United States Justice Foundation

Statement in Opposition to
Proposed Amendment to Rule 6.1
Of the Virginia Rules of Professional Conduct
(October 6, 2016)

On September 29, 2016, a notice by the Virginia State Bar ("VSB") Council was sent to certain members of the Virginia State Bar who work with the United States Justice Foundation, requesting comments on a recommendation from the Virginia Access to Justice Commission that all VSB members annually self-report their pro bono hours and pro bono related financial support.

In response to that request, we submit the following comments from the United States Justice Foundation and the undersigned in strong opposition to the proposed requirement.

I. The Proposed Mandate Implicitly Assumes that Pro Bono Activity Should Be Mandated.

The proposal does not mandate pro bono activity at this time. It only mandates that every member of the Virginia bar (with several exceptions) report to the Virginia State Bar the hours and moneys devoted to providing legal services without pay. The sole purpose stated by this reporting mandate is "to make available information about lawyers' pro bono public legal service." And the means by which such information is made known is an annual certification by each bar member — such certification to be filed with the Virginia State Bar, not available at this time to the general public. Failure to meet this self-reporting requirement results in an automatic administrative suspension of the delinquent's membership in the Bar, and consequently, disqualifies the delinquent member from the practice of law, even though the member remains obligated to meet his CLE requirements and to pay dues to the Virginia State Bar.

Even though the current proposal does not mandate any pro bono activity, it would be foolhardy for any attorney to assume that, if he reports zero hours and zero financial pro bono outlay, the VSB would not take notice, especially in light of current Rule 6(1)(a), which states that a "lawyer **should** render at least two percent per year of the lawyer's professional time to pro bono publico legal services." (Emphasis added.) In light of this expectation, the Virginia State Bar appears to believe that it has a right to compel the lawyer to keep track and report his

time and money devoted to pro bono legal services. In essence, the new ethics rule rests upon the implicit but unstated assumption that it is unethical for a member of the VSB not to perform or financially support pro bono legal services.

It would be equally foolhardy not to perceive that at least some in the VSB are now laying the foundation for a later ethics rule which would mandate pro bono work — once the Bar can demonstrate statistically that "not enough" pro bono work is being done on a voluntary basis. This proposed rule change is the proverbial camel's nose under the tent, which will lead to mandatory pro bono legal work or financial support of such work.

II. The Proposed Mandate Is Unethical.

The VSB has offered not the slightest ethical foundation for this requirement. One would think that, in light of the long history of self-regulated pro bono service, the Bar would not take this giant step towards government regulation without evidence that necessitates government stepping in. As paragraph 10 of the preamble to the Virginia Rules of Professional Conduct reminds us:

> Self-regulation … helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent for the right to practice.

Not only has the Bar failed to articulate any defensible ethical basis for its proposed reporting requirement, but closer examination reveals that the proposed mandate is itself unethical.

In his book entitled, "The Life and Morals of Jesus of Nazareth" (popularly known as the Jefferson Bible), Virginia's own Thomas Jefferson — after engaging in a careful study of "the moral principles inculcated by the most esteemed of the sects of ancient philosophy" and the "moral doctrines of Jesus" — came to this conclusion:

> His moral doctrines … were more pure and perfect than those of the most correct of the philosophers…; and they went far beyond both in inculcating universal philanthropy… to all mankind, gathering all into a family, under the bonds of love, charity, peace, common wants and common…[,] evincing the peculiar superiority of the system of Jesus over all others.

How does the VSB's proposed reporting mandate measure up to the moral teachings of Jesus? It does not. Instead, to require a lawyer to notify the VSB the fact that he rendered

legal services pro bono, and that such services cost him a certain amount would violate Jesus' teaching not to "render under Caesar" what belongs to God. See Luke 20:25.

Among the passages quoted in the Jefferson Bible is Jesus' Sermon on the Mount, and among those cited passages were those from Matthew 6:1-4. In today's English, Jesus strongly warned:

> **Beware** of practicing your righteousness before men to be **noticed** by them.... [Matthew 6:1 (emphasis added).]

Rather, he instructed:

> when you give to the poor, **do not** sound a trumpet before you, as the hypocrites do in the synagogues and in the streets, so that they may be honored by men. [Matthew 6:2 (emphasis added).]

Instead, he continued:

> when you give to the poor, **do not** let your left hand know what your right hand is doing, so that your giving shall be in **secret**.... [Matthew 6:3 (emphasis added).]

Applying these principles to the practice of law, Jesus teaches that the giving of legal services or other financial help to the poor is a duty owed to God in Heaven who alone has the authority to determine the value of the pro bono services rendered and, thus, the reward for such services. By forcing the lawyer to report to the VSB. the proposed mandate would rob the lawyer of that liberty and reward. Surely, it would be unethical for the bar to deprive an attorney of his full reward to which he would be entitled if he gave in secret, not letting his left hand know what his right hand is doing. *See* Matthew 6:1-4. Yet, that is precisely what the reporting mandate would do.

According to the Sermon on the Mount, then, pro bono work is a duty owed exclusively to God — completely outside the compulsory powers of the Virginia State Bar.

III. The Proposed Mandate Is Unconstitutional.

A common mistake in American constitutional law is the assumption that the federal Bill of Rights and the United States Supreme Court's interpretation of those rights supplant the state's declarations of rights and the state supreme courts' interpretations of those rights. Such is not the case, however, when a state constitution affords higher protection of an individual right, the state ruling constituting an independent and adequate state ground. *See* Michigan v. Long, 463 U.S. 1032 (1983).

Virginia's original guarantee of religious liberties is, itself, unique because its Article I, Section 16 contains the only constitutional religion guarantee in the entire country that actually defines "religion" as a legal/political term. It states:

> Religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience.

Applying this jurisdictional principle here, as established by Jesus' teaching on the giving of alms, it is self-evident that one's duty to provide pro bono services is a duty "which we owe to our Creator" — not to the Virginia State Bar — and because it is a duty to God alone, then "the manner of discharging it, can be directed only by reason and conviction, not by force or violence." Thus, "all men are equally entitled to the free exercise of religion, according to the dictates of conscience," including lawyers who are entitled to be free from the coercive power of the Virginia bar. *Id.* In short, the VSB has no jurisdiction to require its members to report their pro bono hours or financial support. For that reason alone the proposal should be rejected.

But there is more. In the parable of the Good Samaritan, Jesus responds to a lawyer's attempt to justify himself in relation to the commandment that one must love his neighbor as oneself by the question: "Who is my neighbor?" Instead of giving the lawyer a direct answer, Jesus told a story of a man who had "compassion" for a complete stranger, prompting him to voluntarily and unconditionally meet the stranger's need. Jesus then exhorted the lawyer to go and do likewise, but he did not threaten him with punishment if he failed.

According to this parable then, Jesus taught that loving one's neighbor could not be qualified (to exclude certain persons as"non-neighbors"), nor quantified (to meet some measured amount). Although not yet mandated, current Rule 61.(a) of the Virginia Rules of Professional Conduct provides that a "lawyer **should** render at least two percent per year of the lawyer's professional time to pro bono legal services[,] [which] include poverty law, civil rights law, public interest law, and volunteer activities designed to increase availability of pro bono legal services." (Emphasis added.)

As for quantity, who is to know how much time or money an individual VSB member should provide pro bono? The ABA model rules state that every lawyer should "aspire" to render at least (50) hours of pro bono publico legal services per year." Two percent or 50 hours may be a paltry amount for a senior partner in a large firm, but a great deal for a sole practitioner or those recently out of law school. Additionally, the current VSB rule states that "a law firm or other legal group of lawyers may satisfy their responsibility collectively under this Rule." Individual lawyers in large firms may take advantage of this rule, whereas sole practitioners would be hard-pressed to do likewise. The Good Samaritan gave without measure

(Luke 10:35), and the tax collector Zaccheas gave one-half of what he owned (Luke 19:8) and both were commended. Yet the rich young ruler was chastised by Jesus for not giving away all that he had. Luke 18:22-25.

As for quality, what difference does it make whether the services provided fit in one of the named categories — poverty law, civil rights law, or public interest law? The Good Samaritan in Jesus' story did not ask the man in the ditch how he got there. From the Samaritan's perspective, it could have been either that he was not injured by any fault of his own, or by his own fault. And he also could have been a man of some means. Would legal services rendered to a friend who is the CEO of a large corporation, facing the prospect of a devastating divorce, qualify as pro bono publico? Or would the CEO's wealth and domestic legal problem disqualify application of the pro bono classification, even though provided with no expectation of a return? Can pro bono assistance be only provided to the tenant, and never to the landlord.

Love — in short — cannot be quantified or qualified, because by nature, love must be wholly voluntary and without condition — "the manner of discharging it can be directed only by reason and conviction." That is why, under Article I, Section 16 of the Virginia Constitution, the commandment to love one's neighbor as oneself falls outside the jurisdiction of the civil ruler, including the Virginia State Bar. As Article I, Section 16 of the Virginia Constitution states: "it is the mutual duty of all to practice Christian love, forbearance, and charity." By definition, a mutual duty is a reciprocal one, "each acting in return or correspondence to the other given and received."

As a duty owed exclusively to the Creator, because the duty to love is enforceable only by reason and conviction, not by force or violence, the proposed mandate by the Virginia State Bar, acting on the authority of the Supreme Court of Virginia, violates the free exercise of religion as embodied in the Virginia state constitution.

As the U.S. Supreme Court said in a case involving Virginia's regulation of the practice of law, "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." NAACP v. Button, 371 U.S. 415, 439 (1963).

IV. The Proposed Mandate is Discriminatory.

According to the September 29, 2016 notice the proposed mandate "would require **all** VSB members to report the amount, if any, of their pro-bono activity." (Emphasis added.) This is not the case. Instead, the mandate, if approved, exempts three subclasses of VSB members: (1) judges; (2) government lawyers who are prohibited from "providing legal service out side of [their] employment"; and (3) those on retired, disabled, or associate status with the bar. No reason has been provided to justify any of these exemptions. Particularly as to the two main exemptions, there is no good reason for them.

As for members of the judiciary, for example, there would be no incompatibility for a sitting judge to be available to provide, without charge, mediation services to those unable to afford counsel. Conducting mediation only on cases outside of the judge's judicial circuit and district would largely eliminate any conflicts that would necessitate recusal in some matter that would come before the providing judge. In the unlikely event of a conflict, another judge could hear the few cases in which there could be a conflict. This is the ordinary way that conflicts are handled, and there appears to be no reason why the same practice would not work to everyone's satisfaction.

As for government lawyers constrained by their employer from engaging in pro-bono work, there is nothing special about government employment that would justify such a blanket restraint. Rather, there is nothing special about government employment that should be considered sufficient to exempt VSB lawyers from pro bono service. Interestingly, the proposal would wholesale exempt these lawyers, as there is no provision for some alternative form of public benefit provided, such as community service. If government agencies employing lawyers are considered to have the authority to impose a ban on pro-bono work, then private law firms and others employing lawyers should have that same power.

V. Conclusion

It has become commonplace in modern American law to neglect the weightier matters of morals, but when it comes to an issue of legal ethics, it would be a travesty not to invest some time and effort to gain moral discernment before acting. Indeed, Professor Thomas D. Morgan, one of the outstanding legal ethicists of our day, reminds us that America's leading legal ethicist of the early 19th century, David Hoffman, wrote: "What is morally wrong cannot be professionally right, however it may be sanctioned by time or custom."

For the reasons stated we urge the VSB Council to reject the proposed self-reporting pro bono requirement, and to reconsider the entire pro bono matter, including current Rule 6.1(a) of the Virginia Rules of Professional Responsibility.

Michael Connelly
Michael Connelly
Executive Director, USJF
Member of the Texas Bar

Herbert W. Titus
Herbert W. Titus
Senior Counsel, USJF
Member of the Virginia State Bar