



# Northwest Justice Project

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César E. Torres  
Executive Director

March 2, 2020

Chief Justice Deborah Stephens  
Justices of the Washington Supreme Court  
Susan L. Carlson  
Clerk of the Supreme Court  
P.O. Box 40929  
Olympia, WA 98504-0929  
[supreme@courts.wa.gov](mailto:supreme@courts.wa.gov)

Re: Proposed Amendment to Comment 4 of RPC 4.4

Dear Chief Justice Stephens, Justices of the Washington Supreme Court, and Madam Clerk,

The Northwest Justice Project writes in support of the proposed amendments to comment 4 of the Rules of Professional Conduct (RPC), and in support of the modifications submitted by the ACLU-WA in its comment letter. The proposed amendments will promote this Court's efforts to preserve access to justice for Washington's residents and ensure that attorneys in criminal and civil practice have similar guidance to prevent inappropriate use of immigration status to intimidate, coerce, or obstruct parties and witnesses.

As detailed in NJP's letter in support of the proposed amendments to General Rule 38, immigration enforcement activities in Washington's courts undermine the ability of immigrant populations to access the courts. There is evidence that attorneys involved in criminal practice have facilitated civil immigration arrests at courthouses.<sup>1</sup> This activity has impacts far beyond the criminal legal system, and has contributed to the deep fear immigrant communities have of engaging with the justice system in any capacity.

Public safety depends on the willingness and ability of all Washington residents to seek the protection of the courts. The rise in immigration enforcement activities in courthouses has had direct impacts on NJP clients who are survivors of crime. Immigrant victims of crime in Washington are highly reluctant to participate in the court system, whether it is to seek a protection order against a domestic abuser, obtain a divorce from a perpetrator of sexual assault, or testify as a victim in a criminal case. The reluctance of immigrant survivors of crime to participate in the justice system has immediate negative impacts on public safety. In particular, because immigrant victims of domestic violence are unwilling to come to court to seek protection, those victims and their families remain at significant risk of future violence.

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<sup>1</sup> University of Washington Center for Human Rights, *Justice Compromised: Immigration Arrests at Washington State Courthouses*. October 2019, available at <https://jsis.washington.edu/humanrights/2019/10/16/ice-cbp-courthouse-arrests/>

The proposed amendment to Comment 4 is necessary to ensure the continued integrity of the protections put in place by RPC 4.4. NJP supported the initial adoption of Comment 4 because of our firsthand experience with the use of immigration status to intimidate, harass, and improperly silence civil litigants, including immigrant victims of sexual harassment seeking civil justice. Yet, because the Comment is limited to attorneys in civil cases, it falls short of fully protecting immigrant communities from improper use of immigration status. The proposed revisions would close a loophole in protection contemplated by the initial Comment by extending the Comment’s guidance to attorneys in criminal practice.

The proposed amendments to Comment 4 appropriately distinguish between legitimate inquiry into immigration status and the use of immigration status that undermines the right of access to the courts. Nothing in the proposed comment prevents an attorney in civil or criminal practice from inquiring into immigration status relevant to a pending matter— it simply makes clear that threatening to report a party or witness to immigration authorities, or making such a report with information gathered in ones role as an attorney serves no substantial purpose of the state adjudicative system.

The proposed amendments are also consistent with the First Amendment. The United States Supreme Court has recognized that “[t]he license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice.” *In re Snyder*, 472 U.S. 634, 644-45, 105 S.Ct. 2874, 86 L.Ed.2d 504 (1985). “[T]he integral role that attorneys play in the judicial system . . . requires them to refrain from speech or conduct that may obstruct the fair administration of justice . . . . Thus, attorneys may not invoke the federal constitutional right of free speech to immunize themselves from even-handed discipline for proven unethical conduct.” *Disciplinary Counsel v. Gardner*, 793 N.E.2d 425, 429 (Ohio 2003); *see also Bd. of Prof’l Responsibility v. Parrish*, 556 S.W.3d 153, 165 (Tenn. 2018) (collecting cases rejecting First Amendment challenges to attorney discipline). The First Amendment does not prohibit this Court from enacting rules that limit an attorney’s use of information gathered in the course of client representation for purposes unconnected with that representation.<sup>2</sup> Moreover, the proposed amendments in no way limit what lawyers can do or say in their wholly personal capacities.

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<sup>2</sup> Similarly, RCW 4.24.510 (the anti-SLAPP statute) does not preclude this Court from adopting the proposed comment. “The purpose of the statute is to protect the exercise of individuals’ First Amendment Rights under the United States Constitution and rights under article I, section 5 of the Washington State constitution.” *Segaline v. State, Dep’t. of Labor and Indus*, 169 Wn. 2d 467, 473 (2010); Laws of 2002, ch. 232, §1. Where there is no First Amendment right to engage in particular speech, the anti-SLAPP statute does not create such a right. *Cf. Segaline*, 169 Wn. 2d at 474 (holding that government agency has no First Amendment right to particular speech and is thus unprotected by RCW 4.24.510). Moreover, other state courts have held that similar anti-SLAPP statutes do not apply to the speech of government employees acting in a professional capacity. *Kobrin v. Gastfriend*, 821 N.E.2d 60, 65-66 (Mass. 2006) (holding that anti-SLAPP statute did not bar civil claims against government-employed psychologist for statements made in his professional capacity); *see also Segaline*, 169 Wn.2d at 482-83 (Madsen, J., concurring) (Washington’s anti-SLAPP statute is “designed to protect overtures to the government by parties petitioning in their status as citizens, and therefore [does] not apply to the communication of one hired by a government agency made within the context of that employment.”) (citing *Kobrin*, 812 N.E. 2d 60).

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The right to practice law is a significant privilege, and the Rules of Professional Conduct help ensure that lawyers acting in their professional capacity do so in a manner that effectuates the fair administration of justice. We urge you to adopt the proposed comments to RPC 4.4 to provide further guidance to Washington lawyers and to promote access to justice. Thank you for the opportunity to comment.

Sincerely,

A handwritten signature in black ink that reads "Vanessa T. Hernandez". The signature is written in a cursive style with a large, sweeping flourish at the end.

Vanessa Torres Hernandez  
Director of Advocacy

**From:** [OFFICE RECEPTIONIST, CLERK](#)  
**To:** [Tracy, Mary](#)  
**Subject:** FW: Comment on proposed amendments to RPC 4.4  
**Date:** Monday, March 2, 2020 9:03:43 AM  
**Attachments:** [image001.png](#)  
[2020-03-02 NJP RPC 4.4.pdf](#)

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**From:** Vanessa Torres Hernandez [mailto:Vanessa.Hernandez@nwjustice.org]  
**Sent:** Monday, March 2, 2020 8:46 AM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Subject:** Comment on proposed amendments to RPC 4.4

Dear Madam Clerk,

Please see the attached comments from the Northwest Justice Project.

Best,  
Vanessa

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