

## **HALT'S 2002 LAWYER DISCIPLINE REPORT CARD**

### **SUMMARY OF FINDINGS**

HALT's 2002 Lawyer Discipline Report Card reveals a system of self-regulation that is badly broken and in need of urgent reform. If an attorney discipline agency in this country imposes any discipline, more often than not it takes the form of a minor, secretly dispensed reprimand. While some jurisdictions are beginning to make their disciplinary services better known to the public, many states remain hopelessly stranded in the dark ages, without websites or listings in local telephone directories. Agencies deprive consumers of basic information about their lawyer's discipline history. In many states, disciplinary hearings are held in secret and a few jurisdictions forbid even the person who filed the complaint to attend. Many consumers fear that if they submit grievances, their lawyers may sue them, and when individuals do have the courage to file a complaint, state "gag rules" punish them with fines and imprisonment if they speak about the grievance. State agencies delay filing formal charges against attorneys and if a hearing regarding a lawyer's ethical violations does occur, the judge and jury consists of fellow lawyers. This country's lawyer discipline system continues to be irresponsible at best – and in some cases downright antagonistic – toward consumers.

More than 30 years ago, retired Justice Tom Clark of the United States Supreme Court examined the system of lawyer discipline for the American Bar Association and reported a "scandalous situation" that required "the immediate attention of the profession."<sup>1</sup> The Clark Committee itemized 36 faults in the disciplinary system and, in particular, noted that "[m]ost disciplinary agencies deliberately discourage any publication of information concerning their activities, believing that the public image of the profession is damaged by a disclosure that attorney misconduct exists." The Committee also pointed out that a panel of lawyers, rather than judges or lay persons, were running the disciplinary system. The Committee charged that this institutional bias rendered the system ineffective.

Twenty-two years later, an American Bar Association commission chaired by academic Robert McKay revisited the matter by conducting a nationwide evaluation of lawyer discipline enforcement.<sup>2</sup> The McKay Commission found that the public held a "growing mistrust of secret, self-regulated systems of lawyer discipline." The Commission noted that where elected bar officials controlled all or parts of a state disciplinary system, an apparent conflict of interest was created "regardless of the actual fairness and impartiality of the system." Ultimately, the Commission reported that the public viewed lawyer discipline as "too slow, too secret, too soft, and too self-regulated."

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<sup>1</sup> Special Committee on Evaluation of Disciplinary Enforcement, American Bar Association, *Problems and Recommendations in Disciplinary Enforcement* 1 (1970).

<sup>2</sup> Commission on Evaluation of Disciplinary Enforcement, American Bar Association, *Lawyer Regulation for a New Century* xviii (1992).

Despite decades of repeated calls for reform, nothing has changed. According to a 2002 nationwide survey commissioned by Columbia Law School, two-thirds of Americans believe lawyers are overpaid, even in comparison to doctors and corporate executives.<sup>3</sup> About half think that attorneys do more harm than good. Four in ten say lawyers are dishonest. And over two-thirds of Americans lack confidence in the integrity of the lawyer discipline system.<sup>4</sup> In spite of this, there has been no major evaluation of this country's lawyer discipline system since the McKay Commission study – until now.

HALT has produced the 2002 Lawyer Discipline Report Card to assess whether states have taken any meaningful action to ameliorate the lawyer discipline system since McKay. The Report Card, which judges the performance of lawyer discipline agencies in all 50 states and the District of Columbia, evaluates each agency on six key factors: (1) Adequacy of Discipline Imposed; (2) Publicity and Responsiveness; (3) Openness of the Process; (4) Fairness of Disciplinary Procedures; (5) Public Participation; and (6) Promptness. The first factor – Adequacy of Discipline Imposed – is weighted most heavily, constituting 35 percent of each state's overall grade. The following four categories each account for 15 percent, and the final factor is five percent of the overall grade.

To evaluate the adequacy of the discipline imposed by each disciplinary agency and each state's promptness in processing consumer grievances, HALT analyzed the most recent statistics released by the American Bar Association's Survey on Lawyer Discipline.<sup>5</sup> All other factors were evaluated based on data HALT collected from May through September of 2002. In order to assess each agency's publicity and responsiveness, openness, public participation and disciplinary procedures, HALT called each state disciplinary agency and evaluated the website, brochure and annual report published by each agency. Based on the findings and recommendations of the 1970 Clark Committee and the 1992 McKay Commission, HALT developed a specific set of criteria for each factor. A list of grading criteria is provided on the back of each state's report card and a more detailed explanation of the grading methodology is available upon request.

The top five states – Massachusetts, Florida, Oregon, Connecticut and Wisconsin – show some encouraging signs. Massachusetts, for example, is a model for fairness in its disciplinary procedures. The state's Board of Bar Overseers provides grievants with absolute immunity, allows lawyer misconduct to be proven through an appropriate standard and does not threaten consumers with fines or imprisonment if they choose to speak publicly about their complaints. Instead of dodging the public, as many agencies do,<sup>6</sup> the Massachusetts Board actively protects

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<sup>3</sup> Columbia Law Survey, *Lawyers and the Legal Profession* (April 2002).

<sup>4</sup> Deborah Rhode, *In the Interests of Justice: Reforming the Legal Profession* 158 (2000) [hereinafter *Interests of Justice*].

<sup>5</sup> American Bar Association, *Survey on Lawyer Discipline*.

<sup>6</sup> In reference to the New Hampshire Bar's client compensation fund, fund chairman David Jordan confessed two years ago, "[W]e don't tell anyone about the fund. Half the board doesn't want the public to know about the fund because it says that lawyers are crooks." Steven Serdikoff, *The Sham of Client Compensation Funds*, Nolo: Law for All (2002) <[http://www.nolo.com/democracy\\_corner/article.cfm/objectid/](http://www.nolo.com/democracy_corner/article.cfm/objectid/)>.

consumers by repeatedly reminding the public of the disciplinary office's services in major Boston newspapers and the like.

The five worst states – Pennsylvania, North Carolina, Montana, Kentucky and Alaska – are unresponsive to consumer inquiries, fail to retain important records, do little to make their lawyer discipline agencies known to consumers and bury their lists of sanctions into trade publications for lawyers. Pennsylvania's Disciplinary Board, ranked worst in the nation, has no website, refuses to answer consumer questions over the telephone, does not offer an official complaint form, holds all lawyer discipline proceedings in secret and prohibits non-lawyers from serving on hearing committees – shameful facts for a state with one of the highest concentrations of lawyers in the nation.

## **ANALYSIS OF THE CATEGORIES**

HALT's Report Card shows dismal results in all six categories, with the exception of Publicity and Responsiveness – an area where disciplinary agencies appear to be improving. The most critical factor in evaluating the performance of a lawyer discipline agency – Adequacy of Discipline Imposed – produced the country's lowest marks. Grades were paltry in the areas of Openness of the Process and Fairness of Disciplinary Procedures. States also fared poorly in Public Participation and Promptness.

### **Adequacy of Discipline Imposed**

In order to comprehend the infrequency with which acts of lawyer misconduct are met with punishment, it is important to understand that current disciplinary agencies have no authority to sanction attorneys for many different forms of egregious misconduct. The lawyer discipline system does not, for example, address complaints that an attorney's service was remarkably overpriced or that an attorney billed for services that a client never authorized. Only a strict violation of the narrow rules of professional conduct fall within a disciplinary agency's jurisdiction. Of that small subset of misconduct that does constitute a rule violation, Stanford Law Professor Deborah Rhode notes that the majority of it goes unreported.<sup>7</sup> Clients frequently lack sufficient information or incentives to file grievances and many individuals have little understanding of their rights in disputes with lawyers.

Of those cases that consumers do report, only a select number lead to investigation – let alone discipline. The American Bar Association reports that the vast majority of agencies fail to review most consumer grievances.<sup>8</sup> Agencies like the Texas State Bar investigate less than one-third of the complaints that consumers submit to the state's Chief Disciplinary Counsel. Agencies in Idaho, Colorado and Mississippi look into less than one out of every ten consumer grievances.

Ultimately, this trickle of discipline – starting from the vast number of incidents of lawyer misconduct filtering down to the smaller number of formal attorney grievances slowly making its way to the scanty percentage of complaints investigated by the agency and finally

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<sup>7</sup> Rhode, *Interests of Justice* 159.

<sup>8</sup> American Bar Association, *Survey on Lawyer Discipline*.

down into to the even smaller pool of investigated cases that lead to discipline – means that only a miniscule fraction of lawyer misconduct ultimately makes it way to punishment.

Even in the rare case that an agency does decide to mete out discipline, the sanctions tend to be little more than private slaps on the wrist. Most often a lawyer receives only a secret admonition or a closed-door reprimand. Lawyers often receive several private admonitions before they receive any public discipline.<sup>9</sup> Who you are, where you practice, and who you know can directly affect the severity of the sanction imposed and the lawyer’s ability to continue the practice of law.<sup>10</sup> In the end, less than three percent of investigated cases lead to public sanctions and only one percent result in disbarment. The American Bar Association’s most recent data shows that agencies in Delaware, New Hampshire and Rhode Island did not disbar a single attorney, despite the thousands of complaints they received from consumers.

### **Publicity and Responsiveness**

Notwithstanding the inadequacy of the sanctions imposed in most states, many disciplinary agencies are doing a better job of advertising their services, informing the public of how and where to file grievances against unethical attorneys and responding to consumer inquiries about the lawyer discipline system. All but four states – Alabama, Alaska, Delaware and Pennsylvania – host websites that publicize lawyer discipline services, present examples of misconduct and often feature online complaint forms. Agencies are also providing more detailed and clear brochures upon request. Many agencies advertise services in local Yellow Page directories and through links on the internet.

While a few years ago, consumers used to be met with busy signals and long waits when they called disciplinary agencies, they are now starting to receive a more prompt response and direct answers to their inquiries. New York is one notable exception. Unlike all other states, New York is splintered into six different disciplinary agencies, each overseeing different sections of the state. The lack of centralization poses a number of problems with regard to responsiveness. For example, if a consumer plugs the terms “New York,” “attorney,” “discipline” and “complaint” into the internet search engine Google, the consumer will be directed to the Fourth Judicial Department of New York’s website. The site’s homepage does not explain that complaints may only be submitted to the department if they involve an attorney with offices in one of 22 counties. When a consumer calls the Second Department, District 9, she is instructed to contact another district within that same department, and then when the consumer telephones the other district, she is informed that she has reached the wrong department. The confusing decentralized system in New York hinders consumers from filing grievances.

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<sup>9</sup> Leslie C. Levin, *The Emperor’s Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 Am. U. L. Rev 1, 14 (1998).

<sup>10</sup> Paula A. Monopoli, *Legal Ethics and Practical Politics: Musings on the Public Perception of Lawyer Discipline*, 10 Geo. J. Legal Ethics 423, 425 (1997).

## **Openness of the Process**

Although most lawyer discipline agencies are starting to make their services better known to the public, the vast majority of states do not allow much of the information that comes out of their disciplinary agencies known to the public. If consumers call their state agency and ask whether a grievance has ever been filed against a particular attorney, all but two states – Oregon and Arizona – refuse to respond. Few disciplinary agencies will even inform an inquiring consumer of whether the agency has ever admonished or reprimanded a particular lawyer.

Lawyer discipline agencies also make it difficult for the public to find out which attorneys have been disbarred, suspended and publicly censured. Most states bury these lists in bar journals and legal newspapers – publications that do not reach the general public. It seems that little has changed since 1970, when the Clark Commission reported that “[m]ost disciplinary agencies deliberately discourage any publication of their activities, believing that the public image of the profession is damaged by a disclosure that attorney misconduct exists.”<sup>11</sup>

While the vast majority of states allow complainants to attend lawyer discipline hearings, a number of jurisdictions continue to keep hearings closed to the general public. Florida, for example, allows only the grievant and the defendant lawyer into the hearing room. New York, Missouri and Nevada hold secret hearings – prohibiting even the person who filed the complaint from observing the proceedings.

## **Fairness of Disciplinary Procedures**

HALT’s Report Card also demonstrates that state agencies are not, by and large, promulgating fair and evenhanded disciplinary procedures. Nine states – Alaska, Arkansas, Georgia, Montana, Nebraska, Nevada, New Jersey, South Dakota and Washington – have “gag rules” that prohibit consumers from speaking publicly about their grievances. In these states, consumers who choose to inform local media or simply tell friends or family members about their grievances before complaints become “public” will be held in contempt of court and fined or even imprisoned. In addition to the nine states with threatening “gag rules,” 27 states ask consumers to maintain secrecy with regard to their grievances. This not only poses an unconstitutional restraint on free speech, but it also intimidates an already vulnerable community of victimized legal consumers.

Only 11 states allow unethical conduct to be proven by the same standard applied in all other civil proceedings – “preponderance of the evidence.” Most agencies will not discipline an attorney unless violations of professional conduct rules are demonstrated with the more burdensome “clear and convincing” evidentiary test – a standard which guarantees that fewer lawyers will be found guilty. Georgia goes so far as to require proof “beyond a reasonable doubt,” the test used in criminal proceedings where an individual’s life and liberty is jeopardized.

Absolute immunity is offered to grievants in only about half of all jurisdictions. When consumers receive immunity, their lawyers may not sue them for filing grievances. Without

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<sup>11</sup> Special Committee on Evaluation of Disciplinary Enforcement, *Problems and Recommendations* 1.

immunity, consumers are discouraged to register complaints against their attorneys because they fear that their lawyers might sue them under defamation statutes.

## **Public Participation**

One fundamental problem that HALT's Report Card exposes is the lack of public participation on lawyer discipline hearing panels. In most states, lawyer discipline agencies are run by state bar associations. In these states, the bar also acts as a trade association, charged with protecting the status and economic interests of the legal profession. In the remaining states, although the disciplinary agency is technically independent, the state bar has considerable influence over who sits on the disciplinary governing board, who is hired as bar counsel, how complaints are processed and what is considered unethical conduct under the state's rules of professional responsibility. This not only poses a strong conflict of interest, but it also discourages consumers who have already been victimized by lawyers from filing complaints with agencies that are by, for and of lawyers.

In all but one state – Iowa – lawyers make up at least two-thirds of the adjudicating committee. In Arizona, California, Georgia, Indiana, Kansas, Kentucky, Mississippi, Michigan, North Carolina, Pennsylvania, Tennessee and Washington, lawyers comprise 100 percent of lawyer discipline hearing panels.

## **Promptness**

Finally, an issue of great concern is delay in the lawyer discipline system. Twenty-three agencies do not keep a record of how quickly they process consumer grievances. Of those that do track this information, even the best states – Arkansas, Maine, Mississippi, Nevada, North Dakota and South Dakota – take five months to file formal charges against attorneys. Lawyer discipline agencies can take as long as two and a half years to impose discipline. Most agencies have no deadlines for processing complaints and as a result, they have no incentive to promptly respond to consumer grievances. While agencies sluggishly review complaints, unethical attorneys continue to take new clients.

## **HALT'S RECOMMENDATIONS**

The need for reform is clear. The more difficult task is to establish specific strategies for progress. Based on the findings of the 2002 Lawyer Discipline Report Card, HALT makes the following recommendations:

### **Adequacy of Discipline Imposed**

- The jurisdiction of lawyer discipline agencies needs to be broadened to encompass additional acts of misconduct such as overbilling and negligence.
- Agencies need to implement plain-language standards that state what constitutes grounds for dismissing a complaint, for a finding of probable cause and for imposing discipline.

- A complaint should never be dismissed based solely on the responding attorney's answer.
- The complaining client should be given an opportunity to dispute the answer.
- Should the two sides disagree about the facts, the agency should investigate.
- Private reprimands should be eliminated or only used in very limited circumstances.
- Agencies should institute fines in some cases; fines will help deter future misconduct and can help fund the agency's work.

### **Publicity and Responsiveness**

- At a minimum, every agency should be listed in all local Yellow Pages directories.
- Agencies should encourage government and private consumer advocacy organizations to refer consumers to disciplinary agencies.
- Agencies should advertise regularly in newspapers of mass circulation and in consumer publications.
- Attorneys should be required to distribute a brochure on discipline to each client when the attorney is hired.

### **Openness of the Process**

- Lawyer discipline agencies should disclose the number of complaints filed against a lawyer, the number of complaints still pending, the basis of complaints (e.g., theft, neglect), the investigative findings, the resolution of closed complaints and a summary of all private and public discipline imposed.
- The general public – and especially all grievants – should have the right to attend disciplinary hearings, just as they have a right to attend all courtroom trials.

### **Fairness of Disciplinary Procedures**

- No state should have a “gag rule” that fines or imprisons consumers that wish to exercise their First Amendment right to speak publicly about grievances.
- Agencies should revise the content and tone of their brochures so that consumers do not feel that they under a duty to keep their mouths shut.
- Every state should enact legislation that protects consumers from being sued by their lawyers for filing complaints.
- The burden of proof in every jurisdiction should be no higher than “preponderance of the evidence” – the standard currently used in all other civil proceedings.

### **Public Participation**

- The lawyer discipline system should eliminate its inherent bias by creating an independent regulatory system. Canada, Great Britain and Australia provide useful models for independent regulation.<sup>12</sup> Canada and Great Britain have provided oversight through ombudsmen and advisory commissions with most of their members drawn from outside the bar. Australia has an independent office that handles

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<sup>12</sup> Rhode, *Interests of Justice* 162.

complaints and Australian law professor Adrian Evans reports that the system consequently performs more effectively.<sup>13</sup>

### **Promptness**

- Each disciplinary agency should adopt and adhere to deadlines for all stages of complaint resolution. Further, states should institute fines for lawyers who do not cooperate with investigations within designated deadlines.

### **CONCLUSION**

The nation's lawyer discipline system remains in critical need of reform. HALT has recommended a number of solutions. In many instances, these are the same suggestions made by the Clark Committee in 1970, the McKay Commission in 1992 and in previous Lawyer Discipline Report Cards produced by HALT. It is time for lawyer discipline agencies to take the specific measures that have been proposed in study after study for more than three decades. Meaningful reform in this nation's attorney discipline system will help return the legal system to its rightful owner: the legal consumer.

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<sup>13</sup> Professor Evans spoke about Australia's system of independent lawyer regulation at the 2002 National Conference on Professionalism, sponsored by the Nelson Mullins Riley and Scarborough Center on Professionalism at the University of South Carolina School of Law.