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April 28, 2014

Re: Proposed Changes to GR 15

Dear Clerk Carpenter:

Thank you for soliciting comments regarding the proposed changes to GR 15. The Washington Association of Prosecuting Attorneys (WAPA) takes the following positions.

1. Adding the *Ishikawa* factors to the rule is a good idea.

Parties and courts often are at a loss for the precise factors when a sealing issue arises unexpectedly. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982). However, the proposed rule does not include the *Ishikawa* requirement for written findings. While people may disagree over whether written findings are too burdensome for trial courts, the *Ishikawa* case requires written findings as a constitutional imperative. It cannot be removed through the rule-making process.

2. Juvenile Court Records Should Be Presumed Open

There are a number or provisions in this proposed amended rule that apply to juvenile records. The comment to proposed GR 15(c)(2) says: "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"; proposed GR 15(c)(5) says "...except for sealed juvenile offenses..."; GR 15(c)(9) says "Except for juvenile offenses".

The rule should not categorically exempt juvenile records from the constitutional presumption of openness.

The existing rule says that it applies to "all court records..." GR 15(a). "Court records" are defined in GR 31(c)(4). Juvenile courts are a division of the superior court and their records fall within GR 31. Thus, the proposed amendments create an internal conflict with the other provisions of the general rules.

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The same reasons that mandate openness of adult court records apply to juvenile court records. They should not be categorically exempted from constitutional requirements through the rule-making process. The constitutionality of this question should be addressed by the courts. The relationship between article I, § 10, GR 15, and RCW 13.50.050 is presently the subject of litigation in Division One of the Court of Appeals. *See State v. SJC*, No. 69154-6-I. This proposed rule should not be implemented until the issue is decided in the pending litigation.

3. Acquittals Should Not Be Presumptively Sealed.

The proposed rule at one place (GR 15(c)(4)) allows a trial court to consider an acquittal as a basis to seal. As long as this is a single consideration that is weighed against the strong public interest in access to court records, the proposal is consistent with constitutional requirements.

At other places, however, (GR 15(c)(9) and (d)), the proposed ruled appears to presume that vacated, dismissed convictions, or cases resulting in acquittal, should be closed. It should be remembered that acquittals often occur under very controversial and politically-charged circumstances. See e.g. John P. Sellers, III, *Sealed With An Acquittal: When Not Guilty Means Never Having to Say You Were Tried*, 32 Cap. U. L. Rev. 1 (2003) (discussing the controversial killing of a citizen by police who were later acquitted). Acquittals should not be categorically removed from the constitutional presumption of openness. This part of the proposed rule is likely unconstitutional.

4. Proposed GR 15(c)(8) Should Address Service of Proposed Sealing Orders on Opposing Parties.

This proposed addition appears to be consistent with *State v. McEnroe*, 174 Wn.2d 795 (2012), and will inform parties how to submit documents without sacrificing their privacy. However, the proposed rule does not address an issue that was latent, and unaddressed, in *McEnroe*, to wit: under what circumstances may a party submit documents under this provision ex parte? In *McEnroe*, that issue was not addressed because it was presumed that the State should not have access to the documents (which were submitted pre-trial and were related to defense counsel's strategy in a death penalty case), but this will not always be the case. A party should not be permitted to submit documents ex parte.

5. The rule should not permit destruction of court records without the consent of the parties.

Proposed GR 15(9)(5)(A) provides that trial exhibits may be destroyed "if the court so orders." Trial courts or clerk's offices may not be aware of pending appeals or collateral attacks that could result in a reversal of criminal convictions. Nor would courts or clerk's know whether personal and valuable property admitted into evidence should be returned to its rightful owner. This change would put at risk many important trial exhibits that may be needed for retrials, and may permit the destruction of private property that should be returned to witnesses or victims.

Thank you again for considering comments on this important rule change.

Sincerely,

Pamela Beth Loginsky

Pamela B. Loginsky
Staff Attorney