

Superior Court of the State of Washington for Snohomish County

JUDGE
THOMAS J. WYNNE

SNOHOMISH COUNTY COURTHOUSE
3000 Rockefeller Avenue, M/S #502
Everett, WA 98201-4060
(425)388-3598 FAX

Department 9
(425) 388-3418
thomas.wynne@snoco.org

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Justice Charles Johnson
Chair, Supreme Court Rules Committee
% Clerk of the Supreme Court
P.O. Box 40929
Olympia, WA 98504

RE: Comment to proposed GR 31 (I)

Dear Justice Johnson:

The District and Municipal Courts Judges Association has submitted a proposed amendment to GR 31, which has been published by the Supreme Court for comment. The DMCJA has also recommended that ARLJ 9 be repealed due to its conflict with GR 31. I agree that ARLJ 9 should be repealed, for the reasons stated. I am writing to oppose the adoption of the proposed GR 31 (I).

Although I have served as a Superior Court Judge for the last 20 years, I also served as a Judge of the District Court from 1979 through 1992. I have served as a member of the JISC Data Dissemination Subcommittee since 1999 and was one of the drafters of GR 31, GR 22, and the most recent amendments to GR 15. This comment is made in my individual capacity and the views expressed herein do not necessarily reflect the views of JISC, the Data Dissemination subcommittee or any other judicial branch organization.

Trial court judges at all levels routinely consider a variety of reports to assist in decisions regarding sentencing, sanctions for violations of sentence conditions and the determination of the competency of defendants to participate in criminal proceedings. Those reports take the form of presentence reports, sexual deviancy evaluations, substance abuse evaluations, domestic violence assessments, competency evaluations from Western or Eastern State Hospitals, self help support group attendance reports, and

a variety of compliance reports. The volume of those reports is greater in Limited Jurisdiction Courts

To the extent that these documents are part of the judicial decision making process in criminal cases, the mandate of Article 1, Sec. 10 of the Washington Constitution that “...*justice in all cases shall be administered openly*” applies. The presumption of public access to court records applies both to civil and criminal cases. *Dreiling v. Jain*, 151 Wash. 2d 900, 908, 93 P.2d 861 (2004). Public access may not be denied to documents filed with the court that become part of the court’s decision making process without some overriding interest requiring secrecy. *Dreiling*, 151 Wash. 2d at 909-10, 93 P.3d 861; *Rufer v. Abbot Labs*, 154 Wash. 2d 530, 549, 114 P.3d 1182 (2005). A party may ask the court to determine whether such an overriding interest exists by moving to seal or redact a document under GR 15 and by applying the five factor test set forth in *Seattle Times v. Ishikawa*, 97 Wash. 2d 30, 37-39, 640 P.2d 716 (1982). Court records include any document “*maintained by a court in connection with a judicial proceeding*” GR 31 (c) (4).

If compliance reports are filed but never considered by the court in any proceeding, those documents may be sealed and removed from public access under a good cause standard. Absent relevance to a decision made by the court, such documents are not presumptively public under Article 1, Section 10, Washington Constitution. *Bennett, et al v. Smith Bunday Berman Britton, PS*, ___ Wash. 2d ___ (2013)

The proposed GR 31 (l) seeks to bypass a consideration of the Ishikawa factors by trial courts for the purpose of restricting public access to the identified documents. When we drafted GR 22, we asked the Supreme Court to do just that for parenting evaluations, domestic violence assessment reports, risk assessment reports, CPS summary reports, sexual abuse evaluations and portions of GAL reports filed and considered by the court in family law and guardianship cases. In family law and guardianship cases such reports are now filed confidentially with a cover sheet in a “GR 22 file”. GR 22 (e). There is a reason the procedure provided for in GR 22 is limited to family law and guardianship cases. When the fourth *Ishikawa* factor is applied to the reports identified in GR 22 (e), the privacy interest of a party to family law or guardianship proceedings almost always outweighs the public interest in the open

administration of justice. Family law and guardianship proceedings are essentially private actions litigated in a public forum.

The oath for new attorneys approved by the Washington State Supreme Court recognizes criminal charges as “*public offenses*”. Oath of Attorney, para 5. When the fourth *Ishikawa* factor is applied to the reports listed in the proposed amendment to GR 31 (l), the opposite result is reached. The public interest in the open administration of justice almost always outweighs the privacy interest inherent in those reports in criminal cases. In *State v. DeLauro*, 163 Wash. App. 290, 258 P.3d 696 (2011) the Court of Appeals found that a competency evaluation considered by the court in its decision making process must be filed with the court as a *court record* and is subject to Article 1, Section 10, Washington Constitution, notwithstanding the provisions of RCW 10.77.210. There is no distinction between competency evaluations and presentence reports, substance abuse evaluations, or sexual deviancy evaluations covered by proposed GR 31 (l). Under existing caselaw, those records may be restricted from public access only after application of the *Ishikawa* factors and entry of written findings by the court under GR 15. The public interest in the open administration of justice under Article 1, Section 10 should prevail in weighing individual privacy interests in such reports in criminal cases.

The proposed GR 31 (l) should not be adopted by the Supreme Court. But if the Supreme Court does not accept the analysis in this comment, the subject matter of proposed GR 31 (l) should be included in an expanded GR 22, not in GR 31. I concur with the comment submitted by the Washington State Association of County Clerks. In either case, the proposed amendment to GR 31 should not be approved as drafted.

Respectfully Submitted,

Thomas J. Wynne
Judge
Snohomish County Superior Court

CC: JISC Data Dissemination Committee
Stephanie Happold, Data Administrator, AOC
Judge Charles Snyder, President, SCJA
Judge Sara Derr, President, DMCJA
Justice Mary Fairhurst, Chair, JISC