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César E. Torres
Executive Director

Northwest Justice Project

April 16, 2013

VIA ELECTRONIC MAIL AND FIRST CLASS MAIL

Clerk of the Supreme Court
ATTN: Denise Foster
Washington State Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929

Re: PROPOSED COMMENT TO RPC 4.4 re IMMIGRATION STATUS

Dear Ms. Foster:

I write on behalf of Northwest Justice Project (NJP), the largest provider of civil legal services to low income people in the State of Washington, many of whom are recent immigrants or non-citizens. During the course of our efforts to resolve their legal claims and disputes, a significant percentage of our immigrant client population have had their immigration status both explicitly and implicitly used as a threat by opponents and their attorneys in litigation. We support the proposed Comment to RPC 4.4 as it provides important additional guidance for lawyers often faced with a dilemma that may be presented when clients seek a strategic advantage over a vulnerable opposing party, and cautions against improper conduct when tempted in the name of zealous representation.

For example, most recently, in a highly contentious case involving farm worker women who asserted claims of sexual harassment at their agricultural employer's workplace, opposing counsel sought to discover the immigration status of NJP's clients as well as that of women represented in the matter by the Equal Employment Opportunity Commission. The women's immigration status seems of marginal relevance to whether they experienced sexual harassment on the job, especially given that they had given up their right to back pay and front pay and were only seeking garden variety emotional distress damages. Opposing counsel further sought to discover immigration status about some of the plaintiffs' family members and witnesses, which had no relevance to the women's sexual harassment experience. In addition, one of the opposing attorneys repeatedly referred to some of the women as "illegal aliens" without in fact knowing their status, in what appeared to be clear attempt to intimidate, harass, and improperly silence the women. This litigation behavior created unnecessary stress and fear for the plaintiff women and the witnesses and impacted their participation in the case.

NJP is also aware of the use of immigration status as a deterrent to claims by victims of domestic violence, particularly when child custody or primary residential time under a parenting plan is at issue. Opposing parties and counsel often threaten to report a victim to the Immigration and Customs Enforcement (ICE) in order to either encourage reconciliation or to prevent them from asserting primary custody or residential time, or limitations on visitation time with children. While the courts have addressed the discoverability and relevance of immigration status in recent decisions cited in the GR 9 Cover Sheet (notably *Salas v. Hi-Tech Erectors,* 168 Wn.2d 664, 669-70 (2010) and *Diaz v. Washington State Migrant Council,* 165 Wn. App. 59 (Div. III 2011)), as early as 1993, the Supreme Court held that immigration status is not dispositive of child placement decisions and thus has limited relevance. *In re Dependency of J.B.S.,* 123 Wn.2d 1, 863 P.2d 1334 (1993). Arguably, it has absolutely no relevance to a determination of parental fitness and should never be a basis for implying fitness of a parent or potential harm to a child *per se*. Hence, immigration status should not be discoverable absent the actual presence of other information relevant to these issues.

The proposed Comment to RPC 4.4 strikes the appropriate balance between the legitimate need to know immigration status as central to a pending legal claim and the inappropriateness of such inquiry for the sole purpose of intimidation, coercion or harassment. While the Comment embraces the inappropriateness of such inquiry when immigration status is only marginally relevant to a pending issue, or is the subject of a frivolous or prejudicial inquiry before the court, adding a cross-reference to RPC 3.4(d) and (e) would mitigate the potential inappropriate use of evidence related to immigration status. Finally, the Comment as written could arguably be construed as not extending to a potential report or threat to report a party to immigration authorities made by an opposing party acting on the advice of counsel, which can be even more pernicious. Again, adding a cross-reference to RPC 3.4(a) would go some way toward addressing this concern and reinforcing the intent of the Comment.

Thank you for taking the initiative to provide guidance on this important issue.

Sincerely,

Deborah Perluss

Deborah Perluss
Director of Advocacy/General Counsel

C César E. Torres, Executive Director