

May 25, 2005

**COMMENTS FROM
HALT – AN ORGANIZATION OF AMERICANS FOR LEGAL REFORM
RE: REPORT OF THE MASSACHUSETTS BAR ASSOCIATION
TASK FORCE ON LAWYER DISCIPLINE**

Pursuant to a request from the Massachusetts Bar Association, *HALT – An Organization of Americans for Legal Reform* hereby submits comments regarding the Task Force on Lawyer Discipline's recommendations to the Massachusetts Bar Association.

Founded in 1978, HALT is a nonprofit public interest group dedicated to increasing access and accountability in the civil justice system. HALT's Lawyer Accountability Project works to make lawyers more responsive to the needs of legal consumers and to empower legal consumers to protect themselves from negligent, unscrupulous and incompetent attorneys. Through our Report Cards, appellate litigation, media campaigns, legislative work, white paper releases and grassroots lobbying, HALT has been on the forefront of fights to improve systems in place to weed out unethical lawyers and to provide meaningful recourse to victimized legal consumers.

Most recently, HALT provided input to officials in Pennsylvania, New York, New Jersey, New Hampshire, the District of Columbia, and Washington State, as they considered reforms for their respective systems of attorney discipline. In keeping with our recommendations, we have seen a rise in nonlawyer participation on hearing panels, the abolition of disciplinary "gag rules" and increased satisfaction from client populations in those jurisdictions.

We appreciate the Massachusetts Bar Association's appointment of a committee to review its system of attorney discipline. We are pleased that the Task Force has, in many respects, proposed thoughtful solutions to repair some of the problems plaguing the disciplinary body.

Specifically, we strongly support the Task Force's recommendation to implement meaningful time standards for processing lawyer discipline cases. We do not, however, believe that the 18-month time standards suggested by the Task Force represent real improvement. To add teeth to the Task Force's aspirational call for time standards and to address the immediate needs of a backlogged system, we are proposing a 9-month time table for disposing of disciplinary matters. Such standards will go far to jettison the delay that has long plagued Massachusetts' attorney discipline system.

We believe, however, that five of the Task Force's proposals present potential setbacks for the Department. First, a statute of limitations of five years for bringing lawyer discipline

cases will hinder the Bar's ability to weed out many unscrupulous attorneys from the profession. Implementation of such a statute would also represent a radical departure from the American Bar Association's model rules, the procedures in place in the vast majority of jurisdictions and Massachusetts' own longstanding tradition of investigating every complaint.

Second, we urge the Bar to refrain from raising the standard of proof from "preponderance of the evidence" to "clear and convincing evidence." Attorney discipline proceedings are inherently civil in nature and should therefore apply the civil "preponderance" standard. The Task Force has advanced no persuasive rationale for raising the Bar's established standard for deciding disciplinary cases.

Third, HALT encourages the Bar to reject the Task Force's recommendation to ignore oral inquiries from consumers. Such a blanket restriction reduces consumer access to the system and prevents members of the public from obtaining prompt information about the system of attorney discipline.

Fourth, we believe that the Bar should continue to hold public hearings for all disciplinary appeals, so that complainants can contribute their perspectives and insights at these proceedings. In an era that places a premium on principles of sunshine and transparency, the Bar should not take a step backwards by transferring discipline proceedings behind closed doors.

Finally, the Bar should reject the Task Force's proposal to eliminate any reference to disciplinary proceedings upon a hearing panel recommendation of "no discipline" or "private discipline." Clients and prospective clients should have access to an attorney's full disciplinary history so they can decide for themselves whether it is in their best interest to retain a particular lawyer.

In our 2002 survey of attorney discipline bodies, Massachusetts' disciplinary procedures and dedicated staff led us to rank the state's lawyer discipline system as best in the nation. We are confident that the Bar will continue to lead the way by adopting reforms that will improve the system of attorney regulation and rejecting proposals that represent critical setbacks.

I. The Bar Should Implement Meaningful Time Standards for Processing Lawyer Discipline Cases.

HALT strongly urges the Bar to bring an end to its longstanding pattern of delay by adopting time standards that would ensure disposal of a case within nine months after receipt of a complaint.

In 2002, HALT released its Lawyer Discipline Report Card, which evaluated discipline systems in all 50 states and the District of Columbia, in six areas: (1) Adequacy of

Discipline Imposed; (2) Publicity and Responsiveness; (3) Openness of the Process; (4) Fairness of Disciplinary Procedures; (5) Public Participation; and (6) Promptness.

While the Report Card ranked Massachusetts' disciplinary system as best in the nation overall, the state received an overall grade of B-minus—in large part because of the system's history of delay and backlogged cases. While we praised Massachusetts for its evenhanded procedures, dedicated staff and open process, we found that the system was ultimately unable to fully serve its core mission of protecting consumers because it was taking far too long to mete out discipline.

In addition to analyzing statistics from the American Bar Association, we considered feedback that we regularly receive from legal consumers exasperated by the sluggish pace of Massachusetts' attorney discipline process. We spoke with numerous individuals who filed complaints with the Massachusetts Bar and had yet to receive any response—often years later. The Bar's dedicated staff and fair procedures meant little when victims were not seeing results.

Unfortunately, little has changed since we issued our findings three years ago. Just last month, a *Boston Globe* investigation revealed, "Massachusetts ranks worst in the country for resolving allegations of attorney misconduct in a timely manner" ("Mass. lags in disciplining lawyers," April 20, 2005). Most alarming, the *Globe* reported that delays are longer in the most serious cases and "in several instances more than eight years elapsed between the filing of a complaint and the imposition of a public sanction, such as a suspension or a disbarment."

The Task Force's report raises the same grave concerns about the Bar's pattern of delay:

[P]ublic confidence in the system of lawyer discipline is destroyed when a self-regulatory system takes many years to adjudicate issues involving a lawyer's integrity or competence. It is difficult for the public to understand why (as in the many cases the Task Force has observed) serious sanctions are meted out to attorneys (including indefinite suspensions and disbarments) following years of inactivity by Bar Counsel. The phenomenon of a lawyer receiving a three-month suspension in 2005 for an offense in 1995 must appear to the public as, at best, bizarre. (*Task Force Report*, p. 15.)

As the Task Force's report notes, Supreme Judicial Court Justice Greaney provided an example of the system's regular delay. He reported to the full Court a relatively simple Bar discipline case because of inordinate delay in the prosecution. In his memorandum to the Court, he wrote: "What troubles me is that the misconduct described in Count One occurred in 1991, but the Petition for Discipline was not filed by Bar Counsel until 1998. The case is now before me some nine years after the misconduct took place." (*Task Force Report*, p. 17.)

The Task Force's study demonstrates that this case is hardly unique: "Cases of eight to twelve years 'in the system' are not uncommon." (*Task Force Report*, p. 23).

A 1991 "Memorandum of Understanding" called for the implementation of time standards, but as the Task Force correctly points out, "These time standards must be more than merely aspirational." (*Task Force Report*, p. 27). Instead, the Bar needs to adopt clear deadlines for investigations, hearings and final dispositions.

The Task Force suggests that Massachusetts should follow time standards that call for an investigation period of six months, a hearing period of another six months, and a Board review period of an additional six months. Under this structure, a case would not be resolved for 18 months.

The 18-month guidelines should not serve as the framework for Massachusetts. Other administrative agencies in Massachusetts as well as several other state attorney discipline bodies are able to mete out discipline much more promptly. Given the burgeoning backlog of cases currently hamstringing Massachusetts' system, the Bar should follow a more constructive model.

The Massachusetts Board of Registration in Medicine, which oversees the state's oversight of doctors, provides one useful model. On average, the agency resolves cases in less than a year, according to its latest annual report (*Massachusetts Board of Registration in Medicine Annual Report*, 2003). Recently, the board imposed time standards and streamlined its process and now, in many circumstances, the Board resolves a case in just a few months.

In addition to the model established by the Massachusetts medical board, the Bar can find guidance by analyzing the ABA's most recent statistics regarding case processing. According to the 2003 survey, Mississippi, North Dakota and Wyoming are filing formal charges within three months of receiving grievances. See *American Bar Association Survey on Lawyer Discipline*, 2003.

In light of this benchmark, we propose that the Bar impose a deadline of 90 days for investigating a complaint. In fact, federal prosecutors are only permitted 30 days to exercise their judgment in bringing criminal charges. Under the federal Speedy Trial Act, "Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges." See 18 U.S.C. § 3161(b). If decisions which put a liberty interest at stake can be reached in 30 days, surely decisions involving attorney discipline can be reached in a period three times as long.

Once a complaint is investigated, the Bar should take no longer than 90 additional days to hear the case. If complicated cases against doctors, which often require extensive

medical testimony and documentation, can be resolved in just a few months, there is no reason that a hearing involving lawyer misconduct can not be adjudicated within six months.

Finally, after the hearing concludes, the Bar should have no more than 90 additional days to obtain final Board approval of the disciplinary decision. Under this structure, the Bar would impose discipline within nine months of receiving a complaint. Delaware, Georgia, Iowa, Maine, Michigan, Mississippi, Nevada, North Dakota, Oklahoma, Rhode Island and Wyoming dispose of cases in this amount of time—and in many cases, in far fewer months. See *American Bar Association Survey on Lawyer Discipline*, 2003.

II. The Bar Should Reject the Task Force’s Recommendation to Adopt a Five-Year Statute of Limitations for Lawyer Discipline.

Nationwide, statutes of limitation for filing complaints against lawyers are rare. Only a tiny handful of jurisdictions preclude complaints simply because they allege misconduct that occurred years earlier. Of that tiny handful, most statutes toll until the complainant discovers or should have discovered the misconduct.

Nevertheless, the Task Force has proposed that the Bar adopt a Draconian statute that begins to run at occurrence, rather than discovery. (*Task Force Report*, p. 28-29.) The danger of such a statute is perhaps most evident in the context of estate planning misconduct. If an estate planning attorney negligently drafts a will, for example, the error is usually discovered only after the testator dies. In many, if not most cases, this comes far more than five years after the estate planner drafted the will and committed the misconduct. Were Massachusetts to adopt this occurrence-based statute of limitations, unscrupulous estate planners would almost never be under any threat of sanctions by the Bar. The 5-year statute would preclude complaints against them in nearly every instance.

The Task Force asserts that implementation of a statute of limitations would allow the system to address the pattern of delay that has hampered the system: “[P]ublic confidence in our system of self-regulation as a profession demands that we address the problem of unreasonable delay in Massachusetts, and that only by forcing prosecutors to end the investigatory period will that problem be overcome. Public confidence demands more than disciplinary proceedings spanning over a decade.” (*Task Force Report*, p. 29).

To the contrary, dismissing meritorious disciplinary complaints on the basis of an arbitrary statute of limitations will serve only to further erode public confidence in the legitimacy of the Massachusetts discipline system. If the Task Force’s concern is delay, the Bar can address this problem by adhering to the strict time standards proposed earlier in our comments.

The ABA has rejected a statute of limitations and indicated that “conduct of a lawyer, no matter when it occurred, is always relevant to the question of fitness to practice” (Model Rule Commentary to Rule 18).

Recent ABA statistics reveal the 10 states processing cases most efficiently— Delaware, Montana, Nebraska, Nevada, New York, North Dakota, Rhode Island, Tennessee, Vermont and Wyoming. See American Bar Association *Survey on Lawyer Discipline*, 2003. Of those, only one, Wyoming, has placed a statute of limitations on complaints against lawyers. Indeed, the vast majority of states do not strictly prohibit investigations simply on the basis of the time period in which the alleged misconduct occurred. And even in Wyoming, statutes of limitation do not begin to run until conduct is discoverable.

If the Bar adopted a 5-year, occurrence-based statute of limitations, it would break with the American Bar Association’s model rules, Massachusetts’ own long-established preference for investigating all complaints, and the rules set forth in the vast majority of states. We strongly urge the Bar to avoid implementing this radical statute.

III. The Bar Should Reject the Task Force’s Recommendation to Change the Standard of Proof for Lawyer Discipline Cases from “Preponderance of the Evidence” to “Clear and Convincing Evidence.”

In 2002, HALT praised Massachusetts as the nation’s model for attorney discipline— primarily because of its fair approach to consumers and evenhanded procedures. Rejection of the longstanding “preponderance of the evidence” standard for proving violation of the rules of professional conduct in favor of the less workable and far more strenuous “clear and convincing” standard would undermine the state’s commitment to legal consumers.

As the United States Supreme Court held in *Ex Parte Wall*, one of the earliest cases involving attorney discipline to reach the Supreme Court, disciplinary proceedings are civil in nature. The Court noted: “The proceeding is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministrations of persons unfit to practice in them.” See *Ex Parte Wall*, 107 U.S. 265, 288 (1883).

Attorney discipline hearings are licensure proceedings. Unlike criminal trials, where the purpose is to hold the state to its burden of proving that the defendant has committed a crime, attorney discipline hearings are held to determine whether a licensed professional possesses the requisite skills and ethics to maintain his or her license. Unlike a defendant in a criminal proceeding, a respondent attorney does not stand to lose his liberty in a disciplinary hearing.

“Preponderance of the evidence” is the standard used in nearly every civil case. See *Baker v. Parsons*, 434 Mass. 543, n. 18 (2001). The only instances in which Massachusetts

civil law requires “clear and convincing evidence” involve liberty interests. See *Care & Protection of Laura*, 414 Mass. 788 (1993) (parental unfitness must be proved by “clear and convincing evidence” in adoption cases).

The Massachusetts Supreme Judicial Court has held that “preponderance of the evidence” is the de facto standard in administrative proceedings. See *Craven v. State Ethics Comm’n*, 390 Mass. 191 (1983). Even severe civil sanctions that do not interfere with a liberty interest have been held to the “preponderance” standard. See *id.* at 200. The adoption of an intermediate standard of proof, such as “clear and convincing evidence,” too often serves as the functional equivalent of the criminal “reasonable doubt” standard. See *Medical Malpractice Joint Underwriting Assoc. v. Commissioner of Ins.*, 395 Mass. 43 (1985).

Should the Bar depart from its established standard of proof in favor of a quasi-criminal standard, a victim of attorney misconduct could potentially recover money damages in a malpractice lawsuit against a lawyer who may be impervious to even the most minor disciplinary sanctions simply because the disciplinary standard of proof is so onerous. Even in a case in which the bulk of the evidence demonstrates that an attorney has committed misconduct, a lawyer, under the Task Force’s new structure, may be able to evade discipline. Surely, this is not the kind of result that the Bar would hope to achieve.

In light of the civil nature of attorney discipline proceedings, many states apply the “preponderance of the evidence” standard, including Arkansas, Kentucky, Maine, Michigan, Missouri, New Mexico, Tennessee, Texas, Utah and Washington.

A departure from its longstanding application of the “preponderance” standard to the elevated “clear and convincing” standard would be a real setback for a system that has been praised for its evenhanded procedures and fair-minded approach to attorney discipline. We urge the Bar to avoid taking this dramatic step backwards.

IV. The Bar Should Reject the Task Force’s Recommendation to Hold Private Hearings for Disciplinary Appeals.

The Task Force made several recommendations regarding the openness of disciplinary proceedings and the availability of disciplinary histories to the public. In an era that places a premium on principles of sunshine and transparency, Massachusetts’ disciplinary system must continue to uphold its tradition of openness by allowing the general public to attend *all* disciplinary hearings and access full disciplinary histories for members of the Massachusetts Bar. Doing otherwise feeds the public perception that the disciplinary system has something to hide.

In its first proposal regarding Massachusetts’ disciplinary system’s openness, the Task Force recommended that the Bar adopt a rule change that would make certain disciplinary

proceedings non-public. This rule would apply to cases in which a respondent attorney rejects a private admonition, thereby initiating further proceedings. The Task Force calls this the “Problem of Public Hearings for Private Admonitions.” (*Task Force Report*, p. 34)

To be clear, HALT finds the imposition of private discipline inappropriate in any case. Closed-door reprimands do little to meaningfully sanction errant attorneys and deter future misconduct. Rather, these admonitions—which amount to little more than slaps on the wrist—lead to the perception that lawyer discipline systems are shrouded in secrecy. HALT urges the Bar to eliminate this type of discipline or, at a minimum, restrict this sanction to very limited circumstances.

Regarding the openness of hearings to appeal private admonitions, HALT strongly advises the Bar to continue allowing the public to attend these hearings, just like any other civil proceeding. A victim would never be prohibited from sitting in on a trial in the criminal justice system; there is no reason to exclude complainants from disciplinary hearings. In addition, the general public should have a right to attend *all* lawyer discipline hearings held in Massachusetts. Due to the self-regulated nature of Massachusetts’ discipline system, it is particularly important to keep all aspects of the system open to the general public, and complainants in particular.

V. The Bar Should Reject the Task Force’s Recommendation to Prohibit Oral Consumer Inquiries.

A requirement that the public submit all inquiries in written form would only serve to make the lawyer discipline system less accessible to legal consumers. We encourage the Massachusetts to make as many channels of communication—including the telephone—available as possible.

Colorado’s Attorney Regulation Counsel’s complaint intake procedure provides a useful model. To initiate a complaint in Colorado, the first step for all complainants is a telephone conversation with a disciplinary staff member. This type of system establishes a two-way conversation between Bar Counsel and complainants, which allows disciplinary staff to gather as much information as possible from complainants while also providing complainants the opportunity to ask questions and better understand the disciplinary process. These conversations should, of course, be memorialized in writing and added to the complaint’s records.

As the Task Force reported, the Massachusetts Office of Bar Counsel received approximately 80 percent of its inquiries by telephone in 2004. Predicting the fallout from eliminating this popular point of entry to the discipline system, the Task Force asserted that it “is not likely to allow serious situations to go undetected.” (*Task Force Report*, p. 14.) It is

not enough just to hope that complaints go undetected; the Bar must actively ensure that the discipline system remains as accessible to legal consumers as possible.¹

HALT urges the Bar not to risk deterring even one complainant by the need to put her complaint in writing. By continuing the current system of allowing complainants to speak with disciplinary staff by telephone to initiate complaints, Massachusetts can keep its discipline system open and accessible.

VI. The Bar Should Reject the Task Force’s Recommendation to Eliminate Any Reference to Disciplinary Proceedings Immediately Upon Issuance of a Panel’s Recommendation of “No Discipline” or “Private Discipline.” The Bar Should Also Refuse to Publish Anonymous (“John Doe”) Records of Disciplinary Cases Under Any Circumstances.

The Task Force urged a rule change that would eliminate immediately upon the issuance of a hearing panel recommendation of “no discipline” or “private discipline” any reference to the proceedings on the Bar’s attorney search Web site. (*Task Force Report*, p. 34.) HALT strongly opposes this recommendation.

Legal consumers have a right to access an attorney’s disciplinary history, regardless of its severity. Although, as outlined above, HALT finds the imposition of private discipline an ineffective sanction for attorney misconduct, a private reprimand nonetheless constitutes discipline. Consider a case in which multiple complaints have been filed against a lawyer, resulting in several private admonitions. This pattern of misconduct—regardless of its severity—should be available to potential clients. Similarly, a history of multiple complaints lodged against an attorney—regardless of whether they resulted in disciplinary action—would be of interest to potential clients.

Disciplinary history is one of the most critical pieces of information a legal consumer can use to determine whether or not to hire a certain lawyer. By blocking consumer access to this information, the Bar is affirmatively concealing disciplinary histories of its members. Legal consumers should be able to access a lawyer’s full history of disciplinary complaints—even if the complaints result in “no discipline” or “private discipline.”

The Task Force also recommended that the Bar implement a rule change that would require the Office of Bar Counsel to publish “John Doe” cases where a complaint is

¹ Stanford Law Professor Deborah Rhode notes that the majority of lawyer misconduct goes unreported. (Deborah Rhode, *In the Interests of Justice: Reforming the Legal Profession* 159) Clients frequently lack sufficient information or incentives to file grievances and many individuals have little understanding of their rights in disputes with lawyers. For this reason, lawyer discipline bodies must take every step to remain as open and accessible as possible to legal consumers.

dismissed or an attorney is not disciplined by the board, rather than failing to report these cases at all. (*Task Force Report, p. 53*)

HALT commends the Task Force for recognizing the need for reporting all disciplinary cases, as opposed to reporting only cases in which discipline is meted out. However, HALT recommends that attorney names be published in connection with these records. Publishing anonymous, or “John Doe,” records does little to advance the goal of arming potential clients with critical consumer information.

To ensure that the system is operating effectively and serving its core mission of protecting legal consumers, it is critical that the Bar publish all reports regarding all dispositions. HALT urges Massachusetts to make *all* disciplinary actions—successful or not—open to the state’s legal consumers. Furthermore, HALT recommends that attorney names be published in each of these instances.

Conclusion

Massachusetts has long been a model for fair procedures and an evenhanded approach to attorney discipline. We hope that the Bar will uphold this tradition by implementing strict time standards and providing more comprehensive reports of its case management. In addition, we urge the Bar to reject proposals that represent critical setbacks. Adoption of a 5-year, occurrence-based statute of limitations, elevation of the standard of proof in disciplinary hearings, prohibition on telephone inquiries and secret disciplinary proceedings undermine Massachusetts’ longstanding commitment to sunshine and accessibility.

Because all who practice law have a shared responsibility in creating a discipline system that investigates promptly, deliberates openly and fairly, and weeds out unethical or incompetent attorneys, HALT encourages the Massachusetts Bar Association to embrace these reforms. By addressing the shortcomings of the current system, we believe the Bar can move closer to implementing a discipline system that engenders consumer trust and respect, rather than alienation and resentment.

Respectfully Submitted,

HALT – An Organization of Americans for Legal Reform

By: Suzanne M. Blonder
Associate Counsel

Kristin Weber
Program Associate