SEPTEMBER - OCTOBER 2013
STAKEHOLDER COMMENTS
FOR GR 15 DRAFT

From:	Blackman, Charlie
To:	Pam Loginsky (Pamloginsky@waprosecutors.org)
Cc:	Happold, Stephanie
Subject:	FW: FW: GR 15 proposdd draft
Date:	Wednesday, September 18, 2013 4:10:55 PM
Attachments:	2013 09 13 GR 15 draft amendment DDC.docx

I don't understand the interplay between GR15(c)(2)(A), which properly lists the five Ishikawa factors that must be considered, and GR15(c)(4)(C), which says (as did the old rule) that the fact a criminal conviction has been vacated can weigh against the public's right to know. Does the latter trump the former? While I don't think this was the intent of the drafters, as written it seems to. Perhaps I'm missing something.

Charlie Blackman, Dep. Pros. Atty., Snohomish County

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Medicaid Fraud Control Unit
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October 3, 2013

Stephanie Happold
Data Dissemination Administrator
Administrative Office of the Courts
PO Box 41170
Olympia, WA 98504-1170

Dear Ms. Happold:

Thank you for giving the Attorney General's Office, Medicaid Fraud Control Unit an opportunity to comment on the proposed GR 15 amendments. There is a new statute, the Washington Medicaid False Claims Act (FCA) that was effective on June 7, 2012, that impacts some of the provisions of GR 15 that may also need amendments. I have attached a track changes copy of the draft GR 15 amendments that contains some language for the Data Dissemination committee and others to consider.

I am also attaching a copy of a brief summary document and power point document that provides some back ground information about significant procedural aspects of the FCA. I have also provided these documents to the Washington Association of County Officials (Clerks), and to the Superior Court Judges Association (SCJA) through Whatcom County Superior Court judge, Judge Snyder.

Please do not hesitate to contact me if you have any questions. I can be reached at carrieb@atg.wa.gov or 360-586-8895.

Best regards,

Carrie L. Bashaw

CARRIE L. BASHAW
Senior Counsel
WA Medicaid Fraud Control Unit

CB:kjs
Enclosures

GENERAL RULE 15 As Of 09132013

Draft Amendment

DESTRUCTION, SEALING, AND REDACTION OF COURT RECORDS

(a) Purpose and Scope of the Rule. This rule sets forth a uniform procedure for the destruction, sealing, and redaction of court records. This rule applies to all court records, regardless of the physical form of the court record, the method of recording the court record, or the method of storage of the court record.

(b) Definitions.

(1) "Court file" means the pleadings, orders, and other papers filed with the clerk of the court under a single or consolidated cause number(s).

(2) "Court record" is defined in GR 31(c)(4).

(3) "Destroy"~~. To destroy~~ means to obliterate a court record or file in such a way as to make it permanently irretrievable. A motion or order to expunge shall be treated as a motion or order to destroy.

(4) "Dismissal" means dismissal of an adult criminal charge or juvenile offense by a court for any reason, other than a dismissal pursuant to RCW 9.95.240, ~~or~~ RCW 10.05.120, RCW 3.50.320, or RCW 3.66.067.

(5) ~~(4)~~ ~~Seal. To s~~"Seal" means to protect from examination by the public and unauthorized court personnel. A motion or order to delete, purge, remove, excise, or erase, or redact shall be treated as a motion or order to seal.

(6) ~~(5)~~ ~~Redact. To r~~"Redact" means to protect from examination by the public and unauthorized court personnel a portion or portions of a specified court record.

(7) ~~(6)~~ "Restricted Personal Identifiers" are defined in GR 22(b)(6).

(8) ~~(7)~~ "Strike" applies to ~~. A~~a motion or order to strike and ~~is~~ not a motion or order to seal or destroy.

(9) ~~Vacate. To v~~"Vacate" means to nullify or cancel.

(c) Sealing or Redacting Court Records.

(1) In a civil case, the court or any party may request a hearing to seal or redact the court records. In a criminal case or juvenile proceedings, the court, any party, or any interested person may request a hearing to seal or redact the court records. Except for cases under RCW 74.66, ~~R~~reasonable notice of a hearing to seal must be given to

Comment [cb1]: Pursuant to RCW 74.66.050(2), a defendant is not to be notified of a filed complaint until the court lifts the seal or issues some other court order causing the defendant to be notified.

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all parties in the case. In a criminal case, reasonable notice of a hearing to seal or redact must also be given to the victim, if ascertainable, and the person or agency having probationary, custodial, community placement, or community supervision over the affected adult or juvenile. No such notice is required for motions to seal documents entered pursuant to RCW 74.66, CrR 3.1(f) or CrRLJ 3.1(f).

Comment [cb2]: Alternative language if above not adequate or appropriate.

(2) ~~After~~ At the hearing, the court ~~may order the court files an and records in the proceeding, or any part thereof, to be sealed or redacted if the court makes and enters written findings that the specific sealing or redaction is justified by identified compelling privacy or safety~~ concerns ~~that outweigh the public interest in access to the court record.Agreement of the parties alone does not constitute a sufficient basis for the sealing or redaction of court records. Sufficient privacy or safety concerns that may be weighed against the public interest include findings that:~~ shall consider the applicable factors and enter specific findings on the record to justify any sealing or redaction.

(A) For any court record that has become part of the court's decision-making process, the court must consider the following factors:

(i) Has the proponent of sealing or redaction established a compelling interest that gives rise to sealing or redaction, and if it is based upon an interest or right other than an accused's right to a fair trial, a serious and imminent threat to that interest or right; and

(ii) Has anyone present at the hearing objected to the relief requested; and

(iii) What is the least restrictive means available for curtailing open public access to the record; and

(iv) Whether the competing privacy interest of the proponent seeking sealing or redaction outweighs the public's interest in the open administration of justice; and

(v) Will the sealing or redaction be no broader in its application or duration than necessary to serve its purpose.

COMMENT

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.
The applicable factors the court shall consider in a Motion to Seal or Redact incorporate current Washington caselaw.

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(B) For any court record that was not a part of the court's decision-making process, the court must consider the following:

(i) Has the proponent of the sealing or redaction established good cause; and

(ii) Has any nonparty with an interest in nondisclosure been provided notice and an opportunity to be heard.

COMMENT

In Bennett et al v. Smith Bunday Berman Britton, PS, 176 Wn.2d. 303 (2013), the State Supreme Court held 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 be sealed under a good cause standard.

(3) Agreement of the parties alone does not constitute a sufficient basis for the sealing or redaction of court records.

(4) Sufficient privacy or safety concerns that may be weighed on a case by case basis against the public interest in the open administration of justice include findings that:

(A) The sealing or redaction is permitted by statute; or

(B) The sealing or redaction furthers an order entered under CR 12(f) or a protective order entered under CR 26(c); or

(C) A criminal conviction or an adjudication or deferred disposition for a juvenile offense has been vacated; or

(D) A criminal charge or juvenile offense has been dismissed, and:

(i) The charge has not been dismissed due to an acquittal by reason of insanity or incompetency to stand trial; or

(ii) A guilty finding does not exist on another count arising from the same incident or within the same cause of action; or

(iii) Restitution has not been ordered paid on the charge in another cause number as part of a plea agreement.

or

(E) A defendant or juvenile respondent has been acquitted, other than an acquittal by reason of insanity or due to incompetency to stand trial; or

(F) A pardon has been granted to a defendant or juvenile respondent; or

(G) The sealing or redaction furthers an order entered pursuant to RCW 4.24.611; or

(H) The sealing or redaction is of a court record of a preliminary appearance, pursuant to CrR 3.2.1, CrRLJ 3.2.1, or JUCR 7.3 or a probable cause hearing, where charges were not filed; or

(I) A Medicaid false claims act case filed under RCW 74.66 has been declined by the State of Washington, and dismissed by the court, and the seal never lifted.

(I) The redaction includes only restricted personal identifiers contained in the court record; or

(J) Another identified compelling circumstance exists that requires the sealing or redaction.

COMMENT

Additional privacy or safety concerns that may be weighed against the public interest are included based upon the deliberations at the Joint Legislative Court Records Privacy Workgroup in 2012.

In Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205 (1993), the court held that the presumptive right of public access to the courts ***is not absolute and may be outweighed by some competing interest as determined by the trial court on a case by case by basis, according to the Ishikawa guidelines.***

(5) Every order sealing or redacting material in the court file, except for sealed juvenile offenses, shall specify a time period, after which, the order shall expire. The proponent of sealing or redaction has the burden of coming back before the court and justifying any continued sealing or redaction beyond the initial specified time period. Any request for public access to a sealed or redacted court record received by the custodian of the record after the expiration of the Order to Seal or Redact shall be granted as if the record were not sealed, without further notice. Thereafter, the record will remain unsealed. The 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.

COMMENT

Requiring a time period, after which the order sealing or redacting expires, implements the Ishikawa factor that the order must be no broader in its duration than necessary to serve its purpose. The critical distinction between the adult criminal system and the juvenile offender system lies in the 1977 Juvenile Justice Act's policy of responding to the needs of juvenile offenders. Such a policy has been found to be ***rehabilitative*** *in nature, whereas the criminal system is punitive. State v. Rice, 98 Wn.2d 384 (1982); State v. Schaaf, 109 Wn.2d 1,4; Monroe v. Soliz, 132 Wn.2d 414, 420 (1997); State v. Bennett, 92 Wn. App. 637 (1998). Legacy JIS systems do not have the functionality to automatically unseal or unredact a court record upon the expiration of an Order to Seal or Redact.*

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(6) 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. The existence of a court file containing a redacted court record is available for viewing by the public on court indices, unless protected by statute.

Comment [cb3]: RCW 74.66.050(2) does not allow for the identification of the parties in court indices because it is filed in camera. Also, until a matter under the FCA is *final and the seal lifted*, the information furnished pursuant to the Act is exempt from the Washington Public Records Act (PRA), chap. 42.56 RCW. RCW 74.66.030.

COMMENT

Existence of a case can no longer be determined for the purpose of public access and viewing, if the case cannot be found by an index search. Redacting the name of a party in the index would prevent the public from moving for access to a redacted record under section (f). The policy set forth in this section is consistent with existing policy when the entire file is ordered sealed, as reflected in section (c) (9).

(7)~~(3)~~No court record shall be sealed under this rule when redaction will adequately protect the interests of the proponent.

(8) Motions to Seal/Redact when Submitted Contemporaneously with Document Proposed to be Sealed or Redacted – Not to be Filed.

(A) The document sought to be sealed or redacted shall not be filed prior to a court decision on the motion. The moving party shall provide the following documents directly to the court that is hearing the motion to seal or redact:

(i) The original unredacted document(s) the party seeks to file under seal shall be delivered in a sealed envelope for in camera review.

(ii) A proposed redacted copy of the subject document(s), if applicable.

(iii) A proposed order granting the motion to seal or redact, with specific proposed written findings and conclusions that establish the basis for the sealing and redacting and are consistent with the five factors set forth in subsection (2)(a).

(B) If the court denies, in whole or in part, the motion to seal, the court will return the original unredacted document(s) and the proposed redacted document(s) to the submitting party and will file the order denying the motion. At this point, the proponent may choose to file or not to file the original unredacted document.

(C) If the court grants the motion to seal, the court shall file the sealed document(s) contemporaneously with a separate order and findings and conclusions

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granting the motion. If the court grants the motion by allowing redaction, the judge shall write the words "SEALED PER COURT ORDER DATED [insert date]" in the caption of the unredacted document before filing.

(D) If filing under seal is authorized by statute, rule, or order (including an order requiring or permitting a seal and obtained pursuant to this rule, a party seeking to file under seal any paper or other matter in any civil case shall file and serve a motion, the title of which includes the words "Motion to Seal Pursuant to [Statute, Rule, or Order]" and which includes (i) a citation to the statute, rule, or order authorizing the seal; (ii) an identification and description of each item submitted for sealing; (iii) a statement of the proposed duration of the seal; and (iv) a statement establishing that the items submitted for sealing are within the identified statute, rule, or order the movant cites as authorizing the seal. The movant shall submit to the Clerk along with a motion under this section each item proposed for sealing. Every order sealing any item pursuant to this section shall state the particular reason the seal is required and shall identify the statute, rule, or order authorizing the seal.

Comment [cb4]: Not sure if this is the correct spot for this proposed amendment, but some district courts have adopted this language which might be useful for Washington. See M.D. Florida Local Rule 1.09(b).

COMMENT

The rule incorporates the procedure established by State v. McEnroe, 174 Wn.2d 795 (2012).

(9)~~(4)~~Sealing of Entire Court File. When the clerk receives a court order to seal the entire court file, the clerk shall seal the court file and secure it from public access. All court records filed thereafter shall also be sealed unless otherwise ordered. Except for sealed juvenile offenses and cases filed under RCW 74.66, the existence of a court file sealed in its entirety, unless protected by statute, is available for viewing by the public on court indices. The information on the court indices is limited to the case number, names of the parties, the notation "case sealed," the case type and cause of action in civil cases and the cause of action or charge in criminal cases, except where the conviction in a criminal case has been vacated, the charge has been dismissed, the defendant has been acquitted, the governor has granted a pardon, or the order is to seal a court record of a preliminary appearance or probable cause hearing; then section (d)shall apply. Except for sealed juvenile offenses, the order to seal and written findings supporting the order to seal shall also remain accessible to the public, unless protected by statute.

(10)~~(5)~~Sealing of Specified Court Records. When the clerk receives a court order to seal specified court records the clerk shall:

(A) On the docket, preserve the docket code, document title, document or subdocument number and date of the original court records; and

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(B) Remove the specified court records, seal them, and return them to the file under seal or store separately. The clerk shall substitute a filler sheet for the removed sealed court record. If the court record ordered sealed exists in a microfilm, microfiche or other storage medium form other than paper, the clerk shall restrict access to the alternate storage medium so as to prevent unauthorized viewing of the sealed court record; and

(C) File the order to seal and the written findings supporting the order to seal. Except for sealed juvenile offenses and cases under RCW 74.66, both shall be accessible to the public; and

(D) Before a court file is made available for examination, the clerk shall prevent access to the sealed court records.

(11)~~(6)~~Procedures for Redacted Court Records. When a court record is redacted pursuant to a court order, the original court record shall be replaced in the public court file by the redacted copy. The redacted copy shall be provided by the moving party. The original unredacted court record shall be sealed following the procedures set forth in (c)(5).

(d) Procedures for Vacated Criminal Convictions, Dismissals and Acquittals, Pardons and Preliminary Appearance Records.

(1) In cases where a criminal conviction has been vacated and an order to seal entered, the information in the public court indices shall be limited to the case number, case type ~~with the notification "DV" if the case involved domestic violence~~, the ~~adult's~~ defendant's ~~or juvenile's~~ name, and the notation "vacated."

(2) In cases where a defendant has been acquitted, a charge has been dismissed, a pardon has been granted, or the subject of a motion to seal or redact is a court record of a preliminary appearance, pursuant to CrR 3.2.1 or CrRLJ 3.2.1, or a probable cause hearing, where charges were not filed, and an order to seal entered, the information in the public indices shall be limited to the case number, case type ~~with the notification "DV" if the case involved domestic violence~~, the ~~adult's~~ defendant's ~~or juvenile's~~ name, and the notation "non conviction."

(e) Procedures for Sealed Juvenile Offender Adjudications, Deferred Dispositions, and Diversion Referral Cases. In cases where an adjudication for a juvenile offense, a juvenile diversion referral, or a juvenile deferred disposition has been sealed pursuant to the provisions of RCW 13.50.050 (11) and (12), the existence of the sealed juvenile offender case shall not be accessible to the public.

Comment [cb5]: Until a matter under RCW 74.66 is final and the seal lifted, the information furnished pursuant to the Act is exempt from the Washington Public Records Act (PRA), chap. 42.56 RCW. RCW 74.66.030.

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(f) **Procedures for Sealed Medicaid False Claims Act Cases Filed Under RCW 74.66.050(2).**

(1) In Medicaid false claims act cases where the State of Washington declined to intervene, the court and the State of Washington provided written consent to dismiss the case and the case was subsequently dismissed, and where the court does not order the case unsealed and available for public viewing, the information in the public court indices shall be limited to the case number, case type and the notation "dismissed."

Comment [cb6]: Until a matter under RCW 74.66 is final and the seal lifted, the information furnished pursuant to the Act is exempt from the Washington Public Records Act (PRA), chap. 42.56 RCW. RCW 74.66.030.

Thus, suggested language that covers FCA cases where the seal is never lifted and the case never litigated.

COMMENT

GR 15(e) does not address whether the applicable factors identified in Section (c)(2)(A)(i)-(v) must be considered by the court before sealing Juvenile Offender records pursuant to RCW 13.50.505.

RCW 13.50.050 (11) addresses sealing of juvenile offender court records in cases referred for diversion.

RCW 13.40.127 prescribes the eligibility requirements and procedure for entry of a deferred disposition in juvenile offender cases, and the process for subsequent dismissal and vacation of juvenile offender cases in which a deferred disposition was completed. Records sealing provisions for deferred dispositions are contained in RCW 13.50.050. RCW 13.40.127(10)(a)(ii) provides for administrative sealing of deferred disposition in certain circumstances. RCW 13.50.050(14)(a) states that:

> *"Any agency shall reply to any inquiry concerning confidential or sealed records that records are confidential, and no information can be given about the existence or nonexistence of records concerning an individual."*

This remedial statutory provision is a clear expression of legislative intent that the existence of juvenile offender records that are ordered sealed by the court not be made available to the public. Records sealed pursuant to RCW 13.40.127 have the same legal status as records sealed under RCW 13.50.050. RCW 13.40.127(10)(c). The statutory language of 13.50.050(14)(a), included above, differs from statutory provisions governing vacation of adult criminal convictions, reflecting the difference in legislative intent found in RCW 9.94A.640, RCW 9.95.240, and RCW 9.96.060.

~~(e)~~**(f) Grounds and Procedure for Requesting the Unsealing of Sealed Court Records or the Unredaction of Redacted Court Records.**

(1) Order Required. Sealed or redacted court records may be examined by the public only after the court records have been ordered unsealed or unredacted pursuant to this section ~~or~~, after entry of a court order allowing access to a sealed court record or redacted portion of a court record, or after an order to seal or redact the record has expired. Compelling circumstances for unsealing or unredaction exist when the proponent of the continued sealing or redaction fails to overcome the presumption of openness under the factors in section (c)(2). The court shall enter specific findings on the record supporting its decision.

(2) Criminal Cases. A sealed or redacted portion of a court record in a criminal case shall be ordered unsealed or unredacted only upon proof of compelling circumstances, unless otherwise provided by statute, and only upon motion

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and written notice to the persons entitled to notice under subsection (c)(1) of this rule except:

(A) If a new criminal charge is filed and the existence of the conviction contained in a sealed record is an element of the new offense, or would constitute a statutory sentencing enhancement, or provide the basis for an exceptional sentence, upon application of the prosecuting attorney the court shall nullify the sealing order in the prior sealed case(s).

(B) If a petition is filed alleging that a person is a sexually violent predator, upon application of the prosecuting attorney the court shall nullify the sealing order as to all prior criminal records of that individual.

(C) If the time period specified in the Order to Seal or Redact has expired, the sealed or redacted court records shall be unsealed or unredacted without further order of the court in accordance with this rule.

(2) Civil Cases. A sealed or redacted portion of a court record in a civil case shall be ordered unsealed or unredacted only upon stipulation of all parties or upon motion and written notice to all parties and proof that identified compelling circumstances for continued sealing or redaction no longer exist, or pursuant to ~~RCW~~ chapter 4.24 RCW or CR 26(j). If the person seeking access cannot locate a party to provide the notice required by this rule, after making a good faith reasonable effort to provide such notice as required by the Superior Court Rules, an affidavit may be filed with the court setting forth the efforts to locate the party and requesting waiver of the notice provision of this rule. The court may waive the notice requirement of this rule if the court finds that further good faith efforts to locate the party are not likely to be successful.

COMMENT

In State v. Richardson, 177 Wn.2d 351(2013), there was a motion in the trial court to unseal a 1993 criminal conviction, which had been sealed in 2002, under an earlier version of GR 15. The State Supreme Court remanded to the trial court for further proceedings, because there was no record of considering the Ishikawa factors. The Supreme Court held that "compelling circumstances" for unsealing exist under GR 15 (e) when the proponent of sealing fails to overcome the presumption of openness under the five factor Ishikawa analysis. In either case, the trial court must apply the factors.

(4) Juvenile Proceedings. Inspection of a sealed juvenile court record is permitted only by order of the court upon motion made by the person who is the subject of the record, except as otherwise provided in RCW 13.50.010(8) and 13.50.050(23). Any adjudication of a juvenile offense or a

crime subsequent to sealing has the effect of nullifying the sealing order, pursuant to RCW 13.50.050(16). Unredaction of the redacted portion of a juvenile court record shall be ordered only upon the same basis set forth in section (2), above.

~~(f)~~**(g) Maintenance of Sealed Court Records.** Sealed court records are subject to the provisions of RCW 36.23.065 and can be maintained in mediums other than paper.

~~(g)~~**(h) Use of Sealed Records on Appeal.** A court record, or any portion of it, sealed in the trial court shall be made available to the appellate court in the event of an appeal. Court records sealed in the trial court shall be sealed from public access in the appellate court, subject to further order of the appellate court.

~~(h)~~**(i) Destruction of Court Records.**

(1) The court shall not order the destruction of any court record unless expressly permitted by statute. The court shall enter written findings that cite the statutory authority for the destruction of the court record.

(2) In a civil case, the court or any party may request a hearing to destroy court records only if there is express statutory authority permitting the destruction of the court records. In a criminal case or juvenile proceeding, the court, any party, or any interested person may request a hearing to destroy the court records only if there is express statutory authority permitting the destruction of the court records. Reasonable notice of the hearing to destroy must be given to all parties in the case. In a criminal case, reasonable notice of the hearing must also be given to the victim, if ascertainable, and the person or agency having probationary, custodial, community placement, or community supervision over the affected adult or juvenile.

(3) When the clerk receives a court order to destroy the entire court file the clerk shall:

(A) Remove all references to the court records from any applicable information systems maintained for or by the clerk except for accounting records, the order to destroy, and the written findings. The order to destroy and the supporting written findings shall be filed and available for viewing by the public.

(B) The accounting records shall be sealed.

(4) When the clerk receives a court order to destroy specified court records the clerk shall:

(A) On the automated docket, destroy any docket code information except any document or sub-document number previously assigned to the court record

destroyed, and enter "Order Destroyed" for the docket entry; and

(B) Destroy the appropriate court records, substituting, when applicable, a printed or other reference to the order to destroy, including the date, location, and document number of the order to destroy; and

(C) File the order to destroy and the written findings supporting the order to destroy. Both the order and the findings shall be publicly accessible.

(5) Destroying Records.

(A) This subsection shall not prevent the routine destruction of court records pursuant to applicable preservation and retention schedules.

~~(i)~~(B) Trial Exhibits. Notwithstanding any other provision of this rule, trial exhibits may be destroyed or returned to the parties if ~~all parties so stipulate in writing and~~ the court so orders.

(j) Effect on Other Statutes. Nothing in this rule is intended to restrict or to expand the authority of clerks under existing statutes, nor is anything in this rule intended to restrict or expand the authority of any public auditor in the exercise of duties conferred by statute.

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BRIEF SUMMARY OF THE WASHINGTON (WA) MEDICAID FALSE CLAIMS ACT (FCA), chap. 74.66 RCW FOR SUPERIOR COURT PERSONNEL

This document, prepared October 1, 2013, is a brief procedural overview of the WA Medicaid False Claims Act. It does not constitute legal analysis, advice or official policy of the Washington Attorney General's Office (AGO). If you have questions, you may contact Senior Counsel, Carrie Bashaw at carrieb@atg.wa.gov or at 360-586-8895.

A. Background

In addition to other enumerated impermissible actions, the WA FCA provides liability for treble damages and a penalty from $5,500 to $11,000 per claim for anyone who knowingly submits or causes the submission of a false or fraudulent Medicaid claims to the State of Washington. RCW 74.66.020(1)(a-g).

The statute was effective on June 7, 2012 (Washington Session Laws, Laws of 2012, ch. 241, (Engrossed Substitute S.B. 5978)), and includes a provision called a *qui tam* action (from a Latin phrase meaning "he who brings a case on behalf of our lord the King[Queen], as well as for himself [herself]").[1] RCW 74.66.010(13). This provision allows a private person, known as a "relator," to bring a lawsuit on behalf of the government, where the private person has information that the named defendant has knowingly submitted or caused the submission of false or fraudulent Medicaid claims to the government. RCW 74.66.010(14); 74.66.050(1). For the most part, the WA FCA mirrors the federal false claims act. 31 U.S.C.A. § 3729-3733.

How do you pronounce *qui tam*? There is no consistency regarding the pronunciation of *qui tam*.

- The simplest is "key tam" (like a door "key" and rhymes with "ham").
- Black's Law Dictionary suggests "kweye tam" (rhymes with "eye").
- Some say "kweye tom" (like the common name "tom," but often said with an upper crust accent).
- And some say "kwee tam/tom" (sounds just like it looks, but *not* "kway").

B. Procedural Matters

1. A complaint filed under the FCA must be filed in camera, under seal, and must be served on the State of Washington through the Attorney General's Office, but not on the defendant.[2] RCW 74.66.050(2); 31 U.S.C.A. § 3730(b). This means that all

[1] While the FCA also authorizes the AGO to file civil FCA complaints without a relator, the focus of this summary is on the relator/qui tam aspects of the FCA. RCW 74.66.040; RCW 74.66.060(5).

[2] Lori Landis, Chief Deputy Clerk, the U. S. District Court, WD of WA indicates that the court does not put FCA cases on PACER. Attempts to locate a case will get a "no record found" response. This is also

records relating to the case must be kept on a secret docket by the Court Clerk.

2. Until a matter is final and the seal lifted, the information furnished pursuant to the Act is exempt from the Washington Public Records Act (PRA), chap. 42.56 RCW. RCW 74.66.030. This would apply to both the court and the AGO.

3. Copies of the complaint are given *only* to the WA AGO, and to the assigned judge of the Superior Court; it is not to be served on the defendant until the court so orders. RCW 74.66.050(2).[3]

4. With some exceptions, relator's counsel and the courts should follow the Washington superior court civil rules and General Rule 15(c). Exceptions include:

    - Because the defendant is not to be served with the complaint while it is being investigated, any motion to seal and required hearing under GR 15(c)(1) *cannot* include the defendant. RCW 74.66.050(2).

    - If a case is declined by the AGO and subsequently dismissed by the court pursuant to RCW 74.66.050(2) and the seal *is not lifted*, there is no provision in the statute permitting the dismissed case to be made available for public viewing as currently required under GR 15(c)(4). *See* RCW 74.66.030.

    - Because the case is not available for public viewing pre-intervention by the AGO, the court order and written order sealing the case *cannot* be filed and made available to the public as currently required under GR 15(c)(4) and GR 15(5)(C).

5. The following information should be included on the first caption page of a complaint:

FILED <u>IN CAMERA</u>	**or**	**FILED UNDER SEAL**
AND UNDER SEAL		**Pursuant to RCW 74.66.050(2)**

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true of other District Courts around the country. Ms. Landis authorized the AGO to provide her contact information, you can reach her at 206-370-8483 if you have any questions.

[3] In the Western District Court of Washington, they assign a cause number, and pre-assign all FCA cases to a judge. (Lori Landis, Chief Deputy Clerk).

6. Relator's counsel will often include a first cover caption that identifies the government, but not the relator or the defendant:

State of Washington,	**State of Washington,**
ex rel.	***ex rel.***
Plaintiffs	**Plaintiffs**
[UNDER SEAL]	
Relator	**v.**
v.	
[UNDER SEAL]	**[UNDER SEAL]**
Defendant	**Defendant**

Then, a second caption page identifying all the parties is provided.

- Thus, when received, the State of Washington (and any other governmental entity listed), should be identified in the court's sealed record as the primary party plaintiff to the case because it is being brought in the "name of the government." RCW 74.66.050(1).

7. Upon filing the complaint, it remains under seal for at least sixty days, during which time the AGO must determine whether or not it will intervene in the action. RCW 74.66.050(2); 31 U.S.C.A. § 3730(b)(2). For good cause shown, the AGO may move for an extension of time in which to determine whether it will intervene. RCW 74.66.050(3); 31 U.S.C.A. § 3730(b)(3).

    a. At the federal level, these motions typically request an extension of the seal for six months at a time. The AGO is not aware of actual statistics reporting on the length of time the average qui tam case remains under seal. Based on experience at the federal level, most intervened or settled cases are under seal for 2-3 years (with, of course, periodic reports to the supervising judge concerning the progress of the case, and the justification of the need for additional time). We are aware of cases still under seal going back to 2005.

    b. The complaint remains under seal until the AGO has determined whether or not it will intervene. RCW 74.66.050(3); 31 U.S.C.A. § 3730(b)(3). Once an intervention decision or unsealing of the complaint is made, the plaintiff may serve the complaint on the defendant. RCW 74.66.050(2); 31 U.S.C.A. § 3730(b)(2).

8. No other person may intervene or bring a similar action except the AGO. RCW 74.66.050(5); 31 U.S.C.A. § 3730(b)(5).

9. A complaint can be filed in any county in which the defendant(s) can be "found, resides, transact business, or in which any act proscribed by RCW 74.66.020 occurred." RCW 74.66.110(1).

10. In addition to the complaint filed with the superior court, the relator must serve upon the AGO a written "disclosure" of substantially all the evidence in the possession of the relator about the allegations set forth in the complaint. This disclosure is not filed in any court, and is not available to the named defendant. The statement and all evidence must be provided in *electronic format*. RCW 74.66.050(2).

11. The Attorney General must investigate the allegations. RCW 74.66.040. The investigation may involve state agencies (typically the Washington State Health Care Authority and Department of Social and Health Services). In some investigations where the federal government may also be a victim, Assistant United States Attorneys' will participate in the investigation and work closely with the AGO.

12. The investigation will often involve specific investigative techniques, including Civil Investigative Demands (CID) for documents or electronic records, witness interviews, compelled oral testimony from one or more individuals or organizations, and consultations with experts. RCW 74.66.120. If there is a parallel criminal investigation, search warrants and other criminal investigation tools may be used to obtain evidence.

    - Any records, testimony or other information obtained by the AGO pursuant to a CID are entirely exempt from the PRA. RCW 74.66.120(31).

13. At the conclusion of the investigation, the AGO will choose one of three options:

    a. <u>Intervene</u> in one or more counts of the pending qui tam action. RCW 74.66.100(3). This intervention expresses the Government's intention to take over the lawsuit and act as the primary plaintiff in prosecuting any counts identified by the AGO. *Id.*[4]

    b. <u>Decline</u> to intervene in one or all counts of the pending qui tam action. If the State of Washington declines to intervene, the relator and his or her attorney may prosecute the action on behalf of the State, but at that point, the State is not a direct party to the proceedings apart from its right to any recovery. RCW 74.66.060(3). Nevertheless, the relator may be required to keep the

[4] At the federal level, it is reported that fewer than 25% of filed qui tam actions result in an intervention on any count by the Department of Justice.

AGO informed about the case and provide copies of pleadings and other material. RCW 74.66.060(3).

- The AGO may intervene at a later date upon a showing of good cause. RCW 74.66.060(3).

c. Move to dismiss the relator's complaint, either because there is no case, or the case conflicts with significant statutory or policy interests of the State of Washington. RCW 74.66.060(2)(a).

- Dismissal of a qui tam action may only occur if the court and the AGO give written consent that explains the reason for the consenting to dismissal. RCW 74.66.050(1).

14. In practice, two other events may occur:

    a. Settle the pending qui tam action with the defendant prior to the intervention decision, regardless of relator objections. RCW 74.66.060(2)(b). This usually, but not always, results in a simultaneous intervention and settlement with the State of Washington (at the federal level, this is included in the 25% intervention rate).

    b. Advise the relator that the AGO intends to decline intervention and encourage the relator to voluntarily dismiss the action. At the federal level, this usually, but not always, results in dismissal of the qui tam action.

15. Upon intervention under RCW 74.66.060(1), the AGO has primary responsibility for prosecuting the action, and along with the complaint would likely file:

    a. notice of intervention;

    b. motion to unseal the qui tam complaint and court file.

16. The defendant is not required to respond to any complaint filed under RCW 74.66 until 20 days after the complaint is unsealed and served on the defendant. RCW 74.66.050(3).

17. The decision by the AGO to intervene in a case does not necessarily mean that it will endorse, adopt or agree with every factual allegation or legal conclusion in the relator's complaint.

18. The AGO also has the ability to assert claims arising under other statutes (such as the state criminal Medicaid False Statement under RCW 74.09.230, Anti-Kickback

Act under RCW 74.09.240), actions under RCW 74.09.210, Breach of Contract, or the common law, which the relators do not have the legal right to assert in their complaint, since only the False Claims Act has a qui tam provision. RCW 74.66.060(5).

19. Possible court filings during the course of the investigation include:

    a. Petitions for a court order compelling attendance or compliance under a CID.
        - May be filed in any county where the person needing to respond resides, is found, or transact business. RCW 74.66.120(25)

    b. Petition to modify or set aside a CID.
        - May be filed in any county where the person needing to respond resides, is found, or transacts business. RCW 74.66.120(26).

20. The Washington Superior Court civil rules apply to pre-intervention investigative demand disputes. RCW 74.66.120(30).

21. Washington's FCA does not have a statute of limitations. RCW 74.66.100(2).

22. Whistleblowers may experience retaliation including losing employment and being excluded in their profession. Whistleblower relief is available. RCW 74.66.090.

Chapter 74.66 RCW
MEDICAID FRAUD FALSE CLAIMS ACT

RCW Sections

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74.66.090 Whistleblower relief.
74.66.100 Procedure for civil actions.
74.66.110 Jurisdiction -- Seal on action.
74.66.120 Civil investigative demands.
74.66.130 Reporting.

Notes:

Reviser's note -- Sunset Act application: The medicaid fraud false claims act is subject to review, termination, and possible extension under chapter 43.131 RCW, the Sunset Act. See RCW 43.131.419. RCW 74.66.005 through 74.66.130 are scheduled for future repeal under RCW 43.131.420.

74.66.005
Short title.

This chapter may be known and cited as the medicaid fraud false claims act.

[2012 c 241 § 214.]

Notes:

Sunset Act application: See note following chapter digest. **Intent -- Finding -- 2012 c 241:** See note following RCW 74.66.010.

74.66.010
Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter:

(1)(a) "Claim" means any request or demand made for a medicaid payment under chapter 74.09 RCW, whether under a contract or otherwise, for money or property and whether or not a government entity has title to the money or property, that:

(i) Is presented to an officer, employee, or agent of a government entity; or

(ii) Is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the government entity's behalf or to advance a government entity program or interest, and the government entity:

(A) Provides or has provided any portion of the money or property requested or demanded; or

(B) Will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(b) A "claim" does not include requests or demands for money or property that the government entity has paid to an individual as compensation for employment or as an income subsidy with no restrictions on that individual's use of the money or property.

(2) "Custodian" means the custodian, or any deputy custodian, designated by the attorney general.

(3) "Documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret the data compilations, and any product of discovery.

(4) "False claims act investigation" means any inquiry conducted by any false claims act investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of this chapter.

(5) "False claims act investigator" means any attorney or investigator employed by the state attorney general who is charged with the duty of enforcing or carrying into effect any provision of this chapter, or any officer or employee of the state of Washington acting under the direction and supervision of the attorney or investigator in connection with an investigation pursuant to this chapter.

(6) "Government entity" means all Washington state agencies that administer

medicaid funded programs under this title.

(7)(a) "Knowing" and "knowingly" mean that a person, with respect to information:

(i) Has actual knowledge of the information;

(ii) Acts in deliberate ignorance of the truth or falsity of the information; or

(iii) Acts in reckless disregard of the truth or falsity of the information.

(b) "Knowing" and "knowingly" do not require proof of specific intent to defraud.

(8) "Material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

(9) "Obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or rule, or from the retention of any overpayment.

(10) "Official use" means any use that is consistent with the law, and the rules and policies of the attorney general, including use in connection with: Internal attorney general memoranda and reports; communications between the attorney general and a federal, state, or local government agency, or a contractor of a federal, state, or local government agency, undertaken in furtherance of an investigation or prosecution of a case; interviews of any qui tam relator or other witness; oral examinations; depositions; preparation for and response to civil discovery requests; introduction into the record of a case or proceeding; applications, motions, memoranda, and briefs submitted to a court or other tribunal; and communications with attorney general investigators, auditors, consultants and experts, the counsel of other parties, and arbitrators or mediators, concerning an investigation, case, or proceeding.

(11) "Person" means any natural person, partnership, corporation, association, or other legal entity, including any local or political subdivision of a state.

(12) "Product of discovery" includes:

(a) The original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(b) Any digest, analysis, selection, compilation, or derivation of any item listed in (a) of this subsection; and

(c) Any index or other manner of access to any item listed in (a) of this subsection.

(13) "Qui tam action" is an action brought by a person under RCW 74.66.050.

(14) "Qui tam relator" or "relator" is a person who brings an action under RCW 74.66.050.

[2012 c 241 § 201.]

Notes:

Sunset Act application: See note following chapter digest.

Intent -- Finding -- 2012 c 241: "The legislature intends to enact a state false claims act in order to provide this state with another tool to combat medicaid fraud. The legislature finds that between 1996 and 2009 state-initiated false claims acts resulted in over five billion dollars in total recoveries to those states. The highest recoveries in those cases were from claims relating to billing fraud, off-label marketing, and withholding safety information; these cases were primarily related to the pharmaceuticals industry and hospital networks, hospitals, and medical centers. By chapter 241, Laws of 2012, the legislature does not intend to target a certain industry, profession, or retailer of medical equipment, or to place an undue burden on health care professionals. Chapter 241, Laws of 2012 is not intended to harass health care professionals, nor is intended to be used as a tool to target actions that are related to incidental errors or clerical errors, which should not be considered fraud. The intent is to use the false claims act to root out significant areas of fraud that result in higher health care costs to this state and to use the false claims act to recover state money that could and should be used to support the medicaid program." [2012 c 241 § 101.]

74.66.020
Civil penalty — False or fraudulent claims.

(1) Subject to subsections (2) and (4) of this section, a person is liable to the government entity for a civil penalty of not less than five thousand five hundred dollars and not more than eleven thousand dollars, plus three times the amount of damages which the government entity sustains because of the act of that person, if the person:

(a) Knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(b) Knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(c) Conspires to commit one or more of the violations in this subsection (1);

(d) Has possession, custody, or control of property or money used, or to be used, by the government entity and knowingly delivers, or causes to be delivered, less than all of that money or property;

(e) Is authorized to make or deliver a document certifying receipt of property used, or to be used, by the government entity and, intending to defraud the government entity, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(f) Knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the government entity who lawfully may not sell or pledge property; or

(g) Knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the government entity, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the government entity.

(2) The court may assess not less than two times the amount of damages which the government entity sustains because of the act of a person, if the court finds that:

(a) The person committing the violation of subsection (1) of this section furnished the Washington state attorney general with all information known to him or her about the violation within thirty days after the date on which he or she first obtained the information;

(b) The person fully cooperated with any investigation by the attorney general of the violation; and

(c) At the time the person furnished the attorney general with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to the violation, and the person did not have actual knowledge of the existence of an investigation into the violation.

(3) A person violating this section is liable to the attorney general for the costs of a civil action brought to recover any such penalty or damages.

(4) For the purposes of determining whether an insurer has a duty to provide a defense or indemnification for an insured and if coverage may be denied if the terms of the policy exclude coverage for intentional acts, a violation of subsection (1) of this section is an intentional act.

(5) The office of the attorney general must, by rule, annually adjust the civil penalties established in subsection (1) of this section so that they are equivalent to the civil penalties provided under the federal false claims act and in accordance with the federal civil penalties inflation adjustment act of 1990.

[2012 c 241 § 202.]

Notes:

Sunset Act application: See note following chapter digest.

Intent -- Finding -- 2012 c 241: See note following RCW 74.66.010.

74.66.030
Public records exemption.

Any information furnished pursuant to this chapter is exempt from disclosure under the public records act, chapter 42.56 RCW, until final disposition and all court-ordered seals are lifted.

[2012 c 241 § 203.]

Notes:

Sunset Act application: See note following chapter digest.

Intent -- Finding -- 2012 c 241: See note following RCW 74.66.010.

74.66.040
Attorney general — Investigation — Civil action.

The attorney general must diligently investigate a violation under RCW 74.66.020. If the attorney general finds that a person has violated or is violating RCW 74.66.020, the attorney general may bring a civil action under this section against the person.

[2012 c 241 § 204.]

Notes:

Sunset Act application: See note following chapter digest.

Intent -- Finding -- 2012 c 241: See note following RCW 74.66.010.

74.66.050
Qui tam action — Relator rights and duties.

(1) A person may bring a civil action for a violation of RCW 74.66.020 for the person and for the government entity. The action may be known as a qui tam action and the person bringing the action as a qui tam relator. The action must be brought in the name of the government entity. The action may be dismissed only if the court, and the attorney general give written consent to the dismissal and their reason for consenting.

(2) A relator filing an action under this chapter must serve a copy of the complaint and written disclosure of substantially all material evidence and information the person possesses on the attorney general in electronic format. The relator must file the complaint in camera. The complaint must remain under seal for at least sixty days, and may not be served on the defendant until the court so orders. The attorney general may elect to intervene and proceed with the action within sixty days after it receives both the complaint and the material evidence and information.

(3) The attorney general may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under subsection (2) of this section. The motions may be supported by affidavits or other submissions in camera. The defendant may not be required to respond to any complaint filed under this section until twenty days after the complaint is unsealed and served upon the defendant.

(4) If the attorney general does not proceed with the action prior to the expiration of the sixty-day period or any extensions obtained under subsection (3) of this section, then the relator has the right to conduct the action.

(5) When a person brings an action under this section, no person other than the attorney general may intervene or bring a related action based on the facts underlying the pending action.

[2012 c 241 § 205.]

Notes:

Sunset Act application: See note following chapter digest.

Intent -- Finding -- 2012 c 241: See note following RCW 74.66.010.

74.66.060
Qui tam action — Attorney general authority.

(1) If the attorney general proceeds with the qui tam action, the attorney general shall have the primary responsibility for prosecuting the action, and is not bound by an act of the relator. The relator has the right to continue as a party to the action, subject to the limitations set forth in subsection (2) of this section.

(2)(a) The attorney general may move to dismiss the qui tam action notwithstanding the objections of the relator if the relator has been notified by the attorney general of the filing of the motion and the court has provided the relator with an opportunity for a hearing on the motion.

(b) The attorney general may settle the action with the defendant notwithstanding the objections of the relator if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, the hearing may be held in camera.

(c) Upon a showing by the attorney general that unrestricted participation during the course of the litigation by the relator would interfere with or unduly delay the attorney general's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the relator's participation, such as:

(i) Limiting the number of witnesses the relator may call;

(ii) Limiting the length of the testimony of the witnesses;

(iii) Limiting the relator's cross-examination of witnesses; or

(iv) Otherwise limiting the participation by the relator in the litigation.

(d) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the relator would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the relator in the litigation.

(3) If the attorney general elects not to proceed with the qui tam action, the relator has the right to conduct the action. If the attorney general so requests, the relator must serve on the attorney general copies of all pleadings filed in the action and shall supply copies of all deposition transcripts, at the attorney general's expense. When the relator proceeds with the action, the court, without limiting the status and rights of the relator, may nevertheless permit the attorney general to intervene at a later date upon a showing of good cause.

(4) Whether or not the attorney general proceeds with the qui tam action, upon a showing by the attorney general that certain actions of discovery by the relator would interfere with the attorney general's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not

more than sixty days. The showing must be conducted in camera. The court may extend the sixty-day period upon a further showing in camera that the attorney general has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding RCW 74.66.050, the attorney general may elect to pursue its claim through any alternate remedy available to the state, including any administrative proceeding to determine a civil money penalty. If any alternate remedy is pursued in another proceeding, the relator has the same rights in the proceeding as the relator would have had if the action had continued under this section. Any finding of fact or conclusion of law made in the other proceeding that has become final is conclusive on all parties to an action under this section. For purposes of this subsection, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the state of Washington, if all time for filing the appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

[2012 c 241 § 206.]

Notes:

Sunset Act application: See note following chapter digest.

Intent -- Finding -- 2012 c 241: See note following RCW 74.66.010.

74.66.070
Qui tam action — Award — Proceeds of action or settlement of claim.

(1)(a) Subject to (b) of this subsection, if the attorney general proceeds with a qui tam action, the relator must receive at least fifteen percent but not more than twenty-five percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the relator substantially contributed to the prosecution of the action.

(b) Where the action is one which the court finds to be based primarily on disclosures of specific information, other than information provided by the relator, relating to allegations or transactions in a criminal, civil, or administrative hearing, in a legislative or administrative report, hearing, audit, or investigation, or from the news media, the court may award an amount it considers appropriate, but in no case more than ten percent of the proceeds, taking into account the significance of the information and the role of the relator in advancing the case to litigation.

(c) Any payment to a relator under (a) or (b) of this subsection must be made from the proceeds. The relator must also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs.

All expenses, fees, and costs must be awarded against the defendant.

(2) If the attorney general does not proceed with a qui tam action, the relator shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount may not be less than twenty-five percent and not more than thirty percent of the proceeds of the action or settlement and must be paid out of the proceeds. The relator must also receive an amount for reasonable expenses, which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All expenses, fees, and costs must be awarded against the defendant.

(3) Whether or not the attorney general proceeds with the qui tam action, if the court finds that the action was brought by a person who planned and initiated the violation of RCW 74.66.020 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under subsection (1) or (2) of this section, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of RCW 74.66.020, that person must be dismissed from the civil action and may not receive any share of the proceeds of the action. The dismissal may not prejudice the right of the state to continue the action, represented by the attorney general.

(4) If the attorney general does not proceed with the qui tam action and the relator conducts the action, the court may award to the defendant reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the relator was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(5) Any funds recovered that remain after calculation and distribution under subsections (1) through (3) of this section must be deposited into the medicaid fraud penalty account established in RCW 74.09.215.

[2012 c 241 § 207.]

Notes:

Sunset Act application: See note following chapter digest.

Intent -- Finding -- 2012 c 241: See note following RCW 74.66.010.

74.66.080
Qui tam action — Restrictions — Dismissal.

(1) In no event may a person bring a qui tam action which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the state is already a party.

(2)(a) The court must dismiss an action or claim under this section, unless opposed by the attorney general, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed:

(i) In a state criminal, civil, or administrative hearing in which the attorney general or other governmental [government] entity is a party;

(ii) In a legislative report, or other state report, hearing, audit, or investigation; or

(iii) By the news media;

unless the action is brought by the attorney general or the relator is an original source of the information.

(b) For purposes of this section, "original source" means an individual who either (i) prior to a public disclosure under (a) of this subsection, has voluntarily disclosed to the attorney general the information on which allegations or transactions in a claim are based, or (ii) has knowledge that is independent of, and materially adds to, the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the attorney general before filing an action under this section.

[2012 c 241 § 208.]

Notes:

Sunset Act application: See note following chapter digest.

Intent -- Finding -- 2012 c 241: See note following RCW 74.66.010.

74.66.090
Whistleblower relief.

(1) Any employee, contractor, or agent is entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent, is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent, or associated others in furtherance of an action under this chapter or other efforts to stop one or more violations of this chapter.

(2) Relief under subsection (1) of this section must include reinstatement with the

same seniority status that employee, contractor, or agent would have had but for the discrimination, two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees, and any and all relief available under RCW 49.60.030(2). An action under this subsection may be brought in the appropriate superior court of the state of Washington for the relief provided in this subsection.

(3) A civil action under this section may not be brought more than three years after the date when the retaliation occurred.

[2012 c 241 § 209.]

Notes:

Sunset Act application: See note following chapter digest.

Intent -- Finding -- 2012 c 241: See note following RCW 74.66.010.

74.66.100
Procedure for civil actions.

(1) A subpoena requiring the attendance of a witness at a trial or hearing conducted under RCW 74.66.040 or 74.66.050 may be served at any place in the state of Washington.

(2) A civil action under RCW 74.66.040 or 74.66.050 may be brought at any time, without limitation after the date on which the violation of RCW 74.66.020 is committed.

(3) If the attorney general elects to intervene and proceed with a qui tam action, the attorney general may file its own complaint or amend the complaint of a relator to clarify or add detail to the claims in which the attorney general is intervening and to add any additional claims with respect to which the attorney general contends it is entitled to relief.

(4) In any action brought under RCW 74.66.040 or 74.66.050, the attorney general is required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(5) Notwithstanding any other provision of law or the rules for superior court, a final judgment rendered in favor of the government entity in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, estops the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under RCW 74.66.040 or 74.66.050.

[2012 c 241 § 210.]

Notes:

Sunset Act application: See note following chapter digest.

Intent -- Finding -- 2012 c 241: See note following RCW 74.66.010.

74.66.110
Jurisdiction — Seal on action.

(1) Any action under RCW 74.66.040 or 74.66.050 may be brought in the superior court in any county in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by RCW 74.66.020 occurred. The appropriate court must issue a summons as required by the superior court civil rules and service must occur at any place within the state of Washington.

(2) The superior courts have jurisdiction over any action brought under the laws of any city or county for the recovery of funds paid by a government entity if the action arises from the same transaction or occurrence as an action brought under RCW 74.66.040 or 74.66.050.

(3) With respect to any local government that is named as a coplaintiff with the state in an action brought under RCW 74.66.050, a seal on the action ordered by the court under RCW 74.66.050 does not preclude the attorney general or the person bringing the action from serving the complaint, any other pleadings, or the written disclosure of substantially all material evidence and information possessed by the person bringing the action on the law enforcement authorities that are authorized under the law of the local government to investigate and prosecute the action on behalf of the local government, except that the seal applies to the law enforcement authorities so served to the same extent as the seal applies to other parties in the action.

[2012 c 241 § 211.]

Notes:

Sunset Act application: See note following chapter digest.

Intent -- Finding -- 2012 c 241: See note following RCW 74.66.010.

74.66.120
Civil investigative demands.

(1)(a) Whenever the attorney general, or a designee, for purposes of this section, has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims act investigation, the attorney general, or a designee, may, before commencing a civil proceeding under RCW 74.66.040 or making an election under RCW 74.66.050, issue in writing and serve upon the person, a civil investigative demand requiring the person:

(i) To produce the documentary material for inspection and copying;

(ii) To answer in writing written interrogatories with respect to the documentary material or information;

(iii) To give oral testimony concerning the documentary material or information; or

(iv) To furnish any combination of such material, answers, or testimony.

(b) The attorney general may delegate the authority to issue civil investigative demands under this subsection (1). Whenever a civil investigative demand is an express demand for any product of discovery, the attorney general, the deputy attorney general, or an assistant attorney general must serve, in any manner authorized by this section, a copy of the demand upon the person from whom the discovery was obtained and must notify the person to whom the demand is issued of the date on which the copy was served. Any information obtained by the attorney general or a designee of the attorney general under this section may be shared with any qui tam relator if the attorney general or designee determines it is necessary as part of any false claims act investigation.

(2)(a) Each civil investigative demand issued under subsection (1) of this section must state the nature of the conduct constituting the alleged violation of this chapter which is under investigation, and the applicable provision of law alleged to be violated.

(b) If the demand is for the production of documentary material, the demand must:

(i) Describe each class of documentary material to be produced with such definiteness and certainty as to permit the material to be fairly identified;

(ii) Prescribe a return date for each class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

(iii) Identify the false claims act investigator to whom such material must be made available.

(c) If the demand is for answers to written interrogatories, the demand must:

(i) Set forth with specificity the written interrogatories to be answered;

(ii) Prescribe dates at which time answers to written interrogatories must be submitted; and

(iii) Identify the false claims law investigator to whom such answers must be submitted.

(d) If the demand is for the giving of oral testimony, the demand must:

(i) Prescribe a date, time, and place at which oral testimony must be commenced;

(ii) Identify a false claims act investigator who must conduct the examination and the custodian to whom the transcript of the examination must be submitted;

(iii) Specify that the attendance and testimony are necessary to the conduct of the investigation;

(iv) Notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and

(v) Describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

(e) Any civil investigative demand issued under this section which is an express demand for any product of discovery is not due until thirty days after a copy of the demand has been served upon the person from whom the discovery was obtained.

(f) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section may not be sooner than six days after the date on which demand is received, unless the attorney general or an assistant attorney general designated by the attorney general determines that exceptional circumstances are present which warrant the commencement of the testimony sooner.

(g) The attorney general may not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the attorney general, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary.

(3) A civil investigative demand issued under subsection (1) or (2) of this section may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if the material, answers, or testimony would be protected from disclosure under:

(a) The standards applicable to subpoenas or subpoenas duces tecum issued by a court to aid in a special inquiry investigation; or

(b) The standards applicable to discovery requests under the superior court civil rules, to the extent that the application of these standards to any demand is appropriate and consistent with the provisions and purposes of this section.

(4) Any demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law, other than this section, preventing or restraining disclosure of the product of discovery to any person. Disclosure of any product of discovery pursuant to any express demand does not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(5) Any civil investigative demand issued under this section may be served by a false claims act investigator, or by a commissioned law enforcement official, at any place within the state of Washington.

(6) Service of any civil investigative demand issued under (a) of this subsection or of any petition filed under subsection (25) of this section may be made upon a partnership, corporation, association, or other legal entity by:

(a) Delivering an executed copy of the demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(b) Delivering an executed copy of the demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

(c) Depositing an executed copy of the demand or petition in the United States mail by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(7) Service of any demand or petition may be made upon any natural person by:

(a) Delivering an executed copy of the demand or petition to the person; or

(b) Depositing an executed copy of the demand or petition in the United States mail by registered or certified mail, with a return receipt requested, addressed to the person at the person's residence or principal office or place of business.

(8) A verified return by the individual serving any civil investigative demand issued under subsection (1) or (2) of this section or any petition filed under subsection (25) of this section setting forth the manner of the service constitutes proof of the service. In the case of service by registered or certified mail, the return must be accompanied by the

return post office receipt of delivery of the demand.

(9)(a) The production of documentary material in response to a civil investigative demand served under this section must be made under a sworn certificate, in the form as the demand designates, by:

(i) In the case of a natural person, the person to whom the demand is directed; or

(ii) In the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to the production and authorized to act on behalf of the person.

(b) The certificate must state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the false claims act investigator identified in the demand.

(10) Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material available for inspection and copying to the false claims act investigator identified in the demand at the principal place of business of the person, or at another place as the false claims act investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (25) of this section. The material must be made available on the return date specified in the demand, or on a later date as the false claims act investigator may prescribe in writing. The person may, upon written agreement between the person and the false claims act investigator, substitute copies for originals of all or any part of the material.

(11)(a) Each interrogatory in a civil investigative demand served under this section must be answered separately and fully in writing under oath and must be submitted under a sworn certificate, in the form as the demand designates, by:

(i) In the case of a natural person, the person to whom the demand is directed; or

(ii) In the case of a person other than a natural person, the person or persons responsible for answering each interrogatory.

(b) If any interrogatory is objected to, the reasons for the objection must be stated in the certificate instead of an answer. The certificate must state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information must be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(12) The examination of any person pursuant to a civil investigative demand for oral testimony served under this section must be taken before an officer authorized to

administer oaths and affirmations by the laws of the state of Washington or of the place where the examination is held. The officer before whom the testimony is to be taken must put the witness on oath or affirmation and must, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony must be recorded and must be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection does not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the superior court civil rules.

(13) The false claims act investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney general, any person who may be agreed upon by the attorney for the government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking the testimony.

(14) The oral testimony of any person taken pursuant to a civil investigative demand served under this section must be taken in the county within which such person resides, is found, or transacts business, or in another place as may be agreed upon by the false claims act investigator conducting the examination and the person.

(15) When the testimony is fully transcribed, the false claims act investigator or the officer before whom the testimony is taken must afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless the examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make must be entered and identified upon the transcript by the officer or the false claims act investigator, with a statement of the reasons given by the witness for making the changes. The transcript must then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within thirty days after being afforded a reasonable opportunity to examine it, the officer or the false claims act investigator must sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons given.

(16) The officer before whom the testimony is taken must certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or false claims act investigator must promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

(17) Upon payment of reasonable charges therefor, the false claims act investigator must furnish a copy of the transcript to the witness only, except that the attorney general, the deputy attorney general, or an assistant attorney general may, for good cause, limit the witness to inspection of the official transcript of the witness' testimony.

(18)(a) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (1) or (2) of this section may be accompanied, represented, and advised by counsel. Counsel may advise the person, in confidence, with respect to any question asked of the person. The person or counsel may object on the record to any question, in whole or in part, and must briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that the person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. The person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If the person refuses to answer any question, a special injury proceeding petition may be filed in the superior court under subsection (25) of this section for an order compelling the person to answer the question.

(b) If the person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of the person may be compelled in accordance with the provisions of the superior court civil rules.

(19) Any person appearing for oral testimony under a civil investigative demand issued under subsection (1) or (2) of this section is entitled to the same fees and allowances which are paid to witnesses in the superior courts.

(20) The attorney general must designate a false claims act investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and must designate such additional false claims act investigators as the attorney general determines from time to time to be necessary to serve as deputies to the custodian.

(21)(a) A false claims act investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section must transmit them to the custodian. The custodian shall take physical possession of the material, answers, or transcripts and is responsible for the use made of them and for the return of documentary material under subsection (23) of this section.

(b) The custodian may cause the preparation of the copies of the documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any false claims act investigator, or employee of the attorney general. The material, answers, and transcripts may be used by any authorized false claims act investigator or other officer or employee in connection with the taking of oral testimony under this section.

(c)(i) Except as otherwise provided in this subsection (21), no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, may be available for examination by any individual other than a false claims act investigator or other officer or employee of the attorney general authorized under (b) of this subsection.

(ii) The prohibition in (c)(i) of this subsection on the availability of material, answers, or transcripts does not apply if consent is given by the person who produced the material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for the material, consent is given by the person from whom the discovery was obtained. Nothing in this subsection [(21)](c)(ii) is intended to prevent disclosure to the legislature, including any committee or subcommittee for use by such an agency in furtherance of its statutory responsibilities.

(d) While in the possession of the custodian and under the reasonable terms and conditions as the attorney general shall prescribe:

(i) Documentary material and answers to interrogatories must be available for examination by the person who produced the material or answers, or by a representative of that person authorized by that person to examine the material and answers; and

(ii) Transcripts of oral testimony must be available for examination by the person who produced the testimony, or by a representative of that person authorized by that person to examine the transcripts.

(22) Whenever any official has been designated to appear before any court, special inquiry judge, or state administrative judge in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to the official the material, answers, or transcripts for official use in connection with any case or proceeding as the official determines to be required. Upon the completion of such a case or proceeding, the official must return to the custodian any material, answers, or transcripts so delivered which have not passed into the control of any court, grand jury, or agency through introduction into the record of such a case or proceeding.

(23) If any documentary material has been produced by any person in the course of any false claims act investigation pursuant to a civil investigative demand under this section, and:

(a) Any case or proceeding before the court or special inquiry judge arising out of the investigation, or any proceeding before any administrative judge involving the material, has been completed; or

(b) No case or proceeding in which the material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of the investigation:

Then, the custodian shall, upon written request of the person who produced the material, return to the person the material, other than copies furnished to the false claims act investigator under subsection (10) of this section or made for the attorney general under subsection (21)(b) of this section, which has not passed into the control of any

court, grand jury, or agency through introduction into the record of the case or proceeding.

(24)(a) In the event of the death, disability, or separation from service of the attorney general of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to civil investigative demand under this section, or in the event of the official relief of the custodian from responsibility for the custody and control of the material, answers, or transcripts, the attorney general must promptly:

(i) Designate another false claims act investigator to serve as custodian of the material, answers, or transcripts; and

(ii) Transmit in writing to the person who produced the material, answers, or testimony notice of the identity and address of the successor so designated.

(b) Any person who is designated to be a successor under this subsection (24) has, with regard to the material, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person's predecessor in office, except that the successor may not be held responsible for any default or dereliction which occurred before that designation.

(25) Whenever any person fails to comply with any civil investigative demand issued under subsection (1) or (2) of this section, or whenever satisfactory copying or reproduction of any material requested in the demand cannot be done and the person refuses to surrender the material, the attorney general may file, in any superior court of the state of Washington for any county in which the person resides, is found, or transacts business, and serve upon the person a petition for an order of the court for the enforcement of the civil investigative demand.

(26)(a) Any person who has received a civil investigative demand issued under subsection (1) or (2) of this section may file, in the superior court of the state of Washington for the county within which the person resides, is found, or transacts business, and serve upon the false claims act investigator identified in the demand a petition for an order of the court to modify or set aside the demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside the demand may be brought only in the district court of the United States for the judicial district in which the proceeding in which the discovery was obtained is or was last pending. Any petition filed under this subsection (26)(a) must be filed:

(i) Within thirty days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier; or

(ii) Within a longer period as may be prescribed in writing by any false claims act investigator identified in the demand.

(b) The petition must specify each ground upon which the petitioner relies in seeking relief under (a) of this subsection, and may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of the person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(27)(a) In the case of any civil investigative demand issued under subsection (1) or (2) of this section which is an express demand for any product of discovery, the person from whom the discovery was obtained may file, in the superior court of the state of Washington for the county in which the proceeding in which the discovery was obtained is or was last pending, and serve upon any false claims act investigator identified in the demand and upon the recipient of the demand, a petition for an order of the court to modify or set aside those portions of the demand requiring production of any product of discovery. Any petition under this subsection (27)(a) must be filed:

(i) Within twenty days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier; or

(ii) Within a longer period as may be prescribed in writing by any false claims act investigator identified in the demand.

(b) The petition must specify each ground upon which the petitioner relies in seeking relief under (a) of this subsection, and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

(28) At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (1) or (2) of this section, the person, and in the case of an express demand for any product of discovery, the person from whom the discovery was obtained, may file, in the superior court of the state of Washington for the county within which the office of the custodian is situated, and serve upon the custodian, a petition for an order of the court to require the performance by the custodian of any duty imposed upon the custodian by this section.

(29) Whenever any petition is filed in any superior court of the state of Washington under this section, the court has jurisdiction to hear and determine the matter so presented, and to enter an order or orders as may be required to carry out the provisions of this section. Any final order so entered is subject to appeal under the rules of appellate procedure. Any disobedience of any final order entered under this section by any court

must be punished as a contempt of the court.

(30) The superior court civil rules apply to any petition under this section, to the extent that the rules are not inconsistent with the provisions of this section.

(31) Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (1) or (2) of this section are exempt from disclosure under the public records act, chapter 42.56 RCW.

[2012 c 241 § 212.]

Notes:

Sunset Act application: See note following chapter digest.

Intent -- Finding -- 2012 c 241: See note following RCW 74.66.010.

74.66.130
Reporting.

Beginning November 15, 2012, and annually thereafter, the attorney general in consultation with the health care authority must report results of implementing the medicaid fraud false claims act. This report must include:

(1) The number of attorneys assigned to qui tam initiated actions;

(2) The number of cases brought by qui tam actions and indicate how many cases are brought by the attorney general and how many by the qui tam relator without attorney general participation;

(3) The results of any actions brought under subsection (2) of this section, delineated by cases brought by the attorney general and cases brought by the qui tam relator without attorney general participation;

(4) The amount of recoveries attributable to the medicaid false claims; and

(5) Information on the costs, attorneys' fees, and any other expenses incurred by defendants in investigating and defending against qui tam actions, to the extent this information is provided to the attorney general or health care authority.

[2012 c 241 § 213.]**Notes:** **Sunset Act application:** See note following chapter digest. **Intent -- Finding -- 2012 c 241:** See note following RCW 74.66.010.

Washington's *Qui Tam*– Medicaid False Claims Act

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October 3, 2013

Who is the MFCU?

- Established in 1978, the Washington State Medicaid Fraud Control Unit investigates and prosecutes criminal fraud committed by health care providers.
- **Effective June 7, 2012,** the Unit also prosecutes civil fraud under the Medicaid false claims act. RCW 74.66 *et seq.*
- The unit also investigates and prosecutes crimes committed against vulnerable adults.
- 8 Prosecutors, 11 Investigators, 5 Data Analysts/Auditors, 2 Paralegals, 6 Professional Support Staff

Medicaid Fraud In WA

- **Civil Case:** can be liable for three times the government's damages plus penalties of $5,500 to $11,000 per false claim, plus attorney fees & costs-RCW 74.66.020(1)
- **Criminal Case:** Medicaid False Statement, Class C Felony, five years imprisonment and/or a $25,000 fine. RCW 74.09.230; anti-kickbacks RCW 74.09.240
- **Fraud:** Those who knowingly submit, or cause another to submit, false claims for payment of Medicaid funds
- **Knowingly:** does not require specific proof of intent to defraud.

Private Citizen Action: *Qui Tam*

- *Qui tam*--The term "*qui tam*" is translated as “[s]he who brings an action for the king[queen] as well as for himself[herself]."

- *Qui tam* is the technical term for the unique mechanism in the False Claims Act that allows persons and entities with evidence of fraud against government programs or contracts to sue the wrongdoer on behalf of the government.

How do you pronounce *qui tam*

- The simplest is “key tam” (rhymes with "ham").
- Black's Law Dictionary suggests “kweye tam” (rhymes with "eye“).
- Some say “kweye tom” (like the common name, but often said with an upper crust accent).
- And some say “kwee tam/tom” (just like it sounds, but *not* “kway”).

Filing Procedures

- The qui tam complaint must be filed “in camera” and under seal, which means that all records relating to the case must be kept on a secret docket by the Clerk of the Court. RCW 74.66.050(2).
- The U. S. District Court, Western District of Washington does not put FCA cases on PACER and any attempt to locate the case through electronic means will get a “no record found” response.
- W.D. of Washington, Lori Landis, Chief Deputy Clerk, 206-370-8483

Exempt From The PRA

- Until a matter under the FCA is final and seal lifted, the information furnished pursuant to the Act is exempt from the Washington Public Records Act (PRA), chap. 42.56 RCW. This would include the court file. RCW 74.66.030.

- Any records and other information obtained pursuant to a civil investigative demand are entirely exempt from the PRA. RCW 74.66.120(31).

Conflicts With GR 15

- GR 15 (c) (1)Sealing or Redacting Court Records. (1) In a civil case, the court or any party may request a hearing to seal or redact the court records. In a criminal case or juvenile proceedings, the court, any party, or any interested person may request a hearing to seal or redact the court records. Reasonable notice of a hearing to seal must be given to all parties in the case. In a criminal case...

- RCW 74.66.050(2) does not allow the for the defendant to be notified or served with the complaint until the seal is lifted.

GR 15(c)(4)

- Sealing of Entire Court File. When the clerk receives a court order to seal the entire court file, the clerk shall seal the court file and secure it from public access. All court records filed thereafter shall also be sealed unless otherwise ordered. The existence of a court file sealed in its entirety, unless protected by statute, is available for viewing by the public on court indices. The information on the court indices is limited to the case number, names of the parties, the notation "case sealed," the case type and cause of action in civil cases and the cause of action or charge in criminal cases, except where the conviction in a criminal case has been vacated, section (d) shall apply. The order to seal and written findings supporting the order to seal shall also remain accessible to the public, unless protected by statute.

- RCW 74.66.030 provides: “Any information furnished pursuant to this chapter is exempt from disclosure under the public records act…until final disposition and all court-ordered seals are lifted.”

GR 15(5)(C)

- Sealing of Specified Court Records. When the clerk receives a court order to seal specified court records the clerk shall:
  - (C) File the order to seal and the written findings supporting the order to seal. Both shall be accessible to the public.

- RCW 74.66.030 provides: "Any information furnished pursuant to this chapter is exempt from disclosure under the public records act…until final disposition and all court-ordered seals are lifted."

Counties Potentially Affected

- A complaint can be filed in any county in which the defendant(s) can be "found, resides, transact business, or in which any act proscribed by RCW 74.66.020 occurred." RCW 74.66.110(1).

Who Are The Parties

- The State of Washington (and any other governmental entity listed), should be identified in the court record as the primary party plaintiff because it is being brought in the "name of the government." RCW 74.66.050(1).

- In the caption, the Relator(s) should be listed after the governmental entity.

Captions

- The following information should be included on the first caption page of a complaint to the right of the parties:

FILED <u>IN CAMERA</u>
AND UNDER SEAL

or

FILED UNDER SEAL
Pursuant to RCW 74.66.050(2)

Identification of the Parties

Relator's counsel will often include a first cover caption that identifies the government, but not the relator or the defendant

State of Washington,
ex rel.
Plaintiffs

[UNDER SEAL]
Relator

v.

[UNDER SEAL]
Defendant

State of Washington,
ex rel.
Plaintiffs

v.

[UNDER SEAL]
Defendant

Then, a second caption page identifying all the parties is provided.

Who receives the complaint

- Copies of the complaint are given *only* to the WA Attorney General's Office (AGO), and to the assigned judge of the Superior Court; it is not to be served on the defendant until the court so orders. RCW 74.66.050(2).

- In the U.S. District Court, Western District Court, they pre-assign all FCA cases to a judge. (Lori Landis, Chief Deputy Clerk).

The Seal

- A qui tam complaint remains under seal for at least 60 days during which the AGO can investigate and decide whether to take over the action. RCW 74.66.020(2).

- Before the 60 day period expires, the AGO is authorized to seek an extension of the seal. RCW 74.66.050(3).

- At the federal level, most extension requests are for 6 month periods.

AGO Options

- **Intervene**. RCW 74.66.100(3). Intervention expresses the Government's intention to take over the lawsuit and act as the primary plaintiff in prosecuting any counts identified by the AGO.

- **Decline**. If declined, the relator may prosecute the action on behalf of the State. The State is not a direct party to the proceedings apart from its right to any recovery. RCW 74.66.060(3). The relator may be required to keep the AGO informed about the case and provide copies of pleadings and other material. RCW 74.66.060(3).

- **Intervene At A Later Date**. Upon a showing of good cause. RCW 74.66.060(3).

- **Move to Dismiss**. Requires court and AGO written consent to dismiss. RCW 74.66.060(2)(a); RCW 74.66.050(1). Encourage relator to voluntarily dismiss.

- **Settle The Case**. Prior to the intervention decision, regardless of relator objections. RCW 74.66.060(2)(b).

Investigative Tools

- Audits and data analysis
- Compel production of records and data: through a Civil Investigative Demand
- Evidence Under Oath: like a deposition, but not the same

Possible Court Hearings Before Unsealing

- Petitions for a court order compelling attendance or compliance.
  - May be filed in any county where the person needing to respond resides, is found, or transact business. RCW 74.66.120(25)

- Petition to modify or set aside a CID.
  - May be filed in any county where the person needing to respond resides, is found, or transacts business. RCW 74.66.120(26).

- The Washington Superior Court civil rules apply to petitions. RCW 74.66.120(30).

Initiating Intervention

- Upon intervention, the AGO has primary responsibility for prosecuting the action (RCW 74.66.060(1)), and along with the complaint would likely file:
  - 1) a notice of intervention;
  - 2) a motion to unseal the qui tam complaint and the court file

Who Is The Relator

- Usually the inside person who understands the fraud and has the evidence to support a fraud charge.
- Whistleblowers may have to overcome retaliation including losing employment and being excluded in their profession.
- Whistleblower cases take time and can have financial and emotional stress on relators and their families.
- Whistleblower relief is available. RCW 74.66.090

Examples of Fraud

- **Kickbacks & Off-label Marketing** – Pharm. Manufacturers
- **Unbundling** - Multiple billing codes instead of one
- **Double billing** – repeated billing for the same goods or service
- **Upcoding** - Inflating bills by using billing codes for more expensive illness or treatment
- **Billing for brand-named** drugs when generic drugs are actually provided
- **Unlicensed Practice** – persons other than the licensed practitioner providing the service

False Claims Act Math:

- **Assumption:** Amount defrauded from the Government is $10 M.
- **Triple damages** awarded = $30 M.
- **Relator awarded** national average of 17%, or $5.1 million, which is shared with the lawyer, & taxes are owed. Entitled to 15% - 30%.
- **Government nets** $24.9 M; typically 50% gets returned to the Federal government and 50% gets returned to the State of Washington.

Deficit Reduction Act

- **The DRA creates cash incentives for strong laws:** State's that enact a False Claims Act closely modeled on the federal version of the law, the Federal Government will increase the state share of FCA Medicaid awards by 10 percentage points.

- **10 percentage point increase.** When the Federal-State Medicaid split is 50-50, a DRA compliant state will split awards 40-60, with the state getting 60 percent.

Federal FCA Recoveries

- Since 1988, whistle-blowers have helped the U.S. government recover $24.2 billion, and 75 percent of that involved medical treatment, according to the Department of Justice.

- The pace is accelerating. Since 2009, 91 percent of the $10.6 billion recovered has come in health-care cases.

Facilities	Practitioners	Medical Support	Medical Support
Hospitals	Chiropractors	RN, PT, OT, RT	Dialysis Centers
Skilled Nursing Facilities	Doctors	Counselors, Psychologists	Ambulance, Transportation
Assisted Living	Dentists	Durable Medical Equipment	Radiology
Boarding Homes	Podiatrists	Pharmaceutical Manufacturer	Medical Device Manufacturer
Day Surgery	Optometrists, Opticians	Home Health	3rd Party Billing Co.
Mental Health Facilities	ARNP, PAs	Laboratory	Managed Care company
Substance Abuse Facility	Paramedics	Pharmacy	Medicaid Program

WA Case Metrics	June 7, 2012 through September 30, 2013
QT Global cases filed in Federal Dist. Cts. around the country	75
QT State only cases filed in WA Superior Cts.	1
QT filed in WA Federal District Cts.	2
non-QT civil cases filed in WA Superior Cts.	1
WA Intervention	0
WA formally declined	3
Civil Settlements	17
Prospective relief enforceable in WA courts- CIA, Settlement Agreements, Injunctions etc.	3
Total Active Civil Cases (includes monitored cases)	105

WA Cases	June 7, 2012 to September 30, 2013
Pharmaceutical Manuf.	48
Pharmacy	11
Laboratory	8
MD/OD	5
DME	5
Hospitals	2
Dentist	1
Home Health	1
Optometrist/Optician	1
Radiology	1
Skilled Nursing Facility	2
Other (medical device, dialysis, billing comp., orthotics)	10

WA Recoveries	6/7/2012 to 9/30/2013
WA Share QT Civil Restitution	$13,249,239
Fed. Share QT Civil Restitution	$22,502,968
Penalties Collected by WA	$8,285,087
WA State Only Non-QT (federal & state share)	$169,261
Interest collected by WA	$263,668
DRA 10% bump	$0
Amount To Relators	$0
Costs (MFCU salaries, admin., experts, etc.)	$1,050,188
Total Recoveries	**$44,470,223**

Points of Interest

- Washington's FCA does not have a statute of limitations. RCW 74.66.100(2)
- Qui Tam actions cannot be brought if the state is already a party to an administrative proceeding or civil suit on the same matter. RCW 74.66.080(1)
- Original Source & *No* Public Disclosure. RCW 74.66.080

Superior Court of the State of Washington
for the County of King

WILLIAM L. DOWNING
Judge, Department No. 43

Seattle, Washington
98104-2312

October 3, 2013

Hon. Thomas J. Wynne
Snohomish County Superior Court
3000 Rockefeller Ave., MS 502
Everett, WA 98201-4046

Re: Proposed Amendment to GR 15

Dear Judge Wynne:

Thank you again for all your good work on the JISC Data Dissemination Committee. Having had a chance to look over what I understand to be a proposed amendment to GR 15, I did want to offer a few comments for your consideration.

In section (c)(2) of the proposed rule, there appears to me to be a significant watering down of what I believe should be a rigorous process for a judge to order the elimination of the public's right to access their court records. Currently, the rule requires the court to enter written findings that the public's interest is outweighed by a specifically identified privacy or safety concern that the court finds to be compelling. It is my belief that the state and federal constitutions still require this. Yet, the proposed rule would simply have the judge "consider" a list of factors before denying the public access. My dictionary defines "consider" as "to think carefully about." Remember that these issues most typically arise when the litigants are in agreement and there is nobody arguing on behalf of the public interest. For the presumption in favor of public access to have even a fighting chance in these circumstances, the rule has to clearly tell the judge what he or she must find and not simply consider. I fear that the proposed language (inviting a judge to orally state "I've considered all the factors and now I'm sealing these records") is a big step backwards.

In what now appears to be GR 15(c)(4)(B), I have an old complaint. I believe a sealing or redaction requires the finding of a "compelling interest" that outweighs the value of public scrutiny. Parties to litigation routinely serve their private interests through agreed protective orders issued upon an ostensible showing of "good cause." How, then, can a sealing order be justified merely because it "furthers a protective order"?

My third concern is with a perceived shortcoming in GR 15(c)(5). I applaud the inclusion of a requirement for an expiration date attached to any sealing or redaction order. However, I think language should be added to incorporate the constitutional requirement that the duration of the denial of access be as short as possible and be tied to the finding of a need that continues to be compelling throughout that period. Without this language, I fear we will see more orders denying public access to public records for "ninety-nine years" (and I know that court clerks, looking out for their successors, don't like such orders either).

My fourth and final concern is more difficult for me to get a handle on – although perhaps the most important. It relates to the many new ways in which the proposed rule seems to facilitate the removal from public view of so much information about how police, prosecutors and judges have handled adult and juvenile criminal cases. This all raises some very important and difficult issues of social policy as well as political theory and constitutional law and I guess I'm just left feeling some discomfort with the rule-making process as the forum for their resolution.

Thank you for considering and sharing my comments.

Sincerely,

William L. Downing

WACDL Washington Association of Criminal Defense Lawyers

Douglas R. Hyldahl
President

Teresa Mathis
Executive Director

October 3, 2013

Data Dissemination Committee
c/o The Honorable Thomas J. Wynne
Snohomish County Superior Court
3000 Rockefeller Ave
M/S 502
Everett, WA 98201

Re: Comments on Proposed General Rule 15

Dear Members of the Data Dissemination Committee,

WACDL thanks the committee for the opportunity to comment upon the proposed changes to General Rule 15, governing access to and sealing of court records. For over 25 years, WACDL has worked to improve the quality and administration of justice and to promote a rational and humane criminal justice system. Our members work hard in court to give life to the principle that people are innocent until guilt is proven beyond a reasonable doubt.

WACDL is strongly committed to the open administration of justice and the public's ability to oversee the courts, but also works on behalf of our members and their clients to protect individual privacy and preserve opportunities for successful reentry. The reasons these issues are critically important to our clients' lives are described in WACDL's April 11, 2013 letter to this committee.

Furthermore, for the reasons discussed in WACDL's letter to this Committee on April 11th of this year, we support the proposed changes to GR 15(c)(4)(D) that would permit sealing of non-conviction records. Also as discussed in those letters, we continue to oppose amending GR 15(c)(6) to prohibit redaction of a name in the court index; that issue remains pending in the Washington State Supreme Court in *Hundtofte v. Encarnacion*, No. 88036-1. We acknowledge that the current draft of GR 15 has removed the language of GR 15(c)(4) that was problematic, but the problems in GR 15(c)(6), described in WACDL's April 11 letter, remain.

Sincerely,

Teresa Mathis
Executive Director

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info@wacdl.org
wacdl.org

WACDL Washington Association of Criminal Defense Lawyers

Kimberly N. Gordon
President

Teresa Mathis
Executive Director

April 11, 2013

Data Dissemination Committee
c/o The Honorable Thomas J. Wynne
Snohomish County Superior Court
3000 Rockefeller Ave.
M/S 502
Everett, WA 98201

RE: Comments to proposed Changes to General Rules 15 and 31

Dear Members of the Data Dissemination Committee,

I write on behalf of the Washington Association of Criminal Defense Lawyers (WACDL). For 25 years, WACDL has worked to improve the quality and administration of justice and to promote a rational and humane criminal justice system. Our members work hard in court to give life to the principle that people are innocent until guilt is proven beyond a reasonable doubt. This principle "is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."[1]

If this fundamental principle is not also protected outside of the courtroom, citizens do not receive true justice. Such is the case with nonconviction data – arrest and court records relating to cases in which the government has never met its burden of proof, or cases in which an individual has earned, by all accounts, the right to say that they have never been convicted. We appreciate the Committee's dedication to working on this issue and thank you for the opportunity to provide comment.

We support amending the rules to create a clear process by which people can have courts make individualized assessments about the dissemination of nonconviction data. Our work has shown us how difficult it is to balance the many interests affected by dissemination of nonconviction data. We appreciate the Committee's hard work in attempting to do so and support much of the proposed language. We believe that much of the language comes close to providing a clear process by which people can have courts make individualized assessments about the dissemination of nonconviction data. Such a process will help make the presumption of innocence real, and also furthers these other important goals:

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[1] *Coffin v. United States*, 156 U.S. 432 (895).

- It will reduce unintended and unjustified but racially and economically disparate harms found in Washington's criminal justice system. Thereby, it will assist Washington's Board for Judicial Administration in fulfilling its Resolutions to "[e]valuate existing and proposed rules, policies and practices to determine whether they contribute to racial and ethnic disproportionality or disparate impact in the justice system," to "[i]dentify corrective measures and pursue system-wide improvements in racial and ethnic fairness," and to "[d]evelop and implement action plans to … eliminate racial and ethnic disproportionality, disparate treatment, and disparate impact in the justice system … ."

- It will improve our communities by removing unwarranted barriers to employment and safe, stable housing.

- It will bring these rules and the court's approach to criminal records in line with changing technology.

- It will make the protections offered Washingtonians consistent with those available in many other states.[2]

- It will give effect to Washington's Access to Justice Technology Principles, which recognize that "access to justice is a fundamental right in Washington State" and that:

  > use of technologies in the Washington State justice system must protect and advance the fundamental right of equal access to justice. There is a particular need to avoid creating or increasing barriers to access and to reduce or remove existing barriers for those who are or may be excluded or underserved, including those not represented by counsel.

  Principle 3 notes "the justice system has the dual responsibility of being open to the public and protecting personal privacy."

- It will strike the balance enunciated by the United States Supreme Court – that with time, the public's right to know about non-conviction records decreases and an individual's right to privacy increases.[3] This balance was already recognized by this Committee in 2008 when it concluded:

  > [o]ther court records … may not have been intended to be open to the public for long periods of time, especially now with remote accessibility of electronic court records. For example, the work group raised issues regarding the retention of non-conviction information for long periods of time. Such court records can be misleading, especially when it relies on AOC's name/case search "public view"

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[2] Summaries of some of these protections can be found in the Matthew Rosen's article via http://xa.yimg.com/kq/groups/1624843/1578842625/name/Expanding+Relief+in+Delaware+Report.pdf, and at U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 4 (2006), http://www.justice.gov/olp/ag_bgchecks_report.pdf.

[3] *U.S. D.O.J. Et al v. Reporters for Freedom of Association et al.* 489 U.S. 749 (1989).

> website, which provides very limited and specific information. Extended retention of these records serves no public purpose and may be a disservice to the public and subject of these records.[4]

- It is consistent with Executive Order 00-33 re: Public Records Privacy Protections, which declares in part:

> Citizens of the state of Washington are gravely concerned about their privacy, and that concern is well-founded. … It is the state government's added responsibility to protect the personal privacy rights of Washington's citizens and lead the private sector by example and by law.

- It works to remedy the problems highlighted and reforms suggested and justified by the Equal Employment Opportunity Commission,[5] the National Consumer Law Center,[6] the American Bar Association,[7] the New York Times,[8] MSNBC,[9] and Princeton University's Institute for Research on Poverty.[10]

Finally, people are the most important reasons to amend the rules pertaining to dissemination of nonconviction data. They include a single mother falsely accused of rape of a child while fleeing her abusive relationship. She was acquitted of all charges, but the record of the false accusation of rape continues to show up when she applies for jobs. They include a man placed on temporary leave by his employer after the discovery of a ten-year-old accusation. He lost work and pay for two months until he was able to obtain the records to show that the case had

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[4] A copy of the complete Report is attached as Appendix A.

[5] *See* http://www.msnbc.msn.com/id/38740828/ns/business-careers/t/background-checks-can-offer-bad-history-lesson.

[6] The National Consumer Law Center published a comprehensive and evidence-based 2012 report titled "Broken Records." The Report concludes, in part, that

> Despite the importance of the accuracy of criminal background reports, evidence indicates that professional background screening companies routinely make mistakes with grave consequences for job seekers. … With the explosive growth of this industry, it is essential that the "Wild West" of employment screening be reined in so that consumers are not guilty until proven innocent. Currently, lack of accountability and incentives to cut corners to save money mean that consumers pay for inaccurate information with their jobs, and thus, their families' livelihood.

The entire Report can be found at http://www.nclc.org/images/pdf/pr-reports/broken-records-report.pdf.

[7] *See http://www.abacollateralconsequences.org/.*

[8] *See "Faulty Criminal Background Checks*" http://www.nytimes.com/2012/07/25/opinion/faulty-criminal-background-checks.html?_r=0.

> Sloppy reporting was not a huge problem in the past when there were fewer companies gathering data and the only way to get it was to examine court records in person. But, in recent years, this has become a computer-driven industry, with companies buying often incomplete records in bulk from the courts or from other screening companies and then not updating them. An incomplete report might show, for instance, that a job candidate was charged with a crime but not that he was exonerated. And faulty data can circulate forever.

[9] See *Supra*, note 5.

[10] *See The Mark of a Criminal Record* http://www.princeton.edu/~pager/pager_ajs.pdf and http://www.princeton.edu/~pager/annals_sequencingdisadvantage.pdf.

been dismissed. And they include a man who was arrested here 20 years ago on a misdemeanor charge that was later dismissed. Even though he is now a successful businessman who lives in New York, this ancient record causes him problems with international travel and housing. Just recently, his friend was denied a mortgage for an apartment because he was the co-signer on the mortgage and the index from his otherwise sealed, "nonconviction" record was discovered. Other stories abound on a local and national level.[11]

At the same time, we have serious concerns about the language proposed in GR 15(c)(4) and GR 15(c)(6). These sections, either alone or together, constitute a giant step backwards, making it even harder for anyone who seeks to limit the dissemination of nonconviction data. They will reduce access to justice for hundreds, if not thousands, of individuals.

GR 15(c)(4)'s requirement that the proponent of sealing and redaction "distinguish their case from similarly situated individuals" makes the remedies unavailable to most people. In fact, this amendment would result in a General Rule that is even *worse* than what currently exists. We understand that this proposed language is a response to the Court of Appeal's recent decision in *Hundtofte v. Encarnacion*.[12] But our Supreme Court's review of that case is pending, and it has been given strong reasons to disagree with the lower court's unprecedented decision.

GR 15(c)(6)'s upends the status quo recognized in the Court of Appeals decision in *J.S. v. State of Washington*.[13] In that case, the Court confirmed that GR 15(d)[14] does not restrict the ability of a court to redact, but "simply describes procedures and limits to public information when an 'entire court file' is ordered sealed."[15] GR 15(c)(6) should likewise make it clear that courts are authorized to order redaction of names from public court indices, when redaction is otherwise supported by factors found in the *Ishakawa* decision and GR 15(c)(2). We have represented too many people who are harmed solely by the unfair implication drawn from a name appearing in a case index. Indeed, this is the case with the man referenced in the last example provided above; the index connecting him to cases containing 20-year-old nonconviction data resulted in the denial of a mortgage.

Throughout the country, we are celebrating the 50th Anniversary of *Gideon v. Wainwright*. In the main opinion filed in that case, Justice Hugo L. Black, wrote this about the right to counsel:

> Without it, though [a layman] be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

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[11] *See* "*Think it Can't Happen to You? Stories of Real People Harmed by Inaccurate or Misleading Criminal Background Check Reports."* *http://www.nclc.org/images/pdf/pr-reports/broken-records-stories.pdf.*

[12] 169 Wn. App. 498, 280 P.3d 513 (Div. I, 2012).

[13] No. 65843-3-I.

[14] GR 15(d) currently provides:

> In cases where a criminal conviction has been vacated and an order to seal entered, the information in the public court indices shall be limited to the case number, case type with the notation "DV" if the case involved domestic violence, the adult or juvenile's name, and the notation "vacated."

[15] Slip. Op. at 10-11.

Similarly, without a means to truly prevent the dissemination of nonconviction data, individuals who have not been found guilty still face many of the dangers of conviction. This is because they cannot do anything about the unfettered dissemination of that information.
Currently, we constantly hear from people whom are denied meaningful participation in our society, even though they have never been convicted of any crime. Many of them have been led to believe by judges, by defense lawyers, and by prosecutors, that dismissal of the case or the decision not to charge, means something. When they learn otherwise, their faith and trust in our justice system is shaken to its core. Without changes to GR 15(c)(4) and (c)(6), the amendments will have little value. Individuals who otherwise go through the detailed and laborious process to obtain a favorable ruling will still find that they are unfairly defined by nonconviction data.

We are very supportive of the Committee's efforts to draft amendments to GR 15 and GR 31. We appreciate the opportunity to provide comment and are willing to work together with the Committee to find language that addresses these concerns.

Very Truly Yours,

WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Kimberly N. Gordon
President

Encl.

SARAH DUNNE
LEGAL DIRECTOR

LA ROND BAKER
NANCY TALNER
VANESSA HERNANDEZ
STAFF ATTORNEYS

MARGARET CHEN
FLOYD AND DELORES JONES FAMILY FELLOW

October 4, 2013

Data Dissemination Committee
c/o The Honorable Thomas J. Wynne
Snohomish County Superior Court
3000 Rockefeller Ave
M/S 502
Everett, WA 98201

Re: Comments on Proposed General Rule 15

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION
901 FIFTH AVENUE #630
SEATTLE, WA 98164
T/206.624.2184
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WWW.ACLU-WA.ORG

JEAN ROBINSON
BOARD PRESIDENT

KATHLEEN TAYLOR
EXECUTIVE DIRECTOR

Dear Members of the Data Dissemination Committee,

The ACLU of Washington (ACLU) thanks the committee for the continued 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 also seeks to protect individual privacy and preserve opportunities for successful reentry.

For the reasons discussed in our letters to this Committee on April 11th and July 30th of this year, we support the proposed changes to GR 15(c)(4)(D) that would permit sealing of non-conviction records. Also as discussed in those letters, we oppose amending GR 15(c)(6) to prohibit redaction of a name in the court index. We appreciate the Committee's consideration of these issues and welcome any questions.

Sincerely,

Vanessa Torres Hernandez
vhernandez@aclu-wa.org.
ACLU-WA Second Chances Project

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October 4, 2013

Judge Thomas Wynne
Chair, Data Dissemination Committee
Judicial Information System
Snohomish County Superior Courthouse
3000 Rockefeller Avenue
Dept. 9, Fl 5
Everett, WA 98201

Re: Proposed Amendments to GR 15

Dear Judge Wynne:

I am writing to reiterate the concerns of the Rental Housing Association ("RHA") about the Committee's proposed amendments to GR 15 that I have previously articulated in my July 24, 2013 letter to you and in my August 28, 2013 letter to Justice Fairhurst, copies of which are attached hereto.

On the Committee's proposed GR 15 amendments, RHA shares the concerns reflected in the October 3 letter of Judge William Downing of the King County Superior Court and believes the proposed changes to the GR 15 draft by the Committee reflecting Judge Downing's concerns are beneficial.

RHA continues to believe that any changes to GR 15 before the *Encarnacion* is decided by our Supreme Court would be premature.

RHA further believes that GR 15 should be a procedural rule only. Decisions on substantive policy questions of whether particular court records are accessible are for the Legislature.

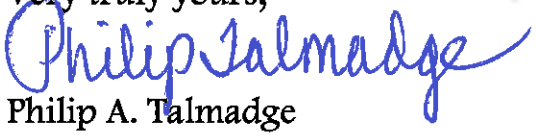
RHA is concerned, in particular, with the proposed new GR 15(c)(4) and GR 15(d) that purport to authorize the sealing of records of persons who have received executive clemency. A Governor may choose to pardon for a variety of reasons. The underlying conviction should remain in the public domain.

Similarly, GR 15(d)(2) presumably includes acquittals by reason of insanity or due to incompetency to stand trial. The public deserves more information on such matters than "non-conviction."

Finally, the comment to the proposed amendment to GR 15(c)(4)(E) again mentions "deliberations of the Joint Legislative Court Records Privacy Workgroup in 2012." Deliberations of such a group is not a formal legislative committee, and that did not result in legislation or other policy adopted by the Legislature are not definitive actions by the Legislature of which the Committee should take cognizance.

Thank you for your attention.

Very truly yours,



Philip A. Talmadge

attachments

cc: Stephanie Happold

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July 24, 2013

Judge Thomas J. Wynne
Chair, Data Dissemination Committee
Judicial Information System
Snohomish County Superior Courthouse
3000 Rockefeller Avenue
Dept. 9, Floor 5
Everett, WA 98201

Re: Proposed Amendments to GR 15, 31

Dear Judge Wynne:

I am writing to you on behalf of the Rental Housing Association ("RHA") to express its concerns regarding the proposed amendments to GR 15, 31.

As you know, JIS's Data Dissemination Committee is considering extensive amendments to GR 15, the courts' rule addressing the sealing and redaction of court records, and GR 31, relating to access to court records.

RHA shares the Committee's belief that it is entirely appropriate for the Committee to establish appropriate *procedural* standards by which the public seeks to seal, redact, unseal, or access public records, with a major caveat to be expressed below. However, on the public policy as to which court records may be accessed, *substantive* access policy, RHA strongly believes that this is a matter for legislative policymaking where the broader opportunities for public participation can come into play.

The starting place for any discussion of access to court records should be the policy of *transparency*. The people themselves articulated this policy when they enacted Initiative 276:

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is

> good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected.

It is no different for court records, as GR 31(a) itself has acknowledged, particularly where article I, § 10 of our Constitution is also implicated.

As noted above, RHA supports clear procedural rules in GR 15 and 31. However, the proposed comments to GR 15 make reference to specific court decisions and statutes. Plainly, court decisions and statutes may change. It may not be wise to tie the procedural rules for access, sealing, redacting, and unsealing records to specific decisions or statutes, except as may be absolutely necessary.

More critically, from RHA's perspective, is any effort by amendments to GR 15 and 31 to enact substantive changes on access to court records. This Committee should know that *numerous* bills were offered in the 2013 legislative session purporting to restrict access to court records, records that have been used to make employment and housing decisions. *See* attached. RHA is concerned that the proponents of these bills, having failed to enact them in the Legislature, are turning to this Committee as an alternate forum in which to secure relief that they could not obtain in the Legislature.[1]

RHA *opposes* any changes in GR 15 or 31 that affect substantive policy on access to court records. The policy of access announced in GR 31(a) should remain intact and this Committee should not be a forum for enacting substantive changes that detract from a policy of public access to court records. The Legislature, with its broader opportunities for public participation, is the more appropriate forum for such efforts.

---

[1] For example, in California, legislation was enacted limiting access to unlawful detainer information. The California Supreme Court invalidated such legislation. *U.D. Registry, Inc. v. State*, 40 Cal. Rptr.2d 228 (Cal. App. 1995), *review denied* (Aug. 17, 1995), *cert. denied, sub. nom. Cisneros v. U.D. Registry, Inc.*, 516 U.S. 1074 (1996) (statute prohibiting consumer credit report from containing unlawful detainer information violated First Amendment).

I will be participating in the Committee's July 29 teleconference. If I can provide additional information to you and the Committee on RHA's behalf, please do not hesitate to let me know.

Very truly yours,

Philip A. Talmadge

cc: Bill Hinkle

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August 28, 2013

Justice Mary Fairhurst
Chair, Judicial Information System Committee
Washington State Supreme Court
PO Box 40929
Olympia, WA 98504-0929

Re: *September 6, 2013 JISC Meeting*

Dear Justice Fairhurst:

I am writing to you on behalf of the Rental Housing Association of Washington ("RHA"), a statewide organization of over 5000 rental housing owners and managers, to express its concerns regarding any proposed amendments to GR 15, 31 and the recent decision of the JISC Data Dissemination Committee to prohibit the bulk dissemination of juvenile offender court records in JIS by AOC.

As you know, JISC's Data Dissemination Committee is considering extensive amendments to GR 15, the courts' rule addressing the sealing and redaction of court records, and GR 31, relating to access to court records. At its July 31 meeting, the Committee specifically voted to amend its policy on data dissemination to "exclude from any bulk distribution by the Administrative Office of the Courts [juvenile offender records] otherwise authorized by GR 31(a), except for research purposes as permitted by statute or court rule." RHA believes that such a step is a serious move contrary to transparency in JIS. RHA wants to provide you its background thoughts on any GR 15/31 amendments and the decision regarding bulk dissemination of juvenile offender records.

RHA has the highest respect for Judge Thomas Wynne, as chair, and the members of the Data Dissemination Committee. The Committee's task is a most serious one. However, RHA believes that the Data Dissemination Committee *assumed* that it needed to act with respect to juvenile records based on the alleged interest of the Legislature on that topic. The Committee has overstated legislative "concern" on the issue. Moreover, any such action on juvenile records is inconsistent with the policy on data

dissemination RHA believes should animate JISC's efforts. Finally, any JISC decision on GR 15/31 or juvenile records should await the Supreme Court in *Hundtofte v. Encarnacion*, 169 Wn. App. 498, 280 P3d 513 (2012), *review granted*, 176 Wn.2d 1019 (2013).

(1) The Legislature Has Not Directed Action by the Data Dissemination Committee Decision on Juvenile Records

On the legislative issue, Senator Debbie Regala (who retired after the 2012 session) sponsored SB 5019 in the 2011-2012 legislative cycle. That bill purported to restrict access to "non conviction records" relating to individuals in the criminal justice system. That bill did not pass. In 2013, SB 5341 was introduced in which the Legislature called upon the Supreme Court to adopt court rules to implement "public policy interests" associated with offender non-conviction records. That bill did not even receive public hearing.

Similarly, HB 1651 was introduced in the 2013 session to restrict access to the court file of juvenile offenders. This legislation also failed.

Thus, efforts to limit access to court records, particularly those of juvenile offenders, have shifted from the Legislature to JISC and the Data Dissemination Committee when the legislative efforts were unsuccessful. The Legislature has not asked JISC to act. JISC should not tolerate this forum-shopping.

(2) The Proper Policy for JIS Data Dissemination

RHA believes that it is entirely appropriate for JISC and its Data Dissemination Committee to establish appropriate *procedural* standards by which the public seeks to seal, redact, unseal, or access court records. However, on the public policy as to which court records may be accessed, *substantive* access policy, RHA strongly believes that this is a matter for legislative policymaking where the broader opportunities for public participation can come into play.

The starting place for any discussion of access to court records should be the policy of *transparency*. The people themselves articulated this policy when they enacted Initiative 276:

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority,

> do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected.

It is no different for court records, as GR 31(a) itself has acknowledged, particularly where article I, § 10 of our Constitution is also implicated.

RHA opposes any effort by amendments to GR 15 and 31 or the Data Dissemination Policy to enact substantive changes on access to court records. The policy of access announced in GR 31(a) should remain intact and JISC and the Data Dissemination Committee should not be a forum for enacting substantive changes that detract from a policy of public access to court records. The Legislature, with its broader opportunities for public participation, is the more appropriate forum for such efforts.

Specifically, RHA believes that an amendment to the Data Dissemination policy forbidding bulk distribution of juvenile offender records by JIS is a *substantive* decision, and represents a first step a broader policy, contrary to principles of transparency, that attempts to restrict how and by whom records *that are otherwise public*[1] may be used. This is inappropriate.

Further, such an effort to limit access raises constitutional concerns. For example, in California, legislation was enacted limiting access to unlawful detainer information. California courts invalidated such legislation. *U.D. Registry, Inc. v. State*, 40 Cal. Rptr.2d 228 (Cal. App. 1995), *review denied* (Aug. 17, 1995), *cert. denied, sub. nom. Cisneros v. U.D. Registry, Inc.*, 516 U.S. 1074 (1996) (statute prohibiting consumer credit report from containing unlawful detainer information violated First Amendment).

(3) <u>JISC Should Not Act Until Encarnacion Is Decided</u>

In *Encarnacion*, the Court of Appeals determined that tenants who had settled their unlawful detainer action were not entitled to an order redacting the court records and inserting initials for their actual names.

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[1] The juvenile records at issue are accessible, to the degree permitted by statute, in public court files.

Division I concluded that article I, § 10 of the Washington Constitution on openness of judicial decisions also compelled full access to court records. That constitutional provision assured the public and the media a right to access to court documents. The policy of openness as to public records was so fundamental as to make any exception to that policy "appropriate only under the most unusual circumstances" that implicated significant interests.

The Supreme Court has granted review in *Encarnacion* and heard arguments in the case. It would be premature for JISC to make any recommendations to the Court on GR 15 or 31, or for the Data Dissemination Committee to amend the Data Dissemination Policy until the Court files its opinion in *Encarnacion*.

RHA will be present at JISC's upcoming September 6 meeting. If I can provide additional information to you and the JISC on RHA's behalf, please do not hesitate to let me know.

Very truly yours,

Philip A. Talmadge

cc: Bill Hinkle

Columbia Legal Services

Institutions Project

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(206) 464-5933
Aurora Martin, Director

Ms. Stephanie Happold
Data Dissemination Administrator
Administrative Office of the Courts
PO Box 41170
Olympia, WA 98504-1170

To: Members of the Data Dissemination Committee
From: Merf Ehman
Re: Proposed Changes to GR 15
Date: October 3, 2013

Columbia Legal Services (CLS) thanks the Committee for their efforts in amending GR 15 and for an additional opportunity to comment.

CLS is a statewide nonprofit legal services organization based in Seattle that has provided free civil legal services to low-income individuals and families since 1967. The organization's mission is to advocate on behalf of people living in poverty by seeking social and economic justice for them through systemic change. CLS does this through transactional legal work to community based organizations, large scale litigation, policy advocacy and community education. CLS exists 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. This work includes supporting the successful and safe transition of children and adults with criminal records back to our communities. We submit these changes on behalf of our clients.

We support the changes made in the second GR 15 proposal regarding juvenile records. We continue to support the proposed changes to the treatment of non-conviction data under the proposed rule. However, we still have serious concerns regarding the absolute prohibition on any redaction to the court indices.

Juvenile Records

CLS applauds the Dissemination Committee's decision to remove the proposed language that would have required an *Ishikawa* analysis for all juvenile sealing applicants. Dissemination Committee Draft Proposal, GR 15(c)(2)(A) (April 2013). This change restores the current language of GR 15 and is consistent with the requirements of RCW 13.50.050. Requiring a court to consider the Ishikawa factors would be inconsistent with the legislature's statutory intent to treat juveniles involved in the criminal justice system differently than adults. This differential treatment is based upon the developmental differences between juveniles and adults and the juvenile justice system's rehabilitative purpose.

We support the Committee's proposal to exempt children from the requirement that every sealing order specify an expiration date. Proposed GR 15(c)(5). No expiration date is required under the Juvenile Justice Act. This change will help effectuate the purpose of the Act – to facilitate the rehabilitation of those with youthful offenses. Additionally, we agree with the committee's proposal to make the existence of a sealed juvenile offender case not accessible to

the public in accordance with RCW13.50.050(14)(a)[1]. Proposed GR 15(e). This change is essential to carrying out the strong legislative intent to keep juvenile records confidential. The statute requires all agencies to state that it cannot give any information concerning sealed juvenile records including whether or not they exist. *Id.*

Non-conviction Data

CLS supports the amendments to GR 15(c)(4) that include additions to the list of findings that may be weighed when a court considers whether to seal a record. Under the proposed change, a court may now consider whether the information a party tries to seal includes preliminary appearances, dismissed charges, pardons or acquittals.

This change removes a black mark from the record of Washington residents who did not engage in any illegal conduct. No longer will they need to explain that the charges were dismissed or were never even filed. This change furthers the fundamental constitutional principle of assumed innocence.

For those that made mistakes and did engage in unlawful conduct, this change will further their rehabilitation process. Many times people have turned their lives around, but a criminal record continues to haunt them- even a very old one. Sealing and redaction of a court record will facilitate reentry and rehabilitation. This supports a purpose of our criminal justice system, which is to "offer the offender an opportunity to improve himself or herself." 9.94A.010.

Court Index Redaction

We strongly oppose the proposal to bar redaction of a name from the JIS index. Proposed GR 15(c)(6). There is no case law supporting the proposition that redacting a name from a court index is not a viable option under both GR 15 and *Ishikawa. See Hundtofte v. Encarnacion,* 169 Wash. App. 498, (2012) *review granted*, 297 P.3d 707 (Wash. 2013)*; Indigo Real Estate Services v. Rousey,* 151 Wash.App. 941 (Wash.App. Div. 1 2009). In *Rousey,* a party moved to have her name redacted from the court index and the court remanded. The court emphasized that after the trial court applies GR 15 and the *Ishikawa* factors, that it still "must exercise discretion to decide whether the interests asserted by Rousey are compelling enough to override the presumption of openness." *Id.* at 953. The court left the decision of whether and how to redact a court record up to the discretion of the trial court. *Id.* GR 15 should not reduce the discretion of a trial court to determine the most constitutionally appropriate means to redact a court file given the circumstances presented.

Although the public has a constitutional right of access to court records, this right is not absolute. *State v. Waldon,* 148 Wash.App. 952, 957, 962 (2009); *Seattle Times v. Ishikawa,* 87 Wash.2d 30 (1982). A party should have the opportunity to present evidence to show compelling circumstance to redact his or her name from a court index. Whether the party's compelling circumstances might outweigh the public's right of access to that particular part of the court

[1] The comment's cite to the statute should be RCW 13.50.050 rather than RCW 13

record should be determined by a trial court using an analysis under GR 15 and *Ishikawa*. *Rousey*, 151 Wash.App. at 953.

For example, a woman who has vacated her criminal conviction may wish to seek a redaction of her name from the JIS index. She applies for many jobs, but is continually denied employment because her name appears in a court index showing she was a defendant in a criminal case. These continued rejections happen even though the case was vacated. Under these circumstances, she should have the opportunity to petition the court for a redaction of her name from the court index. Moreover, allowing an opportunity to redact in a case regarding a vacated criminal record is in line with the legislature's intent. The statute provides that once a criminal conviction is vacated "the offender shall be released from all penalties and disabilities resulting from the offense." RCW 9.94A.640(3).This includes permitting the party to state on employment applications that he or she was never convicted of that crime. *Id.*

Another example of someone who might an opportunity to seek redaction is an innocent tenant who won his eviction case. In those circumstances, the tenant prevailed at court, but cannot find housing because his name remains in the court index. Under the proposal, he would have no opportunity to seek redaction of his name from the court index by demonstrating compelling circumstances and meeting the requirements of GR 15 and *Ishikawa* Whether a redaction is appropriate should be made by a trial court under GR 15 and *Ishikewa* rather than predetermined by a court rule.

center for
CHILDREN & YOUTH
JUSTICE

September 20, 2013

JIS Data Dissemination Committee
Administrative Office of the Courts
PO Box 41170
Olympia, WA 98504-1170

RE: Final Proposed GR 15 Draft

Dear Judge Wynne and Members of the Committee:

I write in support of the JIS Data Dissemination Committee's final proposed amended GR 15. We at the Center for Children & Youth Justice greatly appreciate the committee taking into consideration the impact of this rule change on vulnerable youth and young adults.

We appreciate the Committee's hard work and commitment to addressing the need for public safety and open courts. In addition, you've recognized that a large number of youth in the juvenile justice system are also youth who are or have been in the child welfare system, these young people face formidable barriers as they try to become self-supporting and positive contributors to society while lacking the support and resources that many other young people have as they begin their journey into adulthood. Their juvenile offense records, when public, are frequently used to deny them employment, housing, and even educational benefits, essential components of independence. This happens even when these young people have remained clear from involvement with the justice system for significant periods of time.

Thank you again for your work and for allowing us to provide comments throughout the rule-making process. The Center for Children & Youth Justice will continue to be an available resource for you on this issue. Please do not hesitate to contact me if you have any questions or concerns.

Very truly yours,

Bobbe J. Bridge

Justice Bobbe J. Bridge (ret.)
Founding President/CEO
Center for Children & Youth Justice

Better systems. Better lives.

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Christie Hedman, *Executive Director*
Michael Kawamura, *President*

Telephone: (206)623-4321
Web: *www.defensenet.org*

October 2, 2013

Data Dissemination Committee
c/o The Honorable Thomas J. Wynne
Snohomish County Superior Court
3000 Rockefeller Ave
M/S 502
Everett, WA 98201

Re: Comments on Proposed General Rule 15

Dear Data Dissemination Committee,

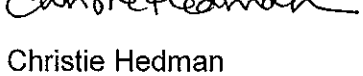
I am writing on behalf of the Washington Defender Association (WDA) to support proposed changes to General Rule 15(c)(4)(D), governing access to and sealing of court records, and to express our opposition to the proposed amendments to GR 15(c)(6). WDA was established in 1983 and has over 1300 members who provide public defense services across Washington. The indiscriminate dissemination of court records has significantly affected our clients' ability to move on with their lives after involvement in the justice system and is of grave concern to us.

The proposed changes to GR 15(c)(4)(D) permitting sealing of non-conviction records are crucial to protect former public defense clients from the misleading use of non-conviction data that may prevent them from obtaining or retaining employment, housing, or volunteering for their children's school activities.

We oppose amending GR 15(c)(6) to prohibit redaction of a name in the court index as that issue remains pending in the Supreme Court in *Hundtofte v. Encarnacion.*

Please let me know if you have any questions or if I can provide you with further information. I can be reached at 206-623-4321 or at hedman@defensenet.org.

Sincerely,



Christie Hedman
Executive Director

DANIEL T. SATTERBERG
PROSECUTING ATTORNEY

King County

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Stephanie Happold
Data Dissemination Administrator
Administrative Office of the Courts
PO Box 41170
Olympia, WA 98504-1170

RE: Comments to Proposed Changes to GR 15

Dear Ms. Happold,

Thank you for soliciting comments regarding the proposed changes to GR 15. My comments are set forth below.

1. **Adding the Ishikawa[1] 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 Are Presumed Open Under Art. I, § 10.**

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 proposals should be rejected for the following reasons.

First, 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.

Second, the Washington Supreme Court has repeatedly rejected arguments that any particular type of record is categorically exempt from article I, §10 of the Washington Constitution. Allied Daily Newspapers of Wash. v. Eikenberry, 121 Wn.2d 205, 848

[1] Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982).

P.2d 1258 (1993) (statute unconstitutional where it required courts to redact identifying information of child victims of sexual assault made public during the course of trial or contained in court records); In re Detention of D.F.F., 172 Wn.2d 37, 256 P.3d 357 (2011) (court rule for involuntary commitment proceedings unconstitutional to the extent that it presumed closure instead of openness); State v. Chen, No. 87350-0, slip op. at 2, 2013 WL 4758248 (Wash. Sept. 5, 2013) (notwithstanding statutory provisions that arguably suggest competency reports are private, "once a competency evaluation becomes a court record, it also becomes subject to the constitutional presumption of openness, which can be rebutted only when the court makes an individualized finding that the Ishikawa factors weigh in favor of sealing."). *See also* State v. DeLauro, 163 Wn. App. 290, 258 P.3d 696 (2011) (competency reports relied upon by court are presumed open).

If neither the Supreme Court through it's rule-making power, nor the legislature through statutory law, can exempt a category of records from article I, § 10, then it is certainly inappropriate to create such an exemption through this changes to this rule.

Comments to the proposed rules note that juvenile systems have been rehabilitative but those comments fail to address the fact that even rehabilitative systems can be abused where records are routinely sealed, and that there is a substantial body of literature arguing that juvenile court systems are not served by secrecy of proceedings or records. *See* William McHenry Horne, The Movement to Open Juvenile Courts: Realizing the Significance of Public Discourse in First Amendment Analysis, 39 Ind. L. Rev. 659 (2006) ("History sheds little light on whether juvenile court proceedings should be open"); Stephan E. Oestreicher, Jr., Toward Fundamental Fairness in the Kangaroo Courtroom: The Due Process Case Against Statutes Presumptively Closing Juvenile Proceedings, 54 Vand.L.Rev. 1751, 1758-68 (2001) (discussing history of juvenile courts and arguing that "...as the United States Supreme Court suggested ... if a person's liberty is at stake, public scrutiny is the only tolerably efficient check against potential abuse or malfunction of the adjudicative process.") (internal quotation marks omitted); Emily Bazelon, Public Access to Juvenile and Family Court: Should the Courtroom Doors Be Open or Closed, 18 Yale. & Pol'y Rev. 155, 168-80 (1999) (summarizing history of closure versus openness); Jan L. Trasen, Note, Privacy v. Public Access to Juvenile Court Proceedings: Do Closed Hearings Protect the Child or The System?, 15 B.C. Third World L.J. 359, 369-74 (1995).

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, even if there is a "clear legislative intent" to treat juvenile records differently. The constitutionality of this question should be addressed by the courts.

Third, 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.

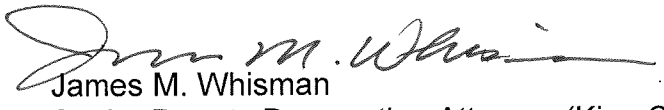
This proposed addition appears to be consistent with the McEnroe decision and will inform parties how to submit documents without sacrificing their privacy. However, the proposed rule does not address an issue that was latent, and unaddressed, in McEnroe, to wit: under what circumstances may a party 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,



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