

Before the Presiding Judges of the Administrative Judicial Regions

Per Curiam Rule 12 Decision

APPEAL NO.: 17-020

RESPONDENT: Presiding Judge of the Administrative Judicial Regions; Office of Court Administration

DATE: November 29, 2017

SPECIAL COMMITTEE: Judge Stephen B. Ables, Chairman; Judge Mary Murphy; Judge Olen Underwood; Judge Billy Ray Stubblefield; Judge Sid Harle; Judge Missy Medary; Judge Dean Rucker; Judge David L. Evans; Judge Kelly G. Moore

Petitioner sent the Office of Court Administration (OCA) three emails requesting several categories of records. OCA provided one of the requested records to Petitioner and informed Petitioner that some of the requested records did not exist. OCA denied Petitioner access to records responsive to the following requests:

- 1) notes, emails, papers, or cover letters that anyone on the committee generated or received regarding a Rule 12 petition previously filed by Petitioner;
- 2) cover letters that were generated to the committee regarding the prior petition; and
- 3) records on how and when the committee members received the petition.

OCA explained that the records Petitioner was denied were not subject to Rule 12, but if they were, they would be exempt from disclosure under Rules 12.5(a), (f) and (i). OCA also explained that the fact that a record is not subject to Rule 12 does not make the record confidential and that the requested records were being withheld because they were privileged attorney-client communications, records related to the special committee's deliberative process, and records subject to judicial privilege. Petitioner then filed this appeal.

Rule 12 does not require records custodians to create records in response to Rule 12 requests. *See* Rule 12.4(a)(1). Therefore, to the extent Petitioner is appealing the fact that some of the records do not exist, that portion of the appeal must be denied. The remainder of this decision addresses the denial of access to the records responsive to the descriptions listed above.¹

The threshold issue in a Rule 12 appeal is whether the records at issue in the appeal are “judicial records” subject to Rule 12. Rule 12.2(d) defines a “judicial record,” in pertinent part, as “a record made or maintained by or for a court or judicial agency in its regular course of business *but not pertaining to its adjudicative function, regardless of whether that function relates to a specific case.*” (Emphasis added.)

¹ The responsive records consist of a recommendation regarding a draft decision and the votes and responses submitted by members of the special committee.

Special committees assigned to review appeals from the denial of access to records under Rule 12 exercise an adjudicative function when they review and issue decisions in Rule 12 appeals. The records that OCA denied Petitioner access to are records that were created by members of the special committee assigned to the prior appeal filed by Petitioner or by the OCA attorney assigned to assist the presiding judges of the administrative judicial regions with their duties regarding Rule 12 appeals. The records created by Rule 12 special committees and their attorneys are related to the special committees' adjudicative functions and are not subject to Rule 12.

Because the records at issue in this appeal are not subject to Rule 12, the Rule 12 appeal process does not apply to the denial of access to the records at issue in this appeal and this special committee is without authority to issue a decision in the matter. Nevertheless, if the responsive records had been subject to Rule 12, they would be exempt from disclosure under Rules 12.5(a), (f) and (i) because they consist of attorney-client communications and judicial deliberations.