



April 28, 2023

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

BY EMAIL TO supreme@courts.wa.gov

Re: Earthjustice Comment on Proposed Amendments to Wash. RPC 1.8(e)

To the Clerk and Justices of the Washington Supreme Court:

Earthjustice supports the proposed amendments to Rule 1.8(e), and respectfully requests that the Court adopt additional amendments to Rule 1.8(e) to exempt public interest attorneys representing clients *pro bono* from the prohibition on covering clients' litigation expenses.

We agree with the public comments submitted by members of the executive committee of the WSBA Civil Rights Law Section, and incorporate them by reference. We write separately to explain additional ways in which Rule 1.8(e) could be modified to advance our ability to serve our clients and advance our organization's mission.

Earthjustice is a 501(c)(3) nonprofit public interest legal organization. Earthjustice wields the power of law and the strength of partnership to protect people's health, to preserve magnificent places and wildlife, to advance clean energy, and to combat climate change. Our 200+ full-time lawyers rank among the nation's foremost legal strategists for the environment. Earthjustice's Northwest Regional Office is based in Seattle, and has been at the forefront of many of the most significant legal decisions safeguarding Washington's imperiled species, ancient forests, and waterways.

Like many nonprofit environmental legal organizations, Earthjustice's clients are typically organizations or groups rather than individuals. We routinely represent community-based organizations, environmental and public health advocacy organizations, unions and trade organizations, and Tribes. Our clients are not charged attorneys' fees.

Rule 1.8(e) poses particular problems when the client in question is an organization, rather than an individual. The Committee on Professional Ethics has explained that the prohibition on covering litigation expenses for non-indigent clients extends to non-indigent nonprofit organizations.¹ While there are many widely accepted methods for determining whether an individual qualifies as indigent, there is less guidance available on how to determine

¹ WSBA Advisory Op. 2149 (2007), available at <https://ao.wsba.org/print.aspx?ID=1587>.

whether an organization qualifies as indigent. In addition, low-income organizations do not always have access to the same court fee waivers that are available to indigent individuals to help defray litigation costs. For example, while some low-income litigants can get filing fees waived, organizations do not qualify for *in forma pauperis* status under federal law.²

We have observed that being liable for litigation expenses is a significant barrier to prospective clients' participation in environmental litigation. This is particularly true for organizations with smaller budgets or strict financial controls that make it very difficult to free up funds to cover litigation expenses.

In particular, our partners and clients from communities of color and low-income communities are often the least able to cover litigation expenses. Earthjustice believes that the fights for justice and our environment are inseparable. But organizations that represent communities that have been systemically disenfranchised and discriminated against are often less able to overcome the financial barriers to litigation than other "green" groups. The rules of professional conduct should encourage us to center the voices of the communities who are most directly impacted by the harmful practices we seek to challenge. Instead, Rule 1.8(e) makes it harder for organizations from overburdened communities to participate in litigation, vindicate their rights, and protect their communities.

Rule 1.8(e) can also create potential conflicts among clients when we represent multiple organizations with differing abilities to pay litigation expenses. The most equitable solution to such conflicts that promotes access to justice would be for Earthjustice to pay litigation expenses.³

Earthjustice's donors generously fund our work because they want us to bring high-impact litigation to defend the planet and its people. An exception to Rule 1.8(e) for public interest attorneys who represent clients *pro bono* would allow us to extend that generosity to smaller clients who do not have access to the same resources.

² *Rowland v. Cal. Men's Colony*, 506 U.S. 194, 196 (1993) (holding that only a natural person qualifies for *in forma pauperis* status under 28 U.S.C. § 1915).

³ See 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.").

In sum, we urge you to promote equity and access to justice by adopting the proposed amendments to Rule 1.8(e) and by proposing additional amendments to allow public interest attorneys to cover clients' litigation costs.

Sincerely,



Kristen L. Boyles, *Managing Attorney*
Northwest Regional Office
Earthjustice

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Please find attached comments on the proposed amendment to RPC 1.8(e) from Earthjustice's NW Regional Office. Thank you for your time and consideration.

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