

**COMMENTS TO THE SECOND JUDICIAL DEPARTMENT OF NEW YORK
FROM HALT – AN ORGANIZATION OF AMERICANS FOR LEGAL REFORM
RE: PROCEDURES OF THE GRIEVANCE COMMITTEES
RECOMMENDED BY THE KRAUSMAN REPORT**

The Report and Recommendations of the Committee to Review the Procedures of the Committees on the Grievance Committees of the Second Judicial Department, chaired by the Honorable Gabriel M. Krausman, was released on October 5, 2004. Pursuant to a request by the Second Department, HALT – *An Organization of Americans for Legal Reform* hereby submits comments regarding the Krausman Committee’s proposed changes to the department’s disciplinary rules.

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 well-known 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 provide recourse to victimized legal consumers.

Most recently, HALT provided input to officials in Pennsylvania, New Jersey, New Hampshire, the District of Columbia, Arizona as they considered reforms for their respective systems of attorney discipline. As a result of our efforts and the dedication of disciplinary staff, 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 congratulate the Second Judicial Department for appointing a committee to review its system of attorney discipline. We are pleased that the Krausman Committee has, in many cases, proposed thoughtful solutions to repair some of the problems plaguing the disciplinary body.

Specifically, we strongly support the Committee’s recommendation to increase the number of competent Special Referees. Faster turn-around on written reports after the conclusion of a disciplinary hearing is also a welcome improvement. Providing referees with a copy of court rules would certainly assist them in meting out appropriate discipline.

We also congratulate the Committee for refusing to support a statute of limitations for filing a complaint against an unethical attorney because it can take years to discover a lawyer’s misconduct. In addition, we believe that consolidation of informational pamphlets of the Second Department’s three grievance committees is a good step toward alleviating a great

deal of confusion related to New York's bifurcated system. And finally, we support the Krausman Committee's proposal to allow complainants to be heard on a disciplined attorney's application for reinstatement.

We believe, however, that two of the Krausman Committee's proposals represent potential setbacks for the Department. First, we disagree with the Committee's opposition to the imposition of disciplinary costs on culpable attorneys because we believe that added funds would help shore up the Second Department's resources. In addition, we would like the Second Department to clarify the Krausman Committee's recommendation to reduce the minimum duration of suspension from one year to a mere six months. The Department should amend the proposal to indicate that the shorter suspension will be used to replace lesser forms of discipline, such as public censure, and the one-year suspension will continue to be used to sanction attorneys who have committed more serious violations.

Finally, HALT also urges the Second Department to take this opportunity to conduct a more far-reaching examination of the region's disciplinary system. In particular, we advise the Department to increase nonlawyer participation on hearing panels and bring the disciplinary system out into the open. Together with the Krausman Committee's recommendations, these proposals can help restore lost public trust in the system that oversees attorney conduct in southeastern New York.

I. HALT Supports Krausman Committee Recommendations that Offer Meaningful Protections to Legal Consumers.

The Krausman Committee issued a number of proposals that stand to create a more responsive, fair and prompt system for meting out lawyer discipline in the Second Judicial Department. By adopting these recommendations, the Second Department will bring itself more in line with its counterparts throughout New York and across the country.

Several of the Committee's proposals speak directly to the issue of fairness in the system. For example, one of the Committee's proposals states, "Do not adopt a rule effectively imposing a statute of limitations for making a complaint against an attorney." The Committee correctly concluded that such a statute of limitations would serve only to shield lawyers and prevent victimized clients from seeking recourse.

New York's Second Judicial Department's complicated attorney discipline structure confounds many consumers, and unfortunately, the Second Department hosts no Web site to explain the unique structure of its disciplinary system. With the substantial time it takes the average consumer to simply figure out the system, a statute of limitations would prevent many consumers from filing a complaint before the statute ran out. By adopting a proposal that bars a statute of limitations on attorney discipline complaints, the Committee has displayed a commitment to protecting legal consumers and creating an evenhanded discipline process.

The Committee also approved a proposal that directs that “all interested parties, including the complainants and other victims of a suspended or disbarred attorney’s misconduct, receive notice of an application for reinstatement.” Such a rule, which is already in place in New York’s Fourth Judicial Department, would create an opportunity for the complainant to provide input in the reinstatement process. This aspect of the discipline process, currently shrouded in secrecy, urgently demands a measure of sunshine and transparency, which this proposal would provide.

The Committee’s proposals that address the need for prompt handling of complaints against attorneys stand to reduce the considerable delays that currently plague the system. According to the American Bar Association’s 2002 Survey on Lawyer Disciplinary Systems, it can take New York’s Second Judicial Department as long as one year to file formal charges against an attorney, following the receipt of a complaint. The same study found that other states, such as Nevada, typically take as few as 60 days to file charges. The slow pace of discipline in New York’s Second Judicial Department not only delays justice for victimized clients; while complaints languish, unethical attorney continue to take on new clients.

With its proposal that would “require Special Referees to complete and submit their reports to the court within 60 days after the conclusion of a disciplinary hearing,” the Committee promises to provide a measure of relief for the problem of delay. By implementing deadlines such as this for processing complaints, disciplinary officials have an incentive to promptly respond to grievances. New York’s Second Judicial Department should adopt and adhere to this deadline, while also adopting similar time standards for all stages of complaint resolution.

The Committee’s proposal to “undertake a recruitment initiative, not limited to retired members of the judiciary, to increase the number of eligible and competent Special Referees,” would increase the pace of the Second Judicial Department’s discipline system. As presented in the Committee’s report, “The subcommittee concluded that the disciplinary hearing process could be expedited by increasing the current pool of eligible Special Referees ... Expediting the process would have the concomitant effect of bolstering confidence in the system.”

In addition to reducing delays in the system, this proposal also raises a critical point when it directs that recruitment efforts should not be solely aimed at retired members of the judiciary. The lack of public—or nonlawyer—participation on lawyer discipline hearing panels creates a system of self-regulation, which undermines public confidence and allows accused attorneys to answer only to their peers from the bench and bar. As the Second Judicial Department seeks to enlarge its supply of Special Referees, it should ensure that at least a majority of Special Referees on any hearing panel are nonlawyers.

Furthermore, all Special Referees should undergo extensive background checks and meet a rigorous set of ethical criteria. Those charged with the weighty responsibility of ridding the legal profession of its unscrupulous members must be impartial and well-qualified

for the task. By approving a proposal that would “provide a Special Referee with a copy of the court’s rules when assigned to hear a disciplinary proceeding,” the Committee showed a commitment to ensuring that Special Referees are competent and well-informed.

Finally, we support the Committee’s proposal to “consolidate informational pamphlets of the three Grievance Committees into one uniform pamphlet,” which would be an excellent step toward making the Second Judicial Department’s discipline system more user-friendly and responsive to the general public. As it stands, the Second Judicial Department’s system is overly-complex and a uniform pamphlet marks a first step toward eliminating consumer confusion. To build on this, the Second Judicial Department should also work to develop an easily-navigable Web site for legal consumers wishing to file a complaint against an attorney. Ultimately, New York should consider streamlining its entire attorney discipline system, to bring itself in line with every other state in the nation.

This set of proposals represents pro-legal consumer reform of the Second Judicial Department’s lawyer discipline system. The Committee should be commended for its dedication to addressing features ranging from promptness and responsiveness to fairness and openness. These proposals, if adopted, will address the problems plaguing the region’s discipline system.

II. HALT Urges the Second Department to Require Culpable Lawyers to Pay Disciplinary Costs and Clarify the Krausman Committee’s Recommendation to Reduce the Minimum Length of Suspensions.

In a press release announcing the Krausman Committee’s recommendations to the Second Department’s disciplinary body, Justice A. Gail Prudenti of the Supreme Court, stated, “[W]e must act in ways that foster the public’s trust and confidence in the legal system” [“Appellate Division, Second Judicial Department, Makes Report on Attorney Admission and Discipline Available to Public,” October 5, 2004] Unfortunately, one of the Krausman Committee’s recommendations fails to satisfy this important mission.

The Committee opposes the imposition of disciplinary costs on culpable attorneys. We strongly disagree with the Committee’s position because we believe that the additional funds would bring urgently needed capital to the Second Department. As you may know, California recently passed legislation to require respondent attorneys to help fund disciplinary costs because legislators recognized the need for added resources in the state’s badly underfunded discipline system. Under the new California law, attorneys who are the subject of a complaint are not automatically required to pay any fee; but if they are later found to have violated the state’s professional conduct rules, they must pay disciplinary costs. We believe the Second Department would greatly benefit from adopting a similar rule.

According to the ABA’s most recent statistics, grievance committees within the Department do not currently have adequate resources to investigate every complaint filed.

Some committees, including those in the Ninth District, are investigating less than one out of every three complaints. With added funds, the Second Department would be able to hire more staff to review more complaints, respond more efficiently to consumers, and fulfill some of the Krausman Committee's important proposals.

In addition, we believe that the Second Department should clarify one of the Krausman Report recommendations. The Committee proposes reducing the minimum duration of a suspension from one year to just six months. While we agree that some instances of misconduct only merit a six-month suspension, we urge the Department to clarify that the six-month suspension should be used sparingly and only under circumstances in which a public censure would have been applied under the previous rules. Year-long suspensions should continue to be applied in cases in which an attorney has been in flagrant violation of the Rules of Professional Conduct. A clarification the Committee's recommendation is necessary so that the shortened suspension option is not overused.

We urge the Second Department to require culpable attorneys to pay disciplinary costs associated with the proceedings that their misconduct produced, and we hope that the Department will take a closer look at a recommendation to reduce the length of minimum suspensions from one year to six months. These two items addressed in the Krausman Report warrant a reanalysis by the Department.

III. The Second Department Should Take this Opportunity to Conduct a More Comprehensive Overhaul of its System of Attorney Discipline.

At this time, a unique opportunity arises for the Second Department to go beyond the Krausman Report to ensure that all of the characteristics of the region's discipline system fulfill the Department's mission to protect the local client population. 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.

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 Second Department's—to change.

Under HALT's Report Card, New York's disciplinary body, taken as a whole, fell within the worst 10 systems in the nation. The Second Department's results brought down New York's average to a shameful grade of D. In particular, HALT criticized the Second Department for failing to require more participation by nonlawyers on grievance subcommittees and for prohibiting the public, including complainants, from attending disciplinary hearings.

HALT hopes that the Second Department will use the Krausman Committee as a springboard to repair some of these critical problems facing the region's discipline system. As a starting point, HALT offers the following suggestions: (a) increased public participation in the disciplinary process and (b) expanded openness in disciplinary hearings.

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

The Second Department should increase lay participation in the disciplinary decision-making process. Under the Department's current law, "each grievance committee shall consist of 19 members and a chairman, all of whom shall be appointed by this court and 16 of whom shall be attorneys Each grievance committee shall have the power to appoint its members to subcommittees of not less than three members, two of whom shall constitute a quorum and shall have power to act. At least two members of a subcommittee shall be attorneys." See NY CLS Sup. Ct § 691.4.

Because only three out of 19 members of each grievance committee are nonlawyers, there are not enough nonlawyer members to ensure that every subcommittee is comprised of at least one lay person. The Second Department should increase the number of lay persons serving on grievance committees so that at least one nonlawyer can serve on every subcommittee that hears a complaint. This would bring the Department in line with nearly every other jurisdiction in the country, which require that at least one-third of every panel consist of lay persons.

A system in which attorneys preside as judge and jury over their colleagues is perceived as lenient and biased 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 urge the Second Department to revise its disciplinary rules to ensure that at least one lay person serves on every grievance subcommittee.

In addition, in an era that places a premium on principles of sunshine and transparency, the Second Department's disciplinary system must come out into the open. Current New York law bars members of the public from attending disciplinary hearings. See NY CLS Sup. Ct § 691.4(j) ("all proceedings conducted by a grievance committee shall be sealed and be deemed private and confidential"). Unlike the vast majority of states, even the individual who files a complaint against an attorney is forbidden to attend the proceeding in which his complaint is heard. At best, this creates the appearance of impropriety, and in many cases, this prevents the grievance committees from learning the full set of facts. 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 hearings held by the Second Department. In an age where principles of sunshine and transparency guide government proceedings, the Department's current rule is perceived as regressive. It also gives the public the notion that the disciplinary system has something to hide—hardly a perception that the Department hopes to propagate in light of its mission to protect legal consumers. We urge the Department to permit members of the public—and particularly, complainants—to attend disciplinary hearings.

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

Conclusion

HALT strongly supports most of the Krausman Committee's recommendations. We do trust, however, that the Second Department will give further consideration to a proposal to require culpable attorneys to pay disciplinary costs for proceedings that their misconduct produced. We also hope that the Department will clarify the Committee's recommendation to reduce minimum suspensions from one year to six months. In addition, we urge the Department will take this opportunity to conduct a more comprehensive overhaul of the region's system of attorney discipline. The Department should allow more nonlawyers to participate in the disciplinary decision-making process and eliminate the secrecy pervading the system.

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 Second Department to embrace these reforms. By addressing the shortcomings of the current system, we believe the Second Department can create a discipline system that engenders consumer trust and respect, rather than alienation and resentment.

Respectfully Submitted,

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