

**April 8, 2005**

**COMMENTS OF  
HALT, INC. AN ORGANIZATION OF AMERICANS FOR LEGAL REFORM  
TO THE DISTRICT OF COLUMBIA BAR BOARD OF GOVERNORS  
REGARDING PROPOSED AMENDMENTS TO THE DC RULES OF  
PROFESSIONAL CONDUCT**

Pursuant to the District of Columbia Bar's request of February 8, 2005, HALT *An Organization of Americans for Legal Reform* hereby submits comments regarding proposed amendments to the DC Rules of Professional Conduct.

First, we strongly support the District's retention of sections of the rules, such as Rule 1.5(b)'s requirement that fee agreements be in writing and Rule 5.5(b)'s allowance of fee-splitting between lawyers and nonlawyer partners, that provide significantly stronger protections for legal consumers than their counterparts in the American Bar Association's Model Rules of Professional Conduct.

To uphold and extend this commitment to fully protecting legal consumers, HALT urges the Board of Governors to consider our comments regarding four of the DC Rules of Professional Conduct: Rule 1.2 (Scope of Representation), Rule 1.4 (Communication), Rule 1.5 (Fees), and Rule 5.4 (Professional Independence of a Lawyer). We respectfully suggest that the District:

- further amend Rule 1.2 to reduce ambiguity and to provide clarification that ensures a client's desires are fully carried out;
- revise Rule 1.4 to supply more specific guidance regarding effective lawyer-client communication; and
- adopt the proposed changes to Rule 1.5 and further modify the rule to expressly prohibit the use of value-based billing in probate cases and also offer detailed information to ensure fee agreements are fully understandable and fair to clients; and
- retain Rule 5.4's allowance of fee-splitting arrangements with nonlawyers.

## **I. Rule 1.2 - Scope of Representation**

HALT suggests several revisions to Rule 1.2 of the DC Rules of Professional Conduct that will ensure that a client's best interests are served. We urge the District to revise Rule 1.2(a) by clarifying that a lawyer has an ethical obligation to respect a client's decisions in both criminal and civil matters and by issuing clear guidance regarding the best way to proceed in the event of a disagreement between a lawyer and client. We also urge the District to amend Rule 1.2(c) by including a requirement that limited scope representation agreements be made in writing within the rule, rather than in a subsequent rule, as is currently proposed.

**DC Proposed Rule of Professional Conduct 1.2(a)** A lawyer shall abide by a client's decisions concerning the objectives of the representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

HALT is pleased to see the District implicitly acknowledge in Rule 1.2(a) that the client has the absolute right to make decisions concerning the objectives of a representation and to make the final decision about whether and when to settle a matter. With minor adjustments, Rule 1.2(a) can more fully uphold this essential client right.

Just as the rule acknowledges that a lawyer has an ethical obligation to respect a client's decisions in a criminal case, we suggest the District consider incorporating language that clarifies that a lawyer has a similar obligation to obey a client's decision in a civil case.

In addition, we urge the District to add guidance regarding the best way to proceed in the event of a disagreement between a lawyer and client. In the rule itself or in the rule's commentary, HALT suggests that Rule 1.2(a) include clear instruction that even if honest disagreement between the lawyer and the client about the best way to proceed arises, so long as a lawyer is retained by a client, the client's instructions should be followed, unless doing so would constitute a criminal act or violate the Rules of Professional Conduct.

The following incorporates HALT's recommended changes in italicized text:

**HALT's Proposed Rule of Professional Conduct 1.2(a)** A lawyer shall abide by a client's decisions concerning the objectives of the representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify. *A lawyer has a similar ethical obligation to obey a client's decision in a civil case. In the event of an honest disagreement between the lawyer and the client about the best way to proceed, so long as a lawyer is retained by a client and the lawyer continues to represent the client, the client's instructions should be followed, unless doing so would constitute a criminal act or violate the Rules of Professional Conduct.*

**DC Proposed Rule of Professional Conduct 1.2(c)** A lawyer may limit the objective of the representation if the client gives informed consent.

HALT vigorously supports Rule 1.2(c)'s allowance of limited scope representation (also known as unbundled legal services), an arrangement that provides a more affordable point of access to the justice system than full scale representation. HALT also urges the District to recognize in the commentary to Rule 1.2 that limited scope representation is but one of several ways to increase access for legal consumers. Lawyers have an ethical responsibility to be familiar with other low-cost options for consumers and to help their clients find and use resources such as mediation and arbitration, self-help legal materials and Web sites, and nontraditional legal service providers.

HALT also strongly urges the District to require in Rule 1.2 that agreements of limited scope representation be made in writing. In the proposed changes to the DC Rules of Professional Conduct, Rule 1.5(b) would be modified to require that the scope of a lawyer's representation be communicated to the client in writing. HALT strongly supports this proposed change, which will limit misunderstandings and disputes over what services are being performed. However, HALT encourages the District to include a similar requirement within Rule 1.2 itself to make this obligation abundantly clear to lawyers. Proposed Rule 1.2(c) would require that a limited scope representation arrangement only be made if a client gives "informed consent." By requiring a

written agreement, the rule would ensure that informed consent was actually obtained.

The following incorporates HALT's recommended changes in italicized text:

**HALT's Proposed Rule of Professional Conduct 1.2(c)** A lawyer may limit the objective of the representation if the client gives informed consent *by signing a written agreement outlining the scope of the representation.*

## **II. Rule 1.4 - Communication**

HALT recommends that the District consider revisions to Rule 1.4 to include a greater level of detail and to supply more specific guidance regarding effective lawyer/client communication.

**DC Proposed Rule of Professional Conduct 1.4** (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. (c) A lawyer who receives an offer of settlement in a civil case or proffered plea bargain in a criminal case shall inform the client promptly of the substance of the communication.

The DC Bar Rules of Professional Conduct Review Committee has declined to propose changes to Rule 1.4, which currently lacks unambiguous wording and omits critical sections of the corresponding ABA Model Rule. In order to reduce this vagueness and ensure full client-lawyer communication, we suggest the District amend Rule 1.4 to include Rules 1.4(a)(1), 1.4(a)(2) and 1.4(a)(4) from the ABA Model Code of Professional Responsibility.

Rule 1.4(a)(1), which provides that a lawyer shall "promptly inform the client of any decision or circumstance with respect to which the clients informed consent if required by these Rules"; Rule 1.4(a)(2), which provides that a lawyer shall "reasonably consult with the client about the means by which the client's objectives are to be accomplished"; and Rule 1.4(a)(4), which provides that a lawyer shall "consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law," all serve meaningful functions. By incorporating these three sub-rules, the District's Rule 1.4 can issue a fuller set of instructions regarding client communication.

In addition, Rule 1.4 with its repeated use of the terms “reasonable” and “reasonably” at most recapitulates the negligence standard of care for the tort of legal malpractice. While it may be true that lawyers are *legally* obligated only to keep clients reasonably informed, one hopes that their *ethical* obligation to their clients is greater than merely avoiding malpractice.

HALT suggest the words “reasonably” and “reasonably” be removed from Rule 1.4’s language. Lawyers have a duty to keep their clients informed, to provide requested information and to explain matters to a client’s satisfaction. Including the tort law principle of reasonableness in a statement of ethical duty injects ambiguity and allows attorneys to unilaterally decide how much communication is ethically required.

The following incorporates HALT’s recommended changes in italicized text and our recommended deletions in stricken text:

**HALT’s Proposed Rule of Professional Conduct 1.4** *(a) A lawyer shall promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by these Rules; (b) A lawyer shall consult with the client about the means by which the client's objectives are to be accomplished; (c) A lawyer shall keep a client ~~reasonably~~ informed about the status of a matter and promptly comply with ~~reasonable~~ requests for information; (d) A lawyer shall explain a matter to the extent ~~reasonably~~ necessary to permit the client to make informed decisions regarding the representation; (e) A lawyer who receives an offer of settlement in a civil case or proffered plea bargain in a criminal case shall inform the client promptly of the substance of the communication; (f) A lawyer shall consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.*

Clear, unambiguous language, such as that contained in the first section of HALT’s Legal Consumers Bill of Rights, offers model standards for lawyer-client communication. We hope the District will consider incorporating a similar statement into the revised Rules of Professional Conduct.

**Legal Consumers Bill of Rights, Section I** You have the right to control your own legal affairs. This means that your lawyers must: keep you fully informed with regular written monthly progress reports about the status of your matter; promptly answer your questions; promptly return your phone calls; promptly disclose all alternatives available to you for resolving your matter; and fully discuss the advantages and risks involved in each decision. This also means that you make all the key decisions in your matter, including

whether and on what terms to settle a dispute. Finally, this means that if you are not satisfied with how your matter is being handled, you have the right to fire your lawyer and file a formal complaint with the Attorney Discipline Board in your state.

HALT's Legal Consumers Bill of Rights, which is attached in its entirety, provides a plain language summary of the key ethical obligations and sound practices clients should expect from ethical lawyers. We urge the District to recognize and codify the ethical obligation on lawyers to provide basic consumer information-such as that include in this Bill of Rights-to prospective clients as part of a written retainer agreement. Three states-New York, Illinois and Florida-already require lawyers to provide clients information about their rights either in written retainer agreements or through materials displayed in attorneys offices. Requiring lawyers to include this basic consumer information in a written retainer agreement will do more to improve legal ethics and enhance lawyer accountability than any other action that the Commission could take.

### **III. Rule 1.5 - Fees**

In several aspects, the District's Rule 1.5 represents a substantial improvement on the Model Rule 1.5 laid out by the American Bar Association, in that it supplies more explicit guidance about the information lawyers must provide clients about fee arrangements. HALT encourages the District modify Rule 1.5 to offer detailed information to ensure fee agreements are fully understandable to clients and also expressly prohibit the use of value-based billing in probate cases.

**DC Proposed Rule of Professional Conduct 1.5(b)** When the lawyer has not regularly represented the client, the basis or rate of the fee, the scope of the representation, and the expenses for which the client will be responsible shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation.

HALT strongly supports the District's retention of Rule 1.5(b)'s requirement that fee agreements be made in writing. Fee disputes are an extremely important consumer issues because their occurrence causes such financial hardship for consumers. Daily, HALT hears from legal consumers with stories about the impact that fee disputes have had on their lives. By requiring written fee agreements, the potential for fee disputes and unfair billing practices is sharply reduced. HALT also encourages the District to provide sample attorney-client fee agreements in the revised Rules of Professional Conduct. Many of the fee agreements in circulation are vague, confusing or biased against

the consumer. We suggest that an actual sample fee agreements be appended to the rules for reference preferences.

In addition, we strongly urge the District to adopt the proposed addition of the requirement that the scope of representation be stated in writing. As outlined above, HALT also suggests the District mirror this requirement within Rule 1.2, which deals with the scope of representation.

**DC Proposed Rule of Professional Conduct 1.5(c)** A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation, other expenses to be deducted from the recovery, whether such expenses are to be deducted before or after the contingent fee is calculated, and whether the client will be liable for expenses regardless of the outcome of the matter. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

HALT fully supports the District's requirement in proposed changes to Rule 1.5(c) that contingency fee agreements fully and conspicuously disclose in writing the fact that clients will be responsible for expenses. Many clients mistakenly believe that they will owe nothing if the lawyer loses the case. This misconception is fostered in part by lawyer advertisements that claim "You Pay Nothing Unless We Win." To avoid this common consumer misunderstanding, we strongly urge the District to adopt the proposed change to Rule 1.5(c).

Finally, HALT also suggests that Rule 1.5 expressly prohibit value-based (or percentage fee) billing as it is often allowed in probate cases. Percentage fees can be an arbitrary and unfair way to calculate how much should be paid for probate work. For example, \$100,000 worth of stock in a corporation can be transferred to an heir with no more time, effort or risk than \$100 worth of the same stock. Yet the lawyer or corporate personal representative can ask a fee 1,000 times higher for the larger transaction.

The following incorporates HALT's recommended changes in italicized text:

**HALT's Proposed Rule of Professional Conduct 1.5(g)** *A lawyer shall not enter into an arrangement for, charge, or collect a value based (or percentage) fee in a probate matter.*

With these revisions, the District's Rule 1.5 can continue to serve as a true national model.

#### **IV. Rule 5.4 - Professional Independence of a Lawyer**

HALT vigorously supports the District's retention of Rule 5.4(b)'s allowance of fee splitting agreements between lawyers and nonlawyer partners. Allowing this innovative approach to the provision of legal services increases consumer access to cost-effective, high-quality representation. The District's pioneering leadership on this important issue serves as a prototype for other states to emulate.

#### **Conclusion**

HALT commends the District for laying out a code of ethical conduct for lawyers that in many ways provides more protections and options for legal consumers than the American Bar Association's Model Rules of Professional Conduct. By incorporating the revisions to Rules 1.2, 1.4, 1.5 and 5.5 suggested herein, the DC Rules of Professional Conduct can continue to serve as a national model.

Respectfully submitted,

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## Attachment – HALT’s Legal Consumers Bill of Rights

### Legal Consumers Bill of Rights

*I. You have the right to control your own legal affairs.*

This means that your lawyers must

- keep you fully informed with regular written monthly progress reports about the status of your matter;
- promptly answer your questions;
- promptly return your phone calls;
- promptly disclose all alternatives available to you for resolving your matter; and
- fully discuss the advantages and risks involved in each decision.

This also means that you make all the key decisions in your matter, including whether and on what terms to settle a dispute.

Finally, this means that if you are not satisfied with how your matter is being handled, you have the right to fire your lawyer and file a formal complaint with the Attorney Disciplinary Board in your state.

*II. You have the right to affordable legal services.*

This means that your lawyers must fully disclose

- all alternative fee arrangements;
- total anticipated fees;
- total anticipated costs; and
- any referral fees paid to other lawyers.

This also means that your lawyers must

- provide you with an honest appraisal of the likelihood of a successful representation;
- sign a written fee agreement that spells out the financial terms of every representation;
- agree not to exceed estimated costs and fees without your written consent;
- agree to return any unused portion of your retainer or other advanced payments;
- make full use of economical legal support services such as paralegals and legal secretaries, as well as your own personal services to reduce the total bill to you; and
- each month provide you a written itemized bill.

In addition, this means that whether you have signed an hourly contract or a contingency fee agreement, your lawyers can only charge you a reasonable fee based on the work actually performed.

*III. You have the right to competent legal representation.*

This means that your lawyers must

- provide legal services that are timely, thorough and professional;
- tell you to seek other help, or arrange for co-counsel, if they do not regularly practice law in the areas involved in your matter;
- treat you courteously;
- not neglect your matter;
- respect your right to privacy and protect your secrets and confidential information;
- ensure that they have no conflicts of interest in representing you;
- maintain accurate records; and
- provide you with copies of all court documents and letters they produce or receive while representing you.

*IV. You have the right to an accessible and accountable legal system.*

This means that you cannot be denied representation on the basis of race, creed, color, religion, sex, sexual orientation, age, national origin or disability.

This also means that court clerks and other personnel must provide standardized forms and directions on completing them to non-lawyers as well as lawyers.

In addition, this means that complaints against lawyers will be considered by an impartial disciplinary board that includes nonlawyers as members.

Finally, this means that lawyers and court personnel must answer legal questions and prepare documents in simple English that is understandable to non-lawyers.