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October 21, 2013

Honorable Justice Mary Fairhurst, Chair, JISC
Washington State Supreme Court
PO Box 40929
Olympia, WA 98504-0929

Dear Justice Fairhurst:

Re: Proposal to Amend GR 15

The Rules Committee of the DMCJA Board reviewed a draft proposal to amend GR 15, dated August 9, 2013, and presented a memo to the DMCJA Board. At its September Board meeting, the DMCJA Board voted unanimously to accept the Rules Committee memo, which is attached, along with comments to the draft proposal itself. Both the memo and the comments are attached to this letter.

Thank you for considering these comments. If you have any questions regarding this recommendation, please let me know.

Sincerely,

Judge David A. Svaren,
President, DMCJA Board

cc: Stephanie Happold, AOC
Jennifer Krebs, AOC
Michelle Pardee, AOC

Attachments:
August 15, 2013, Memo from DMCJA Rules Committee
August 9, 2013, draft amendments to GR 15, with margin comments

Memorandum

To: DMCJA Board

From: DMCJA Rules Committee

Date: 8/15/2013

Re: Proposed Amendments to GR 15

Background

The DMCJA Rules Committee was asked to review proposed amendments to General Rule (GR) 15 and provide initial feedback to the DMCJA Board. The draft proposal, dated August 9, 2013, is attached. We had a phone conference with Judge James Heller and Judge Steve Rosen, both of whom sit on the Data Dissemination Committee (DDC), and discussed the draft amendments and the intent and purpose in preparing it. It is our understanding that some member(s) of the Supreme Court requested the DDC to draft proposed amendments to GR 15 to help clarify the process for sealing and redacting court records.

Analysis

There has been substantial case law over the past thirty years discussing the substantive and procedural issues involving the sealing and redacting of court records. It appears the proposed amendments to GR 15 are an attempt to incorporate specific factors contained in case law. *Seattle Times Co., v. Ishikawa, 97 Wn. 2d (1982); Dreiling v. Jain, 151 Wn. 2d 900 (2004); Rufer v. Abbott Labs., 154 Wn 2d 530 (2005).* For example, the amendments attempt to incorporate provisions of the recent decision in *Bennett v. Smith Bundy Berman Britton*, 176 Wn.2d, 303, 291 P.3rd 886 (2013). The majority's opinion was written by Justice Chambers with three justices joining. However, *Bennett* contains a strong dissent by four justices and a concurrence in the result only by Justice Madsen, which J. Johnson also joined. There is a question whether the "*uber dicta"* of the majority opinion in *Bennett* is truly the opinion of the majority of the Supreme Court and should be incorporated into GR 15. GR 15 was substantially amended in 2006. Given some of the statements contained in the concurrence and dissent, and the extensive case law that already exists in this area, it's unclear whether there is need for an amendment to GR 15 at this time.

These reviewers appreciate the effort the DDC has gone to into drafting amendments to GR 15 to incorporate the Supreme Court's opinions on the issues related to sealing and redaction. Whether GR 15 conflicts or replaces the *Ishikawa* factors was addressed in State v. Waldon, 148 Wn. App. 952 (2009), *rev. denied* 166 Wn. 2d 1026 (2009). In *Waldon*, the court held: "In sum, revised GR 15 does not fully comply with the constitutional benchmark defined in *Ishikawa.* But it can be harmonized with *Ishikawa* to preserve its constitutionality. We

conclude that GR 15 and *Ishikawa* must be read together when ruling on a motion to seal or redact court records. Many of the appellate cases on this topic reveal that parties have not presented and discussed the *Ishikawa* factors to the trial court and trial judges have consequently failed to apply the factors when deciding motions to seal or redact. Hence, many appellate decisions remand the case to the trial court to apply the *Ishikawa* factors and GR 15 provisions to the motion and enter an order specifically setting forth the court's findings and conclusions

The currently case law in this area is clear that the *Ishikawa* factors, along with other provisions of GR 15 must be used. The amendments attempt to incorporate the factors into GR 15, but due to the numerous comments inserted between various sections of the rule, the amendments are difficult to follow.

One of the changes proposed to GR 15 is the mandatory requirement for an expiration date in the order sealing or redacting. See GR 15(c)(5): "Every order sealing or redacting material in the court file, except for sealed juvenile offenses, shall specify a time period, after which, the order shall expire." It appears that this provision seeks to implement the fifth *Ishikawa* factor that he order be no broader in its application or duration than necessary to serve its purpose and that the order apply for a specific time period with a burden on the proponent to come before the court at a time specified to justify continued sealing. *Id. at 39.* The majority in *Bennett* noted that "with or without an expiration date, an order to seal is always subject to challenge consistent with our open administration of justice jurisprudence." *Bennett* at 893. The requirement for an explicit expiration date raises several issues for trial courts.

Notably, Courts of Limited Jurisdiction are allowed to destroy court records after a period of time, maintaining only the index. If an order sealing a record is set to expire after the document would otherwise be destroyed, is the CLJ required to maintain the sealed record?

It has been noted that the Judicial Information System (JIS) does not currently have the ability to include an expiration date on an order to seal or redact. Would the document(s) remain sealed in JIS until a request to unseal is made?

Another question is whether the proposed amendments are prospective or retrospective? If the amendments to GR 15 are intended to simply incorporate existing appellate case law on this topic, it is assumed its application is retrospective. However, if there are substantive amendments that affect sealing or redaction orders previously entered, there may be significant ramifications on trial courts if there is an expectation trial courts will go back and review formerly sealed or redacted records absent a motion.

There are several concerns with proposed language. For instance, the rule seems unorganized when determining which factors to consider on a motion to seal or redact. Subsection (c) provides the factors a court should consider in deciding a motion to seal or redact. The factors to consider vary depending on when the motion to seal is filed, and what it attempts to protect. Subsection (c)(2)(A) provides factors to consider when a court record was considered by a court in reaching a decision, whereas (c)(2)(B) provides factors to consider when a court record was not considered by a court in reaching a decision. In subsection (c)(8), the rule sets forth the procedure to follow when a motion to seal is made at the same time as the documents proposed to be sealed are filed. For clarity, perhaps these three sections should be closer together as they cover the three possible scenarios.

The proposed rule, under GR 15(c)(2), requires a court to "enter specific findings on the record to justify any sealing or redaction." For purposes of appellate review, it would seem the court should also enter specific findings when it denies a motion to seal or redact. The lack of a record and detailed findings have been an issue in several reported cases.

Subsection (c)(4) sets forth the privacy or safety concerns that may be weighed against the public interest in open files. While the rule provides factors a court may consider, it does not provide guidance on the weight these factors carry. The parties and the court need to look at case law for this information. *E.g.*, *Waldon* at 334.

Language in two of the subsections is ambiguous, and it is not clear whether the subsections apply only to juvenile offenses or whether they also apply to adult convictions. See GR 15(c)(4)(C) and (D). Likewise, the language in subsection (c)(4)(D)(iii) regarding restitution is confusing.

> (4) Sufficient privacy or safety concerns that may be weighed on a case by case basis against the public interest in the open administration of justice include findings that:
>
> …
>
> (C) A criminal conviction or an adjudication or deferred disposition for a juvenile offense has been vacated; or
>
> (D) A criminal charge or juvenile offense has been dismissed, and:
>
> …
>
> (iii) Restitution has not been ordered paid on the charge in another cause number as part of a plea agreement.

The proposed addition of GR 15(c)(4)(I) appears to be redundant: "The redaction includes only restricted personal identifiers contained in the court record." By their nature, restricted personal identifiers are already redacted. Does this mean that before a court can redact something that is already supposed to be redacted under court rule, it must go through the analysis to redact any "restricted personal identifiers"?

It is unclear how the following terms are used in the rule, as their usage is not always consistent: "juvenile proceedings", "court files", court records". It is also unclear how someone is to apply the provisions of GR 15 in relationship to the sealing provisions of GR 22.

We are also providing some "margin" comments to the proposed GR 15 amendments which address specific questions or concerns.

GENERAL RULE 15 As Of 0809013

Draft Amendment

DESTRUCTION, SEALING, AND REDACTION OF COURT RECORDS

(a) Purpose and Scope of the Rule. This rule sets forth a uniform procedure for the destruction, sealing, and redaction of court records. This rule applies to all court records, regardless of the physical form of the court record, the method of recording the court record, or the method of storage of the court record.

(b) Definitions.

(1) "Court file" means the pleadings, orders, and other papers filed with the clerk of the court under a single or consolidated cause number(s).

(2) "Court record" is defined in GR 31(c)(4).

(3) "Destroy". ~~To destroy~~ means to obliterate a court record or file in such a way as to make it permanently irretrievable. A motion or order to expunge shall be treated as a motion or order to destroy.

(4) "Dismissal" means dismissal of an adult criminal charge or juvenile offense by a court for any reason, other than a dismissal pursuant to RCW 9.95.240, ~~or~~ RCW 10.05.120, RCW 3.50.320, or RCW 3.66.067.

(5) ~~(4) Seal. To s~~"Seal" means to protect from examination by the public and unauthorized court personnel. A motion or order to delete, purge, remove, excise, or erase, or redact shall be treated as a motion or order to seal.

(6) ~~(5) Redact. To r~~"Redact" means to protect from examination by the public and unauthorized court personnel a portion or portions of a specified court record.

(7) ~~(6)~~ "Restricted Personal Identifiers" are defined in GR 22(b)(6).

(8) ~~(7)~~ "Strike" applies to ~~. A~~a motion or order to strike and ~~is~~ not a motion or order to seal or destroy.

(9) ~~Vacate. To v~~"Vacate" means to nullify or cancel.

(c) Sealing or Redacting Court Records.

(1) In a civil case, the court or any party may request a hearing to seal or redact the court records. In a criminal case or juvenile proceedings, the court, any party, or any interested person may request a hearing to seal or redact the court records. Reasonable notice of a hearing to seal must be given to all parties in the case. In a criminal case, reasonable notice of a hearing to seal or redact must also be given to the victim, if ascertainable, and the person or agency having probationary,

Commented [jeg1]: What is the difference between "court file" and "court record"? It would seem that "court record" includes the "case file". In proposed GR 31.1 there is a definition of "case records", which includes "case files". Consistent terminology would be nice.

Commented [jeg2]: Does examination by the public include attorneys to the case? Is it "protecting from examination" or "restricting public access"?

Commented [jeg3]: Why does this reference only GR 22, as redaction of personal identifiers are also mentioned in other court rules?

Commented [jeg4]: Should an interested person be permitted to file a motion in a civil case?

Commented [jeg5]: Should this clarify "an adult criminal case"? A "juvenile proceeding" is not necessarily a juvenile offense proceeding, but it's implied in the way this sentence is drafted..

Commented [jeg6]: This sentence implies that it's an "adult" criminal case, but then notice must be given to a person/agency having custody of the juvenile. Would this just be in decline cases?

custodial, community placement, or community supervision over the affected adult or juvenile. No such notice is required for motions to seal documents entered pursuant to CrR 3.1(f) or CrRLJ 3.1(f).

(2) ~~After~~ At the hearing, the court ~~may order the court files an and records in the proceeding, or any part thereof, to be sealed or redacted if the court makes and enters written findings that the specific sealing or redaction is justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record.Agreement of the parties alone does not constitute a sufficient basis for the sealing or redaction of court records. Sufficient privacy or safety concerns that may be weighed against the public interest include findings that:~~ shall consider the applicable factors and enter specific findings on the record to justify any sealing or redaction.

(A) For any court record that has become part of the court's decision-making process, the court must consider the following factors:

(i) Has the proponent of sealing or redaction established a compelling interest that gives rise to sealing or redaction, and if it is based upon an interest or right other than an accused's right to a fair trial, a serious and imminent threat to that interest or right; and

(ii) Has anyone present at the hearing objected to the relief requested; and

(iii) What is the least restrictive means available for curtailing open public access to the record; and

(iv) Whether the competing privacy interest of the proponent seeking sealing or redaction outweighs the public's interest in the open administration of justice; and

(v) Will the sealing or redaction be no broader in its application or duration than necessary to serve its purpose.

Commented [jeg7]: Delete?

Commented [jeg8]: Establishing the basis for

Commented [jeg9]: Or denial

Commented [jeg10]: The distinction of records the court has reviewed and relied upon in its decision-making process [announced in the Bennett case] is an awkward standard. If something has been filed in the court file, without a contemporaneous motion to seal, it would seem that the document is open for public review. Will judges be required to go through the court file and determine which pieces of paper the judge considered in making a decision? If a document wasn't considered in a decision, but was not filed under seal, is public access restricted?

Commented [jeg11]: Odd word choice. Recognized that the language comes from caselaw. Suggest rewording: e.g., What is the least restrictive means available to protect the identified interest while allowing public access to the record.

COMMENT

GR 15(c)(2)(A) does not address Juvenile Offender records sealed pursuant to RCW 13.50.050. This section does apply to Juvenile Offender records sealed under the authority of GR 15, only.

The applicable factors the court shall consider in a Motion to Seal or Redact incorporate current Washington caselaw. ~~including:~~

- ~~*Federated Publications v. Kurtz, 94 Wn.2d 254 (1980)*~~
- ~~*Seattle Times v. Ishikawa, 97 Wn.2d 30 (1982)*~~
- ~~*Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205 (1993)*~~
- ~~*State v. Boneclub, 128 Wn.2d 254 (1995)*~~
- ~~*Rufer v. Abbot Laboratories, 154 Wn.2d 530 (2005)*~~
- ~~*Dreiling v. Jain, 151 Wn.2d 900 (2004)*~~
- ~~*State v. Waldon, 148 Wn. App. 952 (2009)*~~

~~State v. Coleman, 151 Wn. App. 614, at FN 13 (2009)~~

~~Tacoma News v. Cayce, 172 Wn.2d 58 (2011)~~

(B) For any court record that was not a part of the court's decision-making process, the court must consider the following:

(i) Has the proponent of the sealing or redaction established good cause; and

(ii) Has any nonparty with an interest in nondisclosure been provided notice and an opportunity to be heard.

COMMENT

In Bennett et al v. Smith Bunday Berman Britton, PS, 176 Wn.2d. 303 (2013), the State Supreme Court held that documents obtained through discovery that are filed with a court in support of a motion that is never decided are not part of the administration of justice and therefore may be sealed under a good cause standard.

(3) Agreement of the parties alone does not constitute a sufficient basis for the sealing or redaction of court records.

(4) Sufficient privacy or safety concerns that may be weighed on a case by case basis against the public interest in the open administration of justice include findings that:

(A) The sealing or redaction is permitted by statute; or

(B) The sealing or redaction furthers an order entered under CR 12(f) or a protective order entered under CR 26(c); or

(C) A criminal conviction or an adjudication or deferred disposition for a juvenile offense has been vacated; or

(D) A criminal charge or juvenile offense has been dismissed, and:

(i) The charge has not been dismissed due to an acquittal by reason of insanity or incompetency to stand trial; or

(ii) A guilty finding does not exist on another count arising from the same incident or within the same cause of action; or

(iii) Restitution has not been ordered paid on the charge in another cause number as part of a plea agreement.

or

Commented [jeg12]: This is really an awkward standard.

Commented [jeg13]: Good cause for what?

Commented [jeg14]: It may impossible to determine who is a nonparty with an interest.

Commented [jeg15]: Does this mean that any of these concerns will always weigh against the public interest such that sealing or redaction is allowed?

Commented [jeg16]: This subsection does not make sense. If restitution was paid, is this still a factor?

(E) A defendant or juvenile respondent has been acquitted, other than an acquittal by reason of insanity or due to incompetency to stand trial; or

(F) A pardon has been granted to a defendant or juvenile respondent; or

(G) The sealing or redaction furthers an order entered pursuant to RCW 4.24.611; or

(H) The sealing or redaction is of a court record of a preliminary appearance, pursuant to CrR 3.2.1, CrRLJ 3.2.1, or JUCR 7.3 or a probable cause hearing, where charges were not filed; or

(I) The redaction includes only restricted personal identifiers contained in the court record; or

(J) Another identified compelling circumstance exists that requires the sealing or redaction.

COMMENT

Additional privacy or safety concerns that may be weighed against the public interest are included based upon the deliberations at the Joint Legislative Court Records Privacy Workgroup in 2012.

In Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205 (1993), the court held that the presumptive

right of public access to the courts ***is not absolute and may be outweighed by some competing interest as determined by the trial court on a case by case by basis, according to the Ishikawa guidelines.***

(5) Every order sealing or redacting material in the court file, except for sealed juvenile offenses, shall specify a time period, after which, the order shall expire. The proponent of sealing or redaction has the burden of coming back before the court and justifying any continued sealing or redaction beyond the initial specified time period. Any request for public access to a sealed or redacted court record received by the custodian of the record after the expiration of the Order to Seal or Redact shall be granted as if the record were not sealed, without further notice. Thereafter, the record will remain unsealed. The Court, in its discretion, may order a court record sealed indefinitely if the court finds that the circumstances and reasons for the sealing will not change over time.

COMMENT

Requiring a time period, after which the order sealing or redacting expires, implements the Ishikawa factor that the order must be no broader in its duration than necessary to serve its purpose. The critical distinction between the adult criminal system and the juvenile offender system lies in the ~~policy of the~~ 1977 Juvenile Justice Act's policy of responding to the needs of juvenile offenders. Such a policy has been found to be ***rehabilitative*** *in nature, whereas the criminal system is punitive. State v. Rice, 98 Wn.2d 384 (1982); State v. Schaaf, 109 Wn.2d 1,4; Monroe v. Soliz, 132 Wn.2d 414, 420 (1997); State v. Bennett, 92 Wn. App. 637 (1998). Legacy JIS systems do not have the functionality to automatically unseal or unredact a court record upon the expiration of an Order to Seal or Redact.*

Commented [jeg17]: And criminal charges were not subsequently filed

Commented [jeg18]: Why is this needed if the personal identifier redaction rule applies?

Commented [jeg19]: Note that the term "court file" is used here, not "court record".

Commented [jeg20]: This provision applies in adult criminal cases and all civil cases, including family law, adoption, etc?

Commented [jeg21]: Is it intended that this provision will be prospective?

Commented [jeg22]: Does this mean that CLJ will have to maintain sealed records until the expiration of the sealing order to allow public access? Will CLJ be permitted to destroy sealed records in conjunction with the usual destruction schedule?

Commented [jeg23]: There should be no current support for the proposition that the policy underlying the adult criminal system is simply punitive.

Commented [jeg24]: This is a big concern. How will courts keep track of this information?

(6) The name of a party to a case may not be redacted, or otherwise changed or hidden, from an index maintained by the Judicial Information System or by a court. The existence of a court file containing a redacted court record is available for viewing by the public on court indices, unless protected by statute.

COMMENT

Existence of a case can no longer be determined for the purpose of public access and viewing, if the case cannot be found by an index search. Redacting the name of a party in the index would prevent the public from moving for access to a redacted record under section (f). The policy set forth in this section is consistent with existing policy when the entire file is ordered sealed, as reflected in section (c) (9).

(7) ~~(3)~~ No court record shall be sealed under this rule when redaction will adequately protect the interests of the proponent.

(8) Motions to Seal/Redact when Submitted Contemporaneously with Document Proposed to be Sealed or Redacted – Not to be Filed.

(A) The document sought to be sealed or redacted shall not be filed prior to a court decision on the motion. The moving party shall provide the following documents directly to the court that is hearing the motion to seal or redact:

(i) The original unredacted document(s) the party seeks to file under seal shall be delivered in a sealed envelope for in camera review.

(ii) A proposed redacted copy of the subject document(s), if applicable.

(iii) A proposed order granting the motion to seal or redact, with specific proposed written findings and conclusions that establish the basis for the sealing and redacting and are consistent with the five factors set forth in subsection (2)(a).

(B) If the court denies, in whole or in part, the motion to seal, the court will return the original unredacted document(s) and the proposed redacted document(s) to the submitting party and will file the order denying the motion. At this point, the proponent may choose to file or not to file the original unredacted document.

(C) If the court grants the motion to seal, the court shall file the sealed document(s) contemporaneously with a separate order and findings and conclusions granting the motion. If the court grants the motion by allowing redaction, the judge shall write the words "SEALED PER COURT ORDER DATED [insert date]" in the caption of the unredacted document before filing.

COMMENT

The rule incorporates the procedure established by State v. McEnroe, 174

Commented [jeg25]: This prohibition conflicts with the opinions in *Indigo Real Estate v. Rousey*, 151 Wn.941 App (2009) and *Hundtofte v. Encarnacion*, 169 Wn. App. 498 (2013), which provide that the trial court must do a GR 15 and *Ishikawa* factor analysis on such requests. The Supreme Court has granted review in *Hundtofte.*

Commented [jeg26]: This paragraph is confusing. It seems to refer to an "index" maintained by JIS or a court. Court file available for public viewing on "court indices". Does this include the "court record" and the "court file"? Unless protected by statute….What if the court ordered the redaction of a name and use of initials for some compelling reason? Is the use of a initials or "Janeor John Doe" allowed?

Commented [jeg27]: Is this all done exparte or is opposing counsel provided a copy of the motion and document sought to be sealed or redacted?

Commented [jeg28]: Given the developing caselaw, the number of factors could change.

Commented [jeg29]: Or redact?

Commented [jeg30]: If the documents are returned there is no record for appellate review.

Commented [jeg31]: Must the order of denial contain specific findings and conclusions

Commented [jeg32]: How would there ever be a record for appellate review if the documents are returned?

Commented [jeg33]: Is this sentence necessary? The order may have allow some redaction.

Commented [jeg34]: Is the sealing order available for public review?

Wn.2d 795 (2012). ~~for withdrawal of documents filed contemporaneously with a Motion to Seal or Redact is incorporated in the rule.~~

(9)~~(4)~~Sealing of Entire Court File. When the clerk receives a court order to seal the entire court file, the clerk shall seal the court file and secure it from public access. All court records filed thereafter shall also be sealed unless otherwise ordered. Except for sealed juvenile offenses, the existence of a court file sealed in its entirety, unless protected by statute, is available for viewing by the public on court indices. The information on the court indices is limited to the case number, names of the parties, the notation "case sealed," the case type and cause of action in civil cases and the cause of action or charge in criminal cases, except where the conviction in a criminal case has been vacated, the charge has been dismissed, the defendant has been acquitted, the governor has granted a pardon, or the order is to seal a court record of a preliminary appearance or probable cause hearing; then section (d)shall apply. Except for sealed juvenile offenses, the order to seal and written findings supporting the order to seal shall also remain accessible to the public, unless protected by statute.

(10)~~(5)~~Sealing of Specified Court Records. When the clerk receives a court order to seal specified court records the clerk shall:

(A) On the docket, preserve the docket code, document title, document or subdocument number and date of the original court records; and

(B) Remove the specified court records, seal them, and return them to the file under seal or store separately. The clerk shall substitute a filler sheet for the removed sealed court record. If the court record ordered sealed exists in a microfilm, microfiche or other storage medium form other than paper, the clerk shall restrict access to the alternate storage medium so as to prevent unauthorized viewing of the sealed court record; and

(C) File the order to seal and the written findings supporting the order to seal. Except for sealed juvenile offenses, both shall be accessible to the public; and

(D) Before a court file is made available for examination, the clerk shall prevent access to the sealed court records.

(11)~~(6)~~Procedures for Redacted Court Records. When a court record is redacted pursuant to a court order, the original court record shall be replaced in the public court file by the redacted copy. The redacted copy shall be provided by the moving party. The original unredacted court record shall be sealed following the procedures set forth in (c)(5).

(d) Procedures for Vacated Criminal Convictions, Dismissals and Acquittals, Pardons and Preliminary Appearance Records.

(1) In cases where a criminal conviction has been vacated and an order to seal entered, the information in the public court indices shall be limited to the case number, case type ~~with the notification "DV" if the case involved domestic violence~~, the ~~adult's~~ defendant's ~~or juvenile's~~ name, and the notation

Commented [jeg35]: Court file is used here.

Commented [jeg36]: Court file is used here.

Commented [jeg37]: Court records is used here.

Commented [jeg38]: Court file vs. court record

Commented [jeg39]: The findings and order will have to generic, otherwise the purpose of protecting the proponent's privacy is circumvented.

Commented [SUH40]: DDC requested further review and discussion regarding (9) and asked for comments from interested parties.

Commented [SUH41]: Possible comment added after subsection discussing financial restraints/computer system upgrades.

Commented [jeg42]: It becomes confusing when court file, index and court records are used somewhat interchangeably in this rule.

Commented [jeg43]: This section assumes old technology and paper records.

Commented [jeg44]: How is this accomplished with electronic court records?

Commented [jeg45]: Juvenile offense and juvenile proceedings are used in the rule, and the distinction is not always clear.

"vacated."

(2) In cases where a defendant has been acquitted, a charge has been dismissed, a pardon has been granted, or the subject of a motion to seal or redact is a court record of a preliminary appearance, pursuant to CrR 3.2.1 or CrRLJ 3.2.1, or a probable cause hearing, where charges were not filed, and an order to seal entered, the information in the public indices shall be limited to the case number, case type ~~with the notification "DV" if the case involved domestic violence~~, the ~~adult's~~ defendant's ~~or juvenile's~~ name, and the notation "non conviction."

(e) Procedures for Sealed Juvenile Offender Adjudications, Deferred Dispositions, and Diversion Referral Cases. In cases where an adjudication for a juvenile offense, a juvenile diversion referral, or a juvenile deferred disposition has been sealed pursuant to the provisions of RCW 13.50.050 (11) and (12), the existence of the sealed juvenile offender case shall not be accessible to the public.

COMMENT

GR 15(e) does not address whether the applicable factors identified in Section (c)(2)(A)(i)-(v) must be considered by the court before sealing Juvenile Offender records pursuant to RCW 13.50.505.

RCW 13.50.050 (11) addresses sealing of juvenile offender court records in cases referred for diversion.

RCW 13.40.127 prescribes the eligibility requirements and procedure for entry of a deferred disposition in juvenile offender cases, and the process for subsequent dismissal and vacation of juvenile offender cases in which a deferred disposition was completed. Records sealing provisions for deferred dispositions are contained in RCW 13.50.050. RCW 13.40.127(10)(a)(ii) provides for administrative sealing of deferred disposition in certain circumstances. RCW 13.50.050(14)(a) states that:

> *"Any agency shall reply to any inquiry concerning confidential or sealed records that records are confidential, and no information can be given about the existence or nonexistence of records concerning an individual."*

This remedial statutory provision is a clear expression of legislative intent that the existence of juvenile offender records that are ordered sealed by the court not be made available to the public. Records sealed pursuant to RCW 13.40.127 have the same legal status as records sealed under RCW 13.50.050. RCW 13.40.127(10)(c). The statutory language of 13.50.050(14)(a), included above, differs from statutory provisions governing vacation of adult criminal convictions, reflecting the difference in legislative intent found in RCW 9.94A.640, RCW 9.95.240, and RCW 9.96.060.

~~(e)~~(f) Grounds and Procedure for Requesting the Unsealing of Sealed Court Records or the Unredaction of Redacted Court Records.

(1) Order Required. Sealed or redacted court records may be examined by the public only after the court records have been ordered unsealed or unredacted pursuant to this section ~~or~~, after entry of a court order allowing access to a sealed court record or redacted portion of a court record, or after an order to seal or redact the record has expired. Compelling circumstances for unsealing or unredaction exist when the proponent of the continued sealing or redaction fails to overcome the presumption of openness under the factors in section (c)(2). The court shall enter specific findings on the record supporting its decision.

Commented [jeg46]: Is this COMMENT really needed?

Commented [jeg47]: The Court is not an agency.

Commented [jeg48]: Unredaction…awkward word choice. Grounds and Procedure for Requesting the Recission of an Order Sealing or Redacting Court Records [Court files?].

Commented [jeg49]: Court files too?

Commented [jeg50]: So this would allow a motion to rescind an order sealing or redacting soon after the original sealing/redaction order was entered. Is the burden shifting with this provision? Is this language needed given section 2 [below].

Commented [SUH51]: DDC requested further review as it relates to the *Bennett* case.

(2) Criminal Cases. A sealed or redacted portion of a court record in a criminal case shall be ordered unsealed or unredacted only upon proof of compelling circumstances, unless otherwise provided by statute, and only upon motion and written notice to the persons entitled to notice under subsection (c)(1) of this rule except:

(A) If a new criminal charge is filed and the existence of the conviction contained in a sealed record is an element of the new offense, or would constitute a statutory sentencing enhancement, or provide the basis for an exceptional sentence, upon application of the prosecuting attorney the court shall nullify the sealing order in the prior sealed case(s).

(B) If a petition is filed alleging that a person is a sexually violent predator, upon application of the prosecuting attorney the court shall nullify the sealing order as to all prior criminal records of that individual.

(C) If the time period specified in the Order to Seal or Redact has expired, the sealed or redacted court records shall be unsealed or unredacted without further order of the court in accordance with this rule.

(3) Civil Cases. A sealed or redacted portion of a court record in a civil case shall be ordered unsealed or unredacted only upon stipulation of all parties or upon motion and written notice to all parties and proof that identified compelling circumstances for continued sealing or redaction no longer exist, or pursuant to ~~RCW~~ chapter 4.24 RCW or CR 26(j). If the person seeking access cannot locate a party to provide the notice required by this rule, after making a good faith reasonable effort to provide such notice as required by the Superior Court Rules, an affidavit may be filed with the court setting forth the efforts to locate the party and requesting waiver of the notice provision of this rule. The court may waive the notice requirement of this rule if the court finds that further good faith efforts to locate the party are not likely to be successful.

COMMENT

In State v. Richardson, 177 Wn.2d 351(2013), there was a motion in the trial court to unseal a 1993 criminal conviction, which had been sealed in 2002, under an earlier version of GR 15. The State Supreme Court remanded to the trial court for further proceedings, because there was no record of considering the Ishikawa factors. The Supreme Court held that "compelling circumstances" for unsealing exist under GR 15 (e) when the proponent of sealing fails to overcome the presumption of openness under the five factor Ishikawa analysis. In either case, the trial court must apply the factors.

(4) Juvenile Proceedings. Inspection of a sealed juvenile court record is permitted only by order of the court upon motion made by the person who is the subject of the record, except as otherwise provided in RCW 13.50.010(8) and 13.50.050(23). Any adjudication of a juvenile offense or a crime subsequent to sealing has the effect of nullifying the sealing order, pursuant to RCW 13.50.050(16). Unredaction of the redacted portion of a juvenile court record shall be ordered only upon the same basis set forth in section (2), above.

Commented [jeg52]: Note: court record is used here.

Commented [jeg53]: If there is a time period in the order, isn't the order self-executing? Should this sentencet say the "records are available for public access without further court order"?

Commented [jeg54]: It seems that the provisions of this section conflict with the provisions of GR 22, Access to Family Law and Guardianship Court Records.

Commented [jeg55]: Note: court record is used here.

Commented [jeg56]: It seems that this burden differs from (f) (1), i.e., compelling circumstances for unsealing exist when the proponent of sealing fails to overcome the presumption of openness under the factors.

Commented [jeg57]: CRLJ 26 as well?

Commented [jeg58]: CLJ Rules?

Commented [jeg59]: Or sworn declaration?

Commented [jeg60]: Do juvenile proceedings include: juvenile offenses, truancy, alternative placement, dependency, etc?

~~(f)~~**(g) Maintenance of Sealed Court Records.** Sealed court records are subject to the provisions of RCW 36.23.065 and can be maintained in mediums other than paper.

~~(g)~~**(h) Use of Sealed Records on Appeal.** A court record, or any portion of it, sealed in the trial court shall be made available to the appellate court in the event of an appeal. Court records sealed in the trial court shall be sealed from public access in the appellate court subject to further order of the appellate court.

~~(h)~~**(i) Destruction of Court Records.**

(1) The court shall not order the destruction of any court record unless expressly permitted by statute. The court shall enter written findings that cite the statutory authority for the destruction of the court record.

(2) In a civil case, the court or any party may request a hearing to destroy court records only if there is express statutory authority permitting the destruction of the court records. In a criminal case or juvenile proceeding, the court, any party, or any interested person may request a hearing to destroy the court records only if there is express statutory authority permitting the destruction of the court records. Reasonable notice of the hearing to destroy must be given to all parties in the case. In a criminal case, reasonable notice of the hearing must also be given to the victim, if ascertainable, and the person or agency having probationary, custodial, community placement, or community supervision over the affected adult or juvenile.

(3) When the clerk receives a court order to destroy the entire court file the clerk shall:

(A) Remove all references to the court records from any applicable information systems maintained for or by the clerk except for accounting records, the order to destroy, and the written findings. The order to destroy and the supporting written findings shall be filed and available for viewing by the public.

(B) The accounting records shall be sealed.

(4) When the clerk receives a court order to destroy specified court records the clerk shall:

(A) On the automated docket, destroy any docket code information except any document or sub-document number previously assigned to the court record destroyed, and enter "Order Destroyed" for the docket entry; and

(B) Destroy the appropriate court records, substituting, when applicable, a printed or other reference to the order to destroy, including the date, location, and document number of the order to destroy; and

(C) File the order to destroy and the written findings supporting the order to destroy. Both the order and the findings shall be publicly accessible.

Commented [jeg61]: And Redacted?

Commented [jeg62]: And redacted?

Commented [jeg63]: Court files?

Commented [jeg64]: And Redacted?

Commented [jeg65]: And redacted?

Commented [jeg66]: Any court record, any court file?

Commented [jeg67]: Definition of "juvenile proceeding"

Commented [jeg68]: Court file is used here and the subsection A uses court records.

Commented [jeg69]: Why the exception for accounting records?

Commented [jeg70]: Public access.

Commented [jeg71]: Is this because of the Auditor? If they are sealed, the Auditor cannot see them.

Commented [jeg72]: Available for public access.

(5) Destroying Records.

(A) This subsection shall not prevent the routine destruction of court records pursuant to applicable preservation and retention schedules.

~~(i)~~(B)Trial Exhibits. Notwithstanding any other provision of this rule, trial exhibits may be destroyed or returned to the parties if ~~all parties so stipulate in writing and~~ the court so orders.

(j) Effect on Other Statutes. Nothing in this rule is intended to restrict or to expand the authority of clerks under existing statutes, nor is anything in this rule intended to restrict or expand the authority of any public auditor in the exercise of duties conferred by statute.

Commented [jeg73]: Does this include court files?

Commented [jeg74]: Where are these preservation and retention schedules found? Are courts relying upon schedules set for in the PRA? Is there a statute or court rule establishing these schedules?

Commented [jeg75]: After any applicable appeal period has expired or appeals exhausted?

Superior Court of the State of Washington for Snohomish County

THOMAS J. WYNNE
JUDGE

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October 22, 2013

Justice Mary Fairhurst
Washington State Supreme Court
Chair, JISC
P.O. Box 40929
Olympia, WA 09504

RE: DMCJA Comments to DD Committee proposed GR 15 amendments

Dear Justice Fairhurst:

About 4:00 yesterday I received a copy from AOC of a letter addressed to you by Judge David Svaren, President of the DMCJA. The Data Dissemination Committee has been drafting proposed amendments to GR 15 since February 2013. We held a public hearing in Everett on April 12. The DMCJA and SCJA have been well aware of these efforts. In mid September a DD Committee final draft was distributed to stakeholders by AOC, including Judicial Associations, for a final round of comments before submission to the JISC. Our process has been highly transparent. We have welcomed comments, as others may see issues DD Committee members may have missed or not considered. The announced cutoff for comments by the Data Dissemination Committee was October 4. Several amendments were made by the DD Committee at our October 8 meeting as a result of comments received.

It appears that the DMCJA has chosen to bypass the Data Dissemination Committee by forwarding comments to you directly, only 4 days before the JISC meeting at which GR 15 amendments are being considered. I spoke to Judge Heller at the end of the day yesterday, and he had no knowledge of Judge Svaren's letter or DMCJA Board comments. The DD Committee has been given no opportunity to address the 75 comments submitted by the DMCJA. Many of the DMCJA comments are irrelevant , as they address sections of GR 15 not included by the DD Committee in the proposed amendments. I will address those comments, individually, as DD Committee chair, by attachment to this letter. The rest of the DD

committee has not participated in drafting my responsive comments. There are two comments I will mention in this letter, as they are addressed in the DMCJA Memorandum attached to Judge Svaren's letter.

The first is the use of the *Bennett* decision by the DD Committee. The lead opinion in *Bennett* was by a 4 justice plurality. The CJ, in a concurring opinion, agreed that documents obtained through discovery that are filed with a court in support of a motion that is never decided are not part of the administration of justice and may remain sealed under the good cause standard of CR 26(c). Therefore the DD Committee included that portion of the Bennett decision in the rule. The lead opinion in Bennett also contained a requirement for a document log to accompany a Motion to Seal. That requirement did not make it's way into the proposed GR 15 amendments, as it was not supported by a 5th Justice in a concurring opinion.

The second issue is the requirement of (c) (6) that the name of a party may not be redacted, or otherwise changed or hidden from an index. The DD Committee understands that the Supreme Court accepted review of the *Hundtofte* case and a decision is pending. We originally included specific language form the court of Appeals *Huntofte* decision, but deleted it. A decision from the Supreme Court is not necessary for the rule proposal to go forward. Issues in Hundtofte are whether GR 15 allows redaction of names of parties, as currently written, and whether the tenants (petitioners) have met Constitutional standards, as set forth in the caselaw to allow sealing. GR 15 does not currently specifically prohibit redaction of a name from the index.

If name of a party is sealed, the case becomes invisible to the public, and can't be found for the public to move for unsealing. (c) (6) is consistent with (c) (9), which provides that if entire file is sealed, the existence of the case is available for public viewing. Redacting the name defeats (c) (9). The same standard applies for a redaction as for sealing the record. If names of parties can be redacted from the index, (c) (9) will have no effect. Eventually all sealed court records will have the name of the party redacted from the index and will be invisible to the public.

I see no basis for delay of the JISC consideration of Data Dissemination Committee recommendations, based upon the DMCJA comments. I will offer two additional amendments to the DD Recommendations, as a result of DMCJA comments. I recommend that JISC go forward with DD Committee recommendations on GR 15 amendments , per the agenda, at the

JISC meeting on October 25. I have communicated with 3 other DD members today and they concur with that recommendation.

Very Truly Yours,

Thomas J. Wynne
Chair, Data Dissemination Committee

ATTACHMENT: Response to DMCJA Comments

CC: DD Committee members
Stephanie Happold
Vicky Cullinane
Pam Payne

Response to DMCJA Comments to proposed GR 15 amendments

1. Court file and Court record have 2 different meanings. A court file is made up of individual court records. Sections (b) (1) & (2) were not included in DD Committee proposed amendments. This is existing GR 15 language.
2. Attorneys are included in the term "public" unless otherwise excepted by GR 15. Sections (b) (5) was not included in DD Committee proposed amendments, other than a numbering change. This is existing GR 15 language.
3. (b) (7) was included in GR 15 in 2006 concurrently with the drafting of GR 22. Sections (b) (7) was not included in DD Committee proposed amendments, other than a numbering change. This is existing GR 15 language.
4. The existing rule is clear as to who can request a hearing to seal or redact in a civil case. Sections (c) (1) was not included in DD Committee proposed amendments. This is existing GR 15 language

5.& 6. Juvenile Offender cases are not criminal cases. See State v. Schaaf, 109 Wn.2d 1, (1987); State v. Rice, 98 Wn.2d 384 (1982). Sections (c) (1) was not included in DD Committee proposed amendments. This is existing GR 15 language.

7.& 9. There isa a typo in (c) (2). The words *concerns* should be shown with a Strikethrough. I agree that the following language should be added at the end of (c) (2): *, or denial of a motion to seal or redact.*

8. The DD proposed language should be used

10. The DD proposed language should be used. It reflects caselaw.
11. DD proposed language should be used.
12. Proposed DD language is now *consider and apply*. *Consider* was used by the Supreme Court in State v. Sublett, 176 Wn.2d 58 (2012).
13 Good cause for sealing or redaction, of course.
14, Non parties with an interest in nondisclosure should be obvious. Notice is required throughout GR 15.
15. Privacy or safety concerns identified under (c) (4) cannot create an entitlement to sealing. The Ishikawa factors must first be applied. The McEnry and Waldon cases, cited by DMCJA are applicable here.
16. The provision on restitution still applies if restitution has been paid. It's common for a plea bargain in cause A to include payment of restitution in causes B & C as a sentence condition in cause A, and an agreement to dismiss causes B & C.
17. DD Committee proposed language should be used
18. Superior Court Judges commonly encounter court records filed by a party that contain unredacted personal identifiers in family law cases.
19. The term *court file* is properly used, as differentiated from a court record.
20. There is no need to seal an adoption file or a juvenile dependency, truancy. ARY, or CHINS file, as those types of cases are already not open to the public. (c) (5) applies in all other types of cases.
21. The DD Committee did not address the prospective/retrospective issue. Existing caselaw would apply as of the date of court action, without respect to GR 15.

22. SEE GR 15 (i) (5) (A), which controls the issue of retention schedules.
23. SEE State v. Rice, 98 Wn.2d 384.
24. GR 15 proposed amendments are written so that a request for access to a sealed record for which the time on the sealing order has expired will trigger unsealing, without further order of the court. The shortcomings of existing systems is accounted for. County Clerks are OK with the proposed language.
25. The DD Committee did not see a conflict with decisions ion Rousey and Hundtofte. DD is aware that the Supreme court accepted review in Hundofte and a decision is Pending.
26.Use of the terms court index or indices is a reference to AOC maintained data. Court record and court file have different meanings, as defined in (b). Use of initials . is not addressed by GR 15. It implicates CR 10, CRLJ 10, and CrR 2.1 and CrRLJ 2.1, instead.
28. The Ishikawa standards have been in place for over 30 years and are unlikely to Change.
29. (8) (B) should read the motion to seal *or redact*
30.& 32 The proponent can choose not to file the original unredacted document. If the choice is not to file, the proponent has elected not to make a record for appeal. The procedure in (c) (8) is that adopted in the McEnroe case
31. Section (c) (2) applies in RE specific written findings.
33.The DD suggested language should be used This is the King County procedure.
34. (c) (9) requires that the order sealing and findings remain accessible to the public.
35-38. The terms court record and Court file are used properly. They have different meanings , s defined in (b).
39 The requirement that the order and findings shall be accessible to the public is existing GR 15 language, not part of the proposed amendment.
40. The DD review and discussion on (c) (9) was completed.
41-45. Section (c) (10) was not part of the proposed amendments from DD, except for the exception for juvenile offenses. The DMCJA comments refer to existing GR 15 language.
46. The comment referred to is essential to prevent any misunderstanding over whether The proposed GR 15 amendments address whether the Ishikawa factors apply to sealing juvenile offender records under RCW 13.50.050.
47. The cited statutory language is a basis for current AOC policy in re access to sealed juvenile offender court records.
48. The DD proposed language should be used.
49. The term court records is properly utilized in (f) (1).
50. The proponent of sealing always has the burden of proof. (f) (1) contains the language of the Richardson case., cited in the comment.
51. DD review in RE the Bennett case was completed.
52. The term court record is used properly in (f) (2).
53. A new case management system would use this procedure. No order is needed if the time period has expired.
54. Except for the reference to redaction, this is the existing GR 15 language. No conflict. with GR 22 exists.
55. The term court record is properly used. . Except for the reference to redaction, this is

the existing GR 15 language.

56. The same standard applies to both criminal and civil cases, as provided in (f) (1)..

57.& 58 No CRLJ 26j exists.

59. This is the existing GR 15 language not part of the proposed amendments

60.Truancy, ARY, CHINS, and Dependency court records are not open to the public-case type 7. This is the existing GR 15 language not part of the proposed amendments.

62. This is the existing GR 15 language not part of the proposed amendments. No further Amendment is required.

63-65. This is the existing GR 15 language not part of the proposed amendments. No further amendment is required. The term court record is properly used in (g).

66. The term court record is properly used in (i) (1).

67. This is the existing GR 15 language not part of the proposed amendments.

68. The terms court file and records are properly used in (i) (3). This is the existing GR 15 language, not part of the proposed amendments.

69. This is the existing GR 15 language, not part of the proposed amendments.

70. the public access requirement for orders and findings sealing is consistent with (c) (9). This is the existing GR 15 language, not part of the proposed amendments.

71. This is the existing GR 15 language, not part of the proposed amendments. Yes. As I recall from 2006 amendments this addresses state auditor requirements.

72. (i) (4) (C) is consistent with (c) (9).

73. This is the existing GR 15 language, not part of the proposed amendments. The term court records is properly used in (i) (5) (A).

74. This is the existing GR 15 language, not part of the proposed amendments. The Courts of Limited Jurisdiction retention schedule approved by JISC is an example.

75. A Court would not order destruction of exhibits during the appeal period. SEE RCW 36.23.070.

(c) Sealing or Redacting Court Records.

(1) In a civil case, the court or any party may request a hearing to seal or redact the court records. In a criminal case or juvenile proceedings, the court, any party, or any interested person may request a hearing to seal or redact the court records. Reasonable notice of a hearing to seal must be given to all parties in the case. In a criminal case, reasonable notice of a hearing to seal or redact must also be given to the victim, if ascertainable, and the person or agency having probationary, custodial, community placement, or community supervision over the affected adult or juvenile. No such notice is required for motions to seal documents entered pursuant to CrR 3.1(f) or CrRLJ 3.1(f).

(2) ~~After~~ At the hearing, the court ~~may order the court files an~~ and ~~records in the proceeding, or any part thereof, to be sealed or redacted if the court makes and enters written findings that the specific sealing or redaction is justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record.Agreement of the parties alone does not constitute a sufficient basis for the sealing or redaction of court records. Sufficient privacy or safety concerns that may be weighed against the public interest include findings that:~~ shall consider and apply the applicable factors and enter specific written findings on the record to justify any sealing or redaction, or denial of a motion to seal or redact.

(8) Motions to Seal/Redact when Submitted Contemporaneously with Document Proposed to be Sealed or Redacted – Not to be Filed.

(A) The document sought to be sealed or redacted shall not be filed prior to a court decision on the motion. The moving party shall provide the following documents directly to the court that is hearing the motion to seal or redact:

(i) The original unredacted document(s) the party seeks to file under seal shall be delivered in a sealed envelope for in-camera review.

(ii) A proposed redacted copy of the subject document(s), if applicable.

(iii) A proposed order granting the motion to seal or redact, with specific proposed written findings and conclusions that establish the basis for the sealing and redacting and are consistent with the five factors set forth in subsection (2)(a).

(B) If the court denies, in whole or in part, the motion to seal or redact, the court will return the original unredacted document(s) and the proposed redacted document(s) to the submitting party and will file the order denying the motion. At this point, the proponent may choose to file or not to file the original unredacted document.