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AMERICANS FOR LEGAL REFORM

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**COMMENTS TO THE CALIFORNIA BOARD OF GOVERNORS BY HALT, INC.
RE: PROPOSED RULES GOVERNING THE ONLINE PUBLICATION OF
NOTICES OF DISCIPLINARY CHARGES**

Pursuant to a request from the California State Bar's Board of Governors, HALT, Inc., hereby submits comments on rules proposed by the California State Bar's Board Committee on Regulation, Admission, and Discipline.

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 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 to provide meaningful recourse to victimized legal consumers.

We appreciate the Board Committee on Regulation, Admission and Discipline's proposal and the invitation to comment to the State Bar of California. We believe that the recommendations found in the Committee's proposal to post disciplinary charges online are necessary to reform California's attorney discipline system.

- First, to fulfill the unambiguous legislative intent of California Business and Professions Code 6086.1, the California Board of Governors (the Board) should adopt this proposal.
- Second, the proposal is in accord with established precedent from California case law.
- Third, the express public policy of the State of California requires adoption of this proposal.
- Finally, California's movement toward transparency and accessibility in attorney discipline is a positive step for the state's client population. However, we believe that California can adopt even greater reforms in attorney discipline procedure to aid legal consumers.

We encourage California to continue toward an open and public process of attorney discipline. By adopting this proposal, California will increase access to public information and thereby increase client population's ability to make informed choices about representation.

I. In order to meet the requirements of California Business and Professions Code 6086.1, the Board should adopt the proposal.

We strongly urge the Board to consider the plain language of California Business and Professions Code 6086.1 and the current state of information transmission in the United States and California.

The relevant statute provides: "Subject to subdivision (b), and except as otherwise provided by law, hearings and records of original disciplinary proceedings in the State Bar Court shall be public, following a notice to show cause."¹ In the past this has meant that the records and hearings were available to the public, but they had to be bought for \$.50 per page or the records had to be viewed in person at the State Bar Court. In its proposal, the Committee noted that there is currently no information regarding pending attorney discipline cases available on California's State Bar Web site.

An individual member's online profile will reflect past disciplinary actions where some discipline was issued, but not any pending disciplinary action. In fact, even if an attorney were accused of serious misconduct, his member profile would reflect that, "[t]his member has no public record of discipline."

The plain language of California Business and Professions Code 6086.1 reflects the unambiguous congressional intent to have the records of disciplinary actions available to the public. There is no language regarding how this information should be disseminated. In creating a statute requiring the dissemination of public information without prescribing a method, the legislators created a statute that is necessarily and appropriately malleable for the modern communication of information.

The Federal Communication Commission estimates that in 2005, 97 percent of California homes could potentially, if subscribed to an access service, access a high speed Internet connection.² It also estimates that over half the population of the United States currently has access to an Internet connection.³ From 1997 to 2003, Internet access grew from 18.6 percent of United States households to 54.6 percent of U.S. households.⁴ Not all Internet service is rated at the same price; schools and libraries receive discounted rates, reimbursed by the federal government. California has \$266 million of federal

¹ Cal. Bus. & Prof. Code § 6086.1 (2007).

² Federal Communication Commission. *Trends in Telephone Service*. Washington, DC: U.S. Government Printing Office (2007) 2-10.

³ Federal Communication Commission. *Trends in Telephone Service*. Washington, DC: U.S. Government Printing Office (2007) 2-13.

⁴ Federal Communication Commission. *Trends in Telephone Service*. Washington, DC: U.S. Government Printing Office (2007) 2-12.

funds committed to Internet access in libraries and schools, second only to Texas and New York. The number of high speed lines in the state of California is over 9 million of the United State's total 64 million high speed lines; double the number of high speed lines in Texas or New York.⁵ In 2005, 95.4 percent of the population of California households had telephones.

In order to fulfill the intent of the legislature, the Bar should use reasonable means to make pending disciplinary records available. While more households have telephones than have Internet connections, the State Bar should not discount the greater ease of access to information the Internet provides when compared to telephony. The Internet option offers relief to the State Bar Court from outmoded and unnecessarily costly processes of obtaining records. Although the process of ordering records using the telephone is by no means a Herculean task, when compared with instant and easy access that the Bar could provide to legal consumers through the Internet, it is unnecessarily laborious. Savvy legal consumers who are checking the disciplinary history of potential counsel are more likely to be among those regularly using the Internet, and it is undoubted that they would prefer the option of viewing records over the Internet over calling, ordering, paying for, and waiting for the same records.

The Internet has already become the preferred means of communicating important information and researching what information is available. To enforce the purpose behind California Business and Professions Code 6086.1, the Board should adopt the proposal.

II. The proposal should be adopted to remain consistent with California case law.

HALT strongly urges the Board of Governors to consider dispositions in California case law relevant to the proposal. We believe the California Court of Appeal's 2001 decision in *Mack v. State Bar* demonstrates not only that online publication of a disciplinary record is congruent to a telephone request for the same record, but also that there is a strong public policy in California to favor the Internet for procuring these records.⁶

In *Mack v. State Bar*, an attorney, in 1995, had agreed to a private reproof on the condition that four of the five charges against him were dropped.⁷ In 2001, his member profile, accessible via the State Bar's Web site, still recorded that he had faced disciplinary action before, and that information about this misconduct could be accessed

⁵ Federal Communication Commission. *Trends in Telephone Service*. Washington, DC: U.S. Government Printing Office (2007) 2-10.

⁶ *Mack v. State Bar*, 92 Cal. App .4th 957 (2001).

⁷ *Id.*

by visiting the State Bar Court or requesting the information at \$.50 per page. The attorney objected to this practice, as he believed that his supposedly private reprimand was now being publicized through the Web site. The attorney argued that an online record of his disciplinary past violated the stipulation of his previous punishment that the punishment be private.

The Court of Appeal disagreed, as there had been no affirmative publication by the State Bar. The Court of Appeal decided that using the Internet might have been more convenient than using the telephone to find out if a certain attorney had ever been subject to disciplinary action, but that using the Internet or the telephone were fundamentally the same. The California Government Code provides: "In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."⁸ The Court of Appeal held that this provision indicates a strong public policy consideration in favor of disclosure of public records.

The Board should defer to this decision of the judiciary, clearly indicating the congruity of phone requests and Internet publication and restating the strong public policy preference of the state.

III. The express public policy of the State of California requires the Board to approve the proposal.

HALT strongly urges the California State Bar Board of Governors to take definitive public policy statements of the California Legislature into consideration.

The statement of the California Government Code section 6250 that the legislature "finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state"⁹ coupled with the language of the Business and Professions Code that "hearings and records of original disciplinary proceedings in the State Bar Court shall be public, following a notice to show cause" demonstrates the California legislature's strong preference toward governmental openness.¹⁰

Although using the telephone to order paper copies of Notices of Disciplinary Action was a helpful step in protecting consumers, today it is an outmoded means of acquiring information. If California is to satisfy its stated public policy to protect legal

⁸ Cal. Gov. Code § 6250 et seq. (2007).

⁹ *Id.*

¹⁰ Cal. Bus. & Prof. Code § 6086.1 (2007).

consumers, it should adapt to new, more efficient and less costly means of transmitting information.

IV. The Board of Governors should go a step further by following the Oregon State Bar's model of transparency.

HALT strongly urges the Board to consider the case of Oregon as an example of greater freedom of information regarding attorney discipline functioning in a state.

Oregon is one of the few states in the nation that posts disciplinary history on member profiles, but Oregon goes a step further. The Oregon State Bar allows the public to access information regarding any complaint made against a lawyer. The public receives information from the moment the complaint is filed against an Oregon attorney, with no requirement of a finding of probable cause to make the complaint public.

The typical argument for delaying public disclosure of a complaint until a probable cause finding is that lawyers need a defense against frivolous claims. However, California's neighbor to the north has relegated that duty away from other attorneys in the State Bar and given it to the public to determine if the complaints have any merit. Oregon has chosen to respect a consumer's ability to distinguish frivolous claims from those with merit, and in doing has given Oregonians greater ability to make informed decisions about their representation.

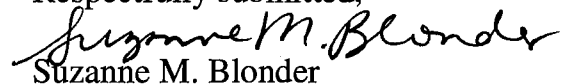
Consumers constantly evaluate goods and services by taking into account mere puffery as well as smear campaigns. Oregon has chosen to give legal consumers the ability to make these informed decisions themselves.

We encourage the Board to follow Oregon's example of granting greater autonomy to legal consumers.

Conclusion

For the reasons stated above, HALT strongly urges the Board to approve the Committee's proposal. HALT commends the Committee, the Board, and the State Bar of California for engaging the public in a dialogue about attorney discipline in California. By adopting this proposal, California will take another important step toward greater access to attorney discipline records for legal consumers.

Respectfully submitted,



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