The Impact of the Justice Gap on Litigants: Are We Providing a Level Playing Field?

By John E. Whitfield, Executive Director, Blue Ridge Legal Services, and Co-chair of the Virginia Access to Justice Commission

The ***ideal*** of equal justice, regardless of one's wealth or station in life, is a cherished hallmark of our judicial system. We certainly pay lip service to it constantly. If there is any such thing as an American Creed, it is our Pledge of Allegiance, which we teach to every one of our grade school students, and which we solemnly recite at almost every public function, with our hands over our hearts. Of course, the Pledge concludes with the promise of "liberty and **justice for all**."

The very first written code of law - the Code of Hammurabi, written in 1700 BC - explicitly stated that one of the fundamental purposes of law was to protect the powerless from the powerful. This view was likewise reflected in Judeo-Christian ethics. In the Book of Proverbs, circa 900 BC, Solomon admonished:

> Speak up for those who cannot speak for themselves,
> for the rights of all who are destitute.
> Speak up and judge fairly;
> defend the rights of the poor and needy.
> *-Book of Proverbs, 31:8-9*

In our lifetime, Lewis F. Powell, Jr., the late U.S. Supreme Court Justice and arguably the greatest Virginia jurist since John Marshall, observed, "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...[I]t is fundamental that justice should be the same, in substance and availability, without regard to economic status."

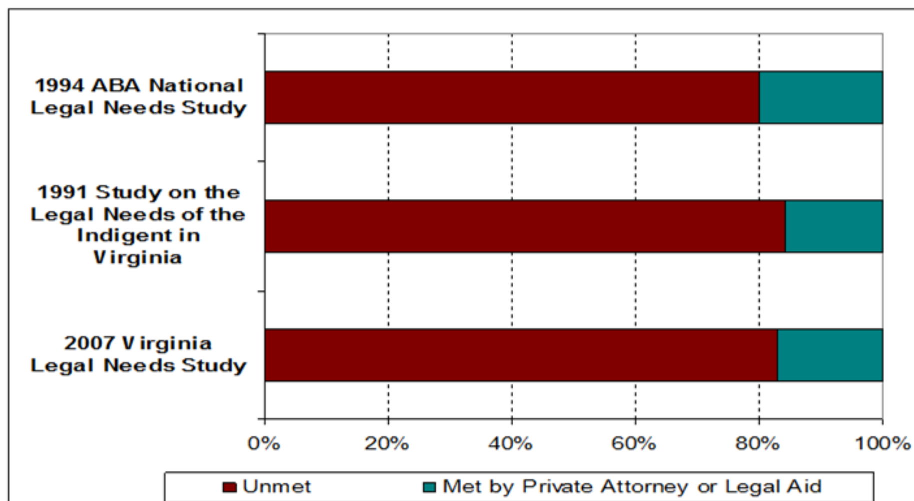
Unfortunately, the harsh reality confronting most low-income Virginians when they go to court is more likely to be as described by retired California Court of Appeals Justice Earl Johnson, Jr.: "Poor people have access to the American courts in the same sense that the Christians had access to the lions when they were dragged into a Roman arena." In the absence of available legal aid or pro bono assistance, a low-income person is typically unable to afford the services of an attorney in a non-fee-generating civil matter. As a result, he or she is often forced to litigate even the most serious civil legal problems without the benefit of counsel, even if the opposing party has counsel. The resulting imbalance can result in a tilted playing field that produces significantly worse outcomes

for self-represented litigants than those where both parties are represented. There are compelling data that confirm Justice Johnson's disturbing characterization of our civil justice system's unequal treatment of the poor.

The unmet civil legal needs of persons unable to afford legal services are well documented at both the national and state levels. On a national level, the American Bar Association first commissioned a comprehensive legal needs study 20 years ago. It found that only 20 percent of the civil legal needs of low-income Americans were being met by legal aid or pro bono attorneys. In 2005 and again in 2009, the federally funded Legal Services Corporation (LSC) conducted a "Justice Gap" survey among its 120 legal aid grantees across the country and found that for every person helped by a legal aid program, another needy person was turned away due to a lack of a sufficient number of legal aid or pro bono attorneys.

In Virginia, the Virginia State Bar, the Virginia Bar Association, and the Virginia Law Foundation first undertook a study of the civil legal needs of the poor in Virginia in 1991. This study found that 84 percent of Virginia's poor did not have benefit of counsel when faced with a serious legal problem, despite the work of Virginia's legal aid societies and the pro bono efforts of private attorneys across the Commonwealth. This study was updated in 2007 by the Legal Services Corporation of Virginia, with partial funding from the Virginia Law Foundation. The 2007 study found that only 17 percent of Virginia's low-income population had the benefit of counsel when facing a serious civil legal problem, closely mirroring the findings of the 1991 report.

The Documented Unmet Civil Legal Needs of the Poor

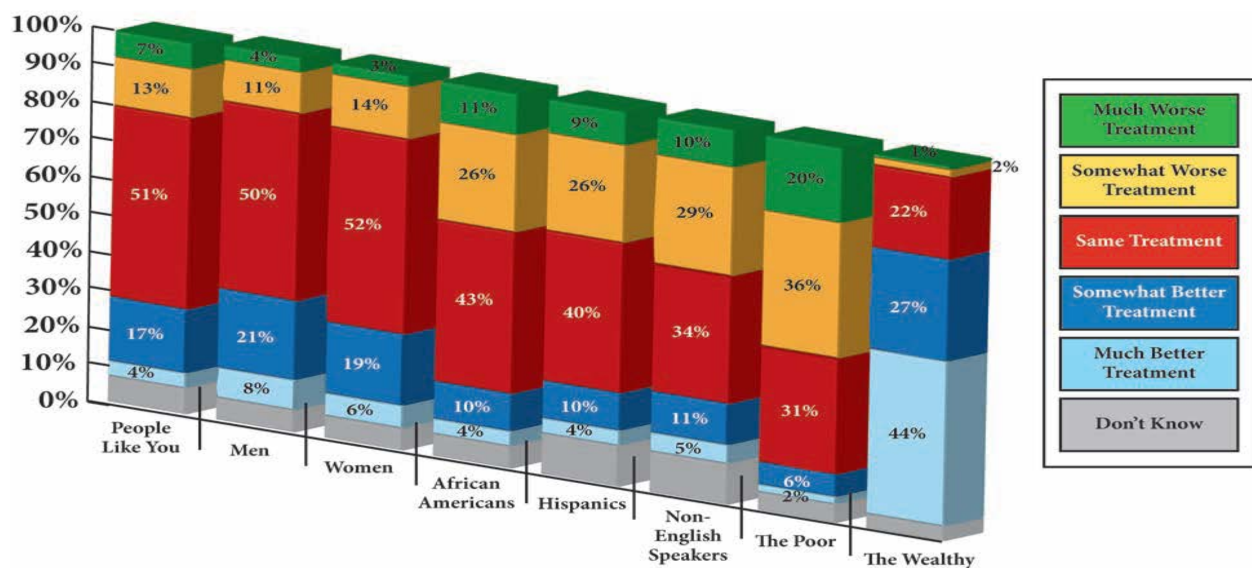


Reinforcing this finding, in a survey of citizens across Virginia conducted by the Office of the Executive Secretary of the Supreme Court of Virginia in 2007, a majority of the public

said they believe the poor receive worse treatment in Virginia's courts compared to other segments of the population. Thirty-six percent thought the poor received "somewhat worse treatment," and another 20 percent thought the poor received "much worse treatment."

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?



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

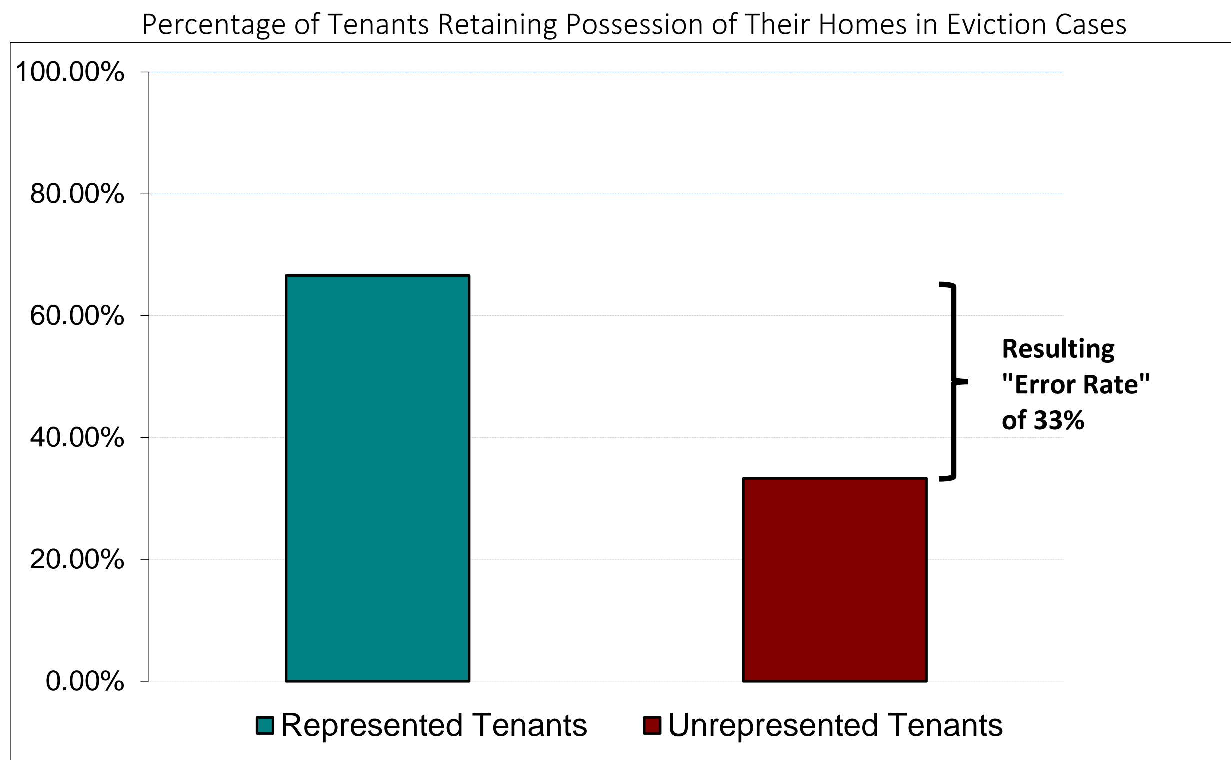
Philosophically, it is a tenet of faith for Americans that the poor should have meaningful access to our civil justice system, regardless of their ability to afford the services of an attorney. Yet, as the studies noted above establish, it is well documented and undisputed that if we equate meaningful access to our civil justice sytem to having the benefit of counsel, we are failing miserably in achieving that ideal. As a practical matter, what impact does a lack of representation have on the outcome of a case?

With the exception of our small claims courts, our system of justice relies upon the adversarial model, with each side capably and zealously represented by counsel. When functioning properly, it is a peerless mechanism for arriving at the truth and applying the law fairly. But when one of those parties can't afford the services of an attorney, the system cannot function 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?

There is a growing body of research that indicates that outcomes for unrepresented litigants are often far less favorable than those for represented litigants – confirming what, I suspect, common sense already tells most of us.

In March 2012 the Boston Bar Association Task Force on the Civil Right to Counsel released the results of an important study*, The Importance of Representation in Eviction Cases and Homelessness Prevention*. This was a carefully designed, controlled, randomized study designed by Harvard Law School Professor Jim Greiner, a statistician and lawyer, with statistically valid results. The study compared the outcomes for tenants facing eviction who were represented in the Boston housing courts versus those who were unrepresented in those courts. It found that in the perfect court setting, with both sides represented, tenants were able to retain possession of their homes two-thirds of the time. In contrast, unrepresented tenants facing represented landlords retained possession in only one-third of their eviction cases. If you view the first scenario, where both sides were represented –creating a level playing field - as the model that produced the most correct results, then the discrepancy between the two is, essentially, the error rate – an alarming error rate of 33 percent.

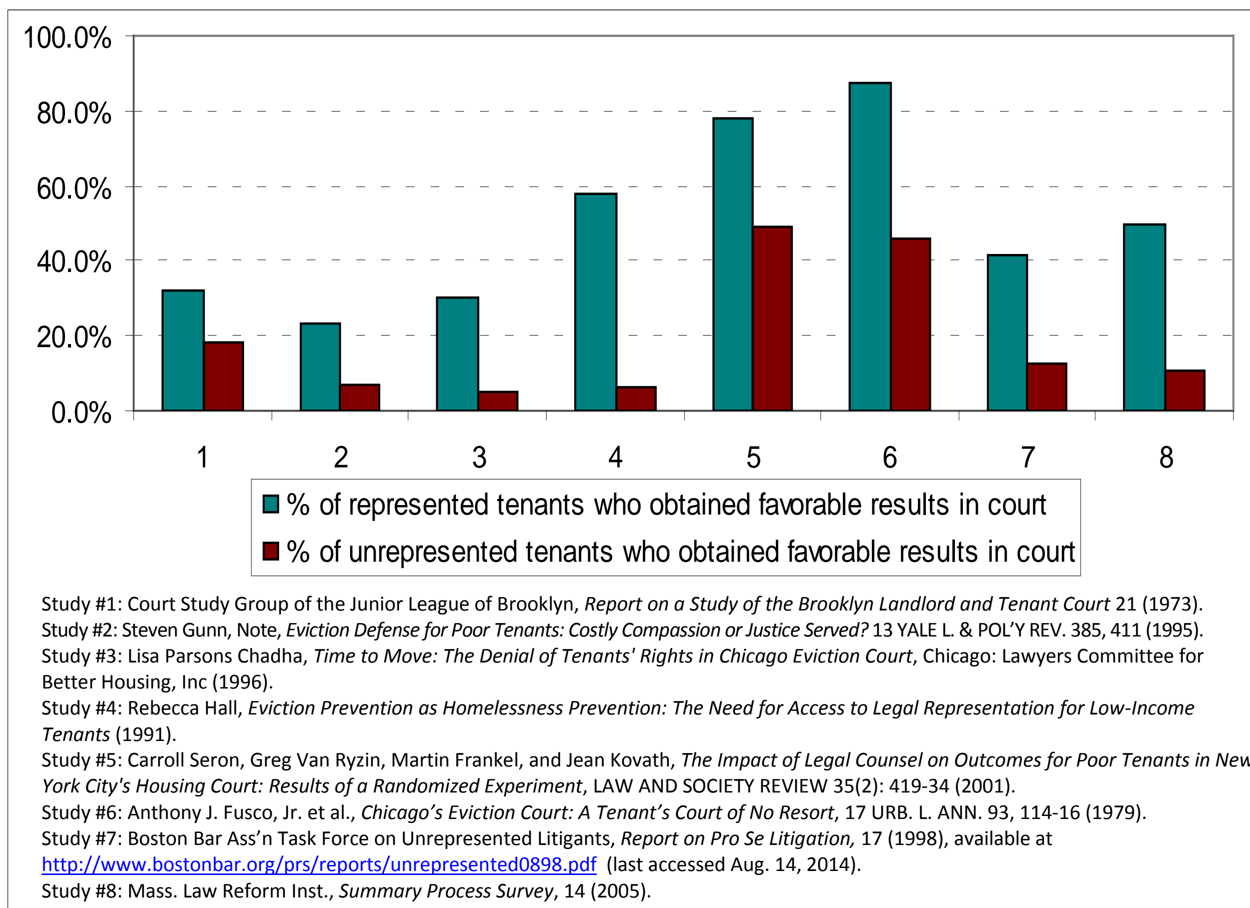
Correlation between Representation and Outcomes in Eviction Cases



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

This particular study was just the latest of a number of studies on the correlation of representation and outcomes in landlord-tenant cases. There have been at least eight other such studies of landlord-tenant eviction cases, from different courts across the country, over the last 40 years. As the next graph shows, while the results varied in the size of the discrepancy, in every study, the pro se tenant fared much, much worse than the represented tenant.

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: Lisa Parsons Chadha, *Time to Move: The Denial of Tenants' Rights in Chicago Eviction Court*, Chicago: Lawyers Committee for Better Housing, Inc (1996).
Study #4: Rebecca Hall, *Eviction Prevention as Homelessness Prevention: The Need for Access to Legal Representation for Low-Income Tenants* (1991).
Study #5: Carroll Seron, Greg Van Ryzin, Martin Frankel, and Jean Kovath, *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 (2001).
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/unrepresented0898.pdf (last accessed Aug. 14, 2014).
Study #8: Mass. Law Reform Inst., *Summary Process Survey*, 14 (2005).

We see similar results in a study of child custody cases in Maryland in 2006.[1] When both parents were represented, or when neither parent was represented - a level playing field in both cases - mothers won custody approximately 65 percent of the time. In contrast,

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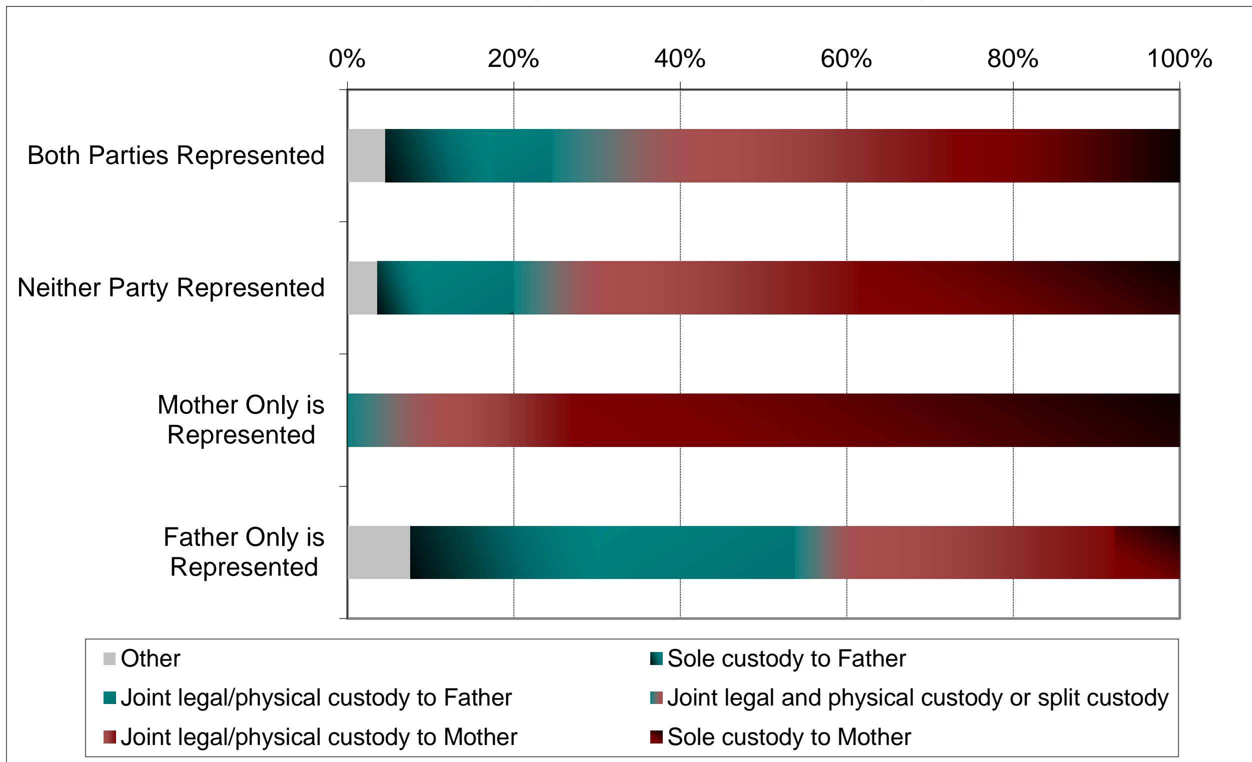
[1] The Women's Law Ctr. of Md., Inc., *Families in Transition: A Follow-up Study Exploring Family Law Issues in Maryland* (2006), available at http://www.wlcmd.org/wp-content/uploads/2013/06/Families-in-Transition.pdf (last accessed Aug. 14, 2014).

when only the mothers were represented and the fathers were unrepresented, mothers won a lopsided 95 percent of the time. When the situation was reversed, with only the fathers represented, fathers won 55 percent of the time. Clearly, the presence or absence of counsel had an enormous impact on the outcome of the case, and to the extent the results varied from the norm - that is, the situation in which both parties were represented - those discrepancies constitute error rates of significant proportions.

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/wp-content/uploads/2013/06/Families-in-Transition.pdf (last accessed Aug. 14, 2014).

Other types of cases have also been the subject of similar studies reflecting similar findings[2]:

- Social Security appeals results: 78 percent of represented claimants won, 28 percent of unrepresented claimants won.
- Unemployment appeals results: 44 percent of represented claimants won, 30 percent of unrepresented claimants won.
- Immigration removal appeals results: 44 percent of represented immigrants won, 39 percent of unrepresented immigrants won.

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[2] Herbert M. Kritzer, *Legal Advocacy: Lawyers and Nonlawyers at Work* 111-20 (1998).

- Domestic violence cases results: 83 percent of represented victims obtained protective orders, 32 percent of unrepresented victims obtained protective orders.

These studies confirm what the general public already intuitively knows and common sense tells us all: you need a lawyer in order to effectively navigate our court system. So if you're poor and can't afford an lawyer, you're effectively locked out of our system of justice in the absence of legal aid or pro bono assistance. As a result, injustice occurs on a regular basis – not intentionally, not due to anyone's prejudice or bias, and notwithstanding the best efforts of our judiciary to be fair, but because of the inherent imbalance created by lack of counsel in a system that presumes the presence of counsel. While a judge may be bending over backwards to compensate for the pro se litigant's lack of counsel during the trial, the judge cannot serve as the pro se litigant's attorney. Moreover, by that stage of the litigation, the die may have already been cast for the unrepresented party. She has not had the the benefit of counsel to analyze her case for the most effective causes of action or defenses, to draft her pleadings to identify those causes of action or defenses and bring them to the court's attention, to discover those facts necessary to develop her case, to subpoena the necessary documents and witnesses to have the evidence available at trial, and to provide all the other "added value" that attorneys bring to litigation when they represent a party, even before the trial begins. It is therefore no surprise to find that pro se litigants fare poorly *vis-à-vis* represented litigants.

Take the high error rates in case outcomes for pro se litigants documented by these studies, multiplied by the documented overwhelming level of unmet need, and I think we can all agree that we have a hidden crisis in our system of civil justice, if we truly believe what we say about equality under the law being fundamental to that system. At current funding levels, legal aid cannot realistically meet the most critical civil legal needs of the poor without the help of the private bar.

The Justice Gap is not just legal aid's problem – it is the courts' problem, the bar's problem, a problem for our entire society. We all proclaim how highly we value the Rule of Law, and Equality and Justice under Law, and yet we benignly allow inequality and injustice to persist unabated in our civil justice system. If we want the poor to "play by the rules," as a society we need to demonstrate to them that the rules work ***for*** them as well as ***against*** them. Otherwise, the very Rule of Law itself is threatened.

If "justice for all" is going to be more than an empty phrase at the close of the Pledge of Allegiance, we need the full-throated pro bono commitment of Virginia's lawyers. As comment 1 to Rule 6.1 of the Virginia State Bar Rules of Professional Conduct notes,

“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.”

Whether we rise to the challenge and meet this responsibility will clearly make a difference in the outcomes of the civil cases of the less fortunate members of our community, affecting whether they will be homeless - or not, whether they will have court protection from domestic violence - or not, whether the best interests of their children will be served when their custody is adjudicated - or not. Whatever their civil legal problems are, the availability of ***your*** pro bono assistance will affect whether those critical, life-changing problems will be fairly decided on a level playing field - or not.

If you are not currently participating in a pro bono program and would like to volunteer, Karl Doss, the VBS Director of Access to Legal Services, would be happy to assist you in locating pro bono opportunities in your areas of interest. You can reach Mr. Doss at doss@vsb.org or by calling (804) 775-0522.