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Monday, August 27, 2018

Supreme Court of the State of Washington
P.O. Box 40929
Olympia, WA 98504-0929
supreme@courts.wa.gov

RE: PROPOSED GENERAL RULE 38

Justices of the Supreme Court:

The proposed General Rule 38 (GR 38) should not be adopted as written. It is overly broad, bars otherwise relevant courtroom discussion, and at best only serves to duplicate already existing cannons of judicial conduct and rules of professional responsibility that were more thoughtfully drafted.

If adopted, GR 38 would run afoul of the generally excepted tradition of free debate and would have a chilling effect on the arguments of parties who would be in constant fear of making a relevant argument that did not, in fact, manifest prejudice, but that *could be* "interpreted as" manifesting prejudice even when none is intended or actually manifested. The proposed rule states:

> The duty to be respectful of others includes the responsibility to avoid comment or behavior that ***can*** reasonably ***be interpreted*** as manifesting prejudice or bias toward another on the basis of categories such as gender, race, ethnicity, religion, disability, age, or sexual orientation.

Proposed GR 38 (emphasis added).[1]

As written, Proposed GR 38 applies to any comment that "**can reasonably** be interpreted" as prejudiced or biased. The rule does not even require a base level of actual

[1] It is interesting to note that of all the protected classes listed in the rule, the drafters excluded the traditionally protected status as a veteran of our armed forces. Apparently, the drafters are not concerned with bias or prejudice against those who have served our country.

interpretation of the comment as manifesting bias; otherwise, it would have specified "is reasonably interpreted" as manifesting bias. Accordingly, one can violate this rule without (1) ever having actually manifested any prejudice at all, and (2) ever having been interpreted as having manifested prejudice. As long as someone could interpret a comment as manifesting bias, the rule is violated.

Not only does Proposed GR 38 not require any actual manifesting of prejudice, it does not require any intent to manifest bias. Rather, this strict liability rule restricts litigants from making any comment, even if relevant, and even if their actual intent is to never say anything manifesting prejudice. So long as some hypothetical person, somewhere, at any time in history, with any religious or other value system could be offended by the comment, the comment is prohibited. Under the rule as proposed, saying that it is silly to believe the sun revolves around the earth would likely be prohibited, even though no actual person is offended by it today in Washington.[2] Such a rule is overly broad.

Proposed GR 38 is also unnecessary because Washington's Code of Judicial Conduct 2.3[3] already obligates judges to ensure proper conduct of litigants:

> (B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, ***and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.***
> (C) ***A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice***, or engaging in harassment, against parties, witnesses, lawyers, or others.

The apparent goal of Proposed GR 38 has already been directly addressed in the existing

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[2] Galileo's championing of heliocentrism and copernicanism was controversial during his lifetime, resulting in a sentence of house arrest for life.

[3] *See also* CJC 2.8 calls on judges to require order and decorum in proceedings before the court and also to require patient, dignified, and courteous conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control.

code. Thus, no additional rule is necessary.

In addition to its overbreadth and redundancy of purpose, Proposed GR 38 directly conflicts with CJC 2.3(D) precisely because it prohibits relevant arguments. CJC 2.3(D) explicitly carves out an exception for arguments that are "relevant" but that might otherwise run contrary to the rule in CJC 2.3(B)&(C) (and proposed GR 38). It states:

> The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from ***making reference to factors that are relevant*** to an issue in a proceeding.

CJC 2.3(D) (emphasis added).[4] Comment five to the rule explains further.

> "Bias or prejudice" does not include references to or distinctions based upon race, color, sex, religion, national origin, disability, age, marital status, changes in marital status, pregnancy, parenthood, sexual orientation, or social or economic status ***when these factors are legitimately relevant to the advocacy or decision of the proceeding, or, with regard to administrative matters, when these factors are legitimately relevant to the issues involved.***

CJC 2.3, Comment ¶ 5.

The thoughtful drafters of CJC 2.3 included this proviso implicitly recognizing that placing prior restraint on all courtroom speech one could theoretically perceive as manifesting "bias" or "prejudice," without providing a relevancy exception, was antithetical to the framework of our dialectic truth seeking system, which is adversarial by nature and design. Proposed GR 38 does not provide this exception at all.

The proposed rule also runs afoul of CJC 2.6: "A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, ***the right to be heard*** according to law." (emphasis added). "The right to be heard is an essential component of a fair and impartial

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[4] *See also* RPC 8.4(h), which already precludes lawyers from engaging in conduct that a reasonable person "would" (not could) interpret as manifesting prejudice, but also provides further that "This Rule does not restrict a lawyer from representing a client by advancing material factual or legal issues or arguments."

system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed." CJC 2.6, Comment ¶ 1.

This comment echoes the principle underlying the Speech or Debate Clause of the United States Constitution. U.S. Const. Art I, sec. 6, cl.1. The basic purpose of which was to prevent intimidation of speakers by shielding those who must speak from "accountability before a possibly hostile judiciary." *Gravel v. United States*, 408 U.S. 606, 617, 92 S. Ct. 2614, 2623 (1972). It is understood as a core institutional protection not merely for the benefit of speakers, but for those whom need their position advocated. *United States v. Myers*, 635 F. 2d 932, 935-36 (2d Cir. 1980) ("[T]he Speech or Debate Clause...serves as a vital check upon the Executive and Judicial Branches ..., for the right of the people to be fully and fearlessly represented...").

The rule's lack of allowance for offensive but relevant speech is effectively prior restraint[5] on the speech of litigants. This prior restraint is made more egregious by the fact that it applies to the precise people whom have come to court to settle a dispute with words, in the one place their speech should be most protected: a court of law. That court of law is expected to operate in a search for truth, not from a position of a priori knowledge of the truth.

Trial lawyers are the ones most likely to find themselves on the front lines dealing with the most contentious socio-political issues of the day. No doubt trial attorneys will be compelled by their duty to their client to make arguments that are relevant, but are contrary to this proposed rule.

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[5] Any restrictions on speech must be content neutral. *Ross v. Early*, 746 F.3d 546 (4th Cir. 2014). Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). Laws burdening such speech are subject to strict scrutiny. *Citizens United v. FEC*, 558 U.S. 310, 312, 130 S. Ct. 876, 882 (2010). The First Amendment stands against attempts to disfavor certain subjects or viewpoints which may be a means to control content. *Id.* at 312.

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And yet, if an attorney's argument is indeed irrelevant or evidences prejudice or bias, opposing counsel will appropriately correct the matter, then and there, as "the best remedy for false or unpleasant speech is more speech, not less speech." *Rickert v. Pub. Disclosure Comm'n*, 161 Wash. 2d 843, 855-56, 168 P.3d 826, 832 (2007); *see also Citizens United*, at 361 ("it is our law and our tradition that more speech, not less, is the governing rule").

It should be self-evident from our history and tradition that free debate is a bedrock principle of our legal system. Yet, "[t]hat men do not learn very much from the lessons of history is the most important of all the lessons that history has to teach." [6]

This rule is overly broad and restricts relevant speech and debate; and the only legitimate goal it seeks to further is already addressed by the Code of Judicial Conduct and the Rules of Professional Conduct. It should not be adopted.

Respectfully submitted,

D. Angus Lee

[6] Aldous Huxley, Collected Essays.

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Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, August 28, 2018 7:59 AM
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Subject: FW: Proposed New Rule GR 38 - Prohibition of Bias
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Subject: Proposed New Rule GR 38 - Prohibition of Bias

Please see the attached comment regarding the proposed rule GR 38.

Thanks,

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