



WASHINGTON
DEFENDER
ASSOCIATION

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Christophe Swaby, President
Christie Hedman, Executive Director

February 27, 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, Chief Justice Stephens and Members of the Supreme Court,

The Washington Defender Association (WDA) writes to express strong support of proposed amendment to RPC 4.4 Commentary and modifications put forward by the ACLU in their comment letter of January 30, 2020. We are aligned with and support the ACLU comments outlining the critical need for amending RPC 4.4 and setting forth the process amongst stakeholders for reaching agreement on proposed modifications.

The agreed-upon proposed amendment to RPC 4.4 commentary is an important tool to prevent weaponizing immigration status in legal proceedings. The amendment adopts crucial prohibitions on lawyer conduct that undermines the fair administration of justice and prevents the proper functioning of the legal system. It is consistent with existing rules that also prevent disclosure of information without consent or in such a way that compromises the interests of clients or other parties. Like these current rules, the proposed amendment also does not run afoul of First Amendment rights.

We write separately to highlight specific defense-related concerns and to offer a minor, but important, additions. We join a statewide coalition of legal services and community-based organizations requesting the Court to adopt the proposed changes to RPC 4.4 as an important step to restore access justice for all Washington residents.

WDA's Interest In GR 38

Public defenders represent noncitizens throughout Washington who must access our courts daily. With a statewide membership of over 1400, the Washington Defender Association is the collective voice of the public defense community. We work to improve the quality of indigent

defense and provide support for high quality legal representation. WDA advocates for systemic change, educates defenders, and collaborates with the community and justice system stakeholders. In 1999, WDA created the Immigration Project to defend and advance the rights of noncitizens accused of crimes and noncitizens facing the immigration consequences of convictions. Since inception, WDA's Immigration Project has provided assistance in over 25,000 public defense cases, conducted over 250 trainings and participated in litigation, legislative and policy efforts to protect and expand the rights noncitizens in Washington's justice system.

Justice System Actors' Engagement With Immigration Enforcement

Collaboration with federal immigration enforcement undermines Washington's justice system. In its recent report *Justice Compromised: Immigration Arrests At Washington Courthouses*,¹ the University of Washington's Center for Human Rights documents practices of collaboration of local prosecutors to assist in the apprehension and deportation of noncitizen defendants when they appear for court.

It is difficult to know how widespread this practice is given that resources to document it are scarce. Additionally, it is often impossible to determine whether defendants (clients) have disappeared because they have been rounded up and deported (or are in the abyss of the ICE detention center), are too afraid to participate in their defense or do not show up for some other reason. However, WDA member defenders have a long history observing incidents that appear to indicate engagement with immigration enforcement agencies to the detriment of their clients.

Defense attorneys are constitutionally obligated to identify noncitizen clients and advise them of the immigration consequences of accepting a plea or being convicted of trial.² They are also obligated to investigate and pursue all viable defenses to charges faced by our clients. At times, this involves the immigration status of alleged victims and witnesses. WDA provides resources and guidance to assist defenders throughout Washington to navigate these circumstances in ways that minimize exposure to immigration consequences for all participants in a case.

Requested Additional Amendment

While WDA supports the proposed amendment to RPC 4.4, it is imperative that, in practice, it does not interfere with or restrict defendants' constitutional right to defend against criminal charges. To avoid such unintended consequences WDA requests the Court to add the following to the last paragraph of the proposed comment: "*Nothing in this comment shall be construed in a manner that limits the constitutional right to defend against criminal charges.*" This requested addition mirrors the language in Evidence Rule 413 which had the same goal – ensuring noncitizens were protected from unwarranted interference with their rights while seeking justice in Washington courts.

¹ See <https://jsis.washington.edu/humanrights/2019/10/16/ice-cbp-courthouse-arrests/> 10/6/19.

² Padilla v. Kentucky 559 US 356 (2010).

Respectfully submitted,

Christie Hedman

Christie Hedman
Executive Director, Washington Defender Association

Amy Hirotaki, Washington Association of Criminal Defense Lawyers
Anita Khandelwal, King County Department of Public Defense
Patrick O'Connor, Thurston County Public Defender
Dan McGreevy Bellingham Public Defender
Michael Kowamura, Pierce County Public Defender
Harry Gasnick, Clallam County Public Defender
Starck Follis, Whatcom County Public Defender
Adam Ballout, ABC Law Group (Everett Public Defenders)
Gregory C. Link, Director, Washington Appellate Project
Kathleen Kyle, Director, Snohomish County Public Defender Association
Jeremy Ford, Director, Counsel of Defense of Chelan
Melissa MacDougall, Indigent Defense Contract Administrator, Okanagan County
Thad Scudder, Director, Cowlitz County Office of Public Defense
Paul Kelley, Director, Yakima County Department of Assigned Counsel
Keith Tyne, Director, Skagit County Public Defender
Richard Davies, Director, Jefferson Associated Counsel
Tom Kryzminski, Director, Spokane County Public Defender
Kathy Knox, Spokane City Public Defender
Peter Jones, Chief Defender, Mason County
Lisa Daugaard, Executive Director, Public Defender Association

Additional Proposed Amendment to 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. **Nothing in this comment shall be construed in a manner that limits the constitutional right to defend against criminal charges.**

From: [OFFICE RECEPTIONIST, CLERK](#)
To: [Tracy, Mary](#)
Subject: FW: Comments On Proposed RPC 4.4 Commentary Amendments
Date: Friday, February 28, 2020 8:09:11 AM
Attachments: [022720 FINAL WDA Comment Proposed RPC 4.4 amendment.pdf](#)

From: Ann Benson [mailto:abenson@defensenet.org]
Sent: Thursday, February 27, 2020 5:54 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comments On Proposed RPC 4.4 Commentary Amendments

Ms. Carlson,

Attached please find for submission comments of the Washington Defender Association regarding proposed amendments to RPC 4.4 commentary.

Regards, Annie

Annie Benson, (she/her)
Senior Directing Attorney



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