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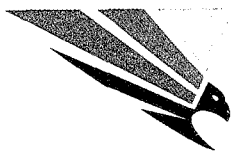

WASHINGTON STATE ASSOCIATION for JUSTICE™

Trial Lawyers. Fighting for You.

April 3, 2017

The Honorable Chief Justice Mary Elizabeth Fairhurst
Washington State Supreme Court
PO Box 40929
Olympia, WA 98504-0929

Re: GR 36 Proposal

Dear Chief Justice:

The ACLU is proposing a new civil rule, General Rule 36, with the stated purpose to "protect Washington jury trials from intentional or unintentional, unconscious, or institutional bias in the empanelment of juries." It is our understanding that the Supreme Court is accepting public comment until April 29, 2017. We submit this letter on behalf of the Washington State Association for Justice (WSAJ).

We are aware that the original ACLU proposal referenced only "race" and "ethnicity" and that the proposal has been modified to include "gender." Therefore, we are assuming the Court will be considering the ACLU proposed rule that references race, ethnicity and gender.

The WSAJ mission is to protect and advance justice for plaintiffs and to protect an individual's right to a jury trial under the Seventh Amendment. We strongly support the ACLU GR 36 proposal in general, though we urge the Court to modify that proposal in four ways.

First, we feel that the proposed Comment 6 is unnecessary and unworkable and should be omitted. Our members – most of whom are trial lawyers – have significant concerns with the procedure this proposed comment would invoke. As proposed, Comment 6 provides (with emphasis supplied):

> [6] The following reasons for peremptory challenges have historically been used to perpetuate exclusion of minority jurors: allegations that the prospective juror was sleeping, inattentive, staring or failing to make eye contact, exhibited a problematic attitude, body language, or demeanor, or provided unintelligent or confused answers. **If any party intends to offer one of those reasons, or reasons similar to them, as the justification for a peremptory challenge, that party must provide reasonable notice to the court and the opposing**

1809 7th Ave, Suite 1500
Seattle, WA 98101-1328
T 206-464-1011 F 206-464-0703
wsaj@washingtonjustice.org
EXECUTIVE DIRECTOR Liz Berry

1314 S Grand PMB #218
Spokane, WA 99202-1174
T 509-326-6660 F 509-458-5977
spokane@washingtonjustice.org
DEPUTY DIRECTOR Suone Cotner

1511 State Ave NE
Olympia, WA 98506-4552
T 360-786-9100 F 360-786-9103
govaffairs@washingtonjustice.org
GOVERNMENT AFFAIRS DIRECTOR Larry Shannon

washingtonjustice.org

party so the behavior can be verified and addressed in a timely manner. A lack of corroborating evidence observed by the judge or opposing counsel verifying the behavior shall be considered strongly probative that the reasons given for the peremptory challenge are invalid.

This is a potentially onerous procedure that will take substantial time away from the substance of voir dire. It is inherently subjective and making a record of these observations will be challenging, at best. It is unclear in the proposal whether the process would occur outside the presence of prospective jurors though, clearly, it would have to in order to protect the integrity of the process. Regardless, the procedure required by Comment 6 would create more problems than it would solve.

Second, WSAJ believes that the rule adopted must also include a directive for trial judges to allow ample time for voir dire for parties to develop or rebut any GR 36 objections. It is for this reason WSAJ joins in the Washington Association of Prosecuting Attorneys' proposal (the WAPA proposal) for language in the final rule to the effect that a "court shall provide the parties with sufficient time for voir dire to allow the parties to exercise peremptory challenges upon adequate information."

Third, while the original ACLU proposal focused primarily on this Court's concerns about racial discrimination, expressed in *State v. Saintcalle*,[1] and did not address gender, WSAJ believes the argument for including gender is self-evident. Like race, RCW 2.36.080(4) prohibits discrimination in jury selection based on gender and there is federal case law extending *Batson* to gender:

> the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case for no reason other than the fact that the person happens to be a woman or happens to be a man. As with race, the 'core guarantee of equal protection, ensuring citizens that their State will not discriminate ..., would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' [gender].'[2]

If the Court is inclined to adopt this proposed rule, it should adopt the version that includes gender.

Finally, WSAJ asks the Court to include sexual orientation in the final rule as well. As with gender, inclusion of sexual orientation in the rule is supported both by the law and by policy considerations identical to those presented by race, ethnicity and gender. In 2014 the Ninth Circuit, in *SmithKline Beecham Corp. v. Abbott Labs.*, ruled that "[t]he history of exclusion of gays and lesbians from democratic institutions and the pervasiveness of stereotypes about the group leads us to conclude that *Batson* applies to peremptory strikes based on sexual orientation."[3]

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[1] 178 Wn.2d 34, 309 P.3d 326, 2013 WL 3946038 (2013).
[2] *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146, 114 S. Ct. 1419, 1430, 128 L. Ed. 2d 89 (1994) (*quoting Batson v. Kentucky*, 476 U.S. 79, 97–98, 106 S. Ct. 1712, 1723, 90 L. Ed. 2d 69 (1986).
[3] *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 486 (9th Cir. 2014).

On this point, the Court will no doubt hear concerns about implementing CR 36 with regard to sexual orientation. The Ninth Circuit considered such arguments:

> Concerns that applying *Batson* to sexual orientation will jeopardize the privacy of gay and lesbian prospective jurors can be allayed by prudent courtroom procedure. Courts can and already do employ procedures to protect the privacy of prospective jurors when they are asked sensitive questions on any number of topics. Further, applying *Batson* to strikes based on sexual orientation creates no requirement that prospective jurors reveal their sexual orientation. A *Batson* challenge would be cognizable only once a prospective juror's sexual orientation was established, voluntarily and on the record.[4]

The Ninth Circuit points out that the State of California has applied *Batson* protections to sexual orientation for over a decade, illustrating "that problems with administration can be overcome, even in a large judicial system that comes in contact with a diverse population of court users."[5]

We appreciate the opportunity to comment on this proposed rule. Please let us know if there is additional information we can provide the Court to facilitate its consideration of this important issue.

Sincerely,

Dominic Bacetich
WSAJ President

Peter Meyers
Chair, WSAJ Court Rules Committee

cc: Sal Mungia

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[4] *SmithKline*, 740 F.3d at 487.

[5] *SmithKline,* 740 F.3d at 487 (*citing People v. Garcia*, 77 Cal. App. 4th 1269, 1282, 92 Cal. Rptr. 2d 339, 348, *as modified on denial of reh'g* (Feb. 22, 2000)).

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1809 7th Ave, Suite 1500 | Seattle, WA 98101-1328

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