

Statement of

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HALT would like to thank the members of the committee for the opportunity to testify on access to the civil justice system. HALT is a non-partisan public interest organization with over 50,000 members nationwide, which works to increase accessibility and accountability in our civil justice system. Our two projects on access issues, the *Freedom of Legal Information Project* and the *Small Claims Reform Project*, study and promote the issues described in the two sections of this statement which follow.

**ALLOWING A CONTINUUM OF LEGAL SERVICE PROVIDERS
TO SERVE A CONTINUUM OF LEGAL NEEDS**

The most important thing the legal profession can do to increase access to the civil justice system is to recognize that those 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 attorney representation, nontraditional alternatives to lawyer representation, easier self-representation, and various combinations of the above.

The promise of diverse legal service delivery mechanisms was highlighted at an April 1999 symposium of legal service providers in Washington, D.C., where Ada Shen-Jaffe, the Director of Legal Services in Washington State, described a typical client population as presenting a pyramid of legal needs that can be served by a variety of providers:

- Fifty percent can be served through very low-cost interventions such as self-help legal publications and software, self-help legal videos, cable-access television, and multi-lingual brochures.
- Thirty-five percent need low-cost intervention involving a trained nonlawyer (for example, a domestic violence shelter worker or a legal forms preparer).
- Ten percent require some help from an attorney, but the legal representation involved is low-cost and may be supplemented with paralegal or nonlawyer support.
- Only five-percent require full-range, high-cost lawyer representation to address their more complex legal needs.¹

The current system constrains consumer choice by forcing all consumers into a service appropriate to only one out of twenty of them.

¹ Turner, J.C. & McGee, J.A. (1999, November). Freedom of Legal Information: Increasing Court Access for Americans of Limited Means. *Management Information Exchange Journal*, 13 (2), 58-61.

While Ms. Shen-Jaffe's comments were made in the context of legal services to the indigent, they apply much more broadly. As progressive journalist Phillip Stern observed two decades ago, "It is not just the very poor who lack access to legal help, *but the preponderance of middle Americans as well.*"² By limiting all consumers to options that only the richest can afford, the organized bar makes it impossible for most consumers to find any legal representation.

Thus, one of the most productive things that the legal establishment can do to improve access to the civil justice system requires no new programs, no new expenditures, and no additional effort by the bar or the courts. In fact, the bar and courts would save considerable expenditures of money and time by simply allowing consumers the opportunity to choose the legal service providers that are right for them without interference from a legal establishment that insists on a one-size-fits-all model of justice.

A common retort to proposals to loosen restrictions on who may provide legal services is "You wouldn't let anyone other than a doctor perform surgery, would you?" Of course the answer to that question is a firm "No." However, not all medical services are provided by doctors. Medical problems range from severe and difficult ailments such as cancer to

² Stern, P. (1980). *Lawyers on Trial*. New York: Times Books.

problems as mundane as a headache. While it would be ill-advised for a layperson to attempt to treat a cancer patient, it would also be overkill for a person to go to a doctor for a simple headache rather than simply taking an aspirin. In between these two extremes are various other medical problems that can be handled by other professionals in the medical field, such as nurse-practitioners and physical therapists.

Unfortunately, when it comes to law, the options available to the “patient” are not nearly as expansive. In most jurisdictions, a consumer of legal services is faced with the choice between paying an attorney hundreds of dollars an hour or handling a legal problem herself. The overzealous enforcement of laws prohibiting the unauthorized practice of law denies consumers options such as legal document preparers and independent paralegals.

While there are too many examples of the misapplication of unauthorized practice laws to enumerate, a few situations are illustrative of this problem:

In 1998, Oregon independent paralegal Robin Smith, who prepared uncontested divorce papers for some ten thousand people for nine years

without complaint, lost her request for the U.S. Supreme Court to review actions by the Oregon State Bar that shut down her business.³

In 1996, the Delaware Disciplinary Counsel filed a lawsuit against Marilyn Arons – a nonlawyer with expertise in special education – for providing services, free-of-charge, to parents of disabled children in "due process" educational placement hearings in that state. Incredibly, the complaint against Arons did not come from the parents or children she serves, but from lawyers for the school districts which have lost numerous cases to her.⁴ Arons appealed this decision all the way to the Delaware Supreme Court, which denied these students and their families the right to her guidance in these hearings.

The true victims of cases like these are not the people prosecuted for unauthorized practice of law. The actual victims are the thousands of people denied access to justice because these practitioners are not available to them. Many of those who would have used Robin Smith's services are unable to pay for an attorney to do this work (or, more accurately, to sign off on this work after a paralegal completes it). These people are left to navigate the system on their own, causing unnecessary difficulty for themselves and sapping the resources of the courts. In Delaware, families of children with

³ *Smith v. Oregon Bar*, 942 P.2d 793 (Ore. 1997), *cert. denied*, 118 S. Ct. 1055 (1998).

special educational needs cannot find a more qualified adviser than Marilyn Arons. There are no attorneys in Delaware who understand the area of special education as well as she does, let alone any who have as much experience in assisting parents in these proceedings before a school board.

What is most telling about the attacks on lay providers of legal services is that they usually do not rise from consumer complaints. Complaints against non-lawyers usually come directly from competing attorneys, state bar associations or the unauthorized practice committees themselves. In fact, Stanford University legal historian Deborah Rhode found that only two percent of complaints against non-lawyer practice involved any claim of injury.⁵ This belies the claim often made by the bar that unauthorized practice prohibitions exist to protect the consumer. In fact, it is lawyers, not consumers, who are the primary beneficiary of these restrictions.

One of the most effective ways to increase consumer choice in legal services would be to abolish unauthorized practice statutes. As the simple and routine legal needs of millions of Americans continue to go unmet each

⁴ Schmitt, R. (1999, Jan. 14). Advocates Act as Lawyers and States Cry 'Objection'. *Wall Street Journal*, p. B1.

⁵ Rhode, D. (1981). Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions. *Stanford Law Review* 34, 1.

year, it is critical that consumers be able to utilize independent paralegals and other non-lawyer resources.

Consumers should have access to these providers of legal services despite the strident and misguided opposition to these innovations voiced by many state and local bar authorities.

HALT's Freedom of Legal Information Project works to strengthen protections that assure consumers access both to accurate and timely legal information and to assistance from non-lawyers. At the core of this reform effort are three principles:

1. The "unauthorized practice of law" means saying you are a lawyer when you are not;
2. Innovative partnering between lawyers and nonlawyers is permissible with client consent after full disclosure of work and fee arrangements; and
3. A client or customer complaint should be required before unauthorized practice of law proceedings can be initiated.

By removing these restrictions on the types of services allowed, legal information will be made more accessible to consumers in a myriad of forms. A choice among these options will allow consumers to use the form of legal services that best suits their situation and budget. States like Arizona, which has eliminated many prohibitions on unauthorized practice, and California, which has established a regulatory system friendly to

independent paralegals, show how consumers can benefit when they are given a choice of legal service options. We urge the ABA to promote these examples nationwide.

EXPANDING THE AVAILABILITY OF SMALL CLAIMS COURTS

Allowing consumers to choose the legal service provider that is best for them is one way in which the legal community can improve access to the justice system. There is also an affirmative step that the administrators of justice can take to insure greater access to justice: improving access to small claims courts. Small claims reform is one way to help address the enormous gap in accessibility between those in upper income brackets and those with average or lower incomes. With the recent explosion in self-representation, it is important that the court system respond by expanding access to the one court that is designed to handle *pro se* litigants.

HALT believes that small claims dollar limits should be raised to \$20,000 – about the price of a new car. While purchasing a new vehicle is an important financial decision for most people, it is not one for which they consult an attorney or other outside expert. Likewise, people who are seeking resolution of legal problems worth an equivalent amount should not need outside expertise in resolving those matters.

To show why higher small claims limits are essential to ensuring access to the system, consider an example of someone denied access to the system. Suppose a homeowner in Boise, Idaho hires a plumber to replace a pipe in her basement, only to come home the next day to find a foot of water on the floor because the plumber didn't properly install the new pipe. The cost to repair all the damage to her home and the amount she paid the plumber totals \$8,000. The plumber, unfortunately, refuses to pay the homeowner and is not even returning her calls.

The homeowner, having been rebuffed in her efforts to settle this dispute amicably, is forced to take the plumber to court to recover her damages. However, the \$8,000 she lost exceeds Idaho's \$4,000 limit on small claims cases. (Idaho's \$4,000 limit is equal to the national median of small claims jurisdictional limits.) To bring a small claims case, she would have to forfeit half of her damages so that she could get her claim below the limit.

Suing in the Idaho District Court is not a viable option for her because she would need an attorney to help her navigate the complicated procedures used by that court. For a case worth \$8,000, it could easily cost her more to pay the attorney than she would collect if she won her case. As a result, she

is stuck in a legal no-man's land and must shoulder \$4,000 of her loss herself.

A dollar limit of \$20,000 on small claims cases would eliminate that no-man's land. Attorneys rarely take cases worth less than that amount, since it would either require too much of the attorney's time to take such a case on a contingency basis, or it would cost the client too much to pay an hourly rate. This limit would not place an undue burden on the courts. Tennessee, for example, has limits of \$15,000 and \$25,000 (varying by county) on its small claims jurisdiction, and has not reported any adverse effect on its caseload. Furthermore, preliminary research by HALT has indicated that increases in caseload after increasing dollar limits has been minimal or nonexistent in the past. A new dollar limit also would not interfere with lawyers' livelihood, because, as mentioned above, lawyers rarely take cases worth less than \$20,000.

HALT's *Small Claims Reform Project* has also suggested a number of other reforms that could be implemented to reform small claims courts nationwide:

- (1) **Authorizing small claims judges to issue court orders.** Only a handful of small claims courts can issue injunctive relief. Courts can use their injunctive powers to deal with many disputes over contracts and disputes between neighbors that cannot currently be heard by the small claims courts. Also, the inability to issue court orders means that small claims judges

often cannot help people collect a judgment they have already won.

- (2) **Expanding small claims dispute resolution programs.** Mediation and other alternative dispute resolution methods are one way to avoid some of the lasting antagonisms produced by court fights. Many small claims courts do have these programs and we encourage their expansion nationwide.
- (3) **Protecting non-lawyer litigants.** Despite the simplified procedures in small claims court, the presence of a lawyer on the opposing side can intimidate a litigant. The simple reform of discouraging lawyers from appearing in small claims court has already been adopted in some states.
- (4) **Making small claims courts user-friendly.** Steps that could make these courts more user-friendly include the expansion of small claims court hours to include evenings and weekends, provision of in-person assistance to consumers at the courts, simple filing forms and published guides to the small claims system, and low filing fees.

States such as California have implemented most of these reforms, making their small claims system a true “people’s court.” We hope that the ABA will follow their example and endorse these changes.

CONCLUSION

With the reforms discussed above in place, legal consumers will have more options when they seek legal assistance and will have the opportunity to obtain help more affordably when they need it. The system’s greater accessibility to consumers will go a long way toward resurrecting the public’s flagging trust in the civil justice system. The increasing exclusion of all but the very wealthy from our civil justice system is a crisis that harms

tens of millions of Americans each year. We hope that the legal community will join with HALT in our work to restore trust in our civil justice system and to ensure that all Americans are able to use it.