Superior Court of the State of Washington
For Thurston County

2000 Lakeridge Drive SW • Building Two • Olympia WA 98502
Telephone: (360) 786-5560 **Website:** www.co.thurston.wa.us/superior

December 24, 2018

Honorable Charles W. Johnson
Washington State Supreme Court
PO Box 40929
Olympia, WA 98504-0929
Sent via e-mail to supreme@courts.wa.gov

Re: Comment on Proposed Amendment to CJC Rule 2.9

Dear Justice Johnson:

The undersigned Superior Court Judges respectfully submit this letter in opposition to the proposed amendment to Rule 2.9 of the Code of Judicial Conduct ("CJC").[1] While we share the motivations and goals articulated by proponents of the proposed amendment, we oppose the proposed amendment because (1) current law authorizing the conduct referenced in juvenile cases renders the proposed amendment unnecessary, (2) simple organization changes within a court can address the concerns raised regarding adult felony cases while better serving the interests of defendants pretrial, and (3) the language of the proposed amendment goes well beyond its articulated purpose and effectively nullifies CJC 2.9 in the process. Given these concerns, we propose that the Court either (1) do nothing, (2) add a comment to Rule 2.9 making it explicitly clear that the operations identified in juvenile cases do not violate the rule because they are authorized by law, or (3) convene a workgroup to more carefully study this issue rather than amend the CJC on an expedited basis without a hearing.

Juvenile Laws Render The Proposed Amendment Unnecessary

We share the proponents' recognition of the importance of risk assessments and screening interviews in furthering "the strong policy of keeping alleged juvenile offenders in the community, reducing the use of detention and eliminating the racial disproportionality among detained youth." GR 9 Cover Sheet to Proposed Amendment ("Cover Sheet"). We disagree, however, that Ethics Opinion 18-04 "jeopardizes that policy by preventing a judge from obtaining initial screening information that informs the level of risk associated with release before the first scheduled court appearance or longer." Cover Sheet. The Opinion makes no reference to juvenile probation departments. Rather, the Opinion expressly recognizes that CJC

[1] The signatories to this letter submit this letter on their own behalf and not on behalf of their courts or any committees on which they serve.

2.9 permits ex parte communications that are "expressly authorized by law." Op. 18-04 at 3. As the proponents recognize, "[n]umerous statutes authorize courts to establish probation departments, and authorize probation counselors to conduct interviews, investigations, and risk assessments and to make recommendations to the court regarding detention and disposition[.]" Cover Sheet. *See, e.g.*, RCW 13.04.035, RCW 13.04.040, RCW 13.20.060, RCW 13.40.010, RCW 13.40.038, RCW 13.40.070.

Given the language of CJC 2.9, Ethics Opinion 18-04, and Title 13 of the Revised Code of Washington, the important functions the proponents seek to continue performing are already permitted without the need for the proposed amendment. Should there be any ambiguity regarding that conclusion, a comment could be added to CJC 2.9 specific to these statutorily recognized functions in juvenile cases. But these concerns do not warrant changing the text of the Code of Judicial Conduct itself, given the magnitude and potential consequences of such an action.

Changing the Structure of Pretrial Services Addresses Adult Felony Case Concerns

It is not clear whether an additional motivation underlying the proposed amendment is to overturn Ethics Opinion 18-04. This would permit court staff to directly communicate with defendants in adult felony cases before they are represented to perform risk assessments necessary to make important decisions regarding pretrial release under CrR 3.2. We recognize the importance and necessity of obtaining such information to meet the many different needs in that setting. However, we oppose amending CJC 2.9 to permit the Court, through its own staff, to engage in those communications.

Decisions concerning the conditions of pretrial release for a criminal defendant facing felony charges are among the most significant decisions in the lifespan of a criminal case.[2] A criminal defendant who is held in custody while awaiting trial may lose their employment and housing, may face pressure to plead guilty, and may have other significant, adverse consequences while the presumption of innocence still applies. As a result, it is critically important that courts making decisions regarding the conditions of pretrial release have the best information possible to make the right decision. This may require communication between a defendant and pretrial services staff to collect information that may relied upon in performing a risk assessment a judge relies upon in establishing the conditions of pretrial release.

But these communications may occur before a defendant is represented by an attorney or is advised by the Court of his or her rights. These communications can be of a highly sensitive nature, including the defendant's drug use, court involvement, source of income, relationships with others who may be engaged in criminal activity, and more. What a defendant says in this setting may have an immediate impact on whether they are released pretrial, and could have longer term consequences if they say anything self-incriminating. Courts, through staff, should not be engaging in these conversations in a setting that is off the record without counsel present, and Ethics Opinion 18-04 correctly recognizes that Courts *cannot* do so.

This does not mean, however, that these conversations cannot or should not happen at all. Rather, it is a question of who should be communicating with defendants in that setting. Thurston County Superior Court, for example, previously employed Pretrial Services Specialists as staff to conduct interviews, prepare pretrial risk assessments, and perform pretrial supervision. After the Court grew concerned about the ethical implications of having court staff perform this

[2] Such decisions in non-felony cases are equally important, but those cases do not raise the same judicial ethics concerns, Op. 18-04 at 6, and thus we do not address them in this letter.

work, these functions were reorganized into a small, separate county agency. Thurston County Pretrial Services Department now has a director and four employees who perform this work and is supervised by a governing board that includes representatives from the Prosecutor's Office, Public Defense, Public Health and Social Services, the County Commissioners, Superior Court, and District Court. As a result, the staff performing this work is no longer subject to a judge's direction and control, removing the CJC 2.9 concerns. Additionally, by having a diverse governing board that includes representation from Public Defense, Thurston County makes sure that the practices and procedures employed by Pretrial Services appropriately addresses any concerns presented by the inherent nature of these pretrial communications.

The model employed by Thurston County is not the only one that could accomplish these goals. These functions could be performed by an employee housed within a county's public defense office or elsewhere. The conclusion remains the same, however: any ethical concerns raised by CJC 2.9 in the pretrial setting for adult felony cases can be addressed by changing the reporting structure of the staff involved, which presents an opportunity to better protect the rights of the defendants involved in the process.

The Language of the Proposed Amendment Nullifies the Rule

For the above-stated reasons, we do not believe that any proposed amendment to CJC 2.9 is necessary or appropriate. Even if that were not the case, however, the language of the proposed amendment goes well beyond its stated purpose and, in effect, nullifies the rule as a result.

The proposed amendment alters the rule by deleting the prior language in CJC 2.9 (A)(1) and replacing it with the following:

(1) When circumstances require and subject to the limitations in paragraphs (A)(1)(a) and (A)(1)(b), ex parte communication is permitted: . . . **in criminal and civil matters**, to make decisions on **such matters as** [(list of examples)]. Such ex parte communication is permitted only if:

(a) . . .

(emphasis added).

While CJC 2.9 currently has a narrow list of circumstances where ex parte communications may be appropriate, the proposed amendment undoes that by stating that they may be appropriate in *any* case ("in criminal and civil matters" (i.e., in all cases)) for *any* matter ("such matters as . . ." (i.e., a non-exclusive and non-exhaustive list)). The primary concern articulated by the proponents is the context of juvenile cases. If that is the concern, then any amendment should be limited to that concern. The proposed language, however, opens up any circumstance in all cases to potential ex parte communications. This is problematic for readily apparent reasons and leaves the amendment open to being the cause of unintended consequences. If the Court decides that any amendment is appropriate, we urge that the amendment be narrowly tailored to the concerns regarding juvenile cases motivating that amendment.

The Code of Judicial Conduct is the Wellspring of the Judiciary's Authority

The judiciary plays an essential role in our democracy. We have the privilege of that role and authority because we are independent, apolitical, and have a steadfast dedication to ensuring the rights of each person who appears before us. A critical tool to ensure that we are conducting ourselves in a manner deserving of that important role is the Code of Judicial Conduct.

Our current CJC 2.9 is almost identical to the ABA Model Code of Judicial Conduct that was developed almost 30 years ago. That Model Code was the subject of extensive stakeholder review, as was Washington's adoption of this provision. Amendments to the Code of Judicial Conduct should only occur when determined to be necessary at the conclusion of a reasoned process involving stakeholders. The proposed amendment is neither necessary nor, due to its expedited process, subject to an appropriate process allowing for stakeholder and public input.

We respectfully request that the Court not adopt the proposed amendment. If the Court disagrees, we suggest that the Court only amend CJC 2.9 by adding a comment specifying that existing law expressly authorizes the communications at issue in juvenile cases. Alternatively, we suggest that the Court convene a workgroup to carefully study the issue and recommend what changes, if any are necessary. Any of the signatories to this letter would volunteer their time to be part of such a workgroup.

Thank you for your time and careful attention to this important issue.

Sincerely,

Judge James Dixon
Thurston County Superior Court

FOR
Judge Michael Evans
Cowlitz County Superior Court

Judge Chris Lanese
Thurston County Superior Court

FOR
Judge Carol Murphy
Thurston County Superior Court

Judge Erik D. Price
Thurston County Superior Court

Judge John C. Skinder
Thurston County Superior Court

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, December 24, 2018 1:47 PM
To: Tracy, Mary
Subject: FW: Comment on Proposed Amendment to CJC Rule 2.9
Attachments: CJCComment.pdf

From: Judge Chris Lanese [mailto:chris.lanese@co.thurston.wa.us]
Sent: Monday, December 24, 2018 1:44 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment on Proposed Amendment to CJC Rule 2.9

Attached please find a comment from Cowlitz County Superior Court Judge Michael Evans and Thurston County Superior Court Judges James Dixon, Chris Lanese, Carol Murphy, Erik D. Price, and John C. Skinder on the proposal to amend Code of Judicial Conduct Rule 2.9.

Judge Chris Lanese
Thurston County Superior Court