



WSBA

WASHINGTON YOUNG LAWYERS DIVISION

April 30, 2009

Re: WYLD Board of Trustees Opposes Legal Technician Rule

On April 23, 2008, the Washington State Bar Association Young Lawyers Division ("WYLD") Board of Trustees ("BOT") voted unanimously against the Practice of Law Board's ("POLB") proposed Legal Technician Rule. The vote by the BOT authorized the President of the WYLD to inform former WSBA President, Stan Bastian, of the WYLD position regarding Legal Technicians. By letter dated March 1, 2006, the BOT under WYLD President Noah Davis, previously advised the WSBA of its opposition (then a 13-1 vote) to the POLB's initial proposed Legal Technician Rule. The POLB moved forward with its mandate and has now proposed a pilot project seeking implementation of the Legal Technician Rule in the practice area of family law. As an update to the WYLD's previous letter, this letter outlines some of the history of the Legal Technician Rule and the reasons for WYLD opposition.

The POLB was created by the Washington State Supreme Court and charged with two functions, one of which was to make recommendations to the Court concerning ways non-lawyers could be authorized to practice law as defined in GR 25(c)(4). Recognizing the unmet legal needs of persons of lesser economic means, as underscored by the Civil Legal Needs Study, the POLB has been engaged in an attempt to address the cited impediments to justice for the past three years. The POLB initially created a proposed rule authorizing non-lawyers, termed "Legal Technicians", to engage in the limited practice of law. The POLB held public hearings, to which the WYLD sent representatives, and presented to associations and conferences, including the WYLD.

The WYLD's March 2006 letter, referenced above, addressed the failure of the Proposed Rule to remedy the problems identified in the Civil Legal Needs Study, and the letter outlined four main points of contention. The first point argued that the Rule failed to provide a more affordable option to an attorney. Noting that Legal Technicians will have basic operating and overhead costs, and further noting that the WYLD's Greater Access and Assistance Program ("GAAP") provided attorney representation at \$50-\$75 an hour, the objection to the Rule was that it did not cap or limit what a legal technician could charge for services. The POLB offered no evidence to support its assertion that a legal technician could serve persons who could not afford an attorney.

The second point in the WYLD's 2006 letter attacked the presumption that, by authorizing a limited practice area for non-attorneys, the number of crooks without a license to practice law currently offering legal services to persons in need would decrease. Noting a lack of resources to enforce the current law, the WYLD challenged the idea that the Rule would deflate the market for a crook's services. It did not seem likely that a person currently making money while offering legal services without a license would go through the rigors of Legal Technician certification, and it is doubtful that the crook's market would diminish when the Legal Technician could only operate in a limited practice area. Furthermore, no additional resources would be made available to prosecutors to enforce the existing law or the new Rule.

The third point in the WYLD's 2006 letter concerned the confusion and ambiguity of the POLB's "to be determined" approach to the services a Legal Technician could engage. At that time, The POLB had not identified any specific practice areas for a Legal Technician. The WYLD suggested that the POLB identify specific practice areas to study the effects and unintended consequences of the program.

The fourth point in the letter questioned whether the legal technician would have the education or critical thinking skills required to issue spot. The letter argued that the Legal Technicians would dilute the quality of legal services by inadequately attempting to help a client beyond the scope of the Rule or by only being able to see a small piece of the larger problem, for which only an attorney could provide assistance. The letter concluded by offering a better course of action, including an expansion of the GAAP program, which benefits both young lawyers and persons of modest means.

As the introduction to this article states, the POLB moved forward with the proposed Legal Technician Rule. At its 2006 retreat, the POLB selected four specific practice areas that it determined to be potentially appropriate for Legal Technician practice. The POLB appointed subcommittees, which drafted reports about the appropriateness of Legal Technician practice in Immigration, Family Law, Landlord-Tenant, and Elder Law. The Immigration Law subcommittee, and ultimately the POLB, decided that Immigration Law was not a viable area of practice for Legal Technicians. The POLB felt the other areas were appropriate, and settled on the recommendation of the Family Law Subcommittee as its recommendation to the Supreme Court.

The POLB's January 7, 2008 report defines the authorized activity of a Legal Technician practicing Family Law. The Legal Technicians would only be able to assist clients in representing themselves in dissolution proceedings, proceedings for legal separation and decrees of invalidity, as well as non-parental custody proceedings and parentage actions. The proposed rule for Family Law Legal Technicians narrowly defines the range of tasks within the scope of practice authorized, specifically itemizing nine tasks. The Legal Technician is prohibited from doing fourteen specified activities.

The 2006 WYLD letter has now been updated to account for the POLB's proposal for a Family Law Legal Technician. While the proposal largely alleviates the WYLD's concerns discussed in the third point, the remaining points of contention were not addressed in any appreciable way. In fact, the proposal creates new concerns and raises more unanswered questions. The following is a brief summary of some of those points:

1. The exceptions in the proposal have swallowed the rule. The prohibited issues include almost every known issue there is in family law, i.e., real property transfers, retirement benefits, inter-state disputes governed by the UCCJEA. The cases that remain are so bereft of substantive issues that many family law attorneys would be able to represent those clients at a reduced fee.
2. It takes a lawyer to spot the relevant issues, including those that are prohibited. If the legal technician does not realize that an issue exists, he or she won't recognize the need to refer a client to an attorney. The potential for abuse is high when a legal technician has a financial incentive to keep the client in the dark.
3. Some of the tasks the legal technician is allowed to do requires a lawyer's oversight. (See defined activity No. 7, which says that a legal technician can perform legal research and draft legal letters and pleadings if the work is reviewed by an attorney.) If a person can't afford an attorney in the first place, how could they afford one to review the work of a legal technician?
4. The POLB makes presumptions based on faulty reasoning. It presumes that because the legal technician's education will be less extensive than an attorney's, and because of the legal technician's limited practice scope, the technician will have a lower overhead and start up cost. How one's education and scope of practice relates to the cost of rent, supplies, and staff is not explained.
5. If a legal technician can't afford overhead, the POLB expects the technician will require a lower salary, which translates into more non-profits being able to hire technicians as staff. The POLB fails to consider the costs of the legal technician's education and training. A legal technician is required to have paralegal training and two years of substantive legal experience. Relying on market forces, as the POLB does, a legal technician is burdened with greater education than a paralegal, yet expected to take a job for less pay. Market forces will require that legal technicians bill at a rate higher than paralegals currently performing similar functions under the supervision of attorneys.
6. The POLB presumes that current paralegals will fill the ranks of legal technicians. Why paralegals currently with firms would leave to accept a lower paying position goes unanswered. Similarly, it is flawed thinking to believe that new legal technicians, having completed two years of training with a firm, would leave, or that a firm would invest two years in training a legal technician and allow them to leave. More accurate expectations

will place legal technicians within law firms billing at higher rates than paralegals due to their higher level of training.

7. A legal technician is required to show proof of the ability to respond to damages arising from the legal technician's errors or omissions in the provision of services. This requirement all but mandates that a technician work for a law firm or nonprofit with malpractice insurance.

8. The WYLD BOT believes the problem is not a shortage of attorneys willing to take cases on a reduced fee, but rather it is a problem of matching willing attorneys to the client. The WYLD continues to work to expand the GAAP program, which matches competent attorneys to persons able to pay a reduced fee for legal services. GAAP remains one of the Division's top initiatives which aims to serve the unmet legal needs of moderate-income individuals and families around the state. WYLD has supported the growth and formation of GAAP for nearly a decade, but its importance has never been more relevant to today's new lawyer. This is because GAAP provides "low-bono" services to those of limited means who fall into the "gap" between those qualifying for free pro bono or legal services representation, and those who can afford traditional marketed legal representation.

GAAP provides low-cost legal services through a referral program to attorneys, often newer lawyers, who can provide compensated services to these individuals who would otherwise remain without any access to the legal system. Additionally, GAAP provides an opportunity for young lawyers to gain valuable practice experience through "low-bono" client representation in many different areas of law and a means to ensuring access to justice for many clients each year.

This past year, the WYLD has advocated aggressively to develop an online in-take and referral system and a model to expand GAAP statewide and serve additional counties in Washington. Currently, the ATJ Board/WYLD GAAP Committee is preparing a statewide centralized GAAP proposal to present to the WSBA Board of Governors for review and approval at the July 2009 BOG meeting.

A few months ago, the WSBA Board of Governors voted against the Practice of Law Board's proposed Legal Technician Rule (LTR). Throughout the debate concerning the LTR, there were many who advocated for statewide expansion of GAAP as an alternative to the LTR and as the best means of addressing the vast unmet legal needs around the state.

The Board of Trustees of the WYLD feels that unique legal skills are necessary to address even the most basic legal issues, and thus only lawyers should provide these services in Washington. With many unemployed and under-employed new lawyers around the state who are particularly qualified and ready to provide these services, the WYLD's position is that it does not make sense to adopt a new rule to create a group of non-lawyer "legal technicians" to provide family law representation. Resources can more effectively be used to expand GAAP and similar programs and train lawyers to address the unmet legal needs and fill the gaps in representation.

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