

# the Legal Reformer

HALT'S MEMBERSHIP NEWSLETTER • Fall 2002

## Attorney Discipline Systems Still Not Making the Grade

*No Major Reforms Implemented In Ten Years*

HALT's 2002 Lawyer Discipline Report Card is a scathing indictment of attorney discipline systems nationwide. The Report Card evaluated the performance of lawyer discipline agencies in all 50 states and the District of Columbia. Two states—Pennsylvania and North Carolina—flunked outright. Another 19 received grades in the D range. Stanford Law School ethics professor Deborah Rhode immediately praised the Report Card as “an all too sobering reminder of the shameful state of bar disciplinary systems,” and District of Columbia Law School Dean Katherine Broderick similarly stressed the important role of this research, “all lawyers who care about the ethics of their profession owe a true debt of gratitude to HALT for this work.”

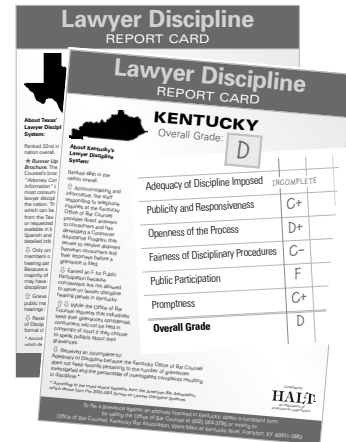
“Despite decades of calls for reform, the attorney discipline system is still badly broken,” stated Executive Direc-

tor Jim Turner. “Our 2002 Lawyer Discipline Report Card found that in state after state the vast majority of consumer complaints are not even investigated or are dismissed on technicalities, while only a handful lead to more than a slap on the wrist.

The results of the Report Card were released to HALT members in October and to the media at a press conference at the National Press Club in Washington, DC, on October 17, 2002.

HALT graded lawyer discipline

agencies in six categories: (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. Thirty-five percent of an agency's overall grade was based on the adequacy of the discipline it imposes. The remaining cate-



*Continued on page 4*

## HALT Files Amicus Brief in California Legal Malpractice Case

By Suzanne Mishkin

In June, HALT filed an *amicus curiae* (“friend of the court”) brief in a precedent-setting legal malpractice case that the California Supreme Court will decide this year. The case, *Viner v. Sweet*, threatens to heighten the burden that a victim of legal malpractice must overcome when proving that his or her attorney acted negligently. As HALT's brief explains:

“The issue presented in this case is whether California is going to abandon the modern trend of authority by imposing a new burden on plaintiffs in transactional legal malpractice cases. *Amicus curiae* HALT, Inc. respectfully urges this Court to decline to take this

radical step, to affirm the decision below, and to provide clear guidance that ameliorates the undue burdens imposed upon victims of legal malpractice by the ‘case within a case’ approach and the ‘but for’ causation requirement.”

In its brief, HALT pointed to the modern trend in legal malpractice cases, which has been to depart from the draconian “but for” standard. This stringent standard forces a legal consumer to prove that but for her attorney's negligence, she would have prevailed in her underlying case. In place of the “but for” standard, many courts have started to employ the “substantial factor” test, requiring plaintiffs to

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# the Legal Reformer

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## Brief filed, Continued from page 1

prove only that their attorney's negligence was a substantial factor in the loss of the underlying case. The "substantial factor" standard establishes a workable test for plaintiffs and ensures that victims of legal malpractice will be able to more easily find recourse. HALT argued:

"Failing to establish an unbiased framework for resolving legal malpractice cases feeds the public's mistrust of

the legal profession. If this Court adopts the high hurdles appellants suggest for proving legal malpractice, it will further exacerbate the public's already low regard for attorneys. Put simply, the public will correctly ask: Why do lawyers make it so hard to win a malpractice case against them unless there's a lot of malpractice they need to protect themselves against?"

Oral arguments in the case and a decision are expected later this year. ■

## Ethics 2000 Ends With a Whimper: ABA Fails to Enact Serious Reform

By Andrew Weltman

In February, the House of Delegates of the American Bar Association finished voting on revisions to the ABA Model Rules of Professional Conduct that were recommended by the ABA's Ethics 2000 Commission. The revisions are not binding on the state bars, which now must decide whether or not to adopt the new Model Rules.

The Commission was formed in 1997 to undertake a review of the ABA's Model Rules of Professional Conduct. HALT has followed the progress of the revision from the beginning and has worked to infuse HALT's mission of increased lawyer accountability into the revised Model Rules.

Many of HALT's suggestions were not incorporated into the Commission's recommendations such as a proposal to include a client bill of rights in the rules and to require lawyers to put all their communications in writing. And several Commission recommendations that HALT supported were not approved by the House of Delegates; for example, a recommendation that all agreements on fees for more than \$500 be in writing.

In fact, after two years of work and countless meetings, the Commission basically kept the Rules intact and did not propose any truly progressive changes that would have positively impacted the attorney-client relationship. Much of the Commission's discussion

centered on the changing organization and structure of modern law practice.

Despite the unwillingness of the ABA's House of Delegates to enact changes that would benefit legal consumers, some states have taken it upon themselves to enact more progressive changes.

In Arizona, not only is the state bar considering adopting reforms rejected by the House of Delegates like mandatory written fee agreements, but they are also considering enacting additional reforms like a mandatory legal malpractice disclosure rule for lawyers who don't carry malpractice insurance. Under such a rule, lawyers would be required to disclose this information to prospective clients. Arizona is also considering a rule that would require attorneys to turn over their clients' files when they cease to represent them.

The actions by the ABA House of Delegates should not be seen as the end, but rather as a beginning. HALT's Lawyer Accountability Project will work with states like Arizona that are interested in enacting reforms that will have a much greater impact on improving the attorney-client relationship and protecting consumers' interests.

Andrew Weltman, a senior at Claremont-McKenna College, interned at HALT during Summer 2002.

# Legal Reform News

## SOUTH DAKOTA REFORM WORKING

In the late 1990's, the state bar of South Dakota enacted a mandatory malpractice insurance disclosure rule. The results have been overwhelming.

The rule requires each lawyer to certify that he or she has attorney malpractice insurance. If an attorney does not have insurance, then the words "This lawyer (or this firm) is not covered by professional liability insurance" must be displayed in a font no smaller than the attorney's name, and must be on all official letterhead and stationary. If an attorney falsely claims to have insurance, he or she can be subject to disciplinary action.

Nationally, it is estimated that as many as 50 percent of lawyers are uninsured. Since South Dakota's rule went into effect, only two percent of that state's attorneys have remained uninsured.

## NJ LAWYERS PROTECT THEIR TURF

On June 25, 2002, an unauthorized practice of law committee of the New Jersey Supreme Court issued Opinion 38 to remind out-of-state attorneys that they are not allowed to work on New Jersey estates.

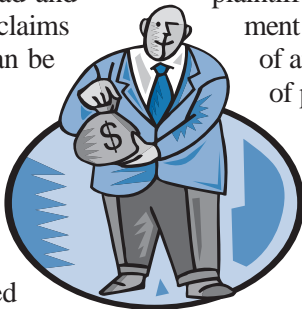
According to the Opinion, there are only two exceptions in which an out-of-state attorney can be hired for estate work. First, the New Jersey and out-of-state heirs of the estate must be so intertwined as to make use of New Jersey counsel impractical. Second, there must be out-of-state heirs with a long-standing lawyer-client relationship that is so close that using a New Jersey firm would be inefficient.

While New Jersey lawyers are applauding the decision, their cheers may be short-lived if the state's supreme

court adopts a multijurisdictional practice proposal. The Supreme Court, which is the final arbiter of practice rules in New Jersey, has appointed two committees to examine the implications of expanding multijurisdictional practices.

## SHOW ME THE MONEY

The Oregon Supreme Court has just ruled in *DeMendoza v. Huffman* that it is constitutional to funnel 60 percent of each punitive award into a state fund set up to benefit crime victims. In reaching its decision, the court concluded that the



plaintiff has no legal entitlement to the punitive portion of an award. The purpose of punitive damages, the court said, is not to "compensate an injured party, but to give bad actors a legal spanking."

In the case cited, the plaintiff Frank DeMendoza, sued his ex-attorney Bruce Huffman for wrongful use of civil proceedings and fraudulent transfer of real property. Kevin Neely, a spokesman for the State Attorney General, said the ruling should allow other cases that have been stalled to proceed. He also said that the state's criminal compensation funds stand to reap a windfall given the number of tobacco lawsuits waiting to be heard.

## CALIFORNIA FOLLOWS ARIZONA'S LEAD

California is using computerized video kiosks in a number of locations throughout the state. The goal is to help reduce court backlog, but according to a recent study of the kiosks' first 18 months of operation, it's still too early to tell if that goal will be achieved.

The kiosks, which are labeled "I Can," help litigants file forms and get basic legal advice. The machines were

installed to handle a growing number of *pro se* litigants. Of the 4.3 million Californians who find themselves in court each year, more than half do not hire a lawyer. In family court, the percentages are even higher. In Van Nuys, officials have established a Self-Help Legal Access Center to deal with *pro se* litigants.

I Can kiosks can be found in eight locations including the Orange County District Attorney's office, Irvine City Hall and the Fullerton and San Juan Capistrano libraries.

## OUR COMMON GOOD

A new website ([www.ourcommongood.com](http://www.ourcommongood.com)) is calling for a "legal revolution" to restore human judgment and values at every level of society. Backing the idea is a broad, bipartisan group of legislators, academics and consumers.

According to their website, "Our system of justice, long America's greatest pride, is now considered a tool for extortion, not balance... Law should make us feel comfortable doing what's reasonable and nervous doing what's wrong. Today Americans are nervous doing almost anything."

True life examples of jumbled nerves abound—from cities cutting tree branches off so children won't be tempted to climb, to doctors ordering expensive cat-scans when they know a simple aspirin will do, to school officials spending hundreds of thousands of dollars in legal fees to terminate an incompetent teacher.

Through lectures, polling and advocacy work—including submitting amicus briefs—Common Good will "call upon judges and legislatures to take back the responsibility, abandoned in the 1960's, to draw the line on who can sue for what."

*Compiled by Yumi Maeda, Andrew Weltman and Theresa Meehan Rudy*

**Attorney Discipline, Cont. from page 1**  
 gories constituted 15 percent of the overall grade, with the exception of Promptness, which comprised five percent.

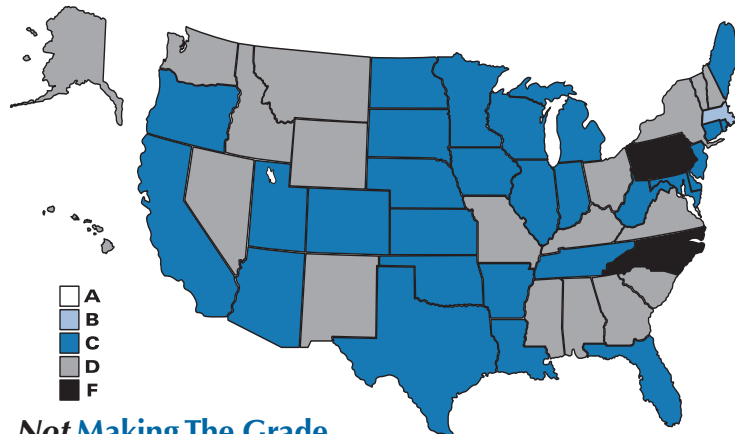
The most critical category—Adequacy of Discipline Imposed—produced the states’ weakest grades. The Report Card shows that lawyer discipline systems are still lenient, dismissing most complaints with little or no review. Only seven states—Arkansas, California, Florida, Massachusetts, South Dakota, Utah and Wisconsin—investigate every consumer grievance. Of the complaints investigated, only a paltry five percent result in public discipline (i.e., disbarment, suspension, probation or public censure) in the average state. Nevada, New Hampshire and Wyoming did not disbar a single lawyer during HALT’s surveyed year, despite the fact that consumers filed thousands of complaints against lawyers licensed in those states.

States fared slightly better in the Publicity and Responsiveness category. All but four states—Alabama, Alaska, Delaware and Pennsylvania—make their lawyer discipline services known to the public through websites. Missouri received first prize for Best Website. Florida took top honors for Best Brochure, while the award for Best Telephone Services went to Colorado, which takes the time to address specific questions from callers, has a toll-free telephone number and is one of the few agencies that allows consumers to register complaints against lawyers over the telephone.

The Openness of the Process category yielded mixed results. While most states allow grievants and the general public to attend disciplinary hearings, the Report Card reveals that most agencies are not sufficiently publicizing the results of those hearings.

“Take an agency like Michigan’s Attorney Grievance Commission. It pub-

lishes sanctions in the state bar journal—a publication for lawyers. And Michigan is not alone. Many states claim that they publish names of disciplined attorneys, but the purpose of publication is defeated if the public never sees those names,” said Associate Counsel Suzanne Mishkin.



**Not Making The Grade**

Oregon and Arizona are the only states that publicly disclose whether a grievance has ever been filed against a particular lawyer. Most states keep information about complaints confidential unless “probable cause” has been found for prosecuting the complaint.

States received low marks for Fairness of Disciplinary Procedures. “Gag rules,” which prevent legal consumers from speaking publicly about their grievances, exist in nine states—Alaska, Arkansas, Georgia, Montana, Nebraska, Nevada, New Jersey, South Dakota and Washington. “If the agency finds out that you’ve spoken to a reporter or even just told your friends or family about your grievance, you could be held in contempt of court, fined or imprisoned. This is a clear violation of the First Amendment right of free speech,” stated Mishkin. Another 27 states do not threaten punishment, but tell consumers they should keep their grievances confidential.

In the Public Participation category, all but one state received a grade of

**Top Ten Best States Overall:**

- Massachusetts (*best*)
- Florida
- Oregon
- Connecticut
- Wisconsin
- North Dakota
- Illinois
- Rhode Island
- Maine
- Arkansas

**Top Ten Worst States Overall:**

- Pennsylvania (*worst*)
- North Carolina
- Montana
- Kentucky
- Alaska
- Georgia
- Nevada
- New York
- South Carolina
- Wyoming

**Winner, Best Website:** Missouri

**Winner, Best Telephone Services:** Colorado

**Winner, Best Brochure:** Florida

**Honorable Mention, Most Open Systems:** Oregon and Arizona

C or lower. Only Iowa earned an A in the area. It is the only agency that allows non-lawyers to serve as the majority on lawyer discipline hearing panels. Every other state requires lawyers to occupy a majority of seats on the hearing panel, allowing the public only a token

note in the decision-making process.

Finally, most states also performed poorly in the Promptness category. Twenty-three agencies do not keep a record of how quickly they process consumer grievances. Of those that do track this information, the best states—Arkansas, Maine, Mississippi, Nevada, North Dakota and South Dakota—take five months to file formal charges against attorneys. Lawyer discipline agencies can take as long as two and a half years to impose discipline.

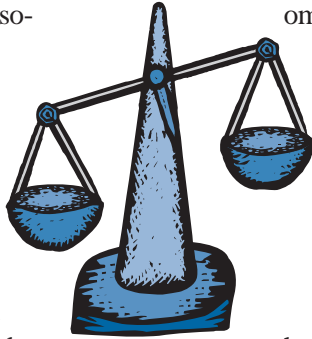
Data for the Lawyer Discipline Report Card was collected through a telephone survey of disciplinary agencies nationwide. HALT also evaluated the website, brochure and annual report of each lawyer discipline agency and analyzed data collected by the American Bar Association 2000 Survey on Lawyer Discipline. HALT’s survey was conducted over four months during the summer of 2002. A copy of the Lawyer Discipline Report Card is available from HALT upon request and at [www.halt.org](http://www.halt.org). ■

# Lawyer Discipline Over the Past 30 Years

By Firas Ayoub

The first formal study of the trend of lawyer self-discipline was produced in 1970, when retired Justice Tom Clark of the Supreme Court conducted an evaluation of the system for the American Bar Association and found 36 different failures in the disciplinary system. The most egregious was the fact that lawyers, rather than judges, were running the disciplinary system in most states. The findings of the study eventually prompted a reevaluation of the system, carried out by academic Robert McKay in 1992. McKay found that progress had been made in solving some of the problems identified by the Clark committee, but still advised additional change.

HALT played a pivotal role in helping the McKay Commission evaluate and articulate its recommendations. The McKay Commission relied on HALT's 1988 and 1990 Attorney Discipline Survey and Report to guide them and listened to HALT members and activists during five public hearings on the topic. HALT's earlier sur-



vey demonstrated that lawyer discipline systems nationwide were slow, secretive, lenient and unresponsive. The ABA's Commission on Evaluation of Disciplinary Enforcement adopted nearly 75 percent of HALT's recommendations for improving the system. With HALT's work and its own research in mind, the McKay Commission made 22 recommendations to the ABA, including greater publicity for lawyer discipline systems, streamlining and hastening the process, adding non-lawyers to discipline boards and, most ambitiously, ending secrecy.

When the ABA House of Delegates finally voted in February of 1992, the outcome yielded significant advances for the public in such areas as alternative dispute resolution and consumer rights issues. The creation of alternative dispute resolution programs such as fee arbitration and mediation programs was an important step, because it was the first time the ABA had admitted that there were no current means to handle a wide variety of legitimate consumer complaints such as

unreturned phone calls and blatant over-billing.

There was, however, one notable failure. The ABA refused to end secret disciplinary procedures, which contained such policies as "gag rules" that threatened complainants with imprisonment or a fine for discussing with anyone the filing of a complaint against a lawyer. Yet the ABA did vote to pass a set of "consumer rights," which included the right to obtain written progress reports on complaint proceedings and the right to testify at complaint hearings. In order to see these initiatives through, the ABA planned to set up an implementation committee that would lobby states to adopt the recommendations passed by the House of Delegates.

Because the ABA handed responsibility for implementing these changes over to the states, many of the initiatives passed have not yet been fully realized.

HALT's newest Lawyer Discipline Report Card calls attention to the states' continued failure to implement any meaningful reform.

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*Firas Ayoub, a senior at Brown University, interned with HALT during Summer 2002.*

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## Dismal Record-Keeping Shows Lack of Public Accountability

Many states continue to keep inadequate records on the number, type and disposition of the complaints they receive about lawyers. In fact, twenty-three states received a grade of "Incomplete" in at least one category in HALT's 2002 *Lawyer Discipline Report Card*. A state received a grade of Incomplete in a category if the agency did not retain records necessary to judge the state's performance in that area.

"How can we ensure that lawyer

discipline agencies are acting as effective watchdogs on the legal profession when they are unable to provide basic data about how many grievances they receive each year, what percentage of those grievances are investigated, how many investigated complaints lead to discipline and other critical information?" asked HALT Associate Counsel Suzanne Mishkin.

In calculating the overall grade assigned to each state, HALT regarded an Incomplete as an F.

"Incomplete grades point to a problem that may be just as harmful as ineffectiveness—a lack of accountability," said Mishkin. "Pennsylvania got an F, in part because the state's disciplinary board does not keep records on how many complaints it investigates. In addition, the Board does not keep information about how quickly it files formal charges or how promptly it imposes sanctions. The Pennsylvania Board's gaping holes are inexcusable. ■"

# HALT Testifies Before ABA Committee

**H**ALT Senior Counsel Tom Gordon delivered testimony at the American Bar Association annual convention on the need for better access to the legal system for all consumers of legal services.

Gordon testified on August 10 at a hearing sponsored by the ABA Standing Committee on the Delivery of Legal Services, where he was among several leading judges, court officials, academics and other advocates speaking about the need for improved access to the civil justice system. His testimony focused on the need to abolish prohibitions on the unauthorized practice of law and improve access to small claims courts as ways that the bar can open up the justice system to its users.

The highlight of Gordon's testimony was an analogy between the legal services industry and other businesses. Professor Ronald Staudt of Illinois Institute of Technology Kent School of Law testified about a design study of the legal system he had undertaken which compared the provision of legal services to other service industries. He commented during his testimony about a Black & Decker executive reminding the company that they were not in the drill business, but in the business of making holes—a reminder of the importance of the customer in any business.

During his testimony, Gordon pointed out the unique advantage that

lawyers have over other industries such as power tool manufacturers: "I like Black & Decker products, and if I'm building a birdhouse I'll certainly use a Black & Decker drill to put holes in the wood I use. But if I want to put a hole in some sheets of paper so that I can insert them into a binder, I wouldn't want to use a drill. Fortunately, there is an invention called a three-hole punch that does the job better than a drill and at far less expense. Now, Black & Decker may want to expand its hole-making business to include low-priced devices to make holes in flimsier material. It may also choose to limit its business to the manufacture of devices that put holes in sturdy materials. But one thing that



HALT's Tom Gordon

Black & Decker cannot do is prosecute the three-hole punch manufacturers for the unauthorized practice of hole-making!"

The panel and audience chuckled at Gordon's remark, understanding his point about how the anti-competitive methods that lawyers use to stifle their competitors in the legal marketplace ultimately hurt consumers.

The panel of ABA representatives leading the hearing appeared most interested in Gordon's testimony, asking more questions of him than of any other participant, and taking up more than the allotted time for questions. ■

## Don't Forget to Renew

**F**or 25 years, HALT has been the only national organization working to make the legal system more fair and affordable for everyone. And in this same amount of time, it's been our members' dedication to our mission of reforming the system that has carried us through both triumphs and challenges. We appreciate your past—and continued—support.

In November, you'll be receiving your 2003 Renewal Notice. Please fill it out and return it right away so HALT can continue its education and legal reform efforts. Members who renew their membership in HALT will receive a free copy of the newly revised and expanded book, *The Legal Resource Directory: Your Guide to Help, Hotlines and Hot Websites*. ■



## Get Better Estate Planning for FREE

**W**rite today for your free copy of our *Better Estate Planning* brochure. This twenty page pamphlet describes estate planning, explains why it is important for you, and discusses the best ways to man-

age your estate. Our brochure tells you what you need to know about writing a will, setting up a trust, reducing your tax liability through carefully planned charitable giving and much, much more.

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# HALT Updates and Expands *The Legal Resource Directory*

You've seen lawyer ads in newspapers and the Yellow Pages. Just pick up the phone and presto—you have a lawyer. But, do you really need one?

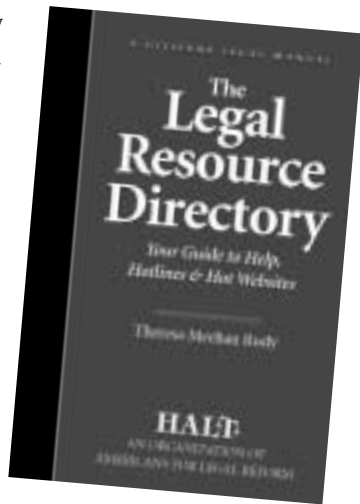
"Turning everyday problems over to a lawyer is often not necessary or financially prudent," said HALT Program Director and author Theresa Meehan Rudy. "A quick call to the right agency or visit to a relevant website may be all you need to get quick and accurate information about your problem. Our new *Legal Resource Directory* puts hundreds of legal resources at your fingertips."

This fall, a new and improved version of *The Legal Resource Directory: Your Guide to Help, Hotlines & Hot Website* is being added to HALT's series of Citizens Legal Manuals. First

published in 1997, HALT has added an additional five years worth of contact information and several new chapters to its book.

Whether you're buying and selling a car, filing a complaint against an attorney or local business, reporting fraud or abuse of a government program, applying for social security benefits, or resolving credit card debt problems—you can find someone who has the answers you need to resolve your problems.

The book, organized by subject matter, includes contact names, addresses, toll-free numbers and websites for hundreds of agencies, organizations, and non-profit groups. It also provides information about more cost-effective legal resources like using independent paralegals, legal telephone services, mediation centers and pre-paid legal service plans.



Members who renew their membership for 2003 with a contribution of \$25 or more, will receive a free copy of *The Legal Resource Directory* this fall. Get your copy free, while supplies last. ■

## From the Mailbox



Dear HALT,

I sent in a contribution in August, but I continue to receive renewal notices telling me I have not renewed. Why is that?

*Confused in Connecticut*

Dear Confused:

HALT uses a calendar year renewal system, where all members are asked to renew their membership for the following year at the same time. We start our renewal program in November and ask you to renew then. If you do not respond to that mailing, we follow up with several other renewal notices giving you several chances to renew your membership.

If you sent us an unsolicited contribution in August, we probably thought you were just making an additional (and appreciated!) contribution to our cause (something many of our members do throughout the year). Or, perhaps you sent in your August contribution in response to one of our summer appeals but thought you were renewing. We will be happy to check on it and get back to you.

For future reference, please expect your renewal notice to arrive in late November. It helps our record keeping immensely when you renew at that time. ■

## HALT's California Interns

HALT's internship program has expanded to include interns working outside of our office in Washington, D.C. During this summer and fall, HALT was assisted by two law students at the University of California Hastings College of the Law.

**Liz Duong** is a second-year law student. She is a graduate of the University of Wisconsin. Her previous work experience includes stints at BBC America and a Washington, DC law firm.

**Steven Coskie**, a third-year law student, is a *cum laude* graduate of Cal State-Fullerton. He has previously

worked as an intern with the San Francisco Office of the Public Defender and has served as a community mediator for the Orange County Human Relations Commission.

Both Liz and Steve worked under the supervision of HALT board member and Hastings law professor Bea Moulton, researching California's small claims court system. Their internships were funded in part by a grant from HALT board member George Miller.

Students interested in internships with HALT can find more information on the HALT website. ■

## Nolo Book Bargain

HALT and Nolo.com have joined together to provide a special offer for legal reform supporters. Purchase any of the legal self-help books listed under the "Specials" page at HALT's website at a discounted Internet price and Nolo will support HALT with a 10% contribution of your purchase. Among the books available are *How to File for Bankruptcy*, *Small Business Legal Pro 4*, *Child Custody*, and *Every Tenant's Legal Guide*. Each of these books has been rated a "Do-it-Yourself Best Buy" in HALT's guide, *Do-It-Yourself Law*. This is an Internet-only offer. ■

## Wear Your Support for Legal Reform

Show your support for legal reform by purchasing a HALT t-shirt.



Exclusively designed for HALT, this comfortable 100% preshrunk cotton tee depicts a vibrant design. Available in Large (42-44) or Extra Large (44-46). Cost, includes shipping: \$12 for members, \$15 for non-members.

Please allow 4-6 weeks for your order to arrive. To order, call our toll-free number 888-FOR-HALT, or send a check, money order, or credit card number to our mailing address. ■

## Book Sale

To purchase any of the titles listed, mail in the **Publication Order Form** along with a check, money order or your credit card information to: HALT, 1612 K Street, N.W., Suite 510, Washington, D.C. 20006. Or, if it's more convenient, call us toll-free at: (888) 367-4258 and charge your order. Please allow 4-6 weeks for delivery. D.C. residents add 6% sales tax.

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Combined Federal Campaign/United Way # 2206

Fall 2002

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