

April 28, 2023

Honorable Charles W. Johnson Honorable Mary I. Yu
Supreme Court Rules Committee
c/o Clerk of the Supreme Court Temple of Justice
PO Box 40929 Olympia WA 98504-0929
supreme@courts.wa.gov

Re: Comments to the Suggested Amendments to RPC 1.8(e)

Dear Justice Johnson, Justice Yu, and Rules Committee Members

Introduction

The undersigned individuals write in support of the suggested Amendment to RPC 1.8(e). The suggested amendment specifically allows Washington lawyers to pay court costs and expenses of litigation for indigent clients to whom they are providing free representation. The suggested amendment also permits such lawyer to make modest gifts for necessary personal expenses consistent with the goals of the litigation. We write as legal aid and pro bono lawyers with extensive experience providing free legal services to low-income persons in Washington. We each lend our experience and commitment to the WSBA Pro Bono and Public Service Committee (PBPSC) which is committed to promoting, supporting and expanding opportunities for Washington lawyers to meet their professional commitments through pro bono and public service activities to advance access to justice for Washington's neediest citizens. However, we write in our individual capacities and not on behalf of the PBPSC or the WSBA.

Background and Need for Amendment

The suggested amendment would establish an important and limited exception to the general rule expressed in RPC 1.8(e) that prohibits a lawyer from advancing court costs or expenses of litigation without holding the client ultimately responsible for the costs. In our experience as legal aid and pro bono providers of free legal services, indigent clients are often confused by and scared of embarking on litigation necessary to protect and preserve their rights when they are told that, while the legal services they will receive are free, they must pay any expenses or repay those fronted by the lawyer on their behalf. Many potential clients fail to pursue litigation that they have every right to pursue because of fear that they will not be able to repay the costs. This is true in a variety of cases, including where potential clients are defending against unlawful evictions, debt collections, and other similar actions, seeking to obtain affirmative relief such as a domestic violence protection order or other family law order, or enforcing their rights to, for example, medical care, employment, or education.

Even when an indigent client agrees to pay litigation costs, they are often unable to benefit from the goals of the representation when they are unable pay rent, medical expenses, costs of transportation, or other life expenses necessary to preserve their rights. Thus, many indigent persons choose to forgo litigation or necessary appeals and lose important rights as a result. The suggested amendment to RPC 1.8(e) enables the lawyer to support the client through the litigation by personally paying for the client's necessities, without any expectation of repayment or payment of a fee.

This very limited exception to the general rule of RPC 1.8(e) does not create any conflict or provide any incentive for the client to pursue the representation insofar as the lawyer has no financial interest in the litigation and the lawyer has no expectation of payment from the client. While the suggested amendment allows a lawyer to recover the costs and fees through a fee-shifting statute, unless the client prevails the lawyer has no expectation of payment or repayment of the extended costs. Moreover, the court has discretion to determine the fees and costs to be paid by an opposing party, subject to standards established by law.

The suggested amendment promotes access to justice for indigent persons by providing them the assurance that they will not be held responsible for expenses that may be fronted on their behalf if they do not prevail. In this regard, the suggested amendment differs significantly from a former amendment to RPC 1.8(e), which would not have been limited to pro bono or free legal aid representation of indigent persons. Rather the prior amendment (since repealed) enabled private attorneys who provided legal services on a contingency fee basis to front the costs of litigation in exchange for a percentage of a damages award. In those cases, the lawyer fully expected to be paid from an award *to the client*. The instant suggested amendment would only allow the lawyer to receive an attorney fee award and reimbursed costs from the opposing party should the client prevail. The attorney's relationship with the client, for all intents and purposes, remains outside a fee for service arrangement.

Recommended Edit to Suggested Amendment

The suggested amendment to RPC 1.8(e) also includes a new Comment to the rule. As suggested, Comment [13] reads as follows:

[13] Financial assistance, including modest gifts pursuant to paragraph (e)(3), may be provided even if the representation is eligible for fees under a fee-shifting statute. However, paragraph (e)(3) does not permit lawyers to provide assistance in other contemplated or pending litigation in which a lawyer may eventually recover a fee, such as contingent-fee personal injury cases, or cases in which fees may be available under a contractual fee-shifting provision, even if the lawyer does not eventually receive a fee.

While the PBPSC fully endorses the suggested amendment to the rule and much of Comment [13], it asks the Court to consider omitting from new Comment [13]: “or cases in which fees may be available under a contractual fee-shifting provision, ...” This language is not supported by the substance and purpose of the rule itself and would impair access to justice for indigent clients when the right to costs and attorney fees arises only under a reciprocal contract obligation. Prime examples involve enforcement of employment rights under certain labor and consumer contracts or a residential lease or other contract that may not be covered by the residential landlord-tenant act.

Washington’s Legislature has also determined as a matter of public policy that fee shifting in contractual relationships should not be used to obtain an unfair advantage. RCW 4.84.330, first adopted in 1977, renders contractual attorney fee provisions mutual. It provides:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.

Attorneys' fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorneys' fees is void.

As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

RCW 4.84.330 codifies the equitable principle of mutuality of remedy.¹ The purpose of RCW 4.84.330 is to level the playing field between the parties. But that is not all it does. While not a “fee-shifting statute” per se,² Courts have regularly relied on RCW 4.84.330 as the statutory basis rendering contractual fees enforceable, mandatory, and bilateral.³ Indeed, because of this statute, “where a contract provides for an award of reasonable attorney’s fees to the prevailing

¹ *Herzog Aluminum v. General American*, 39 Wn. App. 188, 196-97, 692 P.2d 867 (1984), cited with approval in *Mt. Hood Bev. v. Constellation Brands*, 149 Wn. 2d 98, 121,63 P.3d 779 (2003); *Yuan v. Chow*, 96 Wn. App. 909, 918, 982 P.2w 647 (1999); *Kaintz v. PLG, Inc.*, 147 Wn. App. 782, 788, 147 197 P.3d 710 (2008).

² *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 489, 200 P.3d 683 (2009).

³ See, e.g., *Castronuevo v. Gen. Acceptance Corp.*, 79 Wn. App. 747, 754, 905 P.2d 387 (1995) (applying the principle that a more specific attorney fee statute overrides the more general RCW 4.84.330 to deny fees);

party, such an award must be made.”⁴ “There is no authority to support an interpretation of RCW 4.84.330 other than as mandating an award of reasonable attorney’s fees to the prevailing party where a contract so provides.”⁵ Under RCW 4.84.330 contractual fee-shifting in Washington operates similarly to other fee shifting statute, including by applying a “prevailing party” standard and judicial review of what fees are “reasonable.” The application of the statute cannot be waived by the parties to a contract. The public interest and policy goals underlying the statute are the same as those underlying other fee-shifting statutes – to ensure adequate representation of persons who lack legal assistance due to the limited amount in controversy or other reasons that make representation of indigent or vulnerable members of our communities difficult and reduce access to justice.⁶

While the problematic language of the suggested amendment is identical to the ABA Model Rule on which the suggested amendment is based, the only stated rationale for the comment in the Model Rule is as follows: “New Comment [13] underscores that contributions may be made even if the representation is eligible for fees under a fee-shifting statute but not in connection with contingent-fee personal injury cases or other specified matters.” The ABA was primarily concerned about not allowing private lawyers to front the costs of litigation or make modest gifts as an incentive for prospective clients to hire them with every expectation that the lawyer would obtain a fee *from the client*. See [20A107 \(americanbar.org\)](#). The narrow exception created by the Suggested Rule for lawyers providing their services for free to low-income persons should be available regardless of whether a potential fee payment is available from the *opposing party* in a prevailing party fee arrangement. A contract based fee-shifting arrangement is no more likely to create an incentive for a lawyer to provide their services pro bono or through a public interest free legal aid organization than is any other fee-shifting statute. Cases handled by pro bono attorneys or legal aid organizations largely fall into areas of basic needs, housing preservation, and consumer protection – areas in which fee-shifting statutes already exist.

It makes little sense to prohibit the humanitarian and access to justice goals of the suggested rule when a lawyer provides free representation for an indigent client because a contractual fee-shifting provision may shift the payment of fees and costs to the opposing party. Just as Washington statutory law treats contractual and statutory fee provisions similarly, Rule 1.8(e) should do so as well. It is unreasonable to assume a lawyer would, as a matter of self-interest, pursue a case when the merits are such that there is a substantial threat that the client could be saddled with significant debt. Given the potential downside of the prohibition, the

⁴ *Singleton v. Frost*, 108 Wn.2d 723, 727, 742 P.2d 1224 (1987).

⁵ *Id.*

⁶ See *Target National Bank v. Higgins*, 180 Wn. App. 165, 321 P.3d 1215, 1229 (2014)

undersigned attorneys respectfully asks the Court to approve the suggested amendment and proposed Comments subject to deleting “or cases in which fees may be available under a contractual fee-shifting provision,” from Comment [13].

Respectfully submitted,

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Deborah Perluss

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Attached please find a comment letter from individual pro bono/legal aid lawyers on Suggested Amendment to RPC 1.8(e).

Thank you,

Deborah Perluss