



**Bob Ferguson**  
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February 3, 2020

*Sent via email to [supreme@courts.wa.gov](mailto:supreme@courts.wa.gov)*

Susan L. Carlson, Clerk  
Washington Supreme Court  
415 12<sup>th</sup> Avenue SW  
P.O. Box 40929  
Olympia, WA 98504-0929

**RE: Proposed General Rule 38 and Rule of Professional Conduct 4.4 Comment [4]**

Dear Ms. Carlson:

I write in support of Proposed General Rule (GR) 38 and Proposed Rule of Professional Conduct (RPC) 4.4 Comment [4], concerning access to Washington courts by immigrants and their families. I thank the Court for considering these two proposals, which are consistent with the Washington Judiciary's mission and dedicated work to ensure that Washington's judicial system is fair and open to all.

As the state's chief legal officer, I direct approximately 600 attorneys in 13 offices across the state. In addition to providing legal services to our state agencies, the Governor, and the Legislature, my office routinely appears in courts in every corner of the state on matters as diverse as criminal prosecutions, urgent child welfare matters, workers' rights cases, lawsuits against state agencies, consumer protection actions, and civil rights enforcement cases. Critical to my office's success is the ability of all Washingtonians—regardless of immigration background—to feel safe coming to court and telling their stories. As both prosecutors and defense attorneys in thousands of cases per year, attorneys in my office know first-hand the importance of the public's trust that our legal system will deliver order, impartiality, and justice.

As you well know, that trust has been jeopardized by the recent spike in civil immigration operations by federal officials at county and local courthouses. Since early 2017, federal officials have conducted hundreds of courthouse arrests at Washington courts, including in at least 20 of the state's 39 counties. The practice has gravely harmed the public's trust in local courts. Those harms are witnessed routinely by stakeholders representing all parts of the justice system, including judges, prosecutors, defense attorneys, legal aid lawyers, crime victim advocates, interpreters, courthouse staff, non-profit leaders, and individual parties, witnesses, and victims. The harms to our court system are severe enough that my office was forced to file litigation against the federal government seeking to stop its use of Washington courthouses as a dragnet

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for routine civil immigration enforcement. *See* Complaint, *Washington v. U.S. Dep't of Homeland Security, et al.*, No. 2:19-cv-2043-TSZ (W.D. Wash. Dec. 17, 2019).

Of course, my office's lawsuit was hardly the first effort to stop or limit the courthouse arrest practice. Since early 2017 and continuing through the present, Chief Justice Fairhurst and other members of the Supreme Court consistently have voiced their concerns about courthouse arrests to various officials within the federal government. Also in early 2017, Governor Inslee issued an Executive Order prohibiting state agencies from misusing state resources in furtherance of the exclusively federal responsibility of immigration enforcement. Local county prosecutors have likewise been vocal about the negative impact of courthouse arrests on their ability to prosecute crime. The State's requests have been ignored. As a result, and based on a continued need for measures that keep Washington's immigrant communities safe and our economy strong, the Legislature in 2019 passed E2SSB 5497 which seeks to limit unnecessary and harmful entanglement of local government officials with federal immigration enforcement.

All of these efforts are ongoing, and Proposed GR 38 will complement them by clarifying the scope and application of Washington's longstanding common law privilege against civil arrest at or near court. *See, e.g., State ex rel. Gunn v. Superior Court of King Cy.*, 111 Wash. 187 (1920). Should the Court adopt Proposed GR 38, and for avoidance of any doubt about the legal effect of the rule, the Court may wish to include a comment clarifying that it does not expand or alter Washington's longstanding common-law privilege, but rather explains the operation of the privilege in plain language and specific terms that can be understood and applied by judicial officers, court staff, federal officials, and members of the public.

Proposed Comment [4] to RPC 4.4 is likewise necessary and welcome. Through my office's communications with stakeholders statewide, I have become aware of a number of instances where Washington-licensed attorneys (or their agents) have provided or threatened to provide information directly to federal immigration agents in an effort to secure a party or witness's non-appearance at a future proceeding. In other instances, stakeholders suspect this has happened because federal agents suddenly take interest in a party or witness at a crucial stage of an ongoing state proceeding.

These reports are alarming. As officers of the court, lawyers hold a "special responsibility for the quality of justice." Preamble, Wash. Rules of Prof. Conduct. Any effort to get a witness or party civilly arrested in order to "win" a case is a blatant violation of the principle that the rule of law is "grounded in respect for the dignity of the individual." Fundamental Principles of Prof. Conduct, Wash. Rules of Prof. Conduct. Although it is already a violation of RPC 4.4 to report or threaten to report a civil litigant to immigration authorities, this amendment appropriately expands the rule to cover criminal proceedings as well as communications that facilitate (without

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directly requesting) the arrest of a party, witness, or victim. Unfortunately, based on my office's work on courthouse access issues, the need for this amendment is clear to me.

With each of the proposed rules, there would remain an open question of effective enforcement. As the federal government has publicly announced, it plans to ignore any state court rule limiting immigration arrests at courthouses. *See* Letter from William P. Barr, U.S. Attorney Gen., & Chad F. Wolf, Acting Sec'y of Homeland Sec., to Martha Walters, Chief Justice, Or. Supreme Court, & Mary E. Fairhurst, Chief Justice, Wash. Supreme Court (Nov. 21, 2019). Establishment of the applicability of any court rule to federal officials may require the further intervention of state or federal courts. And, because establishment of an ethics violation requires a grievance and supporting evidence, it will be important for WSBA's Office of Disciplinary Counsel to develop promptly methods for obtaining and reviewing communications between Washington-licensed attorneys and federal immigration authorities when a lawyer is suspected of engaging in the conduct described by Proposed RPC 4.4 Comment [4].

Finally, as the Court considers these two proposals, complementary work on these issues will continue. For example, my office has been tasked by the Legislature with issuing model policies ensuring that various types of public spaces remain safe and accessible to all Washingtonians, regardless of immigration status. *See* RCW 43.10.310 and RCW 43.10.315. One of the policies I am required to promulgate is a policy regarding courthouse access. RCW 43.10.310(1). That policy must be published by May 20, 2020. Our work on that policy is ongoing, and may overlap in some part with the work undertaken by the Court here. I look forward to continued dialog with all justice system stakeholders, including the Court, as my office works to finalize and publish the courthouse access policy.

I appreciate the opportunity to comment on Proposed GR 38 and Proposed RPC 4.4 Comment [4]. I close by again thanking the Court for considering proposed rules to improve access to justice, strengthen trust in Washington's legal system, and ensure that Washington's courts remain places where each of us safely may enter to seek justice for our families and ourselves.

Sincerely,



BOB FERGUSON  
Attorney General

RWF/jlg

**From:** [OFFICE RECEPTIONIST, CLERK](#)  
**To:** [Tracy, Mary](#)  
**Subject:** FW: Letter from Attorney General Ferguson re: Proposed General Rule 38 and RPC 4.4 Comment [4]  
**Date:** Monday, February 3, 2020 1:00:28 PM  
**Attachments:** [Sup Court Comment Ltr Re GR 38.pdf](#)

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**From:** Gaul, Judy L (ATG) [<mailto:judy.gaul@atg.wa.gov>]  
**Sent:** Monday, February 3, 2020 12:03 PM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Subject:** Letter from Attorney General Ferguson re: Proposed General Rule 38 and RPC 4.4 Comment [4]

Good afternoon,

Attached please find a letter from Attorney General Ferguson.

Respectfully,

**Judy Gaul**

**Executive Assistant to the Attorney General**

Ph: (360) 664-9083 | Email: [judy.gaul@atg.wa.gov](mailto:judy.gaul@atg.wa.gov)