

Closing the Justice Gap: Rule 6.1 and Pro Bono

**VBS Bar Council Presentation
October 23, 2015**

“...with Liberty and Justice for all.”

“Equal justice under law is not merely a caption on the facade of the Supreme Court building, it is perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system exists...**it is fundamental that justice should be the same, in substance and availability, without regard to economic status.**”

-Lewis Powell, Jr., U.S. Supreme Court Justice



“Access to Justice” and “the Rule of Law”

Just Platitudes?

If we want the poor to “play by the rules,” we as a society need to assure them that the rules work FOR them as well. Otherwise, the Rule of Law itself is threatened.

But does it make any real difference to them as a practical matter? Why DO people hire lawyers, anyway?

o “There can be no justice

o “Poor people have access to the courts

o “...they were dragged into a Roman arena.”

● Prepared by John E. Whitfield, Co-chair,
Virginia Access to Justice Commission

June 3, 2016 ● 3

o “Without equal access to the law, the system not only fails the poor, but also results in the hands of the most powerful and ruthless

Equal Justice Under Law and the Impact of Counsel

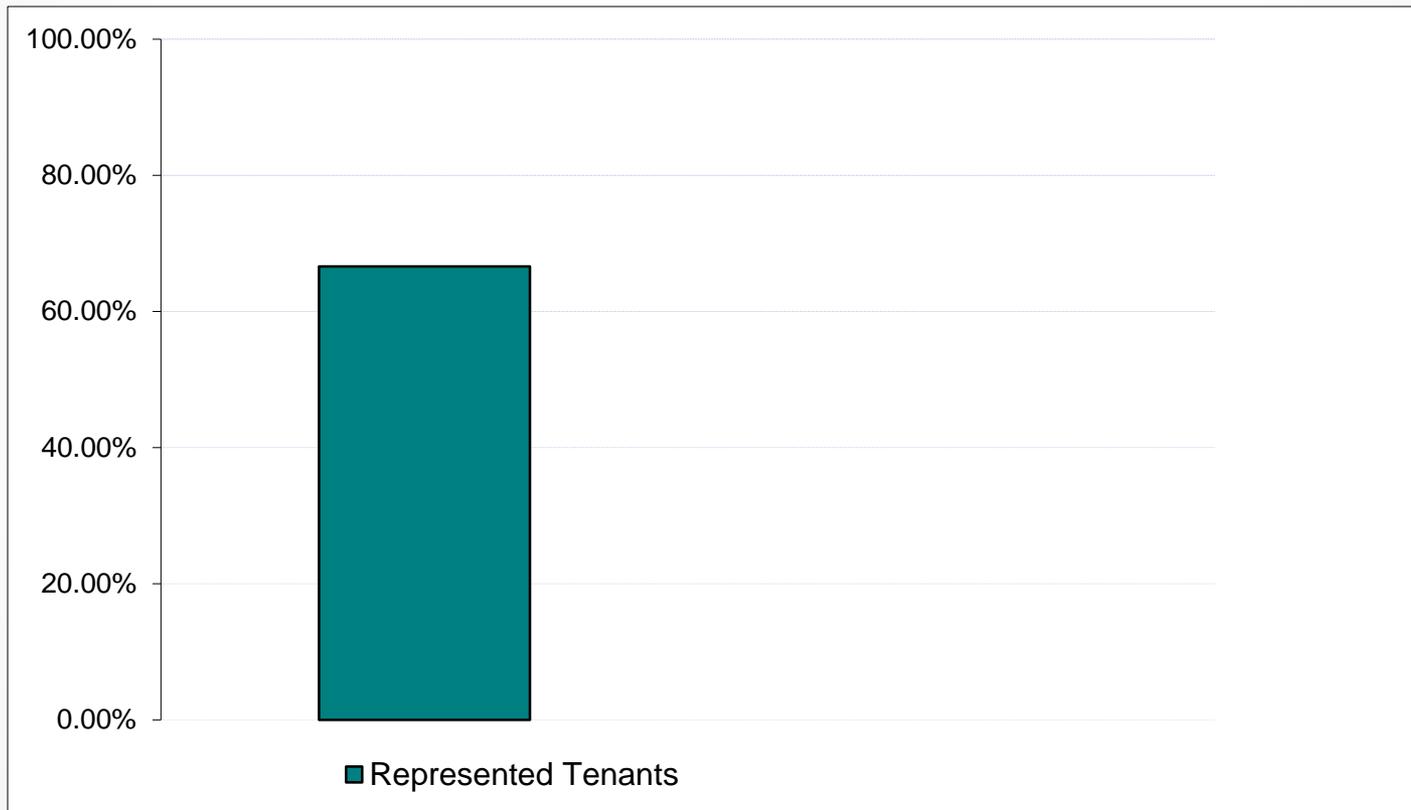
- Our system of justice relies upon the adversarial model, with each side capably and zealously represented by counsel.
- It is a peerless mechanism for arriving at the truth and applying the law fairly.

Unequal Justice Under Law?

- But when one party can't afford the services of an attorney, the system no longer functions properly.
- The normal level-playing field is tilted, despite the best efforts of the court.
- The Judge can't be the *pro se* litigant's counsel.
- What is the result?

Correlation Between Representation and Outcomes in Eviction Cases

Percentage of Tenants Retaining Possession of their Homes in Eviction Cases



Source: *The Importance of Representation in Eviction Cases and Homelessness Prevention*, Boston Bar Association Task Force on the Civil Right to Counsel, March 2012.

Correlation Between Representation and Outcomes in Eviction Cases

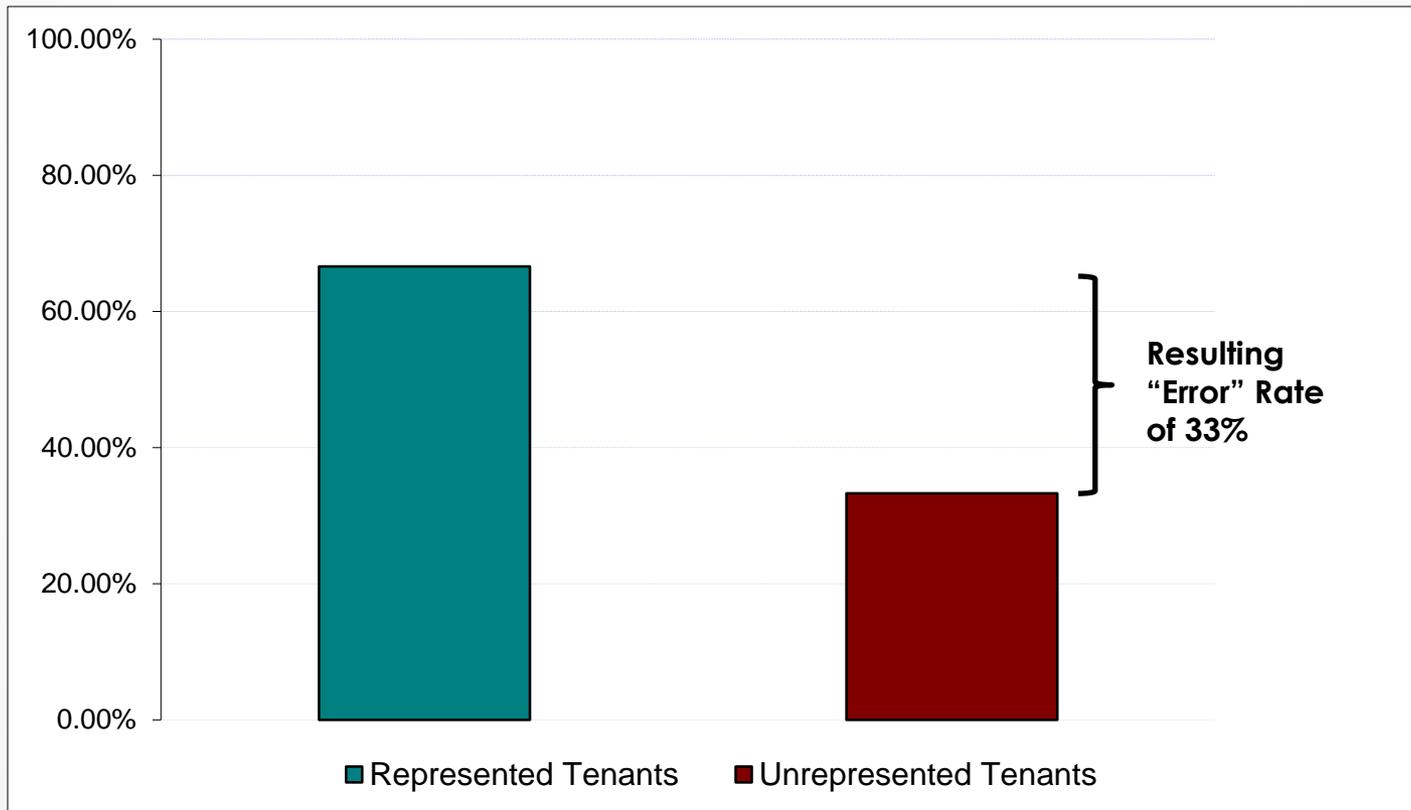
Percentage of Tenants Retaining Possession of their Homes in Eviction Cases



Source: *The Importance of Representation in Eviction Cases and Homelessness Prevention*, Boston Bar Association Task Force on the Civil Right to Counsel, March 2012.

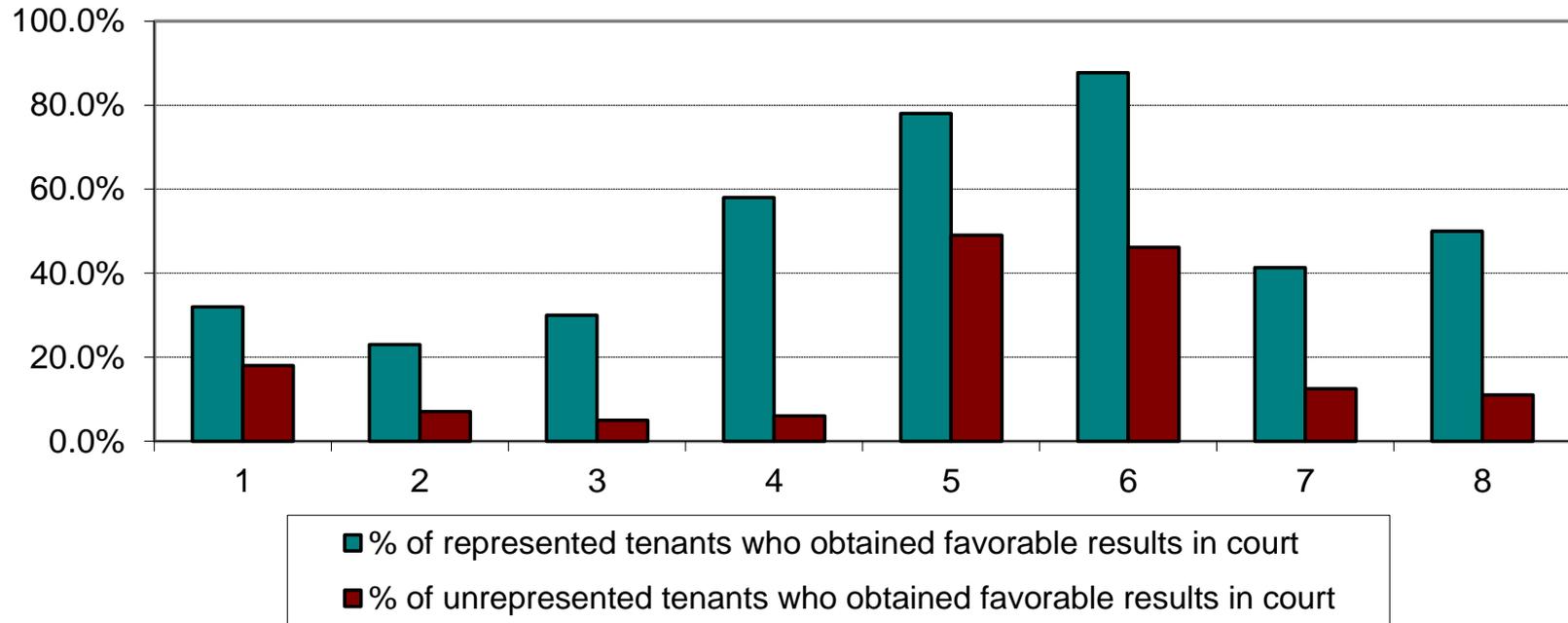
Correlation Between Representation and Outcomes in Eviction Cases

Percentage of Tenants Retaining Possession of their Homes in Eviction Cases



Source: *The Importance of Representation in Eviction Cases and Homelessness Prevention*, Boston Bar Association Task Force on the Civil Right to Counsel, March 2012.

Correlation Between Representation and Outcomes for Tenants in Landlord -Tenant Cases



Study #1: Court Study Group of the Junior League of Brooklyn, *Report on a Study of the Brooklyn Landlord and Tenant Court* 21 (1973).

Study #2: Steven Gunn, Note, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 YALE L. & POL'Y REV. 385, 411 (1995). Study #3: Chadha, Lisa Parsons. 1996. *Time to Move: The Denial of Tenants' Rights in Chicago Eviction Court*, Chicago: Lawyers Committee for Better Housing, Inc.

Study #4: Rebecca Hall, *Eviction Prevention as Homelessness Prevention: The Need for Access to Legal Representation for Low-Income Tenants* (1991).

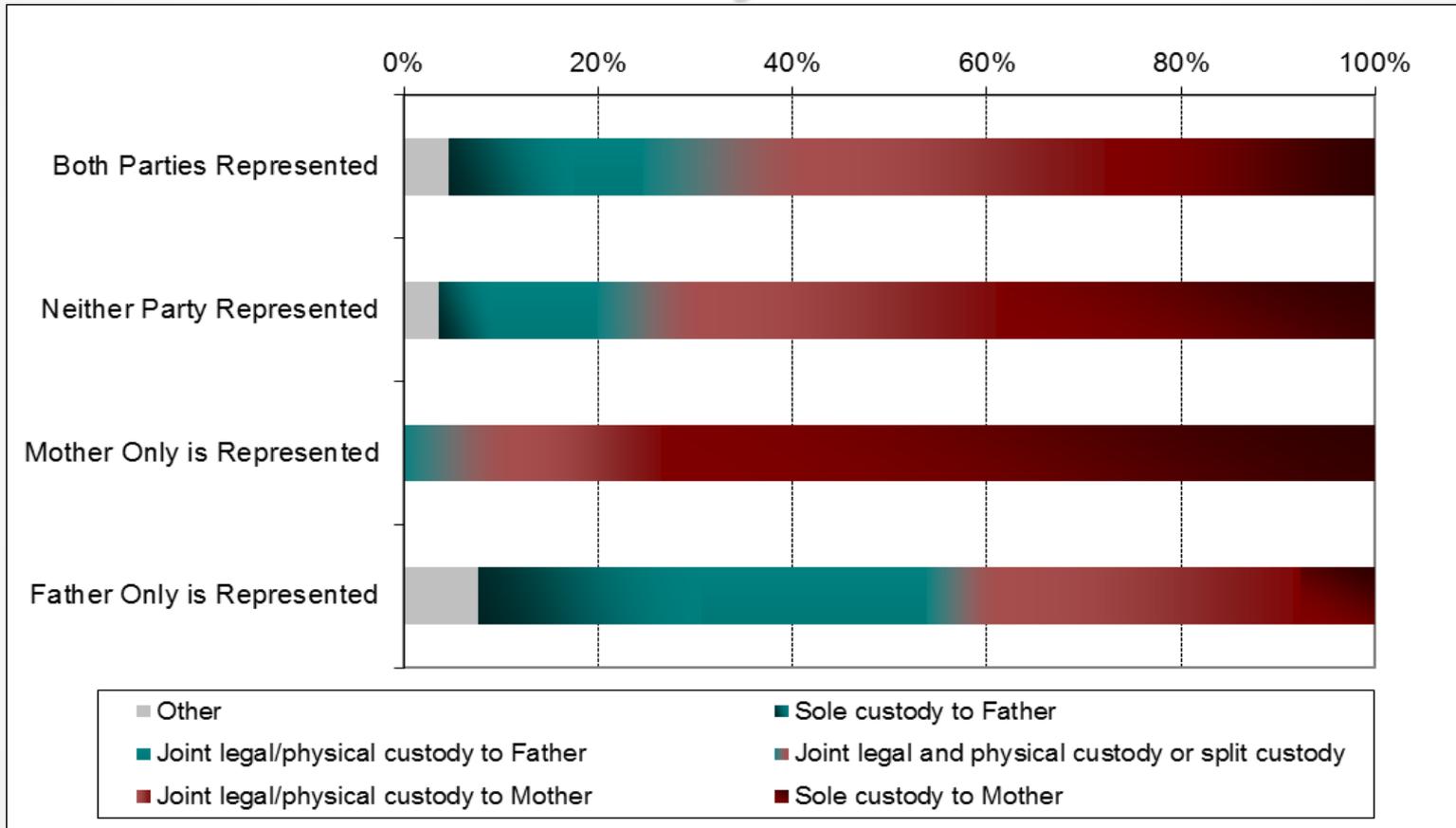
Study #5: Seron, Carroll, Greg Van Ryzin, Martin Frankel, and Jean Kovath. 2001. *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*. Law and Society Review 35(2): 419-34.

Study #6: Anthony J. Fusco, Jr. et al., *Chicago's Eviction Court: A Tenant's Court of No Resort*, 17 URB. L. ANN. 93, 114-16 (1979).

Study #7: Boston Bar Ass'n Task Force on Unrepresented Litigants, *Report on Pro Se Litigation*, 17 (1998), available at <http://www.bostonbar.org/prs/reports/>

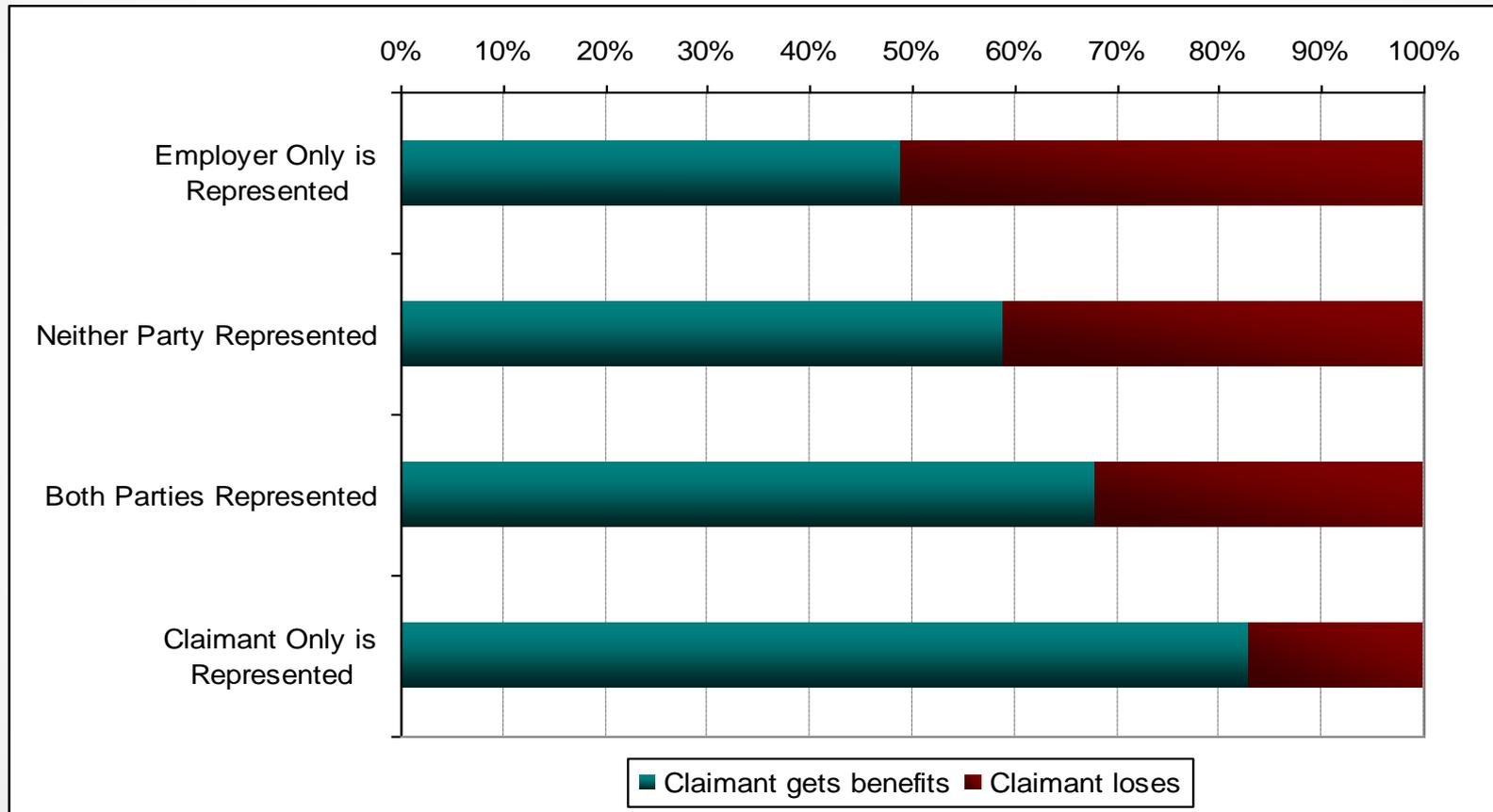
Study #8: Mass. Law Reform Inst., *Summary Process Survey*, 14 (2005)

Correlation Between Representation and Custody Outcomes



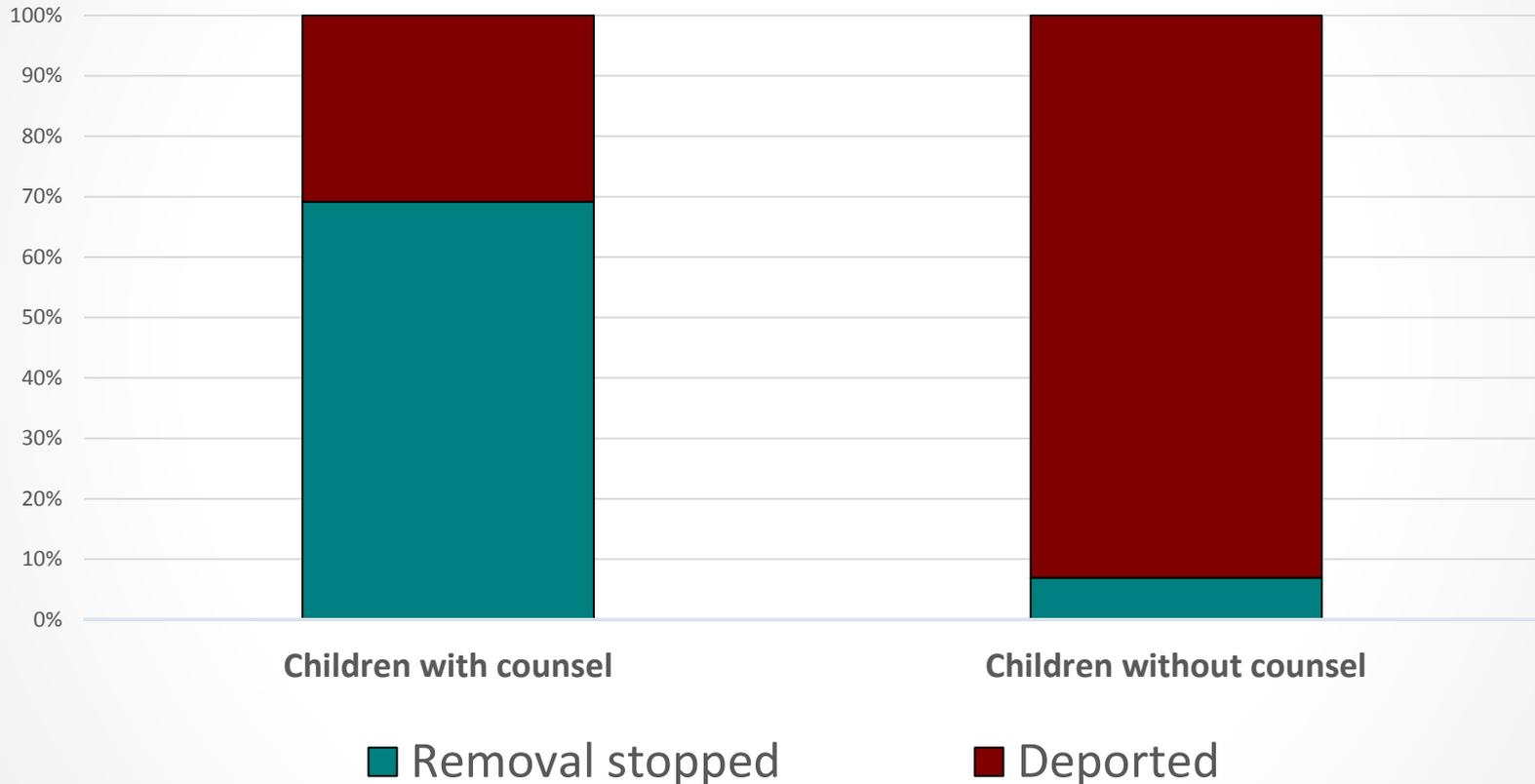
Source: The Women's Law Ctr. of Md., Inc., *Families in Transition: A Follow-up Study Exploring Family Law Issues in Maryland* (2006), available at <http://www.wlcmd.org/pdf/FamiliesInTransition.pdf>.

Correlation Between Representation and Unemployment Benefit Hearings Outcomes



Source: Herbert M. Kritzer, Legal Advocacy: Lawyers and Nonlawyers at Work 111-20 (1998)

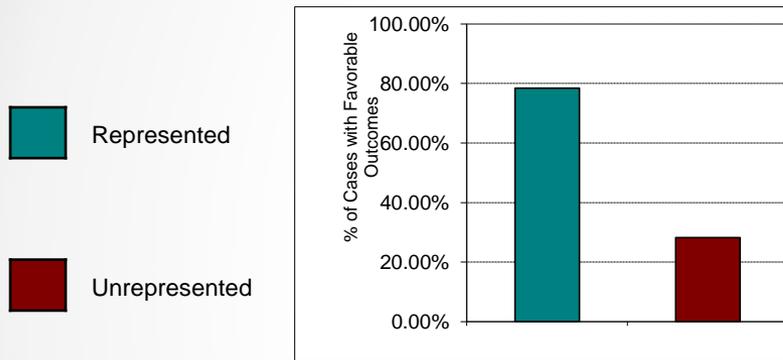
Child immigrants without lawyers face dramatically higher rates of deportation



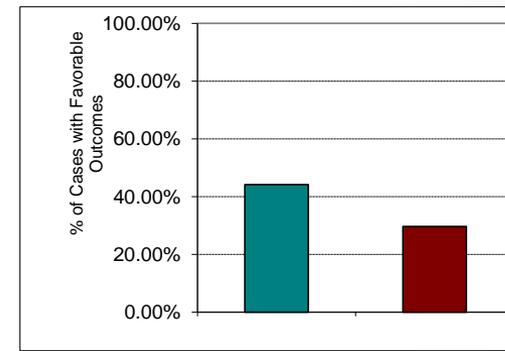
Source: US Justice Department data released to POLITICO, April 2015

Correlation Between Representation and Favorable Outcomes in Other Types of Cases Frequently Involving Low-Income Litigants

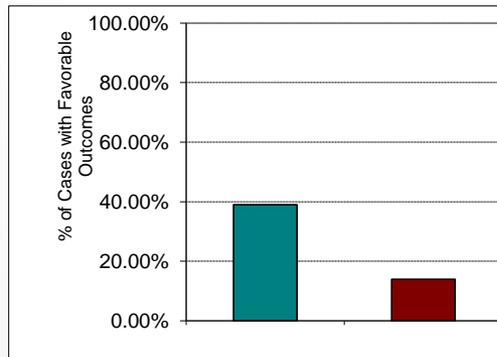
Social Security Appeals



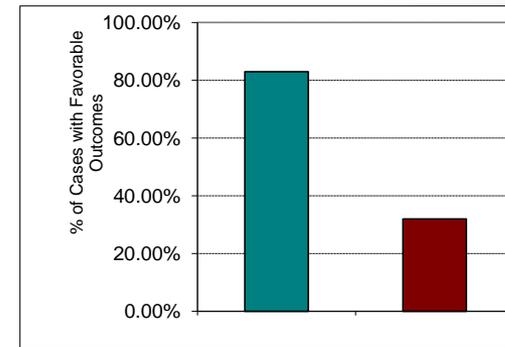
Unemployment Claims



Immigration Removal



Domestic Violence



Source: Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, to be published in an upcoming edition of the *Fordham Law Review*. Virtually all of the outcome studies cited in these materials were referenced in this very helpful work by Professor Engler, who is currently Professor of Law and Director of Clinical Studies at New England College of Law.

Prepared by John E. Whitfield,
Co-chair, Virginia Access to Justice Commission
June 3, 2016 • 13

The Moral: Lawyers Hold the Keys to the Courthouse, and without a lawyer....

These studies confirm what common sense tells us: you need a lawyer in order to effectively navigate our court system, and if you're poor and can't afford an lawyer, you're effectively locked out of our system of civil justice.

Despite the best intentions of any Judge, it's impossible to have a fair trial on a tilted playing field, when one side lacks representation.

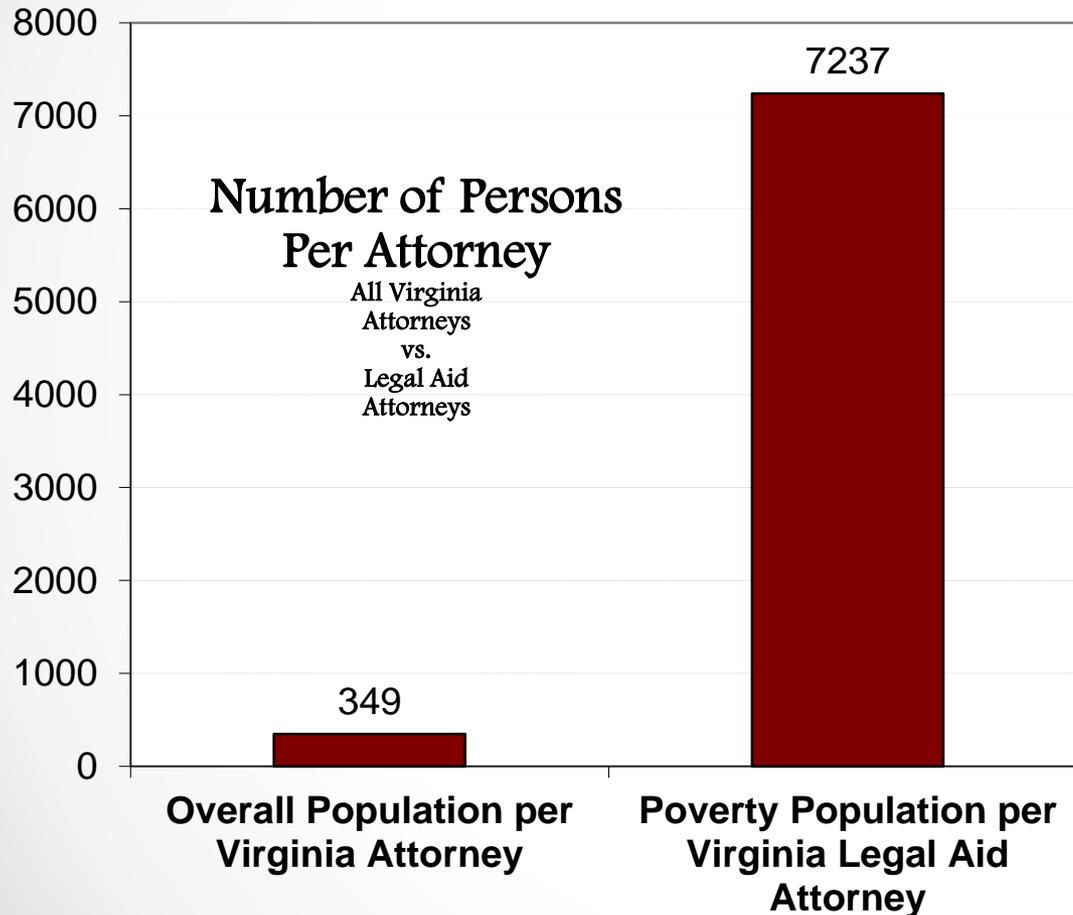
But we have Legal Aid.



Why is there a problem?

Why is *pro bono* still necessary?

Why can't Legal Aid help everyone who qualifies for their assistance?



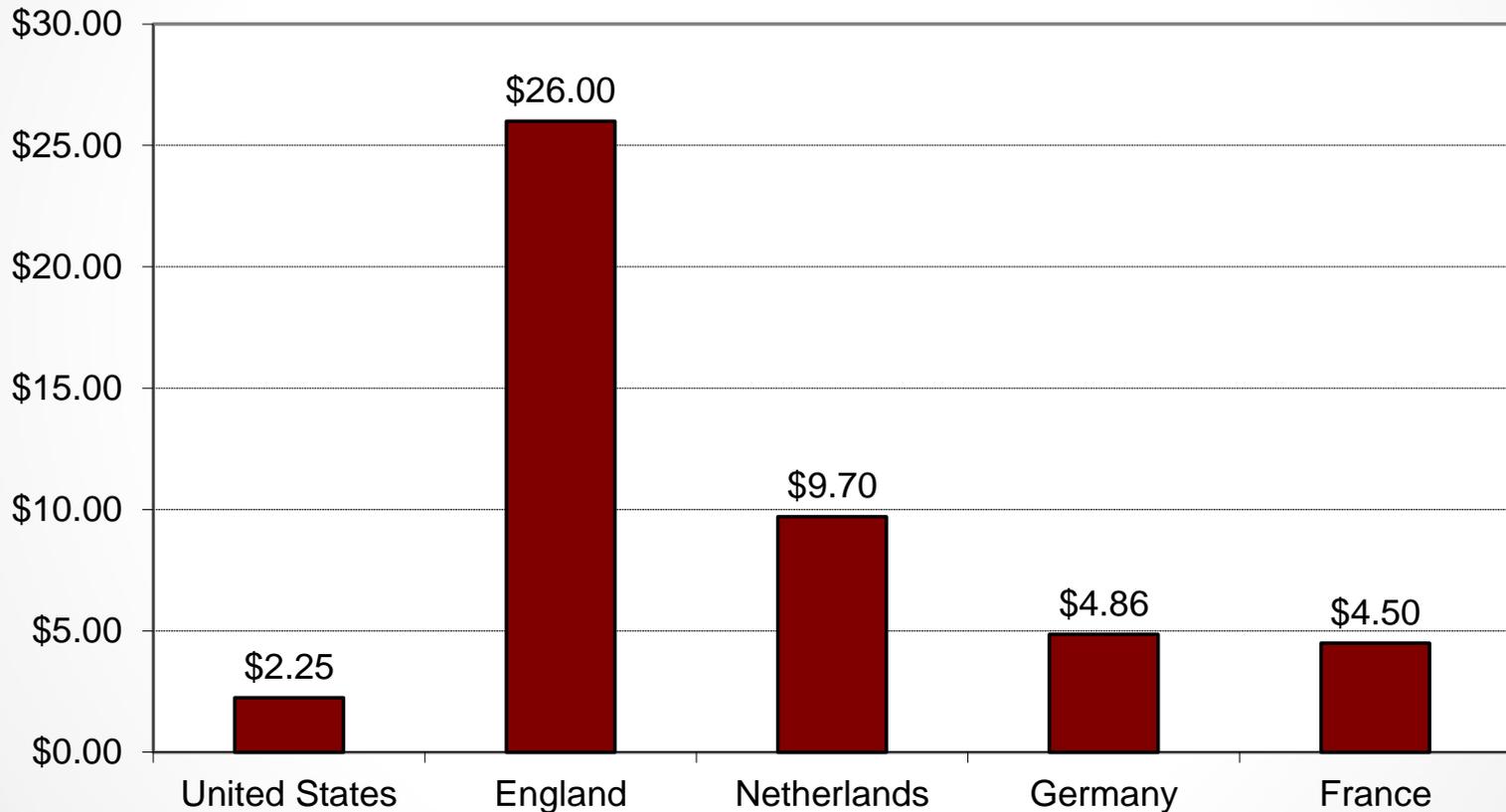
Sources:

Number of active Virginia Lawyers practicing in the state (23,851), VSB Membership Report, 8/3/15.

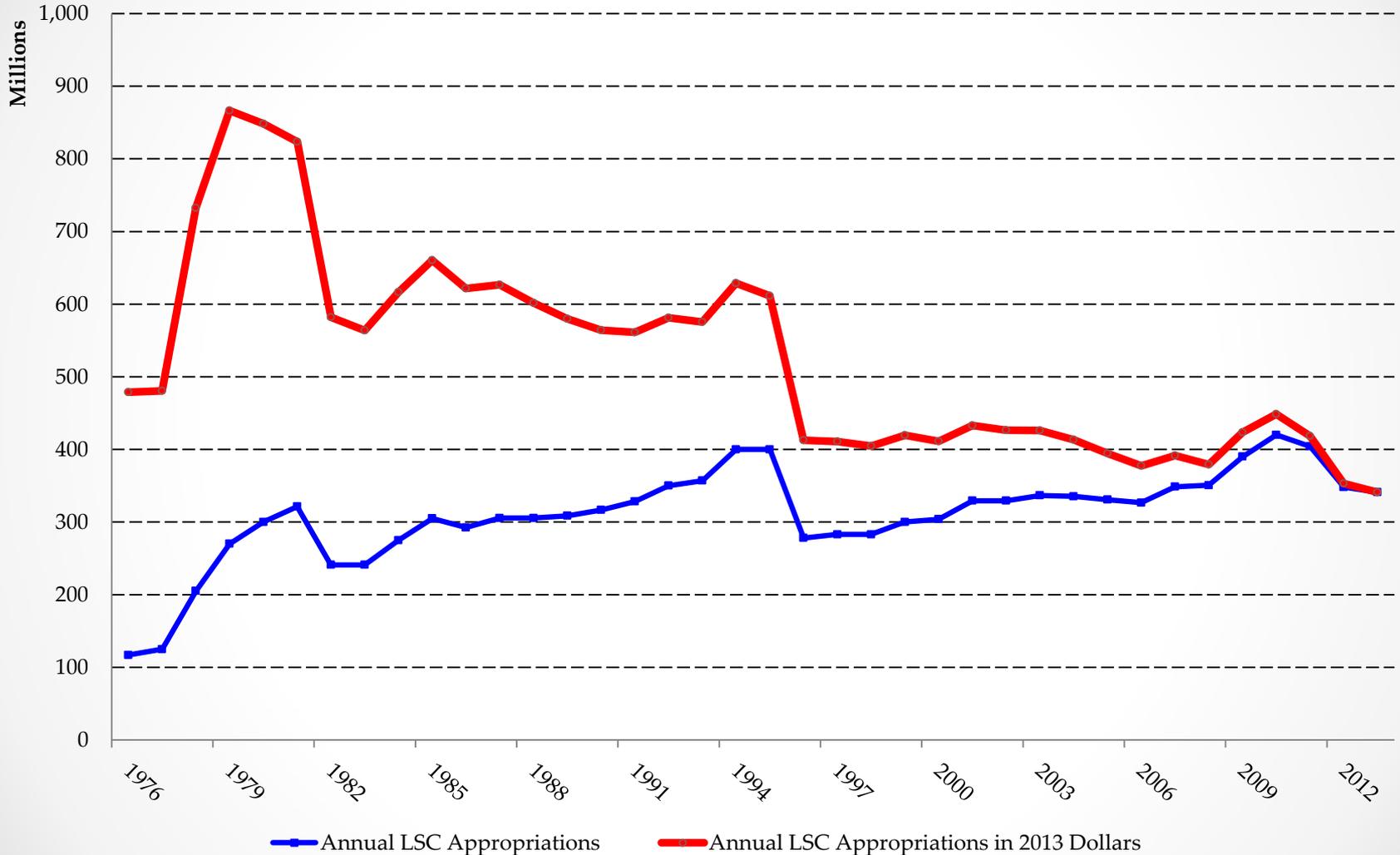
Number of Virginia Legal Aid Attorneys (130), LSCV Grant Applications, May 2014.

Virginia Population figure (overall population, (8,326,289) and poverty population (940,871), US Census website, 2014 estimates.

Government Per Capita Spending on Civil Legal Services for the Poor



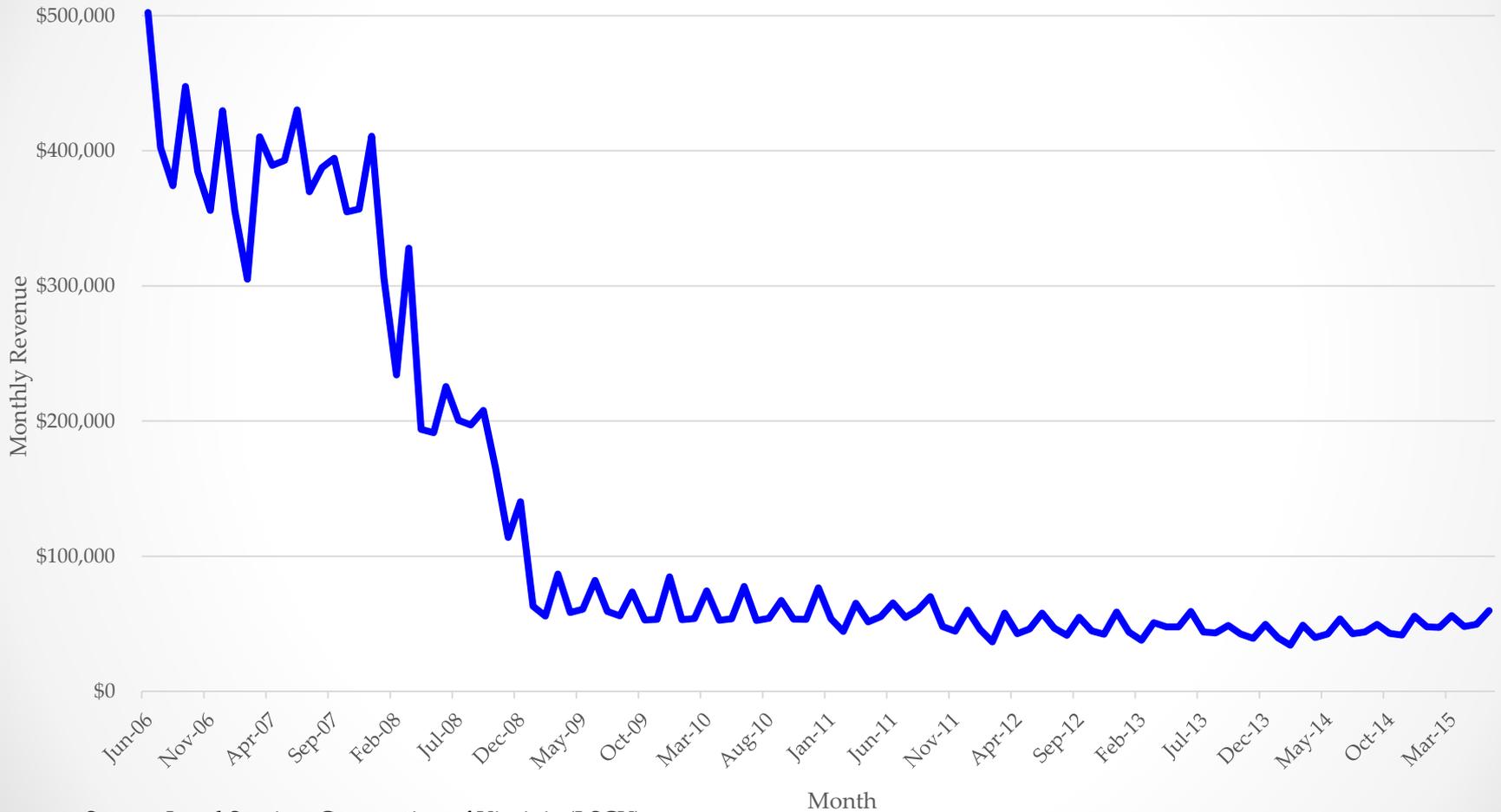
Federal LSC Funding Levels 1976-2013



Source: Legal Services Corporation

Annual LSC Appropriations in 2013 Dollars

Declining IOLTA Revenue in Virginia 2006-2015

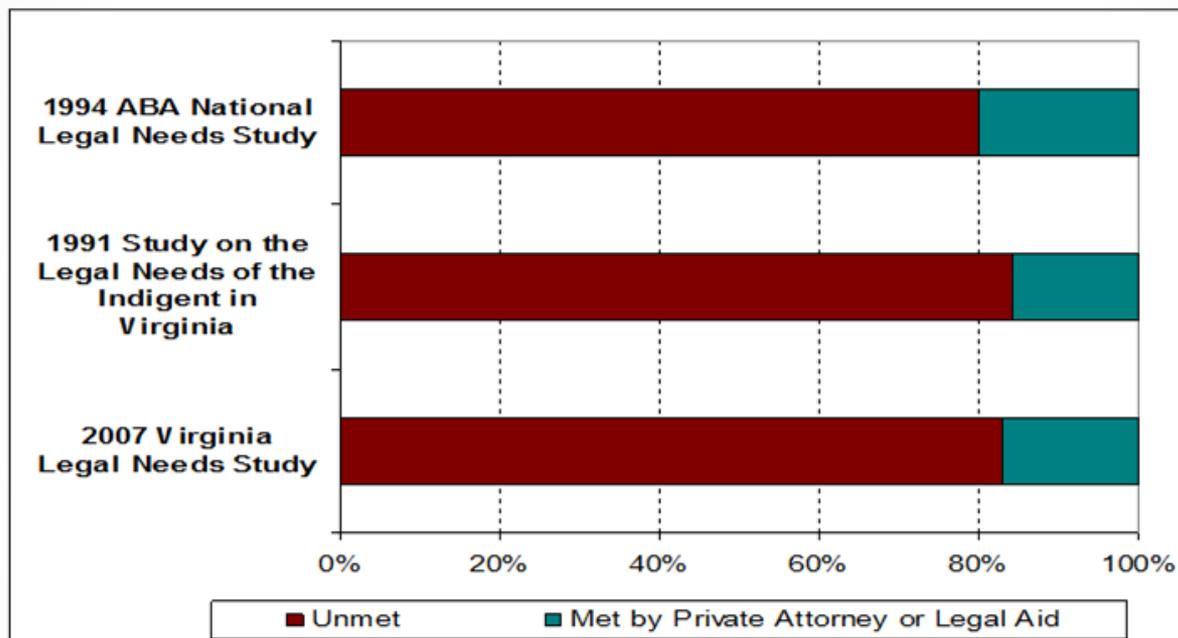


Source: Legal Services Corporation of Virginia (LSCV)

The “Double-Whammy” of Collapsing IOLTA Revenue and Federal Funding Cuts

- Virginia’s legal aid programs have been hit by a double whammy of collapsing IOLTA revenue and federal funding cuts. The overall impact has been a **20% loss in funding**.
- As a result:
 - they have *lost 61 positions (19% of their entire staff compared to 2009)* statewide
 - they have *lost 34 lawyers (21% of their total attorney staff)* statewide
- Meanwhile, *the state’s poverty population has increased 32%* over the last decade.

The Documented Unmet Civil Legal Needs of the Poor

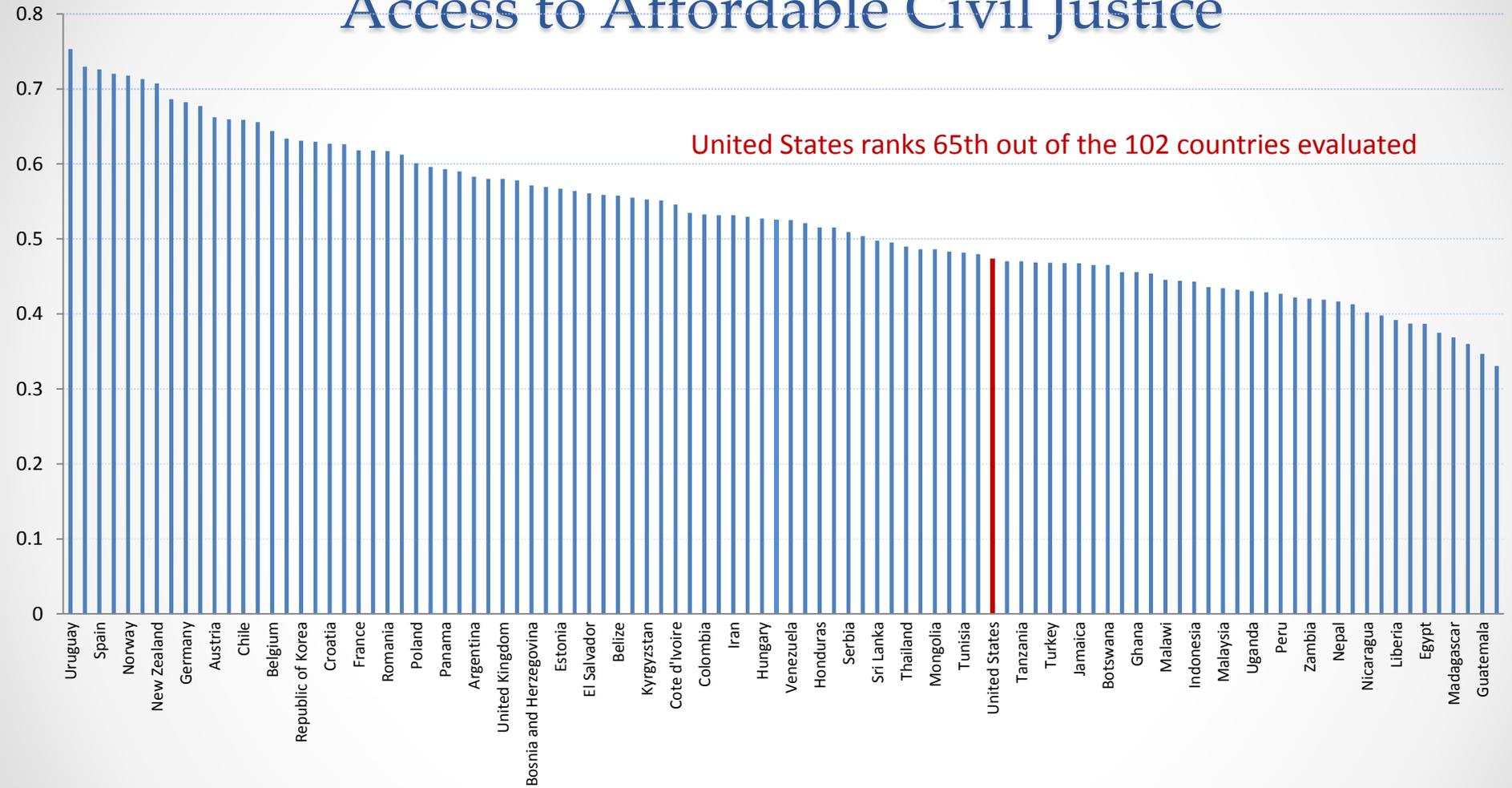


Sources: *1994 ABA National Legal Needs Study*

1991 Study on the Legal Needs of the Indigent in Virginia, commissioned by the Virginia State Bar and funded by the Virginia Law Foundation

2007 Virginia Legal Needs Study, commissioned by the Legal Services Corporation of Virginia (LSCV) and funded in part by the Virginia Law Foundation

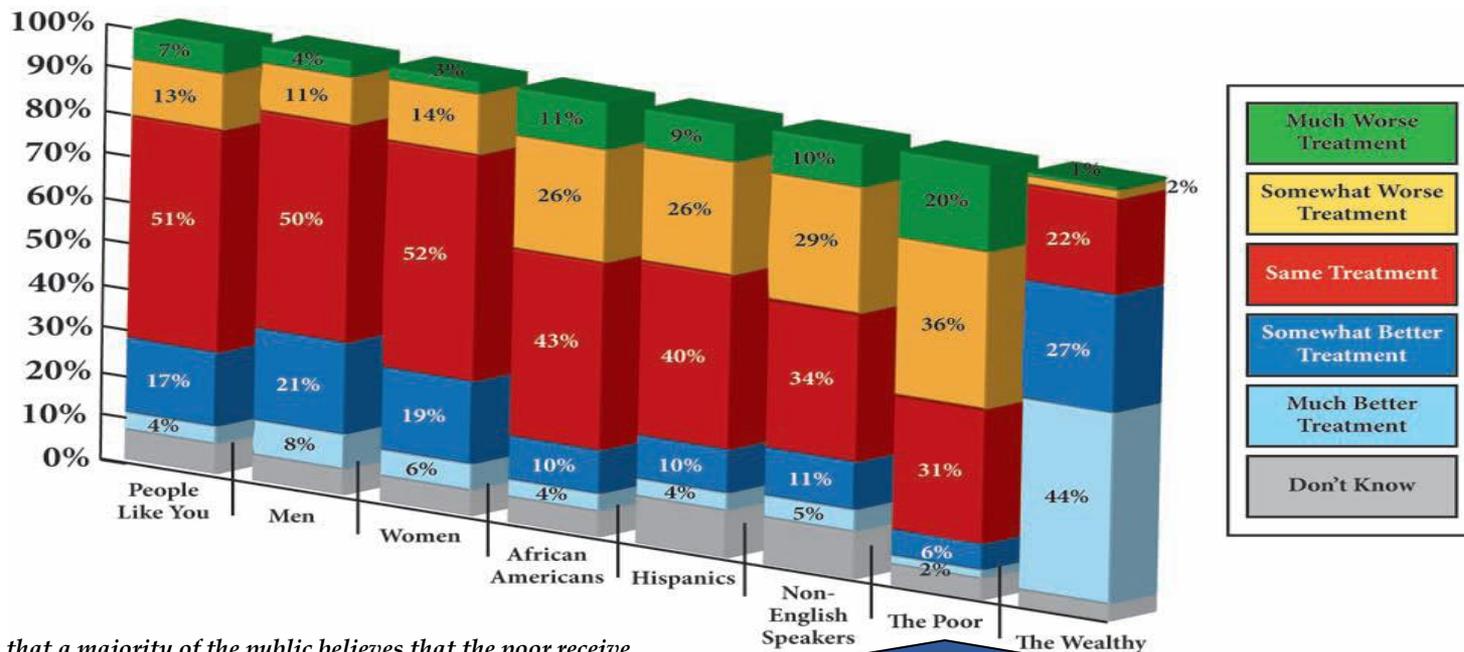
World Justice Project's 2015 Rule of Law Index: Access to Affordable Civil Justice



Source: World Justice Project's Rule of Law Index 2015. There are 8 dimensions, of which Civil Justice System is one, and there are 44 sub-factors, of which access to affordable civil justice is one.

The Public's Perceptions about How Different Groups are Treated in Virginia Courts

What sort of treatment do you think the following groups of people receive in Virginia Courts, compared to other groups?



Note that a majority of the public believes that the poor receive worse treatment in Virginia courts, compared to other segments of the population.

Source: 2007 Citizens Survey, Office of the Executive Secretary, Supreme Court of Virginia.

What does this all mean?

Under current conditions legal aid cannot realistically meet the most critical civil legal needs of the poor without the help of the private bar.

Taking these high error rates for pro se litigants, multiplied by this overwhelming level of unmet need, and we have what should be considered a crisis in our system of civil justice.

If “Justice for All” is going to be more than an empty phrase at the end of the Pledge of Allegiance, we need the sustained support from the Bar in *pro bono* assistance.

Rule 6.1

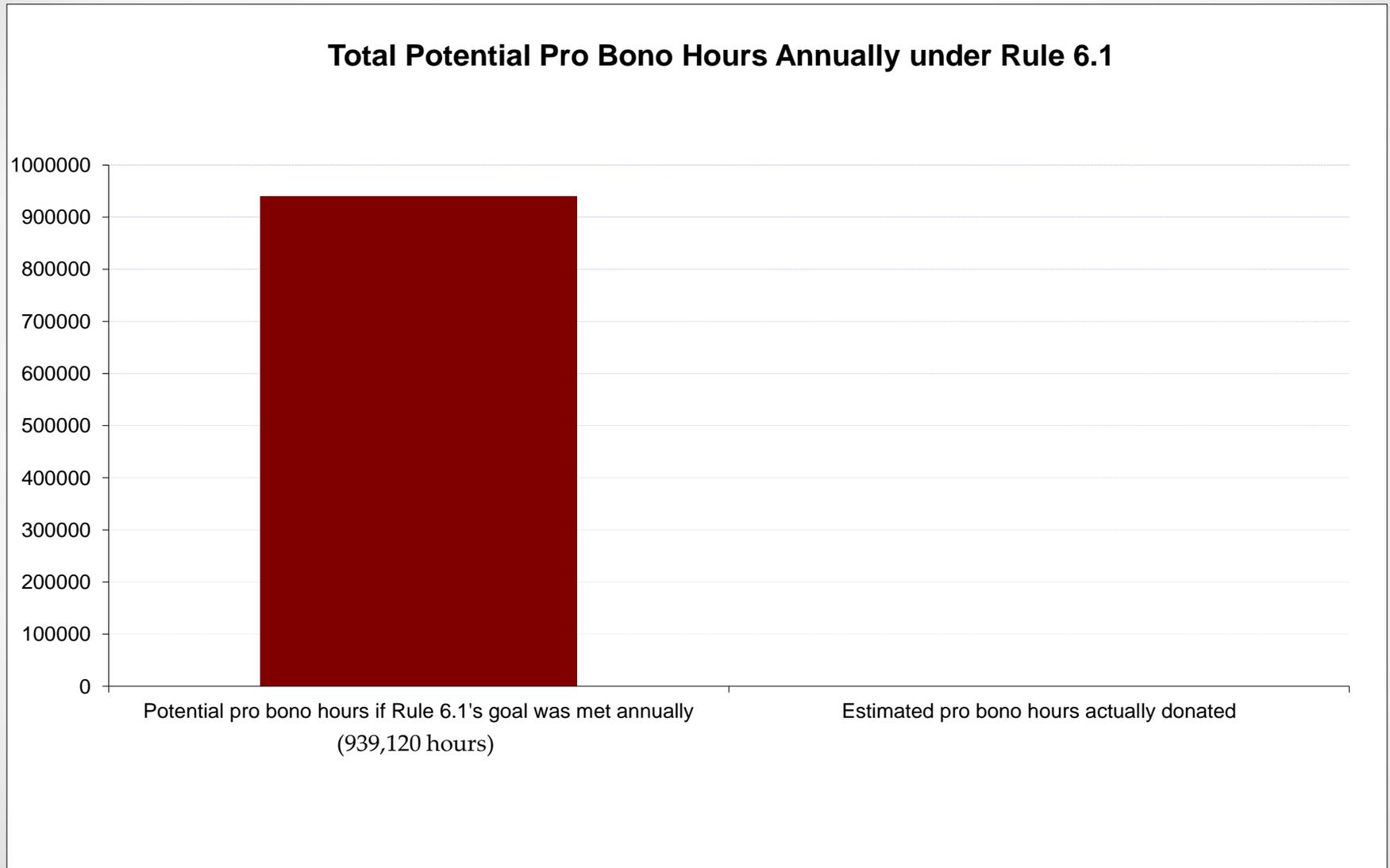


Virginia Rule of Professional Conduct 6.1 establishes the principle that ensuring “Access to Justice” (for those unable to pay) is a key responsibility of the organized bar.

RULE 6.1 Voluntary Pro Bono Publico Service

- (a) A lawyer should render **at least two percent per year** of the lawyer's professional time to pro bono publico legal services. Pro bono publico services include poverty law, civil rights law, public interest law, and volunteer activities designed to increase the availability of pro bono legal services.
- (b) A law firm or other group of lawyers may satisfy their responsibility collectively under this Rule.
- (c) Direct financial support of programs that provide direct delivery of legal services to meet the needs described in (a) above is an alternative method for fulfilling a lawyer's responsibility under this Rule.

Can Pro Bono Fill the Breach in Virginia?

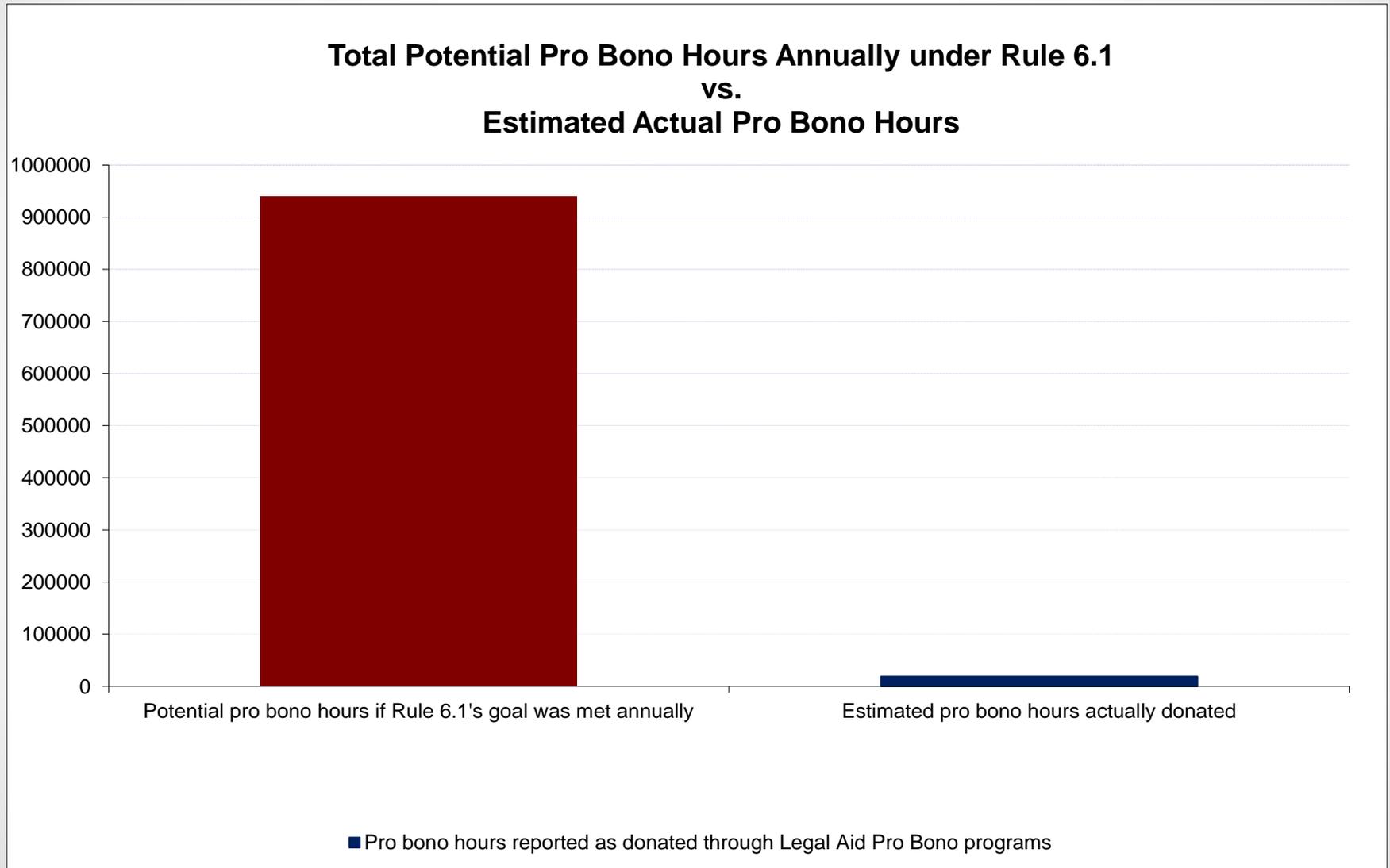


Amount of Pro bono work through Legal Aid's Pro Bono Programs

In 2012-2013 Virginia's legal aid programs closed a total of 35,015 cases for low-income Virginians with civil legal problems.

- Of these, 30,690 cases (88%) were handled by legal aid staff.
- Volunteer attorneys handled 3,561 cases (10%) on a pro bono basis statewide, donating more than 19,000 hours.

Virginia's Pro Bono Gap?



How much other Pro Bono work is occurring outside of Legal Aid's Pro Bono programs?

No one really knows exactly.

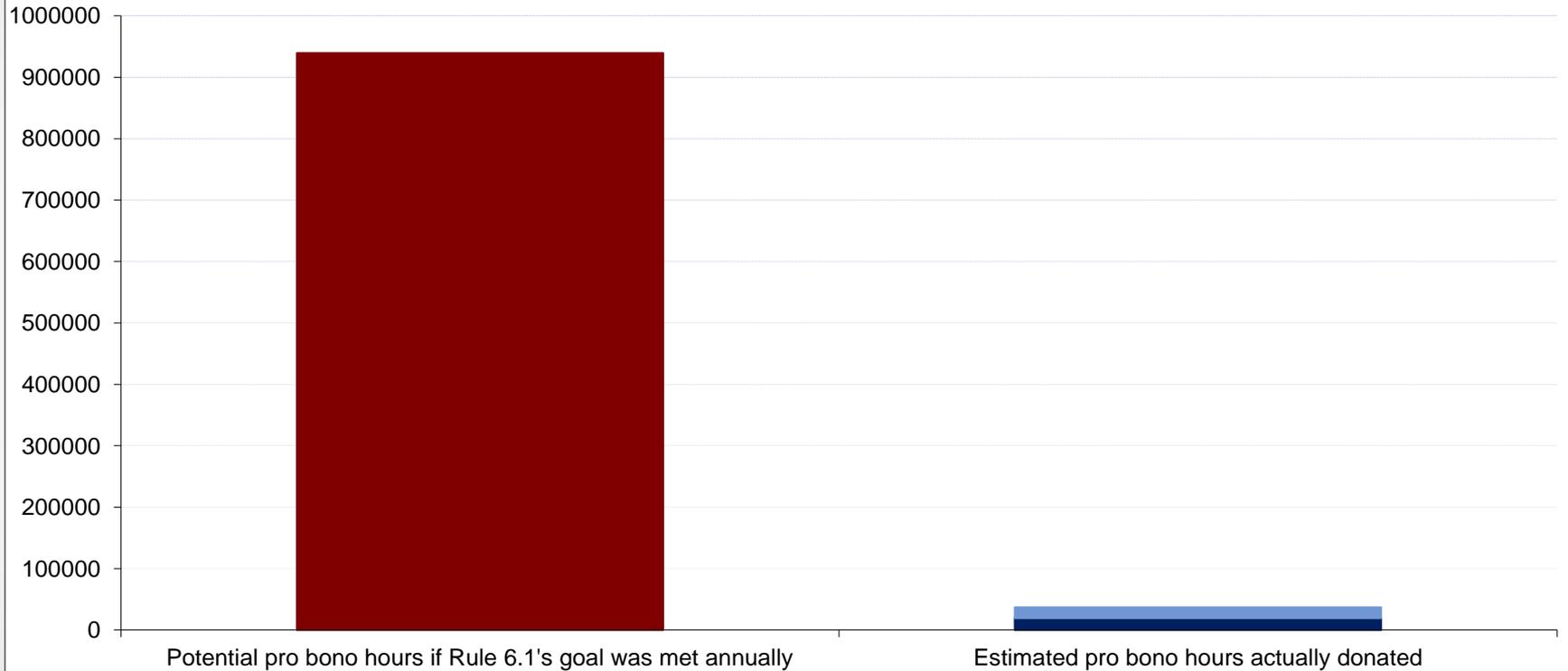
- There's no pro bono reporting requirement for Virginia attorneys, and there's no systematic data collection system for pro bono programs outside of legal aid.
- In 2013 the VSB's Access to Legal Services Committee undertook a first ever statewide survey of non-legal aid pro bono programs in an effort to gain some insight into the amount of pro bono legal work that is being performed through those programs.

VIRGINIA'S PRO BONO GAP

Total Potential Pro Bono Hours Annually under Rule 6.1

vs.

Estimated Actual Pro Bono Hours



■ Pro bono hours reported as donated through Independent pro bono programs

■ Pro bono hours reported as donated through Legal Aid Pro Bono programs

Recent ABA Pro Bono Study

The ABA conducted a national study of American lawyers' pro bono activities, "Supporting Justice III", released in March 2013:

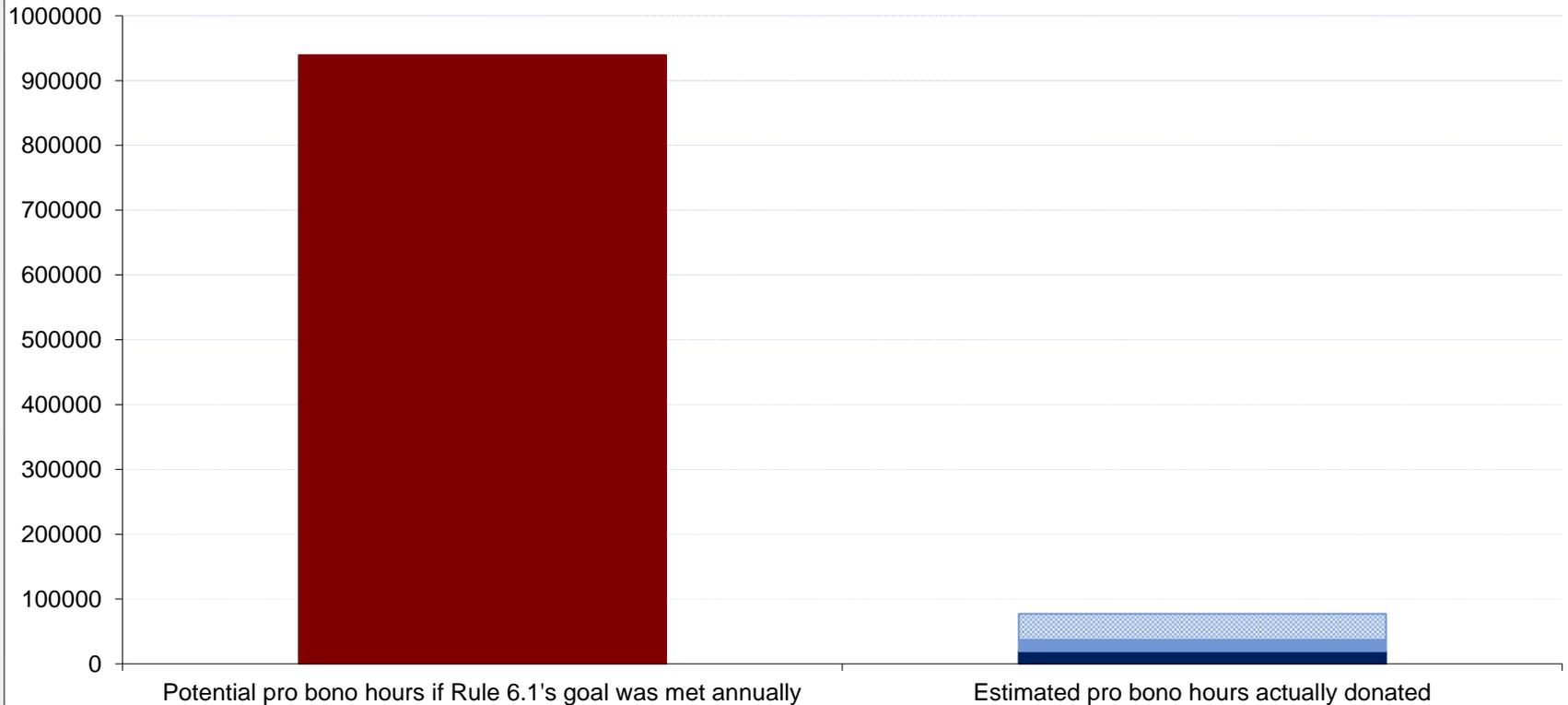
- It found that 27% of their pro bono work came from legal aid pro bono programs;
- Approximately 21% came from other organized pro bono organizations; and
- The remaining 52% of pro bono work came from clients, family members, co-workers, churches, etc., that is, ad hoc pro bono not affiliated with any organized pro bono program.

VIRGINIA'S PRO BONO GAP

Total Potential Pro Bono Hours Annually under Rule 6.1

vs.

Estimated Actual Pro Bono Hours



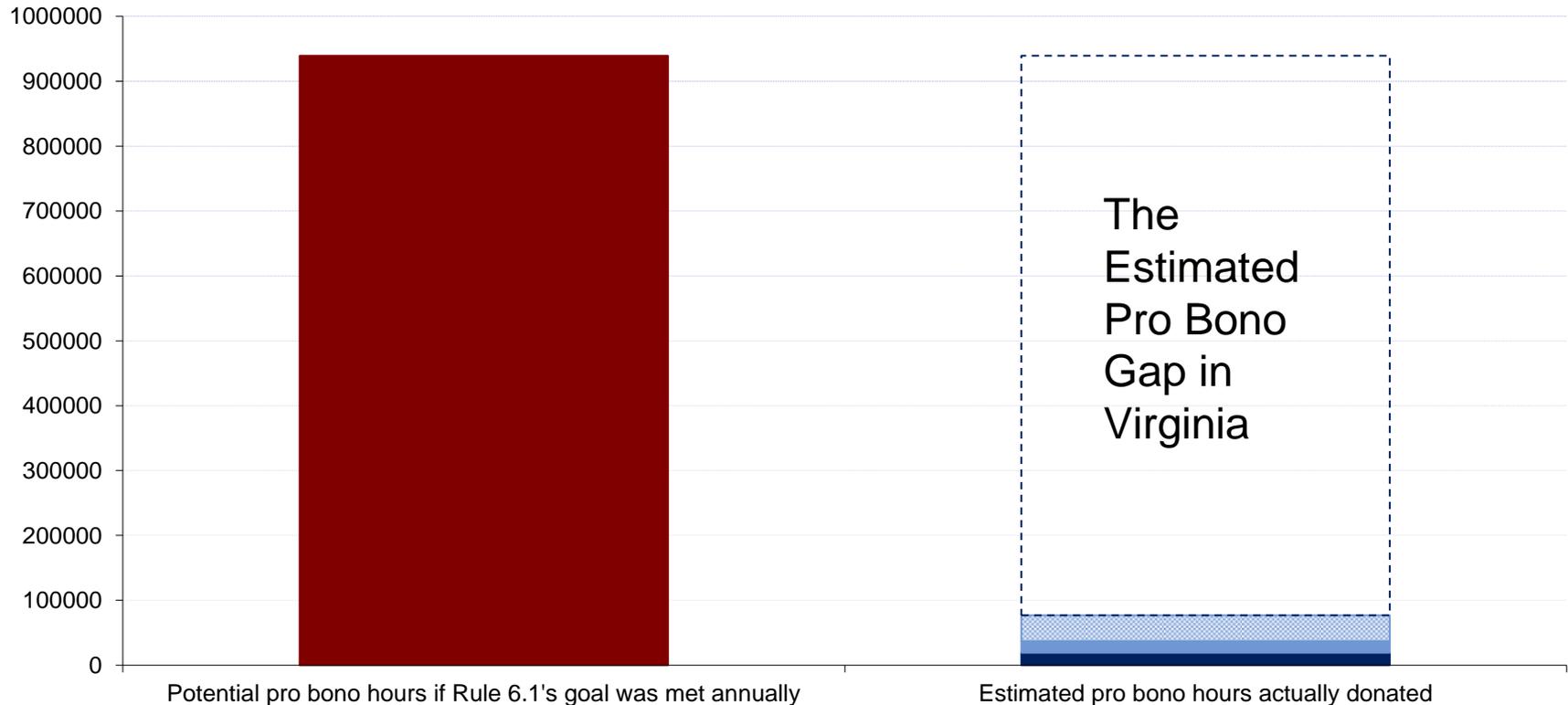
- Pro bono hours reported as donated through Independent pro bono programs
- Pro bono hours reported as donated through Legal Aid Pro Bono programs
- Potential pro bono hours if Rule 6.1's goal was met annually

VIRGINIA'S PRO BONO GAP

Total Potential Pro Bono Hours Annually under Rule 6.1

vs.

Estimated Actual Pro Bono Hours



- Estimated ad hoc pro bono hours donated
- Pro bono hours reported as donated through Independent pro bono programs
- Pro bono hours reported as donated through Legal Aid Pro Bono programs

Whose Problem is this Justice Gap?

The Justice Gap is not just Legal Aid's problem - it's the Courts' problem, it's the bar's problem, it's a problem for our entire society – all proclaiming how deeply we cherish the Rule of Law, and Equality and Justice under Law, yet benignly allowing inequality and injustice to persist unabated in our civil justice system.

By closing the Pro Bono Gap – the difference between the aspirational goals of Rule 6.1 and the actual performance of the bar as a whole in undertaking pro bono work each year - we could make significant inroads in closing the Justice Gap while demonstrating our genuine commitment to the Rule of Law, and Equality and Justice under Law.

References

Much of the information covered in this presentation was published in two articles appearing ***in The Virginia Lawyer***:

- ***Is there a Pro Bono Gap in Virginia?*** Feb. 2014
- ***The Impact of the Justice Gap on Litigants: Are We Providing a Level Playing Field?*** October 2014