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February 28, 2020

Washington Supreme Court
PO Box 40929
Olympia, WA 98504-0929
supreme@courts.wa.gov

Sent via email only

Re: Comment in Support of Proposed New General Rule 38 and Proposed Amendment to Comment to RPC 4.4, and Proponent Edits

Dear Chief Justice Stephens, Members of the State Supreme Court, and Madam Clerk:

I write on behalf of the QLaw Foundation of Washington, which promotes the dignity and respect of LGBTQ+ Washingtonians within the legal system through advocacy, education, and legal assistance. We perform that service through education, advocacy, and legal assistance programs like the LGBTQ+ Legal Clinic, which has served LGBTQ+ communities in King County for nearly ten years. Today we ask that you approve proposed new General Rule 38 and the proposed amendment to Comment to Rule 4.4 – Respect for Rights of Third Person, and adopt them in the form proposed by proponents as attached. *See attached* January 27, 2020 Northwest Justice Project letter and attachment; Proponent Edits to RPC 4.4 Comments.

LGBTQ+ individuals experience disproportionate violence within the immigration detention system. Even under prior federal administrations, immigration officers elected to detain up to 82% of LGBTQ+ immigrants who were eligible for release.¹ In more recent cases nationally, undocumented transgender individuals have been detained while seeking protection from domestic violence² or have been re-detained by ICE within weeks of their release from detention.³ While in detention, LGBTQ+ individuals, and particularly transgender women, experience a great deal of violence and abuse. LGBTQ+

¹ Sharita Gruberg, *ICE Officers Overwhelmingly Use Their Discretion to Detain LGBT Immigrants*, Center for American Progress, October 26, 2016, available at <https://www.americanprogress.org/issues/lgbtq-rights/reports/2016/10/26/291115/ice-officers-overwhelmingly-use-their-discretion-to-detain-lgbt-immigrants/>.

² Richard Gonzales, *ICE Detains Alleged Victim of Domestic Abuse at Texas Courthouse*, National Public Radio, February 16, 2017, available at <https://www.npr.org/sections/thetwo-way/2017/02/16/515685385/ice-detains-a-victim-of-domestic-abuse-at-texas-courthouse>.

³ Nomaan Merchant, *Lawyers: ICE arrests trans migrant woman month after release*, Houston Chronicle, January 17, 2020, available at <https://www.houstonchronicle.com/news/texas/article/Lawyers-ICE-arrests-trans-migrant-woman-month-14984133.php>.

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people in detention are 97 times more likely to report being sexually victimized than non-LGBTQ+ people,⁴ and numerous studies have found that LGBTQ+ immigrants in detention are subjected to verbal and physical abuse as well as withholding of critical medication such as HIV medication and hormone therapy.⁵ At least two transgender women have died in ICE custody following illnesses for which they repeatedly sought medical attention.⁶

LGBTQ+ individuals regardless of immigration status already have a difficult time accessing Washington's courts because of the fear or experience of discrimination and the belief that they will rarely, if ever, be treated fairly in the justice system.⁷ Unfortunately, LGBTQ+ people in Washington have disproportionate need to access courts, particularly in areas like employment rights, health care access, municipal services and utilities, and health care⁸ and experience high rates of discrimination on the basis of immigrant status, sexual orientation, gender identity, and domestic violence/sexual assault survivor status.⁹

It is imperative that our courts are accessible to all Washington residents, and that our legal system affirmatively protects the rights of individuals who need to use it. Proposed General Rule 38 will protect Washington's most vulnerable communities while they access the courts, but will also send a message to LGBTQ+ immigrant communities that the State of Washington recognizes their particular vulnerability to ICE abuses and will not tolerate their exclusion from public life. Equally importantly, the proposed amendments to the Comment to RPC 4.4 – Respect for Rights of Third Person will set the expectation among legal practitioners that the threat of ICE detention (and, for LGBTQ+ people, almost certain assault or abuse) is an unconscionable strategic tactic that has no place among those of us who have sworn to uphold the principles of justice.

And, while we wish the proponent amendments to the proposed language were not necessary, ICE agents have used a number of tactics, including misrepresenting the effect of civil immigration warrants, lying in wait near courthouses, and misrepresenting their purpose to their targets or their family members in order to gain access. It is important that the Court adopt rules which will set clear and unequivocal standards for ICE, court personnel, and members of the Bar to follow.

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⁴ Sharita Gruberg, *ICE's Rejection of Its Own Rules Is Placing LGBT Immigrants at Severe Risk of Sexual Abuse*, Center for American Progress, <https://www.americanprogress.org/issues/lgbt/news/2018/05/30/451294/ices-rejection-rules-placing-lgbt-immigrants-severe-risk-sexual-abuse>

⁵ Human Rights Watch, *Do You See How Much I'm Suffering Here? Abuse against Transgender Women in US Immigration Detention*, available at <https://www.hrw.org/report/2016/03/23/do-you-see-how-much-im-suffering-here/abuse-against-transgender-women-us>

⁶ Sam Levin, *Trans woman who died after illness in US custody had asked to be deported, family says*, The Guardian, June 12, 2019, available at <https://www.theguardian.com/us-news/2019/jun/12/trans-woman-death-us-custody-ice-deportation>

⁷ WSU-Social & Economic Sciences Research Center, *Civil Legal Needs of Low-Income LGBTQ Individuals: Supplement to the 2014 Civil Legal Needs Study Update Pullman, 2016*, at 21.

⁸ *Id.* at 16.

⁹ *Id.* at 18, 19.

We deeply appreciate the strong stance the Washington Supreme Court and retired Chief Justice Mary Fairhurst have taken to preserve the constitutional right to access the courts, and strongly urge the Court today to adopt the proposed rules.

Respectfully,



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César E. Torres
Executive Director

January 27, 2020

Chief Justice Deborah Stephens
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Susan L. Carlson
Clerk of the Supreme Court
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Dear Chief Justice Stephens, Members of the State Supreme Court, and Madam Clerk,

The Northwest Justice Project (NJP) writes in strong support of proposed General Rule 38. NJP is part of a statewide coalition of legal services and community based organizations requesting that this Court adopt General Rule 38 to preserve access to justice for Washington's most vulnerable residents, particularly victims of crime and domestic violence who rely on state courts to ensure their safety and the safety of their families.

NJP's Interest as a Provider of Civil Legal Services

Washington State recognizes that “[t]he provision of civil legal aid services to indigent persons is an important component of the state’s responsibility to provide for the proper and effective administration of civil and criminal justice.” RCW 2.53.005. The Northwest Justice Project is the largest provider of civil legal aid in Washington State, employing over 130 attorneys working in 19 offices across the state. NJP provides representation to low-income people in over 13,000 cases a year. Our clients seek to obtain and preserve safe housing, protect family safety, ensure gainful employment, preserve educational opportunity, combat consumer exploitation, and address the legal needs caused by crime victimization.

A significant proportion of NJP’s civil legal services are to victims of domestic violence, sexual assault, and other crimes.¹ The legal needs of crime victims in Washington are acute. Washington’s 2015 Civil Legal Needs Study report found that on average, domestic violence and sexual assault victims responding to the study experienced an average of over 19 distinct legal problems, a rate twice as high as the general low-income population. Approximately

¹ NJP receives federal Legal Services Corporation funding to provide civil legal services, as well as funding made available for civil legal aid under the federal Victims of Crime Act, administered by Washington’s Office of Civil Legal Aid (OCLA). Under both funding sources, NJP is specifically authorized to provide representation to undocumented immigrant victims of crime, including victims of domestic violence, sexual assault, and trafficking. 45 C.F.R. § 1626.4.

16% of NJP's total cases in 2018 were on behalf of victims of crime, and 38% of NJP's total cases involved family safety (protection orders, dissolution or marriage, or parenting plans).

DHS Activity at Courthouses Prevents Immigrant Victims of Crime from Exercising their Fundamental Right of Access to the Courts

Article 1, section 10 of the Washington state constitution provides that “justice in all cases shall be administered openly and without unnecessary delay.” Const. Art. 1 § 10. This includes the right to seek legal redress in the courts. *King v. King*, 162 Wn.2d 378, 388, 174 P.3d 659 (2007); *see also State v. Vance*, 29 Wn. 435, 70 P. 34 (1902) (recognizing the “right to the usual remedies to collect debts, and to enforce other personal rights” as fundamental rights protected under the Washington constitution’s privileges and immunities clause). The right of meaningful access to the courts is particularly important when the courts are the only mechanism to settle a dispute. *See, e.g., Whitney v. Buckner*, 107 Wn.2d 861, 866, 734 P.2d 485 (1987) (recognizing a constitutional right of access to the courts for the purpose of dissolving marital relationships). *State ex. rel. Taylor v. Dorsey*, 81 Wn. App. 414, 421, 914 P.2d 773, 777 (1996) (persons required to settle disputes through the judicial process must be afforded “meaningful access” to the courts).

For victims of crime seeking protection orders, divorce, and restrictive parenting plans, state court is the only appropriate forum, and that forum is no longer meaningfully available to many immigrants due to immigration enforcement actions. Immigrants across Washington State seeking NJP assistance are already aware that immigration agents are arresting people in and around courthouses. This information has been shared rapidly through family members, co-workers, friends and media coverage. Some of the people who contact NJP attorneys have personally witnessed immigration arrests in and around courthouses. This practice has created deep fear in immigrant communities.

NJP attorneys across the state repeatedly counsel individuals who are hesitant to move forward with legal claims because they fear that filing cases and appearing in court may result in their arrest and possible deportation. Attorneys in NJP's Seattle and Wenatchee offices have advised clients who resisted moving forward with meritorious cases on this basis, including a domestic violence victim who declined to modify a parenting plan and a domestic violence victim who declined to file for divorce from an opposing party incarcerated for sexual abuse. For many people, the potential harms they face in going to court are so untenable that they simply decline to participate in the legal process and thus expose themselves to the risk of future violence. This impact is not confined to domestic violence cases. NJP advocates have counseled clients whom, because of immigration enforcement activities, hesitate to go to court for any reason, including responding to a subpoena or paying a fee.

Attorneys in NJP's Seattle, Omak and Wenatchee offices have represented parties in cases where the perpetrators of crime affirmatively seek to exploit the possibility of civil immigration enforcement to gain legal advantage over NJP clients. These include a child custody case in which the opposing party threatened to call and direct ICE agents to the courthouse to arrest our client (a victim of domestic violence) if he tried to obtain a parenting

plan and access to his children. This was not an idle threat: the opposing party subsequently called law enforcement to solicit our client's arrest due to his undocumented status. In another case, a perpetrator of domestic violence threatened to get an NJP client deported if she filed for dissolution of the marriage.

The specter of civil immigration enforcement in courthouses can also lead NJP clients to limit their arguments and remedies. In some instances, perpetrators of domestic abuse seek to exploit the fact that the victim is undocumented to obtain financial or other forms of control. An attorney in NJP's Tacoma office represented a client seeking a protection order and divorce who omitted evidence that the opposing party routinely threatened her job, because that evidence could expose her status as undocumented and subject her to risk of arrest.

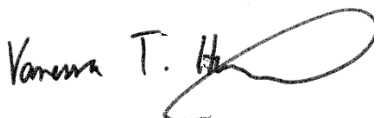
The chilling effect caused by immigration enforcement activity undermines Washington State's policy of preventing domestic violence and enabling access to justice for undocumented immigrant victims of crime. *See Rodriguez v. Zavala*, 188 Wn.2d 586, 588 398 P.3d 1071 (2017) ("As a community, we have recognized the importance of domestic violence as an offense against our ordered society and we have committed to providing victims the maximum protection from abuse which the law and those who enforce the law can provide.") Washington has a strong public policy of preventing and ending domestic violence, with the Legislature recognizing domestic violence as a "serious crime against society" and the "necessity for early intervention by law enforcement" to mitigate the harm. *See RCW 10.99.010*; *see also Danny v. Laidlaw Transit Services, Inc.*, 165 Wn.2d 200, 193 P.3d 128 (2008); Laws of 1992, ch. 111, § 1; Laws of 2004, ch. 17 § 1(1).

Washington recognizes that immigrant victims have particular barriers to accessing justice. In 2018, the legislature passed the Safety and Access for Immigrant Victims Act, RCW 7.98.900, recognizing that "the protections available to immigrants under the law are designed to strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of trafficking in persons, domestic violence, sexual assault, and other crimes while offering protections to such victims." RCW 7.98.005. Our communities are safer when all people can access the protection of the law, and participate in the legal process.

Suggested Amendments to the Rule and Conclusion

Since the GR 38 petition was filed in October 2019, NJP and other members of the statewide coalition supporting the rule have continued to engage with stakeholders, including judges, clerks, legal experts and community members. Those discussions identified the need for a few amendments to clarify the proposed rule to ensure its effectiveness. We have attached proposed amendments, which NJP supports, to this letter for your reference. We ask this court to address the access to justice crisis created by immigration enforcement in and around courthouses, and to adopt proposed General Rule 38 with the amendments attached.

Sincerely,

Handwritten signature of Vanessa T. H. in black ink, consisting of the name 'Vanessa T. H.' followed by a stylized, cursive flourish.

Vanessa Torres Hernandez, Director of Advocacy

PROPOSED AMENDMENT LANGUAGE TO PETITION GR 38
COURT RULE PROHIBITION ON CIVIL ARRESTS

Amended Language in red:

1. No person shall be subject to civil arrest without a judicial arrest warrant or judicial order for arrest while the person is inside a court of law of this state in connection with a judicial proceeding or other business with the court.
2. No person shall be subject to civil arrest without a judicial arrest warrant or judicial order for arrest while the traveling to a court of law of this state for the purpose of participating in any judicial proceeding, accessing services or conducting other business with the court, or while traveling to return home or to employment after participating in any judicial proceeding, accessing services or conducting business with the court. Participating in a judicial proceeding includes, but is not limited to, participating as a party, witness, interpreter, attorney or lay advocate. Business with the court and accessing court services includes, but is not limited to, doing business with, responding to, or seeking information, licensing, certification, notarization, or other services, from the office of the court clerk, financial/collections clerk, judicial administrator, courthouse facilitator, family law facilitator, court interpreter, and other court and clerk employees.
3. Washington courts may issue writs or other court orders necessary to enforce this court rule. **Unless otherwise ordered, the civil arrest prohibition extends to within one mile of a court of law. In an individual case, the court may issue a writ or other order setting forth conditions to address circumstances specific to an individual or other relevant entity.**

For purposes of this rule:

- A. **“Court of law” means any building or space occupied or used by a court of this state and adjacent property, including but not limited to adjacent sidewalks, all parking areas, grassy areas, plazas, court-related offices, commercial spaces within buildings or spaces occupied or used by a court of this state, and entrances to and exits from said buildings or spaces.**
- B. **“Court Order” and “Judicial Warrant” include only those warrants and orders signed by a judge or magistrate authorized under Article III of the United States Constitution or Article IV of the Washington Constitution or otherwise authorized under the Revised Code of Washington. Such warrants and orders do not include civil immigration warrants or other administrative orders, warrants or subpoenas that are not signed by a judge or magistrate as defined in this section. Civil immigration warrant means any warrant for a violation of federal civil immigration law issued by a federal immigration authority and includes, but is not limited to, administrative warrants issued on forms I-200 or I-203, or**

their successors, and civil immigration warrants entered in the national crime information center database.

- C. "Subject To Civil Arrest" includes, but is not limited to, stopping, detaining, holding, questioning, interrogating, arresting or delaying individuals by state or federal law enforcement officials or agents acting in their official capacity.

Additional Proposed Amendment to Rules of Professional Conduct 4.4 Comment (4)

The duty imposed by paragraph (a) of this Rule includes a lawyer's assertion or inquiry 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 or criminal matter. Issues involving immigration status carry a significant danger of interfering with the proper functioning of the justice system. See *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 230 P.3d 583 (2010). When a lawyer is representing a client in a civil or criminal 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. Sharing personal information with federal immigration authorities including home address, court hearing dates, citizenship or immigration status, or place of birth, absent a court order, for the purpose of facilitating civil immigration arrests is conduct that constitutes a report of a person to immigration authorities for purposes of this rule.

A communication in violation of this Rule can also occur by an implied assertion that is the equivalent of an express assertion prohibited by paragraph (a). See also Rules 8.4(b) (prohibiting criminal acts that reflect adversely on a lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects), 8.4(d) (prohibiting conduct prejudicial to the administration of justice), and 8.4(h) (prohibiting conduct that is prejudicial to the administration of justice toward judges, lawyers, LLLTs, other parties, witnesses, jurors, or court personnel or officers, that a reasonable person would interpret as manifesting prejudice or bias on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status). Lawyers employed by local, state and federal government entities engaged in authorized activities within the scope of lawful duties are presumptively not in violation of this Rule unless there is clear indication of no substantial purpose other than to intimidate, coerce, or obstruct a third person from participating in a legal matter.

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Please find attached QLaw Foundation of Washington's letter in support of proposed amendments to GR 38 and RPC 4.4, Comment 4, and in support of further amendments offered by proponents.

Thank you very much for your consideration.

Respectfully,

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