

Rule 4.4 ~~Respect For Rights Of Third Persons~~
Duties Concerning Inadvertently Transmitted Writings*
(Redline Comparison of the Proposed Rule to ABA Model Rule)

~~(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.~~

~~(b) A~~Where it is reasonably* apparent to a lawyer who receives a ~~document or electronically stored information~~writing* relating to ~~the~~a lawyer's representation of ~~the lawyer's client and~~a client that the writing* was inadvertently sent or produced, and the lawyer knows* or reasonably should know* that the ~~document or electronically stored information was inadvertently sent~~writing* is privileged or subject to the work product doctrine, the lawyer shall:

(a) refrain from examining the writing* any more than is necessary to determine that it is privileged or subject to the work product doctrine, and

(b) promptly notify the sender.

Comment

[1] If a lawyer determines this rule applies to a transmitted writing,* the lawyer should return the writing* to the sender, seek to reach agreement with the sender regarding the disposition of the writing,* or seek guidance from a tribunal.* (See *Rico v. Mitsubishi* (2007) 42 Cal.4th 807, 817 [68 Cal.Rptr.3d 758].) In providing notice required by this rule, the lawyer shall comply with rule 4.2.

[2] This rule does not address the legal duties of a lawyer who receives a writing* that the lawyer knows* or reasonably should know* may have been inappropriately disclosed by the sending person. (See *Clark v. Superior Court* (2011) 196 Cal.App.4th 37 [125 Cal.Rptr.3d 361].)

~~[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.~~

~~[2] Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional~~

~~steps, such as returning the document or electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, “document or electronically stored information” includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as “metadata”), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.~~

~~[3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.~~

Rule 8.4 Misconduct
(Proposed Rule Adopted by the Board on March 9, 2017)

It is professional misconduct for a lawyer to:

- (a) violate these rules or the State Bar Act, knowingly* assist, solicit or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud,* deceit or reckless or intentional misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these rules, the State Bar Act, or other law; or
- (f) knowingly* assist, solicit, or induce a judge or judicial officer in conduct that is a violation of an applicable code of judicial ethics or code of judicial conduct, or other law. For purposes of this rule, “judge” and “judicial officer” have the same meaning as in rule 3.5(c).

Comment

[1] A violation of this rule can occur when a lawyer is acting in propria persona or when a lawyer is not practicing law or acting in a professional capacity.

[2] Paragraph (a) does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[3] A lawyer may be disciplined for criminal acts as set forth in Business and Professions Code §§ 6101 et seq., or if the criminal act constitutes “other misconduct warranting discipline” as defined by California Supreme Court case law. See *In re Kelley* (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375].

[4] A lawyer may be disciplined under Business and Professions Code § 6106 for acts involving moral turpitude, dishonesty, or corruption, whether intentional, reckless, or grossly negligent.

[5] Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these rules and the State Bar Act.

[6] This rule does not prohibit activities of a lawyer that are protected by the First Amendment to the United States Constitution or by Article I, § 2 of the California Constitution.



Proposed Rules Archives

RPC 4.4 - Respect for Rights of Third Persons

- [Proposed Changes to RPC 4.4 - Respect for Rights of Third Persons](#) (in Word Format)
- [Comments Received for RPC 4.4 - Respect for Rights of Third Persons](#)

GR 9 Cover Sheet

Suggested Amendment

Rules of Professional Conduct (RPC)

Rule 4.4: Respect for Rights of Third Persons

Submitted by the Board of Governors of the Washington State Bar Association

Purpose

The suggested Comment addresses the issue of whether a lawyer's assertion or inquiry about immigration status violates the Rules of Professional Conduct when the lawyer's purpose is to intimidate, coerce, or obstruct that person from participating in a civil matter. The Comment to Rule 4.4 is intended to address a gap in Washington's ethics laws by providing clear guidance to lawyers as to what is and is not permitted in the context of civil litigation involving individuals who are unauthorized immigrants or who are perceived to be so. This guidance will protect access to the civil justice system regardless of a person's immigration status or ethnicity.

Background

The Department of Homeland Security estimates that there were 11.6 million unauthorized immigrants living in the United States as of January 2008. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669-70 (2010). With the significant presence of unauthorized immigrants have come attempts to use immigration status in litigation, whether or not the party or witness in question is actually an unauthorized immigrant. There is a substantial amount of federal and state authority emphasizing that use of immigration status chills access to the courts and has a variety of adverse effects on the civil justice system:

Even documented workers may be chilled . . . fear[ing] that their immigration status would be changed, or that their status would reveal the immigration problems of their family or friends; similarly, new legal residents or citizens may feel intimidated by the prospect of having their immigration history examined in a public proceeding. Any of these individuals, failing to understand the relationship between their litigation and immigration status, might choose to forego civil rights litigation.

Rivera et al. v. NIBCO, Inc., 364 F.3d 1057, 1065 (9th Cir. 2004) (affirming entry of protective order preventing defendant from inquiring into plaintiffs' immigration status and eligibility for employment); see also *Perez-Farias v. Global Horizons, Inc.*, 2009 WL 1011180, at *18-19 (E.D.Wash. 2009) (explaining that immigration status had been raised in class action "only as a result of an unspoken perception that persons with Hispanic last names are not eligible for work," and declining to "perpetuate any stereotyping of the local Hispanic population by assuming that persons with Hispanic surnames . . . are not eligible to work.")

In *TXI Transportation Co. v. Hughes*, 306 S.W.3d 230 (Tex. 2010), a wrongful death action arising out of a collision between a tractor-trailer rig owned by TXI Transportation and a passenger vehicle, the Texas Supreme Court held the trial court committed prejudicial error by admitting evidence impugning the character of the driver of the TXI truck based on his immigration status. Noting that the issue of which driver was responsible was "hotly contested," the Court explained that the plaintiff hedged his theory by calling attention to the truck driver's immigration status wherever possible. This included dozens of references to the driver's status as an "illegal immigrant," his prior deportation, his use of a "falsified" Social Security number, and his use of a commercial driver's license that was characterized as "invalid" or "fraudulently obtained." *Id.* at 243. The Court explained that "[s]uch appeals to racial and ethnic prejudices, whether 'explicit and brazen' or 'veiled and subtle,' cannot be tolerated because they undermine the very basis of our judicial process." *Id.* at 245.

The Court further noted that the error was harmful not only because the prejudicial effect "far outweighed any probative value," but also because "it fostered the impression that [the driver's] employer should be held liable because it hired an illegal immigrant." *Id.* at 245; see also *Statewide Grievance Comm. v. Paige*, 2004 WL 1833462, at *6 (Conn. Super. Ct. 2004) (concluding that lawyer violated Rule 8.4 by making veiled threats to his former client and the client's new lawyer to reveal information that would harm the client's chances for a successful immigration application and add information to an FBI investigation against the client; the court found that these threats "violated Rule 8.4 because they constituted conduct prejudicial to the administration of justice and an attempt, by intimidation, to obstruct the grievance process and system.")

Appropriate ethical guidance for lawyers will help ensure that parties and witnesses can participate in the civil justice system without fear that a lawyer's unwarranted use of immigration status or ethnicity will adversely affect them. See generally David P. Weber, *(Un)fair Advantage: Damocles' Sword and the Coercive Use of Immigration Status in a Civil Society*, 94 Marq. L. Rev. 613 (2010) (surveying the legal and ethical response to the coercive use of immigration status or "status coercion" in civil proceedings and negotiations, and concluding that as unauthorized immigrants are one of the most vulnerable and susceptible populations to harm done to them; the ethical rules governing lawyers and judges should clearly state, and be understood, as prohibiting this type of coercion).

Although there are a number of reported examples of Washington lawyers alluding to immigration status of an opposing party (e.g., *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664; *Perez-Farias v. Global Horizons, Inc.*, 2009 WL 1011180; *Sandoval v. Rizzuti Farms, Ltd.*, 2009 WL 2058145 (E.D. Wash. 2009)), there is at present no ethics opinion or published disciplinary precedent in Washington clarifying the circumstances under which such conduct is unethical. This void in Washington's ethics law establishes the need for a clear and definitive statement about the ethical parameters and prohibitions in this area.

Ethics Rules and Opinions Relating to Immigration Status Coercion

Former WSBA Formal Opinion 167

From 1969-1972, the ethical duties of Washington lawyers were governed by the former Code of Professional Responsibility (CPR), which was based on the American Bar Association (ABA) Model Code of Professional Responsibility. During that period, the WSBA Board of Governors issued WSBA Formal Ethics Opinion No. 167 (withdrawn), which prohibited threatening to report a person to immigration authorities solely to gain an advantage in a civil matter. Opinion 167 was based on former Disciplinary Rule (DR) 7-105(A), which provided that a "lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." The principles reflected in DR 7-105(A) were explained further in Ethical Consideration 7-21, which was referenced in Opinion 167:

The rationale for this opinion is stated in EC 7-21 which points out that the purpose of civil adjudication is to settle disputes between parties while the criminal process is designed to protect society as a whole. Threats to use the criminal process to coerce adjustment of private civil controversies is a subversion of that process; also, the person against whom criminal process is so misused may be deterred from asserting available legal rights and thus the usefulness of the civil process in settling private disputes is impaired.

Because the threat of contacting INS would involve an abuse of the judicial process, it would undermine public confidence in our legal system. Attorneys should refrain from such conduct.

WSBA Formal Ethics Op. 167 (withdrawn).

The Withdrawal of Former WSBA Formal Ethics Opinion No. 167.

The ABA replaced the Model Code of Professional Responsibility with the Model Rules of Professional Conduct in 1983. In 1985, Washington followed suit by adopting the Washington Rules of Professional Conduct to replace the CPR. Neither the ABA nor Washington included DR 7-105(A) in the Rules of Professional Conduct. It appears that former Opinion 167 was subsequently withdrawn because the rule upon which it was based, DR 7-105(A), was no longer a part of Washington's ethics rules.

The Position of the American Bar Association (ABA)

In 1992, following the abrogation of DR 7-105(A), the American Bar Association issued an ethics opinion on the use of threats of criminal prosecution in connection with a civil matter. Applying the Model Rules, the ABA concluded that, in general, a lawyer is not prohibited from using the possibility of presenting criminal charges against the opposing party in a civil matter as long as certain conditions are met, i.e., (1) the criminal matter is related to the civil claim, (2) the lawyer has a well-founded belief that both the civil claim and the criminal charges are warranted by the law and the facts, and (3) the lawyer does not attempt to exert or suggest improper influence over the criminal process. However, if a threat to bring criminal charges is unrelated to the client's civil claim, if the lawyer does not believe both the civil claim and potential criminal charges are well-founded, or if there is an attempt to suggest or exert improper influence over the criminal process, a number of ethics rules may be violated.

According to the ABA opinion, requiring a relationship between the civil and criminal matters

tends to ensure that negotiations will be focused on the true value of the civil claim, which presumably includes any criminal liability arising from the same facts or transaction, and discourages exploitation of extraneous matters that have nothing to do with evaluating that claim. Introducing into civil negotiations an unrelated criminal issue solely to gain leverage in settling a civil claim furthers no legitimate interest of the justice system, and tends to prejudice its administration.

ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-363 (1992) [hereinafter ABA Formal Op. 92-363].

In evaluating the issue, the ABA noted that the express prohibition in former DR 7-105(A) was "deliberately omitted" from the Model Rules because the drafters believed that

'extortionate, fraudulent, or otherwise abusive threats were covered by other, more general prohibitions in the Model Rules and thus that there was no need to outlaw such threats specifically.' . . . Model Rules that provide an explanation of why the omitted provision DR 7-105(A) was deemed unnecessary and set the limits on legitimate use of threats of prosecution are Rules 8.4, 4.4, 4.1 and 3.1.

Id. The ABA has taken no position on the ethics of a lawyer's use of immigration status in the context of civil litigation.

Unlike Washington, a number of jurisdictions chose to adopt prohibitions similar to DR 7-105(A) in their Rules of Professional Conduct. *See, e.g.*, Cal. Rules of Prof'l Conduct R. 5-100 (2011) (a member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute); Colo. Rules of Prof'l Conduct R. 4.5 (2008) (a lawyer shall not threaten criminal, administrative or disciplinary charges to obtain an advantage in a civil matter nor shall a lawyer present or participate in presenting criminal, administrative or disciplinary charges solely to obtain an advantage in a civil matter).

In Washington, although former DR 7-105(A) has not been expressly incorporated into the RPCs, and former Opinion 167 has been withdrawn, in some circumstances the conduct addressed by those former authorities is prohibited by the current RPCs. With respect to use of information about immigration status, because of the particular vulnerabilities of unauthorized immigrants and the increasing frequency of lawyer conduct intended to exploit that vulnerability, it is appropriate to clarify those circumstances and identify the rules that are implicated.

North Carolina Ethics Opinions

One state has identified the ethical prohibitions on exploiting immigration status. The North Carolina State Bar (NCSB) has adopted two formal

ethics opinions related to use of immigration status in civil matters. The first addressed threatening to report a person's immigration status; the second addressed actually reporting the person's immigration status.

In 2005 the NCSB issued Formal Ethics Opinion 3, which addressed the following question:

May the defense lawyer threaten to report the plaintiff or a witness to immigration authorities to induce the plaintiff to capitulate during the settlement negotiations of the civil suit?

NCSB Formal Ethics Op. 3 (2005).

The NCSB cited ABA Formal Opinion No. 92-363 as support for its conclusion that:

There is no valid basis for distinguishing between threats to report unrelated criminal conduct and threats to report immigration status to the authorities: the same exploitation of extraneous matters and abuse of the justice system may occur. Rule 4.4(a) prohibits a lawyer, when representing a client, from using means that have no substantial purpose other than to embarrass, delay, or burden a third person. . . . The threat to expose a party's undocumented immigration status serves no other purpose than to gain leverage in the settlement negotiations for a civil dispute and furthers no legitimate interest of our adjudicative system. Therefore, a lawyer may not use the threat of reporting an opposing party or a witness to immigration officials in settlement negotiations on behalf of a client in a civil matter.

Id.

In 2009, the NCSB issued Formal Ethics Opinion 5, which addressed the following inquiry:

If Lawyer engages in the discovery [of immigration status] and determines that [plaintiff] is in the country illegally, may Lawyer call the US Immigration and Customs Enforcement (ICE) and report the [plaintiff's] status?

NCSB Formal Ethics Op. 5 (2009).

The NCSB answered that a lawyer may not do so, unless federal or state law requires the lawyer to report the plaintiff's immigration status to ICE. The opinion cited Rule 4.4(a) (prohibiting the use of means that have no substantial purpose other than to embarrass, burden, etc. a third person) and Rule 8.4(d) (prohibiting conduct prejudicial to the administration of justice). Opinion 5 also noted that it is unlikely under this circumstance that the lawyer's impetus to report the plaintiff to ICE is motivated by any purpose other than those prohibited under the rules.

Relevance and Admissibility of Immigration Status in Washington Courts

In *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664 (2010), the Washington Supreme Court addressed whether evidence of undocumented immigration status was admissible with respect to a claim for front pay in a personal injury action. The trial court admitted evidence of immigration status. The jury then determined that the defendant was negligent, but found no proximate cause between this negligence and the plaintiff's injuries.

On the issue of lost future earnings, the Supreme Court held that the plaintiff's immigration status was relevant, noting that relevance under ER 401 "is not a high hurdle." *Id.* at 670. With that standard in mind, the Court stated, "one consequential fact [with regard to front pay] will be the market in which he sells his labor." *Id.* Even a minimal increase in the risk that the plaintiff's future labor market will not be the United States is sufficient to meet the requirements of ER 401 and 402. *Id.*

Despite having some relevance, the Court concluded that under ER 403, the prejudicial effect of admitting the immigration evidence substantially outweighed its relevance:

We recognize that immigration is a politically sensitive issue. Issues involving immigration can inspire passionate responses that carry a significant danger of interfering with the fact finder's duty to engage in reasoned deliberation. In light of the low probative value of immigration status with regard to lost future earnings, the risk of unfair prejudice brought about by the admission of a plaintiff's immigration status is too great. Consequently, we are convinced that the probative value of a plaintiff's undocumented status, by itself, is substantially outweighed by the danger of unfair prejudice.

Id. at 672. The Court rejected the defendant's assertion that the error was harmless, explaining that "[w]e find the risk of prejudice inherent in admitting immigration status to be great, and we cannot say it had no effect on the jury." *Id.* at 673.

Salas did not involve issues of the ethics surrounding the use of an individual's immigration status in a civil matter. But the Court acknowledged the "obvious" prejudicial effects of using immigration status against a person. *Id.* at 672.

In another recent case, a former executive director of a non-profit organization alleged discrimination by board members because the director had asked board members about their immigration status to protect the organization's funding. *Diaz v. Washington State Migrant Council*, No. 29005-1-11, 2011 WL 5842778 (Wash. Ct. App. Nov. 22, 2011) (Division III). The Court of Appeals found that the trial court did not abuse its discretion in denying a motion by the board members seeking a protective order to prevent discovery of immigration status. *Diaz* indicates that immigration status is discoverable when immigration status is central to the factual basis of the cause of action. The court did not address ethical issues.

The decisions in *Salas* and *Diaz* demonstrate the increasing focus on immigration status in civil litigation, and the corresponding need for ethical guidance explaining when inquiry into immigration status, or reporting immigration status, violates the Rules of Professional Conduct.

The Suggested New Comment to Rule 4.4

When a lawyer uses information about a person's immigration status with a purpose to intimidate, coerce, or obstruct that person from participating in a civil matter, a number of existing RPCs may be violated. The most relevant rule in this regard is RPC 4.4(a), which provides:

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Suggested Comment [4] to RPC 4.4 seeks to clarify that, in representing a client, it is unethical under RPC 4.4(a) for a lawyer to make a

statement or inquiry about immigration status for the purpose of intimidating or coercing a person, or obstructing that person from participating in a civil matter.

The suggested Comment further states: “When a lawyer is representing a client in a civil 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.” This is consistent with the view espoused by the North Carolina State Bar, which opined that “The threat to expose a party’s undocumented immigration status serves no other purpose than to gain leverage in the settlement negotiations for a civil dispute and furthers no legitimate interest of our adjudicative system.” NCSB Formal Ethics Op. 3 (2005).

As the suggested Comment recognizes, implied references to a person’s immigration status may violate the rule. In certain other contexts, the RPCs prohibit both express and implied assertions. See RPC 8.4(e) (misconduct for a lawyer to “state or imply” an ability to influence improperly a government agency or official); RPC 4.3 (in dealing with an unrepresented person, lawyer shall not “state or imply” that lawyer is disinterested). Similarly, where immigration status is concerned, a statement or inquiry may seek to accomplish an improper objective without expressly addressing that objective. See *TXI Transp. Co. v. Hughes*, 306 S.W.3d at 243-45 (numerous inappropriate references to a person’s immigration status, whether “explicit and brazen” or “veiled and subtle,” intolerably undermine “the very basis of our judicial process”). Thus, for example, when a lawyer, with the intent to coerce a favorable settlement, threatens to report a party’s undocumented status to U.S. Immigration and Customs Enforcement if the party does not agree to a settlement demand, the lawyer has made a prohibited express assertion. By contrast, a seemingly informational or advisory inquiry in the context of a demand letter or a deposition question — e.g., “Did you know that because a trial is a public proceeding, information about your undocumented status could end up in the hands of U.S. Immigration and Customs Enforcement?” — may have the same prohibited purpose and be designed to achieve the same unjust result. Inquiries into immigration status therefore should be evaluated not merely in terms of whether they embody direct threats or intimidation, but whether their underlying purpose or objective is prohibited, regardless of whether the express language or conduct is of an overtly threatening or coercive nature.

Finally, because a variety of ethics rules may be implicated by conduct designed to intimidate, coerce, or obstruct a person on the basis of immigration status, the suggested Comment cross-references a number of other RPCs. Specifically, the additional rules referenced in the suggested Comment are as follows:

- RPC 8.4(d) prohibits conduct that is prejudicial to the administration of justice. See NCSB Formal Ethics Op. 3 (2005) (introducing into civil negotiations an unrelated criminal issue solely to gain leverage in settling a civil claim “furthers no legitimate interest of the justice system, and tends to prejudice its administration”) (quoting ABA Formal Op. 92-363). The Washington Supreme Court has noted that “conduct deemed prejudicial to the administration of justice has generally been conduct of an attorney in his official or advocacy role or conduct which might physically interfere with enforcing the law,” and “clear violations of accepted practice norms.” 115 Wn.2d 747, 764-65 (1990). If a lawyer, acting as a legal advocate, threatens to use immigration enforcement to coerce or avoid adjustment of a private civil controversy, such conduct may also be prejudicial to the administration of justice, as that rule has been interpreted by the Supreme Court in *Curran*.
- RPC 8.4(h) prohibits conduct that is prejudicial to the administration of justice toward judges, other parties and/or their counsel, witnesses and/or their counsel, 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. In some circumstances, immigration status coercion may reasonably be interpreted as manifesting prejudice on the basis of national origin because immigrants in the United States are widely considered to be of ethnic origins other than European.
- Rule 8.4(b) prohibits criminal acts that reflect adversely on a lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects. Threatening to report a party or witness to immigration authorities to gain an advantage in a civil matter may constitute the crime of extortion in violation of RPC 8.4(b). See ABA Formal Op. 92-363.

The purpose of the civil adjudication system is to resolve disputes between parties, while immigration enforcement is designed to implement federal immigration policies. Assertions or inquiries regarding a party’s or witness’s immigration status to gain an advantage in a civil matter subvert the civil justice system. A Comment to Washington’s Rules of Professional Conduct can make clear that a lawyer representing a client may not use the threat of reporting, or actually report, an opposing party or a witness to immigration officials to intimidate, coerce, or obstruct that person in a civil matter.

Conclusion

The suggested Comment will provide guidance to Washington attorneys, and protection for parties and witnesses, where the question of immigration status may arise.

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