JUDGE KIM PROCHNAU
SUPERIOR COURT OF KING COUNTY
STATE OF WASHINGTON
MALENG REGIONAL JUSTICE CENTER
401 4TH AVENUE NORTH, RJC-SC-0203
KENT, WA 98032-4429

Honorable Charles Johnson
Supreme Court Rules Committee
Washington State Temple of Justice
[Sent via email to Camilla Faulk]

Re: Proposed CJC 2.9

Dear Justice Johnson:

The taskforce is to be commended for the careful attention and thoughtful analysis given to the proposed changes to the Canons of Judicial Conduct. I do, however, have one concern with interpretation and application of CJC 2.9 with regards to those types of proceedings which are not purely adversarial and where the court may have an obligation to protect a vulnerable adult or child. Proposed CJC 2.9(C) and (D) reads:

> **Ex Parte Communications**
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> (C) A judge shall not investigate facts in a matter pending or impending before that judge, and shall consider only the evidence presented and any facts that may properly be judicially noticed, unless expressly authorized by law.
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> (D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control.

This proposed rule is presumably premised on concerns that 1) a judge's investigation of facts may compromise the appearance of impartiality and 2) that the parties should have notice and an opportunity to be heard with respect to any information the judge proposes to consider.

It should be fairly obvious that judges should not visit the scene of an alleged crime, for example, or "Google" the parties' in a contract dispute.

However, in some cases a judge is called upon to be more than a neutral arbiter but is also required to protect the interests of a minor or incapacitated person. Most commonly, this arises in Title 11 guardianship proceedings, after a lay or professional guardian has been appointed. Obviously, the incapacitated person cannot represent their own interests and often there are no family or friends available who can raise any issues of concern as to a lay or professional guardian. Case law, statutes and court

rules thus all recognize that the judge is called upon to supervise the conduct of the guardian but do not provide explicit direction on how that supervision is to occur. *See,* GR 23; RCW 11.92.10.

In recent years the Certified Professional Guardianship Board and Superior Court Judges Association Guardianship and Probate Committee[1] have worked with local courts to set up monitoring systems to ensure that reports are timely filed given that failure to report is sometimes a red flag for even more serious problems. Such monitoring systems are not "expressly authorized by law" and yet are certainly contemplated by the legislation. Unfortunately, monitoring systems are not funded by the legislature and often the incapacitated person has little or no money to pay for an independent investigation, such as appointment of a guardian ad litem.

Even where the incapacitated person does have a family member or friend keeping an eye on their welfare, the Certified Professional Guardian Board can only accept and investigate grievances involving professional guardians; we have no jurisdiction over lay guardians. We also must often rely on courts to adjudicate many of the facts necessary to determine whether a grievance is founded

Other examples of types of actions where the court may be called upon to protect a minor or vulnerable adult include minor settlements under SPR 98.16W.

A couple of examples of questions regarding the application of this proposed rule:

1) County A has never had a monitoring system in place for guardianships. The court is concerned that there may be numerous cases where the guardians have not filed periodic reports as required by law. May a judge go through the existing guardianship files to determine whether reports have been filed and, then , show cause in the guardian (with notice to all entitled to notice) to provide additional information? Can the court set up its own monitoring system to ensure that reports are appropriately and timely filed in the future?

2) The CPG board receives a grievance claiming that Guardian A is neglecting the IP, exposing the IP to substantial danger; the grievance is signed by the IP's attending doctor. The CPG Board sends the grievance to the court and the affected guardian. May the court independently review all of its files concerning this particular guardian to ascertain whether any emergency action should be taken pending a hearing in these matters? Of course, the court will set a hearing and attempt to give notice to the guardian and all parties entitled to notice.

3) Court C previously approved, on behalf of a disabled child, a minor settlement under SPR 98.16W. Court C receives a letter from court in another jurisdiction attaching that Court's Findings of Fact in the divorce proceedings involving the child's parents.

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[1] While I am currently Chair of the Certified Professional Guardian Board and a member of the Guardianship and Probate Committee, this letter reflects purely my personal opinions and does not necessarily reflect the opinions of these committees or that of my Court.

According to the Findings, the parents have been raiding the child's settlement to fund their own expenses and the settlement is in danger of being completely dissipated. May Court C review the Minor Settlement file to determine the status of accountings? May the court direct its staff to notify the bank not to release any further funds to the parents pending a hearing to be set by the court?

4) One parent seeks to obtain a temporary restraining order placing a minor child in their custody pending hearing. The allegations appear persuasive and there appear to be good reason not to require notice before issuance of the restraining order. RCW 26.09 and 26.50 currently requires courts to consult JIS before entering **final** parenting plans and domestic violence protection orders but is silent with respect to temporary restraining orders. (ER 1101 also contains a mechanism for affording notice and an opportunity to be heard with respect to the content of any JIS inquiries in the context of domestic violence protection order proceedings.) May the court examine JIS to determine whether the moving party has any criminal history of concern before issuing the restraining order?

Obviously, even if some "investigation of facts" should be allowed under these circumstances, the court must have a proper concern for due process. Other portions of the rules suggest how to ensure how to ensure that all parties have notice and an opportunity to be heard. And, in fact, the Supreme Court has previously addressed this problem with respect to Judicial Information System records used in Domestic Violence protection order proceedings. See, ER 1101(c) (4).

In summary, I would suggest that the task force look at modifying CJC 2.9 to allow courts to engage in some preliminary investigation of facts, pending proper notice and an opportunity to be heard, in some limited fashion in those cases where the court has a role of not only arbiter but protector of an incapacitated person or minor.

Thank you for the opportunity to comment.

Sincerely,

Kimberley Prochnau
Superior Court Judge