Before the Presiding Judges of the Administrative Judicial Regions

Per Curiam Rule 12 Decision

APPEAL NO.: 16-005 Supplemental

RESPONDENT: Office of Court Management – Harris County Criminal Courts

DATE: December 6, 2016

SPECIAL COMMITTEE: Judge Stephen B. Ables, Chairman; Judge Billy Ray Stubblefield; Judge David Peeples; Judge Dean Rucker; Judge David L. Evans

Petitioner requested from Respondent records related to actions taken by the judges of the Harris County Criminal Courts at Law to remove Petitioner from the list of attorneys eligible for appointment under the Fair Defense Act Plan of the Harris County Criminal Courts at Law. Respondent denied Petitioner's request claiming the requested records are exempt from the Public Information Act and are exempt from disclosure under Rule 12.5(b) of the Rules of Judicial Administration because they relate to the internal deliberations of a court or judicial agency. Petitioner appealed the denial. On April, 4, 2016, this special committee decided that it was without authority to issue a decision in the matter because the records at issue are not "judicial records" subject to Rule 12.

Respondent has filed a Motion for Rehearing requesting that we withdraw or amend our decision and issue a new decision following the precedent established by Rule 12 Decision No. 08-009 issued on February 27, 2009.

Petitioner has filed a mandamus proceeding in district court regarding the denial of the requested records and argues that we should not rule on the request for rehearing and "respondents should be estopped from seeking rehearing after Petitioner has relied on Respondent's inaction by seeking mandamus relief." Petitioner also argues that we do not have the authority to rule on the rehearing because it is time barred. Respondent acknowledges that Rule 12 does not provide a procedure for rehearing but argues that it does not preclude it.

Respondent is correct that Rule 12 does not provide a mechanism for a respondent to appeal a Rule 12 decision or request a rehearing. The only reference to post-decision relief in Rule 12 is one clarifying that an appeal under Rule 12 is "not exclusive and does not preclude relief by mandamus." *See* Rule12.9(n). Accordingly, we conclude that we are without authority to consider a motion to rehear or an appeal of a Rule 12 decision.

Though we are without authority to consider Respondent's motion for rehearing, we feel compelled to address Respondent's concern that we did not follow the precedent set by Rule 12 Decision No. 08-009. The records at issue in that matter were similar to those at issue in this one. In that appeal, Petitioner had been removed from the list of attorneys who are eligible for court

appointments in juvenile felony cases and had not been "renewed" for eligibility for court appointments in felony trial cases. Petitioner was denied access to records regarding Respondent's decision to remove him from the lists. In that decision, the special committee stated that "the process of reviewing applicants for eligibility on the court appointment list is a judicial administration matter."

Approximately two months after the release of Rule 12 Decision No. 08-009, the U. S. Fifth Circuit Court of Appeals in *Davis v. Tarrant County, Texas, et al,* 565 F.3rd 214 (5th Cir. 2009) found that "the act of selecting applicants for inclusion on a rotating list of attorneys eligible for court appointments is inextricably linked to and cannot be separated from the act of appointing counsel in a particular case." The court also stated that these acts "involve the performance of duties which are intimately connected to a judge's adjudicatory role." *Davis,* 565 F.3rd at 226. We found the court's analysis persuasive and applicable to our analysis of the nature of the records at issue in this appeal. Rule 12 applies to records "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." *See* Rule 12.2(d). Based on the 5th Circuit's analysis, we decided that the records at issue in this appeal were related to the judges' adjudicative function and not subject to Rule 12.

Respondent disagrees with our decision and argues that the definition of judicial records does not exclude all records related to a matter that is or has been before a court. Rule 12.2(d) defines a judicial record as one that is "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. A record of any nature created, produced, or filed in connection with any matter that is or has been before a court is not a judicial record."

Respondent argues that the second sentence of the definition, "a record of any nature created, produced, or filed in connection with any matter that is or *has been before a court is not a judicial record*" (emphasis provided by Respondent), excludes only "records that are produced in open court." They argue that "records that are not published in court are judicial records." We first note that we need not reach this argument because our analysis ended once we concluded that the records were related to the judges' adjudicative function. Assuming we had continued our analysis, we disagree with Respondent's interpretation. The second sentence does not carve out a group of records that may still be considered judicial records even if they relate to a judge's adjudicatory function. It emphasizes that any record connected to a case that is or has been before a court is exempt from Rule 12.

To the extent that Rule 12 Decision No. 08-009 is inconsistent with the decision we reached in Rule 12 Decision No. 16-005, it is overruled. We also note that our decision does not mean that the records at issue in Rule 12 Appeal No. 16-005 are subject to disclosure or are subject to the Public Information Act. It means that the procedures provided in Rule 12 for responding to requests and appealing the denial of requests do not apply.