

Administrative Law Section

of the Washington State Bar Association



Administrative Law Section Executive Committee Telephonic/Zoom Meeting November 16, 2020

Executive Committee Members Present: Eileen Keiffer (Chair), Robert Krabill (Immediate Past Chair), Bill Pardee (Chair-Elect), Richelle Little (Secretary), Katy Hatfield (Treasurer), Marjorie Gray (2019-2022), Alexis Hartwell-Gobeske (2019-2022), Ed Pesik (2020-2021), Selina Kang (2020-2021), Lea Anne Dickerson (2018-2021), Susan Pierini (2018-2021), Cameron Zangenehzadeh (Young Lawyer Liaison).

Also Present: Richard Potter, Eileen Trang, Brett Purtzer.

Absent Executive Committee Members: Scott Boyce (2018-2021), Sophie Geguchadze (2020-2021), Robert Rhodes (2020-2023).

Quorum: Yes

Number of voting members present: 12

Members required for quorum: 8

Total number of voting members: 15

Meeting called to order at 12:04 p.m.

1. Approval of Minutes (all)

A motion was made (Mergie) and seconded (Bill) to approve the minutes from the October 19, 2020, meeting; the motion passed unanimously.

2. Approval of Agenda (all)

The agenda was proposed, as distributed by Eileen prior to the meeting. A motion was made (Ed) and seconded (Marjorie) to approve the agenda. The motion passed unanimously.

3. Financial update (Katy Hatfield)

Katy provided an update. We received approximately \$1,800 in revenue from the PRA deskbook last quarter. We received revenue projections from WSBA of what our revenue might be if we hold a full-day CLE. Katy explained that the revenue sharing for full-day CLEs has changed. We did not get any income the last time we held a full-day CLE, compared with up to \$10,000 at some full-day CLE under the previous revenue sharing system. However, we haven't had any "blockbuster" CLEs with large attendance since the new revenue sharing started, so we don't really know how it would play out. For now, due to the pandemic, we are focusing on mini-CLEs anyway.

4. Committee updates

4.1 Retreat Update (Marjorie Gray)

There was no update today.

4.2 Legislative (Richard Potter)

Richard has been monitoring the committee hearings. The December 1, 2020 meeting agenda of the House Local Government Committee includes a report on local government Public Records Act training that Richard will watch.

4.3 Publications and Practice Manual (Selina Kang, Richelle Little)

Selina provided the update. We are waiting to hear back from our contact at Lexis Nexis regarding what needs to be updated in the Administrative Law Practice Manual in 2020.

4.4 CLE (Bill Pardee)

Bill provided an update. Speakers for the December 14 mini-CLE are Matt King and Catherine Taliaferro, and they will speak on the intersection of HIPAA and the PRA.

On February 25, 2021, there will be a mini-CLE on FMLA and PFML.

We have a date reserved in March, and Robert Krabill will be the presenter.

4.5 Diversity and Outreach (Alexis Hartwell-Gobeske / Robert Rhodes)

Alexis provided an update. Gonzaga Law School and eleven WSBA sections hosted a remote networking event for current law students and alumni on October 22. It was a successful event. The platform used allowed students to visit each section's virtual table.

4.6 Homan Award (Lea Anne Dickerson)

The December 14, 2020, CLE at 4pm will be on the WSBA mini-CLE platform, and the reception honoring Richard Potter as recipient of the Homan Award at 5pm will be on Zoom because the mini-CLE platform is not interactive. Contact Eileen if you have not received an invitation to the Zoom reception.

4.7 Newsletter (Ed Pesik)

Ed has submitted the most recent issue of the Newsletter for review by WSBA and is gearing up to start the next issue.

4.8 Elections (Robert Krabill, Lea Dickerson)

There were no updates today.

5. Superior Court Recovery Task Force - Appellate Committee (Eileen Keiffer/Richard Potter)

Eileen provided an update. The proposal to promote Direct Appeals of APA Appeals to Court of Appeals under RCW 34.05.518. is complete. The draft bill developed by the task force is

attached to these minutes. Eileen did not have a sense of whether the amendments were likely to pass this legislative session.

6. Update on Support for ELUHO's budget request re SB 5151 Compliance (Richard Potter)

Richard contacted Nina Carter and let her know that we did not have the 75% members present to vote on this issue at our last meeting. Richard read the email he had sent to Ms. Carter out loud. In the email, Richard communicated that the group is generally in support of agencies having the resources to provide the public with indexes of decisions, but could not opine on the details of the specific proposal. He also let her know that our section would provide formal support of a general nature, and not on the details of the proposal or amount being requested, but that our section's support is conditioned on the Environmental and Land Use Law Section also supporting it.

It was noted that more than 75% of voting members of the executive committee were present (12/15). Marjorie made a motion that this issue falls within GR 12; Eileen seconded. The motion passed unanimously.

Marjorie made a motion to authorize Richard to sign a letter on behalf of the section that formalizes our intent; Susan Pierini seconded. Katy proposed to amend the motion to make it conditional on Environmental Law Section's approval. Marjorie accepted the amendment. The motion passed unanimously.

7. Executive Committee Positions Occupied by Nonattending Members

The Committee had a discussion about what to do about members who are not able to or do not attend meetings consistently. The bylaws article 6.2 provides, "Any member of the executive committee may be removed by a two-thirds majority vote of the executive committee. Grounds for removal of executive committee members include, but are not limited to, regular absence from executive committee meetings... ." The Committee also discussed whether a particular threshold of missed meetings was appropriate before utilizing this bylaws provision. Eileen will reach out to members who have not been attending meetings consistently to gauge availability and appetite for continued involvement with the Committee.

8. Good of the Order

The bylaw amendment to clarify language regarding appointments to vacant positions was approved by the WSBA Board of Governors last Friday, November 13, 2020.

9. Next Meeting

Next meeting is December 14, 2020 at 12:00 p.m.

The meeting adjourned at 12:53 p.m.

Attachments:

- Bill Request Form (Z-bill) from Recovery Task Force - Appellate Committee

BILL REQUEST - CODE REVISER'S OFFICE

BILL REQ. #: Z-0085.2/21 2nd draft

ATTY/TYPIST: JO:lcl

BRIEF DESCRIPTION: Concerning direct appeals to the court of appeals of cases brought under the administrative procedure act.

1 AN ACT Relating to direct appeals to the court of appeals of
2 cases brought under the administrative procedure act; amending RCW
3 34.05.518, 34.05.522, 36.18.018, 34.05.518, and 34.05.522; providing
4 an effective date; providing an expiration date; and declaring an
5 emergency.

6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

7 **Sec. 1.** RCW 34.05.518 and 2010 c 211 s 15 are each amended to
8 read as follows:

9 (1) The final decision of an administrative agency in an
10 adjudicative proceeding under this chapter may(~~(, except as otherwise~~
11 ~~provided in chapter 43.21L RCW,)~~) be directly reviewed by the court
12 of appeals (~~(either (a))~~) upon certification by the superior court
13 pursuant to this section (~~(or (b) if the final decision is from an~~
14 ~~environmental board as defined in subsection (3) of this section,~~
15 ~~upon acceptance by the court of appeals after a certificate of~~
16 ~~appealability has been filed by the environmental board that rendered~~
17 ~~the final decision))~~).

18 (~~(2) For direct review upon certification by the superior court,~~
19 ~~an application for direct review must be filed with the superior~~
20 ~~court within thirty days of the filing of the petition for review in~~
21 ~~superior court. The superior court may certify a case for direct~~

1 review only if the judicial review is limited to the record of the
2 agency proceeding and the court finds that:

3 (a) Fundamental and urgent issues affecting the future
4 administrative process or the public interest are involved which
5 require a prompt determination;

6 (b) Delay in obtaining a final and prompt determination of such
7 issues would be detrimental to any party or the public interest;

8 (c) An appeal to the court of appeals would be likely regardless
9 of the determination in superior court; and

10 (d) The appellate court's determination in the proceeding would
11 have significant precedential value.

12 Procedures for certification shall be established by court rule.

13 (3) (a) For the purposes of direct review of final decisions of
14 environmental boards, environmental boards include those boards
15 identified in RCW 43.21B.005 and the growth management hearings board
16 as identified in RCW 36.70A.250.

17 (b) An environmental board may issue a certificate of
18 appealability if it finds that delay in obtaining a final and prompt
19 determination of the issues would be detrimental to any party or the
20 public interest and either:

21 (i) Fundamental and urgent statewide or regional issues are
22 raised; or

23 (ii) The proceeding is likely to have significant precedential
24 value.

25 (4) The environmental board shall state in the certificate of
26 appealability which criteria it applied, explain how that criteria
27 was met, and file with the certificate a copy of the final decision.

28 (5) For an appellate court to accept direct review of a final
29 decision of an environmental board, it shall consider the same
30 criteria outlined in subsection (3) of this section, except as
31 otherwise provided in chapter 43.21L RCW.

32 (6) The procedures for direct review of final decisions of
33 environmental boards include:

34 (a) Within thirty days after filing the petition for review with
35 the superior court, a party may file an application for direct review
36 with the superior court and serve the appropriate environmental board
37 and all parties of record. The application shall request the
38 environmental board to file a certificate of appealability.

1 ~~(b) If an issue on review is the jurisdiction of the~~
2 ~~environmental board, the board may file an application for direct~~
3 ~~review on that issue.~~

4 ~~(c) The environmental board shall have thirty days to grant or~~
5 ~~deny the request for a certificate of appealability and its decision~~
6 ~~shall be filed with the superior court and served on all parties of~~
7 ~~record.~~

8 ~~(d) If a certificate of appealability is issued, the parties~~
9 ~~shall have fifteen days from the date of service to file a notice of~~
10 ~~discretionary review in the superior court, and the notice shall~~
11 ~~include a copy of the certificate of appealability and a copy of the~~
12 ~~final decision.~~

13 ~~(e) If the appellate court accepts review, the certificate of~~
14 ~~appealability shall be transmitted to the court of appeals as part of~~
15 ~~the certified record.~~

16 ~~(f) If a certificate of appealability is denied, review shall be~~
17 ~~by the superior court. The superior court's decision may be appealed~~
18 ~~to the court of appeals.)) Transfer of cases pursuant to this section~~
19 ~~does not require the filing of a motion for discretionary review with~~
20 ~~the court of appeals. The superior court may certify cases for~~
21 ~~transfer to the court of appeals upon finding that:~~

22 ~~(a) All parties have consented to the transfer to the court of~~
23 ~~appeals and agreed that the judicial review can occur based upon the~~
24 ~~agency record developed before the administrative body without~~
25 ~~supplementing the record pursuant to RCW 34.05.562; or~~

26 ~~(b) One or more of the parties have not consented to the~~
27 ~~transfer, but the superior court finds that transfer would serve the~~
28 ~~interest of justice, would not cause substantial prejudice to any~~
29 ~~party, including any unrepresented party, and further finds that:~~

30 ~~(i) The judicial review can occur based upon the agency record~~
31 ~~developed before the administrative body without supplementing the~~
32 ~~record pursuant to RCW 34.05.562; or~~

33 ~~(ii) The superior court has completed any necessary~~
34 ~~supplementation of the record pursuant to RCW 34.05.562, such that~~
35 ~~only issues of law remain for determination.~~

36 ~~(2) If the superior court certifies a final decision of an~~
37 ~~administrative agency in an adjudicative proceeding, the superior~~
38 ~~court shall transfer the matter to the court of appeals as a direct~~
39 ~~appeal.~~

1 (3) A party contesting a superior court decision granting or
2 denying certification for direct review may file a motion for
3 discretionary review with the court of appeals.

4 **Sec. 2.** RCW 34.05.522 and 1995 c 382 s 6 are each amended to
5 read as follows:

6 The court of appeals may refuse to accept direct review of a case
7 pursuant to RCW 34.05.518 if it finds that the case does not meet the
8 applicable standard in RCW 34.05.518 (~~((2) or (5))~~). (~~(Rules of~~
9 ~~Appellate Procedure 2.3 do not apply in this instance.)~~) The refusal
10 to accept such review is not subject to further appellate review,
11 notwithstanding anything in Rule 13.3 of the Rules of Appellate
12 Procedure to the contrary.

13 **Sec. 3.** RCW 36.18.018 and 2017 3rd sp.s. c 2 s 2 are each
14 amended to read as follows:

15 (1) State revenue collected by county clerks under subsection (2)
16 of this section must be transmitted to the appropriate state court.
17 The administrative office of the courts shall retain fees collected
18 under subsection (3) of this section.

19 (2) For appellate review under RAP 5.1(b), two hundred fifty
20 dollars must be charged, except that no fee may be charged under this
21 section for a case transferred from the superior court to the court
22 of appeals pursuant to RCW 34.05.518 or 36.70C.--- (section 1,
23 chapter . . . (Z-0086/21), Laws of 2021).

24 (3) For all copies and reports produced by the administrative
25 office of the courts as permitted under RCW 2.68.020 and supreme
26 court policy, a variable fee must be charged.

27 (4) Until July 1, 2021, in addition to the fee established under
28 subsection (2) of this section, a surcharge of forty dollars is
29 established for appellate review. The county clerk shall transmit
30 seventy-five percent of this surcharge to the state treasurer for
31 deposit in the judicial stabilization trust account and twenty-five
32 percent must be retained by the county.

33 **Sec. 4.** RCW 34.05.518 and 2010 c 211 s 15 are each amended to
34 read as follows:

35 (1) The final decision of an administrative agency in an
36 adjudicative proceeding under this chapter may(~~(, except as otherwise~~
37 ~~provided in chapter 43.21L RCW,)~~) be directly reviewed by the court

1 of appeals either (a) upon certification by the superior court
2 pursuant to this section or (b) if the final decision is from an
3 environmental board as defined in subsection (3) of this section,
4 upon acceptance by the court of appeals after a certificate of
5 appealability has been filed by the environmental board that rendered
6 the final decision.

7 (2) For direct review upon certification by the superior court,
8 an application for direct review must be filed with the superior
9 court within thirty days of the filing of the petition for review in
10 superior court. The superior court may certify a case for direct
11 review only if the judicial review is limited to the record of the
12 agency proceeding and the court finds that:

13 (a) Fundamental and urgent issues affecting the future
14 administrative process or the public interest are involved which
15 require a prompt determination;

16 (b) Delay in obtaining a final and prompt determination of such
17 issues would be detrimental to any party or the public interest;

18 (c) An appeal to the court of appeals would be likely regardless
19 of the determination in superior court; and

20 (d) The appellate court's determination in the proceeding would
21 have significant precedential value.

22 Procedures for certification shall be established by court rule.

23 (3)(a) For the purposes of direct review of final decisions of
24 environmental boards, environmental boards include those boards
25 identified in RCW 43.21B.005 and the growth management hearings board
26 as identified in RCW 36.70A.250.

27 (b) An environmental board may issue a certificate of
28 appealability if it finds that delay in obtaining a final and prompt
29 determination of the issues would be detrimental to any party or the
30 public interest and either:

31 (i) Fundamental and urgent statewide or regional issues are
32 raised; or

33 (ii) The proceeding is likely to have significant precedential
34 value.

35 (4) The environmental board shall state in the certificate of
36 appealability which criteria it applied, explain how that criteria
37 was met, and file with the certificate a copy of the final decision.

38 (5) For an appellate court to accept direct review of a final
39 decision of an environmental board, it shall consider the same

1 criteria outlined in subsection (3) of this section(~~(, except as~~
2 ~~otherwise provided in chapter 43.21L RCW)~~).

3 (6) The procedures for direct review of final decisions of
4 environmental boards include:

5 (a) Within thirty days after filing the petition for review with
6 the superior court, a party may file an application for direct review
7 with the superior court and serve the appropriate environmental board
8 and all parties of record. The application shall request the
9 environmental board to file a certificate of appealability.

10 (b) If an issue on review is the jurisdiction of the
11 environmental board, the board may file an application for direct
12 review on that issue.

13 (c) The environmental board shall have thirty days to grant or
14 deny the request for a certificate of appealability and its decision
15 shall be filed with the superior court and served on all parties of
16 record.

17 (d) If a certificate of appealability is issued, the parties
18 shall have fifteen days from the date of service to file a notice of
19 discretionary review in the superior court, and the notice shall
20 include a copy of the certificate of appealability and a copy of the
21 final decision.

22 (e) If the appellate court accepts review, the certificate of
23 appealability shall be transmitted to the court of appeals as part of
24 the certified record.

25 (f) If a certificate of appealability is denied, review shall be
26 by the superior court. The superior court's decision may be appealed
27 to the court of appeals.

28 **Sec. 5.** RCW 34.05.522 and 1995 c 382 s 6 are each amended to
29 read as follows:

30 The court of appeals may refuse to accept direct review of a case
31 pursuant to RCW 34.05.518 if it finds that the case does not meet the
32 applicable standard in RCW 34.05.518 (2) or (5). (~~(Rules of Appellate~~
33 ~~Procedure 2.3 do not apply in this instance.)~~) The refusal to accept
34 such review is not subject to further appellate review,
35 notwithstanding anything in Rule 13.3 of the Rules of Appellate
36 Procedure to the contrary.

37 NEW SECTION. **Sec. 6.** Except for sections 4 and 5 of this act,
38 this act is necessary for the immediate preservation of the public

1 peace, health, or safety, or support of the state government and its
2 existing public institutions, and takes effect thirty days after
3 signed into law.

4 NEW SECTION. **Sec. 7.** Sections 1 and 2 of this act expire July
5 1, 2026.

6 NEW SECTION. **Sec. 8.** Sections 4 and 5 of this act take effect
7 July 1, 2026.

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