WSR 24-05-009
RULES OF COURT
STATE SUPREME COURT
[February 7, 2024]

IN THE MATTER OF THE SUGGESTED AMENDMENTS TO RPC 6.1—PRO BONO PUBLICO SERVICE	))))	ORDER NO. 25700-A-1564

Attorney Kevin Flannery, having recommended the suggested amendments to RPC 6.1—Pro Bono Publico Service, and the Court having approved the suggested amendments for publication;

Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the suggested amendments as shown below are 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 2025.

(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, 2025. 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 7th day of February, 2024.

For the Court

Gonzalez, C.J.

CHIEF JUSTICE

Cover Sheet for Proposed Amendment to RPC 6.1

Proponent
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Purpose of the Proposed Amendment

RPC 6.1 sets a non-mandatory, aspirational benchmark for Washington lawyers to provide pro bono publico service and defines the ways in which lawyers may provide that service. The rule also establishes a mechanism for the Washington State Bar Association to honor lawyers who provide a certain amount of pro bono publico service.

This proposed amendment would broaden the scope of the rule such that pro bono publico service also encompasses a lawyer's provision of court-appointed representation to a person entitled to counsel at public expense, regardless of whether the lawyer is paid to accept and carry forth the appointment. The proposed amendment would also make a more technical edit to replace an outdated phrase with more inclusive language when referring to individuals affected by domestic violence.

The court should adopt this proposed amendment for three related reasons.

First, Washington is experiencing an urgent crisis in recruiting and retaining public defense attorneys. Experienced public defenders are leaving public defense because of excessive caseloads and difficult working conditions. When no qualified attorney is available to provide court-appointed representation, cases—and lives—languish.[1] Moreover, Washington's existing caseload limits under the Standards for Indigent Defense will very likely need to be reconsidered—and substantially reduced—in light of a new comprehensive workload study that was recently completed.[2] To address both the current shortage of public defense attorneys and the likely need for additional public defense attorneys in the near future, the court and the bar association must encourage more lawyers working in private practice to provide court-appointed representation. This proposed amendment to RPC 6.1 would place a modicum of substance behind that encouragement and formally communicate to the private bar the need for lawyers to engage in public defense work.

Second, providing court-appointed representation is meaningful legal work that can have positive, life-changing effects for the client, their families, and the community. RPC 6.1 exists to help prod lawyers to represent more than just wealthy interests. The rule tells lawyers that they should aspire to spend at least a minimum number of hours per year advocating for those with limited means. Representing indigent Washingtonians facing criminal charges, involuntary civil commitment, family separation, or other deprivations of liberty belongs in this category of work. The fact that an appointed attorney is paid (and can therefore—thankfully—make out a living and continue to take future appointments) does not change or detract from the nature of the representation as a public service.

Third, ethics rules generally prohibit full-time line defenders from providing pro bono publico service and gaining a commendation.[3] Attorneys who provide court appointed representation in criminal and juvenile offender cases are bound by the Standards for Indigent Defense. Standard 3.2 provides that "[t]he caseload of public defense attorneys shall allow each lawyer to give each client the time and effort necessary to ensure effective representation," and Standard 3.4 sets maximum caseloads for full-time public defense attorneys. Public defense attorneys must also comply with RPC 1.1 and RPC 1.3, which require that they provide competent and diligent representation. As Comment [2] to RPC 1.3 puts it, "A lawyer's workload must be controlled so that each matter can be handled competently." In practice, these overlapping professional responsibility requirements generally prohibit full-time public defense attorneys from providing any other legal services, including those contemplated by paragraphs (a)(1)-(2) and (b)(1)-(2). Additionally, while undertaking system-improvement efforts under paragraph (b)(3) may not conflict with a public defense attorney's obligation under Standard 3.4 to numerically limit the number of cases that they handle, system-improvement efforts will still add work to a workload that unquestionably "must be controlled" to ensure that clients receive competent and constitutionally guaranteed effective representation. Comment [2] to RPC 1.3. In other words, full-time public defense attorneys—already stretched too thin—will rarely have the time to dedicate to activities under paragraph (b)(3). The consequence is that a full-time public defense attorney appearing on behalf of dozens or even hundreds of poor and marginalized Washingtonians each

year will never receive a commendation under RPC 6.1. This proposed amendment fixes that anomaly.

As a final note, no one should think that the court's adoption of this proposed amendment to RPC 6.1 will solve Washington's public defense crisis. Adoption of this proposed amendment is only a very small step, among many more to come, that are necessary to bring balance and dignity to a legal system that has historically treated public defense as the dregs of legal work.

Hearing

A hearing is not requested.

Expedited Consideration

Expedited consideration is requested, given the urgency of the public defense crisis.

1 *See, e.g.*, Ralph Schwartz, *9 Sit in Whatcom County Jail Without Lawyers*, CASCADIA DAILY NEWS (May 12, 2023), https://www.cascadiadaily.com/news/2023/may/12/9-sit-in-whatcom-county-jail-without-lawyers/.

2 *See* Nicholas M. Pace et al., *National Public Defense Workload Study*, RAND CORPORATION (2023), https://www.rand.org/content/dam/rand/pubs/research_reports/RRA2500/RRA2559-1/RAND_RRA2559-1.pdf; *see also National Study Underlines Urgency to Update State's Defense Standards After 50 Years*, WASHINGTON STATE BAR ASSOCIATION (Sept. 13, 2023), https://www.wsba.org/news-events/media-center/media-releases/national-study-underlines-urgency-to-update-state-s-defense-standards-after-50-years-sept.-13-2023.

3 When read in isolation, paragraph (a)(1)'s definition of pro bono publico service appears to cover court appointed representation because clients who receive counsel at public expense are people of limited means who do not pay legal fees. The rule's comments make clear that such a reading is incorrect, however. In particular, Comment [1] and Comment [4] clarify that the phrase "without fee or expectation of fee" in paragraph (a) means that the attorney must enter into the representation expecting to work for free on behalf of the client without any third party, such as the government, paying for the attorney's service. And Comment [15] indicates that legal work for wages—such as the day-to-day court-appointed representation provided by public defense attorneys employed by counties—is excluded from RPC 6.1's definition of pro bono publico service.

RPC 6.1

PRO BONO PUBLICO SERVICE

Every lawyer has a professional responsibility to assist in the provision of legal services to those unable to pay. A lawyer should aspire to render at least thirty (30) hours of pro bono publico service per year. In fulfilling this responsibility, the lawyers should:

(a) provide legal services without fee or expectation of fee to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; ~~and~~ or

(b) provide pro bono publico service through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, or charitable, religious, civil, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate:

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession~~.~~; or

(c) accept appointments by the court for which a fee is expected and provide representation to individuals who are entitled to counsel at public expense.

Pro bono publico service may be reported annually on a form provided by the WSBA. A lawyer rendering a minimum of fifty (50) hours of pro bono publico service shall receive commendation for such service from the WSBA.

Comments

[1] **[Washington revision]** Every lawyer, regardless of professional prominence or professional workload, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of their legal career, each lawyer should render on average per year, at a minimum, the number of hours set forth in this Rule. ~~Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post- conviction death penalty appeal cases.~~

[2] **[Washington revision]** Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means or organizations primarily representing such persons. The variety of these activities should facilitate participation by government lawyers, even when restrictions may exist on their engaging in the outside practice of law.

[3] **[Washington revision]** Persons eligible for legal services under paragraphs (a)(1) are those who qualify for services provided by a qualified legal services provider (see Washington Comment [14]) and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford legal services. Legal services under paragraphs (a)(1) and (2) include those rendered to individuals or to organizations such as homeless shelters, ~~battered women's~~ centers for individuals affected by domestic violence, and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without fee or expectation of fee to qualify as pro bono publico service under paragraph (a)(1) and (2), the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of those paragraphs ~~(a)(1) and (2)~~. Accordingly, services rendered cannot be considered pro bono under those paragraphs if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under ~~this section~~ those paragraphs. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

[5] **[Washington revision]** A lawyer's responsibility under this Rule can be fulfilled ~~either~~ through the activities described in paragraph (a)(1) and (2), or ~~in a~~ through the variety of ways as set forth in paragraph (b), or through the acceptance of paid court appointments as set forth in paragraph (c).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection

claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. ~~Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.~~

[8] **[Washington revision]** Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving in a volunteer capacity on bar association committees or on boards of pro bono or legal services programs, taking part in Law Week activities, acting as an uncompensated continuing legal education instructor, an uncompensated mediator or arbitrator and engaging in uncompensated legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

[10] **[Reserved.]**

[11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.

[12] The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.

Additional Washington Comments (13-16<u>8</u>)

[13] Washington's version of this Rule differs from the Model Rule. Washington's Rule 6.1 specifies an aspirational minimum of thirty hours of pro bono publico legal services per year rather than fifty, but provides for presentation of a service recognition award to those lawyers reporting to the WSBA a minimum of fifty hours. Unlike the Model Rule, paragraph (a) of Washington's Rule does not specify that the majority of the pro bono publico legal service hours should be provided without fee or expectation of fee. And Washington's Rule does not include the final paragraph of the Model Rule relating to voluntary contributions of financial support to legal services organizations. The provisions of Rule 6.1 were taken from former Washington RPC 6.1 (as amended in 2003).

[14] For purposes of this Rule, a "qualified legal services provider" is a not-for-profit legal services organization whose primary purpose is to provide legal services to low-income clients.

[15] ~~Pro bono publico service does not include services rendered for wages or other compensation by lawyers employed by qualified legal services providers (as that term is defined in Washington Comment [14]), government agencies, or other organizations as part of their employment.~~ **<u>[Reserved.]</u>**

[16] The amount of time spent rendering pro bono publico services should be calculated on the same basis that lawyers calculate their time on billable matters. For example, if time spent traveling to a client meeting or to a court hearing is considered to be part of the time for which a paying client would be billed, it is appropriate to include such time in calculating the number of pro bono publico service hours rendered under this Rule.

[17] Paragraph (c) recognizes the critical importance of the timely delivery of legal services through the provision of a court-appointed lawyer to individuals who are entitled to counsel at public expense. Without lawyers to provide court-appointed representation, the integrity of the legal system——as well as the public's confidence in the bar and the judiciary——is intolerably threatened.

[18] Lawyers who provide court-appointed representation should be commended. In particular, some lawyers are ethically prohibited from taking on additional legal work, such as the pro bono legal services under paragraphs (a)(1)-(2) or (b)(1)-(2), by the Rules of Professional Conduct and the Standards for Indigent Defense because they work full-time providing court-appointed representation. Those lawyers should still be recognized as providing pro bono publico service, regardless of the fact that they are paid to provide court-appointed representation.