AGENDA ITEM SUPPLEMENT

JULY 122

DATE: **July 5, 2011**

TO: **Members, Regulation, Admissions and Discipline Oversight Members, Board of Governors**

FROM: **Jill Sperber, Special Assistant to the Chief Trial Counsel Office of the Chief Trial Counsel**

SUBJECT: **Posting of Consumer Alert of Significant Loan Modification Misconduct Filed Charges and Petition Filed Pursuant to Business and Professions Code section 6007(c) based on Loan Modification Misconduct on Member's Profile Page--Request for Approval Following Return from Public Comment**

EXECUTIVE SUMMARY

This item supplements the agenda item dated June 23, 2011 that seeks approval of the Office of the Chief Trial Counsel's proposal to extend the State Bar's current website policy by posting a Consumer Alert on a member's profile page upon the filing of disciplinary charges or a petition filed pursuant to Business and Professions Code section 6007 subdivision (c) that includes loan modification misconduct as set forth in Attachment A following its return from public comment.

After the agenda item was submitted, OCTC received an additional public comment within the comment period and is identified as Attachment D. The comment from HALT attached here supports OCTC's proposal. OCTC continues to recommend that RAD and Board approve posting a Consumer Alert and section 6007(c) petitions based on filed loan modification misconduct charges.

HALT Simple · Affordable · Accountable · Justice for All

June 30, 2011

Ms. Jill Sperber
Office of Chief Trial Counsel
State Bar of California
180 Howard Street, 7th Floor
San Francisco, CA 94105-1639

Re: Proposed Consumer Alert for Misconduct Related to Loan Modifications

To the Board of Governors:

Thank you for your public invitation to provide input regarding the Chief Trial Counsel's proposal to post a consumer alert that would notify the public when a lawyer has been charged with misconduct related to significant loan modifications. We also urge the State Bar to post an involuntary inactive enrollment petition filed under Business & Professions Code section 6007(c) [threat of public harm] when a basis for the application involves loan modification misconduct. HALT strongly supports this critical two-part proposal because we believe that it would help safeguard California's client population from one of the gravest forms of lawyer misconduct.

Founded in 1978, HALT is a nonprofit public interest group dedicated to increasing access and accountability in the civil justice system. Our 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 HALT's Report Cards, appellate litigation, media campaigns, legislative work, white paper releases and grassroots lobbying, our organization has been on the forefront of fights to improve the systems in place to hold unethical lawyers accountable and to provide meaningful recourse to aggrieved clients.

In January, we appeared before the State Bar's Governance in the Public Interest Task Force and testified that California should eliminate private reprovals, increase the number of lay person seats on the Board of Governors and encourage the public's input in the Board nomination process. Last month, we testified before the Board of Governors in support of the Chief Trial Counsel's proposal to post consumer alerts of pending charges of misappropriation of client funds. We were pleased that the Board adopted this critical recommendation.

To satisfy the State Bar's goal of public protection and to maintain its efforts toward transparency, we hope that the Board of Governors will also adopt the Chief Trial

1612 K STREET, NW • SUITE 1102 • WASHINGTON, DC 20006
(202) 887-8255 • FAX (202) 887-9699 • www.halt.org

Counsel's proposal to post a consumer alert and an involuntary inactive enrollment petition for charges of loan modification misconduct.

As we explained during our recent testimony related to consumer alerts for misappropriations, the need for heightened notification is evidenced by the frustration that our organization regularly hears from consumers who did not receive sufficient warning about an attorney's past transgressions before they hired the lawyer. In making the difficult choice over which lawyer to retain, consumers should be armed with complete information about the person to whom they are entrusting their deepest confidences and critical funds. If a consumer alert notified them about loan modification charges against a prospective attorney, many clients might still choose to hire the lawyer, but they would likely pay closer attention to the attorney's lines of communication, real estate experience and billing methods. In working toward its goal of protecting the public, the State Bar should encourage such vigilance on the part of consumers.

With the collapse of the real estate market throughout the past several years, our organization has heard from consumers who have been defrauded by their lawyers as they attempt to save their homes from foreclosure. As the Chief Trial Counsel noted in his April 26, 2011 Executive Summary related to this proposal, many attorneys, in exchange for an advanced fee, promised but never delivered loan modification assistance for distressed homeowners. According to the Chief Trial Counsel, these dishonest lawyers have not only strained the discipline system, they have also overwhelmed the Bar's Client Security Fund due to the unprecedented numbers of claims for compensation by victimized homeowners.

Misconduct related to loan modifications warrants special scrutiny at a time when so many Americans are seeking counsel from lawyers on how to hold onto their homes during the current economic recession. With foreclosure rates now projected to rise in the coming year[1], it is incumbent upon the State Bar to protect consumers from attorneys who have been accused of exploiting vulnerable homeowners. The proposed consumer alert warning would provide this needed protection.

HALT has long advocated for a stronger, more open attorney discipline system.[2] Consumer alerts represent an important step in the right direction toward transparency,

---

[1] "Home prices edge up in April but fall from April 2010," *Los Angeles Times*, June 29, 2011.

[2] We have enclosed a copy of our 2011 Lawyer Discipline Best Practices report, which recommends that every attorney discipline system: (1) disclose a lawyer's complete disciplinary history; (2) host a user-friendly Web site; (3) discipline lawyers with public sanctions; (4) permanently disbar lawyers who commit abusive practices; (5) abolish disciplinary gag rules; (6) increase publicity of discipline programs; (7) open hearings to the public; (8) provide citizens with a majority voice on hearing panels; (9) grant clients and witnesses immunity for any information given to the agency during a disciplinary investigation; and (10) allow citizens to appeal initial complaint dismissals and hearing panel decisions.

but we urge the State Bar to go a step further. As we previously testified in the recent hearing on major misappropriation charges, *all* discipline records should be easily accessible and *all* pending charges should be visible to the public through Consumer Alerts [see attached HALT Comments from April 20, 2011].

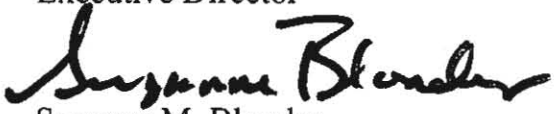
Unfortunately, a brief review of the State Bar's current website reveals that consumers have to dig long and hard to excavate any Notices of Disciplinary Charges. Unrelated boldfaced text obscures the consumer's ability to locate critical information about charges against the attorney. We urge the State Bar to fix this problem by posting Consumer Alerts for all pending changes, not simply those related to major misappropriations of client funds and loan modification violations.

We also urge the State Bar to post an involuntary inactive enrollment petition filed under Business & Professions Code section 6007(c) [threat of public harm] when a basis for the application involves loan modification misconduct. Business & Professions Code section 6007(c)(1) provides: "[T]he involuntary inactive enrollment of an attorney may be ordered upon a finding that the attorney's conduct poses a substantial threat of harm to the interests of the attorney's clients or to the public . . . ." We believe that deceptive loan modification practices qualify as a "substantial threat of harm," especially at a time when so many consumers rely on attorneys to help them keep their homes.

As the Board of Governors works to enhance public protection by the State Bar, we hope that it will approve the Chief Trial Counsel's proposal to post a Consumer Alert and involuntary inactive status for attorneys charged with loan modification misconduct. If HALT could be of any further assistance, please feel free to contact us at (202) 887-8255. Thank you for your consideration.

Sincerely,

Rodd M. Santomauro
Executive Director



Suzanne M. Blonder
Of Counsel
California Bar No. 217873

---

clients and witnesses immunity for any information given to the agency during a disciplinary investigation; and (10) allow citizens to appeal initial complaint dismissals and hearing panel decisions.

Lawyer Discipline Best Practices:
Ten Reforms Disciplinary Agencies Are Doing Right Now to Protect the Public

Clients trust attorneys with their deepest confidences at some of the most critical moments in their lives and rely on the system of lawyer discipline to protect them from attorneys who abuse that trust. HALT has identified 10 best practices that provide models to help every state's lawyer discipline system satisfy that responsibility. In addition to conducting our own analysis, we received recommendations from disciplinary administrators around the country. The officials drew upon their own day-to-day experience fielding complaints against attorneys to provide us with practical solutions to some of the most critical challenges facing our nation's lawyer discipline system.

(1) Disclose a lawyer's complete disciplinary history so that consumers can make informed decisions about whether to hire an attorney.

Too often, the public is kept in the dark about complaints filed against incompetent, dishonest or abusive lawyers. When a consumer calls the disciplinary agency to inquire about a lawyer's history of misconduct, administrators typically are forced to omit a number of past transgressions because they never made their way onto the public record. Even when officials do disclose that an attorney was once formally sanctioned, the staff often does not know or is not at liberty to specify the basis for the discipline (e.g., theft, neglect or incompetence). Lawyer discipline agencies almost never release pending complaints until they lead to formal charges, so the state bar may have to tell a prospective client that the attorney he or she is considering retaining has never been disciplined, when in fact there are dozens of unresolved complaints currently pending against the lawyer.

By providing comprehensive information about complaints, charges and discipline (including informal sanctions) lodged against attorneys, state bars and courts arm consumers with critical information to help them decide whether to hire a particular lawyer and, more importantly, whether to trust that lawyer with their most valued resources.

California, Florida, New Hampshire, Oregon and West Virginia all publicize lawyers' complete disciplinary history, but Oregon sets the nation's best example. Since the Oregon Supreme Court's decision in *Sadler v. Oregon State Bar,*[1] the disciplinary records of Oregon lawyers—including dismissed grievances, pending matters and all past informal and formal sanctions—have been open to the public under Oregon's Public Records Law. In summarizing its decision in *Sadler*, the court concluded: "Opening up

[1] *Sadler v. Oregon State Bar*, 550 P.2d 1218 (1976).

1612 K STREET, NW • SUITE 1102 • WASHINGTON, DC 20006
(202) 887-8255 • FAX (202) 887-9699 • www.halt.org

the files of the Bar to the public may restore confidence in the integrity of the individual attorney and assure those concerned that the profession is truly committed to maintaining the highest legal ethics."[2]

Consequently, the Oregon State Bar fields inquiries over the telephone about a lawyer's complete disciplinary history and makes all written records available for public inspection. Disciplinary history for individual bar members is also available in a searchable database on the Web site for the Oregon State Bar.

Dozens of states already have open government laws on the books and in the next year, lawyer discipline administrators should urge lawmakers to amend statutes to clarify their application to records collected by state disciplinary agencies. Lawyer discipline bodies already keep decades of past files on hand and should make them available to the public as quickly as record management systems allow.

(2) Host a user-friendly Web site that is easy to find and provides helpful information about the discipline process.

Americans increasingly rely on the Internet as the first stop for finding information. To respond to consumers' online needs, every state should host an easily navigable Web site that provides the public with clear and comprehensive information about its mechanism for holding lawyers accountable. An interested citizen should be able to locate the site through a straightforward query on Google. Online disciplinary resources should be easily navigable and include a downloadable complaint form, samples of completed complaint forms, guidance about what misconduct qualifies as an ethics violation, a database where consumers can search for pending and past disciplinary actions, links to rules of professional conduct and information about other avenues for addressing disputes with lawyers, such as the local fee arbitration board and the state's client protection fund.

Unfortunately, many states are still stuck in the Dark Ages with paltry and outdated online resources. Some jurisdictions offer little more than passing references to the existence of a disciplinary mechanism without even supplying a phone number to call for more information. Even Web sites with more resources are often laced with complicated legal jargon and written in a sympathetic tone toward lawyers who have had complaints filed against them. Alabama's Web site on attorney discipline was almost impossible to find after multiple searches and when information was finally discovered, it seemed more focused on shielding lawyers than safeguarding consumers. The introduction on its site states, "A complaint should not be made lightly or used to try to gain an advantage in your transactions with a lawyer. A lawyer who is accused of misconduct suffers whether or not he is found to be at fault."

---

[2] *Id.* at 1227.

The Illinois Attorney Registration and Disciplinary Commission should serve as a model for the rest of the country. The site is easily found online and features a user-friendly, logical interface. It offers a search tool that allows the public to check on an attorney's disciplinary record, including pending complaints, as well as whether he or she is covered by legal malpractice insurance. The site also provides a clear explanation of the disciplinary process, written from the complainant's perspective, and a downloadable "Request for Investigation" form. Consumers can access recently filed complaints, a schedule of upcoming hearings, links to rules governing lawyer conduct and the commission's annual reports, as well as information about the state's client protection fund.

While cautioning against a "one-size-fits-all" approach to restructuring the lawyer discipline process, Douglas Ende, chief disciplinary counsel in Washington state, pointed to helpful components of his state's Web site that could be exported to other disciplinary sites. Washington's Web site includes information in four languages, brochures dealing with common situations between clients and lawyers, details about the Lawyer's Fund for Client Protection and a reference to each lawyer's malpractice insurance coverage.

Pennsylvania's Web site also contains exemplary resources, including an engaging video emphasizing the board's desire to protect clients from wayward attorneys. The site offers materials in Spanish, a helpful Frequently Asked Questions page and information about recently sanctioned attorneys.

Dennis Carlson, Nebraska's counsel for discipline, recommended Web sites go a step further than simply posting names of sanctioned lawyers by also offering consumers a direct link to the reported disciplinary case to give the public a more comprehensive understanding of the lawyer's misconduct.

In 2008, the California State Bar transformed its Web site into a more useful mechanism by posting lawyers' pending disciplinary information online. Charges in the state are public when they are filed and the bar's board of governors concluded that the best way of making the information available to consumers was through its Web site.

Lawyer discipline systems across the country should request funds from the local court or state bar association to update and expand their disciplinary Web sites. Even if the agency cannot afford to hire a professional Web designer to upgrade the interface, limit scrolling and enrich readability functions, non-technical staff can still make some simple improvements. Administrators should revise the site's language so that it is written from the consumer's point of view, provide complaint forms in PDF form, update their sites with hearing schedules and recent disciplinary rulings and include information about what does and does not constitute an ethics violation. These straightforward changes will go a long way toward increasing public access to an often mysterious system.

(3) Abolish closed-door sanctions and replace private admonitions with formal and public censures, fines, suspensions and disbarments.

To increase transparency and public confidence in our system for holding attorneys accountable, lawyer discipline agencies should heighten the visibility and severity of sanctions against wayward attorneys. Disclosure of discipline deters misconduct by others in the profession, enhances the public perception of the self-regulated system and enables prospective clients to make better-informed decisions about hiring a particular lawyer. Addressing incompetent and abusive actions with real consequences—public censures, fines, suspensions and in the most egregious cases, permanent disbarment—effectively filters the pool of qualified lawyers available to the public.

Unfortunately, most states typically give disreputable lawyers little more than a slap on the wrist and routinely hide incompetent and deceptive practices from the public. Behind closed doors, panels often admonish lawyers to avoid repeating transgressions or reprimand them for a more severe offense—but these sanctions are usually left off the public record. Many states limit public discipline to serial offenders and to those who commit crimes or ruthless misconduct against multiple victims.

As of 2010, 15 states discipline all lawyers out in the open. Jurisdictions including Arizona, New Jersey and Washington have never applied or, in some cases, recently abolished concealed sanctions. New Jersey, for example, amended its court rules in 2000 to explicitly eliminate secret scoldings, saying: "There shall be no private discipline."[3] Instead, the Office of Attorney Ethics publicly reprimands, censures, suspends and disbars wayward attorneys. Even in cases of minor misconduct, the office publicly admonishes lawyers and includes the offense on the attorney's record.

Agreeing with the need for meaningful sanctions, Frederick Iobst, chief counsel to Delaware's disciplinary system, suggested states follow Delaware's lead by giving disciplinary officials the authority to impose court-ordered restitution. By implementing this reform, victims could be reimbursed for losses suffered at the hands of a fraudulent lawyer.

As a short-term goal, states still applying discipline behind closed doors should eliminate unofficial "three-strikes-you're-publicly-sanctioned" practices and treat each rule violation with serious consequences. In the coming years, courts and state bars should amend their disciplinary rules to abolish private discipline and to make every transgression a matter of public record. In addition to issuing public sanctions, disciplinary bodies should have the power to impose restitution so that victims may be compensated for an attorney's abuse or neglect.

---

[3] See New Jersey Court Rule 1:20(d) (2008).

(4) Permanently disbar lawyers who commit abusive practices against clients.

While most lay persons believe that disbarment is a permanent prohibition from practicing law, in reality disbarment is treated in most states as a slightly longer suspension. Most lawyer discipline bodies provide disbarred attorneys with the opportunity to apply for reinstatement within a year or two. At a reinstatement hearing, a lawyer usually must simply acknowledge his or her past offenses, demonstrate an interest in reform and pledge to abide by ethics rules in the future. At that point, he or she is permitted to resume practice without even informing new clients of the previous disbarment, in many states.

In most circumstances, attorney ethics violations can be addressed with censures, fines, suspensions and disbarment with the opportunity for reinstatement. Lawyers breaking ethics rules due to substance abuse problems, for example, should usually be given a chance at rehabilitation. But when an attorney commits the most severe kind of infraction without contrition or justification, the sanction of permanent disbarment should at least be an available option to disciplinary bodies.

Unfortunately, the vast majority of states are permitted to return law licenses even to criminals and the most abusive offenders. The case of California lawyer Ronald Silverton demonstrates the dangerous consequences of reinstatement of attorneys who abuse their positions of power. In the 1970s, the California State Bar suspended Silverton for running a long-standing insurance fraud scam. When his suspension came to an end, he resumed practice and proceeded to commit additional crimes, including an illegal adoption racket in the Caribbean. The state disbarred him but later allowed Silverton to apply for reinstatement. After he resumed practicing law for the second time, Silverton began charging unconscionably high fees and entering into settlements without consulting clients first. Once again, California disbarred him. Ultimately, Silverton's repeated abuses over the course of three decades led the state supreme court in 2006 to adopt permanent disbarment as a possible sanction against the profession's worst offenders.

Sadly, the Silverton saga is relatively common as the recidivism rate for disbarred lawyers is alarmingly high. Louisiana, for example, recently reported that 44 percent of lawyers who had been readmitted after disbarment later found themselves facing new disciplinary charges.

A small set of states, such as Indiana, Kentucky and Mississippi, provide for permanent disbarment and another handful, including Alabama, Minnesota and West Virginia, make it permanent at the court's discretion. According to Oregon Disciplinary Counsel Jeffrey Sapiro, Oregon joined this group of states by making disbarment permanent by court rule. State supreme courts should amend court rules to include

permanent disbarment as a possible sanction. The amended rules should contain clear guidance about the circumstances under which the lawyer discipline board should impose this weighty penalty. Factors may include the severity of the transgressions, the number of victims affected and the lawyer's acknowledgment of wrongdoing and attempts at redress.

(5) Abolish gag rules that prevent people from speaking publicly about the complaints they've filed.

To uphold citizens' First Amendment right to free speech and to keep communities informed about attorney abuses, lawyer discipline systems across the country should abolish overly broad confidentiality rules that silence those who file ethics complaints against attorneys. Typically these rules require state bars and courts to caution complainants that they may not publicly disclose the fact that they have filed a grievance. Some states even threaten victims with court sanctions if they choose to confide this information to anyone, including a friend or family member.

Lawyer discipline systems usually include the confidentiality mandate on a complaint form or in a response letter from disciplinary staff. The signature line of Pennsylvania's grievance form, for instance, warns victims to keep quiet, stating, "[Y]ou are requested not to breach the confidentiality of our consideration of your complaint by disclosing your involvement with the Disciplinary Board with other persons."

A few states incorporate the disclosure prohibition into their procedural rules. For example, Alaska's bar regulations provide, "Complainants and all persons contacted during the course of an investigation have a duty to maintain the confidentiality of discipline and disability proceedings prior to the initiation of formal proceedings . . . . It will be regarded as contempt of court to breach this confidentiality in any way."[4] Perhaps most alarming, when we surveyed court and bar administrators in 2006, we learned that at least a dozen states keep their gag rules hidden from public view but ask disciplinary staff to privately caution some victims against publicly disclosing that they have filed a complaint, while others are kept in the dark and only discover the confidentiality requirement after they have inadvertently breached it.

Fortunately, the modern trend recognizes citizens' right to speak freely about the lawyer discipline system and their complaints against lawyers. In the past five years, a few state supreme courts, including those in New Jersey and Tennessee, have struck down complainant confidentiality requirements on First Amendment grounds.[5] In 2009 , Louisiana became the latest state to abolish a rule that once required victims to maintain

---

[4] See Alaska Bar. R. 22(b) (2008).

[5] See *R.M. v. Sup. Ct.*, 883 A.2d 369 (N.J. 2005) and *Doe v. Doe*, 127 S.W.3d 728 (Tenn. 2004).

the confidentiality of bar complaints.[6] The Louisiana Supreme Court held that the confidentiality provision represented an unconstitutional content-based restriction on speech. Pursuant to the court's order, the chief justice of the Louisiana Supreme Court will issue an order to remove language from the Rules for Lawyer Disciplinary Enforcement that prohibits complainants and witnesses from speaking freely.

High courts in states that continue to maintain overly broad confidentiality requirements should revisit their disciplinary rules and strike provisions that place unconstitutional restrictions on complainants. Disciplinary administrators should remove confidentiality instructions from complaint forms and refrain from threatening victims with contempt of court for speaking publicly about the disciplinary process. To combat the widespread notion among victims that they should remain silent about the disciplinary process, state bar and court officials should advise each complainant and witness in writing that they have the unfettered right to speak freely about attorney grievances.

(6) Publicize the availability of lawyer discipline programs through required client notification and local advertising.

The finest lawyer discipline mechanism in the country is relatively useless if few Americans know of its existence. HALT regularly hears from victims of lawyer misconduct who have no idea how to seek recourse and from consumers who are unsure where to go to find out whether their lawyer has committed past transgressions.

Take a 2008 case in Tennessee. When a pregnant woman was jailed for a routine traffic violation and shackled while going into labor, Juana Villegas' husband hired attorney Michael Sneed, who had committed a string of abuses against past clients and was then facing disbarment—much to the Villegases' shock. The information would have helped the Villegases, who could not understand why Sneed was ignoring their phone calls after they paid him his upfront fee. Widespread advertising and a requirement that attorneys notify clients about where to file an ethics complaint and how to review a lawyer's disciplinary record would go a long way toward preventing the problems faced by the Villegases and other victims of attorney abuses.

Requiring attorneys to notify clients and prospective clients about their right to file an ethics complaint is the best way to ensure awareness of and access to the system. Texas provides a useful model. Attorneys practicing law in the state must provide notice to clients of the existence of a grievance process by one of four means: distributing a State Bar brochure describing the grievance process; posting a sign prominently displayed in the attorney's place of business describing the grievance process; including the grievance

[6] See *In Re: Warner*, 2005-B-1303 (April 17, 2009).

process information in the written contract for services with the client; or providing the information in a bill for services.[7]

In addition, Texas law requires the state bar to distribute a brochure written in English and Spanish describing the bar's grievance process, to establish a toll-free telephone number for public access to the chief disciplinary counsel's office, to describe the grievance process in the bar's *Yellow Pages* listings statewide and to make complaint forms written in English and Spanish available in every county courthouse.[8]

To ensure that the public understands where and how to file a complaint against a lawyer, state legislatures and court disciplinary committees should follow Texas' example by requiring lawyers to conduct notification procedures and by posting the information in local telephone directories, public venues and in local newspapers of general circulation. All agencies should have toll-free numbers and allow callers to access a live person, rather than simply automated instructions. In addition, the office should allow for e-mail inquiries. By implementing these measures in the next year, the lawyer discipline agency not only guarantees increased reporting of lawyer misconduct but also proactively demonstrates the agency's dedication to protecting the client population.

(7) Open lawyer discipline hearings to everyone to increase the public's trust.

To increase public trust in the insular lawyer discipline system, states should open their disciplinary hearings to the public and post hearing schedules on disciplinary Web sites and at civic venues. While civil and criminal proceedings are open to the public at every courthouse in the country, many states keep their lawyer ethics proceedings shrouded in secrecy. In at least a dozen jurisdictions, the general public and the press are forbidden to attend. And although the public is technically permitted to be present at disciplinary hearings in most states, information about hearing dates and locations is nearly impossible to find.

Massachusetts is one notable exception. The state's Board of Bar Overseers not only allows the general public and press to attend disciplinary hearings and prehearing conferences but also makes a concerted effort to provide the public with ample notice of the proceedings. The agency's Web site provides a clear link on its home page to a list of dates, times and locations for hearings scheduled that quarter and the same directory is posted in a variety of public venues throughout the state, including courthouses and government agencies.

---

[7] See Tex. Gov't Code Ann. § 81.079(b) (2008).
[8] See Tex. Gov't Code Ann. § 81.079(a) (2008).

The Virginia State Bar also proactively disseminates information about upcoming disciplinary proceedings. According to Virginia Bar Counsel Edward Davis, the clerk of the disciplinary system publishes a docket reflecting the dates, times and locations of all hearings that is readily available on the bar's Web site. Further, the clerk regularly fields telephone inquiries from the public and the press about matters scheduled for hearing.

To follow these examples, courts need to amend rules this year to provide that hearings are open to the public. Because the rule change is useless without widespread announcements of hearings, disciplinary bodies should include timely hearing calendars on their Web sites and in a variety of public forums. The information should be updated monthly and provide specific hearing times and directions to proceedings.

(8) Provide ordinary citizens with a majority voice on the panels that decide attorney misconduct cases.

The self-regulated nature of lawyer discipline systems across the country creates, at a minimum, the appearance of bias. Lawyers dominate the panels that decide complaints against other lawyers. According to the American Bar Association's most recent data, most states allow only token participation by non-lawyers—typically a single seat on a tribunal that is filled and chaired by lawyers and judges.[9] The inherent unfairness in the system suggests that even some of the most abusive lawyers may be given a free pass, as long as they are generally well-liked or maintain power within the profession.

If a jury of ordinary Americans can be trusted to decide complex, multimillion-dollar civil cases and life-or-death capital cases at the criminal level, certainly we can trust lay persons to help decide ethics cases against lawyers. Attorneys can continue to serve as expert witnesses to instruct panels on the appropriate standard of care, but they should no longer be permitted to dominate the disciplinary decision-making process.

Vermont provides a useful—albeit imperfect—model. Like most states, Vermont permits non-lawyers one of three seats on the panels that hear cases and impose sanctions. What is striking about Vermont is its more pronounced reliance on lay persons on its Board of Professional Responsibility, which adopts internal procedures for the administration of lawyer discipline, supervises the program's case docket and case-flow management procedures and assigns hearing panels. Vermont gives ordinary citizens three of the seven seats on the board and often appoints one of the public members as chair or vice-chair. Giving non-lawyers a meaningful role on the panels that decide cases against lawyers helps to ensure impartiality and to increase public confidence in Vermont's lawyer discipline system.

---

[9] "ABA 2008 Survey on Lawyer Discipline, Chart VIII," American Bar Association, 2008, *www.abanet.org/cpr/discipline/sold/home.html.*

In the next year, courts and state bars should amend their disciplinary procedural rules to augment participation by consumers. Non-lawyers should have at least an equal voice on the panels that decide cases against lawyers and on the boards that manage the system.

(9) Grant clients and witnesses immunity from civil liability for any information given to the agency during a disciplinary investigation.

When we conducted research for our 2006 Lawyer Discipline Report Card, HALT found that attorney ethics violations frequently go unreported because many Americans feel somewhat intimidated by the insular system of lawyer discipline. In particular, victims of lawyer misconduct expressed concern over the possibility of being retaliated against or even sued by the attorney about whom they complained. The lawyer has access to all information exchanged in a disciplinary matter and in at least 20 states, has the opportunity to sue the complainant and third-party witnesses over allegations and affidavits included in the complaint, statements made to investigators and testimony given at hearings.

On its Web site, the Virginia State Bar warns complainants: "[T]he complaint process will not protect you from being sued by a lawyer who believes he or she has been wrongly accused in a bar complaint." Some states provide qualified immunity but do not guarantee protection. For example, Alaska's bar rules provide: "The Court or its designee may, *in its discretion*, grant immunity from criminal prosecution to witnesses in disciplinary, disability, or reinstatement proceedings upon application by the Board, Bar Counsel, or counsel for Respondent, and after receiving the consent of the appropriate prosecuting authority."[10] [Emphasis added.]

Fortunately, lawyer discipline bodies are increasingly defending victims and third-party witnesses from prosecution and civil suits. Iowa rules, for instance, provide absolute immunity for communications made during the course of disciplinary proceedings: "Complaints submitted to the grievance commission or the disciplinary board, or testimony with respect thereto, shall be privileged and no lawsuit predicated thereon may be instituted."[11] By inviting citizens to speak candidly about incompetent and abusive attorney practices without fear of reprisal, Iowa's lawyer discipline body strengthens public trust in the system and helps ensure that all misconduct gets reported.

After receiving a draft copy of this report, Indiana's Disciplinary Commission responded that the state's highest court will now amend its rules to provide complainants with absolute civil immunity. Under this important rule change, those who file a grievance

---

[10] Alaska Bar Rule 17(b) (2008).

[11] Iowa Court Rule 35.23(1) (2008).

against a lawyer in Indiana may no longer be sued by that lawyer for anything written in the grievance or stated during a disciplinary proceeding.

To encourage this same candor, lawyer discipline bodies should amend court rules to grant absolute immunity to complainants and witnesses who participate in disciplinary investigations and hearings. In addition, notice of this immunity should be provided on complaint forms, at the outset of any interview by investigating disciplinary administrators and prior to all testimony at hearings.

(10) Allow citizens the right to appeal initial complaint dismissals and hearing panel decisions.

As a final protection against the miscarriage of justice in lawyer discipline proceedings, consumers should have the opportunity to appeal complaint dismissals and hearing panel or board rulings. Investigators and decision-makers should be required to provide substantive explanations for dismissals and dispositions so that complainants understand the basis for decisions and, in appropriate cases, have the grounds to challenge them.

The American Bar Association observed in the commentary to its Model Rules for Lawyer Disciplinary Enforcement, "Disciplinary hearings are neither civil nor criminal but *sui generis*. It is incorrect to assume that, as in a criminal proceeding, the complainant has no rights in regard to case disposition."[12] Complainants should have the opportunity to file an appeal at two distinct stages in the disciplinary process: (1) after the central intake office issues a dismissal of a complaint and (2) following a hearing panel or board decision (depending on the state's structure). Some states, such as Maine, New Hampshire and Utah, provide complainants with the right to challenge initial complaint dismissals but do not allow them the chance to appeal disciplinary rulings by hearing panels or district courts. To ensure justice throughout the entire process, states should present complainants with the opportunity to challenge both initial dismissals as well as hearing panel decisions.

Louisiana provides a helpful model. The state's Rules for Lawyer Disciplinary Enforcement provide complainants with the right to request reconsideration of the disposition of a matter following the initial investigation and to appeal decisions by a hearing committee.[13] The complainant may bring his or her appeal to a panel of the disciplinary board or to the state supreme court.

---

[12] See ABA Model Rule 31, Commentary (2008).
[13] See Louisiana Supreme Court Rule XIX § 30 (2008).

To further protect against wrongful dismissals, the deputy administrator of Illinois' disciplinary system, James Grogan, recommended that other jurisdictions follow his state's example by creating a disciplinary Oversight Committee. In Illinois, Oversight Committee members conduct regular internal quality reviews of a representative sample of dismissed cases.

Courts and state bars should amend court rules to provide complainants with the right to challenge initial dismissals and decisions by hearing panels and boards of professional conduct. Providing a complainant with this ongoing right to appeal helps to guarantee an additional check and balance within the otherwise self-governed system of lawyer discipline. In addition, every state should establish an oversight committee to regularly evaluate dismissed cases to ensure that they are being discarded for the right reasons.

HALT *Simple · Affordable · Accountable · Justice for All*

April 20, 2011

Ms. Jill Sperber
Office of Chief Trial Counsel
State Bar of California
180 Howard Street, 7th Floor
San Francisco, CA 94105-1639

Re: Proposed Consumer Alert for Major Misappropriation of Client Funds

To the Board of Governors:

Thank you for your public invitation to provide input regarding the Chief Trial Counsel's proposal to post a consumer alert that would notify the public when a lawyer has been charged with a major misappropriation of client funds. HALT strongly supports this critical proposal because we believe that it would help safeguard California's client population from one of the gravest forms of lawyer misconduct.

Founded in 1978, HALT is a nonprofit public interest group dedicated to increasing access and accountability in the civil justice system. Our 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 HALT's Report Cards, appellate litigation, media campaigns, legislative work, white paper releases and grassroots lobbying, our organization has been on the forefront of fights to improve the systems in place to hold unethical lawyers accountable and to provide meaningful recourse to aggrieved clients. In January, we appeared before the State Bar's Governance in the Public Interest Task Force and testified that California should eliminate private reprovals, increase the number of lay person seats on the Board of Governors and encourage the public's input in the Board nomination process.

Recently, HALT released our Lawyer Discipline Best Practices report to draw attention to 10 model procedures currently applied by specific lawyer discipline systems across the country.[1] In addition to conducting our own analysis, we received feedback

[1] We have enclosed a copy of our Best Practices report, which recommends that every attorney discipline system: (1) disclose a lawyer's complete disciplinary history; (2) host a user-friendly Web site; (3) discipline lawyers with public sanctions; (4) permanently disbar lawyers who commit abusive practices; (5) abolish disciplinary gag rules; (6) increase publicity of discipline programs; (7) open hearings to the public; (8) provide citizens with a majority voice on hearing panels; (9) grant clients and witnesses

1612 K STREET, NW • SUITE 1102 • WASHINGTON, DC 20006
(202) 887-8255 • FAX (202) 887-9699 • www.halt.org

from disciplinary administrators in 11 states who relied on their own day-to-day experiences to provide us with practical solutions to some of the most critical challenges facing our nation's lawyer discipline system.

The State Bar of California serves as a leader to the rest of the nation in many of the areas that our Best Practices report addresses. In particular, our report praises California for providing the public with ready access to the complete disciplinary history of all attorneys licensed in the state.

Three years ago, the State Bar implemented a policy to post every notice of disciplinary charges (NDC) on its Web site.[2] An NDC represents the filing of formal charges against a lawyer, after a formal investigation has been completed, evidence has been evaluated and reasonable cause exists to believe that a disciplinary violation occurred. The bar's NDC and the attorney's response appear on the lawyer's member profile page, which consumers may open and read online. The notice remains posted until either the State Bar Court finds the attorney guilty of professional misconduct or issues an order otherwise resolving the proceeding, at which point the NDC is replaced with the disciplinary decision. Even if the charges are dismissed, the charges and dismissal determination remain posted for an additional 60 days. Therefore, the State Bar already provides notice of all pending disciplinary charges, including those related to misappropriation of client funds.

Unfortunately, however, the NDC information is hard to locate on a member's profile page. If a consumer were to look up a particular attorney on the State Bar's Web site, she would find the lawyer's name and license number displayed in boldface. Even if the lawyer were facing charges, the lawyer's current status would be marked as "Active" (also appearing in boldface) and the words "This member is active and may practice law in California." Beneath that designation would be the attorney's contact information and educational background. Following that data would be the lawyer's status history, which again is marked as active. Below that would appear a list of any actions affecting the lawyer's eligibility to practice law and, even when charges are pending, it would state, "This member has no public record of discipline," and "This member has no public record of administrative actions." Finally, at the *very* bottom of the member's profile

---

immunity for any information given to the agency during a disciplinary investigation; and (10) allow citizens to appeal initial complaint dismissals and hearing panel decisions.

[2] The State Bar is not the only licensing authority in California that posts online notices of pending charges. The California Medical Board is also required to publish, on its Web site, "All current accusations filed by the Attorney General, including those accusations that are on appeal." See Business and Professions Code 2027(c)(4). The Medical Board's Web site (www.mbc.ca.gov) includes not only a "licensee look-up" feature but also an "enforcement public documents" search feature, in which a consumer can read actual accusations and also disciplinary decisions and stipulated settlements.

page, if the consumer were fastidious enough to scroll all the way down to the very bottom of the frame, the consumer *may* (or may not) notice the single word "Pending" (not appearing in boldface). Next to that word are unmarked links (which, when opened, turn out to be the NDC and response pleadings).

The boldfaced text and sheer amount of information (including repeated references to the member's "active" status) that appear above the single "pending" line obscures the consumer's ability to locate critical information about charges against the attorney. This becomes particularly problematic when the charges involve something as serious and harmful as a major misappropriation of client funds.

The Board of Governors' new proposal would visibly enhance its notification message when the charges involve a major misappropriation. In circumstances in which the alleged misappropriation involves at least $25,000 in client funds, the State Bar would provide a more prominent display on the member's profile page. The extra warning would take the form of a "Consumer Alert," informational text and a disclaimer above the attorney's name on his or her profile page. Once the discipline proceeding or involuntary inactive enrollment proceeding has been decided, the Consumer Alert would be removed. In an era that embraces principles of sunshine and transparency, the Chief Trial Counsel's proposal would ensure that consumers receive a clear and noticeable warning about a potentially dishonest lawyer.

The need for heightened notification is evidenced by the frustration that our organization regularly hears from consumers who did not receive sufficient warning about an attorney's past charges and transgressions before they hired the lawyer. In making the difficult choice over which lawyer to retain, consumers should be armed with complete information about the person whom they are trusting with their deepest confidences and critical funds. If a Consumer Alert notified them about misappropriation charges against a prospective attorney, many clients might still choose to hire the lawyer but would likely pay closer attention to the attorney's fee structure and billing methods. In working toward its goal of protecting the public, the State Bar should encourage such vigilance on the part of consumers.

The State Bar of California has always addressed major misappropriations with the most severe consequences. Misappropriation is the only category that the State Bar may not address through a mere warning letter. On the contrary, misappropriation frequently leads to penalties as serious as disbarment. Of the eight disbarments reported in the April, 2011 *California Bar Journal*, six arose out of a misappropriation of client funds.[3] The State Bar specifically established a Client Security Fund to alleviate monetary injuries caused by a lawyer's misappropriation or other dishonest conduct.

---

[3] California Bar Journal (April, 2011)
www.calbarjournal.com/April2011/AttorneyDiscipline/Disbarments.aspx

Through these actions, the State Bar demonstrates its particular concern for circumstances in which a lawyer has misappropriated a client's funds. The Consumer Alert notification represents a natural extension of the State Bar's efforts to prevent client harm due to misappropriations by lawyers.

While most lawyers will support measures to safeguard the public and protect the integrity of the profession, some may argue that the proposed Consumer Alert deprives them of due process. However, California courts have long acknowledged that "where the state licenses a person to conduct a business, trade or occupation, the person acquires a privilege, not a right, subject to the state's reasonable restrictions." *Rosenblatt v. Cal. St. Bd. of Pharmacy*, 69 Cal.App.2d 69, 74 (1945) (affirming legislature's authority to enact regulations to protect citizens from consequences of unfitness or incompetence in health profession). Thus, while the attorney does not lose his or her right to due process in a court of law, this same right does not extend to proceedings before the licensing agency that awarded him or her the privilege to practice law.

Further, the Chief Trial Counsel's proposal includes a prominent disclaimer stating: "Any Notice of Disciplinary Charges filed by the State Bar contains only allegations of professional misconduct. The attorney is presumed to be innocent of any misconduct warranting discipline until the charges have been proven." Any concerns about the danger of a Consumer Alert are more than adequately balanced by this strong proviso.

As the Board of Governors works to enhance public protection by the State Bar, we hope that it will approve the Chief Trial Counsel's proposal to post Consumer Alerts for charges of major misappropriations. We would also encourage the Board to support a more prominent display of NDC information on a member's profile page so that consumers can more quickly discern if any disciplinary charges are pending. If HALT could be of any further assistance, please feel free to contact us at (202) 887-8255. Thank you for your consideration.

Sincerely,

Rodd M. Santomauro
Executive Director

Suzanne M. Blonder
Of Counsel
California Bar No. 217873

HALT *Simple · Affordable · Accountable · Justice for All*

Lawyer Discipline Best Practices:
Ten Reforms Disciplinary Agencies Are Doing Right Now to Protect the Public

Clients trust attorneys with their deepest confidences at some of the most critical moments in their lives and rely on the system of lawyer discipline to protect them from attorneys who abuse that trust. HALT has identified 10 best practices that provide models to help every state's lawyer discipline system satisfy that responsibility. In addition to conducting our own analysis, we received recommendations from disciplinary administrators around the country. The officials drew upon their own day-to-day experience fielding complaints against attorneys to provide us with practical solutions to some of the most critical challenges facing our nation's lawyer discipline system.

(1) Disclose a lawyer's complete disciplinary history so that consumers can make informed decisions about whether to hire an attorney.

Too often, the public is kept in the dark about complaints filed against incompetent, dishonest or abusive lawyers. When a consumer calls the disciplinary agency to inquire about a lawyer's history of misconduct, administrators typically are forced to omit a number of past transgressions because they never made their way onto the public record. Even when officials do disclose that an attorney was once formally sanctioned, the staff often does not know or is not at liberty to specify the basis for the discipline (e.g., theft, neglect or incompetence). Lawyer discipline agencies almost never release pending complaints until they lead to formal charges, so the state bar may have to tell a prospective client that the attorney he or she is considering retaining has never been disciplined, when in fact there are dozens of unresolved complaints currently pending against the lawyer.

By providing comprehensive information about complaints, charges and discipline (including informal sanctions) lodged against attorneys, state bars and courts arm consumers with critical information to help them decide whether to hire a particular lawyer and, more importantly, whether to trust that lawyer with their most valued resources.

California, Florida, New Hampshire, Oregon and West Virginia all publicize lawyers' complete disciplinary history, but Oregon sets the nation's best example. Since the Oregon Supreme Court's decision in *Sadler v. Oregon State Bar*,[1] the disciplinary records of Oregon lawyers—including dismissed grievances, pending matters and all past informal and formal sanctions—have been open to the public under Oregon's Public Records Law. In summarizing its decision in *Sadler*, the court concluded: "Opening up

[1] *Sadler v. Oregon State Bar*, 550 P.2d 1218 (1976).

1612 K STREET, NW • SUITE 1102 • WASHINGTON, DC 20006
(202) 887-8255 • FAX (202) 887-9699 • www.halt.org

the files of the Bar to the public may restore confidence in the integrity of the individual attorney and assure those concerned that the profession is truly committed to maintaining the highest legal ethics."[2]

Consequently, the Oregon State Bar fields inquiries over the telephone about a lawyer's complete disciplinary history and makes all written records available for public inspection. Disciplinary history for individual bar members is also available in a searchable database on the Web site for the Oregon State Bar.

Dozens of states already have open government laws on the books and in the next year, lawyer discipline administrators should urge lawmakers to amend statutes to clarify their application to records collected by state disciplinary agencies. Lawyer discipline bodies already keep decades of past files on hand and should make them available to the public as quickly as record management systems allow.

(2) Host a user-friendly Web site that is easy to find and provides helpful information about the discipline process.

Americans increasingly rely on the Internet as the first stop for finding information. To respond to consumers' online needs, every state should host an easily navigable Web site that provides the public with clear and comprehensive information about its mechanism for holding lawyers accountable. An interested citizen should be able to locate the site through a straightforward query on Google. Online disciplinary resources should be easily navigable and include a downloadable complaint form, samples of completed complaint forms, guidance about what misconduct qualifies as an ethics violation, a database where consumers can search for pending and past disciplinary actions, links to rules of professional conduct and information about other avenues for addressing disputes with lawyers, such as the local fee arbitration board and the state's client protection fund.

Unfortunately, many states are still stuck in the Dark Ages with paltry and outdated online resources. Some jurisdictions offer little more than passing references to the existence of a disciplinary mechanism without even supplying a phone number to call for more information. Even Web sites with more resources are often laced with complicated legal jargon and written in a sympathetic tone toward lawyers who have had complaints filed against them. Alabama's Web site on attorney discipline was almost impossible to find after multiple searches and when information was finally discovered, it seemed more focused on shielding lawyers than safeguarding consumers. The introduction on its site states, "A complaint should not be made lightly or used to try to gain an advantage in your transactions with a lawyer. A lawyer who is accused of misconduct suffers whether or not he is found to be at fault."

---

[2] *Id.* at 1227.

The Illinois Attorney Registration and Disciplinary Commission should serve as a model for the rest of the country. The site is easily found online and features a user-friendly, logical interface. It offers a search tool that allows the public to check on an attorney's disciplinary record, including pending complaints, as well as whether he or she is covered by legal malpractice insurance. The site also provides a clear explanation of the disciplinary process, written from the complainant's perspective, and a downloadable "Request for Investigation" form. Consumers can access recently filed complaints, a schedule of upcoming hearings, links to rules governing lawyer conduct and the commission's annual reports, as well as information about the state's client protection fund.

While cautioning against a "one-size-fits-all" approach to restructuring the lawyer discipline process, Douglas Ende, chief disciplinary counsel in Washington state, pointed to helpful components of his state's Web site that could be exported to other disciplinary sites. Washington's Web site includes information in four languages, brochures dealing with common situations between clients and lawyers, details about the Lawyer's Fund for Client Protection and a reference to each lawyer's malpractice insurance coverage.

Pennsylvania's Web site also contains exemplary resources, including an engaging video emphasizing the board's desire to protect clients from wayward attorneys. The site offers materials in Spanish, a helpful Frequently Asked Questions page and information about recently sanctioned attorneys.

Dennis Carlson, Nebraska's counsel for discipline, recommended Web sites go a step further than simply posting names of sanctioned lawyers by also offering consumers a direct link to the reported disciplinary case to give the public a more comprehensive understanding of the lawyer's misconduct.

In 2008, the California State Bar transformed its Web site into a more useful mechanism by posting lawyers' pending disciplinary information online. Charges in the state are public when they are filed and the bar's board of governors concluded that the best way of making the information available to consumers was through its Web site.

Lawyer discipline systems across the country should request funds from the local court or state bar association to update and expand their disciplinary Web sites. Even if the agency cannot afford to hire a professional Web designer to upgrade the interface, limit scrolling and enrich readability functions, non-technical staff can still make some simple improvements. Administrators should revise the site's language so that it is written from the consumer's point of view, provide complaint forms in PDF form, update their sites with hearing schedules and recent disciplinary rulings and include information about what does and does not constitute an ethics violation. These straightforward changes will go a long way toward increasing public access to an often mysterious system.

(3) Abolish closed-door sanctions and replace private admonitions with formal and public censures, fines, suspensions and disbarments.

To increase transparency and public confidence in our system for holding attorneys accountable, lawyer discipline agencies should heighten the visibility and severity of sanctions against wayward attorneys. Disclosure of discipline deters misconduct by others in the profession, enhances the public perception of the self-regulated system and enables prospective clients to make better-informed decisions about hiring a particular lawyer. Addressing incompetent and abusive actions with real consequences—public censures, fines, suspensions and in the most egregious cases, permanent disbarment—effectively filters the pool of qualified lawyers available to the public.

Unfortunately, most states typically give disreputable lawyers little more than a slap on the wrist and routinely hide incompetent and deceptive practices from the public. Behind closed doors, panels often admonish lawyers to avoid repeating transgressions or reprimand them for a more severe offense—but these sanctions are usually left off the public record. Many states limit public discipline to serial offenders and to those who commit crimes or ruthless misconduct against multiple victims.

As of 2010, 15 states discipline all lawyers out in the open. Jurisdictions including Arizona, New Jersey and Washington have never applied or, in some cases, recently abolished concealed sanctions. New Jersey, for example, amended its court rules in 2000 to explicitly eliminate secret scoldings, saying: "There shall be no private discipline."[3] Instead, the Office of Attorney Ethics publicly reprimands, censures, suspends and disbars wayward attorneys. Even in cases of minor misconduct, the office publicly admonishes lawyers and includes the offense on the attorney's record.

Agreeing with the need for meaningful sanctions, Frederick Iobst, chief counsel to Delaware's disciplinary system, suggested states follow Delaware's lead by giving disciplinary officials the authority to impose court-ordered restitution. By implementing this reform, victims could be reimbursed for losses suffered at the hands of a fraudulent lawyer.

As a short-term goal, states still applying discipline behind closed doors should eliminate unofficial "three-strikes-you're-publicly-sanctioned" practices and treat each rule violation with serious consequences. In the coming years, courts and state bars should amend their disciplinary rules to abolish private discipline and to make every transgression a matter of public record. In addition to issuing public sanctions, disciplinary bodies should have the power to impose restitution so that victims may be compensated for an attorney's abuse or neglect.

---

[3] See New Jersey Court Rule 1:20(d) (2008).

(4) Permanently disbar lawyers who commit abusive practices against clients.

While most lay persons believe that disbarment is a permanent prohibition from practicing law, in reality disbarment is treated in most states as a slightly longer suspension. Most lawyer discipline bodies provide disbarred attorneys with the opportunity to apply for reinstatement within a year or two. At a reinstatement hearing, a lawyer usually must simply acknowledge his or her past offenses, demonstrate an interest in reform and pledge to abide by ethics rules in the future. At that point, he or she is permitted to resume practice without even informing new clients of the previous disbarment, in many states.

In most circumstances, attorney ethics violations can be addressed with censures, fines, suspensions and disbarment with the opportunity for reinstatement. Lawyers breaking ethics rules due to substance abuse problems, for example, should usually be given a chance at rehabilitation. But when an attorney commits the most severe kind of infraction without contrition or justification, the sanction of permanent disbarment should at least be an available option to disciplinary bodies.

Unfortunately, the vast majority of states are permitted to return law licenses even to criminals and the most abusive offenders. The case of California lawyer Ronald Silverton demonstrates the dangerous consequences of reinstatement of attorneys who abuse their positions of power. In the 1970s, the California State Bar suspended Silverton for running a long-standing insurance fraud scam. When his suspension came to an end, he resumed practice and proceeded to commit additional crimes, including an illegal adoption racket in the Caribbean. The state disbarred him but later allowed Silverton to apply for reinstatement. After he resumed practicing law for the second time, Silverton began charging unconscionably high fees and entering into settlements without consulting clients first. Once again, California disbarred him. Ultimately, Silverton's repeated abuses over the course of three decades led the state supreme court in 2006 to adopt permanent disbarment as a possible sanction against the profession's worst offenders.

Sadly, the Silverton saga is relatively common as the recidivism rate for disbarred lawyers is alarmingly high. Louisiana, for example, recently reported that 44 percent of lawyers who had been readmitted after disbarment later found themselves facing new disciplinary charges.

A small set of states, such as Indiana, Kentucky and Mississippi, provide for permanent disbarment and another handful, including Alabama, Minnesota and West Virginia, make it permanent at the court's discretion. According to Oregon Disciplinary Counsel Jeffrey Sapiro, Oregon joined this group of states by making disbarment permanent by court rule. State supreme courts should amend court rules to include

permanent disbarment as a possible sanction. The amended rules should contain clear guidance about the circumstances under which the lawyer discipline board should impose this weighty penalty. Factors may include the severity of the transgressions, the number of victims affected and the lawyer's acknowledgment of wrongdoing and attempts at redress.

(5) Abolish gag rules that prevent people from speaking publicly about the complaints they've filed.

To uphold citizens' First Amendment right to free speech and to keep communities informed about attorney abuses, lawyer discipline systems across the country should abolish overly broad confidentiality rules that silence those who file ethics complaints against attorneys. Typically these rules require state bars and courts to caution complainants that they may not publicly disclose the fact that they have filed a grievance. Some states even threaten victims with court sanctions if they choose to confide this information to anyone, including a friend or family member.

Lawyer discipline systems usually include the confidentiality mandate on a complaint form or in a response letter from disciplinary staff. The signature line of Pennsylvania's grievance form, for instance, warns victims to keep quiet, stating, "[Y]ou are requested not to breach the confidentiality of our consideration of your complaint by disclosing your involvement with the Disciplinary Board with other persons."

A few states incorporate the disclosure prohibition into their procedural rules. For example, Alaska's bar regulations provide, "Complainants and all persons contacted during the course of an investigation have a duty to maintain the confidentiality of discipline and disability proceedings prior to the initiation of formal proceedings . . . . It will be regarded as contempt of court to breach this confidentiality in any way."[4] Perhaps most alarming, when we surveyed court and bar administrators in 2006, we learned that at least a dozen states keep their gag rules hidden from public view but ask disciplinary staff to privately caution some victims against publicly disclosing that they have filed a complaint, while others are kept in the dark and only discover the confidentiality requirement after they have inadvertently breached it.

Fortunately, the modern trend recognizes citizens' right to speak freely about the lawyer discipline system and their complaints against lawyers. In the past five years, a few state supreme courts, including those in New Jersey and Tennessee, have struck down complainant confidentiality requirements on First Amendment grounds.[5] In 2009 , Louisiana became the latest state to abolish a rule that once required victims to maintain

---

[4] See Alaska Bar. R. 22(b) (2008).

[5] See *R.M. v. Sup. Ct.*, 883 A.2d 369 (N.J. 2005) and *Doe v. Doe*, 127 S.W.3d 728 (Tenn. 2004).

the confidentiality of bar complaints.[6] The Louisiana Supreme Court held that the confidentiality provision represented an unconstitutional content-based restriction on speech. Pursuant to the court's order, the chief justice of the Louisiana Supreme Court will issue an order to remove language from the Rules for Lawyer Disciplinary Enforcement that prohibits complainants and witnesses from speaking freely.

High courts in states that continue to maintain overly broad confidentiality requirements should revisit their disciplinary rules and strike provisions that place unconstitutional restrictions on complainants. Disciplinary administrators should remove confidentiality instructions from complaint forms and refrain from threatening victims with contempt of court for speaking publicly about the disciplinary process. To combat the widespread notion among victims that they should remain silent about the disciplinary process, state bar and court officials should advise each complainant and witness in writing that they have the unfettered right to speak freely about attorney grievances.

(6) Publicize the availability of lawyer discipline programs through required client notification and local advertising.

The finest lawyer discipline mechanism in the country is relatively useless if few Americans know of its existence. HALT regularly hears from victims of lawyer misconduct who have no idea how to seek recourse and from consumers who are unsure where to go to find out whether their lawyer has committed past transgressions.

Take a 2008 case in Tennessee. When a pregnant woman was jailed for a routine traffic violation and shackled while going into labor, Juana Villegas' husband hired attorney Michael Sneed, who had committed a string of abuses against past clients and was then facing disbarment—much to the Villegases' shock. The information would have helped the Villegases, who could not understand why Sneed was ignoring their phone calls after they paid him his upfront fee. Widespread advertising and a requirement that attorneys notify clients about where to file an ethics complaint and how to review a lawyer's disciplinary record would go a long way toward preventing the problems faced by the Villegases and other victims of attorney abuses.

Requiring attorneys to notify clients and prospective clients about their right to file an ethics complaint is the best way to ensure awareness of and access to the system. Texas provides a useful model. Attorneys practicing law in the state must provide notice to clients of the existence of a grievance process by one of four means: distributing a State Bar brochure describing the grievance process; posting a sign prominently displayed in the attorney's place of business describing the grievance process; including the grievance

[6] See *In Re: Warner*, 2005-B-1303 (April 17, 2009).

process information in the written contract for services with the client; or providing the information in a bill for services.[7]

In addition, Texas law requires the state bar to distribute a brochure written in English and Spanish describing the bar's grievance process, to establish a toll-free telephone number for public access to the chief disciplinary counsel's office, to describe the grievance process in the bar's *Yellow Pages* listings statewide and to make complaint forms written in English and Spanish available in every county courthouse.[8]

To ensure that the public understands where and how to file a complaint against a lawyer, state legislatures and court disciplinary committees should follow Texas' example by requiring lawyers to conduct notification procedures and by posting the information in local telephone directories, public venues and in local newspapers of general circulation. All agencies should have toll-free numbers and allow callers to access a live person, rather than simply automated instructions. In addition, the office should allow for e-mail inquiries. By implementing these measures in the next year, the lawyer discipline agency not only guarantees increased reporting of lawyer misconduct but also proactively demonstrates the agency's dedication to protecting the client population.

(7) Open lawyer discipline hearings to everyone to increase the public's trust.

To increase public trust in the insular lawyer discipline system, states should open their disciplinary hearings to the public and post hearing schedules on disciplinary Web sites and at civic venues. While civil and criminal proceedings are open to the public at every courthouse in the country, many states keep their lawyer ethics proceedings shrouded in secrecy. In at least a dozen jurisdictions, the general public and the press are forbidden to attend. And although the public is technically permitted to be present at disciplinary hearings in most states, information about hearing dates and locations is nearly impossible to find.

Massachusetts is one notable exception. The state's Board of Bar Overseers not only allows the general public and press to attend disciplinary hearings and prehearing conferences but also makes a concerted effort to provide the public with ample notice of the proceedings. The agency's Web site provides a clear link on its home page to a list of dates, times and locations for hearings scheduled that quarter and the same directory is posted in a variety of public venues throughout the state, including courthouses and government agencies.

---

[7] See Tex. Gov't Code Ann. § 81.079(b) (2008).
[8] See Tex. Gov't Code Ann. § 81.079(a) (2008).

The Virginia State Bar also proactively disseminates information about upcoming disciplinary proceedings. According to Virginia Bar Counsel Edward Davis, the clerk of the disciplinary system publishes a docket reflecting the dates, times and locations of all hearings that is readily available on the bar's Web site. Further, the clerk regularly fields telephone inquiries from the public and the press about matters scheduled for hearing.

To follow these examples, courts need to amend rules this year to provide that hearings are open to the public. Because the rule change is useless without widespread announcements of hearings, disciplinary bodies should include timely hearing calendars on their Web sites and in a variety of public forums. The information should be updated monthly and provide specific hearing times and directions to proceedings.

(8) Provide ordinary citizens with a majority voice on the panels that decide attorney misconduct cases.

The self-regulated nature of lawyer discipline systems across the country creates, at a minimum, the appearance of bias. Lawyers dominate the panels that decide complaints against other lawyers. According to the American Bar Association's most recent data, most states allow only token participation by non-lawyers—typically a single seat on a tribunal that is filled and chaired by lawyers and judges.[9] The inherent unfairness in the system suggests that even some of the most abusive lawyers may be given a free pass, as long as they are generally well-liked or maintain power within the profession.

If a jury of ordinary Americans can be trusted to decide complex, multimillion-dollar civil cases and life-or-death capital cases at the criminal level, certainly we can trust lay persons to help decide ethics cases against lawyers. Attorneys can continue to serve as expert witnesses to instruct panels on the appropriate standard of care, but they should no longer be permitted to dominate the disciplinary decision-making process.

Vermont provides a useful—albeit imperfect—model. Like most states, Vermont permits non-lawyers one of three seats on the panels that hear cases and impose sanctions. What is striking about Vermont is its more pronounced reliance on lay persons on its Board of Professional Responsibility, which adopts internal procedures for the administration of lawyer discipline, supervises the program's case docket and case-flow management procedures and assigns hearing panels. Vermont gives ordinary citizens three of the seven seats on the board and often appoints one of the public members as chair or vice-chair. Giving non-lawyers a meaningful role on the panels that decide cases against lawyers helps to ensure impartiality and to increase public confidence in Vermont's lawyer discipline system.

---

[9] "ABA 2008 Survey on Lawyer Discipline, Chart VIII," American Bar Association, 2008, *www.abanet.org/cpr/discipline/sold/home.html*.

In the next year, courts and state bars should amend their disciplinary procedural rules to augment participation by consumers. Non-lawyers should have at least an equal voice on the panels that decide cases against lawyers and on the boards that manage the system.

(9) Grant clients and witnesses immunity from civil liability for any information given to the agency during a disciplinary investigation.

When we conducted research for our 2006 Lawyer Discipline Report Card, HALT found that attorney ethics violations frequently go unreported because many Americans feel somewhat intimidated by the insular system of lawyer discipline. In particular, victims of lawyer misconduct expressed concern over the possibility of being retaliated against or even sued by the attorney about whom they complained. The lawyer has access to all information exchanged in a disciplinary matter and in at least 20 states, has the opportunity to sue the complainant and third-party witnesses over allegations and affidavits included in the complaint, statements made to investigators and testimony given at hearings.

On its Web site, the Virginia State Bar warns complainants: "[T]he complaint process will not protect you from being sued by a lawyer who believes he or she has been wrongly accused in a bar complaint." Some states provide qualified immunity but do not guarantee protection. For example, Alaska's bar rules provide: "The Court or its designee may, *in its discretion*, grant immunity from criminal prosecution to witnesses in disciplinary, disability, or reinstatement proceedings upon application by the Board, Bar Counsel, or counsel for Respondent, and after receiving the consent of the appropriate prosecuting authority."[10] [Emphasis added.]

Fortunately, lawyer discipline bodies are increasingly defending victims and third-party witnesses from prosecution and civil suits. Iowa rules, for instance, provide absolute immunity for communications made during the course of disciplinary proceedings: "Complaints submitted to the grievance commission or the disciplinary board, or testimony with respect thereto, shall be privileged and no lawsuit predicated thereon may be instituted."[11] By inviting citizens to speak candidly about incompetent and abusive attorney practices without fear of reprisal, Iowa's lawyer discipline body strengthens public trust in the system and helps ensure that all misconduct gets reported.

After receiving a draft copy of this report, Indiana's Disciplinary Commission responded that the state's highest court will now amend its rules to provide complainants with absolute civil immunity. Under this important rule change, those who file a grievance

[10] Alaska Bar Rule 17(b) (2008).
[11] Iowa Court Rule 35.23(1) (2008).

against a lawyer in Indiana may no longer be sued by that lawyer for anything written in the grievance or stated during a disciplinary proceeding.

To encourage this same candor, lawyer discipline bodies should amend court rules to grant absolute immunity to complainants and witnesses who participate in disciplinary investigations and hearings. In addition, notice of this immunity should be provided on complaint forms, at the outset of any interview by investigating disciplinary administrators and prior to all testimony at hearings.

(10) Allow citizens the right to appeal initial complaint dismissals and hearing panel decisions.

As a final protection against the miscarriage of justice in lawyer discipline proceedings, consumers should have the opportunity to appeal complaint dismissals and hearing panel or board rulings. Investigators and decision-makers should be required to provide substantive explanations for dismissals and dispositions so that complainants understand the basis for decisions and, in appropriate cases, have the grounds to challenge them.

The American Bar Association observed in the commentary to its Model Rules for Lawyer Disciplinary Enforcement, "Disciplinary hearings are neither civil nor criminal but *sui generis*. It is incorrect to assume that, as in a criminal proceeding, the complainant has no rights in regard to case disposition."[12] Complainants should have the opportunity to file an appeal at two distinct stages in the disciplinary process: (1) after the central intake office issues a dismissal of a complaint and (2) following a hearing panel or board decision (depending on the state's structure). Some states, such as Maine, New Hampshire and Utah, provide complainants with the right to challenge initial complaint dismissals but do not allow them the chance to appeal disciplinary rulings by hearing panels or district courts. To ensure justice throughout the entire process, states should present complainants with the opportunity to challenge both initial dismissals as well as hearing panel decisions.

Louisiana provides a helpful model. The state's Rules for Lawyer Disciplinary Enforcement provide complainants with the right to request reconsideration of the disposition of a matter following the initial investigation and to appeal decisions by a hearing committee.[13] The complainant may bring his or her appeal to a panel of the disciplinary board or to the state supreme court.

---

[12] See ABA Model Rule 31, Commentary (2008).
[13] See Louisiana Supreme Court Rule XIX § 30 (2008).

To further protect against wrongful dismissals, the deputy administrator of Illinois' disciplinary system, James Grogan, recommended that other jurisdictions follow his state's example by creating a disciplinary Oversight Committee. In Illinois, Oversight Committee members conduct regular internal quality reviews of a representative sample of dismissed cases.

Courts and state bars should amend court rules to provide complainants with the right to challenge initial dismissals and decisions by hearing panels and boards of professional conduct. Providing a complainant with this ongoing right to appeal helps to guarantee an additional check and balance within the otherwise self-governed system of lawyer discipline. In addition, every state should establish an oversight committee to regularly evaluate dismissed cases to ensure that they are being discarded for the right reasons.