

September 14, 2018



Washington Supreme Court  
P.O. Box 40929  
Olympia, WA 98501

*Sent via e-mail to [supreme@courts.wa.gov](mailto:supreme@courts.wa.gov)*

**Re: Comments on Proposed GR 38**

Dear Justices:

On behalf of Legal Voice, I am pleased to submit comments on proposed GR 38 regarding Prohibition of Bias.

For those of us who practice in the United States District Court for the Western District of Washington, this proposed rule is very familiar. Indeed, the proposed rule mirrors Local Civil Rule 1(d) of the Western District of Washington.<sup>1</sup> It appears that the Western District has adhered to this rule (originally adopted as Local General Rule 9) since 1994.<sup>2</sup>

It would be important and helpful for Washington state courts to follow the leadership of the Western District of Washington by adopting an explicit rule regarding prohibition of bias. Such a rule can help to ensure fair and equal treatment for all court participants. However, we would suggest some additions to the language of proposed GR 38.

**Including “Gender Identity” in the Rule**

Proposed GR 38 provides in part that “[t]he 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.”

While we understand the list of categories to be non-exclusive and may encompass additional categories that are not specifically listed, we would urge the Court to explicitly include “gender identity” in the list of categories. Including the term

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<sup>1</sup> Available at [http://www.wawd.uscourts.gov/sites/wawd/files/LocalCivilRules\\_Dec17\\_2012.pdf](http://www.wawd.uscourts.gov/sites/wawd/files/LocalCivilRules_Dec17_2012.pdf)

<sup>2</sup> See American Bar Association, Young Lawyers Division, Reports No. 116C, n. 4 (Aug. 8-9, 1995) (noting that the U.S. District Court for the Western District of Washington created Local General Rule 9 regarding prohibition of bias on September 30, 1994), available at [https://www.americanbar.org/content/dam/aba/directories/policy/1995\\_am\\_116c.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/directories/policy/1995_am_116c.authcheckdam.pdf)

“gender identity” would help to ensure that people who are transgender are explicitly protected from prejudice or bias under GR 38.

Transgender people face a high level of discrimination in our country, including in our courts. This point is illustrated by a recent national survey of transgender people. In the survey, 22 percent of transgender people reported that they had visited or used services at a court or courthouse in the past year. Two percent of respondents indicated that they did not go to a court or courthouse in the past year because they were afraid of mistreatment as a transgender person. Of those who did access courts or courthouse services, 50 percent reported that they believed court staff or employees knew or thought they were transgender. Of those respondents, 13 percent reported being denied equal treatment or service, being verbally harassed, or being physically attacked because of being transgender.<sup>3</sup>

We appreciate that proposed GR 38 does explicitly list “sexual orientation” as a category. However, the term “sexual orientation” generally has a very different meaning than the term “gender identity.” To be sure, the Washington Law Against Discrimination’s statutory definition of the term “sexual orientation” (adopted in 2006) includes “gender expression or identity” within its meaning.<sup>4</sup> However, we are concerned that readers of GR 38 would not readily understand the term “sexual orientation,” as used in proposed GR 38, includes gender identity as well.

As a result, we would urge the Court to add “gender identity” to the categories listed in proposed GR 38.

On a related matter, should the Court have the opportunity to do so in this rule-making, it would also be very helpful to add “gender identity” in the list of categories under existing RPC 8.4(g) and (h), for the same reasons discussed above.

### **Including “Immigration Status” In the Rule**

We also believe that the Court should consider explicitly including other categories in proposed GR 38. In particular, including “immigration status” as a specific category would help to ensure fair and equal treatment of another highly vulnerable group of people who often face bias and prejudice. We appreciate the Court’s recent adoption of ER 413 to help protect fair and equal treatment of immigrants in our legal system, and believe that including “immigration status” as a specific category in proposed GR 38 would be beneficial for many of the same reasons that led to the adoption of ER 413.

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<sup>3</sup> S.E. James et al., *The Report of the 2015 Transgender Survey*, National Center for Transgender Equality (2016), at 219, available at <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>

<sup>4</sup> See RCW 49.60.040(26) (providing that “[s]exual orientation” means heterosexuality, homosexuality, bisexuality, and gender expression or identity. As used in this definition, ‘gender expression or identity’ means having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth.”).

Thank you for your consideration of our comments and for your efforts to ensure fair and equal treatment of all who participate in our legal system.

Sincerely,

A handwritten signature in black ink that reads "David Ward". The signature is written in a cursive style with a large, stylized "D" and "W".

David Ward  
Senior Attorney

**Tracy, Mary**

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**From:** OFFICE RECEPTIONIST, CLERK  
**Sent:** Monday, September 17, 2018 8:01 AM  
**To:** Hinchcliffe, Shannon  
**Cc:** Jennings, Cindy; Tracy, Mary  
**Subject:** FW: Comments on proposed GR 38  
**Attachments:** Legal Voice comments on proposed GR 38.pdf

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**From:** David Ward [mailto:dward@legalvoice.org]  
**Sent:** Friday, September 14, 2018 5:08 PM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Subject:** Comments on proposed GR 38

Please find attached comments from Legal Voice on proposed GR 38. Thank you for your consideration of our comments.

**David Ward**

Senior Staff Attorney  
*pronouns he/him*

**Legal Voice**

*Women's rights. Nothing less.*

907 Pine St., Suite 500  
Seattle, WA 98101  
206-682-9552 x112  
[Facebook](#) ▪ [Blog](#) ▪ [Website](#)

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