**CLALLAM COUNTY BAR ASSOCIATION**
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March 30, 2009

Chief Justice Gerry Alexander
Washington State Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929

RE: Legal Technician Rule

Dear Chief Justice Alexander:

The members of the Clallam County Bar Association wish to express their objection to adoption of the proposed Legal Technician Rule. We understand that there is an urgent need to provide meaningful and affordable access to justice in the area of family law. However, we believe the risks raised by non-lawyers meeting and advising clients, evaluating their cases and deciding how to prepare cases for court, are greater than the perceived benefits to the public.

Family law presents very significant risks of harm to the parties, from loss of home (often without prior notice), to loss of contact with children, and loss of income. Family law attorneys are often the only resource available to address these risks and hopefully prevent or mitigate damage. If family law were just about preparation of documents, the number of appeals from trial court decisions in family law cases would be much lower, as would the number of malpractice claims – which are higher for family law attorneys than for any other area of practice.

The areas of most significant concern presented by the legal technician rule are discussed below.

**Initial case preparation and pretrial hearings**

**A. Preparation** In the area of family law practice, the initial case evaluation and preparation of documents for pretrial hearings is often the most critical point in the proceeding. Especially in matters involving custody of children and temporary

possession of assets, the competent family law attorney has a responsibility which far exceeds preparation of mandatory state forms.

The attorney has a duty to recognize all of the legal issues which need to be raised at an initial hearing, and to advise the client not only as to the mechanics of the litigation but as to the steps which the client may need to take in his/her life to assist in reaching case goals. Advice on leaving or remaining in a family home, taking or leaving children in the custody of the opposing party, changing the locks, changing bank accounts, and numerous other issues, *must* be given at the beginning of the case. The attorney must be able to explain to the client how his or her actions are likely to affect the litigation. As in every other area of practice involving litigation, strategy –both inside and outside of the courtroom -- is as much a part of the lawyer's art as drafting documents, negotiating, or presenting oral argument.

**B. Pretrial Hearings** In most counties, family law motion dockets are handled by court commissioners who hear dozens of cases every week. These commissioners have their own rules and preferences as to the type of evidence that should be presented, how much material they are willing to read prior to hearing, whether court rules will be rigidly or flexibly enforced. Each commissioner will have his or her own attitude about certain family law issues, especially as to parenting plans and how a child's time is divided between divorcing parents.

To have a non-lawyer who does not appear in court, make decisions about the evidence that should be presented in court, is to risk great prejudice to the client in family law cases. To give just one example, court commissioners often feel that a temporary parenting plan, once issued, should not be changed prior to final case resolution. If that temporary parenting plan hearing does not result in a decision favorable to the client, the chances of being able to change the result in a future hearing may *not be* the same as the chances of prevailing at the initial hearing.

Recognition of jurisdictional issues is also necessary at the very beginning of a family law case. Often the parties will be living in different counties, different states, or even different countries. If matters of jurisdiction and venue are not competently assessed and dealt with, the client may suffer irreparable harm. The training and education of a legal technician to deal with the entire realm of questions that may be raised *at the beginning* of a family law case will have to be as extensive as that of the licensed attorney to prevent that kind of damage to the client.

These are just some examples of how critical pretrial hearings are in family law cases.

**Rules Practice**

Family law cases are some of the most intensively litigated cases in our courts. The Rules of Civil Procedure apply to domestic cases. While it is certainly possible to

train paralegals and legal technicians in the proper application of rules on service of process and the timing of motions, how will the technician recognize when rules regarding third party intervention (CR 24), defenses such as accord and satisfaction (CR 8 (c)), dispositive motions such as summary judgment (CR 56), and judgment on the pleadings (CR 12(c)) apply? In domestic cases, all of the rules of civil procedure can come into play. If one party is represented by counsel, and the other has a legal technician who they believe to have made all of the necessary preparations, the party without counsel will suffer a high probability of failure.

Again, the technician will require theoretical as well as practical training in the application of these rules in order to be competent in preparing a client's case. Failure to recognize defenses and dispositive motions may unnecessarily prolong litigation and result in great cost to the client in the long run.

**Time-sensitivity of litigation**

Under the proposed rule, a client would seek out the assistance of a legal technician who advertises that they can handle a family law case. The technician then prepares the documents and the client goes to court. This may seem like a great help to the client, but if the case presents a real threat to the client, either in parenting, finances, or loss of home, the client may lose critical time that an attorney would have used to anticipate and meet the threat with the best defense possible. Family law cases move very fast in the initial phases; even experienced attorneys can be hard-pressed to prepare all of the necessary evidence and get it filed in a timely fashion prior to a critical hearing. As discussed above, it is often difficult or even impossible to change temporary orders once they are first issued by a court commissioner.

**"Unbundled" legal services and court facilitator services**

It may be felt that the family law bar is rejecting the legal technician rule without proposing any solutions to the problem of representation for lower-income clients. One development that does offer real assistance to these clients is the attorney's ability to offer "unbundled" services. For a very low fee, often just the cost of an hourly consultation, the client can obtain a complete evaluation of his/her case, an explanation of what is likely to happen in court, advice about how to handle the hearing, as well as the documents necessary to address the issues presented at a critical hearing.

For many parties facing critical hearings on temporary orders, the assistance and advice of an attorney who does not have to formally enter the case is affordable and helpful enough to make a difference.

Having court facilitators available to assist lower-income litigants in every county has also provided a valuable and effective resource. Facilitators have the necessary training, but no overhead, and they are easily accessible.

To conclude, the risks inherent in exposing the public to non-lawyers who practice family law are very great. The outcomes in family law cases can have far-reaching affects on other legal aspects of life, such as criminal law, probate, elder law, real estate, and bankruptcy. The goal here should be more than just increased access to justice; it should be increased access to effective representation.

Sincerely,

Carol Mortensen
President
Clallam County Bar Association