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Sent by email only to supreme@courts.wa.gov

November 26, 2014

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

Re: Proposed Limited Licensed Legal Technician Rules of Professional Conduct

Dear Honorable Justices:

I appreciate the opportunity to provide comments on the proposed Limited Licensed Legal Technician (LLLT) Rules of Professional Conduct. I strongly support increasing access to justice through LLLTs and am pleased that Washington State is the first to create such a program.

Having worked in the lawyer discipline arena since 1994, I also believe that it is crucial that the LLLT Rules of Professional Conduct be carefully crafted to avoid misunderstandings and unintended violations. My comments below are also based on the goals of promoting public confidence in LLLTs and encouraging lawyers to support the presence of LLLTs.

As a member of the WSBA's Committee on Professional Ethics[1], I was fortunate to hear a presentation by the LLLT Board on their proposed changes to the Lawyer RPC. My comments are informed by answers to questions during that presentation.

Fee sharing and lawyer/LLLT working relationships (LLLT RPCs 1.5(e) and 5.9)

Proposed LLLT RPC 1.5(e) prohibits LLLTs from sharing fees from lawyers. Lawyer RPC 1.5(e) permits lawyers not in the same firm to share fees only if the fee split is in proportion to the services provided or each lawyer must assume joint responsibility for the representation, the client approves the fee division, including the share each lawyer would receive, the agreement is confirmed in writing, and the total fee is reasonable.

I believe a variation of this rule should be adopted to permit LLLTs to share fees with lawyers. Specifically, the rule should be the same as Lawyer RPC 1.5(e), except that the fee division would have to be in proportion to the services provided (in other words, the option to have each lawyer or LLLT assume joint responsibility for the representation would be deleted). Permitting lawyers and LLLTs in different firms to share fees under such a rule would assist clients by permitting them to hire a lawyer/LLLT team without needing to make separate arrangements

[1] My comments are my own and are not submitted in my role as a member of this Committee.

with each. Under such a scenario, the LLLT would be receiving only the share of a fee attributable to services provided within the scope of the LLLT's license. And clients would be fully protected as they would have to agree in advance to any such fee division.

Particularly when LLLTs are new, lawyers may hesitate to make the commitment to hire an LLLT. Allowing lawyers to work with LLLTs who are not employees of their firm will give clients more access to LLLTs. For example, such a rule would allow a client to hire a lawyer/LLLT team where the LLLT would complete documents and the lawyer would only do work beyond the LLLT license. This would save the client money and be easier for the client than having to hire a lawyer and LLLT separately.

On the other hand, I have serious concerns about proposed LLLT RPC 5.9, which permits LLLTs to be owners of law firms composed of LLLTs and lawyers. This rule would allow an LLLT to have an ownership interest in a law firm as long as lawyers own the majority of the firm, LLLTs do not direct any lawyer's professional judgment and have no direct supervisory authority over lawyers. However, LLLTs are permitted to have managerial roles in such a firm. Moreover, LLLTs will be permitted to share in attorney fees, including attorney fees from practice areas in which they are not permitted to practice. For example, although LLLTs are not allowed to charge contingent fees or practice in areas such as personal injury, they would be permitted to share in contingent fees generated by lawyers in the firm from PI cases.

The rule contains no restriction on LLLTs sharing fees earned by lawyers. LLLTs could be rainmakers for firms and compensated based on the business they bring to the firm. For example, a firm could give a LLLT a majority of the fee earned for a personal injury matter because the LLLT was the "originating partner" for that matter.

This may lead to several unintended consequences. First, no other state permits lawyers to form partnerships with nonlawyers to practice law.[2] *See* Model RPC 5.4(b). Such arrangements are only permitted in the District of Columbia. The prohibition against nonlawyer partners in law firms is longstanding[3] and is designed to protect a lawyer's professional independence.

Many firms now have offices in more than one state. If a Washington firm has an LLLT as a partner, lawyers in other states would not be permitted to join that partnership if they continued to practice law in their home state. *See, e.g.,* ABA Formal Op. 91-360; Michigan Ethics Op. RI-225 (1985), NY Committee on Prof'l Ethics Op. 311 (2012) ("A New York lawyer may not practice law principally in New York as an employee of an out-of-state entity that has non-lawyer owners or managers."). Effectively, this means a Washington firm that has an LLLT as a partner very well may be unable to establish offices in other states. It also means that Washington firms that currently have offices in other states would not be able to have LLLTs as partners. I am concerned that many lawyers may not understand the effect of proposed LLLT RPC 5.9 on their law partners who practice in other states and this could lead to unintended violations of RPC 5.4

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[2] I understand that the LLLT proposal does not use the term "nonlawyer" to include LLLTs. However, because LLLTs are not lawyers, they will be considered nonlawyers by other states.

[3] The ABA prohibited partnerships with nonlawyers in 1928. *See* Vermont Adv. Ethics Op. 2008-3 at 2, n 2.

on the part of the out-of-state lawyers.

Second, I do not believe that a rule prohibiting LLLTs law firm owners from interfering in the professional judgment of lawyer employees of the firm will be sufficient. Even without permitting nonlawyers to own firms, lawyers have repeatedly been disciplined for abdicating their ethical duties and allowing nonlawyers to influence them. I do not intend to downplay the seriousness of those lawyers' misconduct, as they should have complied with the RPC regardless of the nonlawyers' actions, but I believe it is important that the Court bear in mind the risk presented by permitting those not subject to the full panoply of the RPC to profit from lawyers' work product. Most notably, because LLLTs cannot appear in court, the LLLT RPC do not contain any rules regarding candor toward the tribunal. I fear this could lead to LLLT owners of firms applying pressure on lawyers to be less candid with courts if doing so is in the firm's economic interest.

The LLLT program is in its infancy. I urge the Court to be cautious and not adopt proposed LLLT RPC 5.9 at this time. Such a rule can always be added later if it appears necessary after we have had a chance to see how the LLLT program works and how LLLTs integrate with the existing legal profession. On the other hand, I hope the Court will permit LLLTs to share fees with lawyers who are not in the same firm to allow LLLTs more opportunities to work collaboratively with lawyers.

LLLTs as Signatories on Lawyer Trust Accounts (LLLT RPC 1.15A(h)(9)

Proposed LLLT RPC 1.15A(h)(9) permits LLLTs who are "associated in a practice with a lawyer" to be a signatory on the trust account, but if the LLLT is a signatory, "a firm lawyer signature is also required for any withdrawals, transfers, or deposits on the account."

A bank does not require a signature to make deposits or transfers. In most law firms, nonlawyers routinely make deposits for the trust account, as that requires at most completing a deposit slip and bringing the deposit to the bank. Many banks no longer require deposit slips and deposits may be made by transmitting photos of the check to the bank. Because transfers are made electronically or telephonically, there is also no place for a signature.

This rule would mean that if a law firm has an LLLT as a signatory on a trust account, a lawyer would have to have significantly more involvement with the trust account than would otherwise be required. I understand from the LLLT Board's presentation that the rule permits the LLLT to be a signatory on the account so a firm that requires two signatures on trust account checks can have the LLLT as a second signer. However, even if a check requires two signatures, most banks' agreements with their customers permit them to cash a check with only one signature. Because checks are processed electronically, the banks are unable and/or unwilling to accept the liability of determining if an account requires two signatures. Permitting LLLTs to be signatories under such a scenario does not accomplish anything. Either an LLLT should be permitted to be a signatory to the same extent as a lawyer, or an LLLT should not be allowed to be a signatory at all.

I also note that this rule uses the phrase "licensed LLLT" which is redundant and does not appear elsewhere in the proposed rules.

LLLTs holding funds of third parties in a trust account (LLLT RPC 1.15A)

I question the repeated reference to funds of a "third party" in proposed LLLT RPC 1.15A. *See, e.g.*, 1.15A(a), (b), (c), (d), (e) and (f). APR 28 does not appear to permit an LLLT to receive funds of a third party as the LLLT's license is limited to the specific actions listed in APR 28(F). Lawyers typically hold funds belonging to third parties in trust when they receive funds belonging to the client and the opposing party (for example, in a dissolution, a lawyer may receive the proceeds from the sale of a community asset and distribute those proceeds to the lawyer's client and the opposing party). The LLLT is not given authority to act in this capacity and doing so seems inconsistent with the prohibition in APR 28(H)(6) against the LLLT negotiating with the opposing party and communicating the client's position to the opposing party.

A lawyer may also have funds belonging to a third party if the third party is entitled to a portion of funds the lawyer received on behalf of the client, such as when a medical care provider has a lien on settlement proceeds. It appears beyond the scope of the LLLT's license to receive funds belonging to a third party or to be responsible for distributing funds to the LLLT's client and a third party.

Because the references to funds of third parties in proposed LLLT RPC 1.15A may lead to confusion about the scope of the LLLT's practice, I believe that at a minimum, a comment should be included that explains why the rule references funds of a third party and clarifies the LLLT's authority to receive and distribute third party funds.

Language in flat fee agreements (LLLT RPC 1.5(f))

Proposed LLLT RPC 1.5(f) uses language from Lawyer RPC 1.5(f). This includes recommending that the fee agreement state, "In the event our relationship is terminated before the agreed-upon legal services have been completed, you may or may not have a right to a refund of a portion of the fee." However, APR 28(G)(3)(f) requires that an LLLT's fee agreement contain, "[a] statement that the client has the right to rescind the contract at any time and receive a full refund of unearned fees." It would be clearer if the suggested language in RPC 1.5(f) incorporated the language required by APR 28(G)(3). Otherwise, the LLLT flat fee agreement will contain two statements on the same topic that are slightly different, leading to possible confusion.

Terminology

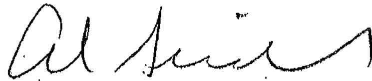
I concur in the comments submitted by the Northwest Justice Project about the use of the terms "represent," "legal practitioner," and "law firm" for the reasons in Deborah Perluss's November 24, 2014 letter. I also have an additional concern about the use of those terms. When I served on

Ethics 2003 (the WSBA Committee that reviewed the ABA's changes to the model rules and made recommendations that served as the basis for the 2006 changes to Washington's RPC), one of our goals was to keep Washington's rules as close to the Model Rules as possible unless we had a good reason to deviate. Doing so makes it significantly easier for practitioners who are admitted in multiple states to understand their ethical obligations and for Washington lawyers to know whether other states' interpretation of a specific RPC is relevant here. The changes in terminology in the LLLT RPC will form the basis for similar changes to the Lawyer RPC and will make Washington's rules inconsistent with the model rules. For example, because the LLLT RPC state that LLLTs "represent" clients, numerous changes are being proposed to the comments to RPC 4.2. If the term "represent" was limited to lawyers, these changes would be unnecessary.

I believe it would be preferable to use terminology that would reduce the number of changes needed in the Lawyer RPC so our rules will continue to be largely consistent with the model rules.

Thank you for the opportunity to comment on the proposed LLLT RPCs. Please feel free to contact me if you have any questions regarding my suggestions.

Sincerely,



Anne I. Seidel

From: OFFICE RECEPTIONIST, CLERK
Sent: Wednesday, November 26, 2014 5:02 PM
To: Tracy, Mary
Subject: FW: Comments on proposed LLLT RPC
Attachments: Seidel LLLT RPC Comments.pdf

From: Anne Seidel [mailto:anne@anneseidel.com]
Sent: Wednesday, November 26, 2014 4:59 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: Comments on proposed LLLT RPC

I am attaching comments on the proposed Limited License Legal Technician Rules of Professional Conduct (LLLT RPC).

Thank you.

Anne Seidel

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