Igor Lukashin

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April 30, 2022 ***Sent via email***

Justice Charles Johnson
Justice Mary Yu
Co-Chairs, Supreme Court Rules Committee
Washington Supreme Court
415 12th Ave SW
Olympia, WA 98501-2314
Email: supreme@courts.wa.gov

Re: Proposed Amendments to Comments, Code of Judicial Conduct Rules 2.2 and 2.6

Dear Justices Johnson and Yu,

I wholeheartedly support any initiative that ensures impartiality and fairness of Washington and federal court proceedings. Last year, I successfully moved, as a *pro se* nonlawyer non-party, to re-designate the Court's seminal tribal fishing case order as a precedential opinion, ***State v. Towessnute***, 486 P.3d 111, 197 Wash. 2d 574 (2021), illustrating breadth of an appellate court's discretion to waive or modify court rules under RAP 1.2(c) to serve the ends of justice. Yet my efforts to eliminate unjustified privilege of RAP 10.6(a)'s licensed-attorney requirement for amicus briefs, including through the formal GR 9 submission, were not even presented for comment[1]. Ensuring the courts exercise available discretion fairly, in addition to CJC 2.6 Comment 4 steps, will ease *pro se* litigants' plight in our courts.

Towessnute was cited once so far, by ***State v. Gudgell***, No. 54657-4-II, n. 12 (Wash. App. Nov. 23, 2021)[2] to relieve the State (!) from complying with RAP 10.3(a)(6). Yet, the majority of the **same** Glasgow-Veljacic-Cruser panel **later** found a *pro se* appeal frivolous because the litigant could not afford a hearing transcript, ***Bell v. Posthuma***, No. 53815-6-

[1] The minutes excerpt I requested and received reads:
R. Igor Lukashin's Suggested Amendments to RAP 10.6—Amicus Curiae Brief
The proponent suggests amending RAP 10.6 to allow pro se litigants to submit amicus briefs. Expedited consideration and a public hearing are requested due to the constitutional nature of the concern.
The committee appreciated the suggestion, and took no action on the proposal. Ms. Benway will inform the proponent.

[2] 20 Wn. App. 2d 162, 499 P.3d 229, from Washington Reports by LexisNexis at advance.lexis.com. Notably, the free public version appears not to provide page breakdowns needed for effective citation

II (Wash. App. Dec. 14, 2021)[3], "award[ing] attorney fees to Posthuma for having to defend against a frivolous appeal" under RAP 18.9 and 18.1(a).

In this state, *pro se* nonlawyers, unlike represented parties or *pro se* attorneys, are not entitled to opportunity cost of their time, even at a (much) lower rate than attorney's fees, creating a core inequity and a powerful incentive[4] for represented parties to advance frivolous issues and arguments that overburdened courts and most *pro se* parties are ill-equipped to combat.

As the 2009 State of the Judiciary[5] ("SoJ"), pp. 5–9, explained, adequate funding for the state judiciary has always been a problem in this state. *See also* 2012 SoJ, pp. 2, 4; 2014 SoJ, pp. 2, 24–25; 2019 SoJ, p. 8; 2022 SoJ, pp. 9, 26–27.

The 2022 LFO Report[6], noted in part that AllianceOne was one of the two debt collection agencies together accounting for 50 of the 77 LFO contracts for courts of limited jurisdiction. One comment, p. 45, noted, "Until Courts have dedicated funding, the inherent conflict the system creates will not go away. Pressure on judges, either explicitly or implicitly, to generate revenue will remain." Another, p. 46 provided, "Washington already has the worst funding for its local courts in the nation… This unfunded mandate undermines local courts' ability to provide services that benefit defendants and the public."

Interestingly, ***Cain v. White***, 937 F. 3d 446 (5th Cir. Aug. 23, 2019)[7] and ***Caliste v. Cantrell***, 937 F. 3d 525, 530 (5th Cir. Aug. 29, 2019)[8], applying *Ward v. Vill. of Monroeville, Ohio*, 409 US 57 (1972), found that non-monetary benefits received, including funding for staff, violated constitutional "impartial tribunal" guarantee. When collection agencies, like AllianceOne, come to court with debt-collection lawsuits, judges may be hard-pressed to rule against the frequent-player litigants for fear of losing prospective filing fee revenue.

I reviewed comments from Access to Justice Board ("AJB"), Attorney General's Office ("AGO"), District and Municipal Court Judges' Association ("DMCJA"), Northwest Justice Project ("NJP"), and Family and Juvenile Law Committee ("FJLC").

AJB highlights an important disparity, "Particularly in cases where one party is represented and the other is not, the knowledge imbalance can turn an ostensibly neutral proceeding into one which produces unjust outcomes." However, it's not only the knowledge, but also

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[3] My RAP 12.3(e) motion to publish *Bell* to provide a warning for *pro se* litigants was denied on 02/10/22
[4] See argument from a decade ago in App. Br. pp. 17–18 – my first *pro se* appeal
[5] *See also* State of the Judiciary, available for 2000–2022
[6] Delostrinos, C., Bellmer, M. & McAllister, J. (2022) *The Price of Justice: Legal Financial Obligations in Washington State*.
[7] https://scholar.google.com/scholar_case?case=3748956222082874894
[8] https://scholar.google.com/scholar_case?case=16667215235167601029& ; "Most significantly, money from commercial surety bond fees helps pay the judge's staff. Without support staff, a judge must spend more time performing administrative tasks. Time is money. And some important tasks cannot be done without staff."; "we do not think it makes much difference that the benefits Judge Cantrell and his colleagues receive from bail bonds are not monetary")

strong incentives by represented parties to take advantage, including because pro se litigants are ill-equipped to understand whether they received a fair and impartial hearing, and the courts may not have enough time or resources to "dig in".

Plus, Karpen (2018), in The social psychology of biased self-assessment[9], at 441-444, suggests that people have a positive bias in estimating their (expected) performance. It may be wise to compile statistics[10] and educate self-represented folks: **If you proceed *pro se*, you are virtually certain to lose[11].** There's a recent remarkable example worth $2 million in ***US v. Toth***, No. 21-1009, pp. 5–8 (1st Cir. Apr. 29, 2022).

AGO's comment, "our attorneys are asked to conduct themselves in a way that provides pro se litigants the opportunity to be heard, even where we disagree with that party's position on the facts, law or relief available", was qualified with "[t]o the extent they can without violating their own obligations". Yet, AGO recently suggested, regarding a *pro se* litigant in No. 100499-1, p. 11, "If he wants to weigh in on an issue pending before an appellate court before a decision is rendered, he can hire an attorney and seek permission to file an amicus curiae brief. RAP 10.6(a)." As such, AGO seems to support hearing views of only parties who can afford to hire an attorney.

Scott v. American Express National Bank, No. 55343-1-II, pp. 9–13 (Wash. App. Apr. 26, 2022) (unp.)[12], a pro se appellant's victory, demonstrates Division Two can live up to the proposed CJC Rule 2.2 changes regarding impartiality and fairness; and this must be fully supported not just at the trial level, but at the appellate and Supreme Court level.

Yet, the proposed CJC 2.2 Comment 4 throttles "reasonable accommodations" by qualifying it, "so long as those accommodations do not give the unrepresented litigant an unfair advantage." If anything, at least state appellate courts are much more willing to waive or modify the rules for the State, *e.g. Gudgell, supra*, *Denney v. City of Richland*, 462 P. 3d 842, 847 (Wash. 2020), or counsel, *State v. Graham*, 454 P. 3d 114, 116–17 (Wash. 2019).

Despite additional guidance, many represented parties will likely cry "unfair advantage", the courts might scale back on "reasonable accommodations" as a result, and the vast majority of self-represented parties will have neither grasp of the law nor resources to appeal or otherwise challenge "unfair advantage" claims of their opponents.

For example, in *State v. Gaines*, No. 99562-1, the state missed a deadline by failing to read the Court's letter containing a date certain, and a *pro se* litigant insisted this Court should neither accept the late filing nor allow the State to participate in the oral argument. However, Commissioner Johnston applied RAP 1.2(c) to allow both the late filing and

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[9] American Journal of Pharmaceutical Education Jun 2018, 82 (5) 6299

[10] Unlike SCOTUS year-end reports, Washington doesn't seem to provide *pro se* statistics in annual SoJs.

[11] *See* ***CJLG v. Barr***, 923 F.3d 622, 634, 636-37 (9th Cir. 2019) (concurrence) for drastically different represented outcomes and limited ability of IJs to develop the record due to high caseload.

[12] https://www.courts.wa.gov/opinions/pdf/D2%2055343-1-II%20Unpublished%20Opinion.pdf

State's oral argument in the interests of justice, but refused to apply the same rule to the *pro se* litigant's request to waive another RAP rule, opting to resolve the matter on an issue unrelated to merits of the question of whether RAP 19.16.500(1)(b) collection fee is subject to specific-amount pre-deprivation notice per (2), (4) and Due Process. *Cf.* *Harper v. Professional Probation Services Inc.* , 976 F.3d 1236, 1241–43 (11th Cir. 2020) (Due Process).

Our state Supreme Court should lead the way in providing "reasonable accommodations". Alas, RAP 10.6(a), *State v. Yishmael*, 195 Wash. 2d 155, 456 P.3d 1172 (2020), and various challenges faced by *pro se* litigants, including funding (*e.g.* ***Bell***, *supra*) or time investment to learn court rules, statutes, and case law to prepare appellate briefs or petitions for review in this Court, all but assure that this Court will almost never be called upon to provide "reasonable accommodations" to serve as a role model to lower courts.

Sincerely,

Igor Lukashin

From: OFFICE RECEPTIONIST, CLERK
To: Linford, Tera
Subject: FW: Proposed Amendments to Comments, Code of Judicial Conduct Rules 2.2 and 2.6
Date: Monday, May 2, 2022 11:05:46 AM
Attachments: Lukashin_comments_re_amendments_to_CJC2_2_and_2_6_26apr2022.pdf

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From: IGOR LUKASHIN [mailto:igor_lukashin@comcast.net]
Sent: Saturday, April 30, 2022 11:43 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Re: Proposed Amendments to Comments, Code of Judicial Conduct Rules 2.2 and 2.6

Greetings,

Please see the attached letter.

Sincerely,
Igor Lukashin