Columbia Legal Services

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John Midgley, Director

Justices of the Supreme Court of Washington
Via Clerk of the Court
PO Box 40929
Olympia, WA 98504-0929
Re: Comments to Proposed General Rule 15

April 29, 2014

Dear Honorable Justices:

Columbia Legal Services (CLS) thanks you for the opportunity to comment on the suggested amendments to GR 15. CLS works to eliminate barriers to the justice system so that all people of low-income can fully engage in civic life, including equitable access to employment, housing, and education.

1. **Any amendments to GR 15 must reflect the differential treatment of juvenile cases in Washington's criminal justice system.**

Washington treats juveniles involved in the criminal justice system differently than adults. *See State v. Bailey*, 313 P.3d 483, 486 (2013) ("[U]nlike adult courts, juvenile courts maintain a system of rehabilitation that the legislature intended 'capable of … responding to the needs of youthful offenders." (quoting RCW 13.40.010(2)). This differential treatment is based upon the developmental differences between juveniles and adults. *See In re Hegney*, 138 Wn.App. 511, 541(2007) citing Laws of 2005, ch. 437, § 1 ("The legislature finds that emerging research on brain development indicates that adolescent brains, and thus adolescent intellectual and emotional capabilities, differ significantly from those of mature adults."). This differential treatment must be reiterated in any amendments to GR 15. *See* RCW 13.50.

The proposed amendments require the application of the *Ishikawa* factors to *any* court record sought to be sealed under GR 15. *See* GR 15(c)(2)(A) Comment. GR 15 should not be amended to require juveniles to meet requirements under *Ishikawa* when sealing records pursuant to this section. Otherwise, the courts will treat juvenile record sealing cases the same as adult cases. They must be treated differently.

This proposition is strongly supported in a very recent legislative enactment, 2SHB 1651 (2014), which creates a new supplemental process for sealing juvenile records in Laws 2014 Chap. 175. This law unequivocally pronounces that the rehabilitation and reintegration of juveniles constitute "compelling circumstances that outweigh the public interest in continued availability of juvenile court records." *Id.* at Sec.1(2).[1] Under this law, most juvenile court records are open

[1] This provision was unanimously supported by the Washington Legislature. Only one legislator voted against 2SHB1651. However, this legislator voted for the cited provision in the intent section when the bill unanimously passed the Washington House.

to the public until the juvenile turns 18 and completes all the terms of disposition. *Id*. at Sec. 4(1)(a). With some exceptions, once these two events occur, the record is administratively sealed by a court. *Id*. at Sec. 4 (a), (b) (court shall hold regular sealing hearings where it shall seal the court record pursuant to the statute).

There are several exceptions to automatic sealing under 2SHB 1651. Sec. 4(a)-(d). First, a long list of enumerated offenses (including the "most serious" offenses, sex offenses, and drug offenses) is ineligible for sealing through this process. Additionally, the court does not automatically seal juvenile records (1) if the court receives an objection or (2) the court notes a "compelling" reason not to seal. *Id.* at Sec. 4(a). Under this exception, the court sets a hearing on the record where the court "shall" seal the record unless inappropriate. *Id.*

CLS strongly supports the current form of GR 15 that does *not* require a court to apply the *Ishikawa* factors to juvenile records. GR 15 (c)(2). The Court should not amend GR 15 to require the application of the *Ishikawa* factors to juvenile records given the state's compelling interest in facilitating rehabilitation and reintegration. At the very least, the Court should wait to make any amendments until pending cases on sealing and redacting court records are resolved (as set out below).

2. The Court should not adopt changes to GR 15 until two pending cases are decided.

When promulgating rules the court should limit the frequency of rule changes to ensure minimal disruption in court practice occurs and create court rules that are clear and definite. GR 9(a)(5),(6). There are two pending cases raising constitutional issues that could significantly impact the sealing and redacting of Washington court records. One will consider whether a trial court must apply the *Ishikawa* factors when determining whether to seal a juvenile record pursuant to RCW 13.50. *State v. S.J.C*, No. 69154-6-1, order granting review (Wn.App. Div. I 2012). In *S.J.C,* a party with a juvenile record requested that his records be sealed pursuant to RCW 13.50.050(11) and (12)(a). *Id.* The trial court rejected the prosecutor's argument that *Ishikawa* applied to sealing juvenile records under the statute and sealed the record. The case is still being briefed to the court of appeals. *Id.*

The other pending case will determine whether and under what circumstances a party can redact his or her name from a court index pursuant to GR 15. *Hundtofte v. Encarnacion*, 169 Wn. App. 498, (2012), *review granted*, 297 P.3d 707 (Wash. 2013). In *Encarnacion*, the court ruled that a party moving to redact a name from the court index must demonstrate compliance with GR 15 and *Ishikawa* as well as demonstrate "unusual circumstances" or show "that the identified interest is specifically protected by statute, court rule, or other similar example of clear and well-established public policy." 169 Wash. App. at 519. A decision from this Court in *Encarnacion* is still pending.

The Court should either not amend GR 15 regarding either of these constitutional issues at this time or wait to amend GR 15 after rulings in *Encarnancion* and *S.J.C.*

3. The Court should study the potential for any inadvertent racial impact before amending GR 15.

Without careful and particular analysis, policy decisions can inadvertently create a discriminatory effect on racial minorities or other protected classes. The disproportionate impact on people of color in Washington's criminal justice system is well documented. A recent Washington report set out these disparities. *See* Preliminary Report on Race and Washington's Criminal Justice System 201, Task Force on Race and the Criminal Justice System (2011); While African Americans make up only 3.6% of Washington's population, they account for nearly 19% of the state's prison population; Native Americans comprise only 1.5% of the total state population, yet they account for 4.3% of those in Washington prisons. *Id*; Washington Department of Corrections Statistics, http://www.doc.wa.gov/aboutdoc/statistics.asp (March 31, 2014). This same disproportionality is present for juveniles as well – African Americans make up 6% of the aged 10-17 population yet represent 14% of juvenile offense referrals; Native Americans children, account for 2% of this population yet make up 6% f referrals. Department of Health and Human Services, 2011 Juvenile Justice Annual Report. The 2011 Task Force Report also presented findings that, among felony drug offenders, African American defendants were 62% more likely to be sentenced to prison than similarly situated white defendants. A 2006 study showed that, in Seattle, the arrest rate for drug delivery was racially disproportionate – 21 times higher for African Americans than whites. Katherine Beckett, *et al, Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, Criminology Vol. 44 No. 1 (2006).

Moreover, there are racial and gender disproportionality issues throughout the rental housing eviction process. A recent study provides evidence of a link between eviction, race, gender and incarceration. Mathew Desmond, *Eviction and the Reproduction of Urban Poverty*, American Journal of Sociology, Volume 118 Number 1, 88–133 (July 2012). This link is a key factor in persistent poverty in urban communities - particularly among African American women. "In poor black neighborhoods, eviction is to women what incarceration is to men: a typical but severely consequential occurrence contributing to the reproduction of urban poverty." *Id.*

Many employers and landlords will refuse to hire or rent to anyone with a criminal record. People with these types of records can be sentenced to a life of unemployment and homelessness even if qualified and able to work or rent. *See* James A. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. St. Thomas L.J. 387 n. 1 (2006) ("A criminal record is a stigma, the management of which becomes a major challenge and preoccupation of its holder."); *See Parker v. Ellis*, 362 U.S. 574, 593-94 (1960) (discussing serious effect on reputation and economic opportunities for felons).

To avoid these consequences, parties should have the opportunity to redact their name from a court record if they can meet the *Ishikawa* standards. To remove this opportunity is to potentially perpetuate biases in our court systems. We respectfully recommend that the court investigate these and other possible unkonw impacts before amending GR 15. The Court already has a Commission set up to undertake this work. The mission of Washington's Minority and Justice Commission is "to determine whether racial and ethnic bias exists in the courts of the state of Washington. To the extent that it exists, the Commission is charged with taking creative steps to overcome it."

Thank you for your attention to these comments.

Sincerely,

Merf Ehman
Staff Attorney
Columbia Legal Services