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April 25, 2013

Justice Charles Johnson
Chair, Supreme Court Rules Committee
ATTN: Denise Foster, Clerk's Office
P.O. Box 40929
Olympia, WA 98504-0929

Re: Support for Proposed Comment (4) to RPC 4.4

Dear Justice Johnson and the Rules Committee,

AMERICAN CIVIL
LIBERTIES UNION
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EXECUTIVE DIRECTOR

The American Civil Liberties Union of Washington (ACLU-WA) writes to express our support for the proposed Comment (4) to RPC 4.4 (Respect for Rights of Third Persons). The proposed Comment would clarify that it is misconduct for a lawyer to assert or inquire about a third person's immigration status when the lawyer's purpose is to intimidate, coerce, or obstruct that person from participating in a civil matter. Given the large number of immigrants not only within the United States but also within Washington, and the harms that have already occurred in civil litigation involving immigrant witnesses and parties as described below, protection for these individuals is essential.

The proposed Comment (4) has been carefully drafted, narrowly tailored to address the specific problem, and thoroughly reviewed. We commend those who have been working for years on drafting the proposed Comment (4) to RPC 4.4 and wholly endorse its approval by the Court.

The ACLU's Interest in This Issue

The American Civil Liberties Union was created by a small group of people who decided to take a stand in response to egregious civil liberties abuses of immigrants in the early 20th century. Our institutional history demands that we voice our support to the proposed Comment (4) to RPC 4.4. In addition, in our legal work we have witnessed first-hand attempts to intimidate and chill immigrants from bringing serious violations of law to light by misusing or threatening to misuse information about immigration status. Our immigrant rights work is dedicated to the principle that when legal rights and due process are denied to one vulnerable group, everyone's rights are at risk. The proposed Comment (4) to RPC 4.4 is a perfect example of this principle. The safety of all will be jeopardized if immigrant witnesses and litigants fear using the justice system due to the risk of improper use of immigration status.

The Adoption of Proposed Comment (4) to RPC 4.4 Will Have a Significant Impact

An estimated 11.1 million undocumented persons live in the United States.¹ Approximately 230,000 undocumented persons live in Washington State.² In fiscal year 2012, U.S. Immigration and Customs Enforcement (ICE) recorded the highest number of deportations ever: 408,849.³ The sheer volume of deportations has created a climate of fear of government in immigrant communities, creating a very real barrier to witnesses coming forward and to individuals accessing our justice system, particularly because opposing litigants and their counsel are allowed unwarranted and unfettered use of immigration status for the purpose of “intimidation, coercion or obstruction” in a civil matter. The proposed Comment (4) to RPC 4.4 would appropriately clarify the ethical boundaries for lawyers regarding the use of immigration status in civil disputes, while not entirely prohibiting the use of such information in the rare case where it is relevant.

Proposed Comment (4) to RPC 4.4 Is Necessary to Assist Civil Litigants in Preserving and Advancing Their Civil Rights

We agree completely with other comments submitted to the Court confirming the need for the Court’s approval of the proposed Comment (4) to RPC 4.4. We can point to numerous additional examples of the use of immigration status as a means to coerce and intimidate civil litigants away from asserting lawful civil actions and protecting their civil rights.

In one case, the law office of MacDonald Hoague & Bayless (MHB) represented a Mexican construction worker in an action to recover unpaid wages. The employer argued that it did not have to pay the worker because it suspected that he did not have proper work authorization. Once MHB pointed out that it is the employer’s responsibility to follow the I-9 process, and that case law expressly holds that immigration status is not relevant to whether someone is entitled to payment of wages for work performed, the employer paid the amount of wages owed. While this worker was able to recover his unpaid wages, the employer’s argument will unfortunately prevent wage recovery or deter the assertion of a valid wage claim in many cases where a worker is unrepresented or has less-knowledgeable counsel.

¹ Hansi Lo Wang, *Undocumented in the United States: 11 Million and Counting*, N.P.R., Feb. 2, 2013, available at <http://www.npr.org/2013/02/02/170909540/americans-undocumented-workers-11-million-and-counting> (last accessed Apr. 22, 2013).

² Jeffrey Passel & D’Vera Cohn, Pew Research Hispanic Center, *Unauthorized Immigrant Population: National and State Trends, 2010* (Feb. 2, 2011), available at <http://www.pewhispanic.org/2011/02/01/iv-state-settlement-patterns/> (last accessed Apr. 22, 2013).

³ Alan Gomez, *Obama Administration Sets Deportation Record: 409,849*, USA TODAY, Dec. 21, 2012, available at <http://www.usatoday.com/story/news/nation/2012/12/21/record-2012-deportations/1785725/> (last accessed Apr. 22, 2013).

In another case, MHB represented a Mexican-American United States citizen in an employment discrimination case. The client had worked in a store front, and the employer had subjected her to racial epithets in front of customers. One customer became a witness in the case. When the employer deposed the witness (who was also of Mexican descent), the very first question the employer's attorney asked was whether the witness was in this country legally and what was his immigration status. Although the MHB attorney objected even though the witness was not an MHB client, the damage was done. The witness was visibly shaken, and at the first break told the MHB attorney that he wanted "nothing to do with the case," and would not testify at trial if called as a witness. Intimidation tactics like this create a severe risk that critical evidence will be suppressed and erroneous outcomes will be the result.

In both case examples above, the plaintiff's and the witness's immigration statuses were not relevant to the issues being litigated. In both cases, the plaintiff and the witness were intimidated by questions related to immigration status which were being pursued to only coerce and intimidate the parties. Had the proposed Comment (4) to RPC 4.4 been in force, MHB would have been able to point, with clarity, to the limits on the use of immigration status that counsel must abide by when immigration status is not relevant to the underlying claim.

Proposed Comment (4) to RPC 4.4 Is Consistent with Federal Immigration Policy

The federal government agencies which enforce immigration laws have a longstanding policy of supporting civil litigants who are undocumented and find it necessary to access state court justice systems to assert and protect their legal rights. ICE supports the use of prosecutorial discretion, consistent with agency policy of not responding to immigration violation tips if the nature of the complaint stems from a labor dispute.⁴ Recognizing the coercive effect that immigration enforcement can have on those who are attempting to protect their rights, ICE stated in a June 17, 2011 Memo:

To avoid deterring individuals from reporting crimes and from pursuing actions to protect their civil rights, ICE officers, special agents, and attorneys are reminded to exercise all appropriate discretion on a case-by-case

⁴ "When information is received concerning the employment of undocumented or unauthorized aliens, consideration should be given to whether the information is being provided to interfere with the rights of employees to form, join or assist labor organizations or to exercise their rights not to do so; to be paid minimum wages and overtime; to have safe work places; to receive compensation for work related injuries; to be free from discrimination based on race, gender, age, national origin, religion, handicap; or to retaliate against employees for seeking to vindicate these rights." U.S. Citizenship & Immigration Services, Operating Instructions, OI 287.3a Questioning Persons During Labor Disputes (rev. Dec. 4, 1996), available at <http://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-53690/0-0-0-61072/0-0-0-61097.html> (last accessed Apr. 22, 2013) (redesignated as Special Agent's Field Manual § 33.14(h)).

April 24, 2013

Page 4

basis when making detention and enforcement decisions in the cases of victims of crime, witnesses to crime, and individuals pursuing legitimate civil rights complaints. **Particular attention** should be paid to:


- victims of domestic violence, human trafficking, or other serious crimes;
- witnesses involved in pending criminal investigations or prosecutions;
- plaintiffs in non-frivolous lawsuits regarding civil rights or liberties violations; and
- individuals engaged in a protected activity related to civil or other rights (for example, union organizing or complaining to authorities about employment discrimination or housing conditions) who may be in a non-frivolous dispute with an employer, landlord or contractor.⁵

Proposed Comment (4) to RPC 4.4 is consistent with the federal government's immigration policies, and we urge the Rules Committee and the Court to approve the proposed Comment (4).


Conclusion

Proposed Comment (4) would deter attorney attempts to use an individual's immigration status to coerce, intimidate, or dissuade witnesses from coming forward to testify about violations of the law or individuals from vindicating their civil rights through our justice system. We urge the Court to approve the proposed Comment.

Sincerely,



Miguel Bocanegra
Joseph Shaeffer
David Whedbee
MacDonald Hoague & Bayless
Cooperating Attorneys



Sarah A. Dunne
Legal Director
Nancy L. Talner
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⁵ Memorandum from John Morton, Director, U.S. Immigration & Customs Enforcement to all Field Office Directors, Special Agents in Charge, & Chief Counsel, (June 17, 2011), available at <http://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf> (emphasis added).