

**Statement of
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For
HALT – An Organization of Americans for Legal Reform
Before the
ABA Commission on Evaluation of the Rules of Professional Conduct
("Ethics 2000 Commission")
August 11, 2000**

We welcome the opportunity to share HALT's views with the American Bar Association's Ethics 2000 Commission. As the largest and oldest national organization representing consumers of legal services, HALT – *An Organization of Americans for Legal Reform* works through education and advocacy to enable people to handle their legal affairs simply, affordably and equitably. Founded in 1978, HALT represents more than 50,000 members nationwide.

We note that the Commission has heard from numerous interested parties within the legal profession but little from individual consumers or the organizations that represent them. HALT's comments present the unique viewpoint only consumers can bring to a discussion on revising lawyers' ethical rules.

Our overriding concern is the abject failure of the proposed rules to require lawyers to provide basic consumer information to prospective clients. If ethical rules are to be effective, they should be known to both attorney and client. Yet nowhere in the model rules is there a requirement that a lawyer provide basic consumer information to a client. This failure is particularly striking because three states – New York, Illinois and

Florida – require lawyers to provide clients information about their rights either in written retainer agreements or through materials displayed in attorneys offices.

We urge the Commission to recognize and codify the ethical obligation on lawyers to provide basic consumer information to prospective clients as part of a written retainer agreement. HALT’s Legal Consumer Bill of Rights provides a plain language summary of the key ethical obligations and sound practices clients should expect from ethical lawyers. The following is our suggested formulation of this rule.

Rule __ -- Legal Consumers Bill of Rights

Before accepting employment, a lawyer shall provide a written retainer agreement to the prospective client which includes the following language:

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.

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.

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We would also like to comment on four model rules that most directly affect the interests of legal consumers: 1.2 – Scope of Representation and Allocation of Authority Between Lawyer & Client; 1.4 – Communication; 1.5 – Fees; and 5.5 – Unauthorized Practice of Law. In each of these critical areas, the current proposed rule fails to clearly articulate an ethical standard that fully protects consumers.

Thus while Rule 1.2 implicitly acknowledges that a lawyer has an ethical obligation to respect a client’s decisions and requires obedience in a criminal case, it fails to make it clear that the client’s decisions in a civil case too must be obeyed. Similarly, Rule 1.2 allows limited representation or “unbundled” services by lawyers, but fails to require lawyers to advise clients of other options for dealing with their legal needs.

Rule 1.4 continues to use the tort law reasonableness principle as the benchmark for an attorney’s ethical obligation to communicate with a client. The ethical standard should not incorporate exculpatory principles of the law of negligence, but should clearly

state that a lawyer has an ethical duty to communicate information about a matter to a client in a full, timely and comprehensive fashion.

Rule 1.5 now requires written fee agreements, but fails to provide a suggested model retainer agreement or even to require that such agreements be executed before the representation is underway. In addition, Rule 1.5 allows lawyers to continue the abusive practice of value-based fees in probate.

Rule 5.5 prohibits lawyers from assisting another person in the unauthorized practice of law, but fails to recognize or accommodate the emerging non-traditional legal service providers that enhance consumer choice. Unauthorized practice is attempting to enter into an attorney-client relationship when one is not a lawyer, not helping consumers decide what mix of legal services best fit their needs.

Our more detailed commentary on each of these areas follows.

Rule 1.2 -- Scope of Representation & Allocation of Authority Between Lawyer & Client

- (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation, and 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, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
- (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
- (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
- (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

HALT is pleased to see the Commission implicitly acknowledge in its proposed language for Model 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 legal matter.

HALT has long advocated this position. In its award-winning title, *Using a Lawyer: And What To Do If Things Go Wrong*, HALT advises legal consumers to take an active role in their working relationships with attorneys lest they imperil their pocketbooks and the outcome of their legal matter. “Whatever degree of involvement you decide on, it is essential to communicate to your attorney both your willingness and intention to be helpful and your ownership of the legal matter under consideration. If the relationship works right, you and your lawyer are partners working for a common goal – with you as the senior partner.”

If Model Rule 1.2(a) is to carry weight, however, it must retain the language that requires lawyers to abide by a client’s instructions with respect to the means to be used to accomplish the client’s objectives. Also, Commentary to Rule 1.2(a) should include clear instruction that even if honest disagreement between the lawyer and client about the best way to proceed exists, 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 Model Rules of Professional Conduct.

Model Rule 1.2(b) has nothing to do with a lawyer's ethical obligations. It represents a gratuitous defense of lawyers' practices, not a statement of ethical responsibilities, and should be stricken.

Rule 1.2(c) allows lawyers to limit the scope of their representation (unbundle legal services), if the limitation is reasonable under the circumstances and if the client gives his or her informed consent.

HALT vigorously supports this change but urges the Commission to add the words “in writing” to the end of the rule so that there is documentation that informed consent was actually obtained. Commentary to Rule 1.2 (c) should also be revised to explain that written communications between lawyers and clients, as now required by Rule 1.5(b), are necessary to help limit misunderstandings and disputes over what services are being performed by the lawyer.

HALT also urges the Commission to recognize in its commentary that limited representation is but one of several ways to increase legal access for 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 services, self-help legal materials and internet sites, and nontraditional legal service providers.

RULE 1.4 – Communication

- (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.

Rule 1.4 with its repeated use of the terms “reasonable” and “reasonably” at most recapitulates the negligence standard 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 suggests that the words “reasonable” and “reasonably” be removed from the model rule language. Lawyers have a duty to keep their clients informed, to provide requested information and to explain matters to the client’s satisfaction. Including the tort law principle of reasonableness in a statement of duty strips the rule of any real meaning, and allows attorneys to unilaterally decide how much communication is ethically required.

Theoretically, lawyers do not control these relationships; clients do. Practically, we know that although it is the client’s legal problem that must be resolved and it is the client who pays the bills, all too often the lawyers are the ones who are calling the shots, including when and when not to communicate with the client. Clear language such as that contained in Section I of HALT's Legal Consumers Bill of Rights is a far better way to protect clients and encourage full communication.

Rule 1.5

- (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee. The factors to be considered in determining the reasonableness of a fee include the following:
 - (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (3) the fee customarily charged in the locality for similar legal services;
 - (4) the amount involved and the results obtained;
 - (5) the time limitations imposed by the client or by the circumstances;
 - (6) the nature and length of the professional relationship with the client;
 - (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) the degree of risk assumed by the lawyer.

- (b) The scope of the representation, the basis or rate of the fee and disbursements 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, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee shall also be communicated in writing.
- (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 and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. 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.

A revision of Model Rule 1.5 now requires lawyers to communicate their fees “in writing.” HALT suggests however, that “fee arrangements” and “scope of representation” be communicated in writing before representation begins. We also encourage this Commission to provide sample attorney-client fee agreements as a part of their ethics revision work. Many of the written fee agreements currently in circulation are intentionally vague, confusing, or biased against the consumer. While the commentary to Rule 1.5 provides some instruction on what the content of a fee agreement should include, we suggest that actual sample agreements (e.g., contingent, hourly and fixed) be appended to the Model Rules for reference purposes.

Fee disputes are an extremely important consumer issue because their occurrence causes such financial hardship for consumers. Daily, HALT receives calls, faxes and

emails from members of the public with stories about the impact that fee disputes have had on their lives: often, if they weren't bankrupted by the original overcharge, they almost certainly were by having to hire another lawyer to complete the work or fight the first bill, if they were able to afford either.

Even without blatant overcharges, legal services are priced beyond the reach of most Americans. Bill-padding, overlawyering, theft (misappropriation), exceeding cost estimates and agreements without the client's consent, charging unconscionably high fees, and keeping a retainer without doing the work, all aggravate the unaffordability of legal assistance and, hence, the inaccessibility of the legal system. In sum, because these fee disputes are so common and so burdensome, it is incumbent upon the legal profession to write an ethical rule that enables lawyers to dramatically reduce misunderstandings about their fees and to avoid fee disputes that culminate in an ethical violation.

HALT also suggests that Model Rule 1.5 expressly prohibit value-based (or percentage fee) billing as is often allowed in probate cases. HALT's book on probate warns consumers about percentage fees which are based on the value of the estate being probated not the amount of work involved in settling the estate. "The law generally requires that such percentage fees be based on the value of the probate estate – the total assets collected and distributed by the personal representative, excluding those that pass to heirs outside of probate. However, fees are often illegally based on the value of the gross estate – everything the deceased owned at death. This practice often greatly increases a lawyer's or personal representative's fee."

Whether percentage fees (which vary from state to state) are based on the probate estate or the gross estate, they 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. The transfer can be made by anyone who can make a phone call or write a letter. Yet a lawyer or corporate personal representative can ask a fee 1,000 times higher for the larger transaction, even though in both cases the transfer maybe performed by a lawyer’s legal secretary or paralegal.

Finally, HALT suggests that Model Rule 1.5 require contingency fee agreements to 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.” What these advertisements don’t mention is that clients are often responsible for expenses, regardless of whether or not they win.

Rule 5.5 Unauthorized Practice of Law

- (a) A lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.
- (b) A lawyer admitted to practice in another jurisdiction, but not in this jurisdiction, does not engage in the unauthorized practice of law in this jurisdiction when:
 - (1) the lawyer is authorized to appear before a tribunal in this jurisdiction by law or order of the tribunal or is preparing for a proceeding in which the lawyer reasonably expects to be so authorized; or
 - (2) other than making appearances before a tribunal with authority to admit the lawyer to practice pro hac vice;
 - (i) a lawyer who is an employee of the client acts on the client’s behalf or, in connection with the client’s matters, on behalf of the client’s other employees or its commonly owned organization affiliates:

- (ii) the lawyer acts with respect to a matter that arises out of or is otherwise reasonably related to the lawyer’s practice on behalf of a client in a jurisdiction in which the lawyer is admitted to practice; or
 - (iii) the lawyer is associated in a particular matter with a lawyer admitted to practice in this jurisdiction.
- (c) A lawyer shall not assist another person in the unauthorized practice of law.

The ABA’s Model Rule 5.5 instructs lawyers on how not to commit the unauthorized practice of law. Our concern lies primarily with Model Rule 5.5(c) which prohibits a lawyer from assisting “another person” in the unauthorized practice of law. More often than not, the other person the rule is referring to is a “nonlawyer.” We suggest that Model Rule 5.5(c) be struck.

Our concern lies not with the individual lawyer or nonlawyer who is the target of unauthorized practice statutes, but with the public, which is denied access to affordable legal help when unauthorized practice of law rules are enforced.

Each year, thirty-eight million low and moderate income households nationwide need legal help, but are denied access to the American civil justice system, according to the American Bar Association.¹ As reported in 1995 by the ABA's Commission on Nonlawyer Practice, part of the crisis in access is due to artificial barriers to nonlawyer legal activity which compound the problems of providing legal services to Americans of limited means.

To address this problem, the Commission recommended that the profession “examine its ethical rules, policies and standards to ensure that they promote the delivery

¹ See *Agenda for Access: The American People and Civil Justice -- Final Report on the Implications of the Comprehensive Legal Needs Study*, Consortium on Legal Services and the Public, American Bar Association, Chicago, Illinois (1996).

of affordable, competent services and access to justice,” and called on the states to reassess their unauthorized practice statutes, rules and enforcement activities.² Ignoring its own Commission, the ABA House of Delegates never even debated these recommendations.

While the ABA chose to ignore an opportunity to help increase access to our civil justice system, the vast majority of Americans who require legal assistance continue to have unmet needs because they simply cannot afford to hire a lawyer.

Broad prohibitions on the “unauthorized practice of law” are vestiges of anticompetitive practices by the legal profession that have become increasingly antiquated as we enter the information age. Indeed the Progressive Policy Institute recently condemned the potential impact of unauthorized practice restrictions, and recommended that “[o]ffering advice or preparing legal documents online should not be deemed the practice of law if the consumer does not expect to establish an attorney/client relationship with the online service.”³

HALT urges this Commission to recognize these changing circumstances and encourage the development of innovative means of delivering legal services, by striking Model Rule 5.5(c).

² See *Nonlawyer Activity in Law-Related Situations: A Report with Recommendations*, Commission on Nonlawyer Practice, American Bar Association, Chicago, Illinois (1995).

³ James H. Johnston and Robert D. Atkinson, “Stopping the Regulatory Threats to the Emergence of Online Law,” available online at <www.dlcppi.org/texts/tech/onlinelaw.html>.