

January 30, 2020

The Honorable Susan L. Carlson
Clerk of the Washington State Supreme Court
Washington State Supreme Court
Temple of Justice
P.O. Box 40939
Olympia, Washington 98504
supreme@courts.wa.gov

Via Electronic Mail



AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

Washington

P.O. Box 2728
Seattle, WA 98111-2728
(206) 624-2184
aclu-wa.org

Michele Storms
Executive Director

Enoka Herat
Police Practices and
Immigration Counsel

**Re: ACLU of Washington Comments Regarding
Proposed Amendment to Comment 4 of RPC 4.4**

TO: Honorable Justices of the Washington Supreme Court:

The American Civil Liberties Union of Washington (ACLU-WA) writes in strong support of proposed amendments to comment 4 of the Rules of Professional Conduct (RPC) 4.4, as modified below. ACLU-WA is part of a statewide coalition of legal organizations and community based organizations requesting that this Court adopt the proposed amendments to preserve access to justice for Washington's most vulnerable residents, and to ensure that lawyers are promoting rather than undermining access to justice for all. ACLU-WA is a statewide, nonpartisan, nonprofit organization with over 135,000 members and supporters dedicated to the preservation of civil liberties. ACLU-WA has long fought for full and fair access to courts and the rights of immigrants, as these are rights fundamental to our free society.

There is a growing access to justice crisis in Washington. In just two years, there have been over 200 documented civil immigration arrests at courthouses in at least 18 counties. Immigration agents, often in plain clothes, are making civil arrests in and around courthouses. This creates an environment of fear that deters noncitizens from coming to court. These warrantless civil arrests run contrary to deeply ingrained public policy ensuring access to courts, protecting the rights of litigants and witnesses, and preserving the dignity and decorum of courts.

Unfortunately, there are lawyers in Washington who are contributing to the problem. Documented evidence reveals that some prosecutors have reported people to immigration authorities and are facilitating these civil immigration arrests at courthouses.¹ Ethics inquiries also reveal that some

¹ University of Washington Center for Human Rights, *Justice Compromised, Immigration arrests at Washington state courthouses* (Oct. 2019), <https://jsis.washington.edu/humanrights/2019/10/16/ice-cbp-courthouse-arrests/>.

criminal defense attorneys have at least considered facilitating immigration arrests of witnesses in cases against their clients.²

Lawyers must enhance rather than impede fair access to the courts. We cannot deliver the promise of equal access to justice and due process under law to community members who are precluded from accessing the courts. Lawyers facilitating courthouse arrests are acting in direct contradiction to the requirement of a fair and open system of justice that must extend to all. Sharing information with immigration authorities that has been gained through one's professional access has a cascading effect, triggering devastating consequences for an individual and their family, employer, community, and our courts. When a lawyer learns of a person's immigration status through their professional duties, they should not attempt to leverage that information or prevent people from accessing the courts. Doing so undermines trust in the judicial system and should be deemed unethical.

Comment 4 to Rule 4.4 already recognizes this basic principle, but it must be expanded to fit the current context. The existing Comment prohibits reporting or threatening to report someone to immigration authorities, but only in the civil context. The proposed revision makes explicit the necessary inclusion of criminal proceedings and other needed clarifications as well.

Since the GR 9 petition was filed in October 2019, ACLU-WA and other members of the statewide coalition supporting the amendments have continued to engage with stakeholders, including the Committee on Professional Ethics (CPE) and the Office of Disciplinary Counsel. Those discussions identified the need to modify the proposed amendments for clarity, effectiveness, and to ensure alignment with other provisions of the RPCs. We have attached the modified proposal, which ACLU-WA, CPE, and the statewide coalition support, to this letter for your reference.

The modified proposed amendments to Comment 4 of RPC 4.4 seek to do three things: 1) expand the prohibition on reporting to the criminal context, 2) clarify that "reporting" includes the sharing of personal information with federal authorities, and 3) provides an exemption for lawyers whose professional duties may include communicating information to immigration authorities.

First, the existing comment is limited only to lawyers representing clients in civil matters who report or threaten to report people to immigration authorities. However, there is no justification for limiting this rule only to

² See John Strait, *Comment on Proposed Amendment to WRPC 4.4, Comment 4* (Jan. 2020), https://www.courts.wa.gov/court_Rules/proposed/2019Nov/Proposed%20Changes%20to%20RPC%204.4;%20Comment%204/John%20Strait%20-%20RPC%204.4.pdf.

those in civil practice. Lawyers participating in criminal cases should also be deterred from reporting or threatening to report people to immigration authorities. There is no reason why such a prohibition would only apply in the civil context but not the criminal.

Second, clarifying that reporting one's personal information to immigration authorities for the purpose of civil immigration enforcement provides a needed clarification that also limits the scope of the rule to the problem the rule is aimed at. This change is critical because it hinges a lawyer's conduct on interactions with immigration agents. Many lawyers, for a variety of reasons from family law to criminal law, may lawfully and ethically inquire into a person's immigration status or share information about a person's immigration status within the course of representation. While it may be intimidating, even intentionally so, to be questioned about one's status, it is critical to clarify that lawyers may properly ask such questions in some contexts. The proposal would instead deem unethical the proactive sharing of information with immigration agents.

Moreover, only information shared with immigration agents related to *civil immigration enforcement* falls under this rule, thus narrowing the scope further. This distinguishes between conduct that facilitates deportations which are civil, from investigations and collaborations facilitating criminal prosecutions. This clarity is needed to allow lawyers engaged in enforcing criminal laws to cooperate with federal immigration law enforcement on criminal investigations. It also protects prosecutors who share information to immigration authorities in an effort to secure waivers of deportation such as U and T visas for crime survivors, and immigration attorneys who are members of the Washington bar, from triggering the rule.

Third, the amendment regarding lawyers whose professional duties require them to share information with immigration authorities is necessary. For example, it may be within the duties of federally employed Washington lawyers to provide information to immigration authorities, so they should be exempted from the presumption that sharing such information is unethical. Even so, if a lawyer shares information with immigration authorities, with the *purpose of intimidating, coercing or obstructing* a third person, their conduct would be deemed unethical.

The RPCs are a powerful tool in defining how our profession expects to participate in the judicial system, and how we are perceived by those most in need of our services. We urge the Court to stand with immigrants and support the modified proposed amendments to Comment 4 of RPC 4.4, and move our state closer to the promise of equal justice for all.

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

MODIFIED PROPOSED AMENDMENT

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.]

From: [OFFICE RECEPTIONIST, CLERK](#)
To: [Tracy, Mary](#)
Subject: FW: ACLU-WA comment letter supporting RPC 4.4 Comment 4 amendments
Date: Thursday, January 30, 2020 9:25:50 AM
Attachments: [Outlook-ACLU-WA-Lo.png](#)
[1-30-2020 ACLU-WA letter RPC 4.4 Comment 4.pdf](#)

From: Enoka Herat [mailto:eherat@aclu-wa.org]
Sent: Thursday, January 30, 2020 9:17 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: ACLU-WA comment letter supporting RPC 4.4 Comment 4 amendments

Good morning. Kindly find attached the ACLU-WA's comment in support of proposed amendments to RPC 4.4 Comment (4).

Best regards,
Enoka

Enoka Herat
Police Practices and Immigration Counsel
Pronouns: she, her

American Civil Liberties Union of Washington
901 Fifth Avenue, Suite 630, Seattle, WA 98164

206.624.2184 x232 | eherat@aclu-wa.org
www.aclu-wa.org



This message is intended only for the people to whom it is addressed and may include confidential attorney-client/attorney-work product communication. If this message is not addressed to you, please delete it and notify me.