PACIFIC NORTHWEST TITLE
Insurance Company, Inc.

RAYMOND L. DAVIS
President

April 25, 2008

Ronald R. Carpenter
Supreme Court Clerk
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929

Re: Comment on Proposed Amendments to APR 12 and APR 12.1 and
Comment on Proposed New LPO Rules of Professional Conduct

Dear Mr. Carpenter:

This is a remarkable proposal. If adopted, the Washington State Bar Association (WSBA) and the Legal Foundation of Washington (LFW) will have the power to regulate escrow and title companies in Washington. Viewed honestly, under the guise of regulating the practice of law, judicial power is expanded to include the power of taxation. WSBA and LFW staff will become revenue agents. The legal profession will successfully shift its moral obligation to represent the poor from itself over to private business. Court rules replace legislation. This proposal should be rejected.

This proposal is about money. As Ms. McElroy, Director of Regulatory Services for the WSBA, acknowledges in her background memo dated May 21, 2007, "[t]he closing firm IOLTA accounts generate a very significant amount of revenue for the Legal Foundation of Washington – far more than do lawyer IOLTA accounts."

What Ms. McElroy classifies as a "loophole in the existing regulations" that, if closed, "could result in the generation of a very significant amount of additional revenue for LFW" is not a "loophole." Acting Chief Justice Barbara Durham instructed the WSBA on November 8, 1994 (copy of Justice Durham's letter attached), after the court rejected the bar's original APR 12.1, that IOLTA accounts could only be required in those situations where the limited practice officer had actually engaged in the practice of law.

> The Bar should comment on how the proposed amendment to APR 12 could be clarified so as to apply only to those funds held in escrow that are *related to transactions in which the limited practice officer engaged in the practice of law.* (emphasis added)

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Hence, the IOLTA rule as it currently exists is limited to those "transactions in which a certified closing officer *has prepared documents* under the authorization set forth in rule 12(d)." APR 12.1(b). (emphasis added).

The new proposal would impose IOLTA requirements on escrow and title companies regardless of whether employee limited practice officers are engaged in the practice of law. The WSBA and the LFW propose that mere employment of a limited practice officer, rather than preparation of documents by the limited practice officer, becomes the trigger point. That is the supposed "loophole" that is being closed.

Justice Durham further advised the bar as follows:

> 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.

I should point out that this proposal, although passing through the Limited Practice Board (LPB), was created without adequate consideration of and input from the affected businesses. The proposal was drafted by the Rules Committee of the LPB with the active assistance of WSBA staff, and with input from the LFW. The Rules Committee, appointed by the WSBA chair, consisted of only the three WSBA representatives. The Rules Committee pointedly excluded from it the LPB representatives of the escrow, title and real estate businesses. In other words, the WSBA excluded the representatives of the affected businesses from having any meaningful input into this proposal.

Escrow companies are licensed and regulated by the Washington Department of Financial Institutions (DFI). RCW 18.44. Title companies are licensed and regulated by the Washington Office of Insurance Commissioner (OIC). RCW 48.29. Both DFI and OIC are within the executive branch of our state government. Their authority to license and regulate escrow and title companies derives from acts of the state legislature.

The judicial power of the State of Washington is vested in the Supreme Court. Const. Art. 4, Sec. 1. The legislative power of the State of Washington is vested in the Legislature. Const. Art. 2, Sec. 1. The WSBA and LFW wish to use the judicial power of the Supreme Court to regulate the escrow accounts of escrow and title companies in order to fund legal services. In effect, the WSBA and LFW seek to tax escrow and title companies who employ APR 12 licensees and to use that revenue to pay attorneys employed by legal aid organizations. With a "the ends justify the means" argument, the WSBA and LFW would violate the separation of powers doctrine in order to achieve their goal.

"The separation of powers doctrine ensures that the fundamental functions of each branch of government remain inviolate. [citation omitted]. The legislative branch generally has control over appropriations. [citations omitted]. . . . If every time we decided that the Legislature had not appropriated enough funds to an agency to act, then the funding of all

agency action would be effectively shifted from the Legislature to the courts." *Hillis v. State, Department of Ecology,* 131 Wash.2d 373, 932 P.2d 139, 148 (1997).

It is helpful to review the background of APR 12. APR 12 was the result of a constitutional conflict between the judiciary and the legislature. Ironically, the conflict was over the separation of powers doctrine. In *WSBA v. Great Western Union Federal Savings and Loan Association,* 91 Wash.2d 48 (1978) the Washington Supreme Court ruled the selection, preparation and completion of loan documents for a fee by a lender was the unauthorized practice of law. Within months the legislature passed RCW 19.62.010 (Laws of 1979, Ex.Sess., Ch. 107, Sec. 1) to reverse *Great Western.* This statute allowed banks and other lending institutions, title companies, and licensed escrow companies to select, prepare and complete certain listed real estate documents, provided no additional fee was charged, and provided the parties to the transaction were given a notice that the documents may substantially affect legal rights and if they had any questions they should consult an attorney.

In *Bennion, Van Camp, Hagen & Ruhl v. Kassler Escrow,* 96 Wash.2d 443 (1981) the court struck down RCW 19.62.010 deciding it was "unconstitutional as a violation of the separation of powers doctrine." Only the judiciary could regulate the practice of law. It was not a coincidence that the *Great Western* and *Kassler* cases arose in Spokane where attorneys had enjoyed a monopoly over real estate closings. Faced with the threat of a constitutional amendment that would challenge the judiciary's exclusive control over what constituted the practice of law and who could do it, the WSBA and the real estate closing industry compromised. APR 12 became effective January 21, 1983 and made what had been ruled illegal by the court, legal.

But since 1983 the Washington Supreme Court has made two rulings that undermine *Great Western.* In *Cultum v. Heritage House Realtors, Inc.,* 103 Wash.2d 623 (1985) the court authorized real estate agents to complete form earnest money agreements.

> We no longer believe that the supposed benefits to the public from the lawyers' monopoly on performing legal services justifies limiting the public's freedom of choice.

And then, in *Perkins v. CTX Mortgage Company,* 137 Wash.2d 93 (1999), the court effectively overruled *Great Western* when it affirmed the dismissal of a class action against a mortgage lender who had charged a fee for the preparation and completion of residential home loan documents by lay employees. This was the precise issue decided to the contrary in *Great Western* twenty-one years earlier. Justice Madsen, in dissent, recognized the significance of the majority's ruling:

> Contrary to *Hagen & Van Camp* and APR 12, the majority expands the class of exempt lay persons by authorizing mortgage lenders' lay employees to participate in legal document preparation. Such a view renders the requirements of both APR 12 and *Cultum* superfluous.

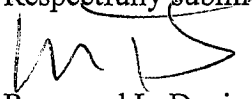
Judge Madsen's comments were, and are, correct. Rather than expand an already questionable rule, this court should seriously review whether APR 12 is even necessary today.

Why are the WSBA and LFW proposing Rules of Professional Conduct for limited practice officers? Ms. McElroy admits in her memo that "[a]s a practical matter, there are very few grievances against LPOs and almost no hearings on such grievances." Limited practice officers are not lawyers and are not supposed to act like lawyers. They are not in private practice; they are the employees of escrow and title companies. They are not the escrow agent; the escrow or title company is the escrow agent. Limited practice officers do not have clients; their employers have customers. Therefore, what is the purpose of these proposed rules? The answer is obvious. The rules give the WSBA and LFW indirect control over the LPOs' employers.

It is easy to abuse power. We have a system of government to minimize such abuse. The legal profession, however, has a disproportionate influence over one of the three branches of government. Because of that influence the legal profession needs to show proper restraint. It has not done so in this instance. This court needs to be mindful of that influence and, in this case, it needs to restrain the legal profession.

This court has been jealous to protect its constitutional authority, as evidenced by its ruling in *Bennion.* There is no institutional check on the power of the judiciary. Instead, we rely on the wisdom of the justices themselves to respect the authority of the other branches of government. This proposal is not wise. It should be rejected.

Respectfully submitted,



Raymond L. Davis

THE SUPREME COURT
STATE OF WASHINGTON

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November 8, 1994

Ronald M. Gould, President
Washington State Bar Association
1201 Third Avenue, 40th Floor
Seattle, Washington 98101-3099

RE: APR 12/IOLTA

Dear Mr. Gould:

Following oral argument on the proposal to amend APR 12 to require limited practice officers to comply with RPC 1.14 (IOLTA), the majority of the court decided that:

The emergency status of the proposed amendment to APR 12 should be removed, and the matter should be considered under the normal rulemaking cycle as established in GR 9.

The Bar should comment on how the proposed amendment to APR 12 could be clarified so as to apply only to those funds held in escrow that are related to transactions in which the limited practice officer engaged in the practice of law. Additionally, 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. 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.

The proposed amendment to APR 12 will be returned to the Bar Association with the request that the proposal be revised to address these concerns.

The members of the Court appreciate the Bar Association's cooperation in redrafting the amendment to APR 12 so that it can be published for comment in the near future.

Sincerely,

B. Durham

Barbara Durham

cc: Mr. Charles K. Wiggins
Ms. Nina A. Mendelson
Mr. Robert W. Sargeant
Mr. James J. Purcell
Ms. Linda M. Moran
Honorable T. W. Small
Mr. John D. Schumacher