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January 30, 2020

VIA FEDERAL EXPRESS

Ms. Susan L Carlson
Clerk of the Court
Washington State Supreme Court
415 12th Avenue SW
Olympia, WA 98501-2314

Re: Comments Regarding the Proposed Amendment to the Commentary to Rule 4.4 of the Rules of Professional Conduct

Dear Ms. Carlson:

As the United States Attorney for the Western District of Washington, I am writing to urge that the proposed additions to comment (4) to Rule 4.4 of the Rules of Professional Responsibility not be adopted. As proposed, the changes to comment (4) are poorly drafted, ill-advised, and unnecessary. The purpose of a comment to the Rules of Professional Conduct is to provide guidance to lawyers regarding their ethical responsibilities under the rule. Such a comment is not the place to attempt to affect a change in immigration policy or to leave lawyers confused regarding their obligations.

Rule 4.4 of the Rules of Professional Conduct already makes clear that it is unethical for a lawyer to use any means that has no substantial purpose other than to embarrass, delay, or burden a third person in litigation. There is no ground to doubt that this would cover the use of immigration status for that purpose. And if there were doubt, the existing comment (4) makes clear that this ethical restriction extends to inquiries regarding a person's immigration status where the purpose of that inquiry is "to intimidate, coerce, or obstruct" a person from participating in judicial proceedings. The proposed commentary goes well beyond that laudable and important purpose and essentially declares that it is unethical for a lawyer to inquire about an individual's immigration status without regard to whether there is a lawful and proper reason for the inquiry. In essence, the commentary attempts to dictate a policy that the rule itself does not require.

First, by adding the words "or otherwise assists with civil immigration enforcement" at line 5, the proposed comment can be read as prohibiting a lawyer from inquiring about immigration status if that inquiry might later be used to assist immigration enforcement. The

proposed additions at lines 15 through 18 baldly state that, absent a court order, Rule 4.4 is violated when a lawyer shares information with federal immigration authorities for the purpose of facilitating civil immigration arrests. This addition by the proposed commentary is a significant extension to the rule. By its terms, Rule 4.4 applies only to actions where the lawyer's purpose is "*to intimidate, coerce, or obstruct*" the individual's participation in a judicial proceeding. The proposed commentary instead announces a flat prohibition that seems to presuppose that contact with immigration officials is contact for the purpose of intimidating, coercing, or obstructing. Rewriting the comment in this way effectively eliminates the *mens rea* element from the rule and creates a strict prohibition against sharing information with federal immigration authorities. Doing so would be ill-advised.

In the practice of law, there are countless appropriate reasons why a lawyer may need to inquire into the immigration status of another person that are not for the purpose prohibited by RPC 4.4. For example, in a custody dispute, counsel might need to know if one parent is an undocumented alien and the status of any deportation proceedings in assessing who should have residential placement of a minor child. In a divorce, if the marital couple is undocumented and has not filed tax returns, understanding immigration status may be important in accurately assessing income in the marital community for a just and equitable distribution of any assets and spousal maintenance. In counseling a domestic-violence victim where the battered spouse discloses that his or her undocumented batterer possesses firearms, that alleged violation of Wash. Rev. Code § 9.71.071 (Alien in Possession of a Firearm), a class C felony, may be of significant interest to a court in granting a protection order and to local law enforcement in pursuing the victim's complaint and enforcing state laws, but that disclosure might in turn lead to an immigration detention. And in criminal defense, a lawyer must know the immigration status of the defendant to advise properly on the immigration consequences of accepting a guilty plea for that plea to be knowing and voluntary. These legitimate inquiries might well be chilled by a comment that presumes that all inquiries and contacts are for an improper purpose.

The comment as drafted would also seem to restrict a lawyer's First Amendment rights to the extent that it purports to gag all lawyers who are subject to the rule from providing information to federal immigration authorities. All lawyers have a duty to uphold the law. The fact that an individual lawyer chooses to make a report to immigration authorities about conduct that is illegal under the laws of the United States should not subject a lawyer to a finding of a state ethics violation provided that the information was not obtained, or the report made, for the purpose of intimidating, coercing, or obstructing a person's participation in a judicial proceeding.

With respect to "government officials," the proposed comment would interpret RPC 4.4 as allowing those officials to share information with federal immigration authorities "only pursuant to RCW 7.98," which is limited to providing certificates regarding crime victims required by federal immigration law in order to obtain a U- or a T-Visa. But efforts to assist crime victims who are not legal residents of the United States might require contact with immigration authorities beyond what is contemplated by this section of the Revised Code of Washington. For example, under 28 U.S.C. § 1100.35, a victim of human trafficking may be

eligible for what is known as "Continued Presence" for up to a year while the investigation takes place and the victim's eligibility for a T- or a U-visa is assessed. Likewise, it could hamper the ability to prosecute crimes where witnesses to these crimes are not legal residents and are already subject to removal proceedings. A county prosecutor may well need to work with ICE to seek some sort of deferred action where a witness in a criminal case is already in removal proceedings or to allow others to be paroled back in to the United States for that purpose. Under the proposed new commentary, those contacts would seem to be precluded.

The commentary also provides that "government officials" are *not* prohibited from sending or receiving information about a person's immigration status or citizenship under 8 U.S.C. § 1373. That statute states that "a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual." Yet that would seem to contradict the preceding sentence. The inconsistency between the statute and the commentary certainly would leave a government lawyer guessing as to the limitations that the commentary purports to impose. Confusion is precisely what such comments are supposed to avoid. Moreover, only lawyers are subject to the rule, not all "government officials."

Aside from the confusion that this will cause for individuals employed by governmental entities within the State regarding how the rule is to be interpreted, limiting the information that can be provided to the Department of Homeland Security and its components may well endanger public safety. A prosecutor for a county or a city within this State should not be prohibited from sharing information about the immigration status and whereabouts of an individual who has been convicted of violating the laws of this State, particularly when the convictions are for violent offenses (including domestic violence). The statistics unequivocally show that perpetrators of domestic violence present a significantly higher risk of reoffense, than other offenders. To limit a prosecutor in this manner flies in the face of his or her duty to uphold the law and protect the community, and it places respect for the law in conflict with the lawyer's ethical obligations. As noted above, it would also seem to preclude the type of investigation that would allow for a prosecution under Wash. Rev. Code § 9.41.171 (Alien possession of firearms) even where the non-citizen offender possessing the firearm is a convicted domestic abuser. In these and other ways, the commentary seems to place protecting information about an individual's immigration status above public safety. Putting a government lawyer—whether state or federal—in the position of assessing whether a person might construe their conduct as "facilitate[ing] immigration arrests" is unfair and runs contrary to the important goal of ensuring access to the courts by undocumented crimes victims.

As written, the commentary also could create the potential for conflict with a prosecutor's discovery obligations. A witness's immigration status sometimes gives rise to a basis for impeachment and, as such, should be ascertained and disclosed. As an example, sometimes witnesses are offered immigration benefits based on their cooperation and testimony. The failure to disclose that fact would violate the prosecutor's discovery obligations. And as already noted,

knowledge of a defendant's immigration status and the consequences of a guilty plea on immigration status is essential to ensure that any plea is knowing and voluntary and providing effective assistance of counsel. *Padilla v. Kentucky*, 559 U.S. 356 (2010); *United States v. Rodriguez-Vega*, 797 F.3d 781, 786 (9th Cir. 2015) Further, although the commentary expressly states that lawyers employed by federal immigration authorities engaged in authorized activities are not in violation of the rule, that limitation is not broad enough. Assistant United States Attorneys, attorneys for the Department of Justice, and other attorneys employed by the federal government all take an oath to uphold the United States Constitution and the laws of the United States which include the immigration laws. Indeed, Assistant United States Attorneys and other attorneys for the Department of Justice are tasked with enforcing federal immigration laws. Therefore, to the extent that any part of this comment is adopted, all lawyers for the federal government should be exempt under this commentary. This Court should not create a rule that impedes a lawyer from carrying out his or her sworn duties.

Moreover, the proposed commentary, as drafted, paints with too broad a brush and the proponents have not provided any evidence that suggests that the addition of this commentary is urgently needed. As drafted, it will have unintended consequences and place restrictions that would cause some lawyers to violate other legal and ethical duties in the interest of complying with the comment as written. The existing commentary already correctly observes that the use of the fact that an individual has no lawful status in the United States in litigation may, in certain circumstances, interfere with the proper functioning of the justice system, citing *Salas v. Hi-Tech Erectors*, 168 Wash. 2d 664 (2010). In that case, the Washington Supreme Court found that the probative value of the plaintiff's undocumented status to the question of lost future earnings did not substantially outweigh the danger of unfair prejudice. But there may well be other cases where the fact that a plaintiff was undocumented would be an essential fact, such as a case where an employer failed to provide safety equipment for undocumented workers and threatened the employees with revealing their status if they complained—thereby using the employees' immigration status as a means of avoiding legal obligations.

Rather than rush forward with this proposal, I urge the Court to reject the commentary and instead consider whether the existing rule accomplishes the objective of ensuring that immigration status is not used as a coercive tool. The Committee should limit any new commentary to the goal of clarifying that lawyers violate their ethical duties when they inquire about immigration status only when they do so for an improper purpose.

Yours truly,

Brian T. Moran
United States Attorney

From:	OFFICE RECEPTIONIST, CLERK
To:	Tracy, Mary
Subject:	FW: Comments to RPC 4.4 by USA Brian T. Moran
Date:	Thursday, January 30, 2020 2:35:35 PM
Attachments:	BTM Ethics comments-final.pdf

From: Skinner, Elisa (USAWAW) [mailto:Elisa.Skinner@usdoj.gov]
Sent: Thursday, January 30, 2020 2:34 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comments to RPC 4.4 by USA Brian T. Moran

Good afternoon:

Attached please find PDF copy of the letter containing the comments of Brian T. Moran, United States Attorney for the Western District of Washington regarding proposed commentary to Rule of Professional Conduct 4.4. The original is separately being federal expressed to your office.

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