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February 26, 2020

The Honorable Susan L. Carlson
Clerk of the Washington State Supreme Court
Washington State Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929
supreme@courts.wa.gov

Via Electronic Mail

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

TO: Honorable Justices of the Washington Supreme Court:

We write on behalf of the Washington State Chapter of the American Immigration Lawyer Association (AILA). AILA is the national association of more than 15,000 attorneys and law professors who practice and teach immigration law. Founded in 1946, AILA is a nonpartisan, not-for-profit organization that provides continuing legal education, information, professional services, and expertise through its 39 chapters and over 50 national committees. The Washington State Chapter has more than 500 members located in all parts of the state. We thank the Supreme Court of Washington State for the opportunity to submit comments on the proposed change to the comment on Rule of Professional Conduct (RPC 4.4) with regard to sharing information with federal immigration authorities and urge its adoption. We also support adoption of new General Rule 38 prohibiting civil arrests without a judicial arrest warrant inside a Washington courthouse, or against persons traveling to, or returning from, a Washington courthouse.

We were among the early groups to urge WSBA and the Court to adopt some explicit prohibition of intimidation of witnesses and parties by threatening disclosure of their status to Immigration and Customs Enforcement [ICE]. We argued for a new specific rule. The issue which prompted this concern in the years after 9/11 often arose in civil contexts. It was especially intended to address problems of employers trying to silence workers from pursuing owed wages or grievances about working conditions through threats to report them to immigration authorities. Eventually the current comment was added to RPC 4.4. Over the years, the

number of immigrant residents in our state has grown dramatically. In 2017, there were more than 1 million Washington state residents who were born abroad, more than triple the number in 1990¹. The current climate of immigration enforcement activities has increased the fears which make immigrants vulnerable to intimidation and wary of public authorities. At the same time, members of immigrant communities constituting a larger share of our community will also make up a greater portion of those impacted by the criminal justice system. There is no reason why intimidation against victims, witnesses and defendants should be allowed in criminal matters any more than in civil proceedings. Access to justice and fair play in our criminal proceedings should not be warped by threats against non-citizens made by officers of the court. Even immigrants who now hold U.S citizenship may have fears for undocumented relatives in their household if they are brought to the attention of the immigration enforcement authorities. The changes to the comment to RPC 4.4 would prevent all lawyers in Washington from reporting individuals to immigration authorities for purposes of burdening their participation in either civil or criminal cases. It would help to ensure that all lawyers are upholding their duty to facilitate access to justice and the truth. Exceptions are provided for compliance with state and federal law and for lawyers employed by federal immigration authorities.

Comments from the government attorneys have challenged the amended comment to RPC 4.4 as being unnecessary. As Prof. John Strait indicates, the current limitation to attorneys in civil cases itself creates questions for criminal attorneys of its applicability. The comment from Asian Pacific Institute for Gender-based Violence provides data concerning the fears of victims of domestic violence have about going to court for a matter involving their abuser. Since U.S. Attorney Moran acknowledges that it is a “laudable and important purpose”, any uncertainty in the rule which increases fears and blocks access to justice should be minimized. The U.S. attorney also suggests that the comment goes beyond the rule. The proposed amendment only clarifies a specific example of conduct that is included in the “means” to “embarrass, delay or burden” prohibited by the rule. Further, the courts have long had jurisdiction over attorney conduct and speech as it impacts the administration of justice in a proceeding in their court rooms.

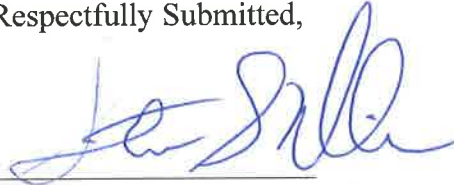
The fear of showing up at a courthouse and being subject to civil arrest by ICE officers can prevent immigrants from having access to justice. General Rule 38 addresses those fears building on a long tradition of

¹ Migration Policy Institute tabulations of the U.S. Census Bureau American Community Survey (ACS) and Decennial Census [2017 data]. <https://www.migrationpolicy.org/data/state-profiles/state/demographics/WA>

common law. The need for some action is warranted by the increased use of Washington's courts for routine civil deportation arrests. Moreover, the broad public safety argument being made against General Rule 38 is not sound. ICE certainly has the resources to prioritize its targets and obtain judicial warrants against those for whom it has the grounds. ICE currently fails to distinguish between individuals who pose a threat to the community and the millions of immigrant families who may include a member with immigration status issues. This failure breaches the trust of the immigrant community, a trust which law enforcement has been trying so hard to build. This proposed comment is limited to civil immigration actions and does not impact any arrest with a judicial warrant. If an individual is a true threat to the community, it is not asking too much to obtain a judicial warrant.

AILA Washington strongly supports the fundamental right of all Washington residents to access our courts. It is enshrined in the state Const. art. I, § 10. The Court should ensure that the attorneys do not use reports to ICE or threats of such reports to curtail fair access. It should also address the fear of civil arrest by ICE which prevents such access. Thank you for the opportunity to comment.

Respectfully Submitted,



Steve S. Miller, Chair of Advocacy
Washington State Chapter of the American Immigration Lawyers
Association

From: [OFFICE RECEPTIONIST, CLERK](#)
To: [Tracy, Mary](#)
Subject: FW: proposed General Rule 38
Date: Wednesday, February 26, 2020 1:16:19 PM
Attachments: [AILA Comments of RPC 4.4. and GR 38.pdf](#)

Forwarding

From: Steve Miller [mailto:ssmiller@cmlseattle.com]
Sent: Wednesday, February 26, 2020 1:16 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Mavunkel@ryanlaw.com
Subject: proposed General Rule 38

Dear Clerk of the Washington State Supreme Court,

Please find the comment from the Washington State Chapter of AILA for proposed comments on RPC 4.4.

Respectfully,

Steve Miller



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