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April 29, 2014

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Re: Comments to Proposed Changes to GR 15

Dear Chief Justice Madsen and Members of the Court:

These comments to the JISC's proposed overhaul of GR 15 are respectfully submitted on behalf of Allied Daily Newspapers of Washington ("ADNW"), the Washington Newspaper Publishers Association ("WNPA") and the Washington Coalition for Open Government ("WCOG").

These organizations, and the publications and citizens they represent, have a profound interest in assuring continued public access to court records. ADNW represents Washington's daily newspapers. WNPA represents 105 community newspapers throughout the state. WCOG is a nonpartisan organization that represents a cross-section of the state's public, press, and government and that is dedicated to defending the public's right to know in matters of public interest. Together, they play a crucial role in giving practical effect to the requirement that "[j]ustice in all cases shall be administered openly[.]" Const. art 1, § 10.

ADNW, WNPA and WCOG strongly oppose the proposed reworking of GR 15. It is an unwarranted rollback of the constitutional promise of open justice. The amendments would lead to sealing, without justification, of a substantial volume of court records that have long been accessible to the press and public.

No convincing reason has been offered for overhauling GR 15 at this time, or for permitting greater secrecy in court records. The proponents erroneously assert that GR 15 must be changed "to remain consistent with current case law and statutory changes." On the contrary, the proposed changes misinterpret recent decisions and ignore newly enacted statutes. Rather than reflect any necessary change in the law, the proposed amendment is an overreaching attempt to rewrite it.

The current rule works, and is well understood by litigants, judges, court administrators and clerks. In practice, it has fulfilled this Court's directive that court records in Washington are presumptively open, and that any party seeking to file a record under seal, or to keep a record

sealed, ***must*** give a compelling reason that outweighs the public's interest in open access. This mandate has been confirmed in *Seattle Times v. Ishikawa*, 97 Wn.2d 30 (1982) and countless later decisions.

There are seven broad concerns with the proposed GR 15 amendments. To summarize:

1. The proposed changes create a new, bifurcated standard for sealing court records. Instead of requiring a "compelling" reason before court records are sealed, the amendment allows sealing on a minimal "good cause" showing for ***any*** record "not a part of the court's decision-making process." This new, second-class category of records is not defined. The amendment thus would result in confusion at best, and could lead to widespread sealing of pleadings and other records that are publicly available under current law.

2. The proposed changes encourage courts to invite third parties to intervene to oppose disclosure, a procedure that a majority of this Court has rejected, and that would impose unwarranted barriers to access.

3. The proposed changes insert a watered-down and misstated articulation of the well established constitutional test for determining whether court records may be sealed.

4. The grounds for sealing are vastly expanded to allow for near-total secrecy of juvenile and non-conviction criminal records.

5. The proposed changes give courts discretion to enter perpetual sealing orders, in violation of article 1, § 10.

6. The proposed new procedure for motions to seal, and for withdrawing documents when sealing is denied, is confusing and incomplete.

7. The proposed changes remove from the public domain a substantial amount of docket information, and will lead to incomplete and misleading indices for criminal and juvenile cases.

Each concern is addressed in detail below.

1. **Embracing an unduly restrictive interpretation of *Bennett v. Smith Bunday Berman Britton, PS*, 176 Wn.2d. 303 (2013), proposed GR 15(c)(2)(B) would permit routine sealing of a new, ill-defined category of records that are "not a part of the court's decision making process."**

Amended GR 15(c)(2) creates a bifurcated standard for sealing. New section (c)(2)(B) would permit any record to be sealed on a lesser showing of "good cause" (rather than the constitutionally mandated "compelling interest") if the record is not "part of the court's decision-making process," a term not defined in the new rule.

The rule comments state that this new procedure reflects what this Court "held" in *Bennett v. Smith Bunday Berman Britton, PS*, 176 Wn.2d. 303 (2013). That is not true, and it ignores the actual holding of *Bennett*. In fact, the premise for proposed sections (c)(2)(B)(i) and (ii) was expressly ***rejected*** by a majority of this Court in *Bennett*.

By way of background, *Bennett* has ***no majority opinion***. The lead opinion is signed by four members of this Court – one of whom joined Chief Justice Madsen's partially concurring opinion that was sharply critical of much of the lead opinion's reasoning. Four justices dissented, rejecting the majority's analysis and finding that *Ishikawa*'s heightened standard for sealing applied to records filed "in anticipation of a court decision[.]" 176 Wn.2d at 324, citing *Rufer v. Abbott Labs.*, 154 Wn.2d 530, 549 (2005).

Bennett also arose in unusual circumstances. A party attached to a summary judgment brief documents that had been designated "confidential" under a discovery protective order. The documents were filed without an accompanying motion to seal, apparently by accident. Just hours later, before the court had reviewed the documents, the case settled and the parties removed the summary judgment motion from the calendar. When the parties learned of their mistakenly unsealed filing, they attempted to rectify it by refiling sealed versions. A witness in the case intervened and objected, for reasons "not entirely clear." 176 Wn.2d at 307 n.1. The trial court granted the motion to seal.

On these novel facts, this Court found that the records could remain sealed without a showing of "compelling concerns" as required by *Ishikawa*. But the only "holding" agreed to by a majority of this Court is 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 remain sealed under the good cause standard of CR 26(c). ***In such circumstances***, the open courts provision of article 1, § 10 of the Washington State Constitution is not implicated." 176 Wn.2d at 317 (Madsen, J., concurring) (emphasis added).

The proposed GR 15 amendment unmoors *Bennett* from its facts, and would permit sealing on a "good cause" showing for ***any*** record that was "not a part of the court's decision making process." Proposed GR 15(c)(2)(B). The proposal is based on one statement in *Bennett*'s lead opinion that "only material relevant to a decision actually made by the court is presumptively public under article 1, § 10." 176 Wn.2d at 305. The proposal to codify this statement into GR 15 is problematic, for many reasons:

- Most significantly, six justices of this Court ***rejected*** the notion that ***any*** record not relied on for a court decision falls outside the constitutional limitations on sealing. Again, a majority agreed only that confidential discovery material, filed in support of a motion that the court never decides, may remain sealed for good cause.

- The proposed rule fails to explain what is meant for records to become "part of the court's decision making process." On its face, proposed GR 15(c)(2)(B)(i) is more access-restrictive than even the lead opinion in *Bennett*, which recognizes that the constitutional right of access applies not only to records that are relevant to a court's "decision," but also to "***other conduct*** of a judge or the judiciary." 176 Wn.2d at 312 (emphasis added). "By using the term 'conduct,' we do not mean to suggest that only an affirmative act by the court in relation to documents renders them public. The meaning of conduct is broad and can include omissions and failures to act." *Id.* at 312 n.3. The proposed rule makes no allowance for records that should be public because they relate to other judicial "conduct."

- *Bennett* is a fairly recent case. It has not been cited in ***any*** appellate decision to date on any sealing issue. Its significance is debatable, as noted above, and should be left to interpretation in future opinions. The rush to codify the ***most access-restrictive reading*** of the decision is preemptive and erroneous.

Among the questions *Bennett* leaves unanswered are: (1) Are pleadings subject to sealing for "good cause" at the outset of a lawsuit? (Pleadings are traditionally public records, and the way the public learns what actions have been filed, by whom, and on what subject; but complaints and answers do not typically become "part of the judicial decision-making process" until long after they are filed, if at all.) (2) Is a hearing on a motion enough to make the underlying moving papers "part of the court's decision-making process," if the court has yet to rule on the motion itself? (If not, the press and public would have a constitutional right to attend a court proceeding, yet no right to look at the records being discussed in open court.) (3) If a third party challenges sealing in a pending case, before the underlying records have formed the basis for a formal judicial decision, does the court's consideration of the motion to unseal constitute judicial "conduct" sufficient to make the documents "relevant"?

Proposed GR 15(c)(2)(B)(i) forecloses debate on such issues. It embraces the broadest possible reading of *Bennett*, and would require trial courts to disregard the heightened sealing requirement for ***any*** record "not a part of the court's decision-making process." The proposed rule will result in confusion and loss of access to records that have long been public.

2. Proposed GR 15(c)(2)(B)(ii) adopts an unnecessary and unworkable notice provision that may require courts to invite non-parties to oppose public access to court records.

Proposed new GR 15(c)(2)(B)(ii) would require courts to consider notifying any non-party "with an interest in nondisclosure" of a motion to unseal, so that they might be heard to oppose public access to court records. This third-party notice provision is based on *dicta* in the lead *Bennett* opinion. The suggestion that is not a holding of the case, but instead was flatly ***rejected*** by the two concurring justices and the four dissenters. *Id.* at 321-22, 324 (Madsen, J., concurring)

(burden of such third-party notice "a serious matter" that lead opinion introduces "'sideways' through *dicta*"; "it should be disregarded as unnecessary to the court's decision"); *id.* at 331 n.4 (Stephens, J., dissenting).

Requiring courts, by rule, to consider a nonparty's "interest in nondisclosure" whenever a litigant seeks to seal a record will result in unnecessary costs and unwarranted delay, particularly in cases where there are large numbers of potentially interested third-parties; where it is facially apparent that no colorable basis exists to seal the records; or where one of the parties already is advocating for sealing. It also will result in unwarranted practical barriers to access in cases where a nonparty is motivated to maintain secrecy while the advocate of access lacks resources for a protracted court battle.

Finally, if third-party notice is to be required in sealing and unsealing matters, no possible justification exists for limiting it to parties "with an interest in nondisclosure," as the proposed rule does. Logic, fairness and the constitutional presumption of access suggest that if a third-party notification provision is to be added to GR 15, courts must be required to provide equal notice to any member of the press or public with an interest in *disclosure* of the record at issue.

3. Proposed GR 15(c)(2)(A) misstates the *Ishikawa* test.

Under proposed new section (c)(2)(A), GR 15 would for the first time expressly refer to the familiar five-part test set that article 1, § 10 mandates before access to court proceedings or records may be denied. *Ishikawa*, 97 Wn.2d at 37-39; *Dreiling v. Jain*, 151 Wn.2d 900, 913-15, 93 P.3d 861 (2004). This in itself is not objectionable as long as the language is faithful to *Ishikawa* – though it also seems unnecessary, as there is no indication courts have had difficulty applying current GR 15 in a manner consistent with the constitutional test. *See State v. Waldon*, 148 Wn. App. 952, 966-67 (2009) (reading rule as "harmonized" with *Ishikawa*).

Unfortunately, the proposed amendment distorts the constitutional test, in two respects. First, it limits application of the *Ishikawa* factors to cases involving sealing only of a "court record that has become part of the court's decision-making process[.]" As discussed in point 1 above, this is an incorrect and improper, overly expansive reading of *Bennett*. The scope of constitutional rules should be developed through case law based on the individual facts of a case.

Second, the proposed rule erroneously restates the *Ishikawa* test as a series of questions for the court to "consider," rather than constitutional requirements that must be satisfied before sealing is allowed. The proposed rule thus suggests trial courts have more discretion than the case law in fact allows. For example, proposed GR 15(c)(2)(A)(i) says one of the "factors" the court must "consider" is: "Has the proponent of sealing or redaction established a compelling interest in sealing[.]" But this question is not merely a factor for the court to weigh. Rather, it is a threshold requirement that "[t]he proponent of...sealing ***must*** make" before sealing may even be considered. *Dreiling*, 151 Wn.2d at 913. Similarly, the proposed rule directs the court simply to

"consider" whether "anyone present at the hearing" has objected to sealing; but the constitutional test requires that "Anyone present ... ***must*** be given an opportunity to object." *Id.* at 914.

If GR 15 is to be amended to incorporate the *Ishikawa* test, it should state the constitutional requirements accurately.

4. The proposed rule dramatically expands the grounds for sealing records in criminal and juvenile cases.

GR 15(c)(2) currently requires the advocate of sealing to come forward with "identified compelling privacy or safety concerns that outweigh the public interest in access to the court record." The rule lists five specific privacy concerns that are per se "sufficient" to be weighed against the public interest in disclosure, plus a catch-all category for other "identified compelling circumstances." GR 15(c)(2)(A). The only "*per se*" privacy interest identified in the criminal context is for a conviction that has been vacated. GR 15(c)(2)(C).

The proposed amendment vastly expands the list – and with it, the classes of records that could routinely be subject to sealing. Under proposed GR 15(c)(4), a sufficient privacy interest would exist to justify sealing with respect to most criminal or juvenile offender cases where charges brought but ***dismissed*** (subsection D); most ***acquittals*** (subsection E); any case where the governor has issued a ***pardon*** (subsection F); and any ***preliminary appearance*** where charges have not yet been filed (subsection H).

These purported criminal privacy interests have ***no support in any case law, statute or rule.*** The sole authority cited by the proponents is something called the "Joint Legislative Court Records Privacy Workgroup" – a body that apparently convened in 2012, with no legislative or judicial mandate. No justification for its radically expansive conception of the privacy rights of criminal defendants has been offered.

The proposed changes also have no sound basis in policy. A vacated conviction is considered a sufficient privacy interest to warrant potential sealing, because the Legislature has determined such a conviction shall be treated as if it the offender never committed the crime – but only if the crime is one the Legislature has found is eligible for vacation, and only if the defendant meets the strict statutory criteria. *See* RCW 9.94A.640 (vacation of felony convictions); RCW 9.96.060 (vacation of gross misdemeanor convictions); RCW 13.50.050 (juvenile convictions). The additional non-conviction circumstances in proposed GR 15(c)(4) are entirely different. An acquittal, for example, does not expunge records of the defendant's contact with the criminal justice system. Nor should it: as a matter of law, acquittal "does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt." *U.S. v. Watts*, 519 U.S. 148, 155 (1997).

Additionally, the proposed changes to GR 15(c)(4) would deprive the public and the press of the ability to evaluate and hold the justice system accountable. They would prevent the public from

learning, for example, about repeat offenders who manage to evade charges. Prosecutors would not be held to account for failure to obtain convictions. Voters would be unable to evaluate the governor's exercise of the power to pardon. Denying access to records of dismissals, acquittals, and other non-conviction outcomes means that systemic problems will escape public scrutiny, and thus are less likely to be corrected. The end result is a less safe and less just society.

Finally, after the proposed amendment was submitted to this Court, the Legislature passed a sweeping overhaul of the juvenile records system and instituted new procedures for access to and sealing of such records. *See* HB 1651. Governor Inslee signed the bill on April 2, and it takes effect June 12, 2014. At a minimum, any change to GR 15 related to juvenile records must be reconsidered in light of this new legislation.

5. Proposed GR 15(c)(5)(A) allows unconstitutional permanent sealing.

Proposed GR 15(c)(5)(A) provides that sealing orders shall expire after a time specified in the order, which "shall be no longer than necessary" to seal the order's purpose. It also provides that the burden on extending the sealing order rests with the party favoring sealing. ADNW, WNPA and WCOG would have no objection if these were the extent of the provisions.

The last sentence of this subsection, however, provides that a 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." Permanent sealing violates the public's right of access under article 1, § 10. As a constitutional matter, sealing orders "***shall*** apply for a specific time period," and there is no provision for "indefinite" sealing orders. *Dreiling*, 151 Wn.2d at 914.

In addition, the first sentence of GR 15(c)(5)(A) purports to exempt juvenile offender records from the requirement that sealing orders must have an expiration date. But the constitutional requirements for sealing set out in *Ishikawa, Dreiling*, and other cases apply equally to juvenile proceedings. *See In re Dependency of J.B.S.*, 122 Wn.2d 131 (1993). Permanent sealing orders are not permitted.

6. Proposed GR 15(c)(8) sets out an incomplete and confusing procedure for motions to seal.

Proposed section (c)(8) sets out a mechanism for filing documents under seal and withdrawing them if a motion to seal is denied. The proponents assert that this proposal "incorporates the procedure established by *State v.McEnroe*, 174 Wn.2d 795 (2012)." But *McEnroe* did not "establish" any particular procedure. It simply holds "that GR 15 does not require open filing of documents submitted contemporaneously with a motion to seal, nor does it require the immediate filing of the documents that are denied sealing," and that a party "may withdraw contemporaneously filed materials following an unsuccessful motion to seal." *Id.* at 808.

While it may be desirable for GR 15 to specify a mechanism for motions to seal and potential

withdrawal of records if the motion is denied, proposed new GR 15(c)(8) is inadequate as drafted. The following changes are suggested:

- The words "Not to be Filed" should be stricken from the section's heading as misleading. It falsely suggests that the motion to seal, and redacted versions of the confidential documents, need not be filed. The only matter "not to be filed" – that is, to be filed *in camera* instead – is the unredacted version of the material for which sealing is proposed.

- The second sentence of section 8(A), discussing submission of records for *in camera* review, should be revised as follows, for clarity: "The moving party shall provide the following documents directly to ~~the court~~**chambers [or the assigned judge]** that is hearing the motion to seal or redact."

- The rule should make clear that motions to seal ***must*** be filed publicly, so that interested parties and the public have a way to understand the basis for the requested sealing. Similarly, portions of records that are not subject to the motion to seal must be filed publicly, with only the proposed sealed material redacted.

- The rule should incorporate the following limitations on motions to seal adopted by the Western District of Washington:

  - "There is a strong presumption of public access to the court's files." U.S. Dist. Ct. (W.D. Wash.) Local CR 5(g).

  - "If the party seeks to file the document under seal because another party has designated it as confidential during discovery, the filing party and the designating party must meet and confer to determine whether the designating party will withdraw the confidential designation or will agree to redact the document so that sealing is unnecessary." *Id.*, CR 5(g)(1)(A);

  - A motion to seal must certify that the parties have explored "redaction and other alternatives to filing under seal," and must set out "a specific statement of the applicable legal standard" for sealing. *Id.*, CR 5(g)(3).

  - "A party must minimize the number of documents it files under seal and the length of each document it files under seal." *Id.*, CR 5(g)(4).

  - Memoranda supporting or opposing a substantive motion may be filed under seal "[o]nly in rare circumstances," and even then they must be publicly filed, with only confidential material redacted. *Id.*, CR 5(g)(5).

  - Any non-party seeking access to a sealed document may intervene for that

purpose. *Id.*, CR 5(g)(8).

- Any procedure providing for return of documents in the event a motion to seal is denied (*see* proposed new GR 15(c)(8)(B)) must be bilateral. That is, the proposed amendment sets out a procedure for a party to "claw back" its ***own*** confidential material submitted in support of a motion, if sealing is denied (as was the issue in *McEnroe*). But the proposal utterly fails to address the more common situation of a party submitting the ***opposing*** party's confidential material, obtained in discovery, to support a motion. In that situation, must the party that submitted the document to the court withdraw it (and lose the right to rely on it in support of its substantive motion), or must the document be filed publicly? The proposed amendment does not say.

7. Proposed GR 15(c)(9), 15(d) and 15(e) create a two-tiered system of access to court records, and shroud court dockets in secrecy.

Current GR 15(c)(4) currently provides that even when a case file is sealed in its entirety, the case still appears on court indices, with the public generally able to access (i) the case number and parties, (ii) the nature of the case, including the charge in criminal cases, and (iii) the sealing order and findings explaining why the file was sealed. The only limitation is that in cases where a conviction has been vacated, the information is limited to case number, case type, and the notation "vacated."

The existing rule appropriately protects access to critical public information. Absent an accessible docket, the public is denied the opportunity to know that judicial activity has occurred, or even that a case exists. Thus, dockets are subject to the same constitutional protections as other court records and proceedings and may only be sealed consistent with *Ishikawa*. *State v. Richardson*, 177 Wn.2d 351, 359-60 (2013) ("the presumption that court records are open would be meaningless if court dockets could be sealed without justification").

The proposed amendment ignores these principles, and would hide from the public vast swaths of docket information that has historically been available.

First, new GR 15(c)(9) and GR 15(e) propose to ***completely remove*** sealed juvenile files from public court indices, such that the very "existence" of a sealed, deferred or diverted juvenile case "shall not be available to the public." Proposed GR 15(e). This proposal is even more misguided than another recent move by JISC to squelch public access to juvenile offender court records. At the same time it was proposing to amend GR 15, JISC also revised its "Data Dissemination Policy" unilaterally to remove juvenile offender records from publicly accessible online court dockets and from any bulk distribution of court records. In a GR 9(e) application filed with this Court on February 18, 2014, ADNW and WNPA proposed a revision to GR 31 to clarify that publicly available court records may not be removed from court indices or dockets, except as authorized by Court rule. ***This proposed amendment to GR 31 should be considered***

before this Court approves any change to GR 15. The proposed change to GR 31 is on the Supreme Court Rules Committee's May 19, 2014, agenda with a request for expedited review.

In addition, as noted above, the Legislature recently enacted sweeping new changes and procedures regarding access to juvenile records. *See* HB 1651. At a minimum, any amendment to GR 15 addressing juvenile records must be reviewed and harmonized with this new statute.

Second, proposed GR 15(c)(9) and GR 15(d)(2) ***would remove from all public court indices accurate information about any criminal case disposed of other than by conviction.*** In any criminal case ending in acquittal, dismissal or pardon, or in which charges are never filed, the only docket information that would appear is the defendant's name and the notation "non-conviction." This change, which is not accompanied by any explanatory comment, would eviscerate the public's ability to hold the justice system accountable. The rationale for treating vacated convictions as if they never happened does not apply to other non-conviction circumstances. Under the proposed amendment, prosecutors and judges would escape public scrutiny because truthful, historic facts about acquittals and dismissals will simply be erased from the public record. This "disappearing-docket" rule would leave the public in the dark about failures of the justice system. For example, there would be no way to establish whether prosecutors were failing to seek or obtain convictions of particular types of crimes.

Worse, the proposed "non-conviction" notation is incomplete and unfair to both the public and defendants alike. Dockets will provide readers no way to tell whether a particular "non-convicted" individual is a convicted-but-pardoned murderer, or someone arrested for a minor offense but never even charged. The courts' dockets should not be a repository of such misleading information.

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In sum, ADNW, WNPA and WCOG urge the Court to reject the proposed reformation of GR 15. The proposal is unnecessary, ill-considered, unworkable, and contrary to this Court's long commitment to a transparent judicial system.

Respectfully submitted,

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Washington Newspaper Publishers Association and
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