NORTHWEST IMMIGRANT RIGHTS PROJECT

Proyecto para los Derechos de Inmigrantes

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

RE: Proposed Comment to RPC 4.4

Dear Justice Johnson and Members of the Rules Committee:

On behalf of Northwest Immigrant Rights Project (NWIRP), I write in support of proposed Comment to RPC 4.4 that has been submitted for your adoption by the Board of Governors of the Washington State Bar Association. NWIRP is the only comprehensive immigration legal services provider in the State of Washington. We focus on providing direct legal services to individuals who are applying to obtain lawful status, as well as those individuals who already have lawful status but are applying to maintain their lawful status or are applying to become U.S. citizens. Our experience of providing direct representation to immigrants in the State of Washington on a daily basis has made clear to us that the proposed Comment addresses a vital aspect of access to justice and the equitable administration of the civil legal system in the State of Washington.

Given the fluidity and complexity of immigration laws, fear of immigration enforcement affects not only individuals who are undocumented, but also those who have legal status to live and work here in the United States. Persons generally must pass through several steps or phases in order to obtain lawful permanent residence in the United States. Some individuals who have submitted applications, which render them prima facie eligible for permanent lawful status, are residing lawfully in the United States pending the final adjudication of their applications. Moreover, some immigration processes can take years to complete. This leads to confusion on different levels.

First of all, immigrants may be unclear about their current status and whether any legal status may be taken away. Thus, they are vulnerable to threats from others notwithstanding their lawful status. Many individuals who have obtained status based on a petition filed by an employer, spouse or family member erroneously believe that the petitioner has the right to revoke their legal status even after they become lawful

permanent residents. This is a common misperception that allows the petitioner to manipulate or coerce the behavior of the other party. This scenario is especially relevant in civil proceeding involving petitions for dissolution, custody issues, or distribution of property.

Similarly, we have seen repeated cases where lawful permanent residents or even U.S. citizens are reluctant to assert their rights in civil litigation for fear of retaliation against family members who do not have similar legal status.

It is also worth noting that Congress has recognized that even undocumented individuals should have access to our legal system. Indeed, in noting the potential for abuse and manipulation of undocumented individuals who are victims of crimes, Congress created a special visa to encourage such individuals to come forward and participate in our justice system. *See* 8 U.S.C. 1101(a)(15)(U).

The proposed comment correctly emphasizes that the use of or threatened use of immigration enforcement to gain an advantage in a separate private civil mater is a subversion of the civil process, and deters persons from asserting valid legal rights. This includes inquiries in the course of litigation as to the immigration status of a party or a witness, as this is often a not-so-subtle implied assertion, as referred to by the proposed Comment. These types of actions impede access to and diminish public confidence in the civil justice system.

The proposed Comment appropriately targets both threats to report, as a form of intimidation, as well as the actually reporting of immigration status for enforcement activities. Unfortunately, we have seen repeated cases where attorneys and parties have resorted to simply reporting the opposing party to immigration enforcement with the hope that the opposing party will be detained, and perhaps even removed from the country, thus completely undermining the civil matter at stake.

Even in those very limited circumstances where a party asserts that a person's immigration status is relevant in the civil matter before the court (such as claims for future wages), this does not justify any separate action reporting or threatening to report that person to immigration authorities. Rather, such conduct is clearly an attempt to subvert the civil process by utilizing federal immigration enforcement authorities (or the specter of their involvement) for the purposes of gaining an advantage in the civil matter. If indeed immigration status is relevant in the civil matter, such information should be brought directly before the court, which has the authority to balance the relevance of the information against the potential prejudice.[1]

The threat of immigration enforcement is one of the most significant barriers facing immigrant workers who seek to assert their labor rights. Similarly, the fear of how civil litigation may impact the immigration status of a party may preclude an individual from asserting their rights in civil cases involving family, housing, personal injury and assorted other civil matters. Unfortunately, it is all too common that an attorney or

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[1] Courts have previously recognized that it is often an abuse or manipulation of the civil system to even attempt to bring the question of the immigration status of the opposing party before the court. *See, e.g., Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064-1066 (9th Cir. 2004).

opposing party will call up immigration enforcement to "report" the opposing party in order to obtain an advantage in the civil litigation. In order to avoid this result the proposed Comment appropriately clarifies that that "When a lawyer is representing a client in a civil matter, a lawyer's communication to a party or a witness that the lawyer will report that person to immigration authorities, or a lawyer's report of that person to immigration authorities, furthers no substantial purpose of the civil adjudicative system if the lawyer's purpose is to intimidate, coerce, or obstruct that person."

We are concerned, however, that a lawyer may seek to justify reporting alleged immigration violations against an opposing party or witness by simply asserting that it was done out of a misguided sense of civic duty, as opposed to being done for the purpose of intimidation, coercion, or obstruction. In order to avoid the necessarily difficult inquiry into the subjective intent of the lawyer, the proposed Comment could more cleanly state, "When a lawyer is representing a client in a civil matter, a lawyer's communication to a party or a witness that the lawyer will report that person to immigration authorities, or a lawyer's report of that person to immigration authorities, furthers no substantial purpose of the civil adjudicative system." This statement better clarifies that in the course of litigation, such actions are strictly prohibited, even if they might otherwise be permitted. Just as lawyers have certain limitations placed on them regarding the scope of statements they can make to the press about an ongoing case, it is reasonable to place restrictions on conduct that will necessarily undermine the integrity of ongoing litigation in which they are involved.

Moreover, given that attorneys represent individuals who often directly engage in similar conduct, with the same purpose of subverting the civil legal matter in question, the proposed Comment should include language that clarifies that a lawyer shall not encourage or participate in reporting or threatening to report an individual. Specifically, a sentence could be included clarifying: "It is similarly a violation of this rule to encourage someone else to report or threaten to report a person to immigration enforcement authorities to obtain an advantage in a civil matter."

Thank you for your attention and consideration in this important matter.

Sincerely,

S/ Matt Adams

Matt Adams
Legal Director
Northwest Immigrant Rights Project