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Promoting Public-Interest Law and Pro Bono Service

October 26, 2021

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Via Email

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Councilmember Charles Allen, Chairperson  
Committee on the Judiciary and Public Safety  
1350 Pennsylvania Avenue, N.W.  
Washington, DC 20004

Re: Bill 24-0298, The "Pro Bono Legal Representation Expansion  
Amendment Act of 2021"

Dear Chairperson Allen and members of the Committee on the Judiciary and  
Public Safety:

Washington Council of Lawyers, together with the organizations listed below,  
is pleased to submit the following testimony in support of Bill 24-0298, The  
"Pro Bono Legal Representation Expansion Amendment Act of 2021."  
This legislation will pave the way for DC government lawyers to take on pro  
bono cases before the D.C. Court of Appeals, Superior Court of the District of  
Columbia, and DC administrative agencies. Having more pro bono lawyers  
available to help DC residents navigating our local courts is another step  
toward closing the justice gap.

Joining our testimony are these organizations:

- Autistic Women and Nonbinary Network
- Bread for the City
- Children's Law Center
- Council for Court Excellence
- DV LEAP
- Fund for Community Reparations for Autistic People of Color's  
Interdependence, Survival & Empowerment
- Legal Aid Society of the District of Columbia
- The George Washington University Law School - Jacob Burns  
Community Legal Clinics
- Tzedek DC
- Washington Bar Association

Thank you for the opportunity to address this important issue.

With kind regards,



Nancy A. Lopez

**Testimony before the District of Columbia Council  
Committee on the Judiciary & Public Safety  
Wednesday, October 27, 2021**

Washington Council of Lawyers, the public-interest bar association for the District of Columbia, offers enthusiastic support of Bill 24-0298, the Pro Bono Legal Representation Expansion Amendment Act of 2021. This legislation amends District of Columbia ethics laws to permit DC government attorneys to appear in D.C. Superior Court and the D.C. Court of Appeals in pro bono cases, and it will enable D.C. government attorneys to more effectively engage in legal advocacy on behalf of low-income individuals. We thank the many members of the Council who have co-sponsored this legislation. We are particularly grateful to Chairman Allen and his staff for their steadfast support of this measure.

Since its founding in 1971, Washington Council of Lawyers has been the only voluntary bar association in the District of Columbia solely dedicated to promoting pro bono and public-interest law. We have over 450 dues-paying members. They are public-interest-minded lawyers, legal professionals, and law students. Our members work at small and large law firms, corporate counsel offices, local and federal government agencies, law schools, legal services providers, and policy organizations. They represent the private sector, including the participation of individuals from dozens of law firms, as well as the non-profit sector, including staff at many legal services organizations that receive funding through the Access to Justice Initiative, a program funded by the D.C. government that has enjoyed the long-time support of the D.C. Council and in particular, this committee.

**The Need for Additional Pro Bono Lawyers  
in the District of Columbia**

Despite the significant efforts of this Council in the past, there still remains a significant demand for pro bono services that far outstrips the resources available. As a result, low-income individuals are confronted with daunting legal situations that profoundly impact their families, homes, and livelihoods. Many of these potential clients frequently have difficulty meeting their basic needs, such as housing, childcare and medical services. Further, a single legal setback can plunge the family into a crisis from which it could take years to recover.

The critical need for pro bono attorneys only continues to increase. According to the District of Columbia Access to Justice Commission's *Delivering Justice* report,<sup>i</sup> in 2017, prior to the COVID pandemic, 75-97% of litigants in high-stakes cases lacked counsel in certain legal areas. For example, 88% of petitioners and 95% of respondents in the Domestic Violence Division of D.C. Superior Court lacked representation; 83% of plaintiffs and 93% of respondents in divorce/custody/miscellaneous cases in the Family Court had no lawyer; and 88% of designated respondents in the Landlord and Tenant Branch were not represented (in contrast to the 95% of landlords who did have representation).

The legal needs of D.C. residents have undoubtedly only increased since the pandemic: for instance, the lifting of the eviction moratorium will likely bring a deluge of cases. According to the most recent Census Bureau Household Pulse survey, an estimated 25,658 DC residents were behind on their rent with an even greater number of 37,662 either “not at all” or “slightly” confident in their ability to make their next month’s rental payment.<sup>ii</sup> In another example, one legal domestic violence clinic reported a 300% increase in calls for assistance during the pandemic.

The Chief Judges of our local courts have urged lawyers in the District of Columbia to address this urgent need. Chief Judge of the D.C. Court of Appeals, Anna Blackburne-Rigsby, writing in support of D.C. Represents, a campaign launched by the D.C. Access to Justice Commission’s COVID-19 Civil Justice Task Force to draw greater pro bono resources to serve D.C. residents in civil legal areas made much harder due to COVID, stated:

Even here in our nation’s Capital, where we have one of the largest concentrations of lawyers, and a judiciary devoted to access to justice, we have people living in our community who do not have the means to afford an attorney, nor access to pro bono assistance. . . . After all the damage that COVID has wrought on our economy, those with lower income levels and those who have been left without a job need you – our community needs you – now more than ever.

There is an untapped resource in our community that could help bridge the justice gap. There are over 600 attorneys employed by the D.C. government who could help answer this call. All of them work for agencies with pro bono policies in place: The Office of the Attorney General issued its policy several years ago, and, we are delighted to say, the Mayor’s Office of Legal Counsel just issued its policy effective September 1. These attorneys could join other lawyers from the private and federal sectors in representing individuals in selected local court cases. However, the current interpretation of the relevant D.C. ethics rule precludes such efforts. That is where this legislation comes in.

A vital aspect of being an attorney is to serve those who cannot afford an attorney. This ideal is espoused in Rule 6.1 of the D.C. Rules of Professional Conduct (see Appendix). Amending the ethics law will remove an enormous obstacle to those who wish to offer their time and talent to represent the underserved and to engage in local pro bono practice.

### **Bill 24-0298 Properly Removes the Ban on Local Court Pro Bono Representation**

Currently, there is a large untapped source of attorneys who could help bridge the gap in legal services that we face in the District. DC government attorneys are currently unable to represent pro bono clients in D.C. Superior Court or the D.C. Court of Appeals. Section 1807.1(h) of the D.C. Municipal Regulations, (see Appendix), forbids DC government employees from “serving in a representative capacity or as an agent or attorney for any outside entity involving any matter before the District of Columbia.” The

D.C. Board of Ethics and Government Accountability (“BEGA”) has interpreted this language to mean that District of Columbia government attorneys are precluded from representing clients in pro bono cases in D.C. courts. While we firmly support the principle that it is important to maintain appropriate restrictions to avoid conflicts of interest, we also passionately believe that this sweeping prohibition goes too far, especially considering the importance of providing legal services to those who most need them.

The bill before you would clarify that D.C. government lawyers may take on pro bono matters in local courts when no conflicts of interest are present. By eliminating this overbroad barrier against local court appearances, this legislation will effectively facilitate pro bono representation in many areas of the law impacting individuals and families in our community.

We share the concerns of those who wish to prevent conflicts of interest from arising when D.C. government attorneys take on pro bono matters. This can be accomplished, however, by enacting procedures to ensure that cases selected by D.C. government lawyers do not involve the D.C. government and are subject to a robust ethics check. There are hundreds of cases between private individuals – with no government involvement whatsoever – that D.C. government lawyers could take on without fear of conflicts. For example, a divorce or custody case that does not involve child support, an eviction case brought by a private landlord where there is no section 8 or public housing issue, a petition for a temporary restraining order in a domestic violence case involving no criminal charges – these are the types of cases where there is a desperate need for pro bono assistance, and in which D.C. government attorneys could provide legal representation.

### **Other Jurisdictions Permit Government Attorneys to Represent Pro Bono Clients in State Courts**

State government employees in some other jurisdictions are permitted to represent pro bono clients in state courts. For example:

- The Maryland Attorney General’s Pro Bono Representation Program handles cases including divorce cases that do not involve issues of child custody but are, of course, litigation in the Maryland state courts. The Pro Bono Representation Program utilizes a Pro Bono Coordinating Committee which screens cases identified by referring organizations and then distributes the cases to interested attorneys.
- In Nevada, unless prohibited by a specific statute, state law permits any attorney employed by the state or any agency or political subdivision of the state to provide pro bono representation to an indigent person *in any proceeding*, if there is no conflict of interest, the supervisor approves, and representation is provided in association with an organization that provides free legal assistance to indigent

persons. (NRS 7.065 Representation of indigent persons by attorneys in public employment).

- In Florida, as long as there is no conflict of interest, the policy of the Office of the Attorney General contains only two explicit prohibitions: (1) representation before any administrative tribunal where the State is a party, and (2) any advice or representation on criminal charges. By implication, we read this to mean that appearances in civil cases in state courts are permitted.
- In Montana, given the state’s role in criminal cases, executive branch attorneys may not appear pro bono in cases involving actual or suspected abuse against a partner or family member, nor in almost all administrative or judicial proceedings in which the state or a political subdivision is a party or in which state interests are likely to be involved. Again, by implication, it appears that executive branch attorneys may participate in other administrative or judicial proceedings, as long as there is not a conflict of interest with their work for the state.

The legislation before you would permit District of Columbia government attorneys to join their counterparts in these and other states in providing pro bono service in local courts, provided that potential conflicts of interest are assessed on a case-by-case basis.

### **Proposed Amendment to Bill 24-0298**

The intention of this legislation is straightforward and laudatory – to permit attorneys employed by the District of Columbia to appear in appropriate cases in D.C. Superior Court and the D.C. Court of Appeals. The current language permits legal representation in proceedings before any “District agency, federal court, or federal agency.” While the language goes on to say “[t]he term “federal court” includes all courts provided in D.C. Official Code § 11-101,” and that provision in turn specifically includes our local courts<sup>iii</sup>, we fear that the provision lacks sufficient clarity and there is a risk that readers who do not take the care to piece these provisions together will not understand its full meaning.

In order to unambiguously further the legislation’s intent, we suggest that the new proposed subsection (e) instead read as follows:

“(e)(1) Except as provided in paragraph (2) of this subsection, an employee may provide legal representation in proceedings before any District of Columbia court, District of Columbia agency, federal court, or federal agency if:

- (A) The matter does not involve a claim against the District of Columbia;
- (B) The District of Columbia or, in a criminal proceeding, the United States, is not a party;
- (C) The District of Columbia does not have a direct or substantial interest in the matter;

(D) The representation does not conflict with the employee's duties and responsibilities in the District of Columbia; . . .”

This clarifying language will make it clear to attorneys wishing to take on a pro bono case in local courts and agencies that they may do so provided there are no other conflicts (and if the attorney's agency pro bono policy permits). It also makes it clear to the supervisors and ethics officers within the prospective volunteer attorney's agency that local court and agency appearances are not necessarily prohibited.

### **Conclusion**

Washington Council of Lawyers is committed to our mission to help our justice system serve everyone, regardless of money, position or power. Creating new opportunities for DC government attorneys to provide pro bono legal assistance is a critical element in achieving this vision. Increasing the availability of pro bono cases for attorneys working for the District who want to help their community using the tools they have been fortunate enough as lawyers to foster is a worthwhile ambition. This legislation removes a significant impediment towards achieving that goal. We urge the D.C. Council to continue its commitment to access for justice by passing this legislation to permit DC government attorneys to appear before the D.C. Courts and agencies in pro bono cases.

## Appendix

### PART I D.C. PERSONNEL REGULATIONS CHAPTER 18: EMPLOYEE CONDUCT

#### 1807: OUTSIDE EMPLOYMENT AND PRIVATE REPRESENTATIONS

1807.1 A District government employee shall not engage in any outside employment or other activity incompatible with the full and proper discharge of his or her duties and responsibilities. Activities or actions that are not compatible with government employment include, but are not limited to the following:

(h) Serving in a representative capacity or as an agent or attorney for any outside entity involving any matter before the District of Columbia, except as permitted by Subsection 1807.6 or 1807.7; or

1807.6: Nothing in this section shall prevent an employee from acting without compensation as agent or attorney for another District employee who is the subject of any personnel action, if not inconsistent with his or her duties.

1807.7 Nothing in this chapter shall prevent an employee from acting, with or without compensation, as agent or attorney for his or her parent(s), spouse, domestic partner, child, or any person for whom, or for any estate for which, he or she is serving as guardian, executor, administrator, trustee, or other personal fiduciary except in those matters in which he or she has participated personally and substantially as a government employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or which are the subject of the employee's official responsibility, provided that the government official responsible for appointment to the employee's position approves. This provision shall not abridge a government attorney's responsibilities under the District of Columbia Rules of Professional Conduct.

#### **Rule 6.1 of DC Rules of Professional Conduct.**

A lawyer should participate in serving those persons, or groups of persons, who are unable to pay all or a portion of reasonable attorney's fees or who are otherwise unable to obtain counsel. A lawyer may discharge this responsibility by providing professional services at no fee, or at a substantially reduced fee, to persons and groups who are unable to afford or obtain counsel, or by active participation in the work of organizations that provide legal services to them. When personal representation is not feasible, a lawyer may discharge this responsibility by providing financial support for organizations that provide legal representation to those unable to obtain counsel.

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<sup>i</sup> D.C. Access to Justice Commission, *Delivering Justice: Addressing Civil Legal Needs in the District of Columbia* (December 2019), available at <https://dcaccesstojustice.org/reports>.

<sup>ii</sup> U.S. Census Bureau, *Household Pulse Survey: Week 38 (September 15-27), Housing Tables 1b (“Last Month’s Payment Status for Renter-Occupied Housing Units, by Select Characteristics: District of Columbia”) and 2b (“Confidence in Ability to Make Next Month’s Payment for Renter-Occupied Housing Units, by Select Characteristics: District of Columbia”)* (published October 6, 2021) available at <https://www.census.gov/data/tables/2021/demo/hhp/hhp38.html>

<sup>iii</sup> D.C. Mun. Regs. *Judicial Power*, § 11–101 (2021)

The judicial power in the District of Columbia is vested in the following courts:

(1) The following Federal Courts established pursuant to article III of the Constitution:

- (A) The Supreme Court of the United States.
- (B) The United States Court of Appeals for the District of Columbia Circuit.
- (C) The United States District Court for the District of Columbia.

(2) The following District of Columbia courts established pursuant to article I of the Constitution:

- (A) The District of Columbia Court of Appeals.
- (B) The Superior Court of the District of Columbia.