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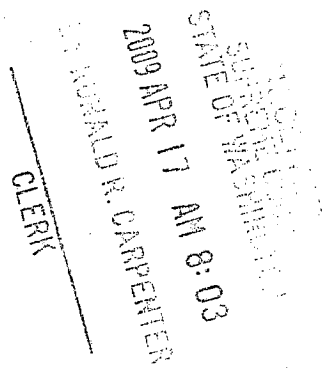

Clerk of the Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

Re: Legal Technician Rule and Proposed APR Rule 28

Dear Madam Clerk:

I am submitting the following comment for consideration by the Justices of the Washington State Supreme Court in connection with the proposed Legal Technician Rule and the new Proposed APR Rule 28 from the Practice of Law Board ("POL Board"). I strongly oppose the proposed rule.

Background. I have been practicing law since 1978 and have served as an adjunct professor of law at Seattle University School of Law since 1999. I have been honored to receive the President's Award from the State Bar and the Professionalism and Public Justice Awards from the Washington State Association for Justice (formerly WSTLA). As a special district counsel for the Office of Disciplinary Counsel for four terms, hearing officer for disciplinary matters, and member of the Rules of Professional Conduct Committee, I have followed the work of the Practice of Law Board closely. This included active inquiry respecting its progress when I served on the Board of Governors of the Washington State Bar Association 2003-2005. I have recently put my name forward for the post of President of the Washington State Bar Association (2010-2011). In connection with my past service and my ongoing candidacy, I have had the opportunity to confer with a broad array of stakeholders within the legal community regarding elements of the draft proposal before the Court. There is a consensus within the membership of the Washington State Bar Association (WSBA), both broad and deep, raising thoughtful objections to the draft proposal before the Court. These objections fall into four areas of concern:

(1) The Proposal Will Not Improve Access to Justice
(2) The Methodology followed by the Practice of Law Board is Flawed
(3) The Proposal Creates More Problems than it Solves
(4) The Proposal Undermines More Effective Measures

While access to justice remains a critical issue of concern to both bench and bar, I am persuaded that the Proposed APR Rule 28 will do little, if anything, to improve access to justice. On the contrary, it promises to engender problems

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in implementation and oversight that will divert needed energy to provide real solutions and undermine more effective, more rapidly implemented measures.[1]

1. The Draft Proposal Will Not Improve Access to Justice.

The challenge of providing access to justice and equal justice under the law requires that legal services be both competent and affordable. The Practice of Law Board has specified an array of requirements for legal technician licensure in an attempt to blunt telling criticisms raising the specter of a "two-tiered" system of justice, with the poor served by "legal technicians" and the better off by "lawyers." In an effort to address the issue of "competence," the POL Board sets out at least *ten* requirements: license fees, testing, financial responsibility, pro bono hours, educational prerequisites, work experience prerequisites, continuing legal education, trust account/IOLTA account, professional responsibility, including maintaining confidentiality and written contracts with mandated disclaimers, and maintenance of a staffed office location for receipt of service of process. These demanding requirements are necessary and appropriate before entrusting one's legal affairs, even in a narrowly circumscribed area, to another. They also demonstrate the real world challenges to developing legal skills sufficient to serve the public competently.

Unfortunately, these laudable requirements undermine the ability of such legal technicians to be "affordable," thereby unraveling the very justification for the entire undertaking. The POL Board recommendations have addressed the issue of competence with a series of "top down" mandates, but avoid the one easy, cost-effective way to assure competence: having the legal technicians work under the supervision of a lawyer. Early on, the POL Board became wed to the notion that "freestanding, independent" legal technicians would provide competent, affordable services through increased "competition." The economic realities are that underserved populations, including many of limited financial means in less accessible locations, present precisely the circumstances where market forces cannot effectively operate to satisfy unmet legal service needs.

The assumption that creation of a legal technician category will leap over economic and geographic challenges to the provision of services is not supported by the evidence. For instance, brief reflection suggests that it would

[1] The Civil Legal Aid Crisis Summit, for example, scheduled for later this week at Seattle University School of Law (April 17, 2009), holds forth the promise of new approaches to provision of legal services, without many of the evident drawbacks of the Proposal before the Court. The recent efforts of WSBA President Mark Johnson in support of the LAW Fund's Campaign for Equal Justice show an engaged, focused and vigorous effort calculated to bring the efforts of the organized Bar to the challenges of underserved populations.

be far more cost-efficient to incentivize existing family law practitioners to expand the work of supervised family law paralegals, then to separately license, insure, train, and discipline a cadre of legal technicians. The very licensing requirements will likely result in a delay of several years before *any* legal technicians can quality.

Moreover, there is no evidence that the necessarily demanding requirements essential to assuring competence will result in: (i) any reduction in the charges such technicians would charge the public compared with lawyers; (ii) any increased availability of affordable legal services in underserved practice areas or geographical areas; (iii) any incentive for anyone to pursue legal technician status. There is simply no data to support the notion that legal technicians would provide competent services in a more affordable fashion, nor that legal technicians would fulfill any critical shortfall in geography areas requiring legal services. The Washington State Civil Legal Needs Study, cited in support of this Proposal, identifies the need for legal services for the indigent (those at or below 125 percent of the Federal Poverty Level) as being *the greatest* in rural areas. The education and experience mandates, however, are much more readily available in metropolitan areas, but would do little regarding underserved rural areas.[2]

The proposed rule is, to put it plainly, long on mandates and short on implementation, oversight, and enforcement. It is long on precatory assumptions and short on demonstrable evidence. The promises suggested on a cursory first look, cannot be delivered upon. Not only does the Proposal fail to address the problem it set out to address (access to justice), it creates an elaborate structure that cannot be implemented or enforced. The Proposal fails to avail itself of the experience that the State Bar has had in overseeing the very mandates set out here, which is probably why the Board of Governors has decisively opposed the proposal of the POL Board. Finally, in an effort to address significant concerns respecting competence, the POL Board has created an unwieldy set of mandates, nullifying the affordability central to any attempt to improve access to justice.

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[2] This has been the experience in Arizona, where the Legal Document Preparers Program, created in July 2003, resulted in its "technicians" being overwhelmingly located in metropolitan areas. "As of March 20, 2008 (for the period July 2007–June 2009), the Arizona Supreme Court has certified 574 document preparers, almost all of whom are located in Arizona's two major urban centers: Phoenix Metro and Tucson. Arizona's CDP program has essentially no rural presence. (See www.supreme.state.az.us/cld/ldp.htm.)" Johnson & Heller, "The Washington State Supreme Court Should Decline to Adopt the Family Law Legal Technician Proposal. Bar News, July 2008.

2. The Proposal Creates More Problems than it Solves.

The proposed Rule APR 28 mandates would require oversight and enforcement of the licensing and financial responsibility requirements, mandatory *pro bono*, continuing legal education, and discipline. Either the numbers of legal technicians qualifying for the program would be vanishingly small, too small to make any significant impact on access to justice, or they would soon overwhelm the regulatory apparatus outlined in the Rule. The practical reality is that there is no way that a seven person "Commission" and "Commission Administrator" could replace the functions currently performed by the WSBA's licensing, CLE, and disciplinary departments. The regulatory requirements portend creation of a "shadow" bar association for legal technicians, apparently funded by lawyers or self-sustaining. The economic viability of this untested regulatory apparatus is very much in doubt.

The training must be demanding in order to assure competent legal assistance; anything less will result in a degraded system of "two tier" justice. Creation of a legal technician category, if it gains traction in the public mind, will likely lead to many individuals holding themselves out as "legal technicians" without the requisite and demanding training. This last concern is critically important: significant burdens placed on legal technician status will likely result in a "black market" in legal technicians and a whole new front on the unauthorized practice of law. Experience in the past has shown that obtaining support in connection with prosecutions is challenging, at best, and the increasing economic pressures placed on public prosecutors will lead to challenges to enforcement. The public need for competent, affordable representation and counsel will not be advanced.

3. The Methodology Followed by the Practice of Law Board is Flawed.

As a Governor, working with then Young Lawyer Division (YLD) President Noah Davis, we made specific inquiry of the Practice of Law Board respecting its inclusion of young lawyers as a means of providing access to justice. In connection with my candidacy for Bar President, I have renewed inquiries into creation of a professionalism sequence in law school involving either a pre-graduation or pre-admission expectation of public service. Every year the WSBA has an additional 1200 admittees successfully completing the Bar examination. This amounts to just over three percent of the active Bar membership every year. These young lawyers are a relatively untapped resource and the YLD has expressed willingness, indeed eagerness, to expand its role in fulfilling the unmet needs articulated in the Court's Civil Legal Needs Study (2003).

When the Practice of Law Board was asked whether it had reached out to young lawyers and law students several years ago, it became clear that they had not. The reaction was reminiscent of the parable of the drunk man who, having lost his keys, searches for them several hundred feet from where they were lost, because "it is ever so dark there and the light is better here."

The POL Board has assumed its own conclusions, by assuming that competent legal technicians will be more affordable than young lawyers. Conversations with young lawyers suggest they remain an untapped resource in our efforts to achieve access to justice state-wide. A growing culture of public service, nurtured by our three law schools, can be encouraged by actions by this Court and the WSBA. The influx of idealism, energy and commitment by our young lawyers has not been fully brought to bear in addressing access to justice. This should be explored first, before opening the practice of law to legal technicians. The market constraints impeding provision of affordable legal services to the poor, geographically remote, and other underserved populations will affect all law providers, whether technician or lawyer. Intervention by the organized Bar to "change the math," is more likely to promote access to justice.

4. <u>The Proposal Undermines More Effective Measures.</u>

While I have suggested that market forces cannot, in and of themselves, address unmet needs, appropriate scholarships, incentives, *pro bono* services, promoting the culture of public service, can help bridge the "justice gap." The Civil Legal Aid Crisis Summit is likely to generate new initiatives to address this daunting challenge. Introduction of a widely opposed "legal technician" category in an ill-fated effort to generate "competition," will not only fail because it is exceedingly difficult to generate competition for provision of unmet needs by those who cannot pay, but because it will deter more effective measures.[3] At the least it will divert funds and energy (limited resources to be sure) to a less productive direction.

The evidence suggests that a better solution (more effective at lower costs) can be found in a number of other statewide initiatives and incentives including: expansion of funding for public defender and legal aid agencies, funding and implementation of the Greater Access and Assistance Project (GAAP) plans for

[3] The "rescue doctrine" recognizes that abandoned rescue attempts (say, a swimmer attempting to rescue a drowning person) may deter effective rescuers from undertaking efforts (other swimmer-rescuers may not jump in seeing someone already swimming towards the victim). In much the same way, creation of legal technicians may lead lawyers to feel that the "problem" has been solved and undermine effective efforts. Further, while efforts to get legal technicians to serve the poor may fail, they may compete with lawyers for "paying work." The net result may be to deprive entry level attorneys from gainful employment, without serving any underserved populations.

statewide expansion of its successful Spokane and Snohomish County programs, statewide expansion of existing clinics, increasing scholarships, externships, student loan credits, and salary subsidies to encourage the provision of legal services in underserved areas. This combined with expansion of *pro se* support services in the courts for family law matters by experienced family law volunteers, law students, interns, externs, clinics, and young lawyers, will do more than creation of a new class of law provider based on a failed market analysis.

I have long advocated a "professionalism sequence" in the three Washington law schools to promote the commitment to public service. The administrative apparatus to oversee young lawyers is already in place. Current market forces and economic pressures suggest that the idealism and professionalism of lawyers, especially young lawyers, combined with appropriate financial incentives will be more effective than the creation of a "lawyer-lite" legal technician in delivering competent representations and counsel to underserved populations in practice areas crying out for additional resources. The problems of assuring competence, maintaining discipline, and undertaking enforcement actions to protect the public against the unauthorized practice of law, outweigh any speculative gain in the provision of legal services to underserved populations under this proposal.

The Access to Justice Board, working with the Washington Young Lawyers Division (WYLD), and its standing committee, the Greater Access and Assistance Project (GAAP) Committee, undertook a feasibility study funded by the WSBA for about $20,000 in 2007. The Committee looked at the successful programs already operating in Spokane and Snohomish counties and those being planned in Kitsap and Whatcom counties and is now developing a statewide implementation plan. GAAP is designed to address the "justice gap" by providing services to those who do not qualify for legal aid with volunteer lawyers working on low-fee panels. Reduced-fee lawyer panels avoid all the restrictions of the Proposal and, unlike the legal technician proposal before the Court, would effectively address the economic barriers to obtaining representation and counsel. The GAAP model would not require the creation of an entire "shadow bar association" and actually holds forth the promise of an effective approach to meeting unmet civil legal needs.

Already, in an organic fashion, developments are lending synergy to the efforts of the organized Bar to address challenges to access to justice. There are too many such efforts to name them all. The Eastside Legal Assistance Program is celebrating its twentieth anniversary; I have, myself, been a founding volunteer since its creation by the East King County Bar Association Board. Michele Storms, Executive Director of the Gates Public Service Law Scholarship Program since 2006, has rejoined the University of Washington with the

specific goal of encouraging and expanding public service opportunities. Brenda Williams, Supervising Attorney of the Tribal Court Public Defense Clinic (and current WSBA Governor) has expanded externship opportunities for law students in the tribal courts. WSBA President Mark Johnson working with Judge Steven Gonzalez and Professor (and former U.S. Attorney) John McKay are spearheading specific efforts in the Campaign for Equal Justice.

Conclusion.

Proposed APR Rule 28 from the Practice of Law Board ("POL Board") should be rejected. The Rule does not provide for a realistic administrative, funding, or disciplinary model. There is no evidence that that it provides competent, affordable legal services to underserved populations or improves access to justice. It is premised upon unsupported assumptions predicting success for a market model that has already failed respecting such populations. It will undermine entry level practice opportunities for new lawyers in areas where market forces operate and deter better, more effective approaches, such as those of the GAAP and others. It has been repeatedly opposed by both the leadership and the membership of the Bar for good reason. I thank you for your consideration of my comments in your deliberations.

Very truly yours,

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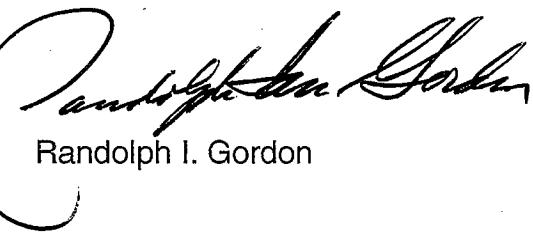
By: 
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