

Testimony on: **Proposed Revisions to Part 6, §I of the Rules of the Supreme Court of Virginia on the Unauthorized Practice of Law¹**

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Testimony to the
**Virginia State Bar
Standing Committee on
Legal Ethics**

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Responsive Law thanks the Committee for the opportunity to present these comments. Responsive Law is a national nonprofit organization working to make the civil legal system more affordable, accessible, and accountable to its consumers. We have testified to state bar associations and legislatures as well as to the American Bar Association on a range of issues affecting users of the legal system.

We participated in the ABA Commission on the Future of Legal Services and we have examined innovations in legal service delivery in the United States and abroad. We support policies that expand the range of legal services available to meet people's legal needs and that loosen restrictions on who may provide assistance on legal matters so that people of all income levels can get the legal help they need. **We would like to express our reservations with regard to the proposed amendments to Part 6, §I of the Rules of the Supreme Court of Virginia on the Unauthorized Practice of Law.** While the amendments streamline the format of the existing rules and generally clarify what does and does not constitute the unauthorized practice of law, they do not address innovations in legal service delivery that should also be excluded from prohibitions on the unauthorized practice of law.

The Committee Should Consider and Work Toward Improving the Current State of Access to Justice Through Its Amendments to Virginia's Rules for Unauthorized Practice of Law.

The justice gap in the United States extends from the poorest Americans across the middle class. In the World Justice Project 2017-2018 report, the United States ranks 94th out of 113 countries (tied with Cameroon, Uganda, and Zambia) in the affordability and

¹ This is a revised version of our previously submitted testimony of July 13, which inadvertently quoted an individual out of context.

accessibility of its civil justice system.² Americans cannot afford to pay lawyers for assistance with everyday legal needs even though the average American household faces a significant legal problem every year.³ In the United States overall, more Americans do not address their legal problems due to lack of access to justice than their peers in countries such as England and the Netherlands, where there are fewer restrictions on how legal services can be offered.⁴ Small businesses also struggle with the gap in access to justice, with over half facing legal problems without legal assistance.⁵

In Virginia alone, almost half of low- and moderate-income households experience at least one legal problem annually, and Virginia's poverty level has increased while the Commonwealth's legal aid programs have lost funding.⁶ Pro bono service is inadequate to fill this gap. Even if every Virginia lawyer were in compliance with Rule 6.1 of the Virginia Rules of Professional Conduct regarding pro bono service, it would provide only six minutes of legal services to each Virginian annually.⁷ Further, the average Virginian would have to work almost two whole days to afford one hour of a lawyer's

² World Justice Project, *WJP Rule of Law Index 2017-2018* (2018), available at https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf.

³ Gillian K. Hadfield & Jamie Heine, *Life in the Law—Thick World: The Legal Resource Landscape for Ordinary Americans in Beyond Elite Law: Access to Civil Justice for Americans of Average Means* (Samuel Estreicher & Joy Radice eds., 2015) (observing that fifty to sixty percent of low- and moderate-income American households face an average of two legal problems annually).

⁴ *Id.*

⁵ LegalShield, *Decision Analyst Survey: The Legal Needs of Small Business* (2013), available at <https://www.le-galshield.com/news/legal-needs-american-families-0>.

⁶ *Ten Facts About Virginia's Justice Gap*, Virginia State Bar Pro Bono/Access to Justice Services, http://www.vsb.org/site/pro_bono/ten_facts_justice_gap (stating that while Virginia's poverty level increased thirty percent as of 2015, Virginia's legal aid programs lost twenty percent of their funding).

⁷ *Id.* (stating that only 80,000 of the 900,000 pro bono hours that the rule is intended to achieve are actually provided. This means that less than nine percent of the target pro bono hours under Rule 6.1 of the Virginia Rules of Professional Conduct are fulfilled. With a population of 8.47 million Virginians, the target 900,000 hours would only provide six minutes of legal services per Virginian).

time.⁸ These discrepancies show why existing lawyer resources are inadequate to bridge the justice gap, and more innovative legal services need to be permitted.

By Creating Exceptions That Are Not Based in Actual Consumer Harm, Virginia's Rules for Unauthorized Practice of Law Remain Protectionist and Thus Expose the Bar and Its Policymakers to Antitrust Liability.

Faced with the choice of allowing non-lawyers to compete with lawyers, bar associations have continually chosen to insulate themselves from competition rather than allow non-lawyers to provide legal services. Allowing the bar to exercise its protectionist instincts is not only problematic from an access to justice perspective; it also runs afoul of antitrust laws. The Supreme Court's decision last year in *North Carolina Board of Dental Examiners v. Federal Trade Commission* makes clear that when a controlling number of the decision makers on a state licensing board are active participants in the occupation the board regulates, the board can invoke state-action immunity from antitrust laws only if it is subject to active supervision by the state.⁹

The current governance structure of most state bars leaves them open to antitrust action, for which *Dental Examiners* makes it clear they would not receive state action immunity.¹⁰ The Virginia State Bar Standing Committee on Legal Ethics is composed entirely of

⁸ U.S. Bureau of Economic Analysis, "Table SA51-53, Disposable personal income summary," <https://www.bea.gov/iTable/iTable.cfm?reqid=70&isuri=1&acrdn=4>, accessed July 9, 2018 (stating that the average take-home pay in Virginia in 2016 was \$46,177. Assuming that the average Virginian works eight hours a day five days a week, the average Virginian would have to work nearly two whole days to afford one hour of a lawyer's time). See also The United States Consumer Law Attorney Fee Survey Report 2015-2016, <https://www.nclc.org/images/pdf/litigation/tools/atty-fee-survey-2015-2016.pdf> (estimating that the average hourly rate for an attorney in Virginia is \$358).

⁹ *North Carolina State Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015).

¹⁰ For a full discussion of the implications of *Dental Examiners* on anticompetitive regulatory action by the bars, see ResponsiveLaw's Comments to the State Bar of California Governance in the Public Interest Task Force on Consumer Protection in the Wake of the *Dental Examiners* Decision, <http://board.calbar.ca.gov/docs/agendaitem/Public/agendaitem1000014653.pdf> (retrieved April 28, 2016).

lawyers, making them active participants in the legal market.¹¹ The Committee receives public comments responding to its proposed rule changes and then submits its proposed amendments to the Virginia State Bar Council, also composed entirely of lawyers with one law professor.¹² If the Virginia State Bar Council approves the proposed amendments, they are submitted to the Supreme Court of Virginia for final approval.¹³ Since 2009, the Supreme Court of Virginia has adopted the vast majority of proposed changes approved by the Bar Council through 2018, which may indicate it is not exercising the active supervision that would exempt the VSB Council and its members from antitrust liability.¹⁴

The Commonwealth Should Not Implement Rules and Regulations Prohibiting Innovations in Legal Services Without Defining and Identifying the Consumer Harm That They Cause.

The current introduction to Part 6, §I of the Rules of the Supreme Court of Virginia on the Unauthorized Practice of Law notes that courts are empowered to prohibit and discipline UPL so as to avoid consumer harm. However, many models of non-lawyer LSPs have existed for several years without substantial harm to consumers, and with customer satisfaction levels equal to or better than those of lawyers.

In the United States, there are several examples of non-lawyer LSPs that have helped consumers resolve their legal issues. Online services like Legal Zoom have had as many as one million users over the course of a decade without reliable evidence of incompetence.¹⁵ Call for Action uses a national network of more than 1200 non-lawyer volunteers to help people resolve consumer complaints,

¹¹ Legal Ethics, Virginia State Bar, <http://www.vsb.org/site/about/legal-ethics/>.

¹² Bar Council, Virginia State Bar, <https://www.vsb.org/site/about/council>.

¹³ Rule Changes, Virginia State Bar, http://www.vsb.org/pro-guidelines/index.php/rule_changes/item/paragraph_13-12_13-30.

¹⁴ Id. (showing that the Supreme Court of Virginia has adopted fifty-four proposed amendments and has only rejected four: two in 2009, one in 2010, and one in 2013. The Committee has withdrawn ten proposed changes since 2009).

¹⁵ Andrew Perlman, "Towards the Law of Legal Services," 37 *Cardozo L. Rev.* 49, 107 (2015) (stating that "more than one million consumers have used LegalZoom in the last ten years alone, and there is no reliable evidence of incompetence").

operating since 1963 with no record of consumer harm.¹⁶ Harvard's Small Claims Advisory Service uses undergraduate students without lawyer supervision to help guide people through Massachusetts small claims courts, without any record of consumer harm since it began operating in 1973.¹⁷

Similarly, in England and Wales, there has been a robust market of non-lawyer LSPs for decades, in both litigation and legal advice. McKenzie Friends provide moral support, take notes, assist in the management of court papers and provide advice on courtroom conduct, and may charge a fee for their services. They have operated for nearly fifty years, with a recent report finding that there was "no evidence of [consumer detriment] occurring on any scale."¹⁸ More broadly, the United Kingdom's Citizens Advice has used non-lawyer volunteers to provide advice on legal and other matters to tens of millions of people for over seventy-five years,¹⁹ and has a 97% consumer satisfaction rating.²⁰ In contrast to these records of consumer satisfaction, lawyers have a consumer satisfaction rating of 76%,²¹ with one lawyer discipline complaint filed annually for every fourteen lawyers.²² Especially when compared to the already

¹⁶ <http://callforaction.org/volunteer-info/> (retrieved April 28, 2016).

¹⁷ <http://masmallclaims.org/about.html> (retrieved April 28, 2016).

¹⁸ Legal Services Consumer Panel, "Fee Charging McKenzie Friends," p. 5 (April 2014), http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/2014%2004%2017%20MKF_Final.pdf (retrieved April 28, 2016).

¹⁹ Citizens Advice, "Our annual report and accounts 2014/15," p. 5, <https://www.citizensadvice.org.uk/Global/Public/About%20us/Annual%20report/Citizens-Advice-annual-report-2014-15.pdf> (retrieved April 28, 2016).

²⁰ "Client satisfaction with the Citizens Advice service," (2014), https://www.citizensadvice.org.uk/Global/Migrated_Documents/corporate/client-satisfaction-2.pdf (retrieved April 28, 2016).

²¹ ABA Section of Litigation, "Public Perception of Lawyers: Consumer Research Findings," p. 19 (April 2002), http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/public_perception_of_lawyers_2002.authcheckdam.pdf (retrieved April 28, 2016).

²² ABA Center for Professional Responsibility, "Survey on Lawyer Discipline Systems," p. 2 (January 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_%20IA_2014_%20sold_results.authcheckdam.pdf (retrieved April 28, 2016).

highly regulated services of lawyers, leading non-lawyer LSPs do not appear to have a consumer protection problem.

Causes of action for unauthorized practice of law should require a complaint from a customer and a finding of actual harm to that customer. This finding of actual harm cannot be based merely on the fact that someone paid a non-lawyer to provide services; it must be based on harm caused by the services themselves. Illustrating the need for such a requirement, the VSB's ethics counsel acknowledged that the VSB was unable to prove that nonlawyers engaging in routine document preparation caused consumer harm. Nevertheless, the VSB still characterized nonlawyer companies like LegalZoom as engaging in unauthorized practice of law without describing any victim of such practice.²³

Without such a requirement, rules for unauthorized practice of law can be used to protect lawyers from competition, rather than to protect consumers from incompetence. Many non-lawyer innovators delivering legal services—both online and brick-and-mortar—cite prosecutions for unauthorized practice of law as one of the main obstacles to their businesses. With a requirement-of-harm provision added to these rules, providers of innovative, affordable law-related services will be unable to provide affordable services to customers without fear of running afoul of UPL rules.

Instead of Making Individualized Exceptions for Certain Types of Non-Lawyer LSPs, the Committee's Amendments Should Implement a Broader Policy of Preventing Consumer Harm.

Parts 3 through 5 of the proposed amendments list exceptions to UPL prohibitions. These proposed amendments show that the Committee understands that legal service providers can competently provide certain legal services as efficiently as lawyers. These exceptions, however, seem arbitrary without language to explain why exceptions were made in these instances and not in others.

²³ Deborah L. Rhode and Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 Fordham L. Rev. 2587 (2014). Available at: <http://ir.lawnet.fordham.edu/flr/vol82/iss6/2> (citing Telephone Interview with Jim McCauley, Ethics Counsel, Va. State Bar (July 16, 2013)).

For example, the proposed rules carve out a UPL exception for real estate agents acting as a settlement agent. We appreciate the Committee's acknowledgment that real estate agents are not engaging in UPL when they perform settlement duties. However, there is no reason not to apply this principle more broadly to other service providers. When the bar chooses which service providers may or may not compete with lawyers, it is acting just as anticompetitively as if it prohibited all competition.

Making such exceptions is therefore not actually founded in consumer interests. Rather than enumerating specific exceptions for areas of focus that do not actually necessitate lawyer involvement—which suggests an arbitrary approach to unauthorized practice of law that does not serve consumer interests—the Committee should adopt language that effectively prevents consumer harm.

Conclusion

The Committee's efforts to protect consumers from unauthorized practice of law that causes verifiable consumer harm are encouraging. Unfortunately, the proposed amendments do not go far enough to balance prevention of consumer harm with provision of more affordable and efficient legal service innovations—a balance that cannot be best achieved by allowing lawyers to regulate their own competitors. We therefore urge the Committee to develop amendments to Virginia's rules for unauthorized practice of law that are tailored to preventing consumer harm in lieu of provisions that are anticompetitive.

The privilege of lawyer self-regulation is already on thin ice after the *Dental Examiners* case. For lawyers to extend that privilege to include regulation of non-lawyers without sufficient showing of consumer harm would not only be inappropriate; it would be a signal to antitrust authorities that the legal profession is not capable of handling that privilege. Rather than trying to extend its regulatory reach, the profession should demonstrate that it is capable of exercising discretion by acknowledging the limits of its regulatory reach.