Before the Presiding Judges of the Administrative Judicial Regions
Per Curiam Rule 12 Decision

APPEAL NO.: 19-019

RESPONDENT: County Court at Law No. 2, Johnson County

DATE: January 14, 2020

SPECIAL COMMITTEE: Judge Stephen B. Ables, Chairman; Judge Ray Wheless, Judge Olen Underwood; Judge Billy Ray Stubblefield; Judge Susan Brown

On April 15, 2019, Petitioners made a Rule 12 request for a variety of records[1] from Respondent regarding the Johnson County juvenile indigent defense plan, CPS court appointment plan, related attorney appointment lists and list maintenance, and related court appointments. On April 25, 2019, Respondent replied to Petitioners that it was providing them records it believed were responsive to 8 of the 16 categories of records requested. Respondent also stated it was not aware of records that fit the specific parameters of the remaining 8 records requests, and made no Rule 12 pronouncements related to any of the documents. Then, on October 18, 2019, Petitioners made a follow-up Rule 12 records request[2] related to the removal of Petitioners from the juvenile indigent defense appointment list and for related attorney appointment data. Respondent replied on October 30, 2019 that it was providing Petitioners with certain documents in response to the request, but that it was not making any pronouncements as to whether the documents demonstrated "good cause" for removal from the appointment lists because doing so would "invade the parameters" of Rule 12.5 exemptions related to judicial work product (Rule 12.5(a)) and internal deliberations (Rule 12.5(f)). Respondent separately asserted that documents or records that fell under Rule 12.5(a) and Rule 12.5(f) were exempt from disclosure. Petitioners filed this appeal and requested expedited review. We did not grant Petitioners' request for expedited review, and the special committee will not address Petitioners' appeals requests that extend beyond the scope of the records requested from Respondent.[3]

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[1] In Petitioners' April 15 letter, 10 of 16 the records requests sought records showing the specific date(s) Petitioners were removed from the juvenile indigent defense appointment list plus the judge(s) connected to, reason(s) for, and notice provided in connection with removal, as well as any date(s) the Petitioners were intentionally skipped from receiving appointments. The remaining requests related to the establishment and maintenance of the Johnson County Juvenile Indigent Defense Plan, CPS attorney appointment plan or rules, and related attorney appointment data.

[2] In Petitioners' October 18 letters, two of Petitioners' three requests sought documents that might show any "good cause" reasons to substantiate the removal of Petitioners from the juvenile indigent defense appointment list. The remaining request related to attorney appointment data.

[3] The special committee will not comment on the nature of the documents submitted to it that extend beyond the records sought by Petitioners in their Rule 12 records requests. Rule 12 exists to provide public access to information in the judiciary, and does not require the special committee to opine on the validity of assertions posed by Petitioners. *See* Rule 12 Decision No. 19-016.

Rule 12 Requested Records

First, we must determine whether Rule 12 applies to the Petitioners' request for records. The threshold issue in a Rule 12 appeal is whether the requested records are "judicial records," which are defined by Rule 12.2(d) as follows:

> "*Judicial record* means 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. 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 added)

In Rule 12 Decision No. 16-005, the special committee considered an appeal from an attorney who was removed from the list of attorneys eligible for appointment under the Fair Defense Act Plan of the Harris County Criminal Courts at Law. Relying on the US Fifth Circuit's 2009 decision in *Davis v. Tarrant County, Texas*[4] we concluded that records related to the maintenance of a list of attorneys who are eligible for appointment under a county's Fair Defense Act plan are related to a judge's "adjudicative function" and are not "judicial records" as defined by Rule 12.2(d). *See* Rule 12 Decision No. 16-005. The act of removing an attorney from a county's Fair Defense appointment list is part of list maintenance and as such the act relates to a judge's adjudicative function. The Petitioners' requests related to dates the Petitioners were skipped over for appointments as well as to the judges connected to removal from the appointment list, the reasons for removal, and the notice connected to that removal are therefore related to a court's adjudicative functions and are not judicial records.

We next address Petitioners' request for documents related to the local juvenile indigent defense plan and CPS attorney appointment plan or rules. As we observed in Rule 12 Decision No. 19-016, a court's local rules of procedure specifically address the processing of cases and therefore relate to a court's adjudicative function. Indigent defense plans and CPS attorney appointment plans or rules fall under the umbrella of local rules of procedure, and thus are not judicial records.

We lastly address Petitioners' request related to court appointment data. Petitioners, in their April letter to Respondent, requested a copy of "all documents needed to show" the number of Johnson County juvenile indigent defendants appointed counsel on or after February 26, 2018 as well as the number of Spanish-speaking juvenile indigent defendants appointed counsel on or after February 26, 2018. In Respondent's April reply, Respondent indicated it was providing Petitioners documents it believed were responsive to the request for the number of juvenile indigent defendants appointed counsel, but that it was not aware of records that covered the number of Spanish-speaking juvenile indigent defendants appointed counsel. Petitioners made the same requests again in October, and Respondent replied that it was not aware of the existence of any documents that pertained to the requests. A judicial officer is not required to create a document in response to a request (Rule 12 Decision No. 18-001), and Respondent is under no obligation to

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[4] 565 F.3d 214, 226 (5th Cir. 2009).

harvest its case files to create a document that would satisfy Petitioners' requests.[5]

Because the records at issue in this appeal are not judicial records under Rule 12, we can neither grant the petition in whole or in part, nor sustain denial to the requested records. And because the records at issue are not judicial records, we need not address Respondent's exemption claims related to the records.

Deficient Notice of Denial

Finally, we briefly address Petitioners' deficient notice of denial arguments. The primary significance of a decision finding that a record is not subject to Rule 12 is that the Rule 12 procedures for responding to a request and appealing the denial of a request do not apply. *See* Rule 12 Decision No. 12-006. Because the records at issue in this appeal are not judicial records under Rule 12, Respondent was not obligated to comply with Rule 12 notice of denial procedures in responding to Petitioners.

In closing, and as has been stated in many previous Rule 12 decisions, although the records at issue are not "judicial records" does not mean they are completely exempt from disclosure. The records may be open pursuant to other laws, and neither the fact that a record is not subject to Rule 12 nor a decision making this determination should be used as a basis for withholding records.

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[5] We note that there is a distinction between court appointment data found in court case files and appointment data reports generated from those files. Court appointment data found in juvenile records are a product of the court's appointment discretion in a given case, are clearly related to a court's adjudicative function, are therefore not judicial records, and are not subject to Rule 12. However, some juvenile indigent defense appointment data must be reported to the Office of Court Administration by the clerks on a monthly basis. To the extent Respondent was maintaining a report of appointment data for administrative purposes or if Respondent had a copy of a court activity data report generated by the clerk that covered the data requested by Petitioners, Respondent would need to produce the information because the documents would relate to the court's administrative function and be subject to Rule 12. *See* Rule 12 Decision No. 19-016 (maintenance of copy of local rules relate to judicial officer's administrative function, not its adjudicative function).