

September 16, 2003

**COMMENTS OF
HALT, INC. AN ORGANIZATION OF AMERICANS FOR LEGAL REFORM
TO THE DISTRICT OF COLUMBIA COURT OF APPEALS
IN SUPPORT OF RECOMMENDATION
BY THE DISTRICT OF COLUMBIA BAR BOARD OF GOVERNORS
TO RAISE THE CEILING ON MEMBERSHIP DUES TO \$195**

Pursuant to the District of Columbia Court of Appeals request of June 17, 2003, HALT – *An Organization of Americans for Legal Reform* hereby submits comments supporting the Board of Governors’ recommendation to increase the ceiling on annual membership dues from \$155 to \$195, effective July 1, 2004.

HALT urges the Court of Appeals to approve the recommended increase, which will generate more than \$2 million a year for bar services and help to address urgent problems facing the District’s attorney discipline system. By shoring up resources with a dues increase, the Court of Appeals can make attorney discipline in the District begin to function effectively and help restore public confidence in the legal profession.

1. Bar Counsel and the Board on Professional Responsibility Need Additional Resources to Fulfill the Bar’s Responsibility to Protect the Public from Attorney Misconduct.

First and foremost, the dues increase is necessary to put an end to the system’s overwhelming backlog of pending discipline cases. As recently reported in the June 23, 2003 *Legal Times*, the Board on Professional Responsibility and Office of Bar Counsel face a dire need for additional staff and space. In 2002, the D.C. Bar received 1,393 complaints. Only 82 of those complaints – or six percent – resulted in Board on Professional Responsibility decisions. By June of this year, the Bar was already facing a logjam of at least 274 cases that were more than 90 days old.

Sadly, these numbers come as no surprise. Despite the dedicated efforts of Bar Counsel Joyce Peters and her staff, the District’s attorney discipline system is hamstrung by a resources crisis that undermines both operations and credibility. A full-time staff of six and a largely unsupervised volunteer network of 62 attorneys simply cannot process the volume of complaints that corresponds with the size of the D.C. Bar’s total membership, which totaled 75,915 as of May 2003 (Board of Governor’s Recommendation).

As Joanne Doddy Fort, Chair of the District's Board on Professional Responsibility, publicly acknowledged earlier this year, staffers "are just overloaded at the moment" and space is so limited that some lawyers in the Bar Counsel's office have been working in the hallways of the D.C. Court of Appeals ("Citing Backlog, Bar Enforcers Push for Funds," *Legal Times*, p. 1, June 23, 2003). Working under such impossible circumstances, the Office of Bar Counsel is unable to give complaints the full attention they deserve or to vigorously prosecute cases that demand swift and meaningful action.

The dues increase would allow Bar Counsel and the Board on Professional Responsibility to hire more attorneys and support staff to process and investigate complaints, which would allow discipline cases to proceed more expeditiously, accurately and fairly.

In addition, these desperately needed resources would allow the Bar Counsel and Board on Professional Responsibility to secure an adequate and appropriate physical plant so they can execute their responsibilities in a professional fashion. To state the obvious, consultations in attorney discipline matters should not be held in the hallways and other public areas of our courthouses. Complainants are understandably reluctant to speak candidly with enforcement staff in such an environment. This unfortunate situation sends an implicit message to complainants that their problems are not viewed as serious and creates the appearance of an amateur operation.

The additional revenue would also permit the Bar to better respond to victims of misconduct. Currently, District residents report to us that they have no way of tracking the progress of their complaints. They do not receive prompt confirmation letters that their complaint has been received by the Office of Bar Counsel and even once they do receive correspondence, they are frequently left in the dark about progress in their case. Added funds, made possible through the dues increase, would allow the District to create methods for complainants to easily and quickly monitor the status of their complaints, such as an automated telephone system or a section of the Web site accessible by a complaint identification number and password.

Finally, the additional revenue could be used to improve the Bar's Web site. We suggest that the Bar add current statistics to the site in order to give clients considering filing a complaint an accurate picture of the discipline process. By laying out the statistics on how long the process takes – the percentage of cases that are handled within three months, for instance – clients would gain a more realistic understanding of the process. These improvements would not amount to a large expense, but they are unlikely to occur without a larger operating budget.

2. The Court of Appeals Should Take this Opportunity to Begin the Process of Systematically Improving the District's Attorney Discipline and Client Compensation Systems.

At this time, a unique opportunity arises for the Court of Appeals to look beyond fiscal demands on the discipline system. As D.C. Bar President Shirley Ann Higuchi, commenting on the Board of Governors' recommendation to increase dues, stated, "One of the important challenges we face this coming year is for the Board of Governors and the Board on Professional Responsibility to work together to determine if there are ways to handle our disciplinary matters more effectively up to and including making recommendations to revise Rule XI." ("Court of Appeals Seeks Comments on Dues Ceiling," June 17, 2003) While HALT supports the recommended dues increase, we also urge the Court of Appeals and the Board of Governors to reexamine Bar Rule XI, which shapes disciplinary proceedings.

HALT's 2002 Lawyer Discipline Report Card – a comprehensive analysis of attorney discipline systems in all 50 states and the District of Columbia – reveals systemic problems that demand attention. Our study found that inadequate resources, biased procedures and endless delay plague nearly every discipline system across the nation. No state received an A. Thirty-nine states, including the District of Columbia, received grades below C. Two states – Pennsylvania and North Carolina – flunked outright.

HALT's report card followed three decades of calls for reform. The 1992 American Bar Association McKay Commission declared the system "too slow, too secret, too soft, and too self-regulated." This study followed an earlier 1970 blue ribbon panel led by Supreme Court Justice Tom Clark that found the lawyer discipline system was in a "scandalous situation." After 30 years with only marginal improvement, it is time for discipline systems – including the District's – to change.

Rather than simply hiring more staff and providing more space, we should reanalyze our discipline system and determine the underlying causes of the current predicament.

The experience in California is instructive. In the late 1980s, the State Bar of California faced a gridlocked, ineffective discipline system. Burdened by nearly 4,000 unanswered complaints, the Bar implemented a dues increase in 1989. The new funds were used to hire additional staff. Realizing that boosting revenue was only a first step, the Bar then reanalyzed and reorganized the system by streamlining procedures and stiffening penalties.

As reported in a June 18, 1989 *Los Angeles Times* article, the California Bar, after reassessing its system of attorney discipline, hired nine full-time employees, appointed a chief trial counsel to run the system, named an outside monitor to oversee the system, opened court proceedings to the public and shortened procedures wherever possible. The Bar also took steps to accelerate claims going through the Client Security Fund. While the California disciplinary system remains far from perfect, the thorough overhaul conducted in 1989 – rather than settling with a dues increase alone – showed a strong commitment to creating a discipline system with teeth.

HALT hopes that the Court of Appeals will use the dues increase to create a similar turnaround for the District's attorney discipline system. One way to begin this process is by instructing the Bar's Board of Governors to conduct a thorough appraisal of the entire attorney discipline system. As a starting point, HALT offers the following suggestions.

3. The Court of Appeals should Consider Three Additional Reforms to Enhance the Effectiveness and Credibility of the District's Attorney Discipline System.

In addition to relieving the backlog and improving public communication with the increased funding currently under consideration, we believe that three additional reforms can significantly improve the operations and performance of the District's attorney discipline system:

- (a) increased public participation in the disciplinary process;
- (b) more even-handed procedures; and
- (c) imposition of firm deadlines.

We believe that each of these improvements would greatly strengthen the District's discipline system and begin to restore lost public confidence in its ability to enforce lawyer accountability.

a. Increased Public Participation

The District should increase nonlawyer participation in the disciplinary decision-making process. Hearing committees should have an increased – if not a majority – nonlawyer voice. A system in which attorneys preside as judge and jury over their colleagues is perceived as lenient and self-serving by the general public. The claim that nonlawyers are unqualified or insufficiently informed about the legal profession is wholly unfounded. Jurors with no special expertise regularly decide sophisticated questions and are trusted with far more weighty decisions, such as capital murder cases.

We should also consider the addition of a special oversight role to be filled by a nonlawyer. Attorney discipline systems in other countries provide a model for this. Many of the provincial Law Societies of Canada, for example, include an Independent Complaints Commissioner. This Commissioner is wholly unconnected with the legal profession and is available to review cases in which complainants feel their claims were handled unfairly by a biased, self-regulated professional board. Commissioners consider the way a complaint was handled; they do not re-investigate the initial complaint. The Commissioner may find that a claim was dismissed without reason, or that an investigation was not handled fairly or thoroughly. In any of these events, the commissioner sends the case back to be re-investigated (<http://www.lawsociety.bc.ca>, <http://www.lawsociety.mb.ca>, <http://www.lsuc.on.ca>).

In Great Britain, the Legal Services Ombudsman for England and Wales – who is also an independent nonlawyer – oversees the discipline system to ensure that complaints are thoroughly investigated in a timely manner. If a complainant is dissatisfied with an outcome, he or she may appeal to the Ombudsman to review the case. The Ombudsman reports that she sends nearly one-half of the appeals for review back to the professional boards for reconsideration or reinvestigation. Funds from the dues increase could be used to salary such a position (<http://www.olso.org>).

In assessing the District’s disciplinary system, we urge the Court of Appeals to carefully consider the models of Canada, England and Wales, and allow for increased participation by independent nonlawyers.

b. More Even-Handed Procedures

The discipline system should also strive to become more even-handed. Discipline policies should more closely approximate the rules of the governing justice system. While the District should be praised for granting individuals civil immunity from lawsuits based on the substance of their complaints, HALT recommends that the Bar replace its far too stringent “clear and convincing evidence” standard of proof with a more reasonable and fair “preponderance of the evidence” standard. Unethical conduct should be proven by the same standard – a preponderance of the evidence – that is applied in all other civil proceedings.

In addition, individuals should be permitted to be speak freely about complaints. Currently, section 17 of Bar Rule XI provides: “[A]ll proceedings involving allegations of misconduct by an attorney shall be kept confidential until either a petition has been filed under section 8(c) or an informal admonition has been issued.” Although this rule may be directed at members of Bar Counsel and the Board on Professional Responsibility, District residents tell us that this provision suggests that *they* are prohibited from communicating about an attorney’s misconduct. In reevaluating the

disciplinary system, the District should clarify this ambiguity so that complainants do not feel threatened into silence.

By replacing a system designed to shield unethical attorneys with a more impartial set of procedures capable of meting out appropriate discipline, the District could provide an appropriate balance of due process and consumer protection.

c. Firm Deadlines

An obvious way to correct the delays that plague the current attorney discipline system is to establish, and enforce, real deadlines in the disciplinary process. Currently, Rule XI only provides one hard and fast deadline; a hearing committee has 60 days from the conclusion of a hearing to submit its report to the Board on Professional Responsibility. As reported in the June 23, 2003 *Legal Times*, even this 60-day limit is rarely met.

Last year, the average civil complaint filed in D.C. federal court resulted in a disposition within only ten-and-a-half months and the average criminal complaint resolved in just nine-and-a-half months, according to the 2002 U.S. District Court Judicial Caseload Profile (<http://www.uscourts.gov/cgi-bin/cmsd2002.pl>). In the context of attorney discipline, there is no reason why a final decision should not be rendered within a year from the date on which a complaint is filed.

To achieve this one-year goal, we believe that timelines should be developed for six distinct steps in the disciplinary process, and suggest the following deadlines:

- (1) within 30 days of receipt of a complaint (unless dismissed), an investigation shall be initiated;
- (2) within 60 days of the initiation an investigation, charges shall be filed (i.e. the decision of whether the complaint merits a hearing because it marks a violation of a rule of professional conduct);
- (3) within 60 days of the filing of charges, a hearing shall be convened;
- (4) within 60 days of the completion of a hearing, a hearing committee shall dismiss charges or recommend discipline;
- (5) within 60 days of a hearing committee's recommendation, the Board on Professional Responsibility shall dismiss the case or recommend discipline to the Court of Appeals; and

- (6) within 90 days of the Board on Professional Responsibility's recommendation, the District of Columbia Court of Appeals shall render a final decision.

Imposing real deadlines like these would be a giant step toward cutting red tape and creating a system that actually brings justice to victims of misconduct. Statistics from an American Bar Association Survey on lawyer discipline in 2000 show that several states have found it possible to handle discipline quickly (American Bar Association, *Survey on Lawyer Discipline*, Chicago 2000). On average, Arkansas, Nevada and North Dakota all file formal charges within 90 days of receiving a complaint, with North Dakota imposing sanctions 45 days later.

In developing a timeframe for processing cases, the District should also consider procedures employed in disciplinary systems abroad. The Office of the Legal Services Commissioner of Australia, which oversees the continent's lawyer discipline system, completes 80% of its cases within three months and holds the discipline process of the Law Society – the Australian equivalent of a bar association – to a six-month limit (<http://www.lawlink.nsw.gov.au>). The Law Society of Upper Canada acknowledges all complaints within 24 hours (<http://www.lsuc.on.ca>). Time limits such as these would go a long way toward relieving the anxieties of consumers and expediting discipline for unscrupulous and incompetent attorneys.

An increase in the dues ceiling alone is simply not sufficient. The District's deteriorating system calls for a more comprehensive approach. Our examination of the system and reports from District residents demonstrate that greater public participation, more even-handed procedures and firmer deadlines are necessary to execute the true spirit of Rule XI.

Conclusion

HALT strongly supports the D.C. Bar Board of Governors' recommended dues increase. If directed properly – toward hiring more staff and adding more office space to address a high volume of complaints and adopting more responsive and user-friendly procedures for complainants – the dues increase can help address many of the urgent problems facing the District's discipline system. A complementary reanalysis of Bar Rule XI – one that focuses on incorporating more nonlawyer participation, adopting more even-handed procedures and implementing firm deadlines – would further strengthen the system.

The effectiveness and efficiency of the District's discipline system rest on two foundations. First, the discipline system must have adequate resources to field and investigate complaints and impose sanctions. Second, the system must be shaped by rules that mark a commitment to fair and rigorous discipline.

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 Court of Appeals to embrace the dues increase and direct it toward addressing the discipline system's failures. By addressing these shortcomings, we believe the District can create a discipline system that engenders consumer trust and respect, rather than alienation and resentment.

Respectfully submitted,

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