



February 5, 2020

By Email and 1st Class U.S. Mail

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

Dear Madam Clerk,

Please accept the following comments to the Proposed Amendment to Comment to Rule of Professional Conduct 4.4 – Respect For Rights Of Third Persons, published for comment in November 2019. Adoption of this commentary amendment is aligned with the Commission’s mission to ensure all persons have access to our State Courts, where the vast majority of justice is sought and achieved. The Minority and Justice Commission supports adoption of the proposed amendment pursuant to the revised language put forward by proponents and supported by the Washington State Bar Association.

The Washington State Supreme Court established the MJC nearly 30 years ago, based upon the “fundamental principle of the fair and equal treatment of all” and the recognition that “any system of justice ... must be examined continuously” to ensure it is “meeting the needs of all people governed, to include people of color.” *See* Order of the Supreme Court dated October 4, 1990. The MJC is tasked with identifying “the concerns ... regarding lack of equal treatment” and “to make recommendations for judicial improvement.” *Id.* The State Supreme Court overwhelmingly has renewed the order of establishment every five years since enactment.

Rule 4.4 was promulgated in the wake of the Washington Supreme Court’s decision in *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664,230 P.3d 583 (2010). That decision and RPC 4.4 acknowledge that “issues involving immigration status carry a significant danger of interfering with the proper functioning of the justice system.” *See* RPC 4.4. These dangers are now upon us.

Participation in judicial proceedings has never been without risk for noncitizens. However, current circumstances have dramatically escalated the well-founded fears of Washington’s immigrant communities when faced with participating in judicial proceedings or accessing our courts. In pending litigation requesting Washington’s Western Federal District Court to enjoin ICE and Border Patrol from making courthouse arrests, the Attorney General documents that there have been over 200 documented arrests at Washington courthouses by federal immigration authorities since 2018. *See State of Washington v. Department of Homeland Security*, Case 2:19-cv02043, Compl. at 52. These are civil arrests of persons believed to have violated civil immigration laws.

These actions are interfering with access to our courts for noncitizens throughout our state. Immigrant communities are afraid to seek protection, answer criminal charges, pay fines or access the many other necessary services courts provide. The Commission believes it is incumbent on our

public institutions to take necessary actions to address this access to justice crisis in our communities.

Adopting proponent's amendment to RPC 4.4 is one such necessary action. RPC 4.4 currently sets forth prohibitions on a lawyer reporting a third party or witness to immigration authorities. The current rule is limited to civil matters. The Commission believes such guidance is now imperative to ensure that prosecutors and defense attorneys are given the benefit of clear guidance and transparent expectations on this complex issue. See *Justice Compromised: Immigration Arrests At Washington State Courthouses*, University of Washington Center for Human Rights, 2019. (Documenting immigration reporting practices of Grant, Clark and Adams County prosecuting attorneys' offices.)

The Commission has reviewed the amendments to the proposed amendment put forward by the Washington State Bar Association and agreed upon by proponents. The Commission supports these amendments on the basis that they streamline the rule and provide enhanced clarity,

The Commissions respectfully urge the Supreme Court to adopt the proposed amendment to the commentary for RPC 4.4.

Thank you for your consideration.

Minority and Justice Commission

Judge G. Helen Whitener
Lorraine Bannai
Jeffrey Beaver
Lisa Castilleja
Judge Faye Chess
Judge Linda Coburn
Theresa Cronin
Asst. Chief Adrian Diaz
Judge Mike Diaz
Judge Theresa Doyle
Jason Gillmer
Judge Bonnie Glenn
Kitara Johnson
Anne Lee
Judge LeRoy McCullough
Karen Murray
Christopher Sanders
P. Diane Schneider
Judge Lori K. Smith
Travis Stearns

Interpreters Commission

Judge Mafé Rajul
Judge Andrea L. Beall
Fona Sugg
Frankie Peters
Sharon Harvey
Kristi Cruz
Katrin Johnson
Francis Adewale
Elisa O. Young
Naoko Inoue Shatz
Luisa Gracia Camón
Diana Noman
Donna Walker
Florence Adeyemi

Proponent's response to CPE's Exhibit B:

EXHIBIT B

COMMITTEE ON PROFESSIONAL ETHICS
SUGGESTED RULE CHANGES

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 but not limited to, 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

25 activities within the scope of lawful duties are presumptively not in violation of this Rule unless
26 there is clear indication of no substantial purpose other than to intimidate, coerce, or obstruct a
27 third person from participating in a legal matter.

28

From: [OFFICE RECEPTIONIST, CLERK](#)
To: [Tracy, Mary](#)
Subject: FW: MJC Public Comment - RPC 4.4
Date: Wednesday, February 5, 2020 1:09:15 PM
Attachments: [MJC Comment Ltr - RPC 4.4 with amendments.pdf](#)

From: Thomas, Frank
Sent: Wednesday, February 5, 2020 1:09 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: MJC Public Comment - RPC 4.4

Dear Ms. Carlson:

Please find attached a comment to be posted and made public regarding the proposed RPC 4.4 Rule change. Please accept this public comment as the official statement jointly from the Washington State Minority and Justice Commission and the Washington State Interpreters Commission. We will be sending your office a hard copy, as well. If there is any more that needs to be done in order to post this comment to the public, please let me know.

Thank you,
Frank Thomas

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