



WASHINGTON STATE BAR ASSOCIATION

## Real Property, Probate and Trust Section

March 6, 2017

The Honorable Mary E. Fairhurst, Chief Justice  
The Honorable Charles W. Johnson, Associate Chief Justice  
The Honorable Barbara A. Madsen, Justice  
The Honorable Susan Owens, Justice  
The Honorable Debra L. Stephens, Justice  
The Honorable Charles K. Wiggins, Justice  
The Honorable Steven C. Gonzalez, Justice  
The Honorable Sheryl Gordon McCloud, Justice  
The Honorable Mary I. Yu, Justice  
P.O. Box 40929  
Olympia, WA 98504-0929

Re: Expansion of Services by LLLTs

Dear Chief Justice Fairhurst, Associate Chief Justice Johnson, Justice Madsen, Justice Owens, Justice Stephens, Justice Wiggins, Justice Gonzalez, Justice McCloud and Justice Yu:

The undersigned are the Chair and Chair-Elect of the Real Property Probate and Trust Section of the Washington State Bar Association ("RPPT"). We understand you have requested comments on the proposed expansion of the Limited License Legal Technician ("LLLT") program into the areas of Estate Planning and Health Law. The Executive Committee of RPPT has received a tremendous volume of comments on this proposal from members of RPPT. We write to share those comments and offer suggestions for revisions to the proposal.

RPPT is the largest section of the Washington State Bar Association and is comprised of approximately 2,500 attorneys across the State of Washington. Members of RPPT practice in a variety of settings spanning everything from solo practice to large multi-national firms and in locations from rural to urban. RPPT members practice in many of the areas impacted by the LLLT proposal including estate planning, probate, guardianships, community property, government benefits, vulnerable adult proceedings and transfers of real property. While health insurance disputes and access to charity care are also part of the LLLT expansion proposal, these areas are outside the scope of practice for most RPPT members.

RPPT members recognize there are significant unmet legal needs in our state and that it is the obligation of the legal profession to attempt to serve those needs. However, members of RPPT do not believe the current proposal is an effective tool to meet those needs for the following reasons:

- 1) Surveys of legal needs in Washington all reveal that estate planning is not an area of greatest need. The proposal couples an area of greatest need (health insurance and access to adequate and affordable health care) with one of the areas of lowest need (estate planning and probate), resulting in a proposal that is too broad and not tailored to meet the needs of Washington residents.
- 2) Stakeholders and subject matter experts, including RPPT, were not included in the development of the LLLT Estate Planning and Health Law.

3) The scope of suggested practice areas is too broad and complex to be performed without supervision given the educational and training requirements of LLLTs. Unsupervised practice in these complex areas could result in significant harm to the public. Narrowing the focus of the proposal to the area of greatest need, health care, will provide better trained LLLTs in that specific practice area.

4) Many attorneys have made a significant financial commitment to become licensed to practice law, including taking on student debt. A significant number of RPPT members have expressed concerns about the economic impact on those licensed to practice law in Washington.

#### The Majority of the Proposal Not Targeted to Greatest Need.

The 2015 Washington State Civil Legal Needs Study Update highlights the prevalence of legal problems for low income Washingtonians as of 2014. It provides in part:

**“[H]ealth care and consumer/finance represent the most frequent areas where people experience the greatest number of problems, with employment closing out the top three.**

**“While access to necessary and appropriate health care services is an important problem, issues relating to medical care cost recovery – medical bills and medical debt and related debt collection – pose even more common problems.**

...

**“Problems involving consumer, debt collection, access to credit and financial services rank No. 2 in the list of most common problems reported by Washington’s low-income households.”<sup>1</sup>**

While health care is the area of greatest need, the LLLT proposal focuses mostly on estate planning and probate. Health care and consumer/finance were ranked Nos. 1 and 2 as far as need. Employment problems were ranked No. 3; municipal services/utilities and law enforcement were closely behind and ranked No. 4. Each of these areas was cited with a prevalence of 33% or greater as a legal problem. Washington residents also reported experiencing legal needs in access to government assistance and public benefits, housing including landlord-tenant, and family law matters, with a prevalence of 20-30% in each category. Estate planning, on the other hand, was identified as a legal need in just 17.2% of cases.<sup>2</sup>

The LLLT program is a financial and human capital intensive effort since it relies heavily on volunteers and is subsidized by the licensing fees attorneys pay to the Washington State Bar Association. An expansion of the program into two practice areas, and arguably three practice areas if one includes elder law, will only increase the financial and human capital needs. The members of RPPT believe that if such an investment is to be made it should be made in one of the areas of greatest need, rather than estate planning. Accordingly, the proposal should focus only on the health care related legal problems that are cited as the most prevalent concern.

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<sup>1</sup> 2015 Civil Legal Needs Study Update, pages 6-7

<sup>2</sup> Id., page 7

### Stakeholders Not Involved in Development.

Another significant concern for RPPT members is that RPPT was not invited to participate in the development of the LLLT estate planning and health law program. Ellen Dial, a member of the LLLT board, attended a meeting of the RPPT executive committee in September 2014. This meeting occurred while the LLLT program was in its infancy and development stages. She provided an overview of the LLLT program and asked RPPT to consider if licensing LLLTs to practice in estate planning and probate was appropriate and if so, what would be the recommended scope of practice. The idea was discussed by the RPPT executive committee over the next 4 months and in January 2015 we informed Ms. Dial that RPPT could see a role for LLLTs in estate planning, but not probate matters, given the level of complexity involved in probates and the amount of training that would be necessary. Within estate planning, the RPPT executive committee opined that it may be appropriate for LLLTs to prepare powers of attorney and health care directives (using standardized forms) and simple wills not involving trusts, issues with real property, or any complex community property issues. RPPT's input was only a few sentences in one email and provided few details. RPPT offered to answer any questions or provide further feedback but was never contacted and no further input or involvement was solicited. RPPT learned of the proposed expansion into estate planning and health law via the LLLT board's proposal at a WSBA Board of Governors meeting a few months ago.

Given that RPPT members are the subject matter experts in this area of legal practice, had we been asked we could have provided constructive feedback during the development of the program. Because we only now have the opportunity to comment, valuable volunteer time and effort may have been wasted.

### Scope of Program Too Broad Given Training Requirements

RPPT members are concerned the proposed scope of areas of practice for LLLTs is far too broad given the education and training requirements for LLLTs. RPPT has very significant concerns that unsupervised work in these areas by undertrained professionals could harm the public. As stated above, the proposal combines at least two practice areas. An estate planning and probate practice involves, of course, estate planning and probate proceedings, but also includes areas of community property, revocable and irrevocable trusts, transfers of real and personal property and importantly estate and income taxes. While the proposal seeks to exempt taxable estates, the mere identification of a taxable estate is not simple as it involves an in-depth understanding of trusts and federal and state estate tax laws. Many estate planning and probate attorneys invest an additional year in full time legal education to obtain an LLM in tax so they feel competent to practice in this complex area.

A health care practice involves issues of access to medical services, health insurance, government benefits, and complex areas of state and federal regulations. Most estate planning and probate attorneys elect not to practice in the areas of health insurance and government benefits because including both disciplines in a practice is too broad for many lawyers, even with LLM degrees.

RPPT recommends that the current proposal be scaled back to remove the estate planning, probate and elder law components and, focus on the area with the greatest need – health care and in particular, access to adequate and affordable health care.

### If the Supreme Court Elects to Proceed with a LLLT in Probate and Estate, the Proposal Should be Narrowed.

Below is a reproduction of the table of practice areas from Steve Crossland's January 9, 2017 memo to the WSBA President, President-Elect and Board of Governors with RPPT's suggested revisions to the areas of practice.

The revisions are based on the collective experience of RPPT members about the hidden complexities in issues that on the surface seem straightforward but in practice can become a hornet's nest of legal issues. These hidden complex issues require significantly more course work and practical experience than is required of LLLTs to be able to adequately address them without supervision. This is even more important in the area of estate planning and probate because any mistakes made by a LLLT (or a lawyer for that matter) may not be discovered until years down the road when the client dies or an asset needs to be transferred. Finally, since much of the proposed scope of practice happens extra-judicially, the public cannot rely on an opposing party or a judge or court commissioner to review the work of the LLLT or alert the client to any potential mistakes.

RPPT members request that if the LLLT program is expanded into the areas of estate planning and health law that LLLTs be permitted to practice only in a scope consistent with the comments below.

Scope	Permitted Actions
Estate Planning on Non-Taxable Estates	<ul style="list-style-type: none"> <li>• Drafting wills based on LLLT Board approved forms (<b>RPPT comment:</b> <i>perhaps</i> so long as the client is single or married only once, all bequests are outright or to a Uniform Transfer to Minors Act custodial account for a minor, no children from outside the marriage, and an asset cap be set at a figure well below one-half of the personal exemption from the Washington Estate and Transfer Tax (e.g. below \$1,064,500 in 2017))</li> <li>• <del>Transfer on death deed</del></li> <li>• Designation of beneficiaries on non-probate assets (<b>RPPT comment:</b> <i>perhaps</i>, so long as passing to surviving spouse, other adults, Uniform Transfer to Minors Act custodial accounts for minors or qualified charities)</li> <li>• <del>Creation of community property agreements based on LLLT Board approved forms</del></li> <li>• <del>Revocation of community property agreements</del></li> <li>• Healthcare directives</li> </ul>
Probate on non-taxable estates	<ul style="list-style-type: none"> <li>• Completion of small estate affidavits</li> <li>• <del>Completion of LLLT Board approved forms</del></li> <li>• <del>Presentation of agreed or uncontested orders</del></li> <li>• Completing uniform transfer to minor act provisions</li> <li>• Completion of affidavit of surviving spouse</li> </ul>
Power of Attorney	<ul style="list-style-type: none"> <li>• Limited &amp; durable powers of attorney including for health care and minor children (<b>RPPT comment:</b> using LLLT Board approved forms)</li> <li>• Revocation of powers of attorney</li> </ul>
Guardianships	<ul style="list-style-type: none"> <li>• Completion of LLLT Board approved forms in uncontested guardianships (<b>RPPT comment:</b> suggest limiting to limited guardianships or guardianships involving estates of under \$500,000)</li> <li>• Presentation of agreed or uncontested orders (<b>RPPT comment:</b> if agreed order relates to a guardianship that falls within the limited scope suggested above)</li> <li>• <del>Transition planning for disabled minors</del></li> </ul>

Vulnerable Adult Protection Orders (VAPO)	<ul style="list-style-type: none"> <li>• Preparation of LLLT Board approved forms</li> <li>• Presentation and assistance at initial hearing for temporary order</li> </ul>
Government benefits	<ul style="list-style-type: none"> <li>• Representation in administrative hearings (where not prohibited by agency rules and regulations)</li> <li>• <del>Negotiation and document preparation for applications, denials, disputes and overpayments</del> for social security benefits, Medicare, Medicaid, home health care, long term care and other government benefit programs</li> <li>• Assistance with total and permanent disability discharge for student loan debts</li> </ul>
Health insurance benefits	<ul style="list-style-type: none"> <li>• Advice and assistance with health insurance disputes, including negotiations and writing appeal letters</li> <li>• Assistance with Charity Care applications and denials (<b>RPPT Comment:</b> these areas are outside the expertise of RPPT so we are unable to offer commentary as to the appropriateness of LLLTs practicing in this area)</li> </ul>

### Economic Impact.

Members of RPPT are sympathetic to the residents of Washington who are unable to access or afford an attorney when they need one. RPPT members are also (increasingly) burdened by large amounts of student debt, competition from other attorneys and, particularly in the urban areas, the increasing cost of operating a legal practice. Many members of RPPT have expressed that they currently operate their legal practices on very thin margins, and if they were to lose a portion of their revenue to LLLTs licensed to practice in estate planning and probate, as the LLLT board has proposed, they would likely no longer be able to practice law in the communities in which they currently practice. A loss of practicing attorneys could further exacerbate the access to justice problem.

A significant number of RPPT members have also expressed a deep concern with the LLLT program being subsidized by the license fees collected from attorneys. They do not object to license fees being used to improve access to justice, but do object to them being used for this particular proposal. As representatives of RPPT members, we wanted to share this concern with you.

### Conclusion

For the foregoing reasons, we respectfully submit to the Court that if it wishes to expand the practice areas authorized under APR 28, that the expansion be targeted to health care only.

If the Court wishes to proceed with the expansion into estate planning and probate as well, we request that the scope of practice be tailored to be consistent with the education and training requirements for LLLTs so that they can effectively provide unsupervised representation in these areas.

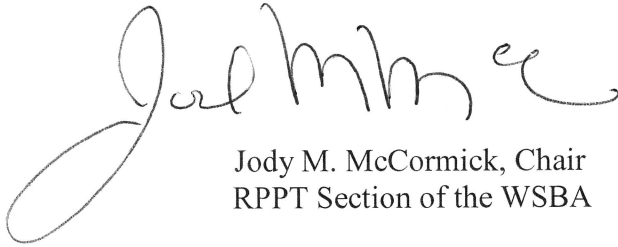
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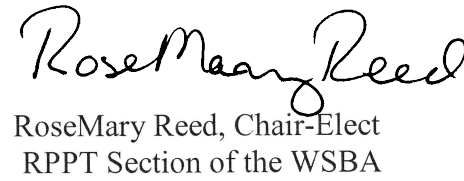
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We thank you for your consideration of the opinions and concerns of the members of RPPT.

Very truly yours,



Jody M. McCormick, Chair  
RPPT Section of the WSBA



RoseMary Reed, Chair-Elect  
RPPT Section of the WSBA

cc: Stephen Crossland, LLLT Board, via email