

GR 9 COVER SHEET

Suggested LIMITED LICENSE LEGAL TECHNICIAN RULES OF PROFESSIONAL CONDUCT (LLLT RPC)

Submitted by the Limited License Legal Technician Board

A. Name of Proponent:

Limited License Legal Technician (LLLT) Board

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C. Purpose: The primary purpose of the suggested Limited License Legal Technician Rules of Professional Conduct (LLLT RPC) is to establish the ethical conduct rules for practicing LLLTs. In July 2013, the LLLT Board convened the RPC Subcommittee to draft the LLLT RPC.

LLLT Board and RPC Subcommittee Composition

The LLLT Board (“Board”) is composed of lawyers in private practice, law school and paralegal educators, legal services providers, access to justice representatives, laypeople, and paralegal advocates. The RPC Subcommittee, chaired by LLLT Board member and past-WSBA president Ellen Dial, was composed of six Board members and three experts in legal ethics, including Douglas Ende (Chief Disciplinary Counsel of

the Washington State Bar Association’s Office of Disciplinary Counsel), Brooks Holland (Gonzaga University School of Law Professor), and Deborah Perluss (Director of Advocacy/General Counsel at Northwest Justice Project). The RPC Subcommittee and the Board had a great diversity of opinion and background, which led to rigorous discussion and well-considered decisions.

The issues that caused the most debate were the following:

- Whether LLLTs “represent” clients in the same sense that lawyers represent client under the lawyer RPC;
- The extent to which LLLTs may communicate with opposing parties and their legal representatives;
- Possible business arrangements involving LLLTs and lawyers;
- The limitations that should apply when LLLTs communicate about their services to prospective clients and in advertising generally.

The rules concerning conflicts of interest also posed a number of challenges and were exhaustively discussed, particularly in the context of LLLT-client business transactions, obtaining client consent to conflicts, and imputation of conflicts among LLLTs and lawyers practicing in the same firm.

RPC Subcommittee Process & Decision Making

The RPC Subcommittee began its work by reviewing the existing Washington Rules of Professional Conduct for lawyers (“Lawyer RPC”) to determine which lawyer rules (1) applied, (2) applied but needed modification, or (3) were missing and needed to be added. The RPC Subcommittee considered the limited role of LLLTs, specifically with respect to the prohibitions against LLLTs representing clients in proceedings,

negotiating the legal rights of clients, and communicating the positions of parties.

Throughout the drafting process, the RPC Subcommittee balanced protection of the public with the need to increase access to justice consistent with APR 28A.

In large part, the LLLT RPC mirror the Lawyer RPC with only slight modification. The RPC Subcommittee chose to follow the same numbering system as the Lawyer RPC for ease of cross-reference and to ensure established case law may be applied in the LLLT context. When a Lawyer RPC did not apply in the LLLT context, the rule was reserved.

The following describes the Board's recommendations regarding some of the key provisions with explanations of how they differ from the Lawyer RPC, if applicable.

The Fundamental Principles, Preamble, and Scope

While the LLLT RPC impart similar aspirational goals for high ethical standards, ideals of public service, and the promotion of improved access to and administration of justice, the proposed counterpart Fundamental Principles of Professional Conduct and Preamble and Scope provisions differ greatly from the Lawyer RPC given the limitations on an LLLT's scope of practice. These proposed paragraphs seek to emphasize that LLLTs are authorized to provide only limited assistance to clients and represent clients only within that limited scope. It further seeks to clarify that LLLTs do not take on the role of negotiators or advocates on their clients' behalves—roles that are engrained in the Lawyer RPC and its preliminary provisions. Finally, under proposed Comment [23], unlike the Lawyer RPC which states the rules are modeled after the American Bar Association Model Rules of Professional Conduct, the comment states that the LLLT RPC are modeled after the Lawyer RPC and that, when necessary, LLLTs should look

to the Lawyer RPC comments for guidance regarding interpretation of the rules to the extent that any LLLT rule and lawyer rule is substantially similar.

Terminology: New Provision 1.0B; Terms “Legal Practitioner” and “Representation”; Deletion of Noun “Counsel” from Rules

The Board recommends dividing Terminology 1.0 into sections A and B. Under Terminology 1.0A, the Board recommends keeping the terminology of the Lawyer RPC with the addition of LLLTs to the definitions of “firm” and “law firm” and “screened,” as it is anticipated that lawyers and LLLTs will associate with one another in firms. Under new Terminology 1.0B, the Board recommends new terms for inclusion in the LLLT RPC. Specifically, among some technical terms that mirror definitions from APR 28, the Board recommends defining two new terms: (1) “legal practitioner,” which envisions a new legal profession with different practitioners that include both lawyers and LLLTs, and (2) “represent” or “representation,” to clarify that the term “represent” when used in connection with an LLLT has a more limited meaning than in the lawyer context.

In addition, the Board recommends deleting all instances of the term “counsel” where it appears as a noun in the lawyer RPC and substituting the term in the LLLT RPC with the appropriate legal practitioner(s) to whom the rule should be applied. This eliminates the ambiguity of whether the term “counsel” references a lawyer only or both an LLLT and a lawyer. See, e.g., LLLT RPC 4.2, LLLT RPC 8.4(h).

LLLT RPC 1.5: Fee Agreements Must Be in Writing; Contingent Fees and Retainers Prohibited

The Board recommends significant changes to RPC 1.5. As proposed, the rule would require LLLTs to obtain fee agreements in writing prior to the provision of legal

services for a fee consistent with APR 28G(3). LLLT RPC 1.5 would also prohibit LLLTs from collecting contingent fees or retainers. Finally, LLLT RPC 1.5(e) prohibits a division of a fee between an LLLT and a legal practitioner who is not in the same firm as the LLLT.

LLLT RPC 1.7: Consent to Conflicts of Interest

As proposed, LLLT RPC 1.7(b) allows a LLLT to obtain a client's consent to a conflict of interest in appropriate circumstances. This is consistent to the approach of the Lawyer RPC. There was some discussion about whether LLLTs will have the training, skills, and experience to communicate adequate information and explanation about the risks of and alternatives to a conflict. It was concluded that they would, and that flatly prohibiting LLLTs from obtaining consent to conflicts would impracticably limit access to LLLT services, contrary to the access to justice purpose of APR 28. Further, authorizing LLLTs to obtain a client's informed consent will encourage them to meaningfully analyze conflicts and make appropriate disclosures to clients.

LLLT RPC 1.8: Business Transactions with Clients Prohibited

The Board recommends that proposed LLLT RPC 1.8 prohibit an LLLT from entering into a business transaction with a current client under subpart (a) because LLLTs will not have the depth and breadth of legal education necessary to accurately explain the risks and legal implications of such arrangements to their clients.

New subpart (k)(2) provides that any limitations on an LLLT's conduct shall not apply to other lawyers in the firm unless the conduct is specifically prohibited by the Lawyer RPC, meaning lawyers may enter into business transactions with clients under RPC 1.8(a) where LLLTs may not.

LLLT RPC 1.10 and Imputation of Conflicts under Rules 1.7 and 1.9 and Disqualification When LLLTs and Lawyers Are Associated in a Firm

While Rule 1.10 applies to LLLTs in the same way that it applies to lawyers under Lawyer RPC 1.10, the current rule does not anticipate a profession with additional legal practitioners associated together in a firm. Given that it is envisioned that LLLTs will work alongside lawyers in firms, considerable time was spent on assuring that the language of the rule is clear that imputation of conflicts applies to both practitioners in that context. New LLLT RPC 1.10(f) specifies that when LLLTs and lawyers are associated in a firm, any conflict of interest imputed to lawyers in the firm are imputed to LLLTs in the same way as conflicts are imputed to LLLTs under the other provisions of LLLT RPC 1.10. Further, the language of LLLT RPC 1.11(b), LLLT RPC 1.12(c), LLLT RPC 1.18(c), and LLLT RPC 6.5(a) has been revised to address conflicts of interest in situations where LLLTs and lawyers are associated in a firm.

LLLT RPC 1.14: Protective Actions by LLLTs

The RPC Subcommittee received significant input that protective actions taken on behalf of a client with diminished capacity require knowledge in areas of law that are not currently within the scope of APR 28; as such, the Subcommittee debated the types of protective actions an LLLT should be able to take on behalf of a client. Where some felt that LLLTs should be able to take any protective action otherwise permitted by law, others felt strongly LLLTs should not be encouraged by the language of the rule to deal with such matters because the appropriate protective action would normally involve areas of law that are outside of the authorized scope of practice, e.g. an LLLT licensed in family law filing a petition for a vulnerable adult protection order. Recognizing that

certain protective actions may be sought by laypersons, but not wanting to encourage LLLTs to take actions that might exceed the scope of their authorized practice, the Board recommends a rule that omits all reference to specific protective actions under LLLT RPC 1.14(b) and includes a comment that LLLTs proceed cautiously when acting independently under the rule, so as not to encourage LLLTs to go beyond their limited practice authority.

LLLT RPC 1.15A(h)(9): LLLT Signing Authority on Trust Accounts When Associated in a Firm with Lawyers

The Board proposes RPC 1.15A(h)(9) to include a requirement that when an LLLT and lawyer are associated in a practice together, an LLLT may be a signatory on the firm trust account only if a firm lawyer signature is also required for any withdrawals, transfers, or deposits on the account. The Board proposes this requirement to ensure that lawyers maintain ultimate responsibility for funds belonging to the lawyers' clients.

Title 3: LLLT Duties When Assisting Clients Advocating on Their Own Behalves

Lawyer RPC Title 3 is intended to address issues related to lawyers acting as counsel of record in a case. Applying the same language in Title 3 of the Lawyer RPC presents challenges in the context of LLLTs given their limitations with respect to advocacy and appearing in court. The Board thus recommends the consolidation of all of Title 3 into one rule, LLLT RPC 3.1, to more appropriately address the special duties and obligations of LLLTs when assisting clients who are acting in advocacy roles on their own behalves.

Title 4 and LLLT Communications with Lawyers and Other LLLTs

Title 4 presented challenges regarding permissible communications between

LLLTs and parties and their legal representatives. The proposed rules provide that, like lawyers, LLLTs must not communicate with a person represented by a lawyer regarding the subject matter of that representation. LLLT RPC 4.2 goes further than the Lawyer RPC by making this a strict prohibition, i.e., such communication cannot occur even with the consent of the person's lawyer. APR 28H(6) prohibits LLLTs from negotiating clients' legal rights and communicating the position of parties. The Board concluded that there would be no reason for an LLLT to communicate with a represented person that would not put the LLLT at risk of violating the limitations imposed under APR 28H(6). For the same reason, proposed LLLT RPC 4.3(b) would prohibit an LLLT from communicating with an unrepresented party.

The more difficult issue for the Board was whether LLLTs should be able to communicate with lawyers and LLLTs who represent opposing parties. The Board initially pursued a variation of Title 4 that would include strict prohibitions against LLLTs having any contact with representatives of opposing parties, including lawyers and LLLTs. At the time, the RPC Subcommittee and the Board felt such communications should be prohibited to prevent LLLTs from entering into situations where they might unintentionally engage in prohibited conduct. When the Board met with the Supreme Court in June 2014, it explained this position and said the rules would include an absolute prohibition against such communications. However, in finalizing the rules, the RPC Subcommittee and Board have concluded that such a prohibition is unworkable, would create unnecessary difficulties in permitting both LLLTs and lawyers to effectively represent their clients, and would likely impede access to justice in many instances. After considerable further discussion, the Board recommends a rule that permits LLLTs

to communicate with opposing lawyers and LLLTs within the bounds of their limited scope of practice. This would leave to an individual legal practitioner the obligation to determine the line of demarcation between a permissible communication and a prohibited negotiation or communication of a party's position.

The Board proposes to provide guidance in the comments to help LLLTs identify and ethically navigate situations where communications with another LLLT or lawyer create a risk of becoming a negotiation or communication of a party's position. The proposed comments clarify that LLLTs should not exceed the scope of their practice authority under APR 28H(6) when communicating with lawyers and LLLTs.

In light of APR 28's characterization of an LLLT's client as one who is acting "pro se, LLLT RPC Title 4 includes other deviations from the lawyer rules that are intended to clarify that the client of an LLLT is not represented by a lawyer for the purposes of Title 4. Specifically, the titles to RPC 4.2 and RPC 4.3 have been changed to eliminate the term "counsel" and to remove the term "unrepresented" as both terms create ambiguity when LLLTs represent an opposing party in a matter.

LLLT RPC 5.5 and 8.5: LLLTs and Multijurisdictional Practice

The Board recommends that all provisions regarding multijurisdictional practice be removed, as no other jurisdictions currently license LLLTs. LLLT RPC 5.5 and 8.5.

NEW LLLT RPC 5.9: LLLT Joint Ownership of Law Firms with Lawyers

The LLLT Board debated appropriate business arrangements LLLTs should be allowed to enter into, specifically with respect to whether LLLTs should be permitted to co-own firms with non-lawyers and lawyers. The RPC Subcommittee spent three months researching and debating the issue and presenting their findings to the LLLT

Board. They further consulted with expert and Law Professor at Michigan State University Renee Knake regarding the future of the legal profession and current business structures that challenge the traditional structure of only lawyers owning law firms. While the enactment of APR 28 raised the question of whether nonlawyers should be generally authorized to participate in the ownership of law firms and share fees with lawyers, the Board concluded that the launch of the LLLT program was not the occasion to resolve that momentous question, particularly since LLLTs will be licensed and regulated by the Court, the same authority that licenses and regulates lawyers.

With respect to lawyer and LLLT co-ownership of firms, the discussion revolved around how to limit or eliminate the possibility of undue influence on a lawyer's professional judgment, while increasing access to justice and ensuring the success of this new profession. After much discussion, the LLLT Board recommends the adoption of LLLT RPC 5.9, which would permit LLLT co-ownership of firms with lawyers with very specific restrictions against an LLLT (1) directing a lawyer's professional judgment, (2) having direct supervisory authority over a lawyer, and (3) possessing a majority interest or exercising controlling managerial authority. With new proposed LLLT RPC 5.9, the Board further recommends a new subpart (d) to LLLT RPC 5.1, which would impose a duty on managing LLLTs to ensure that the conduct of lawyers in the firm comports with the Lawyer RPC.

New LLLT RPC 5.9 with its restrictions reflects the Board's desire to protect the public by ensuring lawyer independent judgment is not compromised, while also ensuring that LLLTs are provided every opportunity to build viable businesses. This new proposed rule seeks to recognize, encourage, and legitimize the association and

interplay of LLLTs and lawyers together in the marketplace and in the profession.

LLLT RPC 7.4: Communication of Fields of Practice and Specialization

The Board recommends that LLLT RPC 7.4 reflect an LLLT's duty to communicate that he or she has a limited license to practice law. Deviations from the lawyer RPC are for that purpose.

LLLT RPC 7.5: Firm Names and Letterhead

The Board recommends that LLLT RPC 7.5(a) require that LLLTs in private practice use the term "Legal Technician" in their firm name, if no lawyers are in the firm. The Board believes this will reduce the risk of misleading the public about the breadth and scope of services provided by a firm with no lawyers. The Board also discussed whether to prohibit LLLTs from using the term "law firm" in a firm name when no lawyers practice in the firm. Concerns were expressed that persons not familiar with our legal system might be misled by a legal practitioner who is not a lawyer using the words "law firm" to describe his or her practice. Ultimately, the Board felt that the required disclosures LLLTs must make in their written contracts with clients, in advertising, and in their firm names sufficiently put clients on notice of the limited scope of LLLT practice. See APR 28G(3); APR 28H(4); proposed LLLT RPC 7.4(a); proposed RPC 7.5(a). Additionally, it is important that this new profession be recognized as the practice of law, even if within a limited scope. Prohibiting the use of the term "law firm" would undermine the goals of APR 28.

LLLT RPC 8.4: Misconduct Involving Lawyers and Violations of APR 28

The Board recommends two new provisions to RPC 8.4 that would provide that LLLTs not knowingly assist lawyers in violating the Lawyer RPC and to ensure that

LLLTs who violate or attempt to violate APR 28F-H or Appendix APR 28 Regulation 2 will be subject to discipline under the LLLT RPC. LLLT RPC 8.4(f)(2) and LLLT RPC 8.4(o).

Comments

The Board proposes comments to each of the rules to identify whether the rule (1) applies analogously to the Lawyer RPC, (2) does not apply in the LLLT context and is thus reserved, or (3) required modification from the Lawyer RPC and why. Also, where necessary, the LLLT Board drafted proposed comments to provide further guidance regarding the application of the rules.

Conclusion

The LLLT Board voted unanimously to approve the suggested LLLT RPC for submission to the Supreme Court. The LLLT Board believes it is important that these suggested LLLT RPC be adopted and effective as soon as possible. Notably, APR 28C(2)(c) requires the LLLT examination to cover the ethics rules for LLLTs. The first LLLT licensing exam will be held in March 2015; as such, applicants will need sufficient lead time to study for the professional responsibility portion of the exam. Further, educators training future LLLTs are required to teach the LLLT RPC as part of the core and practice area education. Educators must teach these important ethics rules in a “proposed” state until the Court takes action.

D. Hearing: A hearing is not requested.

E. Expedited Consideration: Expedited consideration is requested in order to prevent delaying implementation of the LLLT program. The LLLT RPC need to be approved in order for the first licensing examination to take place in early 2015. The

LLLT program's goal is to provide much needed access to justice. Therefore, delay of this program also causes continued delay in providing relief to those in need of LLLT services.

F. Supporting Materials: In addition to the submission of the suggested LLLT RPC, the LLLT Board submits for the Court's information a redline of the Lawyer RPC reflecting the modifications made to create the LLLT RPC. For ease of reading, the word lawyer has been changed to LLLT without redlines.