Faulk, Camilla

From: Cheryl Ford [CherylFord@PNWT.com]
Sent: Tuesday, April 29, 2008 10:13 PM
To: Faulk, Camilla
Subject: Response to proposed changes to APR 12
Attachments: LPO Response to Supreme Court.doc

Attached is my response to the proposed changes to APR 12.

Cheryl A. Ford
LPO # 713

To: The Justices of The Supreme Court
c/o Clerk of the Supreme Court
Re: Proposed changes to APR 12
April 29, 2008

It is disheartening as a professional in the escrow industry to watch recently the self serving manipulation of the administration of APR 12 by the Washington State Bar Association. It is apparent that the WSBA is acting above the law and has appointed itself to redefine the Limited Practice Officer to encompass the responsibilities of the Escrow Officer (RCW 18.44). I wonder what our legislators would think of that.

Supreme Court Justice Barbara Durham summarized it well in her response to the WSBA on November 8, 1994 when she stated in her letter to the President of the Bar, "The Bar should comment on how the Rule could be amended to coordinate the regulation of the LPO's practice of law with the obligations imposed by RCW 18.44 on designated escrow officers." She continued with, "The proposed amendment to APR 12 should avoid even the appearance of **violating the separation of powers doctrine**. In particular it should not appear to usurp the legislative function of regulating escrow and title companies, banks and financial institutions."

History lesson: APR 12 was a product that came after and as a result of the WSBA vs. Great Western Union Federal Savings & Loan Association Case, No. 45350. The Court ruled that the Escrow Officer in preparing and completing legal documents in the transaction was committing the unauthorized practice of law. Through the diligent work of a collective group of professionals APR 12 was created. This respected contingency understood the Escrow Officer needed a means to continue to select, prepare and complete legal documents for the parties in a real estate or personal property transaction without it being considered the unauthorized practice of law. Furthermore, they knew if a solution or compromise was not reached that the public would be burdened as well. Thus APR 12 was born. This was an additional hat that the Escrow Closer would wear in addition to their hat as an Escrow Officer and a Notary.

Facts: Today, in reviewing the Escrow Officer's function as a Limited Practice Officer (LPO), one must dissect the daily routine of an Escrow Officer to determine how much time an LPO spends on selecting and preparing legal documents (most of the time, that is equivalent to the Statutory Warranty Deed and Excise Tax Affidavit). Past studies indicate that less than 5% of the Escrow Officer's time is spent performing LPO services (selecting and preparing legal documents). Typically the LPO may prepare only two legal documents, the Statutory Warranty Deed and the Excise Tax Affidavit. In commercial transactions, the Escrow Officer may not in fact provide any LPO services. In commercial transactions, legal counsel for the buyer or seller will prepare and submit the legal documents to escrow and the services of the LPO are not required. Keep in mind APR 12 was created so the Officer could select, prepare and complete legal documents. It was not created to regulate how an Escrow Officer would prepare a HUD, escrow instructions or maintain their trust account.

Fact: The trust accounting for an escrow agent is defined under RCW 18.44. The disbursement and receipt of funds can be found under section RCW 18.44.40 (3) and specifically defines the forms of deposits. LPO RPC 1.12A and 1.12B concludes the Limited Practice Officer is the recipient and disbursement agent of the escrow funds. This will create two separate governing bodies regulating escrow funds. The LPO services are the selection, preparation and completion of legal documents and do not include the receipt and disbursement of funds. It is the Escrow Officer "hat" who is responsible and is regulated under RCW 18.44 as it pertains to the receipt, disbursement and trust accounting of the funds in an escrow. This statutory duty cannot be delegated to the Court without changing RCW 18.44. The Bar as an administrative body for APR 12, cannot circumvent the legislative process and empower the Supreme Court to license the Escrow Officer who is currently licensed under DFI and thereby provide the Court access to the Escrow Trust Funds and regulation of Escrow Agents.

Let me say this again. There appears to be a blurring of responsibilities between an Escrow Officer and a Limited Practice Officer with the proposed changes to APR 12, the introduction of the LPO RPC's and the existing RCW 18.44. The Escrow Officer's function is to close the transaction based on the terms of the Purchase and Sale Agreement, which includes the receipting of money, disbursement of money, coordinating with the lender (s), buyer and seller as well as the preparation of the HUD Statement, Closing Escrow Instructions, FIRPTA and 1099S. The Escrow Officer, wearing the LPO "hat" may prepare legal documents in accordance with APR 12 for the parties to the transaction. It is not the LPO that receipts and disburses funds from a transaction. It is the services of the Escrow Officer that provides the receipts and disbursements of the transaction as regulated under RCW 18.44. In addition, the Escrow Officer must also close the transaction in compliance with RESPA if applicable. If an Escrow Officer works for a title insurance company, the company that employs the Escrow Officer is regulated by the Office of the Insurance Commissioner (RCW 48.29) as well. The point here is the scope of the LPO has been broadened to overlap into the services provided by the Escrow Officer. The LPO Board, WSBA and the Court should not concern itself with matters over which it does not have jurisdiction.

Why the change now? Barbara Fox said the reason for amending APR 12 and the proposed LPO RPC was because of the increase in the number of complaints submitted to the LPO Board every year. The Board receives 10 to15 complaints a year. There are currently 1200 active LPO's. The Board used to receive 3 to 5 complaints a year. On an average, the LPO performs services on approximately 20 transactions a month (that fall within the definition of the services of the LPO). Now, if there are 1200 LPO's and they perform LPO services on 20 transactions a month and there are 12 months in a year, that would equate to 288,000 transactions a year, which means the total number of complaints per year are less than 1% of the total number of transactions per year. Amending APR 12 and introducing LPO RPC because of a less than 1% complaint factor would not be a prudent business decision in the private sector.

Just a side comment regarding the POA: It has been very useful to have available for parties the specific Power of Attorney forms. However, under APR 12(d) as proposed, there would be an additional Power of Attorney to be used for signing Purchase and Sale Agreements as well as one to sign closing documents. That means two POA's have to be prepared and signed. LPO's are not interested in preparing a document prior to a signed Purchase and Sale Agreement. An LPO only becomes involved in a transaction, after the written agreement has been signed. Also, this additional step for an additional Power of Attorney may be a hardship on the public. Remember we have quite a few military personnel overseas right now. So we ask them to sign a POA prior to signing the Purchase and Sale Agreement and then wherever they may be in the world, they need to sign a second POA which is to be used for their closing documents. This sounds like paranoia. The whole point in having a Power of Attorney is so the party does not have to be present. If it is the competency of the party signing that the WSBA is concerned about, then it is up to the Notary to determine not the LPO. How far is the WSBA reaching in policing the public?

One final note, as LPO's we do not create documents and we do not advise clients what they should or should not do (although we do advise them to seek legal counsel if they so desire). We simply insert information on a preapproved form that has been agreed to in writing between the parties. We are scribes. Perhaps we should repeal APR 12 and move forward, instead of creating a quagmire that burdens the closer, taxpayer, our Legislative Body and the Supreme Court in the end. Perhaps the Supreme Court should take a look at past cases that would support the repeal of APR 12.

Conclusion: The WSBA, as a complete integrated Bar, is reaching beyond its scope in regulating the duties of the Escrow Officer through its governance of the Limited Practice Officer. The LPO Board through the WSBA should be amending APR 12 to work in concert with the other regulatory agencies that exist today not in conflict with them or it should recommend APR 12 be repealed.

As a past president of the Greater Seattle Regional Escrow Association I ask that you do not approve the proposals before you.

Sincerely,

Cheryl A. Ford

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LPO #713