

Proposed Changes to Comments to Rule 6.1 of the Virginia Rules of Professional Conduct

Voluntary Pro Bono Publico Legal 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.

Comment

[1] Every lawyer, regardless of professional prominence or professional work load, has a personal responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The Council for the Virginia State Bar urges all Virginia lawyers to contribute a minimum of two percent of their professional time annually to pro bono services. Pro bono legal services consist of any professional services for which the lawyer would ordinarily be compensated, including dispute resolution as a mediator or third party neutral.

[2] Pro bono services in poverty law consist of free or nominal fee professional services for people who do not have the financial resources to compensate a lawyer. Private attorneys participating in legal aid referral programs are typical examples of "poverty law." Legal services for persons whose incomes exceed legal aid guidelines, but who nevertheless have insufficient resources to compensate counsel, would also qualify as "poverty law," provided the free or nominal fee nature of any such legal work is established in advance.

[3] Pro bono publico legal services in civil rights law consists of free or nominal fee professional services to assert or protect rights of individuals in which society has an interest. Professional services for victims of discrimination based on race, sex, age or handicap would be typical examples of "civil rights law," provided the free or nominal fee nature of any such legal work is established in advance.

[4] Free or nominal fee provision of legal services to religious, charitable or civic groups in efforts such as setting up a shelter for the homeless, operating a hotline for battered spouses or providing public service information would be examples of "public interest law."

[5] Training and mentoring lawyers who have volunteered to take legal aid referrals or helping recruit lawyers for pro bono referral programs would be examples of “volunteer activities designed to increase the availability of pro bono legal services.”

[6] Pro bono public legal services include but are not limited to the following:

- a) Legal representation of disadvantaged people;
- b) The provision of legal advice to an individual or non-profit organization that primarily addresses the human service needs of the disadvantaged;
- c) Administrative rule making for the disadvantaged;
- d) The provision of free training or mentoring to those who represent the disadvantaged;
- e) Serving on the bar association committees assisting the disadvantaged;
- f) Serving on legal committees or boards that address the provision of pro bono legal services to the disadvantaged;
- g) Serving on the boards of legal services or similar pro bono organizations;
- h) Leading or coordinating Law Day activities;
- i) Serving as an instructor for a continuing legal education program on issues of substantive law or advocacy for pro bono and legal services lawyers;
- j) Serving as a mediator or arbitrator in a matter involving a litigant who is unable to pay for such services.
- k) Engaging in legislative advocacy to improve the law, the legal system or the profession in its delivery of legal services for the indigent.

[7] Service in any of the categories described is not pro bono publico if provided on a contingent fee basis. Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free or nominal fee legal services is essential. Accordingly, services for which fees go uncollected or are written off as bad debts would not qualify.

Collective Fulfillment of Pro Bono Publico Service

[8] Although every lawyer has an individual responsibility to provide pro bono publico services, some legal matters require the application of considerably greater effort and resources than a lawyer, acting alone, could reasonably provide on a pro bono basis. In fulfilling their obligation under this Rule, a group of two or more lawyers may pool their resources to ensure that individuals in need of such assistance, who would otherwise be unable to afford to compensate counsel, receive needed legal services. The

designation of one or more lawyers to work on pro bono publico matters may be attributed to other lawyers within the firm or group who support the representation.

[9] ABA Model Rule Comment not adopted.

Financial Support in Lieu of Direct Pro Bono Publico Services

[10] The provision of free or nominally priced legal services to those unable to pay continues to be the obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Not only do these needs far exceed the capacity of the collective bar, the nature of legal practice for many lawyers places constraints on their ability to render pro bono publico legal services. For example, some lawyers (e.g., some government lawyers) are prohibited by the terms of their employment from engaging in any outside practice. Other lawyers lack the experience and access to resources necessary to provide competent legal assistance.

[11] To provide legal services beyond those available through the pro bono efforts of individual lawyers, the legal profession and government have established additional programs to provide such services. Lawyers who are unable to fulfill their pro bono publico obligation through direct, legal representation should support programs that provide legal services for the purposes described in (a) through financial contributions in proportion to their professional income.

Virginia Code Comparison

There was no direct counterpart to this Rule in the Disciplinary Rules of the Virginia Code. EC 2-27 stated that the “basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer. . . . Every lawyer, regardless of professional prominence or professional work load, should find time to participate in serving the disadvantaged.” EC 8-9 stated that “[t]he advancement of our legal system is of vital importance in maintaining the rule of law . . . [and] lawyers should encourage, and should aid in making, needed changes and improvements.” EC 8-3 stated that “[t]hose persons unable to pay for legal services should be provided needed services.”

Committee Commentary

The subject matter of this Rule was not specifically addressed in the Disciplinary Rules of the Virginia Code. The Committee drafted language different from that of the ABA Model Rule to bring the Rule in line with Ethical Considerations approved by the Supreme Court of Virginia on June 17, 1994 (specifically EC 2-28 and 2-29). The Committee then adopted the new versions of EC 2-27 and EC 2-30, EC 2-31, and EC 2-32 as the Rule’s Comment for paragraph (a). Paragraphs (b) and (c) permit greater flexibility in the manner in which lawyers fulfill their pro bono obligations.