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July 12, 2010

Mr. Itzel Berrio  
Office of Chief Trial Counsel  
The State Bar of California  
180 Howard Street  
San Francisco, CA 94105

Dear Mr. Berrio:

We commend the Office of Chief Trial Counsel for proposing critical improvements to the State Bar's Standards for Attorney Sanctions for Professional Misconduct. Since 1978, our nonprofit public interest organization, HALT, has been dedicated to increasing accountability in the civil justice system. In the area of lawyer discipline, we have often pointed to California as a model for the rest of the country and we are pleased to see that the state is once again poised to adopt responsible benchmarks.

While we agree that the Office's 10 proposals all represent essential advancements, we want to express particular support for the recommended amendments to Standards 1.2(b) [Aggravating Circumstances] and 1.8 [Effect of Default]. We also wish to encourage the State Bar to go a step beyond the Office's recommendation with respect to client notification of discipline. Finally, we urge the State Bar to consider further amending its Standards to include some of the criteria presented in HALT's recent Lawyer Discipline Best Practices report.

The Office's proposed amendment to Standard 1.2(b) [Aggravating Circumstances] correctly expands the State Bar's application of factors that would increase penalties against grossly negligent, incompetent and fraudulent lawyers. In addition to existing aggravating circumstances, the proposal would allow the bar to amplify sanctions when an attorney refuses to acknowledge wrongdoing, has substantial legal experience or has engaged in illegal conduct, among other things. These aggravating factors not only comply with recent California case law, but also reinforce the need for strict adherence to the principles underlying the Rules of Professional Conduct. A lawyer who shows no contrition or even acknowledgment that he or she has betrayed a client's confidences, wasted vital resources, committed serious harm and violated the public's trust in our system of law should be penalized more rigorously than one who recognizes his or her transgression and demonstrates how he or she will prevent this problem in the future. Additionally, attorneys who have practiced law for many years should simply know better than to take advantage of a client's trust and should be disciplined more severely for violating ethical rules in which they should be very

conversant. And certainly a lawyer should face a much stricter sanction if his or her ethical breach also violates state or federal law as a lawyer's first responsibility is to uphold the law under all circumstances. We strongly concur with the Office's recommendation to take these additional aggravating factors into consideration when determining the appropriate penalty.

In addition, we advise the State Bar to adopt the proposed new Standard 1.8 [Effect of Default]. The addition of this rule would ensure disbarment of attorneys who default in a disciplinary proceeding, unless the underlying offense is minimal. Defaults comprise a sizeable portion of the Court's caseload. We frequently hear from consumers who report their frustrations with their local disciplinary body's powerlessness to compel disreputable attorneys to face charges. Many victims of attorney abuses report that they do not believe that their complaint was ever acknowledged by the offending lawyer and that, in many cases, the attorney refused to file an answer, show up at proceedings or hear evidence against them. By giving the State Bar Court the authority to disbar in cases of default, the bar makes it far more difficult for attorneys to disregard hearings and delivers a fitting penalty to those who evade court orders.

The Office recommends that the Standards require attorneys to inform clients if they are currently suspended for a period of more than 60 days. While we agree with the need for client notification, we believe that the State Bar should go a step further and require lawyers to report to clients *all* previous and current disciplinary sanctions. When our organization interviewed consumers in preparation for our last Lawyer Discipline Report Card, many told us that they did not realize that their lawyer had a history of misconduct before they retained his or her representation. Requiring lawyers to include this information in an attorney's fee contract would help clients make better-informed decisions about whether to hire a particular lawyer and more important, whether to trust that lawyer with their most valued resources. At a minimum, the State Bar should certainly adopt the Office's recommendation of requiring client notification of current suspensions. Suspended lawyers should be expected to return files and any unearned fees to clients.

HALT will soon release our Lawyer Discipline Best Practices report, which details 10 model procedures applied by disciplinary agencies across the country. Last year, we circulated a draft report to every agency, including the State Bar of California, and encouraged administrators to provide feedback and additional recommendations. Based in part on the input of officials in about a dozen states, our organization finalized a report that encourages courts and bars to adopt the following disciplinary standards:

1. Disclose a lawyer's complete disciplinary history so that consumers can make informed decisions about whether to hire an attorney;

2. Host a user-friendly Web site that is easy to find and provides helpful information about the discipline process;
3. Abolish closed-door sanctions and replace private admonitions with formal and public censures, fines, suspensions and disbarments;
4. Permanently disbar lawyers who commit abusive practices against clients;
5. Abolish gag rules that prevent people from speaking publicly about the complaints they've filed;
6. Publicize the availability of lawyer discipline programs through required client notification and local advertising;
7. Open lawyer discipline hearings to everyone to increase the public's trust;
8. Provide ordinary citizens with a majority voice on the panels that decide attorney misconduct cases;
9. Grant clients and witnesses immunity from civil liability for any information given to the agency during a disciplinary investigation; and
10. Allow citizens the right to appeal initial complaint dismissals and hearing panel decisions.

Our Best Practices report applauds the California State Bar's candidness in publicizing attorney transgressions, recent improvements to its disciplinary Web site and the bar's commitment to permanently disbarring the state's worst offenders. As the State Bar conducts this current overhaul of its Standards of Attorney Sanctions, we hope that it will consider implementing at least three additional rules and procedures detailed in our report.

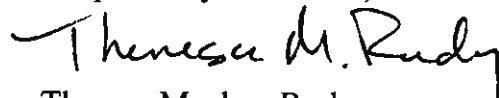
To increase transparency and confidence in its system for holding attorneys accountable, we recommend that California follow the example set by numerous jurisdictions, including neighboring states Arizona and Washington, and abolish closed-door sanctions. Disclosure of discipline deters misconduct by others in the profession, enhances the public perception of the self-regulated system and enables prospective clients to make better-informed decisions about hiring a particular lawyer. Addressing *all* incompetent and abusive actions with real consequences—public censures, fines, suspensions and in the most egregious cases, permanent disbarment—effectively filters the pool of qualified lawyers available to the public.

In addition, we encourage the State Bar to publicize more widely proceedings before the State Bar Court. While most proceedings before the Court are open to the public, the bar's Web site does not contain a schedule of upcoming hearings and little information is provided in local venues—making the already insular system nearly invisible to most Californians. The State Bar should follow the example set by Massachusetts, which not only allows the general public and press to attend every hearing and prehearing conference, but also makes a concerted effort to provide the public with ample notice of the proceedings. The agency's Web site provides a clear link on its home page to a list of dates, times and locations for hearings scheduled that quarter and the same directory is posted in a variety of public venues throughout the state, including courthouses and government agencies.

Finally, we urge the State Bar to consider inviting ordinary citizens to participate in the disciplinary decision-making process. California is one of the only states in the country to exclude laypersons from its disciplinary adjudication procedures. Instead, the state solely relies on judges (in most cases, former lawyers) to rule on matters involving abuses within the profession. The self-regulated nature of the system creates, at a minimum, the appearance of bias. The inherent unfairness in the system suggests that even some of the most abusive lawyers may be given a free pass, as long as they are generally well-liked or maintain power within the profession. If a jury of ordinary Americans can be trusted to decide complex, multimillion dollar civil cases and life-or-death capital cases at the criminal level, certainly we can trust laypersons to help decide ethics cases against lawyers. Lawyers and judges can serve as expert witnesses to instruct panels on the appropriate standard of care, but laypersons should have a much stronger voice in the disciplinary decision-making process.

We appreciate the opportunity to offer our comments and recommendations in response to the Office of Chief Trial Counsel's proposals. Should you need further assistance from our organization as the State Bar considers these critical issues, please feel free to contact us at (202) 887-8255. Thank you for your consideration.

Respectfully submitted,



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Executive Director



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