

## Tracy, Mary

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**From:** Hinchcliffe, Shannon  
**Sent:** Friday, September 14, 2018 4:30 PM  
**To:** Tracy, Mary  
**Cc:** Jennings, Cindy  
**Subject:** FW: Proposed Rule GR 38 Prohibition of Bias

Please publish this comment on the website per Judge Garrow's request.

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**From:** Garrow, Janet [Janet.Garrow@kingcounty.gov]  
**Sent:** Friday, September 14, 2018 2:01 PM  
**To:** AOC DL - Rules Comments  
**Cc:** Garrow, Janet; 'Rebecca Robertson'  
**Subject:** Proposed Rule GR 38 Prohibition of Bias

These are my general comments regarding the proposed rule.

1. The rule references "litigation inside and outside Washington state courtrooms". What is meant by "outside Washington state courtrooms"? Does this mean the physical courtrooms, and within the physical courthouse? Or does this mean during such times as a deposition occurs in an attorneys' office? How broadly are we to interpret the phrase "outside Washington state courtrooms"?
2. The proposed rule uses the phrase "Washington state courtrooms". Does this rule apply to municipal courts, district and superior courtrooms? With the exception of the Supreme Court and the Courts of Appeal, I do not believe the state of Washington has any courtrooms. Did the drafters intend to say, "inside and outside courtrooms in Washington state"? Or did the drafters intend it apply to only the COA and Supreme Court?
3. What does it mean to be "free from prejudice or bias in **any form**"? Hasn't all of our judicial training told us everyone has prejudice and bias? Fortunately many people do not articulate their prejudices or bias [whatever they are] in a courtroom setting. Perhaps it would be less ambiguous if the drafters had proposed that any unlawful prejudice or bias, based upon the listed suspect class categories, is what the behavior the rule is trying to address. But even then, you can also run into problems. What if a witness testifies he said something to the alleged victim because he strongly dislikes that person's [suspect class]? And that person is sitting in the courtroom? Are judges supposed to intervene in a trial if a witnesses' testimony demonstrates explicit prejudice or bias?
4. The list of individuals who must be accorded "fair and equal treatment", seems to imply the rule is limited to conduct within the physical courthouse, not elsewhere. However, the list seems to notably exclude such folks as: interpreters, DV advocates, Marshalls, jail guards, the press, the public. How broadly should this rule be read?
5. Another concern is the term "litigation". Litigation is used to describe proceedings between two or more opposing parties. As I read this rule, it appears it would not apply to pro se litigants representing themselves in cases such as a name change petition, mitigation hearing, etc. Was that intended?
6. Would one be in violation of this rule if the comment or behavior could reasonably be interpreted as manifesting prejudice or bias toward "another" refer to only the listed "court participants", and only if the comment related to the listed categories?
7. Would this rule apply to comments made by jurors during deliberations? We read cases where that has occurred. If another juror reported it, would the verdict be nullified or would the judge have to conduct a hearing?
8. Does the comment or behavior have to occur in open court?

9. What is the remedy if the rule is violated?
10. The title of the rule is also problematic. "Prohibition of Bias". The text of the rule addresses "prejudice and bias", not just bias.
11. How is the rule to be enforced? If the comment or behavior is between two attorneys in a courtroom, outside the presence of the judge, does the rule apply? Does the judge need to hold a hearing to see what comment or behavior occurred? What if the conversation was between a defense attorney talking to a prosecutor's witness?

It strikes me that this proposal should not be a General Rule for Washington Courts. Perhaps it is better addressed by the Supreme Court through one of its Commissions who can recommend general statements of policy for the Supreme Court to adopt. Unlawful bias or prejudice by a judge or attorney can be addressed by the Commission on Judicial Conduct and the WSBA attorney discipline process.

Best regards,

**Judge Janet E. Garrow**  
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