September 14, 2018

Supreme Court of the State of Washington
P.O. Box 40929
Olympia, WA 98504-0929

Submitted electronically via email to supreme@courts.wa.gov

RE: Comment of 18 WSBA attorneys opposing proposed General Rule 38

Justices of the Supreme Court:

The undersigned 18 WSBA attorneys urge the Court not to adopt proposed General Rule 38 (GR 38) because the rule prohibits and chills constitutionally protected speech and conduct.

I. The Constitution protects attorney speech and offensive speech.

The U.S. Supreme Court has "long protected the First Amendment rights of professionals," including attorneys. *Nat'l Inst. of Family & Life Advocates v. Becerra* (*NIFLA*), 138 S. Ct. 2361 (2018). Similarly, this Court has consistently held that "a person does not surrender freedom of expression rights when becoming a licensed attorney." *In re Kaiser*, 111 Wash. 2d 275, 280 (1988). Earlier this year, the U.S. Supreme Court rejected treating "professional speech" as a unique category of speech subject to lesser protection because, "[a]s with other kinds of speech, regulating the content of professionals' speech pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." *NIFLA*, 138 S. Ct. at 2374 (second alteration in original) (internal quotation marks omitted). "[C]ontent-based laws that regulate the noncommercial speech of lawyers" are subject to strict scrutiny. *Id.* at 2374. And regulations of "professional misconduct" do not change this. *See NAACP v. Button*, 371 U.S. 415, 439 (1963).

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Repeatedly, the U.S. Supreme Court has protected offensive, disparaging, and even hurtful speech. *See, e.g., Matal v. Tam*, 137 S. Ct. 1744 (2017); *Snyder v. Phelps*, 562 U.S. 443 (2011); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557 (1995). "Speech does not lose its protected character simply because it may embarrass others or coerce them into action." *Bering v. Share*, 106 Wash. 2d 212, 226 (1986).

II. GR 38 is unconstitutionally vague and overbroad.

In violation of the First Amendment and due process, GR 38 does not provide fair notice of what speech and conduct is prohibited to both those subject to the rule and those enforcing the rule. The rule is vague and overbroad, which will lead to the chilling of protected speech, as well as its arbitrary, subjective, and potentially discriminatory enforcement.

The phrase "[l]itigation, inside and outside Washington state courtrooms" is unconstitutionally vague. GR 38 fails to clearly identify to what actions it applies. "Litigation" is not defined in the rule, but Black's Law Dictionary defines "litigation" as: "A judicial controversy. A contest in a court of justice, for the purpose of enforcing a right."[1] Under this definition, the rule would presumably exclude uncontested judicial matters, such as uncontested name change, divorce, or probate proceedings. The rule also extends to "litigation ... outside Washington state courtrooms." It is unclear whether "outside" means litigation in federal or other state courts, out-of-courtroom activities done to support Washington state litigation, or both.

The phrases "all court participants, whether judges, attorneys, witnesses, litigants, jurors, or court personnel" and "others" are unconstitutionally vague. GR 38 fails to clearly identify to whom its requirements extend. It is unclear whether "court participants" applies only to interactions between attorneys and judges, other attorneys, witnesses, litigants, jurors, and court personnel, or whether "court participants" includes interactions with an attorney's family members, law firm staff, and members of the general public present at the court. The next sentence in the rule compounds the vagueness by switching to the term "others." It is unclear whether "others" means merely "all court participants" or other people in general.

The phrases "free from prejudice and bias in any form," "manifesting bias or prejudice toward another," "[f]air and equal treatment," "respectful," and "manifesting prejudice or bias" are unconstitutionally vague. Based on the slew of undefined terms in GR 38, attorneys cannot reasonably know what speech and conduct is prohibited. For instance, Black's Law Dictionary defines "bias," in part, as:

> Inclination; bent; prepossession; a preconceived opinion; a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction. This term is not synonymous with "prejudice".... Bias is "a particular influential power, which sways the judgment; the inclination of the mind towards a particular object."[2]

Ten additional types of bias are also identified: personal bias, confirmation bias, cognitive bias, selection bias, self-serving bias, hindsight bias, bias for action, availability bias, anchoring bias, and reverse survivorship bias. Since the rule prohibits bias "in any form," it appears that any or all of these types of bias could also be prohibited. While "bias" is not synonymous with "prejudice," "prejudice" be defined, in part, as "bias." More fully, "prejudice" is:

> A forejudgment; bias; preconceived opinion. A leaning towards one side of a cause for some reason other than a conviction of its justice.... The word "prejudice" seemed to imply nearly the same thing as "opinion," a prejudgment of the case, and not necessarily an enmity or ill will against either party.[3]

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[1] https://thelawdictionary.org/litigation/
[2] https://thelawdictionary.org/bias/
[3] https://thelawdictionary.org/prejudice/

Under these definitions, an attorney who expresses strong support of a client's position or points out defects in an opponent's proposition could be found to be "manifesting bias or prejudice toward another."[4]

The phrase "comment or behavior that can reasonably be interpreted as manifesting prejudice or bias toward another" is unconstitutionally overbroad." GR 38 prohibits attorney speech and conduct that may be "*interpreted as manifesting prejudice or bias toward another*," regardless of whether such speech or conduct prejudices the administration of justice or renders an attorney unfit to practice law—categories that the legal profession historically has a legitimate interest in proscribing. *See, e.g.*, *Matter of Disciplinary Proceeding Against Curran*, 115 Wash. 2d 747, 765 (1990) (discussing "violations of practice norms and physical interference with the administration of justice"). If adopted, an attorney could violate GR 38 by accepting, rejecting, or withdrawing from certain cases based on his or her professional and moral judgments, which another could view as prejudiced or bias toward a protected category of persons. GR 38 would impose conflicting duties on an attorney to both act as an advocate, making the best legal arguments available, and remain respectful, "avoid[ing] comment or behavior that can reasonably be interpreted as manifesting prejudice or bias." The mere possibility of discipline for comments or behavior "*that can reasonably be interpreted* as manifesting prejudice or bias toward another" is sufficient to chill protected attorney speech.

III. GR 38 is an unconstitutional content- and viewpoint-based restriction on speech.

"A law found to discriminate based on viewpoint is an egregious form of content discrimination, which is presumptively unconstitutional." *Matal*, 137 S. Ct. at 1744, (Kennedy, J., concurring) (internal quotation marks omitted). For instance, in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the U.S. Supreme Court found St. Paul's Bias-Motivated Crime Ordinance facially unconstitutional because it applied only to fighting words that insulted or provoked violence "on the basis of race, color, creed, religion or gender." *Id.* at 380–81; *see also Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 880 F. Supp. 2d 456 (S.D.N.Y. 2012) (finding an ordinance prohibiting demeaning advertisements only "on the basis of race, color, religion, national origin, ancestry, gender, age, disability or sexual orientation" an unconstitutional content-based speech restriction). In striking down the Ordinance, the Court stated, "[t]he First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." *R.A.V.*, 505 U.S. at 391. But that is precisely what GR 38 does by prohibiting speech "manifesting prejudice or bias toward another *on the basis of categories such as gender, race, ethnicity, religion, disability, age, or sexual orientation.*"

Moreover, the viewpoint of an attorney's speech will determine whether or not the attorney has violated GR 38. For instance, consider the debate over racially motivated killings by police. The phrase "black lives matter" would presumably be permitted under GR 38, but the phrase "blue lives matter" would likely be prohibited because it could be considered prejudiced against black

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[4] Washington's current Rules of Professional Conduct (RPC) already sufficiently address serious cases of bias, prejudice, or invidious discrimination, rendering GR 38 superfluous. *See* Wash. RPC 8.4(g), (h).

Americans. Likewise, an attorney who speaks in favor of same-sex marriage would presumably not violate the rule, but an attorney who says that *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), should not be extended would likely be considered as manifesting prejudice against same-sex couples. In sum, GR 38 is an unconstitutional content- and viewpoint-based restriction on speech because the law applies based on the topic discussed or the idea or message expressed. *See Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015).

IV. Conclusion

GR 38 violates the First Amendment and should be rejected by this Court.

Respectfully submitted,

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From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, September 17, 2018 8:01 AM
To: Tracy, Mary
Subject: FW: Comment of 18 WSBA attorneys opposing proposed GR 38
Attachments: Comment of 18 WSBA attorneys opposing GR 38.pdf

From: Rachel Morrison [mailto:rnbusick@gmail.com]
Sent: Friday, September 14, 2018 5:35 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment of 18 WSBA attorneys opposing proposed GR 38

Attached please find a Comment of 18 WSBA attorneys opposing proposed General Rule 38. Thanks!

All the best,
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