Memorandum

To: DMCJA Board

From: DMCJA Rules Committee

Date: 8/15/2013

Re: Proposed Amendments to GR 15

Background

The DMCJA Rules Committee was asked to review proposed amendments to General Rule (GR) 15 and provide initial feedback to the DMCJA Board. The draft proposal, dated August 9, 2013, is attached. We had a phone conference with Judge James Heller and Judge Steve Rosen, both of whom sit on the Data Dissemination Committee (DDC), and discussed the draft amendments and the intent and purpose in preparing it. It is our understanding that some member(s) of the Supreme Court requested the DDC to draft proposed amendments to GR 15 to help clarify the process for sealing and redacting court records.

Analysis

There has been substantial case law over the past thirty years discussing the substantive and procedural issues involving the sealing and redacting of court records. It appears the proposed amendments to GR 15 are an attempt to incorporate specific factors contained in case law. *Seattle Times Co., v. Ishikawa, 97 Wn. 2d (1982); Dreiling v. Jain, 151 Wn. 2d 900 (2004); Rufer v. Abbott Labs., 154 Wn 2d 530 (2005).* For example, the amendments attempt to incorporate provisions of the recent decision in *Bennett v. Smith Bundy Berman Britton*, 176 Wn.2d, 303, 291 P.3rd 886 (2013). The majority's opinion was written by Justice Chambers with three justices joining. However, *Bennett* contains a strong dissent by four justices and a concurrence in the result only by Justice Madsen, which J. Johnson also joined. There is a question whether the "*uber dicta"* of the majority opinion in *Bennett* is truly the opinion of the majority of the Supreme Court and should be incorporated into GR 15. GR 15 was substantially amended in 2006. Given some of the statements contained in the concurrence and dissent, and the extensive case law that already exists in this area, it's unclear whether there is need for an amendment to GR 15 at this time.

These reviewers appreciate the effort the DDC has gone to into drafting amendments to GR 15 to incorporate the Supreme Court's opinions on the issues related to sealing and redaction. Whether GR 15 conflicts or replaces the *Ishikawa* factors was addressed in State v. Waldon, 148 Wn. App. 952 (2009), *rev. denied* 166 Wn. 2d 1026 (2009). In *Waldon*, the court held: "In sum, revised GR 15 does not fully comply with the constitutional benchmark defined in *Ishikawa.* But it can be harmonized with *Ishikawa* to preserve its constitutionality. We

conclude that GR 15 and *Ishikawa* must be read together when ruling on a motion to seal or redact court records. Many of the appellate cases on this topic reveal that parties have not presented and discussed the *Ishikawa* factors to the trial court and trial judges have consequently failed to apply the factors when deciding motions to seal or redact. Hence, many appellate decisions remand the case to the trial court to apply the *Ishikawa* factors and GR 15 provisions to the motion and enter an order specifically setting forth the court's findings and conclusions

The currently case law in this area is clear that the *Ishikawa* factors, along with other provisions of GR 15 must be used. The amendments attempt to incorporate the factors into GR 15, but due to the numerous comments inserted between various sections of the rule, the amendments are difficult to follow.

One of the changes proposed to GR 15 is the mandatory requirement for an expiration date in the order sealing or redacting. See GR 15(c)(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." It appears that this provision seeks to implement the fifth *Ishikawa* factor that he order be no broader in its application or duration than necessary to serve its purpose and that the order apply for a specific time period with a burden on the proponent to come before the court at a time specified to justify continued sealing. *Id. at 39.* The majority in *Bennett* noted that "with or without an expiration date, an order to seal is always subject to challenge consistent with our open administration of justice jurisprudence." *Bennett* at 893. The requirement for an explicit expiration date raises several issues for trial courts.

Notably, Courts of Limited Jurisdiction are allowed to destroy court records after a period of time, maintaining only the index. If an order sealing a record is set to expire after the document would otherwise be destroyed, is the CLJ required to maintain the sealed record?

It has been noted that the Judicial Information System (JIS) does not currently have the ability to include an expiration date on an order to seal or redact. Would the document(s) remain sealed in JIS until a request to unseal is made?

Another question is whether the proposed amendments are prospective or retrospective? If the amendments to GR 15 are intended to simply incorporate existing appellate case law on this topic, it is assumed its application is retrospective. However, if there are substantive amendments that affect sealing or redaction orders previously entered, there may be significant ramifications on trial courts if there is an expectation trial courts will go back and review formerly sealed or redacted records absent a motion.

There are several concerns with proposed language. For instance, the rule seems unorganized when determining which factors to consider on a motion to seal or redact. Subsection (c) provides the factors a court should consider in deciding a motion to seal or redact. The factors to consider vary depending on when the motion to seal is filed, and what it attempts to protect. Subsection (c)(2)(A) provides factors to consider when a court record was considered by a court in reaching a decision, whereas (c)(2)(B) provides factors to consider when a court record was not considered by a court in reaching a decision. In subsection (c)(8), the rule sets forth the procedure to follow when a motion to seal is made at the same time as the documents proposed to be sealed are filed. For clarity, perhaps these three sections should be closer together as they cover the three possible scenarios.

The proposed rule, under GR 15(c)(2), requires a court to "enter specific findings on the record to justify any sealing or redaction." For purposes of appellate review, it would seem the court should also enter specific findings when it denies a motion to seal or redact. The lack of a record and detailed findings have been an issue in several reported cases.

Subsection (c)(4) sets forth the privacy or safety concerns that may be weighed against the public interest in open files. While the rule provides factors a court may consider, it does not provide guidance on the weight these factors carry. The parties and the court need to look at case law for this information. *E.g.*, *Waldon* at 334.

Language in two of the subsections is ambiguous, and it is not clear whether the subsections apply only to juvenile offenses or whether they also apply to adult convictions. See GR 15(c)(4)(C) and (D). Likewise, the language in subsection (c)(4)(D)(iii) regarding restitution is confusing.

> (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:
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> …
>
> (C) A criminal conviction or an adjudication or deferred disposition for a juvenile offense has been vacated; or
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> (D) A criminal charge or juvenile offense has been dismissed, and:
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> …
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> (iii) Restitution has not been ordered paid on the charge in another cause number as part of a plea agreement.

The proposed addition of GR 15(c)(4)(I) appears to be redundant: "The redaction includes only restricted personal identifiers contained in the court record." By their nature, restricted personal identifiers are already redacted. Does this mean that before a court can redact something that is already supposed to be redacted under court rule, it must go through the analysis to redact any "restricted personal identifiers"?

It is unclear how the following terms are used in the rule, as their usage is not always consistent: "juvenile proceedings", "court files", court records". It is also unclear how someone is to apply the provisions of GR 15 in relationship to the sealing provisions of GR 22.

We are also providing some "margin" comments to the proposed GR 15 amendments which address specific questions or concerns.