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September 29, 2020

Clerk of the Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929
supreme@courts.wa.gov

Re: Comments to Proposed Changes to GR 31

Dear Chief Justice Stephens and Members of the Court:

These comments to the District & Municipal Courts Judges' Association's proposed amendment to GR 31 are respectfully submitted on behalf of Allied Daily Newspapers of Washington ("ADNW"), the Washington Newspaper Publishers Association ("WNPA") and the Washington State Association of Broadcasters ("WSAB").

These organizations, and the news publications and broadcasters they represent, have a profound interest in assuring continued public access to court records. ADNW represents all 21 daily newspapers in Washington. WNPA represents 80 community newspapers throughout the state. WSAB represents 225 radio stations and 27 television across the state. Together, they play a crucial role in informing the public and giving practical effect to the requirement that "[j]ustice in all cases shall be administered openly[.]" Const. art. 1, § 10.

ADNW, WNPA and WSAB strongly oppose DMCJA's proposed revision to GR 31. The proposal would remove from public scrutiny virtually all assessment and compliance reports used by drug-diversion and other therapeutic courts. *See* Proposed GR 31(*l*)(1)(A). Under the proposed rule, these records would remain available to virtually every *participant* in the therapeutic court system – including judges, probation counselors, defendants, and prosecutors. *See* Proposed GR 31(*l*)(2)(A). But the press and public could not access these critical court records without seeking the court's permission. *See* Proposed GR 31(*l*)(3)(A).

The proposed rule is unconstitutional and ill-advised. It impermissibly reverses the presumption, required under art. 1, § 10, that court records are open. Contrary to numerous decisions of this Court, it would impose blanket secrecy on an entire category of court records – records that bear

directly on the courts' decision-making process. The proposed rule also would permit presumptive sealing in all cases, without the specific findings required by case law and GR 15.

If enacted, the proposed rule would deprive the press and public of the ability to evaluate therapeutic courts' operations and decision-making, and would insulate this branch of the judiciary from accountability for its actions. That is bad policy because, as this Court has recognized, "Justice must be conducted openly to foster the public' s understanding and trust in our judicial system and to give judges the check of public scrutiny," whereas "[s]ecrecy fosters mistrust." *Dreiling v. Jain*, 151 Wn.2d 900, 903 (2004).

As this Court held in *Dreiling*, access to court records is governed by the same constitutional test that applies to court proceedings. *Id.* at 860; *see also Rufer v. Abbott Laboratories*, 154 Wn.2d 530 (2005). Under that test, "[o]penness is presumed," and public access to judicial records may be denied only on a specific showing of a need for secrecy under the particular facts of the case; an opportunity for objections to be heard; a weighing of the public's interest in access; and assurances that any sealing is no more restrictive than necessary. *Dreiling*, 151 Wn.2d at 914, citing *Seattle Times Co. v. Ishikawa,* 97 Wn.2d 30 (1982). These procedures are "a strict, well-defined standard" intended "[t]o assure careful, case-by-case analysis of a closure motion," which "clearly call[] for a trial court to resist a closure motion except under the most unusual circumstances." *State v. Bone-Club*, 128 Wn.2d 254, 258-59 (1995).

The proposed amendment to GR 31 contains none of these constitutionally mandated protections. Rather than presuming access, it purports to designate all therapeutic court assessment and compliance records as "Restricted Access records" – a newly concocted category not found in any case law, nor the rules governing court records (GR 15 and GR 31), nor the statute governing therapeutic courts (chapter 2.30 RCW). Rather than requiring a case-by-case assessment, it treats these records in blanket fashion, declaring them as off-limits to anyone other than court insiders. The proposal's mechanism for allowing public access also flips *Ishikawa* on its head: rather than presuming court records are available, anyone seeking access must bring a motion asking the court to grant access.

If adopted, the rule would significantly infringe the public's ability to review, evaluate and understand decisions reached by therapeutic courts. That too violates article I, section 10, which mandates that "the public must – absent any overriding interest – be afforded the ability to witness the complete judicial proceeding, *including all records the court has considered in making any ruling*, whether 'dispositive' or not." *Rufer*, 154 Wn.2d at 549 (emphasis added). Documents considered by the court in reaching its decision must be open in order to assure the public that courts are operating fairly and appropriately. *State v. McEnroe*, 174 Wn.2d 795, 807 (2012). "[M]aterial relevant to a decision or other conduct of a judge or the judiciary is subject to a presumption of public access under article I, section 10." *Bennett v. Smith Bundy Berman Britton, PS*, 176 Wn.2d 303 (2013) (Chambers, J., lead opinion).

There is no question that the assessment and compliance reports targeted by the rule typically form the basis for rulings made by therapeutic courts. Indeed, the proposal itself recognizes this explicitly: on its face it applies to all such "reports used in therapeutic courts." Proposed GR 31(*l*)(1)(A). It is precisely because these records are critical to therapeutic courts' decision-making that the records remain accessible to "[j]udges, commissioners, magistrates, other court personnel, probation counselors, defendants, defendant's attorney of record, and the prosecuting attorney." Proposed GR 31(*l*)(2)(A). But for the same reason, universally depriving the public and press access to these critical records is impermissible.

The proponents of the amendment attempt to justify this expansive secrecy on the ground that "[l]imited public access to assessments and treatment reports would help encourage defendants to cooperate more honestly with risk/needs assessments, mental health and chemical dependency evaluations, and treatment." But potential privacy and treatment concerns are not sufficient to require complete suppression of assessment reports when they form the basis for a court's decision. Indeed, this Court has held that the presumption of openness, and the other constitutional requirements protecting access to court records apply with equal force in proceedings involving private health and other sensitive matters. *See State v. Chen*, 178 Wn.2d 350 (2013) (affirming decision to not seal defendant's competency evaluation under RCW 10.77.210); *see also State v. Delauro*, 163 Wn. App. 290 (2011) (hospital forensic mental health exam subject to art. I, § 10). Therapeutic court records likewise involve disposition of criminal cases, which unquestionably is a matter of significant public interest. No sound basis exists for treating these court records differently from every other criminal court record.

Notably, the statute establishing therapeutic courts contains no provision regarding confidentiality of *any* court records, even though the legislature expressly recognized that the purpose of these diversionary courts was to foster individual treatment needs. *See, e.g.*, RCW 2.30.010(2) ("The legislature further finds that by focusing on the specific individual's needs, providing treatment for the issues presented, and ensuring rapid and appropriate accountability for program violations, therapeutic courts may decrease recidivism, improve the safety of the community, and improve the life of the program participant and the lives of the participant's family members by decreasing the severity and frequency of the specific behavior addressed by the therapeutic court."); *see generally* ch. 2.30 RCW (containing no provision for confidentiality of therapeutic court records). Again, the legislature expressed no intent to provide special treatment for therapeutic court records.

The Court's decision in *State v. Sykes*, 182 Wn.2d 168 (2014), makes retaining public access to therapeutic court records all the more critical. In *Sykes*, a majority found that drug court "staffings" – closed-door meetings in which the drug court judge, attorneys, and treatment professionals meet to discuss each drug court participant's progress – were not court proceedings subject to article 1, Section 10. *Id.* at 174-78. But in reaching that conclusion, this Court relied in part on the fact that "[s]taffings are followed by review hearings in open court," where the

"judge recounts what was discussed at staffing, converses with the participant directly, and then makes a final decision on the record[.]" *Id.* at 173. Those review hearings indisputably are accessible to the public, for all the reasons set forth above – to provide a check of public scrutiny; to foster trust in this aspect of the judicial system; and to hold public officials accountable for the decisions reached in those proceedings. All of these reasons for openness apply with equal force to the court *records* underlying therapeutic court's decisions. Absent compelling circumstances justifying sealing based on individual circumstances (which may be demonstrated under existing court procedures), public access must be presumed.

For all the reasons above, ADNW, WNPA and WSAB urge the Court to reject the proposed revision to GR 31.

Respectfully submitted,

Eric M. Stahl
Counsel for Allied Daily Newspapers of Washington,
Washington Newspaper Publishers Association and
Washington State Association of Broadcasters

From: OFFICE RECEPTIONIST, CLERK
To: Linford, Tera
Cc: Tracy, Mary
Subject: FW: Comments to Proposed Changes to GR 31
Date: Tuesday, September 29, 2020 1:45:04 PM
Attachments: Comments on GR 31.therapeutic court rules.pdf

-----Original Message-----
From: Kruger, Christine [mailto:ChristineKruger@DWT.COM]
Sent: Tuesday, September 29, 2020 1:42 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Stahl, Eric <ericstahl@dwt.com>
Subject: Comments to Proposed Changes to GR 31

Good afternoon,

Attached is a letter from Eric M. Stahl regarding the above-referenced matter.

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