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From: Steve Clem [mailto:steveclem@charter.net]
Sent: Friday, January 24, 2020 3:10 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Proposed Rule GR 38 - Comment Supporting Adoption

Dear Justices,

My name is Steve Clem. I have been practicing law in Washington for 43 years and served six terms as the Douglas County Prosecuting Attorney. I support the adoption of GR 38, which will clearly express the role of Washington's courts to protect parties, witnesses and crime victims in our judicial system and, in particular, those parties, witnesses and crime victims who are undocumented immigrants.

ICE agents have targeted Washington's courts as a means to easily identify and make warrantless arrests of suspected undocumented immigrants. These warrantless arrests are civil in nature. *Arizona v. United States*, 567 U.S. 387, 407 (2012) (citing *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984)). These arrests - and the threat of such arrests - in or near Washington's courthouses negatively affects Washington's justice system and Washington residents. Based on fear of arrest, immigrants who are victims and witnesses may choose to *not cooperate* with law enforcement or prosecution, or may choose to *not seek* civil relief such as protection orders, domestic relationship dissolutions, child custody and support determinations, or to *not contest or seek* adjudications with respect to traffic infractions, collection actions, landlord-tenant actions and other civil matters.

Under ancient English common law, a civil suit was commenced with the arrest of the defendant. A privilege was developed to prevent civil arrest while the putative defendant was attending other unrelated court proceedings. This privilege has been widely applied by American federal and state courts and, in light of the "modern" use of a summons to commence civil actions, the scope of the privilege has been extended to apply to service of process. State courts applied the privilege from civil arrest as early as 1797. *Hayes v. Shields*, 2 Yeates 222 (Penn.) Federal courts applied the privilege as early as 1849. *Parker v. Hotchkiss*, 18 F. Cas. 1137, 1138 (C.C.E.D. Pa. 1849).

English common law is the law of Washington, so long as it is not contrary to the constitutions of the United States and the state, "nor incompatible with the institutions and condition of society in this state." Wa. Const. art. XXVII, § 2; RCW 4.04.010. In *Groundwater v. Town*, 93 Wash. 384, 386, 160 P. 1055 (1916) our Supreme Court acknowledged the common law privilege from civil arrest, but declined to examine and apply the privilege based upon the facts of that case. In *State ex rel. Gunn v. Superior Court of King Cty.*, 111 Wash. 187, 190-91, 189 P. 1016 (1920), our Supreme court applied the privilege and held:

It is not necessary to further discuss the origin and development of the common

law upon this subject, but we content ourselves with the statement of the fundamental idea on which the common-law rule rested. At common law witnesses and parties were privileged from the service of the then existing means of summons in civil actions during the time they were in attendance upon the court. A review of the decided cases would extend this opinion to an unpardonable length and would reveal that the eminent judges of the various federal courts and the Supreme Court itself, and the overwhelming majority of the state courts, are committed to the rule established at common law, and that only a small minority of the state courts adhere to the contrary doctrine. We are content to follow the majority rule, not only because of its overwhelming indorsement by the courts and the eminent jurists who have given it their sanction, but as well because it is founded upon a reason which originally was sound, and which time has not altered.

Proposed GR 38 is supported by the historical protections courts have conferred upon parties and witnesses and by fundamental public policy. It will protect access to justice, the effective administration of justice, and the exercise of due process and equal protection. Please clarify these protections by adopting GR 38.

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Attorney at Law