April 28, 2023

Clerk, Washington Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

BY EMAIL TO supreme@courts.wa.gov

Re: Comment on Proposed Amendment to Wash. RPC 1.8(e) by Members of the Executive Committee of the WSBA Civil Rights Law Section, in our Individual Capacities

To the Clerk and Justices of the Washington Supreme Court:

The undersigned individual members of the executive committee of the Washington State Bar Association (WSBA) Civil Rights Law Section[1] support the proposed amendments to Washington's Rule of Professional Conduct 1.8(e), and urge the Court to adopt additional amendments to exempt public interest attorneys from Rule 1.8(e)'s prohibition on covering litigation costs for clients.

I. THE PROPOSED AMENDMENTS PROMOTE ACCESS TO JUSTICE.

We support the proposed amendment to clarify that attorneys representing indigent clients *pro bono* may cover litigation expenses for these clients and provide modest gifts to these clients for living expenses without running afoul of the ethical rules (provided they do not offer such gifts as an inducement to enter into or continue an attorney-client relationship).

The revised language adds important clarity about how the rule applies to attorneys representing indigent clients *pro bono*. We support the proposed rule's clear statement that covering litigation expenses for these clients or offering modest financial assistance to help them meet basic life necessities does not, in the vast majority of circumstances, create a conflict of interest or invite abuse.

II. THE COURT SHOULD FURTHER AMEND RULE 1.8(E) TO ALLOW PUBLIC INTEREST ATTORNEYS TO COVER LITIGATION EXPENSES.

Even with the proposed new "narrow" exception for indigent clients,[2] Rule 1.8(e) will continue to be a barrier to justice. Public interest attorneys[3] should be exempt altogether from Rule 1.8(e)'s prohibition

[1] The WSBA Civil Rights Law Section is dedicated to improving the practice of civil rights law. The Section advocates for civil liberties and equal rights in Washington, with a particular focus on those who have historically been denied such rights and equal treatment under the law. *See* Wash. State Bar Ass'n, *Civil Rights Law Section*, https://www.wsba.org/legal-community/sections/civil-rights-law-section. This letter is being submitted by the undersigned members of the Section's executive committee in our individual capacities, rather than on behalf of the Section itself.

[2] Proposed Comment [12] to Wash. RPC 1.8(e)(3) ("The paragraph (e)(3) exception is narrow.").

[3] For the purposes of this letter, "public interest attorneys" is intended to refer broadly to all attorneys who represent clients *pro bono* in matters that advance the public interest, including attorneys working for legal nonprofits or law school clinics and private attorneys taking public interest cases *pro bono*.

on covering litigation expenses, whether or not the clients are indigent. We urge the Court to further revise Rule 1.8(e) to improve access to justice and to support the public interest bar.[4]

A. The Public Interest Bar Provides Important Pro Bono Representation to Non-Indigent Clients.

It is not enough to permit public interest attorneys to cover litigation costs for clients only if the client is indigent. While many government-funded legal service providers represent only indigent clients,[5] a great many other nonprofit legal organizations provide *pro bono* representation regardless of a client's ability to pay. These public interest organizations are typically funded by donations. Rather than screening potential clients based on financial criteria, they evaluate cases based on their merit, looking at whether the matter would advance the organization's mission. But if a well-funded public interest organization offered use its resources to cover a non-indigent client's litigation expenses, even under the proposed revisions, this offer could run afoul of Rule 1.8(e).[6]

B. Many Non-Indigent Clients Cannot Pay Litigation Expenses.

There is a significant universe of clients who do not meet traditional definitions of indigence but will still be denied access to justice if they are obligated to cover all litigation expenses themselves. There are many people whose incomes exceed the cap for income-qualified legal services but who cannot comfortably pay thousands—or tens of thousands—of dollars for litigation expenses. As the Court is no doubt aware, even with a *pro bono* attorney, complex litigation can be protracted and prohibitively expensive: filing and appeal fees, court reporters and transcripts, and expert witness fees can easily run into the tens of thousands of dollars.

As a result, prohibiting public interest law firms from covering litigation expenses for non-indigent clients means that some clients in Washington will be unable to bring litigation to vindicate important rights, even when there is a public interest attorney willing to represent them *pro bono*.

---

[4] *See*, *e.g.*, New York Rules of Prof'l Conduct R. 1.8(e)(2) ("a lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client"); D.C. Rule 1.8.(d) ("a lawyer may pay or otherwise provide: (1) The expenses of litigation or administrative proceedings, including court costs, expenses of investigation, expenses or medical examination, costs of obtaining and presenting evidence; and (2) Other financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceedings."); *id.* cmt. [9] ("[C]lient reimbursement of the lawyer is not required.").

[5] Government funding to legal services organizations through the federal Legal Services Corporation or Washington's Office of Civil Legal Aid is restricted and may only be used for the legal representation of indigent people. *See* RCW 2.53.030(2); 42 U.S.C. § 2996 *et seq*.

[6] WSBA Advisory Op. 1389 (1996), *available at* https://ao.wsba.org/print.aspx?ID=469 (clients must repay litigation expenses advanced by attorney, and attorney cannot "forgive" clients' debt but has no affirmative duty to collect); WSBA Advisory Op. 2149 (2007), *available at* https://ao.wsba.org/print.aspx?ID=1587 (attorneys cannot cover litigation costs for a client simply because it is a nonprofit).

C. None of the Original Justifications for Rule 1.8(e) Make Sense As Applied to Public Interest Attorneys in the Modern Era.

A rule that prohibits public interest attorneys from covering their clients' litigations expenses can no longer be sustained based on the original justifications. The realities of public interest lawyering in 2023 make clear that allowing public interest attorneys to cover litigation costs for their clients would not create a conflict of interest by giving attorneys too great a financial stake in the matter, nor encourage clients to bring frivolous lawsuits.

There is no evidence that allowing public interest organizations and lawyers representing clients *pro bono* to cover litigation costs for their clients tends to create a conflict of interest by giving the attorney a financial interest in the matter. First, public interest attorneys have generally chosen to forego higher-paying private sector jobs in order to work in the public interest. Second, compensation for public interest attorneys is typically more dependent upon the organization's funders than on attorneys' fees or any litigation costs contributed by clients.[7] If anything, Rule 1.8(e) creates a financial interest and potential conflict where there otherwise would be none by forcing public interest attorneys into the unwanted role of creditors whose clients owe them money.

Nor is there any reason to believe that allowing public interest attorneys to cover litigation expenses will encourage clients to pursue frivolous lawsuits. Attorneys are already bound by civil rules that prohibit filing pleadings that are not well grounded in fact, are not warranted by law, or are interposed for an improper purpose.[8] And as a practical matter, there simply are not enough public interest attorneys to go around. The access to justice gap is well documented: the demand for pro bono representation is overwhelming and far exceeds the bandwidth available.[9] This means that many worthy cases are never filed.

D. Rule 1.8(e) Perpetuates Inequity Rather Than Helping to Remedy It.

Unintentionally, Rule 1.8(e) helps to undermine equity in the legal profession and justice system. Prohibiting public interest attorneys from covering clients' litigation expenses means that public interest organizations cannot simply represent the clients with the strongest and most important cases among the many who need representation; instead, they can choose only among the clients who are willing and able to pay thousands of dollars in fees and costs, even if legal service is free. By making access to justice dependent upon ability to pay, Rule 1.8(e) perpetuates systemic inequality and injustice rather than helping to overcome it.

Prohibiting public interest attorneys from covering litigation expenses is especially illogical with respect to impact litigation. Impact litigation cases are typically non-damages cases seeking declaratory or injunctive relief that will advance the rights and interests of many people, not just the individual clients bringing suit. It makes little sense to mandate that the clients in such cases, rather than the public interest organizations representing them, bear all of expenses of litigation that benefits many other people. Clients in impact litigation already have a significant non-financial stake in the matter: they invest their time and

---

[7] Similarly, for private attorneys representing clients *pro bono* in a public interest matter, their *pro bono* cases do not typically increase their compensation; often, these cases may reduce their compensation by preventing them from pursuing a fee-generating matter instead.

[8] CR 11; Fed. R. Civ. P. 11.

[9] *See* Legal Servs. Corp., The Justice Gap: The Report (2022), https://justicegap.lsc.gov/the-report/.

energy, often open themselves up to burdensome discovery, and may face backlash for speaking out against the status quo. They should not also have to be able to owe tens of thousands of dollars—a debt that will not be shared by the many others who will benefit from their courage.

E. Rule 1.8(e) Impedes Clear Communication with Clients.

While an ethics opinion indicates that lawyers are not required by Rule 1.8(e) to *collect* the litigation expenses owed by a non-indigent client,[10] it is not clear whether the Rule would allow attorneys to state in a retainer agreement that they do not *intend to collect* litigation expenses owed by a non-indigent client. The practical consequence of this tension is that public interest organizations must tell their clients that the clients are on the hook for litigation expenses, even if the organization has no plans to attempt to collect those expenses.

Ethical rules should not create incentives for lawyers to be less than fully transparent and candid with their clients, or to create illusory financial obligations for clients. A rule that leaves clients guessing about whether they will really have to pay their bills erodes trust in the legal profession, and creates an unnecessary barrier to accessing available *pro bono* legal services.

III. CONCLUSION

In sum, we urge you to adopt the proposed amendments to Rule 1.8(e) *and* to propose additional amendments allowing public interest attorneys to cover clients' litigation costs. A public interest exception to Rule 1.8(e) would improve access to justice, promote equity, and would better reflect the realities of modern public interest lawyering. Thank you in advance for your consideration and your support of the public interest and civil rights bar.

Sincerely,

Breanne Schuster, Chair, WSBA Civil Rights Law Section Executive Committee

Prachi Dave, Secretary, WSBA Civil Rights Law Section Executive Committee

Molly Tack-Hooper, Treasurer, WSBA Civil Rights Law Section Executive Committee

Laura Sierra, Immediate Past President, WSBA Civil Rights Law Section Executive Committee

Julie Moroney, Young Lawyer Liaison, WSBA Civil Rights Law Section Executive Committee

Anna Taylor Moritz, At-Large, WSBA Civil Rights Law Section Executive Committee

Sarah Derry, At-Large, WSBA Civil Rights Law Section Executive Committee

Christine Ybarra, At-Large, WSBA Civil Rights Law Section Executive Committee

Yvonne Chin, At-Large, WSBA Civil Rights Law Section Executive Committee

[10] WSBA Advisory Op. 1389 (1996), *available at* https://ao.wsba.org/print.aspx?ID=469.

From:	OFFICE RECEPTIONIST, CLERK
To:	Martinez, Jacquelynn
Subject:	FW: Comment on Proposed Amendment to RPC 1.8(e) by members of the WSBA Civil Rights Law Section executive committee
Date:	Friday, April 28, 2023 1:18:17 PM
Attachments:	CRLS Exec. Comm. Members Public Comment on Rule 1-8e - Final.pdf

From: Molly Tack-Hooper <mtackhooper@earthjustice.org>
Sent: Friday, April 28, 2023 12:30 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment on Proposed Amendment to RPC 1.8(e) by members of the WSBA Civil Rights Law Section executive committee

Attached please find comments on the proposed amendment to RPC 1.8(e) submitted on behalf of members of the executive committee of the WSBA Civil Rights Law Section, in our individual capacities.

Molly Tack-Hooper
Supervising Senior Attorney, Northwest Office
Earthjustice
(she/they)
810 3rd Ave., #610
Seattle, WA 98104
mtackhooper@earthjustice.org
Tel. (206) 701-9763
@MollyTack