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**Comments to
The Supreme Court of South Carolina
Regarding ABA Consultation Team's Recommendations on the
South Carolina Lawyer Disciplinary System
Submitted by
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Pursuant to a request from the Supreme Court of South Carolina, HALT, Inc. hereby submits comments regarding the ABA Consultation Team's Recommendations regarding the South Carolina Lawyer Disciplinary System.

Founded in 1978, 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 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.

We commend the Court's appointment of an ABA Consultation Team to review its system of attorney discipline, demonstrating the Court's commitment to reform and progress. We are pleased that the Consultation Team has, in many respects, proposed thoughtful solutions to repair some of the problems plaguing the disciplinary body. Along with others, we strongly support the team's recommendation that the court should increase public representation on lawyer conduct commissions. However, we believe the recommendation to expunge records or evidence of dismissed complaints would present a potential set back to creating a more accountable discipline system.

Recommendation 1: The Court Should Increase Public Representation on Lawyer Conduct Commissions

In 2006, HALT released its second Lawyer Discipline Report Card, which evaluated discipline systems in all 50 states and the District of Columbia in six areas: (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 Report Card gave South Carolina a "D+" grade and ranked its disciplinary system as the 44th worst in the entire nation. While HALT praised South Carolina for allowing complainants to speak publicly about their complaints and public access to disciplinary hearings, the state's dismal performance was in part due to its failing score under the public participation criteria. Only two of the Commission's 44 members are non-lawyer citizens and they cannot serve on hearing panels. This places South Carolina at the very bottom of

the nation in terms of public participation in lawyer discipline systems. In the Report Card, HALT found that only four other states have less than 1/3 public member participation in their lawyer discipline hearing panels.¹

The ABA Team recommends that the Commission be compromised of 1/3 public members. While this would be a good first step in the right direction, HALT urges the Court to push further and follow the example of Idaho, where a majority of its hearing panel is comprised of nonlawyers. Public representation ensures fairness in proceedings, minimizes harmful self interest and increases the accountability and reputation of all lawyers in South Carolina. As noted by the ABA Report, the evidence from other states show that even attorneys acknowledge that public members can meaningfully contribute and offer perspectives that enhance the proceedings overall.² Meaningful public representation is particularly critical in restoring public confidence in the South Carolina lawyer profession as a whole, which has been long viewed as insular and ineffective at disciplining their own.

Recommendation 2: The Court Should Implement Meaningful Time Standards for Processing Lawyer Discipline Cases

A key to a fair and effective discipline process is the promptness by which the complaints are handled. The ABA Team's recommendation of creating an Oversight Committee in that regard is helpful, but what is more critical in stopping backlog is the formal adoption of a meaningful time standard for processing cases. According to ABA's most recent statistics regarding case processing in 2007, it takes the South Carolina lawyer commission 517 days from the receipt of complaint to filing of formal charges and 1,434 days (almost four years) from the receipt of complaint to the imposition of a public sanction. Additionally, as the ABA Report points out, although the Commission's own rules require that the Hearing Panel file its report with the Supreme Court within 30 days after the filing of the transcript of proceedings, in actuality it takes an average of 264 days before filing occurs.³

In addition to analyzing statistics from the American Bar Association, we consider feedback regularly received from legal consumers exasperated by the sluggish pace of South Carolina's attorney discipline process. We spoke with numerous individuals who filed complaints and had yet to receive any response—often years later. The Commission's relatively open discipline procedures meant little when victims were not seeing results. Serious delays in resolving cases destroy public confidence and undermine the integrity of the system of lawyer discipline.

In contrast to South Carolina, according to the 2007 survey, Connecticut, North Dakota and Wyoming are filing formal charges within three months of receiving grievances.⁴ In light of this benchmark, we propose that the Court impose a deadline of 90 days for investigating a complaint. In fact, federal prosecutors are only permitted 30 days to exercise their judgment in bringing criminal charges. Under the federal Speedy Trial Act, "Any information or indictment charging an individual with the commission of an offense shall be filed within 30 days from the date on which such

¹ To see the full findings of the Lawyer Discipline Report Card, visit HALT's Web site www.halt.org.

² ABA Report, page 18.

³ ABA Report, page 19.

⁴ American Bar Association Survey on Lawyer Discipline, 2007.

individual was arrested or served with a summons in connection with such charges.”⁵ If decisions which put a liberty interest at stake can be reached in 30 days, surely decisions involving attorney discipline can be reached in a period three times as long.

Once a complaint is investigated, the Commission should take no longer than 90 additional days to hear the case. After the hearing concludes, the Commission should have no more than 90 additional days to obtain final Court approval of the disciplinary decision. Under this structure, the Commission would impose discipline within nine months of receiving a complaint. While South Carolina takes on average 255 days, which is just within nine months, to impose private sanctions, it takes on average 1,433 days to impose public sanctions. There is no good reason for such a large time frame discrepancy between the imposition of private and public sanctions. All cases should be resolved within nine months. Connecticut, Delaware, Maine, Mississippi, Nevada, New York, South North Dakota, South Dakota, Vermont and Wyoming dispose of both publicly and privately sanctioned cases in this amount of time—and in many cases, in far fewer months.⁶

Recommendation 4: The Court Should Adopt ABA’s Recommendation to Allow Complainants to be Provided the Respondent Lawyer’s Response to Their Grievance and Should Have an Appeal of Dismissals by the Disciplinary Counsel

In HALT’s numerous dealings with members of the public, including those from South Carolina, a large criticism of lawyer discipline systems is its secrecy and lack of transparency. In allowing complainants to receive a copy of the attorney’s response, the Court will reduce the public sense of secrecy that surrounds the lawyer discipline system. Furthermore, opening up the process will allow for better communication and information sharing for both sides, which will result in faster and more efficient resolutions.

HALT also fully supports the ABA’s recommendation that a reason be stated on all dismissals of complaints to reduce the secrecy of the system and to give complainants a satisfactory explanation. The public should be informed as much as possible about the disciplinary proceedings to instill confidence and accountability in a predominantly self-regulated system. HALT often hears from complainants that not knowing the reason for the dismissal of their complaint is the biggest source of dissatisfaction and motivation for further action. The Court can easily dissipate much of this problem by adopting this rule. The right of an appeal to a dismissal, as most states have already implemented, will balance the playing field for legal consumers, check against error, and inspire overall confidence in the system.

Recommendation 10: The Court Should *Reject* ABA’s Recommendation to Expunge Dismissed Records

Transparency and public confidence are at the core of effective attorney discipline systems. Expunging dismissed records will create an aura of suspicion and distrust around the system as well as opening the door to the possibility that misbehaving attorneys will have their slates wiped clean. Three years is a very short period, after which records of dismissals are still extremely relevant to

⁵ See 18 U.S.C. § 3161(b).

⁶ See American Bar Association Survey on Lawyer Discipline, 2007.

evaluating the competence of an attorney. The consumer should have a right to all available information in making the important decision of hiring a lawyer. Similarly, a discipline body should have as much information as possible in evaluating attorney misconduct complaints and a pattern of past complaints against a particular attorney can be illuminating in determining the credibility or non-credibility of a complaint. Records provide information that is beneficial to all parties involved. It should be left up to the adjudicating body to decide whether a particular record is relevant in each case, and destroying records permanently removes that possibility. HALT strongly urges the Court to reject this recommendation in order to maintain an open and transparent system that will engender not destroy public confidence.

To deal with the physical space issue of storage, the Court should take the ABA's suggestion and invest in an electronic archiving system which will be more sustainable and will save both space and money in the long run.

Recommendation 14: The Court Should Adopt ABA's Recommendation to Conduct Random Audit of Trust Accounts

We agree with the ABA that independent random audits of trust accounts would provide an excellent deterrent against misconduct by lawyers.

When people are victimized by dishonest lawyers, they are supposed to be compensated by bar-funded client protection funds. But in South Carolina, New York, New Jersey, Connecticut and many other states, this promise is not being kept. Instead, few people receive money from these funds and then only after the lawyer has been disbarred or suspended. A *National Law Journal* investigative report found that the legal profession's commitment to assist victims of unethical attorneys remains unfulfilled.⁷

While reimbursing victims of lawyer theft is an important consumer protection, the Court should implement a strategy for preventing theft in the first place. The ABA's McKay Commission determined that random audits were a proven deterrent to the misuse of money and property. "In states that have used them, these measures have proven effective to deter and detect the theft of funds even before clients file complaints."⁸ In 1992, the McKay Commission recommended the use of random audits for every state. To date, only eleven states have implemented these programs.⁹

Businesses and government offices that handle money are routinely subject to audits. To protect the public and increase their confidence in the attorney-client relationship, lawyers should not be exempt from this scrutiny.

Recommendation 16: The Court Should Adopt ABA's Recommendation to Oversee the Formation of a Formal Annual Budget Process for the Disciplinary Counsel's Office

⁷ "Client funds improved, still flawed," *National Law Journal*, September 27, 2004.

⁸ *Report of the Commission on Evaluation of Disciplinary Enforcement*, American Bar Association. Recommendation 17: Random Audit of Trust Accounts.

⁹ *Survey of Lawyers' Funds for Client Protection, 2005-2007*. American Bar Association.

Disciplinary bodies are often under funded. This prevents them from effectively executing their tasks of investigation and adjudication. The formal annual budget process would alleviate this problem by realistically evaluating the need and capacity of the system and allocating the optimal budget for the Disciplinary Counsel Office. It is critical that the Disciplinary Counsel be given adequate resources to fully investigate complaints and ensure that accountability is being upheld. Furthermore, a formal process will make it easier to identify sources of potential waste or under funding, eliminating inefficiencies and providing for better-managed system overall.

Recommendation 17: The Court Should Adopt ABA’s Recommendation to Formally Train Disciplinary Counsel and Staff

HALT supports all reforms that will ensure a more effective discipline system. Although most lawyers would have had some training in investigation and adjudication, it is likely there are different procedural and merit considerations that would warrant formal training. More importantly, formal trainings would also provide a streamlined process by which all disciplinary counsel and staff should follow, creating a more consistent and fair disciplinary process. In particular, HALT would encourage the incorporation of effective public outreach and communication methods in these trainings that will facilitate a better relationship between the Commission and the public.

Conclusion

HALT once again commends the Court for recognizing the need for reform by inviting the consultation team from ABA to review the lawyer discipline system in South Carolina. We hope that the Court will seriously consider all the recommendations and make reforms that will benefit the legal consumers of South Carolina as well as its legal profession.

Because all who practice law have a shared responsibility in creating a discipline system that investigates promptly, deliberates openly and fairly, and weeds out unethical or incompetent attorneys, HALT encourages the South Carolina Supreme Court to embrace these reforms. By addressing the shortcomings of the current system, we believe South Carolina can move closer to implementing a discipline system that engenders consumer trust and respect, rather than alienation and resentment.