

I am the Executive Director of the WA State Commission on Judicial Conduct, the independent agency of the judicial branch constitutionally charged with enforcing the Code of Judicial Conduct. The members of the Commission have given me permission to comment on the proposed amendment to Rule 2.9. The comment is my own opinion, and is not a formal opinion of the Commission body. These comments in no way reflect criticism of the underlying motivation for the amendment proposal.

The Code is a fundamental document based on a national model that articulates the core values of the justice system. It is amended infrequently and with great care. The last national amendment was in 2007, and followed a three-year intensive interdisciplinary national study, with input from hundreds of stakeholders. Similarly, the Washington State Code was amended in 2011 following a multiple-year, careful study by a task force appointed by the State Supreme Court. The task force focused on Rule 2.9 extensively and specifically, with great concern for the potential consequences of its language. Expedited amendment to the Code in reaction to an Ethics Advisory Opinion is not advisable.

The present amendment proposal is susceptible to overbroad applications that could carry unintended consequences beyond the concerns articulated by the SCJA. Changing the Code Rule to allow, for example, “when circumstances require: ex parte communication...**in civil and criminal matters...for purposes of making decisions on matters such a as dispositions,**” is both vague and extremely broad and could invite ex parte communications far beyond the concerns expressed by the proponents of the amendment. It would also be difficult for both judges and the Commission to interpret.⁶

It is up to the judiciary, of course, but alternative approaches could effectively address the concern without creating the difficulties identified above. An example of a more narrowly-tailored approach would be for jurisdictions with pre-screening mechanisms to pass local court rules authorizing those mechanisms; or for the Supreme Court to carefully and deliberately draft a statewide rule. This would also serve to assure that pre-screening mechanisms would be considered in light of potential due process and ex parte concerns. Another option could be to fashion a comment to the existing Code that addresses the concerns of the proponents of the amendment.

If the proposal moves forward, I respectfully suggest the court allow a hearing to assure full consideration.

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, December 18, 2018 9:19 AM
To: Tracy, Mary
Subject: FW: Comment on Proposed Amendment to CJC Rule 2.9
Attachments: Comment on proposal to amend 2.9.pdf

From: Reiko Callner [mailto:rcallner@cj.state.wa.us]
Sent: Tuesday, December 18, 2018 9:14 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment on Proposed Amendment to CJC Rule 2.9

Attached please find my comment on the proposal to amend Code of Judicial Conduct Rule 2.9.

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