

**District of Columbia
Court of Appeals**



No. M-258-18

BEFORE: Blackburne-Rigsby, Chief Judge; Glickman, Fisher, Thompson,
Beckwith, Easterly, and McLeese, Associate Judges.

ORDER
(FILED – November 1, 2018)

On consideration of the proposed amendments to Rule 49 (c)(9) of this court's rules, published for notice and comment on May 4, 2018, and the comments received concerning those proposed amendments, it is

ORDERED that, with stylistic revisions and one substantive revision, the proposed amendments are hereby adopted, effective January 1, 2019. The substantive revision was to accept the recommendation of some commenters that the proposed amendments be made applicable to retired attorneys. Clean and track-changes versions of Rule 49 (c)(9) as amended are attached to this order.

PER CURIAM

Rule 49. Unauthorized Practice of Law.

(c) EXCEPTIONS. The following activities are permitted as exceptions to Rule 49 (a) if the person is not otherwise engaged in the practice of law or holding out as authorized or competent to practice law in the District of Columbia.

(9) *Pro Bono Legal Services.*

(A) *Person Affiliated with a Non-Profit Organization.* A person may provide legal services *pro bono publico* in affiliation with, but not as an employee of, a non-profit organization located in the District of Columbia that provides legal services to individuals with limited means at no charge or for a nominal processing fee, if the person:

(i) is an enrolled inactive or enrolled retired member of the D.C. Bar or the bar of another state or territory or is authorized to practice law and in good standing in another state or territory;

(ii) is not disbarred or suspended for disciplinary reasons and has not resigned with charges pending in any jurisdiction or court; and

(iii) is supervised by an enrolled, active member of the D.C. Bar in good standing.

(B) *Employee of the Public Defender Service or a Non-Profit Organization.* A person who is employed by the Public Defender Service or a non-profit organization located in the District of Columbia that provides legal services to individuals with limited means at no charge or for a nominal processing fee may provide legal services *pro bono publico* until the person's application to the D.C. Bar is either granted or denied, if the person:

(i) is authorized to practice law and in good standing in another state or territory;

(ii) is not disbarred or suspended for disciplinary reasons and has not resigned with charges pending in any jurisdiction or court;

(iii) is supervised by an enrolled, active member of the D.C. Bar in good standing; and

(iv) has submitted an application for admission to the D.C. Bar no later than 90 days after commencing the practice of law in the District of Columbia.

(C) *Person Who Is Not Barred Anywhere But Who Has a Pending Bar Application.* A person who has applied to a bar and taken the bar examination, but whose application has not yet been granted or denied, may provide legal services *pro bono publico* as an employee of or in affiliation with the Public Defender Service or a non-profit organization located in the District of Columbia

that provides legal services to individuals with limited means at no charge or for a nominal processing fee, until the person's application is either granted or denied, if the person:

(i) has graduated from an ABA-approved law school;

(ii) has been certified by the dean of the law school from which the person graduated as being of good character and competent legal ability;

(iii) is trained and supervised by an enrolled, active member of the D.C. Bar in good standing who is affiliated with the Public Defender Service or the non-profit organization; and

(iv) in addition to complying with Rule 49 (c)(9)(E), gives notice to the public and on all pleadings that the person is not authorized to practice law in any jurisdiction but is practicing under the supervision of a member of the D.C. Bar pursuant to Rule 49 (c)(9)(C).

(D) *Applicability of Rules of Professional Conduct.* A person practicing under Rule 49 (c)(9)(A)-(C) is subject to the District of Columbia Rules of Professional Conduct and the enforcement procedures applicable to those rules, to the same extent as if the person was an enrolled, active member of the D.C. Bar.

(E) *Notice.*

(i) *In Business Documents.* A person practicing under Rule 49 (c)(9)(A)-(C) must give prominent notice of the person's bar status in all business documents specifically pertaining to the person's practice.

(ii) *When Appearing in Any Court.* If the matter requires a person practicing under Rule 49 (c)(9)(A)-(C) to appear in any court, the person must file a completed Form 9 with the person's praecipe of appearance and must submit electronically a copy of the completed Form 9 to the Committee on Admissions. A person practicing under Rule 49 (c)(9)(B) is only required to submit to the Committee on Admissions one Form 9 that covers the period from the beginning of employment until the person's application to the D.C. Bar is either granted or denied, but the person must submit a new Form 9 if any information changes.

COMMENTARY

The following Commentary provides guidance for interpreting and complying with Rule 49, but in proceedings before the court or the Committee on Unauthorized Practice of Law, the text of Rule 49 will govern.

Commentary to § 49 (b)(4):

As a regulation with a purpose to protect the public, the rule requires that representation of non-Bar members must avoid giving the impression to persons not learned in the law that a person is a qualified legal professional subject to the high ethical standards and discipline of the D.C. Bar.

The listing of terms, which normally indicate one is holding oneself out as authorized or qualified to practice law, is not intended to be exhaustive. Experience has shown that the listed terms are often used to misleadingly represent that an individual is authorized to provide legal services. The definition of “hold out” is intended to cover any conduct which gives the impression that one is qualified or authorized to practice. *See In re Banks*, 561 A.2d 158 (D.C. 1987).

A person or a law firm may hold out that person as authorized or competent to practice law in the District of Columbia by describing that person as a “contract lawyer.” *See* Opinion 16-05 of the District of Columbia Court of Appeals Committee on Unauthorized Practice of Law. In general, Rule 49 applies to contract lawyers to the same extent that it applies to other lawyers.

Where a member of the public correctly understands that a person is not admitted to the D.C. Bar but is nonetheless offering to perform services functionally equivalent to those performed by a lawyer, that person is subject to sanction under the consumer protection statutes of the District of Columbia. *See Banks v. District of Columbia Dep’t of Consumer & Regulatory Affairs*, 634 A.2d 433 (D.C. 1993).

Although the rule’s prohibition on unauthorized practice is limited to conduct within the District of Columbia, a person located outside of the District of Columbia may still violate Rule 49 by holding out as authorized to practice law in the District of Columbia.

Commentary to § 49 (c):

When it appears in this rule, the requirement that the person be “authorized to practice law and in good standing in another state or territory” includes attorneys licensed to practice law generally in another state or territory in accordance with that state or territory’s rules. It is not intended to include persons authorized to practice in another state or territory only in limited circumstances under the jurisdiction’s rules, such as law students or those permitted to provide legal services under other forms of limited practice.

Commentary to § 49 (c)(4):

Subsection (c)(4) addresses the persistent question whether a person employed by the District of Columbia and admitted in another jurisdiction may perform the services of a lawyer for the District government without being admitted to the D.C. Bar. The subsection gives the person 360 days to be admitted, which is ample time if application is made promptly. Like the exception for lawyers employed by the United States, the subsection also requires that the person be authorized by her or his agency to perform such services.

Commentary to § 49 (c)(9):

Subsection (c)(9) is intended to increase access to justice in the District of Columbia for those unable to afford an attorney by providing an exception to the requirement of admission to the D.C. Bar for lawyers licensed in other jurisdictions (or law school graduates who are awaiting their bar results) to provide pro bono representation, where the requirements of the exception are met. Subsection (c)(9)(A) creates a single provision permitting inactive or retired members of the D.C. Bar or the bar of another state or territory or a member in good standing of the bar of another state or territory to perform pro bono services under specified conditions. By allowing inactive or retired members of the bars of other states or territories to perform pro bono services, this section ensures that lawyers who have retired from practicing in the District of Columbia under another exception (e.g., federal employees, internal counsel, etc.) can do pro bono work under specified conditions without having to apply for membership in the D.C. Bar. In referring to “enrolled inactive or enrolled retired member of the D.C. Bar or the bar of another state or territory” the court intends to include any lawyer who has retired from the practice of law yet remains authorized to provide pro bono services (sometimes called “emeritus” in certain jurisdictions) as well as those who have not retired but who are not actively practicing law in the jurisdiction.

Subsection (c)(9)(B) creates a single provision applicable to employees of the Public Defender Service (PDS) and of non-profit organizations providing legal services at no charge (or for a nominal processing fee) to individuals of limited means. The provision requires these employees to apply to the D.C. Bar within 90 days of commencing practice.

Subsection (c)(9)(C) permits law school graduates to provide legal services in affiliation with or as an employee of PDS or a non-profit organization providing legal services at no charge (or for a nominal processing fee) to individuals of limited means while their bar applications are pending. Rule 48 currently allows students who participate in law-school clinics to practice under certain conditions. This section permits students to provide pro bono legal services after they graduate but before they have been admitted, so long as they have applied to a bar and taken the bar examination, the law school certifies that they demonstrate “good character and competent legal ability,” and they remain subject to the specified notice and supervision requirements.

Subsection (c)(9)(D) provides that attorneys practicing under the Rule 49 (c)(9) exception are subject to the District of Columbia Rules of Professional Conduct and the D.C. Bar’s enforcement authority, to the same extent as if they were enrolled, active members of the D.C. Bar.

Subsection (c)(9)(E) provides a notice procedure for all attorneys practicing under the Rule 49 (c)(9) exception. Attorneys must complete and submit a certificate (Form 9) and email it to the Committee on Admissions. This certificate provides the Committee on Admissions with the information it needs regarding the eligibility of individual lawyers to practice law under the Rule 49 (c)(9) exception, as well as the name of the D.C. Bar member who is supervising their work. Attorneys who appear in court are required to file a copy of the certificate (Form 9) each time they file a praecipe of appearance in a case. Employees of PDS and other non-profit organizations providing legal services at no charge (or for a nominal processing fee) to individuals of limited means need only submit a single certificate (Form 9) covering their work from the start of their employment until their application for admission to the D.C. Bar is granted or denied, although

they must submit a new certificate (Form 9) if any information (such as the name of their supervisor) changes.

Whether the requirement that the attorney practicing under the Rule 49 (c)(9) exception be “supervised by an enrolled, active member of the D.C. Bar” means that the supervising attorney must personally attend particular events such as a trial, hearing, or meeting depends on the circumstances. The supervising attorney should consider all factors relevant to the appropriate degree and manner of supervision, including the experience and skill of the supervised attorney and the nature of the matter. In some situations, the supervisor ought to be present in court with the supervised attorney. However, in many circumstances, the supervisor may reasonably conclude that he or she does not need to be present. This approach is consistent with the purpose of the Rule 49 (c)(9) exception — “to provide the broadest access to *pro bono* legal services, while serving the purposes of Rule 49 to protect the public from unlicensed legal practitioners.” *UPL Opinion 3-98: Procedure for Practice Pro Bono Publico Under Exception 49 (c)(9)*, at 2. It would place a substantial burden on the Public Defender Service and other non-profit organizations with limited budgets to send supervising attorneys to court with all lawyers practicing under the Rule 49 (c)(9) exception. See *UPL Opinion 12-02: Supervision of Attorneys Under Rule 49 (c)*, at 2 (“[W]hether or not the supervising attorney is physically present when the supervised attorney provides legal services, the supervising attorney remains responsible for the conduct of the supervised attorney. Any recourse the client may have against the supervising attorney is not affected by whether the supervision is in-person.”).

Rule 49. Unauthorized Practice of Law.

(c) EXCEPTIONS. The following activities are permitted as exceptions to Rule 49 (a) if the person is not otherwise engaged in the practice of law or holding out as authorized or competent to practice law in the District of Columbia.

(9) *Pro Bono Legal Services.* ~~A person may provide legal services *pro bono publico* when:~~

~~(A) *Person Affiliated with a Non-Profit Organization.* the A person may provide legal services *pro bono publico* in affiliation with, but not as an employee of, a non-profit organization located in the District of Columbia that provides legal services to individuals with limited means at no charge or for a nominal processing fee, if the person:~~

~~_____ (i) is an enrolled, inactive or enrolled retired member of the D.C. Bar or the bar of another state or territory or is authorized to practice law and in good standing in another state or territory;~~

~~_____ (ii) who is employed by or affiliated with a legal services or referral program in any matter that is handled without fee and who is not disbarred or suspended for disciplinary reasons and has not resigned with charges pending in any jurisdiction or court, but, if the matter requires the attorney to appear in court, the attorney must file with the court having jurisdiction over the matter, and with the Committee, a certificate that the attorney is providing representation in the case without compensation; and~~

~~_____ (iii) is supervised by an enrolled, active member of the D.C. Bar in good standing.~~

~~(B) *Employee of the Public Defender Service or a Non-Profit Organization.* the A person is authorized to practice law and in good standing in another state or territory, is not disbarred or suspended for disciplinary reasons, has not resigned with charges pending in any jurisdiction or court, and who is employed by or affiliated with the Public Defender Service or a non-profit organization located in the District of Columbia that provides legal services for indigent clients to individuals with limited means without fee at no charge or for a nominal processing fee, may provide legal services *pro bono publico* until the person's application to the D.C. Bar is either granted or denied, if the person:~~

~~(i) is authorized to practice law and in good standing in another state or territory;~~

~~_____ (ii) is not disbarred or suspended for disciplinary reasons and has not resigned with charges pending in any jurisdiction or court the person has submitted an application for admission to the D.C. Bar within 90 days after commencing the practice of law in the District of Columbia;~~

~~(iii) the attorney is supervised by an enrolled, active member of the D.C. Bar in good standing who is employed by or affiliated with the Public Defender Service or the non-profit organization; and~~

(iv) has submitted an application for admission to the D.C. Bar no later than 90 days after commencing the practice of law in the District of Columbia.

~~—(iii) the attorney practices under Rule 49 (c)(9)(B) for no longer than 360 days from the date of employment by or affiliation with the Public Defender Service or the non-profit organization, or until admitted to the D.C. Bar, whichever occurs first;~~

~~—(C) the person is an officer or employee of the United States, is authorized to practice law and in good standing in another state or territory, is not disbarred or suspended for disciplinary reasons, has not resigned with charges pending in any jurisdiction or court, is assigned or referred by an organization that provides legal services to the public without fee, and is supervised by an enrolled, active member of the D.C. Bar; or~~

~~—(D) the person is an internal counsel, is authorized to practice law and in good standing in another state or territory, is not disbarred or suspended for disciplinary reasons, has not resigned with charges pending in any jurisdiction or court, is assigned or referred by an organization that provides legal services to the public without fee, and is supervised by an enrolled, active member of the D.C. Bar.~~

(C) *Person Who Is Not Barred Anywhere But Who Has a Pending Bar Application.* A person who has applied to a bar and taken the bar examination, but whose application has not yet been granted or denied, may provide legal services *pro bono publico* as an employee of or in affiliation with the Public Defender Service or a non-profit organization located in the District of Columbia that provides legal services to individuals with limited means at no charge or for a nominal processing fee, until the person's application is either granted or denied, if the person:

(i) has graduated from an ABA-approved law school;

(ii) has been certified by the dean of the law school from which the person graduated as being of good character and competent legal ability;

(iii) is trained and supervised by an enrolled, active member of the D.C. Bar in good standing who is affiliated with the Public Defender Service or the non-profit organization; and

(iv) in addition to complying with Rule 49 (c)(9)(E), gives notice to the public and on all pleadings that the person is not authorized to practice law in any jurisdiction but is practicing under the supervision of a member of the D.C. Bar pursuant to Rule 49 (c)(9)(C).

(D) *Applicability of Rules of Professional Conduct.* An attorneyperson practicing under Rule 49 (c)(9)(A)-(C) must give notice of his or her bar status, and is subject to the District of Columbia Rules of Professional Conduct and the enforcement procedures applicable thereto those rules, to the same extent as if he or she the person were an enrolled, active member of the D.C. Bar.

(E) *Notice.*

(i) *In Business Documents.* A person practicing under Rule 49 (c)(9)(A)-(C) must give prominent notice of the person's bar status in all business documents specifically pertaining to the person's practice.

(ii) When Appearing in Any Court. If the matter requires a person practicing under Rule 49 (c)(9)(A)-(C) to appear in any court, the person must file a completed Form 9 with the person's praecipe of appearance and must submit electronically a copy of the completed Form 9 to the Committee on Admissions. A person practicing under Rule 49 (c)(9)(B) is only required to submit to the Committee on Admissions one Form 9 that covers the period from the beginning of employment until the person's application to the D.C. Bar is either granted or denied, but the person must submit a new Form 9 if any information changes.

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Commentary to § 49 (b)(4):

As a regulation with a purpose to protect the public, the rule requires that representation of non-Bar members must avoid giving the impression to persons not learned in the law that a person is a qualified legal professional subject to the high ethical standards and discipline of the D.C. Bar.

The listing of terms, which normally indicate one is holding oneself out as authorized or qualified to practice law, is not intended to be exhaustive. Experience has shown that the listed terms are often used to misleadingly represent that an individual is authorized to provide legal services. The definition of "hold out" is intended to cover any conduct which gives the impression that one is qualified or authorized to practice. *See In re Banks*, 561 A.2d 158 (D.C. 1987).

A person or a law firm may hold out that person as authorized or competent to practice law in the District of Columbia by describing that person as a "contract lawyer." *See* Opinion 16-05 of the District of Columbia Court of Appeals Committee on Unauthorized Practice of Law. In general, Rule 49 applies to contract lawyers to the same extent that it applies to other lawyers.

Where a member of the public correctly understands that a person is not admitted to the D.C. Bar but is nonetheless offering to perform services functionally equivalent to those performed by a lawyer, that person is subject to sanction under the consumer protection statutes of the District of Columbia. *See Banks v. District of Columbia Dep't of Consumer & Regulatory Affairs*, 634 A.2d 433 (D.C. 1993).

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When it appears in this rule, the requirement that the person be “authorized to practice law and in good standing in another state or territory” includes attorneys licensed to practice law generally in another state or territory in accordance with that state or territory’s rules. It is not intended to include persons authorized to practice in another state or territory only in limited circumstances under the jurisdiction’s rules, such as law students or those permitted to provide legal services under other forms of limited practice.

Commentary to § 49 (c)(4):

Subsection (c)(4) addresses the persistent question whether a person employed by the District of Columbia and admitted in another jurisdiction may perform the services of a lawyer for the District government without being admitted to the D.C. Bar. ~~The requirement that the person be “authorized to practice law and in good standing in another state or territory” includes attorneys licensed to practice law generally in another state or territory in accordance with that state or territory’s rules. It is not intended to include persons authorized to practice in another state or territory only in limited circumstances under the jurisdiction’s rules, such as law students or those permitted to provide legal services under other forms of limited practice.~~ The subsection gives the person 360 days to be admitted, which is ample time if application is made promptly. Like the exception for lawyers employed by the United States, the subsection also requires that the person be authorized by her or his agency to perform such services.

Commentary to § 49 (c)(9):

Subsection (c)(9) is intended to increase access to justice in the District of Columbia for those unable to afford an attorney by providing an exception to the requirement of admission to the D.C. Bar for lawyers licensed in other jurisdictions (or law school graduates who are awaiting their bar results) to provide pro bono representation, where the requirements of the exception are met. ~~It includes a provision, at the request of the United States Department of Justice, allowing government lawyers to participate in providing legal services pro bono publico.~~

~~When persons practice under this exception, they should give formal notice to the court and the parties of doing so. A form of certificate for such notice is appended to the rules, addressing the 4 alternatives under (c)(9) and adding a certificate for pro bono representation under the limited duration supervision exception of (c)(8).~~

Commentary to § 49 (c)(9)(D):

~~Recognizing the increased need for attorneys to serve as pro bono counsel and given the importance of access to justice, the purpose of this rule is to permit individuals who are authorized to practice law and in good standing in another state or territory and who are appropriately supervised by a licensed D.C. Bar member to perform pro bono work in the District of Columbia, provided the work is assigned or referred by an organization that provides pro bono legal services to the public without fee.~~

Subsection (c)(9)(A) creates a single provision permitting inactive or retired members of the D.C. Bar or the bar of another state or territory or a member in good standing of the bar of another state or territory to perform pro bono services under specified conditions. By allowing inactive or retired members of the bars of other states or territories to perform pro bono services, this section ensures that lawyers who have retired from practicing in the District of Columbia under another exception (e.g., federal employees, internal counsel, etc.) can do pro bono work under specified conditions without having to apply for membership in the D.C. Bar. In referring to “enrolled inactive or enrolled retired member of the D.C. Bar or the bar of another state or territory” the court intends to include any lawyer who has retired from the practice of law yet remains authorized to provide pro bono services (sometimes called “emeritus” in certain jurisdictions) as well as those who have not retired but who are not actively practicing law in the jurisdiction.

Subsection (c)(9)(B) creates a single provision applicable to employees of the Public Defender Service (PDS) and of non-profit organizations providing legal services at no charge (or for a nominal processing fee) to individuals of limited means. The provision requires these employees to apply to the D.C. Bar within 90 days of commencing practice.

Subsection (c)(9)(C) permits law school graduates to provide legal services in affiliation with or as an employee of PDS or a non-profit organization providing legal services at no charge (or for a nominal processing fee) to individuals of limited means while their bar applications are pending. Rule 48 currently allows students who participate in law-school clinics to practice under certain conditions. This section permits students to provide pro bono legal services after they graduate but before they have been admitted, so long as they have applied to a bar and taken the bar examination, the law school certifies that they demonstrate “good character and competent legal ability,” and they remain subject to the specified notice and supervision requirements.

Subsection (c)(9)(D) provides that attorneys practicing under the Rule 49 (c)(9) exception are subject to the District of Columbia Rules of Professional Conduct and the D.C. Bar’s enforcement authority, to the same extent as if they were enrolled, active members of the D.C. Bar.

Subsection (c)(9)(E) provides a notice procedure for all attorneys practicing under the Rule 49 (c)(9) exception. Attorneys must complete and submit a certificate (Form 9) and email it to the Committee on Admissions. This certificate provides the Committee on Admissions with the information it needs regarding the eligibility of individual lawyers to practice law under the Rule 49 (c)(9) exception, as well as the name of the D.C. Bar member who is supervising their work. Attorneys who appear in court are required to file a copy of the certificate (Form 9) each time they file a praecipe of appearance in a case. Employees of PDS and other non-profit organizations providing legal services at no charge (or for a nominal processing fee) to individuals of limited means need only submit a single certificate (Form 9) covering their work from the start of their employment until their application for admission to the D.C. Bar is granted or denied, although they must submit a new certificate (Form 9) if any information (such as the name of their supervisor) changes.

Whether the requirement that the attorney practicing under the Rule 49 (c)(9) exception be “supervised by an enrolled, active member of the D.C. Bar” means that the supervising attorney must personally attend particular events such as a trial, hearing, or meeting depends on the circumstances. The supervising attorney should consider all factors relevant to the appropriate

degree and manner of supervision, including the experience and skill of the supervised attorney and the nature of the matter. In some situations, the supervisor ought to be present in court with the supervised attorney. However, in many circumstances, the supervisor may reasonably conclude that he or she does not need to be present. This approach is consistent with the purpose of the Rule 49 (c)(9) exception — “to provide the broadest access to *pro bono* legal services, while serving the purposes of Rule 49 to protect the public from unlicensed legal practitioners.” UPL Opinion 3-98: Procedure for Practice Pro Bono Publico Under Exception 49 (c)(9), at 2. It would place a substantial burden on the Public Defender Service and other non-profit organizations with limited budgets to send supervising attorneys to court with all lawyers practicing under the Rule 49 (c)(9) exception. See UPL Opinion 12-02: Supervision of Attorneys Under Rule 49 (c), at 2 (“[W]hether or not the supervising attorney is physically present when the supervised attorney provides legal services, the supervising attorney remains responsible for the conduct of the supervised attorney. Any recourse the client may have against the supervising attorney is not affected by whether the supervision is in-person.”).