Comments of
HALT—*An Organization of Americans for Legal Reform*
Submitted to the Utah Supreme Court and Utah Judicial Council
Regarding Proposed Rule LDD 6.1

HALT—*An Organization of Americans for Legal Reform* hereby submits comments regarding proposed rule LDD 6.1. HALT commends the Utah Supreme Court and the Utah Judicial Council for showing a commitment to expanding access to a range of legal services for the people of Utah through its proposed definition of the practice of law.

However, HALT respectfully suggests slight modifications of the proposed definition of the practice of law as laid out in proposed rule LDD 6.1, to make it even less restrictive. An overly broad definition of the practice of law would curb consumer access to a diverse marketplace of service providers and force every consumer with a legal problem—no matter how simple—to hire a lawyer. HALT urges the court to craft a simple, narrow definition of the practice of law that goes even further toward protecting access to justice.

HALT offers to the court its own simple model definition of the practice of law, which says that the unauthorized practice of law means saying you are a lawyer when you are not. This concise definition reflects the defining characteristic of the practice of law: the establishment of an attorney-client relationship. It protects the public against fraudulent service providers holding themselves out to be something they are not, while refusing to proscribe consumer access to legitimate nonlawyer service providers.

Finally, HALT urges the court to add to the proposed rule a provision that lays out the conditions for prosecuting violations of this rule to ensure the rule is used as a measure of consumer protection rather than a tool of anticompetitive practices. HALT suggests the court amend the proposed rule to include a provision that requires a consumer complaint to initiate prosecution for the unauthorized practice of law.

According to the American Bar Association, each year, 38 million low- and moderate-income Americans are shut out of the legal system simply because they cannot afford to hire a lawyer. Part of the solution to this crisis in access lies in expanding the availability of less expensive legal services provided by nonlawyers.

Due to the need for greater availability of reasonably-priced legal services, a definition of the practice of law should be as narrow as possible, allowing competent nonlawyers to provide necessary services at an affordable price. Utah's

proposed definition of the practice of law, as laid out in subsection (b) of proposed rule LDD 6.1, on its face, is overly expansive and curbs consumer choice.

The proposed rule defines the practice of law as "the representation of the interests of another person by informing, counseling, advising, assisting, or advocating for that person through application of the law and associated legal principles to that person's facts and circumstances." Although later subsections of the rule carve out exceptions to the definition, the definition itself is sweeping.

Consumers who need access to the system have legal needs that exist along a continuum from simple matters to complex ones. These people therefore need access to a continuum of legal services, including traditional representation by a lawyer, nontraditional alternatives to lawyer representation, easier self-representation, and various combinations of these. The proposed definition, as laid out in the proposed rule's subsection (b), leaves consumers with decidedly few options, effectively blocking access to any service that exists between the two extremes of the continuum: full representation and self-representation.

HALT commends the court for realizing that the proposed definition, as it is defined in subsection (b), would deny legal consumers full access to justice in Utah. By following the definition of the practice of law with a number of exceptions to the definition in the proposed rule's subsection (c), the proposed rule reflects a realization that full access to the legal system is only possible when consumers have a choice among diverse service providers. Many of these exceptions reflect a restatement of already existing First Amendment rights (subsections (c)(1), (c)(2) and (c)(13)) and statutory rights (subsections (c)(8) and (c)(11)).

The proposed rule also carves out exceptions under subsection (c) that guarantee a consumer's access to dispute resolution channels that bypass the court system altogether. An obvious advantage of these channels is that they do not require parties to a dispute to pay expensive lawyer fees or face complex proceedings within the legal system. Furthermore, in cases like labor negotiations, arbitrations or conciliations, someone closely affiliated with the substance of the issue would be more qualified than most members of the state bar who may understand procedure, but not the actual issue in question. These exceptions, which HALT supports, include:

- allowing representation in mediation proceedings (subsection (c)(7));

- allowing service, in a neutral capacity, as a mediator, arbitrator or conciliator (subsection (c)(9)); and

- allowing participation in labor negotiations, arbitrations or conciliations (subsection (c)(10)).

The remaining exceptions in the proposed rule's subsection (c), like those listed above, display a commitment to protecting the rights of Utah's legal consumers. Unfortunately, most of the remaining exceptions made in subsection (c) do not go far enough. These clauses include restrictions that preclude the clauses from meaningfully protecting a consumer's access to a range of legal service providers. These exceptions include:

- "Providing assistance without compensation to another person to complete forms provided by a court for protection from harassment or domestic violence or abuse." (subsection (c)(3))

This clause is correct to assume that the completion of court forms, which are often complex and difficult to understand, sometimes requires assistance. However, the proposed rule offers no compelling reason for limiting this clause's application to these types of court forms alone.

HALT recommends the court broaden subsection (c)(3) by extending it to *all* types of court forms. This would allow court clerks, lawyers working *pro bono* and other knowledgeable individuals to assist and answer questions regarding the completion of all types of court forms.

- "Assisting one's minor child or ward in a juvenile court proceeding, subject to court approval." (subsection (c)(4))

This subsection once again acknowledges that the court system can be difficult to navigate for certain individuals—in this case, juveniles. However, numerous other groups of people may require assistance with court proceedings. Consider an adult child who seeks to assist his or her elderly parent with a legal matter. Similarly, consider a person with limited English skills who seeks the help of his or her fluent child. Surely the court agrees that these situations should also be exempted from prosecution for the unauthorized practice of law. HALT urges the court to revise subsection (c)(4) to make it more inclusive.

Furthermore, HALT recommends that "court approval" in this case be the default. That is, unless a court specifically finds a person unfit to assist an individual in need (a minor child or elderly parent), this should be permitted. This would eliminate the possibility of intimidating and time-consuming court approval proceedings.

- "Representing without compensation a natural person or representing a legal entity as an employee representative in small claims court, subject to court approval." (subsection (c)(5))

HALT fully supports the aim of the exception laid out by subsection (c)(5). HALT has long advocated for reform of small claims courts—one of the only places in the legal system that people can resolve disputes simply, quickly and without a lawyer. Allowing for lay representation is an excellent step toward increasing the user-friendliness of Utah's small claims courts. HALT does recommend, however, that, as with subsection (c)(4), "court approval" be the default.

- "Representing without compensation a natural person or representing a legal entity as an employee representative in an arbitration proceeding, where the amount in controversy does not exceed the jurisdictional limit of small claims court as set by the Utah legislature." (subsection (c)(6))

While HALT supports the allowance of nonlawyer representation in arbitration proceedings, the proposed rule offers no compelling reason for placing a dollar limit on this practice. First, in subsection (c)(7) of the proposed rule, the court does not attach a dollar limit provision to the allowance of nonlawyer representation in mediation proceedings. HALT does not see why this logic would not also be extended to arbitration hearings.

Furthermore, the dollar limit jurisdiction of small claims courts, as set by the Utah legislature, is $7,500. This limit, although recently elevated from $5,000, continues to be prohibitively low, excluding many easily-resolvable, everyday disputes from small claims courts. Subsection (c)(6) of the proposed rule would apply that same prohibitive limit to arbitration proceedings using lay representation.

- "Advising or preparing documents for others by persons whose occupations (i) involve applications of one or more areas of the law and (ii) are regulated or subject to professional oversight by an administrative agency of the State of Utah or by a nationally recognized professional licensing or accreditation organization." (subsection (c)(12))

This clause represents an insightful recognition that document preparation and advice by qualified nonlawyers are valuable services. Indeed, a real estate professional with decades of experience in conducting real estate closings—which essentially involves "point and sign" services—would be much more qualified than a recent law school graduate with no experience in this area of law.

HALT is concerned, however, that as the rule would be applied, it would continue to block consumer access to a number of qualified service providers. As written in the comments to the proposed rule, "Subparagraph (c)(12) is intended to include the advice and document preparation rendered by certified public accountants, alternative dispute resolution practitioners, marriage and family therapists, real estate agents and brokers, securities agents an brokers, estate and financial planners and advisors."

HALT hopes that subsection (c)(12) is not exclusive to the providers listed here. For instance, it is unclear as to whether the rule exempts independent paralegals and legal document preparation services, both of which are industries that lack a formal regulatory body in Utah, but that nonetheless provide critical services at affordable costs.

We urge Utah to follow the model of Arizona, a state that allows, certifies and regulates its thriving independent paralegal industry. Document preparers and independent paralegals provide affordable access to the legal system in matters that are simple enough not to require an attorney and for which the average consumer cannot afford counsel. Fortunately, subsection (c)(12) of the proposed rule creates the opportunity for Utah to create a certification and regulation procedure for independent paralegals, which would ensure that the definition of the practice of law would not block access to these valuable service providers.

While subsection (c) of the proposed rule, with its list of exceptions, represents a substantial stride toward expanding consumer choice among service providers, it does not go far enough toward fully protecting consumer access to a variety of legal service providers. Even with subsection (c)'s exceptions, the restrictions placed on many of these clauses prevent them from actually protecting consumer choice. Furthermore, the proposed rule has striking omissions, such as a number of simple legal tasks that can be adequately handled by nonlawyers, like simple wills and basic consumer contracts.

While HALT commends the court for its attempt to create a definition of the practice of law that includes exceptions for all legitimate legal services, it is unlikely that any list of exceptions could ever cover such service providers. As the Advisory Committee on the Rules of Professional Conduct warned in its Report on the Definition of "The Practice of Law," the list of exceptions is "lengthy and a little unwieldy" and "subject to changes in licensure."

The advisory committee perceptively reported that "today's society demands (and reasonably so) that a number of areas of the practice of law may be undertaken by persons who are not lawyers." Unfortunately, instead of crafting a narrow

definition of the practice of law that acknowledged this principle, the task force tried to accommodate its broad definition with a long list of exceptions.

Any list of exceptions, however, could never encompass every service that could reasonably and competently be rendered by a nonlawyer. More importantly, it deprives consumers of their right to choose what type of service best fits their needs.

Utah House Bill 349, the law that would have defined the practice of law, clearly recognized the danger of a broad definition of the practice of law. That law broadly interpreted the practice of law to mean "appearing as an advocate in any criminal proceeding or before any court of record in this state in a representative capacity on behalf of another person." The law went on to say that "only persons who have been admitted ... to practice law may practice or hold themselves out as licensed to practice law in this state."

H.B. 349 closely mirrors HALT's model definition of the practice of law, a single sentence that would protect consumers against fraudulent practitioners while also protecting consumer choice:

> "The unauthorized practice of law is the act of falsely claiming to be a lawyer."

The defining characteristic of the practice of law is the establishment of an attorney-client relationship. The definition of the practice of law should reflect this core value. HALT's model definition protects the public against the only thing that a nonlawyer could not possibly do—hold the title of "lawyer" and thus hold oneself out as offering an attorney-client relationship.

HALT urges the court to modify proposed rule LDD 6.1 to more closely resemble the breadth and unrestrictiveness of H.B. 349 and HALT's model definition.

In addition to its troublesome aspects that threaten to limit consumer access to affordable and nontraditional service providers, proposed rule LDD 6.1 also lacks clear guidance on *who* can bring a complaint regarding the violation of the rule.

In a national study, Stanford University legal historian Deborah Rhode found that only two percent of complaints against nonlawyer practice involved any claim of injury. The vast majority of complaints are brought by competing lawyers. This raises concern that the proposed rule may be used as a mechanism for stifling competition, rather than as a measure for consumer protection.

To address this concern, HALT recommends that the court amend the rule to include the following provision:

> "No civil or criminal action shall be taken against a person for unauthorized practice of law without a consumer complaint against that person."

Adopting this provision would provide assurance that Utah's practice of law rules would be used only to protect consumers, not to shield lawyers' business interests.

We urge the Utah Supreme Court to consider HALT's simple model definition, either as a replacement for proposed rule LDD 6.1 or as guidance for narrowing its own definition. HALT also urges the court to supplement rule LDD 6.1 with a provision outlining the conditions under which the unauthorized practice of law may be prosecuted to ensure the rule is not misused for lawyer protectionism. With these vital modifications, Utah can shape a rule that not only protects consumers from unqualified or fraudulent service providers, but also protects consumer access to a complete continuum of legal services.

Respectfully Submitted:

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