

THE SUPREME COURT OF WASHINGTON

IN THE MATTER OF THE SUGGESTED NEW)
GENERAL RULE (GR) 38 AND SUGGESTED)
AMENDMENT TO RPC 4.4 COMMENTS [4])
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ORDER

NO. 25700-A- 1274

The Washington Defender Association, having recommended the suggested new General Rule (GR) 38 and suggested amendments to RPC 4.4 Comment [4], and the Court having approved the suggested new rule and suggested amendment for publication;

Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the suggested new rule and suggested amendments as attached hereto are to be published for comment in the Washington Reports, Washington Register, Washington State Bar Association and Administrative Office of the Court's websites.

(b) The purpose statement as required by GR 9(e), is published solely for the information of the Bench, Bar and other interested parties.

(c) Comments are to be submitted to the Clerk of the Supreme Court by either U.S. Mail or Internet E-Mail by no later than 60 days from the published date of the rule in the Washington Reports. Comments may be sent to the following addresses: P.O. Box 40929, Olympia, Washington 98504-0929, or supreme@courts.wa.gov. Comments submitted by e-mail message must be limited to 1500 words.

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ORDER

IN THE MATTER OF THE SUGGESTED NEW GENERAL RULE (GR) 38 AND
SUGGESTED AMENDMENTS TO RPC 4.4 COMMENTS [4]

DATED at Olympia, Washington this 6th day of November, 2019.

For the Court

Fainmust, CJ.

CHIEF JUSTICE

GR 9 COVER SHEET

Proposed New Washington State Court Rule

GENERAL RULE (GR) 38

(A) Names of Proponents: Northwest Justice Project, Washington Defender Association, American Civil Liberties Union (ACLU) of Washington, Northwest Immigrant Rights Project, Washington Immigrant Solidarity Network, Columbia Legal Services, Central Washington Justice For Our Neighbors, Asian Pacific Islander Institute on Gender-Based Violence, Washington State Coalition Against Domestic Violence, Washington Coalition of Sexual Assault Programs, Colectiva Legal del Pueblo

(B) Spokespersons: Annie Benson, Washington Defender Association
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(C) Purpose:

The proposed court rule is based on the civil arrest privilege. As the supplemental materials outline, the privilege has a long-established tradition in common law and Washington caselaw.¹ The privilege prohibits civil arrests without a judicial arrest warrant, or other judicial arrest order, from being carried out against a person who is inside a Washington courthouse, or who is traveling to, or returning from, a Washington courthouse to attend hearings or conduct business with the court.

As of the filing of this petition, incidents involving warrantless arrests in connection with federal civil immigration enforcement activities have been documented in courthouses in 18 Washington counties.² Federal immigration enforcement agents of the Department of Homeland Security Divisions of Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) are arresting people inside, outside and adjacent to (e.g., on courthouse sidewalks and in courthouse parking lots) Washington district, municipal and superior courts. Additionally, ICE and CBP agents are following people as they leave the courthouse, pulling them over in their cars and arresting drivers and passengers.

¹ See memorandum in supplemental materials providing an overview of the law on the civil arrest privilege.

² See factsheet *Immigration Enforcement At Washington Courthouses*, Washington Immigrant Solidarity Network, (Sept. 2019), provided in the supplemental materials and available at: <https://defensenet.org/wp-content/uploads/2019/08/Summary-2-pgr-Immig-Enforement-@-WA-Ct-Houses-AB-FINAL-0829019.pdf>

Targeted people are at courthouses in connection with court business, such as attending a hearing or paying traffic infractions. There are no documented incidents of such individuals causing any disturbance of the peace or posing any danger to others while engaging in court business. Immigration enforcement agents target people of color, predominantly Latinx Spanish speakers. Targeted people are stopped, questioned and/or simply apprehended, often forcefully.

Immigration enforcement actions at courthouses are now well-known throughout Washington's immigrant communities. As a result, noncitizens and their families and communities are afraid to engage with our state's justice system. Some of the impacts of these actions are:

- Victims are afraid to report crimes for fear that they or their family members would have to come to a courthouse as a result of their report.
- Victims and other witnesses are afraid to testify in both civil and criminal cases.
- Victims are afraid to seek domestic violence and other forms of protective orders.
- Would-be parties to civil litigation are afraid to commence civil litigation through which they could otherwise obtain orders of dissolution, parenting plans and orders for support and division of property.
- Respondents in a range of civil litigation are afraid to participate, forcing them to choose between being defaulted, or risking arrest.
- People are foregoing payment of traffic fines, seeking marriage licenses and accessing other administrative court services.
- Defendants fear showing up for court dates to answer and defend against criminal charges. They must choose risking additional charges for failing to appear (an offense with severe immigration consequences) or being arrested, detained and possibly deported by immigration enforcement officers. These circumstances compromise defense attorney's capacity and obligations to defend their clients.
- People who would otherwise accompany friends and relatives to court, are now afraid to provide that accompaniment or transportation to court.
- Prosecutors are impeded in their duties to pursue justice for alleged criminal violations.

It is a fundamental right of all Washington residents to access our courts. Const. art. 1, § 10. The purpose of Washington's court rules is to "provide necessary governance of court procedure and practice and to promote justice by ensuring a fair and expeditious process." GR 9. Targeting those who appear at our courthouses and subjecting them to arrest without a judicial warrant for alleged civil immigration violations frustrates justice and compromises our judicial process.

This civil arrest activity denies access to our justice system for large numbers of individuals and their families, the majority of whom are Spanish-speaking people of color. Their legitimate fears of arrest and deportation require justice system stakeholders to engage all possible strategies to ensure Washington courts are open, neutral and accessible to the public, free of restrictions that would otherwise impede the proper administration of justice.

The proposed rule recognizing the civil arrest privilege is one such strategy. It would prohibit unwarranted immigration enforcement actions and help to restore access to Washington's courts for all, renew confidence in our judicial system and provide a basis to pursue legal action against

state and federal actors who violate orders invoking the privilege. Accordingly, it is appropriate and necessary that the Court adopt the proposed rule.

This rule does not create or resolve conflicts with statutes, case law or other court rules.

(D) Hearing:

The proponents do not believe a public hearing is needed.

(E) Expedited Consideration:

The proponents believe exceptional circumstances justify expedited consideration of the suggested rule. The current circumstances have resulted in an access to justice crisis for noncitizens, their families and communities. Much damage has already occurred, to families, and communities, as well as our courts. And federal immigration enforcement actions continue. Community members report arrests taking place multiple times each week in Grant County alone. Communities and justice system stakeholders cannot wait until September 1st, 2020. Indeed, even if the petition is processed in an expedited manner there will be significant damage to people and the mission of our courts. As such, proponents respectfully request that the proposed rule be moved through the process as quickly as possible. If the committee votes to permit the petition to proceed, proponents request commencement of a 30-day comment period as soon as possible and an expedited schedule for the remainder of the process.

(F) Supporting Materials:

1. *Immigration Enforcement at Washington State Courthouses*, Washington Immigrant Solidarity Network, August 29, 2019.
2. Letter From Chief Justice Mary Fairhurst to Commissioner Kevin McAleenan, US Customs and Border Protection, April 15, 2019.
3. Letter from Chief Justice Mary Fairhurst to Secretary John Kelly, US Department of Homeland Security, March 15, 2017.
4. Letter from Robin L. Haynes, Washington State Board of Governors to Secretary John Kelly, US Department of Homeland Security, June 1, 2017.
5. *Justice Compromised: Immigration Arrests At Washington State Courthouses*, University of Washington Center For Human Rights, October 1, 2019.

PROPOSED WASHINGTON COURT RULE
GENERAL RULE (GR) 38

1. No person shall be subject to civil arrest without a judicial arrest warrant or judicial order for arrest while the person is inside a court of law of this state in connection with a judicial proceeding or other business with the court.

2. No person shall be subject to civil arrest without a judicial arrest warrant or judicial order for arrest while the traveling to a court of law of this state for the purpose of participating in any judicial proceeding, accessing services or conducting other business with the court, or while traveling to return home or to employment after participating in any judicial proceeding, accessing services or conducting business with the court. Participating in a judicial proceeding includes, but is not limited to, participating as a party, witness, interpreter, attorney or lay advocate. Business with the court and accessing court services includes, but is not limited to, doing business with, responding to, or seeking information, licensing, certification, notarization, or other services, from the office of the court clerk, financial/collections clerk, judicial administrator, courthouse facilitator, family law facilitator, court interpreter, and other court and clerk employees.

3. Washington courts may issue writs or other court orders necessary to enforce this court rule.

GR 9 COVER SHEET

**Proposed Amendment to
COMMENT ON RULES OF PROFESSIONAL CONDUCT (RPC)
Comment to Rule 4.4 – RESPECT FOR RIGHTS OF THIRD PERSON**

A. Names of Proponents:

American Civil Liberties Union of Washington (ACLU-WA), Washington Defender Association, Northwest Justice Project, Northwest Immigrant Rights Project, Washington Immigrant Solidarity Network, Columbia Legal Services, Central Washington Justice For Our Neighbors, Asian Pacific Islander Institute on Gender-Based Violence, Washington State Coalition Against Domestic Violence, Washington Coalition of Sexual Assault Programs, Colectiva Legal del Pueblo

B. Spokesperson:

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C. Purpose:

Since Comment (4) to Rule of Professional Conduct (RPC) 4.4 was originally adopted in 2013, the landscape of immigration enforcement has drastically changed. A technical amendment to the comment is needed to clarify that the protections extend to the use of civil immigration enforcement as a weapon against immigrant parties and witnesses across Washington. The changes to the comment would prevent all lawyers in Washington from reporting individuals to immigration authorities in both civil and criminal cases and help to ensure that all lawyers are upholding their duty to facilitate access to justice. The proposed changes also provide exceptions for state and federal law, and for lawyers employed by federal immigration authorities.

These clarifications to the existing comment are proposed to prevent warrantless civil arrests being conducted in and around Washington courthouses by federal immigration enforcement agents. Cooperation with federal immigration enforcement agencies to facilitate these arrests transforms state courthouses into a staging ground for immigration detention and deportation, and makes the courthouse a frightening and unwelcoming place for immigrants and their families. The Washington State Bar Association (WSBA) Board of Governors unanimously approved sending a letter to the Department of Homeland Security recognizing that the “situation leads to access to justice impediments and risks less safe communities.”¹ Chief Justice Fairhurst has sent similar letters to ICE and Customs and Border Protection (CBP) asserting that these arrests “impede the fundamental mission of our courts, which is to ensure due process and access to justice for everyone, regardless of their immigration status.”²

¹ See attached letter from WSBA BOG to ICE.

² See supplemental materials at 2 and 3.

Unfortunately, as reflected in the current Comment [4], lawyers have used immigration enforcement as a strategic tactic knowing that ICE and CBP have in recent months increased their presence at courthouses.³

Immigration enforcement actions have occurred at courthouses throughout Washington, in at least 16 different counties.⁴ ICE and CBP primarily target people of color, predominantly Latinx Spanish speakers. Targeted people are stopped, questioned and/or apprehended as they seek to enter, are inside, or are leaving a Washington courthouse. As a result, noncitizens, including immigrants with lawful status, and their families and communities are afraid to engage with our state's justice system. Defendants fear showing up for court dates to answer and defend against criminal charges. They must choose risking additional charges for failing to appear or being arrested, detained and possibly deported by immigration enforcement officers. These circumstances compromise defense attorneys' capacity and obligations to defend clients, and prosecutors are impeded in their duties to pursue justice for alleged criminal violations. Similarly, victims of crime, including domestic violence are afraid to seek judicial protections for fear being separated from their children or otherwise having to defend themselves against possible deportation.

Our Supreme Court Chief Justice, WSBA, and prosecutors around the country — including in California, Colorado, Massachusetts, and New York — have publicly condemned immigration enforcement actions in courthouses because of the chilling effect on immigrants. However, as the University of Washington's Center for Human Rights has recently reported, some prosecutors in Washington have proactively shared information and reported people to ICE.⁵ Many prosecutors know first-hand that the specter of county involvement in ICE arrests harms public trust in law enforcement, making people less likely to come forward as crime witnesses or to seek protection because they fear doing so will lead ICE agents to detain and deport them or their family members. As a letter sent by California prosecutors to ICE noted, “[n]o one should fear that their immigration status prevents them from seeking justice, whether as a crime victim or otherwise.”⁶

The proposed amendment seeks to clarify that all lawyers in Washington are prohibited from sharing someone's personal information in order to facilitate immigration arrests as doing so burdens community members' access to courts. In Washington State, law enforcement is already prohibited from sharing nonpublic, personal information with immigration authorities,⁷ as are state agencies.⁸ Extending these prohibitions to all lawyers promotes fairness, public safety, and access to justice for all Washingtonians.⁹

³ Lilly Fowler, *More Immigrants Report Arrests at WA Courthouses, Despite Outcry*, <https://crosscut.com/2019/04/more-immigrants-report-arrests-wa-courthouses-despite-outcry>, (last accessed on 9/26/19).

⁴ See attached report, University of Washington Center for Human Rights, *Justice Compromised, Immigration arrests at Washington state courthouses* (Oct. 2019).

⁵ See *Id.*

⁶ Letter to Attorney General Jeff Sessions from California Prosecutors, <https://fairandjustprosecution.org/wpcontent/uploads/2017/09/Letter-to-AG-Sessions-from-California-Prosecutors.pdf> (April 2017).

⁷ See SB 5497 (2019-20), Section 6(5), <http://lawfilesexternal.wa.gov/biennium/201920/Pdf/Bills/Senate%20Passed%20Legislature/5497-S2.PL.pdf>.

⁸ See Executive Order 17-01, https://www.governor.wa.gov/sites/default/files/exe_order/eo_17-01.pdf (February 2017).

⁹ Additionally, an update to the comment was necessary to recognize prosecutors' obligations under state and federal law, as well as to protect lawyers employed by federal immigration agencies.

It is a fundamental right of all Washington residents to access our courts. Const. art. 1, § 10. Justice system stakeholders must take all possible steps to ensure Washington courts are open, neutral and accessible to the public, free of restrictions that would otherwise impede the proper administration of justice. The technical amendment comment to RPC 4.4 furthers the intent of the current comment and reflects the need to ensure that all lawyers, including prosecutors, are not contributing to immigration arrests which actively undermine access to justice. Accordingly, it is appropriate and necessary that the proposed technical amendment to the comment to RPC 4.4 is adopted.

D. Hearing:

The proponents do not believe a public hearing is needed.

E. Expedited Consideration:

The proponents believe exceptional circumstances justify expedited consideration of the suggested technical amendment to the comment to RPC 4.4 and request that the Rules Committee proceed to a 30 day comment period. If the Rules Committee deems it necessary to direct the proposed commentary to the WSBA's Professional Ethics Committee for review, we request that the committee ask that the review be expedited and seek a response within a timeframe time that circumstances warrant.

F. Supporting Materials:

1. *Immigration Enforcement at Washington State Courthouses*, Washington Immigrant Solidarity Network, August 29, 2019.
2. Letter From Chief Justice Mary Fairhurst to Commissioner Kevin McAleenan, US Customs and Border Protection, April 15, 2019.
3. Letter from Chief Justice Mary Fairhurst to Secretary John Kelly, US Department of Homeland Security, March 15, 2017.
4. Letter from Robin L. Haynes, Washington State Board of Governors to Secretary John Kelly, US Department of Homeland Security, June 1, 2017.
5. *Justice Compromised: Immigration Arrests At Washington State Courthouses*, University of Washington Center For Human Rights, October 1, 2019.

1 **SUGGESTED RULE CHANGES**

2 **RULES OF PROFESSIONAL CONDUCT 4.4 COMMENT (4)**

3 The duty imposed by paragraph (a) of this Rule includes a lawyer's assertion or inquiry about
4 any ~~third~~ person's immigration status when the lawyer's purpose is to intimidate, coerce, or
5 obstruct that person from participating in a civil or criminal matter, or otherwise assists with civil
6 immigration enforcement. Issues involving immigration status carry a significant danger of
7 interfering with the proper functioning of the justice system. See *Salas v. Hi-Tech Erectors*, 168
8 Wn.2d 664, 230 P.3d 583 (2010). When a lawyer is representing a client ~~in a civil matter~~,
9 whether the client is the state or one of its political subdivisions, an organization, or an
10 individual, a lawyer's communication to a party or a witness that the lawyer will report that
11 person to immigration authorities, or a lawyer's report of that person to immigration authorities,
12 furthers no substantial purpose of the ~~civil~~ adjudicative and violates this Rule.

13
14 A communication in violation of this Rule can also occur by an implied assertion that is the
15 equivalent of an express assertion prohibited by paragraph (a). Sharing personal information with
16 federal immigration authorities, including but not limited to, home address, court hearing dates,
17 citizenship or immigration status, or place of birth, absent a court order, for the purpose of
18 facilitating civil immigration arrests is conduct that is in violation of this Rule. See also Rules
19 1.6(a) (prohibiting a lawyer from revealing information relating to the representation of a client),
20 8.4(b) (prohibiting criminal acts that reflect adversely on a lawyer's honesty, trustworthiness, or
21 fitness as a lawyer in other respects), 8.4(d) (prohibiting conduct prejudicial to the administration
22 of justice), and 8.4(h) (prohibiting conduct that is prejudicial to the administration of justice
23 toward judges, lawyers, LLLTs, other parties, witnesses, jurors, or court personnel or officers,
24 that a reasonable person would interpret as manifesting prejudice or bias on the basis of sex,
25 race, age, creed, religion, color, national origin, immigration status, disability, sexual orientation,
26 or marital status).

27
28 Government officials may provide federal immigration authorities with information relating to
29 any person involved in matters before a court only pursuant to RCW 7.98, or upon request and in
30 the same manner and to the same extent as such information is lawfully made available to the
31 general public, or pursuant to a court order. Additionally, under 8 U.S.C. § 1373, government
32 officials are not prohibited from sending to or receiving from immigration authorities a person's
33 immigration status or citizenship. Lawyers employed by federal immigration authorities engaged
34 in authorized activities within the scope of lawful duties shall not be deemed in violation of this
35 rule.