one case. However, care must be taken because many such representations routinely involve significant work and effort and should be weighted at a full case or more.

i. Cases that result in partial representations of clients, including client failures to appear and recommencement of proceedings, preliminary appointments in cases in which no charges are filed, appearances of retained counsel, withdrawals or transfers for any reason, or limited appearances for a specific purpose (not including representations of multiple cases on routine dockets).

ii. Cases in the criminal or offender case type that do not involve filing of new criminal charges, including sentence violations, extraditions, representations of material witnesses, and other matters or representations of clients that do not involve new criminal charges. Noncomplex sentence violations should be weighted as at least 1/3 of a case.

iii. Cases in specialty or therapeutic courts if the attorney is not responsible for defending the client against the underlying charges before or after the client's participation in the specialty or therapeutic court. However, case weighting must recognize that numerous hearings and extended monitoring of client cases in such courts significantly contribute to attorney workload and in many instances such cases may warrant allocation of full case weight or more.

iv. Cases on a criminal or offender first appearance or arraignment docket where the attorney is designated, appointed, or contracted to represent groups of clients on that docket without an expectation of further or continuing representation and which are not resolved at that time (except by dismissal). In such circumstances, consideration should be given to adjusting the caseload limits appropriately, recognizing that case weighting must reflect that attorney workload includes the time needed for appropriate client contact and preparation as well as the appearance time spent on such dockets.

v. Representation of a person in a court of limited jurisdiction on a charge which, as a matter of regular practice in the court where the case is pending, can be and is resolved at an early stage of the proceeding by a diversion, reduction to an infraction, stipulation on continuance, or other alternative noncriminal disposition that does not involve a finding of guilt. Such cases should be weighted as at least 1/3 of a case.

Standard 3.6 adopted effective October 1, 2012

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Defense Function std. 4-1.2 (3d ed. 1993)

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES std. 5-4.3 (3d ed. 1992)

AM. BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003)

ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-441 (2006) (*Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation*)

Am. Council of Chief Defenders, *Statement on Caseloads and Workloads* (Aug. 24, 2007)

ABA House of Delegates, *Eight Guidelines of Public Defense Related to Excessive Caseloads* (Aug. 2009)

TASK FORCE ON COURTS, NAT'L ADVISORY COMM'N ON CRIMINAL STANDARDS & GOALS, COURTS std. 13.12 (1973)

MODEL CODE OF PROF'L RESPONSIBILITY DR 6-101.

ABA House of Delegates, *The Ten Principles of a Public Defense Delivery System* (Feb. 2002)

ABA House of Delegates, *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (Feb. 1996)

Nat'l Legal Aid & Defender Ass'n, Am. Council of Chief Defenders, Ethical Opinion 03-01 (2003).

Nat'l Legal Aid & Defender Ass'n, *Standards for Defender Services* std. IV-1 (1976)

Nat'l Legal Aid & Defender Ass'n, *Model Contract for Public Defense Services* (2000)

Nat'l Ass'n of Counsel for Children, *NACC Recommendations for Representation of Children in Abuse and Neglect Cases* (2001)

Seattle Ordinance 121501 (June 14, 2004)

Indigent Defense Servs. Task Force, Seattle-King County Bar Ass'n, *Guidelines for Accreditation of Defender Agencies* Guideline 1 (1982)

Wash. State Office of Pub. Defense, *Parents Representation Program Standards of Representation* (2009)

BUREAU OF JUDICIAL ASSISTANCE, U.S. DEP'T OF JUSTICE, INDIGENT DEFENSE SERIES NO. 4, KEEPING DEFENDER WORKLOADS MANAGEABLE (2001) (NCJ 185632)

Standard 4. Responsibility of Expert Witnesses

[Reserved.]

Standard 5. Administrative Costs

Standard 5.1. [Reserved.]

Standard 5.2.

A. Contracts for public defense services ~~shall~~ should provide for or include administrative costs associated with providing legal representation. These costs should include but are not limited to travel; telephones; law library, including electronic legal research; financial accounting; case management systems; computers and software; office space and supplies; training; meeting the reporting requirements imposed by these standards; and other costs necessarily incurred in the day-to-day management of the contract.

B. Public defense attorneys shall have (1) access to an office that accommodates confidential meetings with clients and (2) a postal address, and adequate telephone services to ensure prompt response to client contact.

Standard 5.2 adopted effective October 1, 2012

Standard 6. Investigators

Standard 6.1. Public defense attorneys shall use investigation services as appropriate.

Standard 6.1 adopted effective October 1, 2012

Standards 7-12

[Reserved.]

Standard 13. Limitations on Private Practice

Private attorneys who provide public defense representation shall set limits on the amount of privately retained work which can be accepted. These limits shall be based on the percentage of a full-time caseload which the public defense cases represent.

Standard 13 adopted effective October 1, 2012

Standard 14. Qualifications of Attorneys

Standard 14.1. In order to assure that indigent accused receive the effective assistance of counsel to which they are constitutionally entitled, attorneys providing defense services shall meet the following minimum professional qualifications:

A. Satisfy the minimum requirements for practicing law in Washington as determined by the Washington Supreme Court; and

B. Be familiar with the statutes, court rules, constitutional provisions, and case law relevant to their practice area; and

C. Be familiar with the Washington Rules of Professional Conduct; and

D. Be familiar with the Performance Guidelines for Criminal Defense Representation approved by the Washington State Bar Association; and

E. Be familiar with the consequences of a conviction or adjudication, including possible immigration consequences and the possibility of civil commitment proceedings based on a criminal conviction; and

F. Be familiar with mental health issues and be able to identify the need to obtain expert services; and

G. Complete seven hours of continuing legal education within each calendar year in courses relating to their public defense practice.

Standard 14.1 adopted effective October 1, 2012

Standard 14.2. Attorneys' qualifications according to severity or type of case[1]:

A. Death Penalty Representation. Each attorney acting as lead counsel in a criminal case in which the death penalty has been or may be decreed and which the decision to seek the death penalty has not yet been made shall meet the following requirements:

i. The minimum requirements set forth in Section 1; and

ii. At least five years' criminal trial experience; and

iii. Have prior experience as lead counsel in no fewer than nine jury trials of serious and complex cases which were tried to completion; and

iv. Have served as lead or co-counsel in at least one aggravated homicide case; and

v. Have experience in preparation of mitigation packages in aggravated homicide or persistent offender cases; and

vi. Have completed at least one death penalty defense seminar within the previous two years; and

vii. Meet the requirements of SPRC 2.[2]

The defense team in a death penalty case should include, at a minimum, the two attorneys appointed pursuant to SPRC 2, a mitigation specialist, and an investigator. Psychiatrists, psychologists, and other experts and support personnel should be added as needed.

B. Adult Felony Cases—Class A. Each attorney representing a defendant accused of a Class A felony as defined in RCW 9A.20.020 shall meet the following requirements:

i. The minimum requirements set forth in Section 1; and

ii. Either:

a. has served two years as a prosecutor; or

b. has served two years as a public defender; or two years in a private criminal practice; and

iii. Has been trial counsel alone or with other counsel and handled a significant portion of the trial in three felony cases that have been submitted to a jury.

C. Adult Felony Cases—Class B Violent Offense. Each attorney representing a defendant accused of a Class B violent offense as defined in RCW 9A.20.020 shall meet the following requirements.

i. The minimum requirements set forth in Section 1; and

ii. Either;

a. has served one year as a prosecutor; or

b. has served one year as a public defender; or one year in a private criminal practice; and

iii. Has been trial counsel alone or with other counsel and handled a significant portion of the trial in two Class C felony cases that have been submitted to a jury.

D. Adult Sex Offense Cases. Each attorney representing a client in an adult sex offense case shall meet the following requirements:

i. The minimum requirements set forth in Section 1 and Section 2(C); and

ii. Has been counsel alone of record in an adult or juvenile sex offense case or shall be supervised by or consult with an attorney who has experience representing juveniles or adults in sex offense cases.

E. Adult Felony Cases—All Other Class B Felonies, Class C Felonies, Probation or Parole Revocation. Each attorney representing a defendant accused of a Class B felony not defined in Section 2 (C) or (D) above or a Class C felony, as defined in RCW 9A.20.020, or involved in a probation or parole revocation hearing shall meet the following requirements:

i. The minimum requirements set forth in Section 1, and

ii. Either:

a. has served one year as a prosecutor; or

b. has served one year as a public defender; or one year in a private criminal practice; and

iii. Has been trial counsel alone or with other trial counsel and handled a significant portion of the trial in two criminal cases that have been submitted to a jury; and

iv. Each attorney shall be accompanied at his or her first felony trial by a supervisor if available.

F. Persistent Offender (Life Without Possibility of Release) Representation. Each attorney acting as lead counsel in a "two strikes" or "three strikes" case in which a conviction will result in a mandatory sentence of life in prison without parole shall meet the following requirements:

i. The minimum requirements set forth in Section 1;[3] and

ii. Have at least:

a. four years' criminal trial experience; and

b. one year's experience as a felony defense attorney; and

c. experience as lead counsel in at least one Class A felony trial; and

d. experience as counsel in cases involving each of the following:

1. Mental health issues; and

2. Sexual offenses, if the current offense or a prior conviction that is one of the predicate cases resulting in the possibility of life in prison without parole is a sex offense; and

3. Expert witnesses; and

4. One year of appellate experience or demonstrated legal writing ability.

G. Juvenile Cases—Class A. Each attorney representing a juvenile accused of a Class A felony shall meet the following requirements:

i. The minimum requirements set forth in Section 1, and

ii. Either:

a. has served one year as a prosecutor; or

b. has served one year as a public defender; or one year in a private criminal practice; and

iii. Has been trial counsel alone of record in five Class B and C felony trials; and

iv. Each attorney shall be accompanied at his or her first juvenile trial by a supervisor, if available.

H. Juvenile Cases—Classes B and C. Each attorney representing a juvenile accused of a Class B or C felony shall meet the following requirements:

i. The minimum requirements set forth in Section 1; and

ii. Either:

a. has served one year as a prosecutor; or

b. has served one year as a public defender; or one year in a private criminal practice, and

iii. Has been trial counsel alone in five misdemeanor cases brought to a final resolution; and

iv. Each attorney shall be accompanied at his or her first juvenile trial by a supervisor if available.

I. Juvenile Sex Offense Cases. Each attorney representing a client in a juvenile sex offense case shall meet the following requirements:

i. The minimum requirements set forth in Section 1 and Section 2(H); and

ii. Has been counsel alone of record in an adult or juvenile sex offense case or shall be supervised by or consult with an attorney who has experience representing juveniles or adults in sex offense cases.

J. Juvenile Status Offenses Cases. Each attorney representing a client in a "Becca" matter shall meet the following requirements:

i. The minimum requirements as outlined in Section 1; and

ii. Either:

a. have represented clients in at least two similar cases under the supervision of a more experienced attorney or completed at least three hours of CLE training specific to "status offense" cases; or

b. have participated in at least one consultation per case with a more experienced attorney who is qualified under this section.

K. Misdemeanor Cases. Each attorney representing a defendant involved in a matter concerning a simple misdemeanor or gross misdemeanor or condition of confinement, shall meet the requirements as outlined in Section 1.

L. Dependency Cases. Each attorney representing a client in a dependency matter shall meet the following requirements:

i. The minimum requirements as outlined in Section 1; and

ii. Attorneys handling termination hearings shall have six months' dependency experience or have significant experience in handling complex litigation.

iii. Attorneys in dependency matters should be familiar with expert services and treatment resources for substance abuse.

iv. Attorneys representing children in dependency matters should have knowledge, training, experience, and ability in communicating effectively with children, or have participated in at least one consultation per case either with a state Office of Public Defense resource attorney or other attorney qualified under this section.

M. Civil Commitment Cases. Each attorney representing a respondent shall meet the following requirements:

i. The minimum requirements set forth in Section 1; and

ii. Each staff attorney shall be accompanied at his or her first 90 or 180 day commitment hearing by a supervisor; and

iii. Shall not represent a respondent in a 90 or 180 day commitment hearing unless he or she has either:

a. served one year as a prosecutor; or

b. served one year as a public defender; or one year in a private civil commitment practice, and

c. been trial counsel in five civil commitment initial hearings; and

iv. Shall not represent a respondent in a jury trial unless he or she has conducted a felony jury trial as lead counsel; or been co-counsel with a more experienced attorney in a 90 or 180 day commitment hearing.

N. Sex Offender "Predator" Commitment Cases. Generally, there should be two counsel on each sex offender commitment case. The lead counsel shall meet the following requirements:

i. The minimum requirements set forth in Section 1; and

ii. Have at least:

a. Three years' criminal trial experience; and

b. One year's experience as a felony defense attorney or one year's experience as a criminal appeals attorney; and

c. Experience as lead counsel in at least one felony trial; and

d. Experience as counsel in cases involving each of the following:

1. Mental health issues; and

2. Sexual offenses; and

3. Expert witnesses; and

e. Familiarity with the Civil Rules; and

f. One year of appellate experience or demonstrated legal writing ability.

Other counsel working on a sex offender commitment case should meet the minimum requirements in Section 1 and have either one year's experience as a public defender or significant experience in the preparation of criminal cases, including legal research and writing and training in trial advocacy.

O. Contempt of Court Cases. Each attorney representing a respondent shall meet the following requirements:

i. The minimum requirements set forth in Section 1; and

ii. Each attorney shall be accompanied at his or her first three contempt of court hearings by a supervisor or more experienced attorney, or participate in at least one consultation per case with a state Office of Public Defense resource attorney or other attorney qualified in this area of practice.

P. Specialty Courts. Each attorney representing a client in a specialty court (e.g., mental health court, drug diversion court, homelessness court) shall meet the following requirements:

i. The minimum requirements set forth in Section 1; and

ii. The requirements set forth above for representation in the type of practice involved in the specialty court (e.g., felony, misdemeanor, juvenile); and

iii. Be familiar with mental health and substance abuse issues and treatment alternatives.

Standard 14.2 adopted effective October 1, 2012

Standard 14.3. Appellate Representation. Each attorney who is counsel for a case on appeal to the Washington Supreme Court or to the Washington Court of Appeals shall meet the following requirements:

A. The minimum requirements as outlined in Section 1; and

B. Either:

i. has filed a brief with the Washington Supreme Court or any Washington Court of Appeals in at least one criminal case within the past two years; or

ii. has equivalent appellate experience, including filing appellate briefs in other jurisdictions, at least one year as an appellate court or federal court clerk, extensive trial level briefing, or other comparable work.

C. Attorneys with primary responsibility for handling a death penalty appeal shall have at least five years' criminal experience, preferably including at least one homicide trial and at least six appeals from felony convictions, and meet the requirements of SPRC 2.

RALJ Misdemeanor Appeals to Superior Court: Each attorney who is counsel alone for a case on appeal to the Superior Court from a court of limited jurisdiction should meet the minimum requirements as outlined in Section 1, and have had significant training or experience in either criminal appeals, criminal motions practice, extensive trial level briefing, clerking for an appellate judge, or assisting a more experienced attorney in preparing and arguing a RALJ appeal.

Standard 14.3 adopted effective October 1, 2012

Standard 14.4. Legal Interns.

A. Legal interns must meet the requirements set out in APR 9.

B. Legal interns shall receive training pursuant to APR 9, and in offices of more than seven attorneys, an orientation and training program for new attorneys and legal interns should be held.

Standard 14.4 adopted effective October 1, 2012

Standards 15-18

[Reserved.]

CERTIFICATION OF COMPLIANCE

[New]

For criminal and juvenile offender cases, a signed Certification of Compliance with Applicable Standards must be filed by an appointed attorney by separate written certification on a quarterly basis in each court in which the attorney has been appointed as counsel.

The certification must be in substantially the following form:

SEPARATE CERTIFICATION FORM

_____ Court of Washington for _____	
State of Washington _____, Plaintiff vs. _____. Defendant	**No.** CERTIFICATION OF APPOINTED COUNSEL OF COMPLIANCE WITH STANDARDS REQUIRED BY CrR 3.1/CrRLJ 3.1/JuCR 9.2

The undersigned attorney hereby certifies:

1. Approximately _____% of my total practice time is devoted to indigent defense cases.

2. I am familiar with the applicable Standards adopted by the Supreme Court for attorneys appointed to represent indigent persons and that:

a. Basic Qualifications: I meet the minimum basic professional qualifications in Standard 14.1.

b. Office: I have access to an office that accommodates confidential meetings with clients, and I have a postal address and adequate telephone services to ensure prompt response to client contact, in compliance with Standard 5.2.

c. Investigators: I have investigators available to me and will use investigation services as appropriate, in compliance with Standard 6.1.

d. Caseload: I will comply with Standard 3.2 during representation of the defendant in my cases. [Effective September 1, 2013: I should not accept a greater number of cases (or a proportional mix of different case types) than specified in Standard 3.4, prorated if the amount of time spent for indigent defense is less than full time, and taking into account the case counting and weighting system applicable in my jurisdiction.]

e. Specific Qualifications: I meet the specific qualifications in Standard 14.2, Sections B-K. [Effective September 1, 2013.]

_____ _____

Defendant's Lawyer, WSBA No. Date

[1] Attorneys working toward qualification for a particular category of cases under this standard may associate with lead counsel who is qualified under this standard for that category of cases.

[2]

SPRC 2
APPOINTMENT OF COUNSEL

At least two lawyers shall be appointed for the trial and also for the direct appeal. The trial court shall retain responsibility for appointing counsel for trial. The Supreme Court shall appoint counsel for the direct appeal. Notwithstanding RAP 15.2 (f) and (h), the Supreme Court will determine all motions to withdraw as counsel on appeal.

A list of attorneys who meet the requirements of proficiency and experience, and who have demonstrated that they are learned in the law of capital punishment by virtue of training or experience, and thus are qualified for appointment in death penalty trials and for appeals will be recruited and maintained by a panel created by the Supreme Court. All counsel for trial and appeal must have demonstrated the proficiency and commitment to quality representation which is appropriate to a capital case. Both counsel at trial must have five years' experience in the practice of criminal law (and) be familiar with and experienced in the utilization of expert witnesses and evidence, and not be presently serving as appointed counsel in another active trial level death penalty case. One counsel must be, and both may be, qualified for appointment in capital trials on the list, unless circumstances exist such that it is in the defendant's interest to appoint otherwise qualified counsel learned in the law of capital punishment by virtue of training or experience. The trial court shall make findings of fact if good cause is found for not appointing list counsel.

At least one counsel on appeal must have three years' experience in the field of criminal appellate law and be learned in the law of capital punishment by virtue of training or experience. In appointing counsel on appeal, the Supreme Court will consider the list, but will have the final discretion in the appointment of counsel.

[3]RCW 10.101.060 (1)(a)(iii) provides that counties receiving funding from the state Office of Public Defense under that statute must require "attorneys who handle the most serious cases to meet specified qualifications as set forth in the Washington state bar association endorsed standards for public defense services or participate in at least one case consultation per case with office of public defense resource attorneys who are so qualified. The most serious cases include all cases of murder in the first or second degree, persistent offender cases, and class A felonies."

Reviser's note: The brackets and enclosed material in the text of the above section occurred in the copy filed by the agency and appear in the Register pursuant to the requirements of RCW 34.08.040.

WSR 12-19-027

RULES OF COURT

STATE SUPREME COURT

[September 10, 2012]

IN THE MATTER OF THE ADOPTION OF NEW GR 31.1 - ACCESS TO ADMINISTRATIVE RECORDS	)))	ORDER NO. 25700-A-1009

The Court having considered a proposed new GR 31A - Access to Administrative Records, and having considered written public comments and testimony received during a public hearing on February 6, 2012, and

The Court having made substantial revisions to the proposed rule in response to the public comments, including renumbering the rule as GR 31.1, and

The Court having approved the new GR 31.1 for publication for the receipt of further comments;

Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the new proposed GR 31.1 as shown below is to be published for comments in the Washington Reports, Washington Register, Washington State Bar Association and Administrative Office of the Court's websites in September, 2012.

(b) The purpose statement as required by GR 9(e) is published solely for the information of the Bench, Bar and other interested parties.

(c) Comments are to be submitted to the Clerk of the Supreme Court by either U.S. Mail or Internet E-mail by no later than December 31, 2012. Comments may be sent to the following addresses: P.O. Box 40929, Olympia, Washington 98504-0929, or Denise.Foster@courts.wa.gov. Comments submitted by e-mail message must be limited to 1500 words.

DATED at Olympia, Washington this 10th day of September, 2012.

For the Court

Madsen, C.J.

CHIEF JUSTICE

GR 9 Cover Sheet

Suggested New Rule
GENERAL RULES (GR)
GR 31.1 - Access to Administrative Records

Purpose:

Overview. Proposed GR 31.1 is a revised version of proposed GR 31A. Proposed GR 31A was published for public comment in June, 2011, and a public hearing was held on February 6, 2012. The public comments and testimony suggested many changes to the proposal; several of the suggested changes involved fundamental policy issues. After reviewing the public input, the Supreme Court made many revisions to the original proposal. Due to the significance and scope of the changes, the Supreme Court is republishing the proposal for the receipt of further comments.

Original proposal. GR 31A was originally proposed to fill a gap in existing laws, because the Public Records Act does not apply to judicial records and no other law broadly addresses public access to the judiciary's administrative records. *See City of Federal Way v. Koenig*, 167 Wn.2d 341, 217 P.3d 1172 (2009). An existing court rule addresses public access to court case files and related documents about judicial proceedings, but it does not address administrative documents. See GR 31 (b) and (c).

A full summary of the original proposed GR 31A was set forth in the original GR 9 cover sheet, which is available on the www.courts.wa.gov website at this LINK. Also found at that link are the original proposed GR 31A and the written public comments that were originally received. A recording of the public hearing on proposed GR 31A is available on the TVW website, www.tvw.org.

Revisions made by the Supreme Court. The Supreme Court held a series of meetings to consider the suggested changes for the rule. The Supreme Court has completed its review and has made many changes, including the following:

- Organization. The most immediately apparent changes relate to the rule's organization. The rule now addresses the following topics in the following order: general principles; records procedures; the rule's application for administrative records; chamber records; and implementation issues. The Court also added hearings for the major parts of the rule and reduced the number of levels of subsections, for greater ease of reader understanding.
- No new judicial cause of action. The Supreme Court removed the sections entitled "Review in Superior Court" and "Monetary Sanctions," due to separation of powers concerns about creating a new judicial cause of action in a court rule. In their place, a section was added indicating that formal judicial review of a court/agency's records decision may be obtained through existing processes outside the rule, such as the filing of a writ. See section (d)(4)(i).
- Participation by third parties. The Supreme Court added a new section allowing for participation of a third party who is the subject of the requested record. The subject of the record may also initiate a review proceeding.
- 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.
- Policy. The rule's policy statement was expanded to include a citation to the constitutional provision on open courts. Language was removed that had cited the constitutional provision on privacy, while still retaining the remainder of the provision's language on privacy. Privacy is an important concept in this area of the law, but the focus of the appellate opinions interpreting the Public Records Act has been on common law principles of privacy, rather than on constitutional principles.
- Certified Professional Guardian Board. The Supreme Court removed the provision that had exempted the CPG Board from the rule. The Court decided that the CPG Board should be subject to the rule, although some of the Board's documents need to be kept confidential. New exemptions for the confidential documents have been drafted.

- Injunctions for requests having improper purposes. The Supreme Court redrafted the section on injunctions. Previously, this section applied only to inmates who requested records with an improper purpose (i.e., harassment, intimidation, threat to security, criminal activity). As redrafted, the section applies to anybody who requests the records with these improper purposes.
- Birth dates. The Supreme Court removed language that would have exempted birth dates for public access. Birth dates are used to distinguish between similarly named people.
- Appellate assignment judges. The Supreme Court deleted the exemption for the identity of appellate court assignment judges. The exemption is not needed here, as it relates to case records, which is addressed in a separate rule, GR 31.
- Deadlines for requesting review of records decisions. The Supreme Court added deadlines for appealing from records decisions. A person who is dissatisfied with a public records officer's decision has 90 days in which to seek internal review within the court/agency. A person who is dissatisfied with the court/agency's final decision has 30 days in which to seek external review.
- Role of the PRA. The Supreme Court refined language on the role of the PRA in providing guidance when the rule's application to a particular issue is ambiguous.
- Security records. A new section was added to protect security records. The new section expands similar language from the Public Records Act.
- Appointment of Defense Expert Witnesses. The Supreme Court expanded one of the exemptions so that it would cover a broader range of documents related to the appointment of expert witnesses for the defense of criminal cases.
- Office of Public Defense and Office of Civil Legal Aid. The Supreme Court rectified a potential ambiguity in the rule by adding language directly stating that the rule applies to the Office of Public Defense and the Office of Civil Legal Aid.
- Commission on Judicial Conduct. The Supreme Court deleted a redundant provision that had expressly excluded the Commission on Judicial Conduct from the rule. The provision specific to the CJC is not needed, because the rule applies only to those agencies that are overseen by a court; the CJC is not overseen by a court.

Accompanying rule. When proposed GR 31A was submitted to the Supreme Court, it was accompanied by a proposed amendment to GR 31 (public access to case files). The proposed amendment to GR 31 made minor changes to ensure that the two rules worked smoothly together. The proposed amendment to GR 31 is still pending; the Court will act on that amendment once the new GR 31.1 is in final form.

GENERAL RULE 31.1
ACCESS TO ADMINISTRATIVE RECORDS
GENERAL PRINCIPLES

(a) Policy and Purpose. Consistent with the principles of open administration of justice as provided in article I, section 10 of the Washington State Constitution, it is the policy of the judiciary to facilitate access to administrative records. Access to administrative records is not absolute and shall be consistent with reasonable expectations of personal privacy, restrictions in statutes, restrictions in court rules, and as required for the integrity of judicial decision-making. Access shall not unduly burden the business of the judiciary.

(b) Overview of Public Access to Judicial Records. There are three categories of judicial records.

(1) Case records are records that relate to in-court proceedings, including case files, dockets, calendars, and the like. Public access to these records is governed by GR 31, which refers to these records as "court records," and not by this GR 31.1. Under GR 31, these records are presumptively open to public access, subject to stated exceptions.

(2) Administrative records are records that relate to the management, supervision, or administration of a judicial entity. A more specific definition of this term is in section (i) of this rule. Under section (j) of this rule, administrative records are presumptively open to public access, subject to exceptions found in sections (j) and (l) of this rule.

(3) Chambers records are records that are kept in a judge's chambers. A more specific definition of this term is in section (m) of this rule. Under section (m), chambers records are not open to public access.

PROCEDURES FOR ADMINISTRATIVE RECORDS

(c) Procedures for Records Requests.

(1) AGENCIES TO ADOPT PROCEDURES. Each court and judicial agency must adopt a policy implementing this rule and setting forth its procedures for accepting and responding to administrative records requests. The policy must include the designation of a public records officer and must require that requests for access be submitted in writing to the designated public records officer. Best practices for handling administrative records requests shall be developed under the authority of the Board for Judicial Administration.

(2) PUBLICATION OF PROCEDURES FOR REQUESTING ADMINISTRATIVE RECORDS. Each court and judicial agency must prominently publish the procedures for requesting access to its administrative records. If the court or judicial agency has a website, the procedures must be included there. The publication shall include the public records officer's work mailing address, telephone number, fax number, and e-mail address.

(3) INITIAL RESPONSE. Each court and judicial agency must initially respond to a written request for access to an administrative record within five working days of its receipt. The response shall acknowledge receipt of the request and include a good-faith estimate of the time needed to respond to the request. The estimate may be later revised, if necessary. For purposes of this provision, "working days" mean days that the court or judicial agency, including a part-time municipal court, is open.

(4) COMMUNICATION WITH REQUESTER. Each court and judicial agency must communicate with the requester as necessary to clarify the records being requested. The court or judicial agency may also communicate with the requester in an effort to determine if the requester's need would be better served with a response other than the one actually requested.

(5) SUBSTANTIVE RESPONSE. Each court and judicial agency must respond to the substance of the records request within the timeframe specified in the court's or judicial agency's initial response to the request. If the court or judicial agency is unable to fully comply in this timeframe, then the court or judicial agency should comply to the extent practicable and provide a new good faith estimate for responding to the remainder of the request. If the court or judicial agency does not fully satisfy the records request in the manner requested, the court or judicial agency must justify in writing any deviation from the terms of the request.

(6) EXTRAORDINARY REQUESTS LIMITED BY RESOURCE CONSTRAINTS. If a particular request is of a magnitude that the court or judicial agency cannot fully comply within a reasonable time due to constraints on the court's or judicial agency's time, resources, and personnel, the court or judicial agency shall communicate this information to the requester. The court or judicial agency must attempt to reach agreement with the requester as to narrowing the request to a more manageable scope and as to a timeframe for the court's or judicial agency's response, which may include a schedule of installment responses. If the court or judicial agency and requester are unable to reach agreement, then the court or judicial agency shall respond to the extent practicable and inform the requester that the court or judicial agency has completed its response.

(7) RECORDS REQUESTS THAT INVOLVE HARASSMENT, INTIMIDATION, THREATS TO SECURITY, OR CRIMINAL ACTIVITY.

(i) The inspection or production of any nonexempt public record may be enjoined for the reasons set forth in section (c)(7)(iii). The request shall be made by motion and shall be a summary proceeding based on affidavits or declarations, unless the court orders otherwise.

(ii) The injunction may be requested by a court or judicial agency which is the recipient of the records request or its representative, or by a person to whom the records request specifically pertains or his or her representative. The injunction request must be filed in the superior court in which the court or judicial agency which is the recipient of the records request is located. If the injunction request is filed by a superior court the decision on the injunction must be made by a visiting judicial officer.

(iii) The court may enjoin all or any part of a request or requests. In order to issue an injunction, the court must find by a preponderance of the evidence that: the request was made to harass or intimidate the court or judicial agency or its employees; fulfilling the request would likely threaten the security of the court or judicial agency; fulfilling the request would likely threaten the safety or security of staff, family members of staff, or any other person; or fulfilling the request may assist criminal activity. Based on the evidence, the court may also enjoin, for a period of time the court deems reasonable, future requests by the same requestor or an entity owned or controlled in whole or in part by the same requestor.

(iv) In deciding whether to enjoin a records request the court may consider all relevant factors including, but not limited to: other requests by the requestor; the type of record or records sought; statements offered by the requestor concerning the purpose for the request; whether disclosure of the requested records would likely harm any person or vital government interest; whether the request seeks a significant and burdensome number of documents; the impact of disclosure on the court's or judicial agency's security and order, the safety or security of court or judicial agency staff, families, or others; and the potential deterrence of criminal activity.

COMMENT: Section 7 is based on the PRA's provision that provides an injunction process for inmate requests that involve harassment or other specified improper purposes. See RCW 42.56.565. Section 7 expands the PRA's provision so that it applies to <u>any</u> person whose request involves the improper purpose. The statute's paragraph on attorney fees was omitted, because this rule does not allow attorney fees.

(d) Review of Records Decision.

(1) NOTICE OF REVIEW PROCEDURES. The public records officer's response to a public records request shall include a written summary of the procedures under which the requesting party may seek further review.

(2) DEADLINE FOR SEEKING INTERNAL REVIEW. A record requester's petition under section (d)(3) seeking internal review of a public records officer's decision must be submitted within 90 days of the public records officer's decision.

(3) INTERNAL REVIEW WITHIN COURT OR AGENCY. Each court and judicial agency shall provide a method for review by the judicial agency's director, presiding judge, or judge designated by the presiding judge. For a judicial agency, the presiding judge shall be the presiding judge of the court that oversees the agency. The court or judicial agency may also establish intermediate levels of review. The court or judicial agency shall make publicly available the applicable forms. The review proceeding is informal and summary. The review proceeding shall be held within five working days. If that is not reasonably possible, then within five working days the review shall be scheduled for the earliest practical date.

(4) EXTERNAL REVIEW. Upon the exhaustion of remedies under section (d)(3), a record requester aggrieved by a court or agency decision may obtain further review by choosing between the two alternatives set forth in subsections (i) and (ii) of this section (d)(4).

(i) REVIEW VIA CIVIL ACTION IN COURT. The requesting person may use a process already existing outside of this rule, such as a judicial writ, to file a civil action in court challenging the records decision.

(ii) ADMINISTRATIVE REVIEW BY VISITING JUDGE OR OTHER OUTSIDE DECISION MAKER. The requesting person may seek administrative review by a person outside the court or judicial agency. If the requesting person seeks review of a decision made by a court or made by a judicial agency that is directly reportable to a court, the outside review shall be by a visiting judicial officer. If the requesting person seeks review of a decision made by a judicial agency that is not directly reportable to a court, the outside review shall be by a person agreed upon by the requesting person and the judicial agency. In the event the requesting person and the judicial agency cannot agree upon a person, the presiding superior court judge in the county in which the judicial agency is located

shall either conduct the review or appoint a person to conduct the review. The review proceeding shall be informal and summary. In order to choose this option, the requesting person must sign a written waiver of any further review of the decision by the person outside the court or judicial agency. The decision under this subsection (ii) is final and not appealable.

COMMENT: Section (4)(i) ensures that record requesters may still go to court if they wish, while section (4)(ii) offers requesters an option to resolve the issue in an informal and speedier manner. Neither section (4)(i) nor section (4)(ii) creates a new cause of action in court; section (4)(i) merely recognizes the existence of other methods for filing a civil action in court; section (4)(ii) merely creates what is essentially a higher level of administrative review.

(iii) MONETARY AWARDS NOT ALLOWED. Attorney fees, costs, civil penalties, or fines may not be awarded under either alternative for external review.

(iv) DEADLINE FOR SEEKING EXTERNAL REVIEW. A request for external review must be submitted within 30 days of the issuance of the court or judicial agency's final decision under section (d)(3).

(e) Persons Who Are Subjects of Records.

(1) Unless otherwise required or prohibited by law, a court or judicial agency has the option of notifying a person named in a record or to whom a record specifically pertains, that access to the record has been requested.

(2) A person who is named in a record, or to whom a record specifically pertains, may present information opposing the disclosure to the applicable decision maker under sections (c) and (d).

(3) If a court of judicial agency decides to allow access to a requested record, a person who is named in that record, or to whom the record specifically pertains, has a right to initiate review under subsections (d)(3)-(4) or to participate as a party to any review initiated by a requester under subsections (d)(3)-(4). If either the record subject or the record requester objects to administrative review under subsection (d)(4)(ii), such alternative shall not be available. The deadlines that apply to a requester apply as well to a person who is a subject of a record.

COMMENT: Subsection (1) is adapted from the PRA statute, which allows but does not require agencies to notify a person who is a subject of a record. Subsection (2) allows the subject of a record to oppose release and present argument in support of the opposition. Subsection (3) allows a person who is a subject of a record to initiate the next level of review.

(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.

(g) Court and Judicial Agency Rules. Each court by action of a majority of the judges may from time to time make and amend local rules governing access to administrative records not inconsistent with this rule. Each judicial agency may from time to time make and amend agency rules governing access to its administrative records not inconsistent with this rule.

(h) Charging of Fees.

(1) A fee may not be charged to view administrative records.

(2) A fee may be charged for the photocopying or scanning of judicial records. If another court rule or statute specifies the amount of the fee for a particular type of record, that rule or statute shall control. Otherwise, the amount of the fee may not exceed the amount that is authorized in the Public Records Act, Chapter 42.56 RCW.

(3) The court or judicial agency may require a deposit in an amount not to exceed ten percent of the estimated cost of providing copies for a request. If a court or judicial agency makes a request available on a partial or installment basis, the court or judicial agency may charge for each part of the request as it is provided. If an installment of a records request is not claimed or reviewed within 30 days, the court or judicial agency is not obligated to fulfill the balance of the request.

COMMENT: Paragraph (3) incorporates a modified version of the Public Records Act's "deposit and installments" language.]

(4) A fee not to exceed $30 per hour may be charged for research services required to fulfill a request taking longer than one hour. The fee shall be assessed from the second hour onward.

COMMENT: The authority to charge for research services is discretionary, allowing courts to balance the competing interests between recovering the costs of their response and ensuring the open administration of justice. The fee should not exceed the actual costs of response. It is anticipated that a best-practices group will consider further guidelines in this area, including fee waivers.

APPLICATION OF RULE FOR ADMINISTRATIVE RECORDS

This rule applies to all administrative records, regardless of the physical form of the record, the method of recording the record, or the method of storage of the record.

(i) Definitions.

(1) "Access" means the ability to view or obtain a copy of an administrative record.

(2) "Administrative record" means a public record created by or maintained by a court or judicial agency and related to the management, supervision, or administration of the court or judicial agency.

COMMENT: The term "administrative record" does not include any of the following: (1) "court records" as defined in GR 31; (2) chambers records as set forth later in this rule; or (3) an attorney's client files that would otherwise be covered by the attorney-client privilege or the attorney work product privilege.

(3) "Court record" is defined in GR 31.

(4) "Judge" means a judicial officer as defined in the Code of Judicial Conduct (CJC) Application of the Code of Judicial Conduct Section (A).

(5) "Public" includes an individual, partnership, joint venture, public or private corporation, association, federal, state, or local governmental entity or agency, however constituted, or any other organization or group of persons, however organized.

(6) "Public record" includes any writing, except chambers records and court records, containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any court or judicial agency regardless of physical form or characteristics. "Public record" also includes meta-data for electronic administrative records.

COMMENT: The definition in paragraph (6) is adapted from the Public Records Act. The work group added the exception for chambers records, for consistency with other parts of the proposed rule.

(7) "Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.

COMMENT: The definition in paragraph (7) is taken from the Public Records Act. E-mails and telephone records are included in this broad definition of "writing."

(j) Administrative Records—General Right of Access. The public has a presumptive right of access to court and judicial agency administrative records unless access is exempted or prohibited under this rule, other court rules, federal statutes, state statutes including the Public Records, Act, Chapter 42.56 RCW, court orders, or case law. To the extent that an ambiguity exists as to whether records access would be exempt or prohibited under this rule or other enumerated sources, responders and reviewing authorities shall be guided by the Public Records Act, Chapter 42.56 RCW, in making interpretations under this rule. In addition, to the extent required to prevent a significant risk to individual privacy or safety interests, a court or judicial agency shall delete identifying details in a manner consistent with this rule when it makes available or publishes any public record; however, in each instance, the justification for the deletion shall be provided fully in writing.

COMMENT: The paragraph states that administrative records are open to public access unless an exemption or prohibition applies. The paragraph's final sentence allows agencies to redact information from documents based on significant risks to privacy or safety.

Any public-access exemptions or prohibitions from the Public Records Act and from other statutes or court rules would also apply to the judiciary's administrative records. For example, GR 33(b) provides that certain medical records relating to ADA issues are to be sealed; the sealed records would not be subject to access under this proposed GR 31A.

(k) Entities Subject to Rule.

(1) This rule applies to the Supreme Court, the Court of Appeals, the superior courts, the district and municipal courts, and the following judicial branch agencies:

(i) All judicial entities that are overseen by a court, including entities that are designated as agencies, departments, committees, boards, commissions, task forces, and similar groups;

(ii) The Superior Court Judges' Association, the District and Municipal Court Judges' Association, and similar associations of judicial officers and employees; and

(iii) All subgroups of the entities listed in this section (k)(1).

COMMENT: The elected court clerks and their staff are not included in this rule because (1) they are covered by the Public Records Act and (2) they do not generally maintain the judiciary's administrative records that are covered by this rule.

(2) This rule applies to the Office of Civil Legal Aid and the Office of Public Defense.

(3) This rule does not apply to the Washington State Bar Association. Public access to the Bar Association's records is governed by [a proposed General Rule 12.4, pending before the Supreme Court].

(4) A judicial officer is not a court or judicial agency.

COMMENT: This provision protects judges and court commissioners from having to respond personally to public records requests. Records requests would instead go to the court's public records officer.

(5) An attorney or entity appointed by a court or judicial agency to provide legal representation to a litigant in a judicial or administrative proceeding does not become a judicial agency by virtue of that appointment.

(6) A person or agency entrusted by a judicial officer, court, or judicial agency with the storage and maintenance of its public records, whether part of a judicial agency or a third party, is not a judicial agency. Such person or agency may not respond to a request for access to administrative records, absent express written authority from the court or judicial agency or separate authority in court rule to grant access to the documents.

COMMENT: Judicial e-mails and other documents sometimes reside on IT servers, some are in off-site physical storage facilities. This provision prohibits an entity that operates the IT server from disclosing judicial records. The entity is merely a bailee, holding the records on behalf of a court or judicial agency, rather than an owner of the records having independent authority to release them. Similarly, if a court or judicial agency puts its paper records in storage with another entity, the other entity cannot disclose the records. In either instance, it is the court or judicial agency that needs to make the decision as to releasing the records. The records request needs to be addressed by the court's or judicial agency's public records officer, not by the person or entity having control over the IT server or the storage area. On the other hand, if a court or judicial agency archives its records with the state archivist, relinquishing by contract its own authority as to disposition of the records, the archivist would have separate authority to disclose the records.

Because of the broad definition of "public record" appearing later in this rule, this paragraph (6) would apply to electronic records, such as e-mails (and their meta-data) and telephone records, among a wide range of other records.

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

(1) Requests for judicial ethics opinions;

(2) Minutes of meetings held by judges within a court and staff products prepared for judicial discussion or decision-making during the meeting;

COMMENT: Minutes of the deliberations at judges' meetings are exempt. Records produced by staff for consideration in judges' meetings and identified in the minutes would be exempt under this section.

(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, 884 P.2d 592 (1994), at which point the deliberative documents become publicly accessible.

(4) Evaluations and recommendations concerning candidates seeking appointment or employment within a court or judicial agency;

COMMENT: Paragraph (4) is intended to encompass documents such as those of the Supreme Court's Capital Counsel Committee, which evaluates attorneys for potential inclusion on a list of attorneys who are specially qualified to represent clients in capital cases.

(5) Personal identifying information, including individuals' home contact information, Social Security numbers, driver's license numbers, and identification/security photographs;

COMMENT: The work group considered including private financial information in this provision, but ultimately concluded that financial information is already addressed in the Public Records Act's exemptions.

(6) Documents related to an attorney's request for a trial or appellate court defense expert, investigator, or other services, any report or findings submitted to the attorney or court or judicial agency by the expert, investigator, or other service provider, and the invoicing and payment of the expert, investigator or other service provider;

(7) Documents, records, files, investigative notes and reports, including the complaint and the identity of the complainant, associated with a court's or judicial agency's internal investigation of a complaint against the court or judicial agency or its contractors during the course of the investigation. The outcome of the court's or judicial agency's investigation is not exempt;

(8) Family court evaluation and domestic violence files when no action is legally pending;

(9) Family court mediation files; and

(10) Juvenile court probation social files.

COMMENT: Paragraphs (8)-(10) create exemptions for files that are already covered, at least in part, by exemptions in state statutes or elsewhere. These paragraphs are included here to make sure that there is no doubt about their exempt status. The inclusion of these three paragraphs should not be interpreted as excluding other statutory (or rule) exemptions that are not expressly listed here. Per section (j) of this rule, exemptions existing in other rules, statutes, and other authorities apply to records under this rule, even if they are not expressly stated here.

(11) Those portions of records containing specific and unique vulnerability assessments or specific and unique emergency and escape response plans, the disclosure of which would have a substantial likelihood of threatening the security of a judicial facility or any individual's safety.

COMMENT: Paragraph (11) expands on comparable language from the Public Records Act, RCW 42.56.420. The PRA language is limited to correctional facilities and the like.

(12) The following records of the Certified Professional Guardian Board:

(i) Investigative records compiled by the Board as a result of an investigation conducted by the Board as part of the application process, while a disciplinary investigation is in process under the Board's rules and regulations, or as a result of any other investigation conducted by the Board while an investigation is in process. Investigative records related to a grievance become open to public inspection upon the filing of a Board-approved complaint for disciplinary action.

(ii) Deliberative records compiled by the Board or a panel or committee of the Board as part of a disciplinary process.

(iii) Dismissed grievances shall be disclosed upon written request using established procedures for inspection, copying, and disclosure with identifying information about the grievant, incapacitated person, and professional guardian and/or agency redacted. A request for dismissed grievances shall cover a specified time period of not less than 12 months.

COMMENT: The exemptions for the CPG Board are taken from the Board's regulations. The sentence at the end of paragraph (a) was added to reflect the manner in which the Board has interpreted this provision.

CHAMBERS RECORDS

(m) Chambers Records. Chambers records are not administrative records and are not subject to disclosure.

COMMENT: Access to chambers records could necessitate a judicial officer having to review all records to protect against disclosing case sensitive information or other information that would intrude on the independence of judicial decision-making. This would effectively make the judicial officer a de facto public records officer and could greatly interfere with judicial functions. Records may remain under chambers control even though they are physically stored elsewhere. For example, records relating to chambers activities that are stored on a judge's personally owned or workplace-assigned computer, laptop computer, cell phone, and similar electronic devices would still be chambers records. However, records that are otherwise subject to disclosure should not be allowed to be moved into chambers control as a means of avoiding disclosure.

(1) "Chambers record" means any writing that is created by or maintained by any judicial officer or chambers staff, and is maintained under chambers control, whether directly related to an official judicial proceeding, the management of the court, or other chambers activities. "Chambers staff" means a judicial officer's law clerk and any other staff when providing support directly to the judicial officer at chambers.

COMMENT: Some judicial employees, particularly in small jurisdictions, split their time between performing chambers duties and performing other court duties. An employee may be "chambers staff" as to certain functions, but not as to others. Whether certain records are subject to disclosure may depend on whether the employee was acting in a chambers staff function or an administrative staff function with respect to that record.

(2) Court records and administrative records do not become chambers records merely because they are in the possession or custody of a judicial officer or chambers staff

COMMENT: Chambers records do not change in character by virtue of being accessible to another chambers. For example, a data base that is shared by multiple judges and their chambers staff is a "chambers record" for purposes of this rule, as long as the data base is only being used by judges and their chambers staff.

IMPLEMENTATION AND EFFECTIVE DATE

(n) Best Practices. Best practice guidelines adopted by the Supreme Court may be relied upon in acting upon public requests for documents.

COMMENT: A new work group is contemplated to recommend best practices to guide courts and judicial agencies in implementing this rule's necessarily broad, general standards. Courts and judicial agencies would benefit greatly from further work in applying the general principles to the specific types of documents and requests that are most likely to arise. For example, best practices could include designating more specific lists of records that are presumptively characterized as "chambers records" or as being within other categories of records under this rule. The BJA's original work group prepared some documents to assist a new best-practices group in this regard. The best-practices group could also recommend the best methods and resources for training judges and staff.

(o) Effective Date of Rule.

(1) This rule goes into effect on _____, and applies to records that are created on or after that date.

COMMENT: A delayed effective date will be used to allow time for development of best practices, training, and implementation.

(2) Public access to records that are created before that date are to be analyzed according to other court rules, applicable statutes, and the common law balancing test. The Public Records Act, Chapter 42.56 RCW, does not apply to judicial records, but it may be used for non-binding guidance.

Reviser's note: The typographical errors in the above material occurred in the copy filed by the State Supreme Court and appear in the Register pursuant to the requirements of RCW 34.08.040.

Reviser's note: The brackets and enclosed material in the text of the above section occurred in the copy filed by the agency and appear in the Register pursuant to the requirements of RCW 34.08.040.

WSR 12-20-006

INTERPRETIVE OR POLICY STATEMENT

HEALTH CARE AUTHORITY

[Filed September 20, 2012, 12:40 p.m.]

Notice of Interpretive or Policy Statement

In accordance with RCW 34.05.230(12), following is a list of policy and interpretive statements issued by the health care authority (HCA).

HCA
Legal and Administrative Services

Document Title: Provider Notice #12-72.

Subject: Drug formulary physicians.

Effective for dates of services on and after October 1, 2012, the medicaid program of HCA will add a new drug formulary section to the Physician-Related Services/Healthcare Professional Services Medicaid Provider Guide.

For additional information, contact Amber Lougheed, HCA, P.O. Box 45504, phone (360) 725-1349, TDD/TTY 1-800-848-5429, fax (360) 586-9727, e-mail amber.lougheed@hca.wa.gov, web site http://www.hca.wa.gov/.

WSR 12-20-010

NOTICE OF PUBLIC MEETINGS

WASHINGTON STATE UNIVERSITY

[Filed September 21, 2012, 12:50 p.m.]

BOARD OF REGENTS SPECIAL MEETING NOTICE

The Washington State University board of regents will hold a special meeting with the University of Washington board of regents at 4:00 on Friday, September 28, 2012. The meeting will last approximately one hour. The meeting will be held in the 901 Fifth Avenue Building, 5th Avenue Conference Room, Seattle, WA.

There will be a reception following the meeting in the same location.

This notice is being sent by the direction of the chair of the board of regents pursuant to the requirements of the Open [Public] Meeting[s] Act of 1971 as amended.

Questions about the board of regents meeting and schedule may be directed to Rebecca Lande, executive assistant to the board of regents, (509) 335-6662.

WSR 12-20-017

NOTICE OF PUBLIC MEETINGS

SEATTLE COMMUNITY COLLEGES

[Filed September 24, 2012, 11:28 a.m.]

In compliance with RCW 42.30.075, following is the revised Seattle Community Colleges - District VI board of trustees regular meeting schedule for 2012, which was adopted by the board on September 13, 2012.

If you have any questions, please contact Carolyn Yeager at (206) 934-3850.

REVISED BOARD OF TRUSTEES
2012 MEETING SCHEDULE
Approved by the Board of Trustees
September 13, 2012

The board of trustees meetings begin with a study session or reception at **3:00 p.m.** Regular meeting agenda sessions will begin at **4:00 p.m.** Dates and locations of the meetings are noted below. **All meetings are on the second Thursday of the month, except May and October.**

DATE	LOCATION
January 12	Seattle Community College District Office 1500 Harvard Avenue Seattle, WA 98122
February 9	Seattle Community College District Office 1500 Harvard Avenue Seattle, WA 98122
March 8	South Seattle Community College (SSCC) 6000 16th Avenue S.W. Seattle, WA 98106

DATE	LOCATION
April 12	Seattle Community College District Office 1500 Harvard Avenue Seattle, WA 98122
May 17	Seattle Community College District Office 1500 Harvard Avenue Seattle, WA 98122
June 14	North Seattle Community College (NSCC) 9600 College Way North Seattle, WA 98103
July 12	Seattle Community College District Office 1500 Harvard Avenue Seattle, WA 98122
August	No meeting
September 13	Seattle Central Community College (SCCC) 1701 Broadway Seattle, WA 98122
October 22	Seattle Central Community College (SCCC) 1701 Broadway Seattle, WA 98122
November 8	Seattle Community College District Office 1500 Harvard Avenue Seattle, WA 98122
December 13	Seattle Community College District Office 1500 Harvard Avenue Seattle, WA 98122

WSR 12-20-021
NOTICE OF PUBLIC MEETINGS
LIFE SCIENCES DISCOVERY FUND AUTHORITY

[Filed September 24, 2012, 5:08 p.m.]

Please note the updated information in bold below for the life sciences discovery fund (LSDF) authority (agency #3560) 2012-2013 board meetings. Note as well that we will post our public meeting agenda and any call-in information if pertinent on our web site http://www.lsdfa.org/about/staff/meetings.html prior to each meeting.

2012-2013 Public Board Meeting Dates

(times are approximate and subject to change)

Monday, October 15, 2012	9:00 a.m. - **11:30 a.m.**	LSDF Office 1551 Eastlake Avenue East **First Floor Agora Room** Seattle, WA 98102
Friday, December 14, 2012	9:00 a.m. - 5:00 p.m.	LSDF Office 1551 Eastlake Avenue East Suite 325 Seattle, WA 98102 and via phone 1-888-272-2618, no password needed
Monday, June 17, 2013	9:00 a.m. - 3:00 p.m.	LSDF Office 1551 Eastlake Avenue East Suite 325 Seattle, WA 98102 and via phone 1-888-272-2618, no password needed
Monday, September 16, 2013	9:00 a.m. - 3:00 p.m.	LSDF Office 1551 Eastlake Avenue East Suite 325 Seattle, WA 98102 and via phone 1-888-272-2618, no password needed
Monday, December 16, 2013	9:00 a.m. - 3:00 p.m.	LSDF Office 1551 Eastlake Avenue East Suite 325 Seattle, WA 98102 and via phone 1-888-272-2618, no password needed

WSR 12-20-024
INTERPRETIVE OR POLICY STATEMENT
HEALTH CARE AUTHORITY

[Filed September 26, 2012, 9:21 a.m.]

Notice of Interpretive or Policy Statement

In accordance with RCW 34.05.230(12), following is a list of policy and interpretive statements issued by the health care authority (HCA).

HCA
Legal and Administrative Services

Document Title: Provider Notice #12-77.

Subject: Kidney Center Services Medicaid Provider Guide.

Effective for dates of services on and after October 1, 2012, the medicaid program of the HCA is publishing an updated coverage table in the Kidney Center Services Medicaid Provider Guide.

For additional information, contact Amber Lougheed, HCA, P.O. Box 45504, phone (360) 725-1349, TDD/TTY 1-800-848-5429, fax (360) 586-9727, e-mail amber.lougheed@hca.wa.gov, web site http://www.hca.wa.gov/.

WSR 12-20-025
INTERPRETIVE OR POLICY STATEMENT
HEALTH CARE AUTHORITY

[Filed September 26, 2012, 9:22 a.m.]

Notice of Interpretive or Policy Statement

In accordance with RCW 34.05.230(12), following is a list of policy and interpretive statements issued by the health care authority (HCA).

HCA
Legal and Administrative Services

Document Title: Provider Notice #12-78.

Subject: Hospice fee schedule updates.

Effective for dates of services on and after October 1, 2012, the medicaid program of HCA will update the hospice fee schedule.

For additional information, contact Amber Lougheed, HCA, P.O. Box 45504, phone (360) 725-1349, TDD/TTY 1-800-848-5429, fax (360) 586-9727, e-mail amber.lougheed@hca.wa.gov, web site http://www.hca.wa.gov/.

WSR 12-20-033

NOTICE OF PUBLIC MEETINGS

UNIVERSITY OF WASHINGTON

[Filed September 27, 2012, 1:30 p.m.]

The chair of the board of regents has provided notice of a change in the **location** of the regular meeting of the board of regents on Thursday, November 8, 2012.

The prior notice of the meeting, dated November 18, 2011, stated it would be held in the Petersen Room of the Allen Library. The revised location for the regular meeting is the Husky Union Building (HUB), Room 334. Committee meetings will be also be held in the HUB, Room 334.

The revised notice, as published in the Washington State Register, should read Thursday, November 8, at 1 p.m., UW Seattle Campus, Husky Union Building (HUB), Room 334, Committees in HUB, Room 334.

This board meeting will begin at 8:00 a.m. with the first of a series of regent committee sessions, which are part of the board's meetings and are attended by some or all of the members of the board. A concluding session, attended by the full board, begins at noon.

Any delay in the committee start time will be announced on the board's web page by noon on the Friday before the meeting date, and at 8:00 a.m. on the meeting date, at the meeting location.

WSR 12-20-035

DEPARTMENT OF LABOR AND INDUSTRIES

[Filed September 28, 2012, 9:00 a.m.]

Minimum Wage Rate

Pursuant to RCW 49.46.020, the department of labor and industries has calculated the adjusted minimum wage rate for 2013 to be $9.19, effective January 1, 2013.

Please call (360) 902-6411 if you have any questions.

WSR 12-20-037

INTERPRETIVE STATEMENT

DEPARTMENT OF REVENUE

[Filed September 28, 2012, 11:51 a.m.]

INTERPRETIVE STATEMENT ISSUED

The department of revenue has reissued the following excise tax advisory (ETA):

ETA 3133 ***Withdrawal of published determinations***

The department has reissued this ETA to announce that it has withdrawn Det. No. 92-231, 12 WTD 233. The taxpayer in this determination created gift baskets that contained various individually wrapped food items. The determination correctly reached a conclusion that this activity was not manufacturing. However, WAC 458-20-136 Manufacturing, processing for hire, fabricating, was subsequently amended to clarify various factors that the department considers in determining whether an activity such as creating gift baskets is manufacturing. The determination does not address these factors and has caused confusion.

A copy of this document is available via the internet at Recent Rule and Interpretive Statements, Adoptions, and Repeals.

Alan R. Lynn
Rules Coordinator

WSR 12-20-038

NOTICE OF PUBLIC MEETINGS

HUMAN RIGHTS COMMISSION

[Filed September 28, 2012, 1:47 p.m.]

The following are revised and/or cancelled commission meeting dates:

November 29, 2012 9:30 a.m.	Conference call	Washington State Human Rights Commission 711 South Capitol Way Suite 402 Olympia, WA 98504
December 13, 2012 9:30 a.m.	CANCELLED	Washington State Human Rights Commission 711 South Capitol Way Suite 402 Olympia, WA 98504
December 27, 2012 9:30 a.m.	Conference call	Washington State Human Rights Commission 711 South Capitol Way Suite 402 Olympia, WA 98504

WSR 12-20-039
INTERPRETIVE OR POLICY STATEMENT
HEALTH CARE AUTHORITY
[Filed September 28, 2012, 3:42 p.m.]

Notice of Interpretive or Policy Statement

In accordance with RCW 34.05.230(12), following is a list of policy and interpretive statements issued by the health care authority (HCA).

HCA
Legal and Administrative Services

Document Title: Provider Notice #12-82.

Subject: Maximum allowable cost updates.

Effective for dates of services on and after November 1, 2012, (unless otherwise noted) HCA will implement the following changes to the prescription drug program: 1. New additions to the maximum allowable cost (MAC) list; 2. MAC adjustments; 3. MAC deletions.

For additional information, contact Amber Lougheed, HCA, P.O. Box 45504, phone (360) 725-1349, TDD/TTY 1-800-848-5429, fax (360) 586-9727, e-mail amber.lougheed@hca.wa.gov, web site http://www.hca.wa.gov/.

WSR 12-20-040
INTERPRETIVE OR POLICY STATEMENT
HEALTH CARE AUTHORITY
[Filed September 28, 2012, 3:43 p.m.]

Notice of Interpretive or Policy Statement

In accordance with RCW 34.05.230(12), following is a list of policy and interpretive statements issued by the health care authority (HCA).

HCA
Legal and Administrative Services

Document Title: Provider Notice #12-83.

Subject: Delayed implementation of medicaid formulary.

HCA medicaid fee-for-service formulary will not be implemented on October 1, 2012, as previously announced. For additional information, contact Amber Lougheed, HCA, P.O. Box 45504, phone (360) 725-1349, TDD/TTY 1-800-848-5429, fax (360) 586-9727, e-mail amber.lougheed@hca.wa.gov, web site http://www.hca.wa.gov/.

WSR 12-20-042
INTERPRETIVE OR POLICY STATEMENT
HEALTH CARE AUTHORITY
[Filed September 28, 2012, 3:55 p.m.]

Notice of Interpretive or Policy Statement

In accordance with RCW 34.05.230(12), following is a list of policy and interpretive statements issued by the health care authority (HCA).

HCA
Legal and Administrative Services

Document Title: Provider Notice #12-81.

Subject: Outpatient hospital fee schedule updates.

Effective for dates of services on and after October 1, 2012, unless specified within this notice, the medicaid program of HCA will revise the outpatient hospitals and outpatient prospective payment system (OPPS) fee schedule.

For additional information, contact Amber Lougheed, HCA, P.O. Box 45504, phone (360) 725-1349, TDD/TTY 1-800-848-5429, fax (360) 586-9727, e-mail amber.lougheed@hca.wa.gov, web site http://www.hca.wa.gov/.

WSR 12-20-048
INTERPRETIVE OR POLICY STATEMENT
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
[Filed October 1, 2012, 11:07 a.m.]

Notice of Interpretive or Policy Statement

In accordance with RCW 34.05.230(12), following is a list of policy and interpretive statements issued by the department of social and health services (DSHS).

Aging and Disability Services Administration
Division of Behavioral Health and Recovery

Document Title: Washington State 1915(b) Medicaid Mental Health Waiver Amendment.

Subject: Regional support network (RSN) consolidations, authorized by SHB 2139.

Effective Date: October 1, 2012.

Document Description: SHB 2139 authorizes DSHS to establish new RSN boundaries where two or more RSNs propose to reconfigure themselves to achieve consolidation. Currently there are thirteen RSNs that provide county-based mental health managed care services statewide through contracted provider networks. DSHS has approved two consolidations effective October 1, 2012, reducing the number of RSNs to eleven statewide. To implement the consolidations, the health care authority has submitted a 1915(b) waiver amendment to the CMS.

To receive a copy of the interpretive or policy statements, contact Thomas Gray, Office of Behavioral Health Services, P.O. Box 45330, phone (360) 725-1314, TDD/TTY 1-800-833-6384, fax (360) 725-2280, e-mail tom.gray@dshs.wa.gov, web site http://www.dshs.wa.gov/dbhr/.

WSR 12-20-049
NOTICE OF PUBLIC MEETINGS
HIGHLINE COMMUNITY COLLEGE
[Filed October 1, 2012, 3:39 p.m.]

This is to inform you of a change in the meeting schedule for the 2012 board of trustees' meeting dates for Highline Community College, Community College District 9. Due to

some scheduling conflicts, the board of trustees has agreed to cancel the previously scheduled meeting of October 11, 2012. The remainder of the schedule of meeting dates for 2012 remains unchanged and is listed below:

DATE	STUDY SESSION	MEETING
November 15, 2012	8:00 a.m.	10:00 a.m.
December 13, 2012	8:00 a.m.	10:00 a.m.

WSR 12-20-052

NOTICE OF PUBLIC MEETINGS

WORKFORCE TRAINING AND EDUCATION COORDINATING BOARD

[Filed October 2, 2012, 7:52 a.m.]

The workforce training and education coordinating board approved the 2013 board meeting schedule. Following is a copy of the scheduled dates. Please reference our web site for locations and time.

Please feel free to contact Julie Anderson, (360) 709-4622 or janderson@wtb.wa.gov, if you have any questions.

Approved 2013 Meeting Schedule

Thursday, January 24	Meeting	Olympia
Thursday, March 14	Meeting	Olympia
Thursday, May 2	Meeting	Olympia
Thursday, June 27	Meeting	TBD
Wednesday, July 24	Retreat	Olympia
Thursday, July 25	Retreat	Olympia
Thursday, September 26	Meeting	TBD
Thursday, November 14	Meeting	TBD

WSR 12-20-070

NOTICE OF PUBLIC MEETINGS

GRAIN COMMISSION

[Filed October 3, 2012, 8:41 a.m.]

The Washington grain commission (WGC) hereby complies with regulations as stated in RCW 42.30.075 and provides pertinent scheduled meeting changes, per the board of directors, for publication in the State Register. The dates change for the November regular meeting is submitted at least twenty days prior to the scheduled meeting dates.

November meeting was previously listed as: Regular - November 15 (10:00 a.m.) and 16 (8:00 a.m.) at WGC offices.

PLEASE CHANGE TO READ: **Regular - December 3, one-day (8:00 a.m.), 2702 West Sunset Boulevard, Suite A, Spokane, WA.**

WSR 12-20-080

NOTICE OF PUBLIC MEETINGS

DEPARTMENT OF ENTERPRISE SERVICES

(State Capitol Committee)

[Filed October 3, 2012, 10:19 a.m.]

The state capitol committee (SCC) meeting scheduled for Thursday, October 11, 2012, has been canceled.

If you have any questions, please contact Nouk Leap at (360) 407-9256 or Kim Buccarelli at (360) 407-9312.