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April 30, 2014

Supreme Court of Washington
PO Box 40929
Olympia, WA 98504-0929

Re: Comments to Proposed General Rule 15

To Whom it May Concern:

The ACLU of Washington (ACLU) thanks the Court for the opportunity to comment upon the proposed changes to General Rule 15, governing access to and sealing of court records. The ACLU is a nonprofit nonpartisan group of over 20,000 members dedicated to advancing civil rights and civil liberties. The ACLU is strongly committed to the open administration of justice and the public's ability to oversee the courts. It is also seeks to protect individual privacy, particularly in the digital age. In light of these values, we offer the following comments.

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I. GR 15 should be amended to protect individual privacy in non-conviction records.

The presumption of innocence is a bedrock principle of our legal system, but that principle is undermined when widely available court records are used to deny opportunities to individuals who have not been convicted of a crime. The ACLU's Second Chances Project is contacted on a regular basis by individual who are denied housing or employment opportunities on account of non-conviction records. For example, the ACLU was contacted this year by a family who was denied a rental apartment solely because one parent had a dismissed misdemeanor charge. Background checks are now virtually ubiquitous. More than 90% of employers and housing providers report conducting background checks on some or all applicants. And, at least 60% of employers in one study stated they probably or definitely would not hire anyone who had any sort of criminal record.

Accordingly, the ACLU supports the proposal to amend GR 15 to recognize the important interest in sealing non-conviction records and to ensure the adequacy of such sealing when it does occur. Current GR 15 does not explicitly recognize that people have a privacy interest in preventing widespread electronic dissemination of non-conviction records. Our legislature recognized those principles when it adopted the Criminal Records Privacy Act, RCW 10.97 and limited dissemination of law enforcement records of non-conviction. It is important that the court rules similarly recognize this interest. The proposed changes to GR 15 also remedy a technical issue. Under current GR 15, sealing court records of non-conviction has little impact, because the nature of charges remains visible and it is not clear that the sealed file involved no conviction. The proposed change to GR 15(d)(2) would address that, by

ensuring that any sealed non-conviction record would no longer reflect the charge and would show that the case was a non-conviction.

We also believe that these proposals adequately balance the public's right to access court proceedings. All court proceedings would remain open to the public, records of proceedings will be open when charges are pending and courts will conduct an individualized analysis of the need for sealing after dismissal, weighing the public's right of access against defendant's interests. The proposed changes strike the appropriate balance between privacy and accountability, and should be adopted.

II. GR 15 should not be amended to categorically prohibit redaction of party names from the court indices

We respectfully suggest that Court remove the proposed GR 15(c)(6) which states that "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." At the outset, any court rule on this issue is premature. The Court is currently considering *Hundtofte v. Encarnacion*, No. 88036-1. *Encarnacion* was argued in June of 2013, and one of the primary issues before the Court is whether redaction of a party name actually amounts to destruction or hiding of a court record, and whether such redaction is permitted by the constitution. We recommend that the Court delete GR 15(c)(6) and revisit the issue after *Encarnacion* is decided.

There are legitimate reasons to change or redact party names in the case index. For example, once ACLU client had a case filed against her, when her niece was the actual perpetrator. Once the deception was discovered, the case name what changed to reflect the actual defendant. The language of proposed GR 15(c)(6) would prevent such necessary changes, as it prevents the name of a party to the case from being "otherwise changed" in the index. Similarly, redaction of a minor party's name to protect individual privacy is common practice in both the federal and appellate courts. *See* RAP 3.4.; Fed. R. Civ. Pro. 5.2(a)(3). It is appropriate to allow individual judges to weigh the need for redaction in particular cases, rather than enact a categorical prohibition on the practice.

In addition, we question the comment following proposed GR 15(c)(6) which states that "[r]edacting the name of a party in the index would prevent the public from moving for access to a redacted file. . ." Presumably, all a member of the public needs in order to move for access to a redacted file is the case number. *See State v. Richardson*, 177 Wn. 2d 351 (2013) (holding that after a motion to unseal is filed, the burden is on proponent of sealing to justify continued sealing). A case number in a redacted case could easily be located with the initials of the party whose name has been redacted, or the name of the opposing party. Further, it is not clear whether the case management system to be implemented in the next few years will permit searches other than by party name or case number: it may be that under the new system, the public could also locate a case by date, keyword, judge, or attorney. In sum, redaction of a party name after consideration of *Ishikawa* may be consistent with the policy behind GR 15.

Conclusion

We thank the Court for the opportunity to comment. Please do not hesitate to contact me if you have any questions.

Sincerely,

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ACLU-WA Second Chances Project