

# VIRGINIA ACCESS TO JUSTICE COMMISSION



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The Honorable Donald W. Lemons

## Commission Co-Chairs

The Honorable S. Bernard Goodwyn  
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The Honorable Tonya Henderson-Stith

### Committee on Access for Self-Represented Litigants

The Honorable Deborah Vatis Bryan

### Pro Bono Committee

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### Pro Bono Coordinating Consortium

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### Outreach and Education Committee

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July 1, 2016

**To:** Michael W. Robinson, Esq., President, Virginia State Bar (VSB)  
Karen A. Gould, Esq., Executive Director and Chief Operating Officer, VSB  
James M. McCauley, Esq., VSB Ethics Committee

**From:** John E. Whitfield, Esq., Co-Chair, Virginia Access to Justice Commission (VATJ Commission)  
George H. Hettrick, Esq., Chair, VATJ Commission Pro Bono Committee  
Stephen D. Otero, Esq., VATJ Commission and Pro Bono Committee  
Scott C. Oostdyk, Esq., VATJ Commission and Pro Bono Committee

**Cc:** The Honorable S. Bernard Goodwyn, Co-Chair, VATJ Commission

**Re:** **Final Proposal to Adopt Pro Bono Reporting for Virginia Lawyers**

Please accept the enclosed materials in support of a proposal of the Virginia Access to Justice Commission (VATJ Commission) to make Virginia the eleventh state to adopt annual attorney self-reporting of pro bono hours and pro bono-related financial support. The proposal was unanimously adopted by the VATJ Commission on June 5, 2015, for reasons briefly explained below.

As reflected in the enclosed materials, the proposal would require modest amendments to: (1) the comments to Rule 6.1 of the Virginia Rules of Professional Conduct,<sup>i</sup> and (2) paragraph 18 of Part 6, Section IV of the Rules of the Supreme Court of Virginia.<sup>ii</sup> The proposed amendments were approved by the VATJ Commission on June 23, 2016. We request that the proposal be submitted for notice and comment so that it can be considered by the VSB Council during its October 2016 meeting. Please let us know if you require any additional information in connection with this request.

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It is widely recognized that we have a sizable Access to Justice Gap in Virginia. Studies consistently show that about 80% of the civil legal needs of low-income citizens go unmet, both nationwide and in Virginia.<sup>iii</sup> The data also consistently demonstrate that having legal representation significantly improves the outcomes for civil litigants in a variety of legal matters (e.g., matters implicating housing, benefits, custody and immigration status).<sup>iv</sup> In the Commonwealth, where half of the one million citizens living at or below the poverty line are likely to require civil legal assistance in any given year, this means that civil legal outcomes are being adversely impacted for 400,000 needy Virginians annually, due solely to their inability to pay for a lawyer.

Compounding the Access to Justice Gap is the fact that the resources available to Legal Aids in Virginia have been squeezed both by severe funding cuts and collapsing IOLTA revenues, all while poverty levels have soared in the wake of the Great Recession. From 2009-14, funding for Legal Aids in Virginia declined by \$6

million (a 20% reduction).<sup>v</sup> This led to layoffs of 70 Legal Aid staff, including 33 staff attorneys (a 20% reduction) during a period in which the poverty population in the Commonwealth grew by a third.<sup>vi</sup> These figures underscore that Legal Aids alone cannot solve this problem for Virginia, and that meaningful progress toward closing the Access to Justice Gap requires coordinated action by the Bar.

The Virginia Rules of Professional Conduct (VRPC) already reflect the VSB's commitment to pro bono. VRPC 6.1(a) provides that Virginia attorneys should devote at least 2% of their professional time toward pro bono matters each year.<sup>vii</sup> Currently, however, there is no mechanism to collect data to measure the VSB's progress against this goal. Moreover, efforts to estimate the contributions of VSB members toward closing the Access to Justice Gap (based upon the very limited and admittedly incomplete data available) suggest the Bar provides less than 10% of its 2% pro bono hours goal.<sup>viii</sup> Thus, either the Bar is falling well short of its stated pro bono goal, or the lack of data regarding pro bono hours results in a dramatic underreporting of actual pro bono work performed, or both. Requiring licensed attorneys to annually self-report pro bono hours and pro bono-related financial contributions will provide data that can help to solve either problem.

Pro bono reporting is not a novel or untested idea. At least ten states have already adopted some form of pro bono reporting, and there is evidence that it can help to narrow the Access to Justice Gap. In the twenty-three years since Florida became the first state to adopt pro bono reporting, pro bono hours have more than doubled (i.e., increased 115%), and pro bono-related financial contributions have more than tripled (i.e., increased 220%).<sup>ix</sup> In neighboring Maryland, since pro bono reporting was adopted in 2002, pro bono hours have increased by 15%, while pro bono-related financial contributions have almost doubled (i.e., increased 94%).<sup>x</sup>

Importantly, the VATJ Commission notes that this proposal is not tantamount to mandatory pro bono, or even a step in that direction. Not one of the ten states that have previously adopted a similar pro bono reporting rule has adopted mandatory pro bono, and the VATJ Commission explicitly rejected mandatory pro bono when adopting this proposal. In addition, by providing a mechanism by which to measure the Bar's progress toward its stated pro bono goal, pro bono reporting would improve the profession's self-governance, and minimize any calls for mandated pro bono service due to the existing lack of complete and accurate pro bono data.

Lastly, the VATJ Commission wishes to clarify that the proposal would not require Virginia attorneys to change how they currently track pro bono hours. The contemplated Rule changes would be satisfied simply by reporting any number of pro bono hours and pro bono-related financial contributions. Thus, lawyers can continue whatever their current practice is for tracking pro bono work and contributions, they can refine their current practice, or they can simply choose to report zero hours and zero contributions. Any of these approaches would comply with the proposed Rule changes.

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<sup>i</sup> See **Attachment 1**.

<sup>ii</sup> See **Attachment 2**.

<sup>iii</sup> See James J. Sandman, "Rethinking Access to Justice," *Virginia Lawyer*, vol. 63, October 2014, at 28; John E. Whitfield, "The Impact of the Justice Gap on Litigants: Are We Providing a Level Playing Field?," *Virginia Lawyer*, vol. 63, October 2014, at 35; John E. Whitfield, "Closing the Justice Gap: Rule 6.1 and Pro Bono," at 21 (Oct. 23, 2015) (**Attachment 4**).

<sup>iv</sup> See Attachment 4 at 7-13 (citations omitted).

<sup>v</sup> See Mark D. Braley, "Legal Aid Programs Produce Results That Touch Everyone in Virginia," *Virginia Lawyer*, vol. 63, October 2014, at 33.

<sup>vi</sup> See Joanna L. Suyes and John E. Whitfield, "Is There a Pro Bono Gap in Virginia?," *Virginia Lawyer*, vol. 62, February 2014, at 46.

<sup>vii</sup> See Attachment 1.

<sup>viii</sup> See Joanna L. Suyes and John E. Whitfield, "Is There a Pro Bono Gap in Virginia?," *Virginia Lawyer*, vol. 62, February 2014, at 48; Attachment 4 at 27-35.

<sup>ix</sup> See **Attachment 5**; see also Brittany Burns, "Closing the Justice Gap: Pro Bono Reporting in Virginia" at 15-16 (2015) (part of **Attachment 3**).

<sup>x</sup> See Attachment 5; see also Brittany Burns, "Closing the Justice Gap: Pro Bono Reporting in Virginia" at 18-19 (2015) (part of Attachment 3).