

WASHINGTON STATE BAR ASSOCIATION

Board of Governors

Rajeev Majumdar, President

January 29, 2020

Susan L. Carlson
Clerk of the Supreme Court
Washington Supreme Court
PO Box 40929
Olympia, WA 98504-0929

re: Comment re the Matter of the Proposed amendments to RPC 4.4 Comment [4] — Respect For Rights of Third Person, Publication Order 25700-A-1274

Dear Madam Clerk:

As President of the Washington State Bar Association (WSBA), I submit the following comment on behalf of the WSBA in support of the amendment of RPC 4.4 Comment [4]— Respect For Rights of Third Person, albeit with a recommendation for one minor change.

With this comment, we hope to provide the Court with the background as we understand it, the rationale for our support of the changes.

On November 6, 2019, the Court published suggested amendment to RPC 4.4[4] for public comment, with an expedited 60-day comment period. According to the materials provided to the Court by the comment proponents, the proposal seeks to support and harmonize the change proposed in the same order for GR 38,¹ and to extend those the protections for third persons already enshrined in RPC 4.4 to prohibit the use of civil immigration enforcement as a weapon against immigrant parties and witnesses across Washington.

The rule proponents requested that the WSBA review and consider supporting the proposed new comment. The Board of Governors requested that the WSBA Committee on Professional Ethics [Committee] review the proposed changes and to advise the Board accordingly.

The Committee issued a written report on January 8, 2020, and appeared before the Board of Governors, along with representatives from the rule proponents on January 17, 2020. Following a thorough presentation and lively discussion, the Board sent the proposed comment back to the Committee for their take on the Board's proposal to make a suggested change to the proposed comment. The proponents were kept informed of the special meeting of the CPE, and were invited to speak on a special meeting of the Board of Governors that I called for yesterday's date.

¹ Also supported by the WSBA, submitted in a separate comment dated 1/27/20.



The WSBA ultimately adopted the position of endorsing the proposed comment with a recommendation for some changes needed to protect lawyers in the appropriate scope of their work, as attached as a redline exhibit to this letter. Our redline version maintains the proponents changes with underline, but modified in **bold** text representing the WSBA's additions or strikethroughs. We have also marked our changes with footnotes.

The WSBA's changes have approval from at least three of the proponents: The ACLU of WA, Northwest Justice Project, and the Washington Defenders Association, as relayed to the Committee.

We agree wholeheartedly that it is a fundamental right of all Washington residents to access our courts, and that it would be unethical and unprofessional conduct for lawyers to target frustrate the purposes of individuals who appear at our courthouses.

Lawyers as officers of the court should have an obligation to play a positive role in ensuring our Washington courts are open, neutral, and accessible to the public, free of restrictions that would otherwise impede the proper administration of justice. The proposed comment, as amended per our suggestion, is wholly appropriate to help establish guidelines for expectations of professional conduct.

For these reasons, the WSBA respectfully urges the Court to adopt the proposed Comment to RPC 4.4[4], as the WSBA suggests it be amended.

In Service,



Rajeev D. Majumdar
WSBA President

Att: Proposed changes to the proposed comment.



RULES OF PROFESSIONAL CONDUCT 4.4 COMMENT (4)

1 The duty imposed by paragraph (a) of this Rule includes a lawyer's assertion or
2 inquiry about a third¹ person's immigration status when the lawyer's purpose is
3 to intimidate, coerce, or obstruct that person from participating in a civil or
4 criminal matter, ~~or otherwise assists with civil immigration enforcement~~².
5 Issues involving immigration status carry a significant danger of interfering with
6 the proper functioning of the justice system. See *Salas v. Hi-Tech Erectors*, 168
7 Wn.2d 664, 230 P.3d 583 (2010). When a lawyer is representing a client in a
8 civil or criminal matter, whether the client is the state or one of its political
subdivisions, an organization, or an individual³, 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, and violates this Rule⁴. Sharing
personal information with federal immigration authorities, including but not
limited to⁵ 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 is in violation constitutes a report of a
person to immigration authorities for purposes of this Rule.⁶

9 A communication in violation of this Rule can also occur by an implied assertion
10 that is the equivalent of an express assertion prohibited by paragraph (a). See
11 also Rules 1.6(a) (prohibiting a lawyer from revealing information relating
to the representation of a client)⁷, 8.4(b) (prohibiting criminal acts that reflect
12 adversely on a lawyer's honesty, trustworthiness, or fitness as a lawyer in other
13 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

14 ¹ Proponents' originally suggested replacing the word "third" with "any", however, in a later submission, the
proponent's concurred with the CPE's recommendation.

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18 ⁵ Proponents' originally suggested this language, however, in a later submission, the proponent's concurred
with the CPE's recommendation.

19 ⁶ Proponents' originally suggested this language in the second paragraph, however, in a later submission, the
proponent's concurred with the CPE's recommendation to move it upwards to the first paragraph and to
modify it and was adopted by the BOG in this new place.

⁷ Proponents' originally suggested this language, however, in a later submission, the proponent's concurred
with the CPE's recommendation.

RULES OF PROFESSIONAL CONDUCT 4.4 COMMENT (4)

1 prejudice or bias on the basis of sex, race, age, creed, religion, color, national
2 origin, immigration status⁸, disability, sexual orientation, or marital status).

3 ~~Government officials may provide federal immigration authorities with~~
4 ~~information relating to any person involved in matters before a court only~~
5 ~~pursuant to RCW 7.98, or upon request and in the same manner and to the~~
6 ~~same extent as such information is lawfully made available to the general~~
7 ~~public, or pursuant to a court order. Additionally, under 8 U.S.C. § 1373,~~
8 ~~government officials are not prohibited from sending to or receiving from~~
9 ~~immigration authorities a person's immigration status or citizenship.~~
10 ~~Lawyers employed by federal immigration authorities engaged in authorized~~
11 ~~activities within the scope of lawful duties shall not be deemed in violation of this~~
12 ~~Rule, unless there is clear indication of no substantial purpose other than~~
13 ~~to intimidate, coerce, or obstruct a third person from participating in a~~
14 ~~legal matter.~~⁹

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From: [OFFICE RECEPTIONIST, CLERK](#)
To: [Tracy, Mary](#)
Subject: FW: WSBA Comment re the Matter of the Proposed Amendment to RPC 4.4, Comment 4 - Respect for Rights of Third Person; Publication Order 25700-A-1274
Date: Wednesday, January 29, 2020 2:14:44 PM
Attachments: [Comment_WSBA to the Court_RPC 4.4 Comment 4 Proposal.pdf](#)
[RPC 4.4 Comment 4 WSBA Redline.docx](#)
Importance: High

From: Rajeev Majumdar [mailto:rajeev@northwhatcomlaw.com]
Sent: Wednesday, January 29, 2020 2:13 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Doug Ende <douge@wsba.org>; Julie Shankland <julies@wsba.org>; Jeanne Marie Clavere <jeannec@wsba.org>; Terra Nevitt <terran@wsba.org>
Subject: WSBA Comment re the Matter of the Proposed Amendment to RPC 4.4, Comment 4 - Respect for Rights of Third Person; Publication Order 25700-A-1274
Importance: High

Dear Madam Clerk,

Please find attached a courtesy copy of the Washington State Bar Association's Comment *re* the Matter of the Proposed Amendment to RPC 4.4, Comment 4 - Respect for Rights of Third Person.

Attached also is a .docx version of our proposed changes for the Court's use.

A hard copy will not be transmitted pursuant to Publication Order 25700-A-1274, as our comment is less than 1500 words.

Warmly,

Rajeev D. Majumdar, President
Washington State Bar Association
(360) 332-7000
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