

WSR 21-04-091
RULES OF COURT
STATE SUPREME COURT
[December 2, 2020]

IN THE MATTER OF THE) ORDER
SUGGESTED AMENDMENT TO RPC) NO. 25700-A-1332
6.5—NONPROFIT AND COURT-)
ANNEXED LIMITED LEGAL)
SERVICE PROGRAMS)

Washington State's Pro Bono Council, having recommended the suggested amendment to RPC 6.5—Nonprofit and Court-Annexed Limited Legal Service Programs, and the Court having approved the suggested amendment for publication;

Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the suggested amendment as shown below is to be published for comment in the Washington Reports, Washington Register, Washington State Bar Association and Administrative Office of the Court's websites in January 2021.

(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 April 30, 2021. 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.

DATED at Olympia, Washington this 2nd day of December, 2020.

For the Court

Stephens, C.J.

CHIEF JUSTICE

GR 9 COVER SHEET

Suggested Amendment to

RULES OF PROFESSIONAL CONDUCT (RPC)

Rule 6.5 — NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICE PROGRAMS

Submitted by the Pro Bono Council

A. Name of Proponent:

Pro Bono Council. As a subcommittee of the Washington State Access to Justice Board, the Pro Bono Council is a convening body that supports and advocates for the sixteen volunteer lawyer programs across the State.

B. Spokesperson:

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C. Purpose:

To obtain clarifying language and comment to Rule of Professional Conduct (RPC) 6.5 allowing a limited legal service program to provide notice, as described in paragraph (a)(3) of the Rule, at the time an individual applies for service, regardless of whether an actual conflict exists at that time.

RPC 6.5 allows non-profit and court-annexed limited legal services programs to offer short-term legal services to clients whose legal interests may be in conflict by exempting such representation from RPCs 1.7, 1.9(a), and 1.18(c), unless a participating lawyer has personal knowledge of a conflict and the conflict cannot be mitigated by specific screening measures. This exemption maximizes the limited resources of limited legal service programs and participating lawyers (pro bono and staff) to provide free legal help to eligible persons. A limited legal service program must utilize effective screening mechanisms to ensure confidential information is not disseminated to an attorney who is disqualified from assisting a client with competing interests because of a known personal conflict.¹ A limited legal service program must provide each client with notice of the conflict and the screening mechanisms used to avoid the dissemination of confidential information relating to the representation of the competing interests.² Finally, a limited legal service program must also be able to demonstrate by convincing evidence that no material information relating to the representation was transmitted to the opposing client's attorney.³

- 1 RPC 6.5 (a)(3)(i)
- 2 RPC 6.5 (a)(3)(ii)
- 3 RPC 6.5 (a)(3)(iii)

Neither the rule nor the comments prescribe how the notice is to be provided, but as currently written, in a known conflict situation, providing individualized notice of an actual conflict creates the potential for inconsistency with the duty of confidentiality codified in RPC 1.6 because the identity of clients involved in the conflict can logically be traced by receipt of that notice alone. This is particularly concerning in many of the cases handled by limited legal service programs in Washington State, because providing individualized notice of a conflict creates safety issues for actual and potential clients who may be seeking protection orders.

Client safety issues in limited legal services programs often arise in cases involving domestic violence. Protection from domestic violence is an area of significant legal need across the country and in Washington. This is borne out by the Washington State Supreme Court-sponsored Civil Legal Needs Study Update of 2015 (Study). The Study found that 71 percent of low-income households in Washington face at least one civil legal problem during a 12-month period.⁴ Further, 76 percent of persons living in poverty who have significant legal needs in Washington cannot get the legal help or representation they need to resolve the problem.⁵ More importantly for purposes of this suggested amendment, the Study confirmed that victims of domestic violence and/or sexual assault experience the highest number of legal problems per capita of any group: low-income Washingtonians who have suffered domestic violence or been a victim of sexual assault experience an average of 19.7 legal problems per household, twice the average experienced by the general low-income population.⁶

4 2015 Washington State Civil Legal Needs Study Update, p. 5, at https://ocla.wa.gov/wp-content/uploads/2015/10/CivilLegalNeedsStudy_October2015_V21_Final10_14_15.pdf.

5 *Id.* at p. 15.

6 *Id.* at p. 13.

Several limited legal service programs, including volunteer lawyer programs, offer legal advice clinics for survivors of domestic violence (DV). If a DV survivor seeks legal aid services while their abuser is a current or former client of that program, under RPC 1.7 or 1.9 there could be a conflict of interest. As described above, RPC 6.5 allows a limited legal service program to provide short-term limited assistance to the conflicted client, who may be the victim/survivor, through the mechanism of screening any personally conflicted attorney(s) from the case and notifying both parties. The current process raises the immediate concern that providing individualized notice of the actual conflict to each party creates an imminent risk of harm to the victim by alerting an alleged DV perpetrator that their victim is seeking legal advice. Thus, the current notice requirement puts the safety of victims/survivors in greater jeopardy. As a collateral matter, RPC 1.6 counsels the exercise of caution when disclosing client information that is likely to result in imminent harm to a third-party.⁷ As a result of the lack of clarity on this issue, some limited legal service programs opt instead to follow a strict policy of not accepting clients where there is a known conflict, which then results in the opposite outcome to the underlying goal of RPC 6.5: to increase access to free limited legal services for low-income Washingtonians.

⁷ See RPC 1.6 Comment [6].

The suggested amendment to RPC 6.5 provides important clarity regarding the notice requirement. This guidance will enable any non-profit or court-annexed limited legal service program that satisfies the provisions of RPC 6.5(a) to serve clients who face compounding challenges to seeking legal assistance and who might otherwise be barred from obtaining the help they need due to barriers unwittingly posed by the RPCs. At the same time, limited legal service programs are able to help keep those clients safe during the course of their legal matter without fear of increasing their risk of harm. The suggested amendment will allow limited legal service programs to notify ALL actual and potential clients at the time an individual applies for help of the potential for conflicts and information about the screening mechanisms. This fulfills RPC 6.5's goal to maximize the accessibility of legal aid to as many individuals as possible while still protecting an individual client's interests, safety and confidentiality within the bounds of attorneys' professional duties.

Additionally, providing notice of the potential for conflicts and the screening mechanisms to all applicants for short-term legal services creates an opportunity for applicants to immediately opt out of receiving services if they feel doing so would be in their best interests. Providing notice only after an actual conflict arises, as usually happens under the current rule, allows no opportunity for clients to opt out or raise objections beforehand.

D. Hearing:

A hearing is not requested, but if the Court seeks further information or a hearing, the Pro Bono Council is happy to make itself available and requests notice of any relevant hearing calendared. The Pro Bono Council has conducted stakeholder outreach on this issue. Please see the attached supporting materials.

E. Expedited Consideration:

Expedited consideration is requested and is proper in order to protect the safety of legal aid clients. The ongoing COVID-19 related crisis and associated legal issues, including evictions, have brought an unprecedented number of new legal aid clients. This increase in

volume will necessarily result in an increase in the potential for conflicts, and in order to protect the physical safety of as many legal aid clients as possible, and in light of the significant open comment period already conducted, the Pro Bono Council requests the proposed changes be implemented as soon as possible.

F. Supporting Materials:

Statement regarding stakeholder outreach conducted by Pro Bono Council

SUGGESTED RULE CHANGES

RULES OF PROFESSIONAL CONDUCT

Recommended by the Pro Bono Council

RPC 6.5

NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICE PROGRAMS

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter and without expectation that the lawyer will receive a fee from the client for the services provided:

(1) is subject to Rules 1.7, 1.9(a), and 1.18(c) only if the lawyer knows that the representation of the client involves a conflict of interest, except that those Rules shall not prohibit a lawyer from providing limited legal services sufficient only to determine eligibility of the client for assistance by the program and to make an appropriate referral of the client to another program;

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer or LLLT associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) or by LLLT RPC 1.7 and LLLT RPC 1.9(a) with respect to the matter; and

(3) notwithstanding paragraphs (1) and (2), is not subject to Rules 1.7, 1.9(a), 1.10, or 1.18(c) in providing limited legal services to a client if:

(i) the program lawyers or LLLTs representing the opposing clients are screened by effective means from information relating to the representation of the opposing client;

(ii) each client is notified of the conflict and the screening mechanism used to prohibit dissemination of information relating to the representation; such notice, may be given prospectively; and

(iii) the program is able to demonstrate by convincing evidence that no material information relating to the representation of the opposing client was transmitted by the personally disqualified lawyers or LLLTs to the lawyer representing the conflicting client before implementation of the screening mechanism and notice to the opposing client.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

(c) Prospective notice shall satisfy the requirements of (a)(3)(ii) only if the assistance provided to both conflicting clients is limited legal service as governed by Rule 6.5.

[Adopted effective October 29, 2002; amended effective September 1, 2006; April 14, 2015.]

Comment

[1] [Washington revision] Legal services organizations, courts and various nonprofit organizations have established programs through

which lawyers provide short-term limited legal services - such as advice or the completion of legal forms - that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9, 1.10, and 1.18.

[2] [Washington revision] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of a legal practitioner. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

[Comment [2] amended effective April 14, 2015.]

[3] [Washington revision] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a), or 1.18(c) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

Additional Washington Comments (6 - 78)

[6] Washington's version of this Rule differs from the Model Rule. The differences accommodate the unique civil legal services delivery system, which uses a statewide centralized telephone intake and referral system for low-income persons to access free civil legal services. The Rule recognizes that lawyers who provide intake and referral services such as these will necessarily at times receive confidential information from adverse parties.

The risk that such information will be used against the material interests of either party is relatively low in comparison to the need for services, and when such a risk exists, protections of lawyer screening and notice to the client are required by the Rule.

[7] Paragraph (a)(3) was taken from former Washington RPC 6.5(a)(3) as enacted in 2002. The replacement of "confidences and secrets" in paragraph (a)(3) with "information relating to the representation" was necessary to conform the language of the Rule to a terminology change in Rule 1.6. No substantive change is intended. See Comment [21] to Rule 1.6.

[8] Providing prospective notice of a potential conflict in accordance with Paragraphs (a)(3)(ii) and (c) would be particularly appropriate in situations where vulnerable client populations may be involved. For example, where a nonprofit or court-annexed limited legal service program is assisting a survivor of domestic violence and the perpetrator of the domestic violence seeks, or previously received, assistance through the same program. In such cases, notification to the perpetrator when the conflict arises could effectively advise the perpetrator that the survivor is contemplating legal action potentially affecting the perpetrator, thus putting the survivor at risk of retaliation.

[Comments adopted effective September 1, 2006; amended effective April 14, 2015; September 1, 2016.]