

# **Promoting Wellness and a Duty of Care in the Legal Profession**

**Originally Prepared by Justice William C. Mims**

**Supreme Court of Virginia**

**and used with his kind permission**

## **1. How is the Legal Profession Doing?**

The legal profession suffers from a serious crisis in terms of the health and well-being of its members. In February 2016, the Hazelden Betty Ford Foundation/American Bar Association study was released, which evaluated data collected from 12,825 attorneys and judges from 19 states. The participants were selected from a wide range of races, ages, professional positions, years of practice, both in the private and public sectors, and hours worked per week. A few of the more concerning findings were:

- 21-36% of those surveyed qualified as having problematic drinking behaviors. By comparison, only about 7% of Americans were known to have an alcohol use disorder in 2014, while 15% of physicians studied were reported with problematic drinking.
- A higher percentage of problematic drinking was reported for those working in private firms than among those working in the public sector.
- 14.2% reported that problematic alcohol use began in law school.
- Being in the early stages of one's legal career is highly correlated with developing an alcohol use disorder: 47.7% reported problematic use began within the first 15 years following law school.
- 28% of respondents were experiencing mild, moderate, or severe depression.
- 61% reported having experienced anxiety during their career, while 11.5% had experienced suicidal thoughts.

## **2. Promoting Wellness in the Legal Profession in Virginia – Recent Developments.**

Chief Justice Donald Lemons served as a member of the National Task Force on Lawyer Well-Being, which was formed in response to these findings. It compiled comprehensive recommendations, published as *“The Path to Lawyer Well-Being: Practical Recommendations for Positive Change”* in August 2017. This report is available at <http://lawyerwellbeing.net/>.

# PROFESSIONAL RESPONSIBILITY RULES FOR PRO BONO PRACTICE

Presented by John S. Koehler, Esq.

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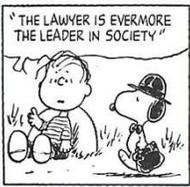
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**Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system.**



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**The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules and regulations is imperative for persons of modest and limited means, as well as for the relatively well-to-do.**



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The ABA House of Delegates has formally acknowledged "the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services" without fee, or at a substantially reduced fee, in one or more of the following areas: poverty law, civil rights law, public rights law, charitable organization representation, and the administration of justice.



This responsibility is reflected in Part 6 of the Virginia Rules of Professional Conduct.

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*... at a substantially reduced fee?*

How can "pro bono" services be anything but free? The comments to VRCP 6.1 make clear that it is acceptable in some situation to accept a "nominal fee." This is not the same as "low bono," which is a practice model.

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*... at a substantially reduced fee?*

The primary distinction between pro bono for a fee and low bono is that the fee received for pro bono work should not supplement the attorney's income. Pro Bono "fees" can be used to cover extraordinary costs of the representation or to reimburse the attorney for mileage and other related expenses.

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... at a substantially reduced fee?

Low bono practices do not limit their services to the poor or charitable organizations, and the attorney's income is drawn from the fees collected. Attorneys who follow a low bono practice model should still make an effort to offer pro bono services.

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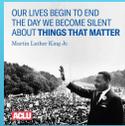
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**VRPC 6.1 Voluntary Pro Bono Publico Service**

- 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.



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**VRPC 6.1 Voluntary Pro Bono Publico Service (cont.)**

- 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.



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*Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged.*



**Comment to VRPC 6.1**

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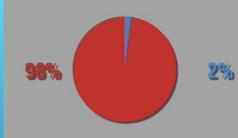
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*2% of a lawyers time is equal to 40 hours of work, or some combination of work and contributions that support the provision of legal services to indigent and low-income clients.*



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**The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer.**



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The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession and government to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services and other related programs have been developed, and others will be developed by the profession and government.

**LEGAL AID SOCIETY OF ROANOKE VALLEY**  
 Providing a full range of free legal services to those who are unable to pay for legal services.  
 For appointments call BLUE RIDGE LEGAL SERVICES 540-344-2080

132 CAMPBELL AVENUE SW, SUITE 200  
 ROANOKE, VIRGINIA 24003-1206  
 540-344-2080

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*Every lawyer should support all proper efforts to meet this need for legal services. When the legal system works well for everyone, we all win – most especially the client who has placed her trust in the system and had that trust justified.*

**“Compassion is not a zero sum game.”**

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**VRPC 6.2 Accepting Appointments**  
 A lawyer should not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

- a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;
- b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or
- c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.



**DOING**  
WHAT NEEDS  
TO BE DONE

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A snappy salute  
and a cheery  
"Aye, aye!"



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An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

Comment to VRPC 6.2

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## Conflicts of Interest



*"My fees are quite high, and yet you say you have little money. I think I'm seeing a conflict of interest here."*

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VRPC Rule 6.3

Membership In Legal Services Organization

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer.

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VRPC Rule 6.3 cont.

The lawyer shall not knowingly participate in a decision or action of the organization:

- a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or
- b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

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VRPC 6.4: There if NO VRCP 6.4



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The ABA Draft Model Rule 6.4 deals with the potential for conflicts of interest where an attorney is, individually or as part of a public service organization, lobbying for or otherwise seeking a change in that law that is potentially adverse to a client.

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VRPC 6.5  
Nonprofit And Court-Annexed Limited Legal Services Programs  
a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:  
1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and  
2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.  
b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

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Part Six is not the only consideration  
Part Six of the VRPC addresses the attorney's *responsibility* to under take pro bono representation. However, we must be mindful that a pro bono client is entitled to all the protections and advantages provide for the VRPC as a whole.

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This means that the Rules governing Competence, Confidentiality, Client Communications, and other professional considerations are just as important in a pro bono representation as they are in your daily practice.



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### Special Considerations for In-House Counsel (and other attorney-employees)

The Association of Corporate Counsel has recognized the special circumstances of attorneys in non-traditional roles as corporate and staff counsel. While many of the ethical considerations are the same as for attorneys in private practice, special emphasis must be given to areas that can present special challenges to attorneys who do not regularly engage with the public.

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### Special Considerations for In-House Counsel

#### Competence

Of course, the in-house lawyer must be competent to handle the pro bono matter. Fortunately, state rules provide if such knowledge does not already exist, it can be developed by working with someone experienced in the field. It might also be acquired through courses or self-study and by taking the time to draft templates and tools for use in the work.

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Special Considerations for In-House Counsel

Scope of representation

Once competence is established, in-house counsel should determine the scope of representation to be provided. It is important that in-house counsel set clear expectations of what they will (and won't) do. Establishing expectations up front is the best way to ensure the in-house counsel can fulfill all ethical duties to the client.

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Special Considerations for In-House Counsel

Employer policies

It is also important for in-house counsel to review their employers' policies around pro bono work to ensure the proposed representation conforms to those policies. An in-house department is well served to set up an initial review process that addresses many ethical concerns such as confirming that training is provided, if needed, to ensure competence.

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Special Considerations for In-House Counsel

File management

In-house counsel must make sure they approach the administration of pro bono matters in a very professional manner. Records pro bono representation should be safely stored in accordance with an appropriate document retention period.

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Special Considerations for In-House Counsel

Corporate Pro Bono offers “off the shelf” clinic programs that help corporate counsel and specialized law firms provide pro bono to the general public.

For additional information on in-house pro bono, please visit [www.cpbo.org](http://www.cpbo.org).

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**PROFESSIONAL RESPONSIBILITY:  
RULES FOR PRO BONO PRACTICE**

The Center for Teaching the Rule of Law

Presented by John S. Koehler, Esq.

**Outline**

Introduction

- I. Public Service as a Standard of Professional Conduct
- II. The Ethics of Pro Bono
  - a. The Need is Great in Virginia
  - b. Public Service Through Pro Bono Representation
  - c. . . . at a substantially reduced fee?
- III. VRPC 6.1 Voluntary Pro Bono Publico Service
  - a. When Pro Bono Is Not Enough (and it's never enough)
- IV. Accepting Appoints from a Tribunal
  - a. VRPC 6.2 Accepting Appointments
- V. Avoiding Conflicts of Interest
  - a. VCPR Rule 6.3
  - b. Wither Rule 6.4?
- VI. Nonprofit and Court-Annexed Limited Legal Services Programs
  - a. VRCP Rule 6.5
- VII. Four Additional Rules to Consider
  - a. VRCP 1.1 Competence
  - b. VRCP 1.2 Scope of Representation
  - c. VRCP 1.6 Privilege and Confidentiality
  - d. VRCP 1.14: Clients with Diminished Capacity
- VIII. Special Considerations for In-House Counsel (and other attorney-employees)
  - a. Employer Policies
  - b. File Management



## **Introduction**

Lawyers play a vital role in the preservation of society. Are we, as Linus Van Pelt (and before him US Supreme Court Justice David J. Brewer) would have it, “Evermore the Leader in Society”?<sup>1</sup>

The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules and regulations is imperative for persons of modest and limited means, as well as for the relatively well-to-do.

## **Public Service as a Standard of Professional Conduct**

Comment 1 to Virginia Rule of Professional Conduct (VRPC) 1.6 states that “[t]he lawyer is part of a judicial system charged with upholding the law.” Moreover, “[o]ne of the lawyer’s functions is to advise clients so that they avoid any violation of the law in the proper exercise of their

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<sup>1</sup> Justice Brewer’s essay appeared as the lead article in the fifth volume of the 5 Yale Law Journal 1 (October 1895). How Charles Shultz came to know of it is something of a mystery as the quotation had little circulation until it was repeated by Linus.

rights.” This latter comment is a direct expression of the view that the lawyer’s duty – her right – extends equally to the client and society. Or almost equally.

Client confidentiality, the subject of VRPC 1.6, is the area in which the lawyer’s duty to the client most often conflicts with her duty to society. Whenever there is any doubt as to which ought to be paramount, the former must prevail. Consider, for example [LEO 1859](#), in which the Committee gave precedence to confidentiality even where this meant potentially prejudicing, at least in the short term, the client’s right to effective assistance of counsel. In doing so, the Committee recognized that pre-litigation cooperation with the government might result in a swifter and fairer resolution of the claim.<sup>2</sup>

### **The Ethics of Pro Bono**

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*“Our justice system must be there for all who need it.” Ronald George, 27th Chief Justice of the California Supreme Court*

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The California Chief Justice made the above comment at a recent meeting of the L.A. Pro Bono Council, a new organization made up of representatives of large law firms and nonprofits who support pro bono work. The need for pro bono work to help the poor and disadvantaged is indisputable. Meeting that need does raise some ethical issues which need to be considered by an attorney providing legal assistance on a pro bono basis.

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<sup>2</sup> Presumably in favor of the government by dispelling the specter of incompetence on the attorney’s part. If there could be a circumstance where divulging a confidential communication would *establish* ineffectiveness of counsel, undoubtedly the client would consent to its being revealed.



work for non-profit housing developers, employment issues, and even intellectual property issues. Most lawyers can find a need for pro bono services within their expertise. Beyond that, most pro bono legal services programs provide training and backup support to enable attorneys to undertake pro bono representation with competence and confidence.

The State Bar's call to provide pro bono services is only one of many reasons attorneys should volunteer their services. Others include: gaining training and experience, improving the image of lawyers, making you feel good about being a lawyer, and, most importantly, making your mother proud of you!

The most direct expression of the ethical duty of an attorney to support the Rule of Law is found in VRPC 6.1 to 6.5, the rules covering public service. Indeed, the comments to VRPC 6.1 make an express reference to the Rule of Law, noting that former Ethical Consideration (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.” The Rule further notes that former 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.”

## The Need is Great in Virginia

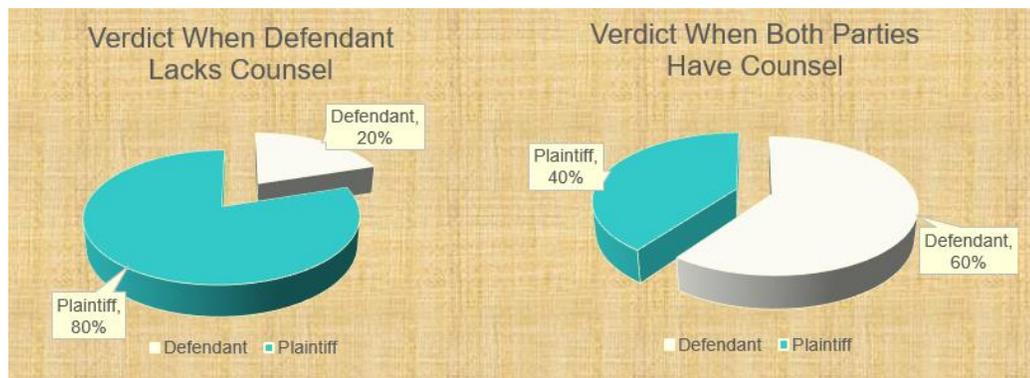
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*There are 965,580 Virginia citizens who live below the poverty line. Even those who are in the next several rungs of the economic ladder are often not able to afford to hire legal counsel.*

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In April 2018, John Whitfield, executive director of Blue Ridge Legal Services, presented findings from a statewide study that showed civil defendants in the General District Courts are represented by a lawyer in only 2 percent of cases. Plaintiffs, meanwhile, have lawyers more than half of the time.

When facing a represented plaintiff, unrepresented defendants prevailed in only 20 percent of their cases. With legal representation the chance of a defendant's verdict increased threefold. Contrary to an assumption made by many critical of the study, the results *did not* include uncontested cases.



Whitfield described the system as “dysfunctional.” He said the results show a disconnect between what the legal system assumes about what happens in courts, and the day-in, day-out experience of tens of thousands of

low-income Virginians. Even in the higher-stake cases in the circuit court, more than half the time the defendant has no lawyer.

Whitfield urged the Court to consider expanding small claims dockets, adopting simplified legal forms in plain language and relaxing some of the rules of procedure that can trap the lawyerless – like the one that says if defendants don't mention that a statute of limitations applies in their case, it is assumed they have waived the right to use it as a defense.

Shortly before the results of this study were presented to the Court, the Justices had ready approved a change to its Rules in an effort to increase access to justice. Effective December 1, 2018, the Rules of the Supreme Court of Virginia, Part 6, Section IV, now includes a new provision, Paragraph 22, that requests each active VSB member report their pro bono hours and/or financial contribution in support of pro bono legal services on their annual dues statement. According to the VSB Access to Legal Services Office, the reporting complements the aspirational goal of Virginia Rule of Professional Conduct 6.1 that each lawyer should render at least two percent of professional time annually to pro bono legal services. Whether the new rule, which requests voluntary reporting of a non-mandatory standard, will have the desired result on increasing both pro bono representation and contributions to organizations that provide legal services, remains to be seen.

### **Public Service Through Pro Bono Representation**

The ABA House of Delegates has formally acknowledged "the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services" without fee, *or at a substantially reduced fee*, in one or more of the following areas: poverty law, civil rights law, public rights law, charitable organization representation, and the administration of

justice. This responsibility is reflected in Part 6 of the Virginia Rules of Professional Conduct.

The Preamble to the VRCP reads:

As a public citizen, a lawyer should seek improvement of the law, of the administration of justice, and of the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ the knowledge in reform of the law, and work to strengthen legal education. A lawyer should be mindful of the deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest. . . .

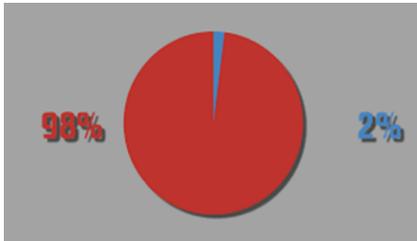
**. . . at a substantially reduced fee?**

How can “pro bono” services be anything but free? The comments to VRCP 6.1 make clear that it is acceptable in some situation to accept a “nominal fee.” This is not the same as “low bono,” which is a practice model. The primary distinction between pro bono for a fee and low bono is that the fee received for pro bono work should not supplement the attorney’s income. Pro Bono “fees” can be used to cover extraordinary costs of the representation or to reimburse the attorney for mileage and other related expenses. Low bono practices do not limit their services to the poor or charitable organizations, and the attorney’s income is drawn from the fees collected. Attorneys who follow a low bono practice model should still make an effort to offer pro bono services.

### **VRPC 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.

Every lawyer, regardless of professional prominence or professional



workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. 2% of a lawyer’s time is equal to 40 hours of work, or

some combination of work and contributions that support the provision of legal services to indigent and low-income clients.

The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer.

**When Pro Bono Is Not Enough (and it’s never enough)**

**Legal Aid:** The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession and government to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services and other related programs have been developed, and others will be developed by the

profession and government. Every lawyer should support all proper efforts to meet this need for legal services. When the legal system works well for everyone, we all win – most especially the client who has placed her trust in the system and had that trust justified.

### **Accepting Appoints from a Tribunal**

#### **VRPC 6.2 Accepting Appointments**

A lawyer should not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

- a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;
- b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or
- c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules. This rule does not apply to serving as court appoint counsel in the normal course of a criminal case. An appointment can include a request to represent a criminal defendant where there is a conflict with the local public defender's office or a court-appointed counsel; however, to constitute pro bono, the attorney accepting the appointment should not apply for a court appointed fee. There are many other instances where a court or administrative tribunal might request that an attorney accept representation on a pro bono basis, such as where an indigent person requires a guardian or is facing a civil commitment. Many appellate courts also will request pro bono counsel for

pro se litigants who may a meritorious case but lack the skill to prepare an adequate brief and present oral argument.

### **Avoiding Conflicts of Interest**

#### **VCPR Rule 6.3**

##### Membership in Legal Services Organization

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

- a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or
- b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

There is no VRPC 6.4. The ABA Draft Model Rule 6.4 deals with the potential for conflicts of interest where an attorney is, individually or as part of a public service organization, lobbying for or otherwise seeking a change in that law that is potentially adverse to a client. It is unclear why Virginia has not adopted this rule.

### **Nonprofit and Court-Annexed Limited Legal Services Programs**

Opportunities for Pro Bono are often provided in informal setting where conflict checks are not practical. VRPC 6.5 is sometimes referred to as a “safe harbor” provision that permits attorneys to take part in limited representation through court or legal group sanctioned clinics, such as “no bills nights,” with limited conflict checks.

#### **VRCP 6.5**

- a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to

a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

### **Four Additional Rules to Consider**

Lawyers often say that the most rewarding aspect of their careers is providing pro bono services to individuals in need. While not intending to be comprehensive, the following post provides several examples of ethical issues that may occur in pro bono representation and the rules that guide attorneys facing them.

#### **VRCP 1.1 Competence**

Of course, the attorney accepting a pro bono case must be competent to handle matter. Fortunately, if such knowledge does not already exist, it can be developed by working with someone experienced in the field. It might also be acquired through courses or self-study and by taking the time to draft templates and tools for use in the work.

#### **VRCP 1.2 Scope of Representation**

Who is your client, and what are the parameters of the work that you will be providing to your client? Equally important, what work will not be done on your client's behalf? The Virginia Rules of Professional Conduct permit attorneys to provided "unbundled" or limited-scope legal services to clients, as a way of making at least some legal representation available to

greater numbers of people who may need it. For example, you might have the bandwidth to help a pro bono client with an uncontested divorce, but not to handle a custody trial. This is completely acceptable, provided such a limitation is reasonable under the circumstances and the client gives informed consent. (See VRCP 1.2(c)). Whether a limitation in a particular case is reasonable will depend on the facts of the situation, and will require you, as the lawyer, to exercise professional judgment.

### **VRCP 1.6 Privilege and Confidentiality**

Clients seeking pro bono legal assistance will often want family members or trusted advisors to attend their meetings with you. Before allowing any third party to sit in on a meeting, you must explain to your client that the attorney-client privilege might be waived. A high-profile example of the privilege waiver appears in the Martha Stewart case, where Martha's sharing of an email from her lawyer with her daughter Alexis resulted in that email being admitted in evidence. In less high-profile matters, particularly those not involving litigation, you may perceive minimal risk in a potential waiver of the privilege, and may advise your client accordingly. You should also explain to your client that, although the conversation may not be privileged, it is absolutely still confidential. (See VRCP 1.6). Confidentiality is broader than privilege and is not waived by the presence of a third party.

### **VRCP 1.14 Clients with Diminished Capacity**

One of the most difficult situations often encountered by lawyers providing pro bono legal services is dealing with clients with diminished capacity. VRCP 1.14 advises lawyers to maintain a conventional relationship with the client as far as reasonably possible. If you believe that

your client cannot adequately act in his or her own interest, there are several options available to you. You can consult with entities that might be able to take action to protect the client. You or another representative can pursue appointment of a guardian ad litem if necessary. It may be tempting to communicate directly with a family member or friend of the client, and you may do so with your client's consent, but you should not allow that family member to act as a substitute for the client. If you need to communicate a material development in the case, you should try to the greatest extent possible to speak with the client directly, rather than providing that information to a family member who may be easier to communicate with.

Fortunately, the ABA has created a number of resources for lawyers in such situations. See, for example, ABA News, "[Who is the client, and other questions in dealing with diminished capacity](#)," and ABA Commission on Law and Aging, [Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers](#).

### **Special Considerations for In-House Counsel (and other attorney-employees)**

The Association of Corporate Counsel has recognized the special circumstances of attorneys in non-traditional roles as corporate and staff counsel. While many of the ethical considerations are the same as for attorneys in private practice, special emphasis must be given to areas that can present special challenges to attorneys who do not regularly engage with the public.

### **Employer Policies**

It is also important for in-house counsel to review their employers' policies around pro bono work to ensure the proposed representation conforms to

those policies. An in-house department is well served to set up an initial review process that addresses many ethical concerns such as confirming that training is provided, if needed, to ensure competence.

### **File Management**

In-house counsel must make sure they approach the administration of pro bono matters in a very professional manner. Records pro bono representation should be safely stored in accordance with an appropriate document retention period.

Corporate Pro Bono offers “off the shelf” clinic programs that help corporate counsel and specialized law firms provide pro bono to the general public. For additional information on in-house pro bono, please visit [www.cpbo.org](http://www.cpbo.org).

**Wellness.** Noun. The state of being in good health, especially as an actively pursued goal.

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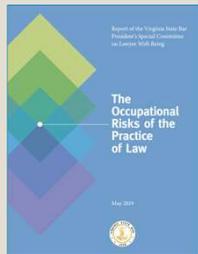
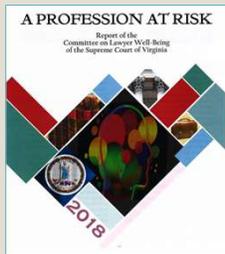
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### Two Important Recent Reports



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**Virginia Judges & Lawyers Assistance Program**  
(Formerly Lawyers Helping Lawyers)



General line: 804-644-3212

24-hour help line: 1-877-545-4682

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**Six Dimensions of Wellness**

- Physical Wellness
- Emotional Wellness
- Spiritual Wellness
- Social Wellness
- Intellectual Wellness
- Occupational Wellness

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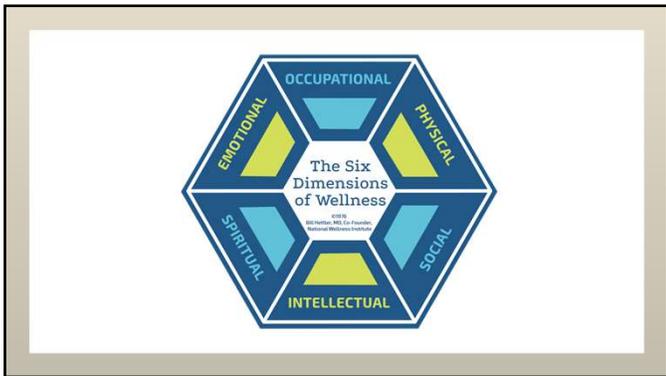
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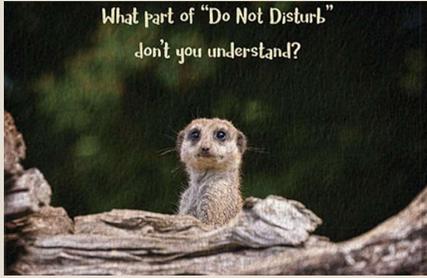
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### Practice Self-Care



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**Physical Wellness** is the ability to maintain a healthy quality of life through positive habits such as a balanced diet, regular exercise, sufficient sleep, and routine check-ups, while avoiding destructive behaviors such as drug abuse, excessive alcohol consumption, and the like.

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**Emotional Wellness** is the ability to understand ourselves and cope with life's challenges, including acknowledging feelings of anger, fear, sadness, or stress.

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**Spiritual Wellness** is the ability to establish peace and harmony in our lives, including developing congruency between our values and our actions.

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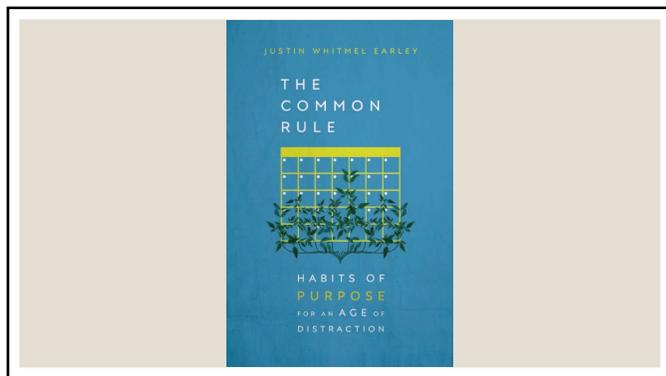
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**Social Wellness** includes our ability to establish and maintain positive relationships with family, friends, and co-workers.

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**Intellectual Wellness** is the ability to learn new concepts, improve skills, and seek challenges in pursuit of lifelong learning.

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**Occupational Wellness** is the ability to receive personal fulfillment in our careers by making a positive impact on the organizations we work in our communities.

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Chief Justice Lemons then created a committee to examine the recommendations made in the National Task Force report and suggest methods of implementation in Virginia. In September 2018, the Virginia committee published its report, “A Profession at Risk” ([http://www.courts.state.va.us/programs/concluded/clw/2018\\_0921\\_final\\_report.pdf](http://www.courts.state.va.us/programs/concluded/clw/2018_0921_final_report.pdf)).

This report included numerous recommendations relating to four sub-groups within the profession: Judicial, Law Schools and Virginia Board of Bar Examiners, Private Sector, and Public Sector (including Legal Aid). It also included three significant recommendations for our profession generally, to be funded with by a \$30 annual assessment for members of the Virginia State Bar:

- A significant increase in the scope of Lawyers Helping Lawyers, which has since been renamed the Virginia Judges and Lawyers Assistance Program (JLAP).
- Creation of a library of wellness related CLEs. Virginia CLE, a division of the Virginia Law Foundation, has generously agreed to undertake this task, including offering two hours of wellness CLE annually for no charge to VSB members.
- Hiring of a Wellness Coordinator within the Office of the Executive Secretary of the Supreme Court of Virginia, to promote and coordinate wellness activities within our profession throughout the Commonwealth.

In addition to these actions directed by the Supreme Court, the Virginia State Bar, at the direction of President Leonard Heath, established a Committee on Lawyer Well-Being. This committee carefully examined and catalogued specific occupational risks and offered practical advice on how to address them. Its report, “The Occupational Risks of the Practice of Law,” is available at [https://www.vsb.org/docs/VSB\\_wellness\\_report.pdf](https://www.vsb.org/docs/VSB_wellness_report.pdf).

### **3. What is Our “Duty” of Care? Am I My Brother’s and Sister’s Keeper?**

Two Legal Ethics Opinions recently approved by the Virginia Supreme Court also bear on lawyer wellness. LEO 1886 discusses the duties of supervisory lawyers when another lawyer in a law firm suffers from significant impairment which has not yet resulted in serious misconduct or a material risk to clients or the public. The LEO opines that the Rule 5.1 duty of supervisors to ensure all firm lawyers comply with the ethics rules includes a duty to take precautionary measures to protect clients from an impaired lawyer. It recommends that firms maintain an enforceable policy governing such situations. Additionally, LEO 1886 notes that supervisors have no duty under Rule 8.3 to report impairment to the Bar when it is unaccompanied by any professional misconduct. Only misconduct that raises a substantial question about another lawyer’s honesty, trustworthiness, or fitness to practice law must be reported to the Bar.

LEO 1887 discusses duties when a lawyer over whom no one has supervisory authority is impaired. It complements LEO 1886 and opines that when there is no supervisory authority over an impaired lawyer, other lawyers aware of the impairment have no duty to report it to the Bar unless the impairment results in misconduct. This is because, absent a supervisory role, lawyers do not have a duty to proactively address the impairment of other lawyers. If, however, it appears that a lawyer is materially impaired in his or her ability to represent clients and is continuing to represent those clients in violation of Rule 1.16(a)(2), then Rule 8.3(a) requires other lawyers aware of the impairment to report it to the Bar. LEO 1887 also suggests that lawyers who are concerned about another lawyer's potential impairment, but who are not ethically obligated to report the impairment, encourage the impaired lawyer to contact a lawyer assistance program like VJLAP.

The Standing Committee on Lawyer Discipline (COLD) of the Virginia State Bar has taken an active role in assisting impaired lawyers. COLD proposed, and the Supreme Court adopted, a rule change clarifying that a lawyer's disciplinary record does not include administrative suspensions, such as impairment suspensions. (Part 6, Section IV, Paragraph 13-1 of the Rules for the Integration of the Virginia State Bar.) The amendment will help remove the stigma from impairment findings, which are often temporary in nature.

Additionally, COLD proposed and the Supreme Court approved a proposal to allow the Office of Bar Counsel (OBC) to share confidential information with the Virginia Judges and Lawyers Assistance Program (JLAP, formerly Lawyers Helping Lawyers). (Part 6, Section IV, Paragraph 13-30.) Specifically, if a lawyer comes to the attention of OBC through the bar complaint process, and it is suspected that either alcohol or substance abuse or mental health concerns may be at the root of the alleged misconduct, this proposal would permit OBC to confidentially refer the lawyer to JLAP. Under the former rule, all complaints were confidential at the early stages and not even the fact that a complaint has been filed could be disclosed to anyone, including a lawyer assistance program. Permitting confidential disclosure has obvious benefits, including quicker referral of lawyers to an entity that can provide them with needed intervention and help.

Another COLD proposal adopted by the Supreme Court will help facilitate retirement with dignity. (Part 6, Section IV, Paragraph 13-23.) OBC may now terminate an impairment proceeding if the lawyer agrees to permanently transfer to the Disabled and Retired class of membership. Doing so would avoid an adjudication of "impaired." This amendment displaced the former rule, under which moving from active to retired status was not permitted if a disciplinary complaint was pending.

Finally, the VSB Standing Committee on Legal Ethics proposed and the Virginia Supreme Court adopted an amendment to the Comments to Rule of Professional Conduct 1.1 (Competence). New Comment 7 provides that a lawyer's mental, emotional, and physical well-being impacts the lawyer's ability to represent clients and make responsible choices in the practice of law. It goes on to state that maintaining the mental, emotional, and physical ability necessary for client representation is an important aspect of maintaining competence to practice law.

#### **4. Knowing and Practicing the Six Dimensions of Wellness.**

Wellness is commonly viewed as having six dimensions. Each dimension contributes to our own sense of wellness or quality of life, and each affects and overlaps the others. At times one may be more prominent than others but neglect of any one dimension for any length of time has adverse effects on overall health.

**Social Wellness** is the ability to relate to and connect with other people in our world.

1. I am able to resolve conflicts in all areas of my life
2. I am aware of the feelings of others and can respond appropriately
3. I have at least three people with whom I have a close trusting relationship
4. I am aware of and able to set and respect my own and others' boundaries
5. I have a sense of belonging/not being isolated
6. I have satisfying social interaction with others

**Physical Wellness:** involves implementing regular physical activity, maintaining a healthy diet, and rejuvenating our bodies through rest and sleep -- all things that protect us from chronic diseases and improve our quality of life.

7. I exercise at least three times per week.
8. I eat a balanced nutritional diet.
9. I am generally free from illness.
10. I am a reasonable weight for my height.
11. I do not use alcohol or use in moderation, am a non-smoker and avoid street drugs.
12. I take proactive steps to avoid and prevent injury, illness and disease.

**Emotional Wellness** is the ability to manage emotions, have a realistic and mostly positive view of ourselves, others, and the circumstances in our lives.

13. Others would describe me as emotionally stable.
14. I can express all ranges of feelings including hurt, sadness, fear, anger and joy and manage related behaviors in a healthy way.

15. I accept and appreciate my worth as a human being.
16. I manage stress and do some activity that elicits the "relaxation response" for at least 15 minutes each day.
17. I avoid blaming other people or situations for my feelings and behaviors.
18. I can realistically assess my limitations and cope effectively with stress and ego.

**Occupational Wellness** is the ability to get personal fulfillment from our jobs or our chosen career fields while still maintaining balance in our lives. Being financially secure also contributes to occupational wellness.

19. I have chosen a job role that I enjoy and that matches my values and lifestyle.
20. I have developed marketable job skills and keep them current.
21. I balance work with play and other aspects of my life.
22. I earn enough money to meet my needs and save to provide economic stability for myself and/or family.
23. I use money positively, e.g., little or no gambling or excessive massing of goods
24. My work benefits individuals and or society.

**Intellectual Wellness** is a commitment to lifelong learning. We nurture our intellectual health when we engage in creative activities, learn new things, and expand our knowledge.

25. I have specific intellectual goals, e.g., learning a new skill, a specific major
26. I pursue mentally stimulating interests or hobbies.
27. I am generally satisfied with my education plan/vocation.
28. I appreciate and explore the creative arts of theatre, dance, music and expressive art.
29. I commit time and energy to professional and self-development.
30. I would describe myself as a life-long learner.

**Spiritual Wellness** is the ability to establish peace and harmony in our lives. It involves learning to be more forgiving, grateful, and compassionate, to be kinder and less judgmental.

31. Principles/ethics/morals provide guides for my life
32. I trust others and am able to forgive others and myself and let go

33. I have a sense of meaning and purpose in my life
34. I have faith in a higher power
35. I practice meditation, pray, or engage in some type of growth practice
36. I have a general sense of serenity.

*“If we live for others, we will gradually discover that no one expects us to be ‘as gods.’ We will see that we are human, like everyone else, that we all have weaknesses and deficiencies, and that these limitations of our play a most important part in all our lives. It is because of them that we need others and others need us. We are not all weak in the same spots, and so we supplement and complete one another, each one making up in himself for the lack in another.” (Thomas Merton, No Man is an Island)*