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AMERICANS FOR LEGAL REFORM

**COMMENTS TO THE ETHICS COMMITTEE OF THE STATE BAR OF
NORTH CAROLINA
REGARDING
PROPOSED 2008 FORMAL ETHICS OPINION 3
SUBMITTED BY JAMES C. TURNER, EXECUTIVE DIRECTOR
July 3, 2008**

Pursuant to the North Carolina State Bar's request for comments regarding proposed 2008 Formal Ethics Opinion 3, HALT strongly supports the proposed opinion, which will help *pro se* litigants, lawyers who wish to provide services to *pro se* litigants, and the courts.

Founded in 1978, HALT is a nonprofit public interest group dedicated to increasing access and accountability in the civil justice system. 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.

As a nonprofit, nonpartisan public interest group dedicated to helping all Americans handle their legal affairs more simply, affordably and equitably, HALT has a strong interest in ensuring that litigants are given the resources they need to represent themselves. Through the efforts of its Freedom of Legal Information Project, HALT has combated restrictive unlicensed practice of law regulations and other mechanisms the legal profession has used to prevent more efficient and accessible innovations in resolving legal disputes.

HALT strongly supports proposed 2008 Formal Ethics Opinion 3 for five key reasons:

- The exploding number of *pro se* litigants is a burden on North Carolina courts.
- Assisted litigants will be less burdensome and better able to effectively and efficiently present their cases to the courts.
- The policy statements in the Preamble of the North Carolina Rules of Professional Conduct require the use of available innovative and efficient ways of resolving conflicts.
- Rule 1.2 of the North Carolina Rules of Professional Conduct expressly allows an attorney to limit the scope of his or her representation.
- The North Carolina client population remains protected by provisions that would prevent an attorney from abusing the system of *pro se* litigants for strategic advantage or avoiding liability.

I. The rapidly increasing number of *pro se* litigants is a strain on the North Carolina court system.

A survey of participants in the 1999 National Conference on *Pro Se* Litigation conducted by the American Judicature Society found that 95% of participants perceived an increase in the number of *pro se* litigants. The perceptions of these participants are backed by data collected from various states. A 2006 report to the Utah Judicial Council found that 49% of petitioners and 81% of respondents in Utah divorce cases are self-represented.¹ The Boston Bar Association Task Force on Unrepresented Litigants found that 75% of litigants in Family and Probate Courts were self-represented.² The Wisconsin *Pro se* Task Force Report found that in the Tenth Judicial Administrative District there was an increase from 43% to 53% of *pro se* litigants in family law cases between 1996 and 1999.³

Many other jurisdictions have reported similar findings, and as unbundled legal resources, do-it-yourself kits, and internet resources make legal information increasingly available to litigants, the trend toward increasing numbers of *pro se* litigants is likely to continue.

These *pro se* litigants can be unprepared and unknowledgeable of court procedures, which can cause delay and frustration for judges and other litigants. Without creative solutions, *pro se* litigants will likely incite more frustrations as their numbers grow. The proposed opinion can remedy this problem by allowing lawyers to keep *pro se* litigants aware of basic court procedures and reducing the amount of time *pro se* litigants take from the courts.

II. Informed *pro se* litigants will ease their burden on the courts by more effectively and efficiently presenting their cases.

Basic courtroom procedures may be confusing and disorienting to an untrained litigant, which can result in delayed or unnecessarily lengthy hearings, missed court dates, improper courtroom behavior or worse. Allowing lawyers to direct litigants so they can know basic information, such as how to properly file documents, know how to access the courthouse, or know how to proceed will make courts more efficient.

Arguments claiming that allowing lawyers to aid *pro se* litigants only encourages litigants to approach the court *pro se* do not take into account the simple fact that people

¹ Committee on Resources for Self-Represented Parties. Strategic Planning Initiative. Report to the Utah Judicial Council (2006).

² Report of the Boston Bar Association Task Force on Unrepresented Litigants (1998), available at http://www.bostonbar.org/prs/pro_se_report/pro_se.PDF

³ Pro Se Litigation: Meeting the Challenge of self-represented litigants in Wisconsin (2000), available at <http://www.wicourts.gov/about/pubs/supreme/docs/prosereport.pdf>

do not need any encouragement to proceed *pro se*. As long as legal services are prohibitively expensive for many Americans, the number of individuals choosing self-representation will also increase. Allowing lawyers to help *pro se* litigants is one way that the courts can ease the increasing burden of untrained litigants in their courthouses.

The proposed opinion will allow litigants who might not be able to afford legal representation a fair chance to be heard while protecting the efficiency of the courtroom.

III. The express policy statements of the North Carolina Rules of Professional Conduct indicate the proposed opinion should be adopted.

Pursuant to the Preamble and Rule 6.5 of the North Carolina Rules of Professional Conduct, the North Carolina State Bar should adopt the proposed opinion. Section six of the Preamble provides:

“A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who, because of economic or social barriers, cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.”⁴

This statement clearly shows the intention that lawyers use their time to ensure equality of access to the law. The expense of hiring an attorney to represent them can be prohibitive for some clients, especially for those who wish to bring claims with relatively small remedies. The complexity of the case may not be great, but prohibitive procedural requirements might make even a simple process daunting.

By encouraging lawyers to help such clients, the North Carolina Bar gives a significant part of the client population, which might not otherwise have had a viable remedy, an opportunity to resolve their conflicts. In so doing, the North Carolina Bar keeps with the stated policy of the Preamble by giving lawyers and clients another tool to provide access to justice.

IV. Rule 1.2 of the North Carolina Rules of Professional Conduct expressly allows an attorney to limit the scope of his or her representation.

The ability to limit the scope of representation is granted in Rule 1.2 of the North Carolina Rules of Professional Conduct and giving advice to *pro se* litigants is a valid exercise of that ability. Rule 1.2 provides that: “A lawyer may limit the scope of the

⁴ N.C. Rules of Prof'l Conduct Preamble § 6 (2008).

representation if the limitation is reasonable under the circumstances and the client gives informed consent.”⁵ Comment six to Rule 1.2 provides that: “A limited representation may be appropriate because the client has limited objectives for the representation.”⁶ Comment seven provides:

“Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely.”⁷

Restricting a relationship with a client to giving a *pro se* litigant advice and not acting for the client in a representative relationship is similar to the consultation mentioned in Comment seven. Also, a *pro se* client is by definition a client with limited objectives for representation, fitting the description of when limited representation is appropriate under Comment six.

The plain language of Rule 1.2 allowing limited scope of representation coupled with the further examples of the Comments strongly support an interpretation allowing *pro se* litigants to receive help from a lawyer on a limited basis.

V. The North Carolina client population remains protected from lawyers that might abuse the proposed opinion.

The client population remains protected from abuses of *pro se* litigants by the established Rules of Professional Conduct. Any lawyer who might advise a client to go into a courtroom as a *pro se* litigant as a strategy would violate Rule 1.1's responsibility to provide competent legal advice. Although representation would be limited in scope, the confidentiality requirements of Rule 1.6 still apply, keeping what a *pro se* litigant shares with an attorney protected.

The question as to how lawyers will know when it is proper to limit the scope of representation is given in Rule 1.2, which state that it must be done if the “limitation is reasonable.” The Rules provide for at least one instance where it is expressly reasonable to limit the scope of representation; Rule 6.5 allows for limited representation for Limited Legal Service Programs. Other reasonable times are when a litigant cannot afford full representation.

⁵ N.C. Rules of Prof'l Conduct § 1.2 (c).

⁶ N.C. Rules of Prof'l Conduct § 1.2 cmt. 6.

⁷ N.C. Rules of Prof'l Conduct § 1.2 cmt. 7

The benefit to the client population of allowing lawyers to counsel *pro se* litigants far outweighs any risk of abuse, which is curtailed by the provisions mentioned above.

Conclusion

For the reasons stated above, we urge the North Carolina State Bar to adopt proposed 2008 Formal Ethics Opinion 3. North Carolina should pride itself on any advances in the law that provide greater access to those who could not otherwise obtain legal counsel of any sort, and continue to move toward a more accessible and efficient judiciary.