

**April 29, 2005**

**COMMENTS OF  
HALT, INC. AN ORGANIZATION OF AMERICANS FOR LEGAL REFORM  
TO THE SUPREME COURT OF WASHINGTON REGARDING PROPOSED  
AMENDMENTS TO THE WASHINGTON RULES OF PROFESSIONAL  
CONDUCT**

Pursuant to the Washington Supreme Court's request of December, 2004, HALT—*An Organization of Americans for Legal Reform* hereby submits comments regarding proposed amendments to the Washington Rules of Professional Conduct.

To uphold and extend this commitment to fully protecting legal consumers, HALT urges the Supreme Court to consider our comments regarding three of the proposed Rules of Professional Conduct: Rule 1.2 (Scope of Representation), Rule 1.4 (Communication) and Rule 1.5 (Fees). In addition, we support amending the rules to require that Washington-licensed lawyers carry a minimum level of professional liability insurance. HALT respectfully recommends that the Supreme Court:

- (1) further amend Rule 1.2 to reduce ambiguity and to provide clarification that ensures a client's desires are fully carried out;
- (2) revise Rule 1.4 to supply more specific guidance regarding effective lawyer-client communication; and
- (3) 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
- (4) amend the Rules of Professional Conduct to include a requirement that every lawyer licensed in the State of Washington obtain insurance coverage for professional liability.

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 well-known 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 provide recourse to victimized legal consumers.

Recently, we have directed much of our reform work toward state rules of professional conduct. In 1999, HALT staff testified before the American Bar Association's Ethics 2000 Committee and urged adoption of our Legal Consumers Bill of Rights, which offers model standards for attorney-client communication. We have worked with several jurisdictions, including the District of Columbia, Georgia, Arizona and Maryland, to bring about long-overdue changes to their rules of professional conduct. We have made these efforts a priority because members of the public, including many from the State of Washington, tell us that ambiguous and often lax ethics rules for lawyers marks one of the greatest obstacles facing legal consumers.

In collaborating with states, we have focused on rules related to the scope of representation, communication, fees and malpractice insurance coverage and disclosure. We have analyzed recommended changes to Washington's Rules of Professional Conduct in these areas. While we believe that the new rules are an excellent first step, we have identified several areas where reform is still needed.

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

HALT suggests several revisions to Rule 1.2 of the Washington Rules of Professional Conduct that will ensure that a client's best interests are served. We urge the Court 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 Court to amend Rule 1.2(c) by including a requirement that limited scope representation agreements be made in writing.

Washington Proposed Rule of Professional Conduct 1.2(a) provides:

Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of the representation, as required by Rule 1.4, 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 settle 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 that this rule acknowledges that a 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 Court 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 Court 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)**

Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of the representation, as required by Rule 1.4, 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 settle 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.*

Washington Proposed Rule of Professional Conduct 1.2(c) provides: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and 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 Court 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 Court to require in Rule 1.2 that agreements of limited scope representation be made in writing. In the proposed changes to the Washington 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 Court 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 scope 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 Court consider revisions to Rule 1.4 to supply more specific guidance regarding effective lawyer-client communication.

Washington Proposed Rule of Professional Conduct 1.4 (a) provides:

A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information; and (5) 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.

While the proposed rule establishes important general guidelines, the Court could give the rule teeth by requiring the lawyer, at the start of the attorney-client relationship, to inform the client of what he or she can expect of the lawyer. The first section of HALT's Legal Consumers Bill of Rights provides a useful model:

**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 Court 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 Court could take.

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

We recommend that the Court amend Rule of Professional Conduct 1.5 to *require*, rather than simply *recommend*, written fee agreements. So many of the disputes that frequently arise out of miscommunications about billing and fees would be eliminated if agreements were memorialized in a written form. HALT also suggests that Rule 1.5 expressly prohibit value-based (or percentage fee) billing, as it is often allowed in probate cases.

Washington Proposed Rule of Professional Conduct 1.5(a) provides:

- (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for

expenses. 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, the reputation, and ability of the lawyer or lawyers performing the services; (8) whether the fee is fixed or contingent; and 9) the terms of the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement of the lawyer's billing practices.

The commentary to proposed Rule 1.5(a)(9) provide that lawyers “are encouraged to use written fee agreements that fully and fairly disclose all material terms in a manner easily understood by the client.”

HALT recommends that the Court require written fee agreements and include this requirement in the text of the rule. Fee disputes are one of the most pressing problems faced by legal consumers because their occurrence causes such financial hardship. 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 Court 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.

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) should provide: "A lawyer shall not enter into an arrangement for, charge, or collect a value based (or percentage) fee in a probate matter."

#### **IV. Mandatory Legal Malpractice Insurance**

While, in many cases, the Bar's recommended changes strengthen and clarify the Rules of Professional Conduct, one striking omission in the new set of proposals is a rule that would require Washington lawyers to obtain professional liability coverage. While Oregon has mandated that its attorneys protect clients by carrying malpractice insurance, its neighbors to the north do not even ask lawyers to inform their clients of whether they maintain a policy.

Washington's client protection fund limits coverage to losses stemming from theft. The Washington State Bar Association's own Web site directly states: "The Lawyers' Fund for Client Protection cannot compensate you for losses caused by a lawyer's malpractice." Attorney discipline systems, including Washington's, do not provide financial compensation to victimized clients. As a result, a legal malpractice case is frequently a client's only recourse when her attorney's negligence has caused financial loss.

A legal malpractice lawsuit, however, is worthless if a lawyer is insolvent and is not covered by professional liability insurance. Mandatory coverage is the only way to fully protect consumers of legal services. For this reason, Oregon has required lawyers to carry malpractice insurance since 1977. According to the Oregon State Bar, mandatory coverage has allowed the bar to focus on malpractice prevention. Since requiring insurance, the quantity and severity of malpractice claims has decreased. Jeff Crawford, director of the Oregon bar's Professional Liability Fund, has stated that surveys of Oregon lawyers show that their satisfaction with the rule is nearly 100 percent. This is, at least in part, because mandatory coverage in the state has lowered policy rates. The cost of minimum \$300,000 insurance in Oregon is about half of what it is in most states.

During this period of reanalysis and reform, the Supreme Court of Washington has the opportunity to follow Oregon's model and require licensed attorneys to carry professional liability insurance. This will give Washington consumers greater peace of mind when working with a lawyer and will allow the Court to fulfill its mission of protecting the state's client population.

## **Conclusion**

HALT supports the Washington State Bar Association's recommended modifications to the Rules of Professional Conduct. The proposed changes represent a marked improvement over the former rules. By providing further clarification in certain sections, issuing specific guidance about communication between lawyers and clients, requiring that fee agreements be in writing, prohibiting the use of value-based billing in probate courts and amending the rules to require lawyers to obtain malpractice insurance coverage, the Washington Rules of Professional Conduct can 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.