WASHINGTON CHAPTER
NAELA
National Academy of Elder Law Attorneys, Inc.

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April 27, 2009

The Honorable Charles W. Johnson
Washington State Supreme Court
Temple of Justice
P. O. Box 40929
Olympia, WA 98504-0929

Re: Comment on Proposed Rule APR 28, Practice of Law by Legal Technicians

Dear Justice Johnson:

Thank you for the opportunity to comment on Proposed APR 28 which would allow non-lawyer "legal technicians" to practice law in several recognized legal specialties. Please know that the Washington chapter of the National Academy of Elder Law Attorneys (hereinafter "WA NAELA") strongly opposes the adoption of proposed APR 28.

The National Academy of Elder Law Attorneys is a non-profit association of attorneys who devote a significant part of their practice to working with older clients and their families. The Academy was established in 1987 to provide resources and assistance to attorneys who deal in the highly specialized issues which its members encounter on a daily basis in providing legal services to elderly clients and those with special needs.

A. GENERAL COMMENTS

While the Practice of Law Board ("POLB") represented to the Washington State Bar Association that its proposal would be limited to Family Law, there is no such limitation in the proposed rule. Indeed the proposal encourages the POLB to establish programs in several legal specialties. Moreover, comments submitted by members of the POLB note that it is their express desire to establish legal technician programs in Family Law, Elder Law and other specialty practice areas. However, even if the POLB truly intended to only establish a legal technician program in Family Law, WA NAELA would be opposed.

As several other commentators have observed, this proposal is a "slippery slope" that is unlikely to make reasonably competent legal services available to underserved members of the public. While the Practice of Law Board may be well-intentioned in proposing this rule, significant

public harm will inevitably result if non-lawyer legal technicians are allowed to practice Family Law, Elder Law or any of the specialties which the POLB has identified.

There are very good reasons underlying the requirements which must be met in order to enter the profession of law. The purpose of those requirements is to protect the public and ensure competency in the practice of law. Lawyers are first required to have broad undergraduate training to prepare them for advanced study. Lawyers are then required to undergo a rigorous program of graduate education in law and legal institutions. Prior to advancing to the bar exam lawyers are investigated to determine their moral character and fitness to practice. Finally, lawyers must take and pass an examination before they can practice law.

Even after new lawyers are admitted to practice, their education has just begun. The legal profession recognizes that even an undergraduate degree, a Juris Doctor degree and bar passage are not enough preparation for the practice of law. This is why the Supreme Court, the Washington Bar Association and other legal associations have established legal internship and mentoring programs. Most law firms also have formal and informal training programs which allow newly admitted lawyers to train with experienced practitioners in order to truly understand the often complex legal issues that must be addressed in the daily practice of law. In addition, lawyers must complete a minimum number of continuing education hours in order to remain qualified to practice law.

The public cannot be assured of reliable professional assistance and advice from non-lawyer legal technicians. It is simply expecting too much to believe that a person with an associate degree in paralegal studies and two or three years of experience working in a law office will be able to provide competent legal advice and services, especially in today's complex legal environment.

Lawyers take training in all of the traditional practice areas. During that training they read and discuss cases, statutes and administrative regulations in an academic environment which assures their exposure to the legal reasoning process which is the foundation for a professional practice. Legal technicians without this background and exposure to courses in real property, torts, contracts, community property, wills, tax, evidence and other semester or year-long law school courses can not hope to understand the reasoning which would form the basis for any advice to clients. They therefore will not have the background to properly identify issues which must be addressed or take appropriate action to protect the interests of their clients.

B. COMMENTS REGARDING THE PRACTICE OF FAMILY LAW

Since the POLB's original proposal to the state bar involved Family Law, some comments regarding that area of law are in order. The Family Law Section of the state bar has already responded with a comprehensive comment regarding this area of law. Those comments are well-taken. Even in many uncontested family law matters retirement plans must be addressed, parenting and child support orders must be drafted, deeds need to be drawn, judgments need to be entered and many possible legal solutions must be examined in light of the law as it then exists and as it may develop, all in the professional judgment of the practitioner. Non-lawyer

legal technicians under the proposed rule could not handle such matters without significant risk that the public would be harmed.

C. COMMENTS REGARDING THE PRACTICE OF ELDER LAW

The POLB clearly intends that non-lawyer legal technicians be licensed to practice the legal specialty of Elder Law. In its previous subcommittee reports the POLB has suggested that legal technicians would be licensed to do estate planning, draft "simple" wills, draft powers of attorney, draft community property agreements, handle guardianships, assist in adult protection actions, apply for Medicaid and perform a vast array of services currently provided by qualified Elder Law attorneys.

The Washington Chapter of the National Academy of Elder Law Attorneys consists of members who not only practice elder law, but are also especially aware of and concerned with the special issues pertaining to the practice of elder law in Washington state. Our members are very concerned with access to justice issues and have participated in many efforts to ensure reasonable access to appropriate legal advice and services. In addition, the great majority of our members provide a significant amount of pro bono and reduced fee services to the public. The following comments only scratch the surface of the numerous problems that would be caused if non-lawyer legal technicians were allowed to practice in this highly specialized area of law. Importantly, many of these comments would be equally applicable to practice areas other than Elder Law.

1. THE NATURE OF ELDER LAW

Any person or organization seeking to provide elder law services should understand the basic nature of elder law and the breadth of knowledge required in the practice of elder law.

"Elder Law" has been defined as the legal practice of counseling and representing older persons, their representatives and their families about the legal aspects of estate planning, health and long-term care planning, public benefits, surrogate decision-making, capacity, conservation, disposition and administration of older persons' estates, and the implementation of their decisions concerning such matters. Elder law requires that any practitioner give due consideration to the applicable tax consequences of the action and the need for more sophisticated tax, health care, public benefits and estate planning expertise. Persons practicing elder law must be capable of recognizing issues of concern that arise during counseling and representation of older persons, or their representatives, with respect to abuse, neglect, exploitation, insurance, housing, long-term care, employment and retirement. Such professionals must also be familiar with the resources and services available to meet the needs of older persons and must further be capable of recognizing professional conduct and ethical issues that arise during such representation.

At its core, "Elder Law" represents a constellation of unique and complex issues which must be considered any time an older person seeks legal services. Indeed, many elder law attorneys find

the broad field so complex that they limit their practice to one particular field, such as guardianship, Medicaid planning and qualification, estate planning, or planning for incapacity.

The Federal courts have found elder law and especially public entitlement planning, such as Medicaid, to be nearly incomprehensible. As Judge Barker declared in Cherry By Cherry v. Magnant, 832 F.Supp. 1271:

> The federal and state Medicaid statutes have been described as the regulatory equivalent of the "Serbonian bog." *See* John Milton, Paradise Lost, bk. 2, 1.592 ("A gulf profound, as that Serbonian bog Betwixt Damiata and Mount Casius old, Where armies whole have been sunk.") These regulations have also been characterized as "almost unintelligible to the uninitiated," *Friedman v. Berger*, 547 F.2d 724, 727 n. 7 (2nd Cir. 1976) (Friendly, J.), *cert denied*, 430 U.S. 984, 97 S.Ct. 1681, 52 L.Ed.2d 378 (1977); as an "aggravated assault on the English language, resistance [resistant] to attempts to understand it"; *Friedman v. Berger*, 409 F.Supp. 1225, 1225-26 (S.D.N.Y. 1976); and by this circuit as "labyrinthian." *Roloff v. Sullivan*, 975 F.2d 333, 340, n. 12 (7th Cir. 1992).

The difficulty that learned judges have understanding and applying the rules for this one small area of Elder Law practice should give all of us pause. The applicable tax, estate planning, guardianship rules and regulations are just as complex.

Attorneys who practice elder law have often spent many years learning and relearning their craft. Those of us who practice in this area frequently encounter lay persons who have relied on a form, a book, documents available through the internet or other sources, and have thereby caused themselves or their family terrible consequences. Allowing or certifying non-lawyers to practice Elder Law, when they have no real knowledge of the court or legal systems and lack a thorough understanding of the consequences which may be caused by documents that they draw, would only further exacerbate a growing problem.

2. ESTATE PLANNING

The POLB's Elder Law Subcommittee report suggests that non-lawyers should be able to draft wills, durable powers of attorney, community property agreements, and presumably numerous other estate planning documents. Such a position presupposes that there can be "simple" form-based solutions to the needs of many elderly persons and their families. While at first blush, such a presupposition may seem reasonable, it is, unfortunately, totally untrue. Senior citizens and their families face an array of complex legal and regulatory hurdles to accomplish any reasonable estate planning. Such persons must consider potential tax implications, planning for incapacity, adequate protection of the elder person's personal and financial status, the possible need for long-term care, Medicaid regulations, Medicare regulations, and numerous other issues. To add to this complexity, the rules and regulations change, sometimes on a monthly or even weekly basis. Untrained non-lawyer legal technicians would have little hope of understanding

the complex needs of modern senior citizens and even less hope of being able to identify and properly interpret the regulations which would apply to their "clients."

Consider first the extraordinary difficulty which is often encountered in determining who the "client" is and what the capacity of the "client" may be. Capacity issues are legion in the law and have led to innumerable will contests and other litigation. The capacity necessary to make a will is different from the capacity to make a power of attorney, and arguably different from the capacity to create a health care directive. Moreover, many, if not most, elderly persons are receiving assistance from a family member or a third party in their later years. Therefore, the issue of undue influence must always be examined and balanced against the apparent capacity of the "client."

Looking at specific documents, please consider the myth of the "simple will." While some wills are short, the planning necessary to draft an appropriate and adequate will is never simple. This is especially true for older Washington citizens with modest assets. Consider an elderly couple who own a home and have a nest egg of perhaps $100,000. A legal technician would doubtless be tempted to write a simple "I Love You" will in which each spouse leaves all of his or her assets to the surviving spouse. However, if one spouse becomes ill and enters a nursing home, the end result will likely be that all of the assets will be expended on nursing home care or to satisfy Medicaid liens, and in addition, will result in a lower quality of life for both spouses. An elder law attorney, on the other hand, can provide solutions, such as a testamentary spousal sole benefit special needs trust, consideration of any caretaker children, the potential for transfers to trusts for disabled family members, and a multitude of other potential methods by which assets can be conserved and quality of life enhanced. Such advanced planning cannot be provided through filling out "forms," and is far beyond the ability of persons who might be licensed as "legal technicians."

Durable powers of attorney are even more problematic than wills. The legislature was so concerned with the potential for abuse of powers of attorney that it imposed strict new guidelines in 2001 and created specific provisions at RCW Chapter 11.94 regarding petitions for interpretation of powers of attorney and other remedies. A legal technician could not be expected to adequately assess the effect of the new rules or the numerous potential disasters which will result if a power of attorney is not carefully drafted to include the specific provisions necessary to meet the needs of an individual client. Powers of appointment, gifting in order to qualify for Medicaid, power over community property, payment of taxes, creation of trusts, ability to make changes of beneficiary on non-probate assets, and transfers of real estate are but a few of the myriad issues that must be considered in drafting a power of attorney. All of these issues require formal legal training and expertise and sometimes consultation with experts in various fields. A mistake in a power of attorney can dissipate an estate, lead to family disputes, cause unintentional taxation, and leave a "client" much worse off than would be the case if no document had been drafted at all.

The POLB's Elder Law subcommittee also suggested that legal technicians be able to draft community property agreements. While Washington does provide for the use of community

property agreements to transfer all property to a surviving spouse, such agreements are fraught with difficulty. A "simple" community property agreement can easily result in complete loss of the estate if one spouse needs to qualify for Medicaid or other public entitlement benefits. Consideration must always be given to the family status of the "client" as well as the potential for death, dissolution of marriage or disability. These considerations are far from simple and the risks associated with any community property agreement are vast. It seems inconceivable that a non-attorney legal technician would be able to assess the specific potential legal ramifications of the provisions of a community property agreement much less draft a document which did not risk substantial harm to the client.

3. PROBATE

The POLB believes that legal technicians would be capable of "advising clients as to whether a probate is necessary," and take other actions to probate estates, petition for orders in probate cases, and other probate services.

As a first consideration, the legislature has raised the financial limit for use of an Affidavit of Successor to $100,000. Thus, if an estate otherwise subject to probate has assets of less than $100,000 (excluding life insurance and other beneficiary-designated instruments which may be far in excess of $100,000) a probate may now be avoided in many cases. Thus the need for probate in cases where the deceased was truly poor may be eliminated and the cost of any necessary legal services greatly reduced.

Furthermore, where there are significant assets, the issues regarding distribution are often complex. These issues can have both legal and relational aspects which require a significant knowledge of the law in the areas of wills, estate administration, tax, community property, and the rules contained in the Trust and Estate Dispute Resolution Act at Chapter 11.96(A) RCW.

Many of the same considerations mentioned above regarding Estate Planning apply equally to the area of probate. The initial decision as to whether or not a probate is "necessary" as well as the numerous decisions that must be made as the administration of an estate progresses are complex and can result in significant losses if not made correctly. This is simply not an area in which non-lawyer legal technicians can provide significant services without creating a potential for significant harm to the public.

4. GUARDIANSHIP

We do not understand why the Practice of Law Board believes that non-lawyers can or should practice in the area of guardianship. First, the Supreme Court has already authorized the establishment of "certified professional guardians" who receive significant training and must complete continuing education in order to remain certified. These persons are already available at a lower cost than attorneys to provide professional guardianship services. While professional

guardians can provide the on-going administration, the professional guardianship board continues to recognize the need for skilled guardianship attorneys in preparing petitions, orders and certain other legal documents in guardianship cases.

Moreover, a review of the appellate cases in Washington over the last few years indicates that litigation is growing in the guardianship area. Even the most specialized practitioners of guardianship law encounter significant challenges when dealing with this complex part of the law. All of the issues identified in the discussions of estate planning and probate above are equally applicable in the guardianship arena, and as a result the preparation and planning necessary to provide beneficial guardianship services has increased.

The guardianship statutes that are in place now reflect a studied attempt by the Washington legislature to provide for the rights of persons who may be subjected to a guardianship petition. If guardianship petitions and other guardianship documents are drafted by non-lawyers, the potential for needless or increased litigation is enormous. The statutes provide that an alleged incapacitated person has a right to counsel and the right to receive specific information regarding the pending guardianship. The notice rules in guardianship cases are exacting and precise. An inappropriately drafted petition, or worse, an unnecessary petition, will almost certainly lead to significant financial loss and disputes between family members or other interested parties.

The issues surrounding entry of a final guardianship order are just as complex as those encountered in deciding whether to go forward with a guardianship petition. The reports of the guardian ad litem (both public and private), the required medical or psychological report, the nature of the assets involved, the individual needs of the alleged incapacitated person, and any pending disputes between family members must all be accommodated. It takes a knowledgeable lawyer, and often a lawyer with special skills, to analyze the medical, social, psychological, financial and other issues and thereby draft an appropriate order granting full or limited guardianship of the person or the estate. This is not something that a non-lawyer should do or consider doing.

5. ACTIONS TO PROTECT VULNERABLE ADULTS

The Washington State Legislature has recently adopted significant changes to the Vulnerable Adult Protection Act found at RCW Chapter 74.34. The amendments include provisions which will allow Superior Court clerks and other non-lawyers to assist petitioners through the use of standardized forms which are being prepared and should be available throughout the state. Personnel in the various clerk's offices will be available to assist potential petitioners free of charge. While this will not eliminate the need for lawyers in contested cases, it appears that the legislature has already moved to provide a low-cost remedy for persons needing to file petitions in vulnerable adult cases.

D. FINAL COMMENTS

The POLB indicates that this proposal is intended, in part, to meet the needs of the underserved poor. However, the POLB's proposal says nothing about the financial status of "clients" legal technicians would work with. We believe that the efforts of this Court and the bar could better be expended on programs that already exist. For example, Columbia Legal Services and the Northwest Justice Project provide needed services and could be much better funded than they already are. In these austere financial times, other free public programs such as GAAP, the family law court facilitator program and the Public Guardian pilot project are likely to face proposals for financial cuts. In addition the public would benefit from an increase in programs which assist lawyers in providing pro-bono services, including the Northwest Justice Project's initiative to coordinate pro-bono services in rural communities. Our limited resources would be much better spent supporting these proven and essential services.

The important role of our state's law schools should not be ignored. These institutions strive to provide the finest available professional education to the dedicated men and women who aspire to a life in the law. One ought to ask what effect the proposal to license legal technicians will have on these schools and our profession in general. Why should anyone make the ever-increasing investment of time and money in law school, if he or she can practice law by becoming a "legal technician?"

One ought to also consider the effect of Proposed APR 28 on the legal profession as a whole. The proposed rule would blur the role of lawyers in the mind of the public. The legal profession exists to serve the needs of the public in a competent and professional manner; licensing non-lawyers to practice law would only subject the public to less-than-competent, non-professional practitioners, while there are many capable, highly trained new lawyers available to meet the public's need. These newer attorneys often charge fees similar to those which legal technicians propose to charge.

In any event, we believe that the proposal to certify "legal technicians," despite what may be the best of intentions, has the potential to do much more harm than good for the citizens of the State of Washington. Nevertheless, there remain many opportunities to increase access to legal services for Washington state citizens. WA NAELA would be happy to consult with the Court or any other groups, including the POLB, in order to improve services for Washington seniors.

Sincerely,

James M. Brown

JAMES M. BROWN
President, WA NAELA

cc: Chief Justice Gerry L. Alexander
Justice Tom Chambers

Justice Mary E. Fairhurst
Justice James Johnson
Justice Barbara Madsen
Justice Susan Owens
Justice Richard B. Sanders
Justice Debra L. Stephens
Ms. Camilla Faulk
Ms. Paula Littlewood. WSBA Executive Director