



# Northwest Justice Project

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Clerk

Washington Supreme Court  
P.O. Box 40929  
Olympia, WA 98504-0929

Re: Northwest Justice Project Comments on Proposed Limited License Legal Technicians Rules of Professional Conduct

Dear Honorable Justices:

The Northwest Justice Project (NJP) respectfully submits comments for the Court's consideration on the proposed Rules of Professional Conduct (RPCs) for the newly created Limited License Legal Technician (LLLT) profession. NJP fully supports the goals of Admission to Practice Rule (APR) 28 and welcomes the opportunities it provides for individuals needing legal assistance to access the justice system to resolve basic legal needs. NJP's support for the LLLT program is demonstrated by the significant resource commitment we have made toward the development of the LLLT infrastructure: three NJP attorneys have served, respectively, on the LLLT Board and the RPC Subcommittee. Our purpose in participating in this effort is to share a perspective based on our experience working with low-income clients within disadvantaged communities. Our goal is to ensure that these communities and individual clients, as well as the general public, are able to receive the benefits of the LLLT program while avoiding some of the pitfalls detailed below.

As Washington again leads the nation in undertaking efforts to address access to justice needs, a clear understanding of the role and function of LLLTs is critical to the success of this initiative. Avoiding possible misunderstanding of the LLLT role or their scope of authority to practice law will protect prospective clients and LLLTs from potential risks arising from erroneous assumptions. As we look forward to working with LLLTs in expanding access to justice we are grimly aware that even with this added resource, the demand for civil legal services for low-income Washingtonians will remain substantially unmet.

## Introduction

The LLLT RPCs are an essential adjunct to the effective implementation of APR 28. In this regard, NJP appreciates the efforts undertaken by the LLLT Board and the RPC Subcommittee in proposing the LLLT RPCs. NJP's comments primarily address the issues identified in the GR 9 Cover Sheet as having been particularly problematic and/or topics of



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significant discussion within the sub-committee and attempt to flesh out for the Court our concerns on these important issues. These comments address problems created by the language of specific rules and includes suggestions for simple revisions that we believe will largely resolve the concerns.

The proposed LLLT RPCs are adapted from the RPCs that govern Washington lawyers, albeit modified to accommodate the practice limitations set out in APR 28. As a result, in certain fundamental respects, the proposed rules potentially create significant confusion for LLLTs, their prospective clients, lawyers, courts and the public at large. In some cases, the proposed RPCs conflict with APR 28.

### **Preamble: Concept of Representation**

The Preamble sets the tone for how the RPC's are to be understood, applied and interpreted. The LLLT RPC Preamble contains broad aspirational statements as to the application of the rules that can be misconstrued as authorizing the practice of law beyond the limited scope of APR 28.

This is especially so with respect to the language that expressly characterizes the role of an LLLT in paragraphs (1), (2), and (3) of the Preamble.<sup>1</sup> The language characterizes an LLLT as a "*representative of clients.*" This terminology permeates the LLLT RPCs and was the subject of in depth discussion in the drafting committee. Importantly, nowhere in APR 28 is an LLLT authorized to "represent a client." Including the term in the LLLT RPCs seems to inappropriately expand the scope of authorized practice contemplated by APR 28 or provide the seeds for significant confusion.

APR 28H expressly prohibits an LLLT to "represent a client" in court, administrative or other dispute resolution proceedings, negotiate on behalf of a client, or "*represent or otherwise provide legal or law related services to a client, except as permitted by law, or associated rules and regulations.*" APR 28H(5), (8). An LLLT is not a speaking agent for a client, is not allowed to negotiate or bind a client through any specific statements or agreements, and does not otherwise act in any representational capacity. APR 28H(6). In

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<sup>1</sup>[1] An LLLT is authorized to provide limited legal services that lie within the scope of the practice that the LLLT is licensed to undertake. Within that scope, an LLLT is a member of the legal profession, *is a representative of clients and has a special responsibility for the quality of justice.*

[2] As a representative of clients within a limited scope, an LLLT performs various functions. As advisor, an LLLT provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. *As an evaluator, an LLLT acts by examining a client's legal affairs and reporting about them to the client or to others.* While an LLLT is not authorized to act as advocate or negotiator, an LLLT conscientiously acts in the best interest of the client, and seeks a result that is advantageous to the client but consistent with the requirements of honest dealings with others.

[3] *In addition to these limited representational functions, an LLLT may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter.* Some of these Rules apply directly to LLLTs who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. Emphasis added throughout.

fact, the APR expressly contemplates that an LLLT “does *not* represent the client” and by definition provides “limited legal *assistance*... to a *pro se* client.” APR 28B(4).

While the drafting committee (and ultimately the LLLT Board) attempted to resolve the debate by defining “representation” and “represent” to denote “limited legal assistance as set forth in APR 28 to a *pro se* client” (see LLLT RPC 1.0B(h)), the definition and the use of the terms is internally inconsistent and makes little sense when applied to the Legal Technician’s scope of authorized practice as specifically set out in APR 28F. Further, unless reference is made repeatedly to the definition, one reading the rules is left with the impression that “representation” is a clearly authorized function. NJP strongly recommends substituting the terms “legal assistance” and “assist” in place of “representation” or “represent” throughout the rules to more appropriately align the RPCs with the APR and avoid creating misunderstanding as to the actual or intended role of an LLLT.<sup>2</sup>

The potential for confusion is discernible when the Preamble is read as a whole. For example, paragraph (2) discusses the role of an LLLT as an “advisor” (an authorized function), but also discusses an LLLT’s role as an “evaluator” and describes the role expansively to include, without limitation, “examining a client’s legal affairs and reporting about them to the client or to others.” But an LLLT is not authorized to “evaluate” and “report” a client’s legal affairs to others. Both the APR and proposed RPC Title 4 expressly *prohibit* an LLLT from communicating a client’s or opposing party’s position to another party or to their lawyer. This problem is easily resolved by simply deleting the concept of an LLLT as an “evaluator” from the Preamble.

### **RPC 1.0 Terminology:**

**a. “Law Firm”** In addition to the terms “representation” and “represent”, NJP is concerned about the definition of “law firm” including a firm made up solely of LLLTs. In common usage, “law firm” communicates that lawyers are present and involved in the business at hand.<sup>3</sup> Even though RPC 7.5(a) requires a firm of non-lawyer LLLTs to clearly identify itself as “Legal Technician(s)”, and prohibits LLLTs from using business names that imply lawyers are members or employees of the firm, the definition of “law firm” in 1.0A(c) expressly *allows* an LLLT-only firm to be called a “law firm.”

Use of “law firm” to signify an LLLT-only firm can create misimpression among the public and prospective clients as to the nature and scope of services available from the firm. Comment [1] to proposed Rule 7.4 effectively acknowledges this and requires that LLLT advertising not misrepresent the LLLT’s services.<sup>4</sup> However, a prospective client should be

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<sup>2</sup> The term appears throughout the LLLT RPCs, but use of the term is particularly problematic in regard to RPCs 1.1, 1.2 and 2.1, as discussed below. Use of the terms “legal assistance” and “assist” in place of “represent” and “representation” throughout the rules would similarly solve ambiguities arising from the other rules.

<sup>3</sup> See, e.g., <https://www.google.com/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=definition%20%22law%20firm%22>

<sup>4</sup> Proposed RPC 7.4 Comment [1] reads in part: An LLLT’s license to provide legal services is unique and may not be understood by persons who are not familiar with the limited scope of practice of an LLLT and with the differences between an LLLT and a lawyer.

able to rely on a business name when considering whether to engage legal services, and the cautionary note contained in proposed Comment [3] to 1.0A(c)<sup>5</sup> reflects the potential for confusion. To assure clarity, given the limited scope of practice, LLLT-only firms should not be included in the definition of “law firm.”

This concern is not merely academic. Communities of color have been significantly harmed by the unauthorized practice of law and substantial numbers low income, non-English speaking people are already confused about who is authorized to practice law. Allowing for LLLT-only “Law Firms” is likely to add to the confusion and provide legitimacy to “notarios,” and other non-lawyer legal services providers who engage in the unauthorized practice of law to the detriment of low-income unrepresented, often LEP, communities.

**b. “Legal Practitioner”:** The role confusion may be compounded by the proposed use of the generic “legal practitioner” to “denote a lawyer or limited license legal technician licensed under APR 28.” The proposed rules accurately define the terms “Lawyer” and “Limited Licensed Legal Technician” (RPC 1.0B(c), (f)), thus there is little reason to use a generic term when referring to both.<sup>6</sup> In conjunction with the LLLT RPC’s, the WSBA is proposing changes to the Lawyer RPCs to conform to the LLLT RPCs. One significant part of that effort is a proposal to omit from the Lawyer RPC’s use of the term “counsel” as a noun and to instead use “legal practitioner” as defined in the proposed LLLT RPC. Regardless of the merit of eliminating the term “counsel” from the Lawyer RPC, which is not addressed here, devising a single generic term to refer to both lawyers and LLLTs creates role-confusion and potentially has unintended consequences that could significantly impact access to justice concerns.

Use of new and potentially confusing terminology that creates an ambiguity as to the nature and scope of specifically authorized LLLT functions by referring interchangeably to both a lawyer and a LLLT as a “legal practitioner” has implications well beyond the ethics rules. For example, use of the generic term “legal practitioner” to refer to both lawyers and LLLTs might incentivize a civil legal aid funder to determine that access to “legal practitioners” (as opposed to “lawyers”) is adequate to meet civil justice needs of low-income persons who in fact require extended attorney representation. This concern is even greater when combined by the use of the term “representation” to define LLLT activity. A constitutional or statutory right to “representation” might potentially be construed by a cost sensitive legislature or court as solely a right to “representation” by a “legal practitioner” LLLT, thereby creating a need for further intervention to ensure that representation rights are fully protected. In order to avoid creating misperceptions of representation rights for persons entitled to or in need of

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<sup>5</sup> Comment [3] reads: “The terms “firm” and “law firm” are used interchangeably in the Lawyer RPC and also in these Rules. An LLLT should be cautious, however, in using the words “law firm” to describe a law practice that includes only LLLTs. The name and description of an LLLT’s practice should not imply that a lawyer is associated with the firm unless that is the case. Rule 7.5(a) requires that any trade name used for an LLLT practice that does not include a lawyer include the words ‘Legal Technician.’”

<sup>6</sup> The term “legal practitioner” only appears once in the proposed LLLT RPCs, in Rule 4.3(a) and twice in Comments, Rule 5.5(a) Comment [1] and 8.5 Comment [2]. In each instance, use of the terms “lawyer” or “limited license legal technician” (as used in other rules) would mean the same and would add clarity, and thereby eliminate the need to use and define the term “legal practitioner”.

a lawyer in civil matters,<sup>7</sup> the term “legal practitioner” can be deleted from the proposed LLLT RPCs, without the need for any substantive changes to the proposed rules.

**RPC 1.1 Competence:**

As written, RPC 1.1 requires an LLLT to provide “competent representation” to a client and to have the “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” As noted above, because the term “representation” communicates a role far broader than “advice” or legal “assistance”, the nature and scope of competence an LLLT is expected to possess under the rule is also similarly and unduly broad. By definition, the LLLT’s scope of authorized practice is limited to tasks set out in APR 28F. The scope of legal knowledge and skill the LLLT is expected to have is also limited to their authorized scope of practice and should not be assumed to include areas of a client’s potential need for representation beyond that limited scope. To avoid creating dissonance between what an LLLT is authorized to do and what an LLLT is expected to know, the rule could be easily modified to read as follows:

“An LLLT shall provide competent ~~representation~~ legal assistance to a client. Competent ~~representation~~ legal assistance requires the legal knowledge, skill, ~~thoroughness and preparation reasonably necessary for the representation.~~ to adequately assist a client.”

**RPC 1.2 Scope of “Representation” and Allocation of Authority:**

As with the lawyer RPC, under Rule 1.2 an LLLT must abide by a client’s wishes concerning his or her objectives and must consult with the client as to the means by which they are pursued. However, as proposed, Rule 1.2 allows an LLLT to take such action on behalf of a client as is “*impliedly* authorized to carry out the representation.” This language also seems to broaden the scope of an LLLT’s practice authority beyond that specifically set out in APR 28F. While subsection (g) clarifies that nothing in the rule is intended to expand the authorized scope of practice, given the very specific and limited nature of the tasks an LLLT is authorized to perform in APR 28F, it is hard to know what additional actions are “impliedly authorized” or “allocable” to an LLLT to take on behalf of a *pro se* client. To avoid confusion (in addition to changing the term “representation”), simply deleting the second sentence of 1.2(a) would solve the concern.

**RPC 1.7 Concurrent Conflict of Interest:**

This rule allows an LLLT to assist clients with concurrent conflicts under RPC 1.7(b). The primary concern is whether an LLLT is able to sufficiently identify and advise clients on a potential conflict especially one that involves an issue of law outside the authorized scope of an LLLT’s practice. Even if the LLLT does identify the conflict, the rule presumes an LLLT

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<sup>7</sup> Presumably, Sixth Amendment jurisprudence governs defense representation rights in criminal proceedings, but use of the generic term “legal practitioner” to refer to both a “lawyer” and “Limited License Legal Technician” could potentially impact right to counsel protections in quasi-criminal justice arenas depending on the range of substantive law areas which may ultimately be authorized for LLLT practice.

is competent and authorized to adequately advise a client and negotiate a conflict waiver as would be permitted by 1.7(b).

The concern is perhaps best illustrated through an example: Under the APR 28 Appendix, Regulation No.2B.3.a, an LLLT is prohibited from assisting more than one party in any domestic relations matter. If in the course of assisting a client to dissolve a marriage not involving any children the client's spouse asks the LLLT to assist him to reduce a child support debt owed to a former spouse, the assistance would not violate the regulation because the spouse's case involves a different legal matter. But there is a conflict because the LLLT would likely receive financial information from the spouse that could be used to benefit or disadvantage either party to the dissolution action.

As written, RPC 1.7(b) would authorize the LLLT to consult with both parties about a conflict waiver and to undertake the subsequent conflict "representation." Given the complexity of this issue for lawyers and the difficulty of successfully navigating it, authorizing conflict waivers seems to create unnecessary risk for both the conflicted clients and for LLLTs. Time and experience will tell whether LLLTs are encountering conflicts and if so, whether such conflicts can be ethically waived and, if so, how. Eliminating subsection (b) from 1.7 would not impair adoption of the basic conflicts rule now, and the issue can be revisited when other areas of LLLT practice are authorized and/or experience with LLLT practice suggests the need for concurrent conflict waivers under the rule.

### **RPC 2.1 Advisor:**

The proposed rule was adopted from the lawyer RPC without any modification. The issue raised is whether the limited scope of authorized LLLT practice includes the "exercise of *independent* professional judgment". The authorized scope of practice in APR 28F is very narrow and appears both to not assume and to effectively preclude the exercise of *independent* professional judgment. For example, an LLLT may use, select, complete and advise on only pre-approved forms or those prepared by a Washington lawyer. APR 28F(4), (6). The education required of an LLLT may equip the LLLT to perform these limited services, but an LLLT is not be expected to have the background training and experience of that required of lawyers. As drafted, RPC 2.1 would *require* an LLLT as a mandatory ethical duty to exercise the same degree of professional judgment as a lawyer which also implicates other areas of law.<sup>8</sup>

Lawyer RPC 2.1 contemplates the authority to exercise independent professional judgment, for example, to predict potential case outcomes, advise on strategic considerations, and counsel a client regarding relevant moral, political, social and economic factors not limited to the specific tasks authorized by APR 28F. The ability and obligation of lawyers to exercise independent professional judgment and the need for that independent judgment to remain

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<sup>8</sup> APR 28 Regulation 2A underscores the limits on LLLT "judgment" by expressly providing that "[a]fter an issue beyond the LLLT's scope of practice has been identified, an LLLT may prepare a document related to the issue *only if a lawyer acting on behalf of the client has provided appropriate documents and written instructions for the LLLT* as to whether and how to proceed with respect to the issue."

unimpaired is exactly why an LLLT is not allowed to direct, regulate or have supervisory authority over any lawyer as set out in proposed LLLT RPC 5.9(b).

The Rule can easily be revised to address this concern by omitting the second sentence from RPC 2.1 altogether, and changing the first sentence to read as follows: "In ~~representing~~ assisting a client, an LLLT shall exercise appropriate professional judgment and render candid advice."

**LLLT RPC 4.1 Truthfulness in Statements to Others:**

This rule adopts the Lawyer RPC 4.1 with no substantive changes. Comment [2], however, reiterates the APR requirement of disclosure of the LLLT's name and license number on pleadings drafted and filed in court. The requirement is reiterated under 4.1 as Lawyer Rule 3.3 was otherwise "reserved." The Comment is perhaps better placed (or should be reiterated) in relation to proposed Rule 3.1.

Finally, NJP wholly endorses the extension to LLLTs of the ethical obligations to promote the administration of justice, including providing pro bono services, as set out in proposed LLLT RPC Title 6 and the values expressed therein.

We greatly appreciate the opportunity to submit these comments and look forward to working with the LLLT profession to carry out the goals of equal justice.

Sincerely,



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