

DELAWARE ACCESS TO JUSTICE COMMISSION

REPORT OF THE SUBCOMMITTEE ON PROMOTING GREATER PRIVATE SECTOR REPRESENTATION OF UNDERSERVED LITIGANTS

Voting Members

Yvonne Takvorian Saville, Esq. (Co-Chair), Weiss & Saville, P.A.

Richard Forsten, Esq. (Co-Chair), Saul Ewing LLP

Adam Balick, Esq. Balick & Balick, LLC

Crystal Carey, Esq., Schmittinger & Rodriguez, P.A.

Tabatha Castro, Esq., The Castro Firm, Inc.

Charlisa Edelin, Esq., Wesley College

Kathi Karsnitz, Esq., Kathi A. Karsnitz, Attorney at Law

Mary MaloneyHuss, Esq., W.L. Gore & Associates, Inc.

Luke Mette, Esq., City of Wilmington

Richard Rowland, Rowland, Johnson & Company, P.A.

Non-voting Members

The Honorable Alan N. Cooper, Family Court (1952-2015)

The Honorable Michael Newell, Family Court

The Honorable Sheldon Rennie, Court of Common Pleas

Representative Melanie George Smith, Esq., Delaware General Assembly and
Richards, Layton & Finger, P.A.

Reporters

Kate Aaronson, Esq., Office of Disciplinary Counsel

Jackie Mette, Esq., Department of Services for Children, Youth & Their Families

Katherine Neikirk, Esq., Supreme Court

Susan Simmons, Delaware State Bar Association

Ashley Tucker, Esq., Administrative Office of the Courts

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EXECUTIVE SUMMARY

On December 15, 2014, the Supreme Court of the State of Delaware established the Delaware Access to Justice Commission (“Commission”) to identify the critical needs related to access to justice in Delaware and to develop realistic and cost effective solutions to those identified needs. The Commission established four subcommittees, including the Subcommittee on Promoting Greater Private Sector Representation of Underserved Litigants (“Promoting Representation Subcommittee”), to assist it in carrying out its mission. As directed by the Commission, the Promoting Representation Subcommittee examined ways to: (i) assist solo practitioners and small law firms that represent clients of limited means, including investigation of whether there are private sector businesses that can help small legal practices in Delaware operate more effectively; and (ii) increase the level of pro bono services provided by the bar.

Based on its examination of these issues, the Promoting Representation Subcommittee makes the following findings and recommendations:

Solo/Small Firm Findings

1. Most solo and small firm practitioners are satisfied with their practices.
2. Solo and small firm practitioners do, however, confront challenges in the management of their practices, including lack of support staff, lack of back-up assistance when away from the office, generation of revenue, and lack of information technology support.
3. At this time, there are few companies like healthcare management service organizations that offer a complete back office solution for small legal practices in Delaware.

Solo/Small Firm Recommendations

1. The Delaware State Bar Association (“DSBA”) should continue to work on the establishment of a Law Office Management Assistance Program (“LOMAP”).
2. The Office of Disciplinary Counsel (“ODC”) should continue to offer free CLEs on useful topics for solo and small firm practitioners.

3. Law school students and new solo and small firm attorneys should have the opportunity to take classes on law firm management.

Pro Bono Service Findings

1. Family law and consumer law are the areas with the greatest need for pro bono services from the bar.
2. Although many attorneys perform pro bono work, fewer attorneys provide more than twenty-five hours of pro bono service a year.
3. Lack of available time or prioritized time is the primary barrier to the provision of pro bono services by Delaware attorneys.
4. Secondary barriers to attorneys' provision of pro bono services include fear, a perceived lack of expertise, and a lack of awareness of the available pro bono opportunities and resources.
5. Depending on the nature of their practice, attorneys face additional barriers to pro bono service.

Pro Bono Service Recommendations

1. In 2017, institute a standing pro bono leadership committee to focus on pro bono family law representation in 2018 and pro bono consumer law representation in 2019.
2. Beginning in 2017, develop statewide pro bono practice groups, starting with family law, to share ideas and information.
3. Starting in the first half of 2018, hold an annual pro bono summit/fair.
4. Create a pro bono challenge for attorneys to meet a clear, measurable, and collective pro bono target.
5. By the end of 2018, create a single source for pro bono information and increase awareness of the variety of pro bono opportunities and assistance available.

6. Remind the bar early and often of areas of critical need and ways to address those needs.
7. Devote more time to consideration of a legal technician program.

To pursue its objectives, the Promoting Representation Subcommittee split into two working groups. One working group focused on ways to help solo practitioners and small law firms and the other working group focused on ways to increase the level of pro bono services provided by the Delaware bar. The work, findings, and recommendations of the working groups are set forth below.

I. WAYS TO HELP SOLO PRACTITIONERS AND SMALL LAW FIRMS

A. Methodologies

To identify ways to assist solo practitioners and small law firms that represent clients of limited means, the working group employed a variety of methods. These methods included a survey of attorneys, an analysis of disciplinary records by the ODC, a review of LOMAPs in other states, meeting with the DSBA about its planned LOMAP, and research regarding the existence of private sector businesses that could handle the back office functions of small legal practices. A draft of this report was also submitted to the DSBA for their review and comments.

1. Survey

The working group prepared a survey to identify the challenges solo and small firm practitioners face and the type of assistance they would find helpful. A link to the survey was emailed to all attorneys with an active registration statement with the Delaware Supreme Court. 195 people responded to the survey. The survey results appear at Appendix Exhibit A. The survey was not prepared in a scientific manner and should not be viewed as scientifically or statistically accurate.

2. ODC analysis

The ODC analyzed its records for sanctions imposed upon Delaware attorneys between January 1, 2013 and July 31, 2015 to determine if there were any trends in violations of the Delaware Lawyers' Rules of Professional Conduct ("Rules of Professional Conduct"). The ODC's analysis appears at Appendix Exhibit B.

3. LOMAP review

The working group reviewed LOMAPs of multiple states, including Maryland, Massachusetts, Washington, and Arizona. The working group also met with Mark Vavala, the DSBA Executive Director, Alison Macindoe, the former DSBA Director of Law Office Management and Johnna Darby, the former DSBA Executive Director, about the DSBA's LOMAP plans.

4. Private sector business research

To determine whether there are companies that can assist small legal practices in Delaware with back office management like the companies that provide outsourcing and back office solutions to medical offices, the working group conducted internet research, spoke with a certified legal manager (Tom Herweg, CLM and CPA, former Executive Director of Morris James LLP) and the former law office management director at the DSBA, and utilized the experience of its solo and small practice members.

B. Findings

Based upon the methodologies described above, the Promoting Representation Subcommittee makes the following findings.

1. Solo and small firm practitioners are generally satisfied with their practices

The survey reflects that 85% of those who responded to the question regarding their satisfaction as a solo or small practitioner were generally satisfied as a solo or small firm practitioner.¹ Solo practitioners liked the independence, flexibility, and autonomy of their practices.²

2. Solo and small firm practitioners do, however, face challenges in the management of their practices

Of those who responded to the survey question regarding the greatest challenges in their practice, the following challenges were identified as a 4 or 5 on a scale of 1 to 5, with 5 having the most impact:³

¹ Appendix Exhibit (hereinafter cited as "App. Ex.") A at 8.

² *Id.* at 9-10.

³ *Id.* at 15.

Percentage of Respondents	Challenge
49%	Lack or absence of support staff
41%	Absence or lack of back-up help when out of the office for illness, vacation or other personal issues
37%	Generation of revenue
30%	Absence of or insufficient technology support
29%	Absence of sounding board

When asked which management or administrative issues they found most challenging, respondents identified, among other things, the need for and supervision of competent support staff, billing, accounting, and recordkeeping.⁴

The ODC's analysis of its disciplinary records shows that the majority of sanctioned violations between January 1, 2013 and July 31, 2015 were attributable to solo practitioners.⁵ The Rules of Professional Conduct most frequently violated include: (i) Rule 1.1 (competence); (ii) Rule 1.3 (diligence); (iii) Rule 1.15 (safekeeping property); and Rule 8.4 (misconduct).⁶ According to the ODC, most of these violations were related to law practice management issues.

3. At this time, there are few companies like healthcare management service organizations that offer a complete back office solution for small legal practices in Delaware

Many medical practices hire companies to provide practice management and administrative support services. The services offered include billing and collection, coding, accounting and financial management, and contract management. While some members of the working group were familiar with healthcare management service companies, they were not aware of similar companies that serve small legal practices in Delaware. There are a number of companies that provide different types of support services (including accounting, benefits, photocopying, information technology, marketing, records management, and word processing support) to Delaware legal practices, but there appear to be few companies that offer a complete back office solution. Based on the

⁴ *Id.* at 16-19.

⁵ App. Ex. B.

⁶ *Id.*

communications of the former director of the DSBA LOMAP with other practice management advisors, it appears that this is also the case in other states.

The working group did identify one out-of-state company that advertises remote back office support, including accounting, billing, and software support, for small to medium size law firms. A working group member spoke with this company and learned that the company had recently begun working with a medium-size law firm in Delaware. The name of this company has been provided to the DSBA as a possible resource for its LOMAP.

C. Recommendations

The Promoting Representation Subcommittee makes the following recommendations for ways to assist solo and small firm practitioners.

1. The DSBA should continue to work on establishment of a LOMAP

The DSBA is in the process of establishing a LOMAP that will focus on assisting firms of one to ten attorneys. The program started in July 2016. The DSBA has indicated that many of the LOMAP recommendations set forth below are in the works, including vendor discounts, CLEs specifically for small firm and solo practitioners, and resources for the starting, running, and closing of a law firm. A subcommittee member met with the DSBA in April to see how things are going.

Based on its LOMAP review, the subcommittee recommends that in designing its LOMAP, the DSBA consider these states' LOMAPs:

- Maryland (<http://www.msba.org/practicemanagement/default.aspx>)
- Massachusetts (<http://masslomap.org/>)
- Washington (<http://www.wsba.org/Resources-and-Services/LOMAP>)
- Arizona (<http://www.azbar.org/professionaldevelopment/practice20/>)

These LOMAPs offer, among other things, helpful information and checklists on firm start-up, firm dissolution, acceptance of credit cards, marketing, technology, and social media.

The subcommittee believes it would be helpful if the DSBA LOMAP could:

- Offer information and advice to solo and small firm practitioners through a website and consultations with DSBA staff or experienced attorneys who

volunteer their time once per month for an hour to meet with a solo or small firm practice to answer any questions they may have or serve as a mentor.

- Hold a lunch hour series once per month to deal with solo and small firm issues such as:
 - Client relations
 - Data management and security
 - Disaster prevention and recovery
 - Financial management
 - Staff issues and concerns/Human resources
 - Marketing/Social Media concerns
 - Office technology
 - Time management
 - Trust accounting and bookkeeping
 - Work and wellness (yoga/meditation)
 - Starting your own firm/winding down your firm/retirement/transition
 - Succession Plan
 - Managing client files and records/managing financial books and records
 - How to deal with ODC complaints
- Offer webinars in the areas identified above.
- Have a website with checklists on the areas identified above, sample forms, such as a Sample Fee Agreement and Sample Closing Letter, and a resource library with helpful articles.
- Offer assistance by way of discounts from accounting firms for pre-certifications of annual report of compliance.
- Hold networking events so that other solo and small firms can get together and share stories and successes.
- Contract with vendors to collaborate with solo/small firm practices to provide discounted services on insurance, software, copying, court service of process, etc.

Survey respondents also expressed interest in assistance with the collection of unpaid fees, health insurance issues, and information technology issues like

website creation and maintenance and cloud providers.⁷ By offering the services described above to solo and small firm practitioners, the DSBA LOMAP can help address the challenges identified by solo and small firm practitioners in the survey. Through the DSBA LOMAP, solo and small firm practitioners will be able to access information and advice about managing their books and records, handling staffing issues, using office technology, and other issues they confront on a regular basis.

2. The ODC should continue to offer free CLEs on useful topics for solo and small firm practitioners

Since October 2014, the ODC has organized and offered free CLEs (each worth 1.5 ethics credits) on useful subjects for solo and small firm practitioners. A list of these CLEs appears at Appendix Exhibit C. The CLEs are currently held in the jury service rooms of the New Castle County, Kent County, and Sussex County courthouses. Because turnout tends to be best on Fridays in the fall, winter, and spring, the ODC tries to schedule the CLEs at those times.

The CLEs are intended to offer useful and practical advice for solo and small firm practitioners. The ODC recruits attorneys to address various law firm management topics, including information technology issues, records management, disaster planning, and staff supervision. The ODC also offers free CLEs that provide practical guidance to practitioners on how to maintain their firm's books and records in compliance with Rule 1.15. Judith Scarborough, CPA, teaches those CLEs.

In designing the free CLEs for 2016 and 2017, the ODC considered the results of the Solo/Small Firm Practitioner Survey and the suggestions of the working group. Survey respondents expressed interest in free CLEs addressing subjects of interest to solo and small firm practitioners, such as law firm management solutions, technology solutions, Rule 1.15 compliance, and lead conversion and retention.⁸ Working group members suggested topics such as the best technology for a small practice, case management systems versus Outlook, 401(k) and other benefits to employees, understanding unemployment tax, head count tax in Wilmington and other taxes, bill collection, and insurance issues. In 2017, the ODC will offer free CLEs on Avoiding Disciplinary Complaints (one presentation in each county), Law Office Management (one presentation in each county), and Books and Records (one presentation in each county). Like the

⁷ App. Ex. A at 21-22.

⁸ *Id.* at 23.

DSBA LOMAP, these free CLEs will help solo and small firm practitioners with challenges they have identified in their practices. The ODC will monitor law firm management related disciplinary issues to determine whether the DSBA LOMAP and free CLEs have a beneficial effect and whether particular CLEs or services should be offered.

3. Law school students and new solo and small firm attorneys should have the opportunity to take classes on law firm management

To address the law firm management challenges solo and small practitioners face, the working group explored whether a class on law office management was or could be offered at Delaware Law School. Working group members contacted Stephen E. Friedman, Associate Dean for Academic Affairs and Professor of Law at Delaware Law School and Charles Slanina, Esq. Dean Friedman provided the syllabus for Small Firm/Solo Law Office Management, a course previously offered at the Law School. The syllabus is attached at Appendix Exhibit D. The course was taught by Slanina.

In school years 2011-2012 and 2012-2013, the course was offered both semesters. In Spring 2014, the course was again offered. The class was capped at 20 students and was full or almost full each time it was offered. Unfortunately, the class has not been offered since Spring 2014 due to declining student enrollment and an increased focus on bar exam preparation. The law school might offer a one credit law firm management class in the future.

The chief disciplinary counsel, who is also a subcommittee reporter, provided Dean Friedman with an overview of the most common law office management issues encountered by small firm and solo practitioners that result in disciplinary sanctions, including maintenance of the law firm's books and records, conflict check system, and supervision of staff. The chief disciplinary counsel strongly encouraged the law school to offer a law firm management class and offered to be a resource to any professor who teaches such a class in the future.

The working group also discussed a fundamental course on law office management for solo and small firm practitioners in light of the recently reinstated fundamentals requirement for newly admitted attorneys. Almost 80% of survey respondents thought it would be helpful for newly admitted solo and small firm practitioners to do a mandatory, free CLE on law firm management issues.⁹

⁹ *Id.* at 27.

Margot Millar of the Commission on Continuing Legal Education informed the working group that the fundamental courses included Fundamentals of Law Practice Management and Technology. Under Rule 4(D) of the Delaware Rules for Continuing Legal Education, attorneys admitted after December 1, 2015, within four years from that January 1st, must attend all of the following fundamental courses: (1) Fundamentals of Lawyer-Client Relations; (2) Fundamentals of Family Law; (3) Fundamentals of Real Estate; (4) Fundamentals of Civil Litigation; (5) Fundamentals of Will Drafting and Estate Administration; (6) Fundamentals of Law Practice Management and Technology; and (7) Fundamentals of Criminal Law and Procedure. The DSBA offered the first Fundamentals of Law Practice Management and Technology on May 10, 2017.

II. INCREASING THE LEVEL OF PRO BONO LEGAL SERVICES PROVIDED BY THE BAR

A. Definition of Pro Bono

In examining ways to increase the level of pro bono services provided by the bar, the Promoting Representation Committee frequently discussed how to define pro bono. Under the Delaware Lawyers' Rules of Professional Conduct, lawyers may fulfill their voluntary responsibility to provide public interest legal service "by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means."¹⁰ Members of the Promoting Representation Subcommittee and attorneys that the Promoting Representation Subcommittee communicated with throughout this process recognize that many attorneys are active in community and charitable activities and serve on community and charitable boards that are not related to the legal system. Given the goals of the Delaware Access to Justice Commission and the name and objectives of this subcommittee, the Promoting Representation Subcommittee used "free or reduced fee legal services provided to persons of limited means or organizations that address the needs of persons of limited means" as the definition for pro bono throughout its work.

The Promoting Representation Subcommittee recognizes that there are other ways lawyers can provide pro bono services under Rule 6.1. The Promoting Representation Subcommittee also recognizes, and applauds, lawyers' participation, and leadership, in community and charitable activities unrelated to the practice of law.

B. Methodologies to Identify the Areas of Greatest Unmet Need

The working group that looked at ways to increase the level of pro bono services provided by the bar split into two groups. One group examined the areas of greatest unmet need for pro bono services. The other group identified the greatest barriers to lawyers providing pro bono services and possible solutions to those barriers.

To identify the areas of greatest unmet need for pro bono services, the working group employed a variety of methods. These methods included review of

¹⁰ Delaware Lawyers' Rules of Professional Conduct Rule 6.1.

information already collected from the courts, review of pro se filings in the courts for fiscal year 2014, and meetings with Delaware legal service providers.

1. Information collected by the Subcommittee on Judicial Branch Coordination in Helping Pro Se Litigants

The working group received information from the Subcommittee on Judicial Branch Coordination in Helping Pro Se Litigants, which met with representatives of the Supreme Court, Court of Chancery, Superior Court, Family Court, Court of Common Pleas, and Justice of the Peace Court to determine their views of the areas of greatest need for legal services within their respective courts.

2. Pro se filings for fiscal year 2014

The working group collected pro se filing information from the courts for fiscal year 2014 (in one case calendar year 2014). While the court data on pro se representation is instructive, the working group notes that pro se representation does not necessarily equate with unmet need for legal services for the poor. Some (perhaps few) pro se litigants may choose to forego a lawyer, even if they could afford one.

The Supreme Court did not track pro se filings in fiscal year 2014, but subsequently determined the number of pro se civil appeals and types of pro se appeals. The Supreme Court pro se numbers are attached at Appendix Exhibit E.

The Court of Chancery filing figures for calendar year 2014 are attached at Appendix Exhibit F.

The Superior Court does not track pro se filers in civil cases, but noted that the number of pro se filers in the Superior Court is not high compared with other courts.

The Family Court filing figures are attached at Appendix Exhibit G. Divorce figures are attached at Appendix Exhibit H.

The Court of Common Pleas pro se filing figures for New Castle, Kent and Sussex counties are attached at Appendix Exhibit I.

The Justice of the Peace Court does not have a mechanism for tracking pro se filings, but noted that attorney involvement in civil cases is extremely low (less than 5%).

The United States District Court for the District of Delaware does not track pro se filings.

3. Meetings with legal service agencies

The working group met with Delaware Volunteer Legal Services, Inc. (“DVLS”), Community Legal Aid Society, Inc. (“CLASI”), Legal Services Corporation of Delaware, Inc. (“LSCD”), and the Office of Child Advocate (“OCA”) to gain their perspectives on the areas of greatest unmet need. The working group also received Delaware Legal Help Link data from calendar year 2014, which is attached at Appendix Exhibit J. Delaware Legal Help Link is a phone line for those in need of legal services. DVLS operates the phone line on behalf of all the legal service agencies.

C. Findings on Areas of Greatest Unmet Need

Based upon the methodologies described above, the Promoting Representation Subcommittee finds that the following areas have the greatest need for pro bono services.¹¹

1. Family law, including divorce (with at least one ancillary matter), protection from abuse petitions, custody (including custody modification), and guardianship

The Family Court indicated that legal services were most needed in divorce, protection from abuse, custody/visitation, and guardianship proceedings. The Family Court filing figures reflect the following areas with the highest concentration of pro se civil filings: (i) custody and custody modification; (ii) divorce; (iii) protection from abuse; and (iv) guardianships.¹² Statewide, in fiscal year 2014, over 50% of divorce filings with at least one ancillary matter were filed

¹¹ Although the Justice of the Peace Court and legal service agencies identified landlord/tenant law as an area of need, they did not view additional volunteer attorneys as the best way to meet this need. The speed of the cases makes placement with volunteer attorneys difficult. Chief Magistrate Davis indicated that a list of volunteer attorneys available to help with appeals to a three-judge panel in the Justice of the Peace Court could be helpful. Justice of the Peace Court staff attorney Jody Huber, who is also the lead reporter for the Subcommittee on Judicial Branch Coordination in Helping Pro Se Litigants, indicated that the focus should be on helping tenants to help themselves, which falls within the scope of her subcommittee and which could include having volunteer attorneys available to answer tenants’ questions.

¹² App. Ex. G.

by pro se petitioners, higher than the percentage of represented petitioners.¹³ The legal service agencies also identified family law matters (divorce, protection from abuse, and custody) as one of the areas with the greatest demand for pro bono legal representation. The DVLS Legal Help Link figures reflect a high level of demand for legal services in protection from abuse, custody/visitation, divorce, and guardianship.¹⁴

2. Consumer law, including consumer debt, debt, breach of contract, and subrogation

The Court of Common Pleas indicated that legal services were most needed in consumer debt cases. The Court of Common Pleas data reflects that the highest number of pro se litigants were in the following matters: (i) consumer debt; (ii) debt; (iii) breach of contract; and (iv) subrogation.¹⁵ The legal service agencies identified consumer debt matters as one of the areas with the greatest demand for pro bono legal representation.

D. Methodologies to Identify the Most Significant Barriers to Attorneys' Provision of Pro Bono Services

To increase the level of pro bono services provided by the bar, the working group believed it was important to begin with identification of what discouraged or prevented attorneys from providing pro bono services. Once those barriers were identified, the Promoting Representation Subcommittee could formulate potential solutions. Although the purpose of this report is to summarize the barriers we found and suggest solutions, it is important to note that there are many inspiring examples of legal organizations and individual lawyers who are succeeding today in contributing a significant amount of time and valuable pro bono service to the poor.

To identify barriers to attorneys providing pro bono services, the working group employed various methodologies including a survey, focus group sessions with different types of attorneys, and meeting with the organizations that rely upon a large number of volunteer attorneys. A draft of this report was also submitted to the DSBA, OCA, DVLS, CLASI, and LSCD for their review and comments.

¹³ App. Ex. H.

¹⁴ App. Ex. J. The DVLS Legal Help Link figures also reflect that wills and estates, which are not within the jurisdiction of Family Court, are an area of need.

¹⁵ App. Ex. I.

1. Survey

The working group prepared a survey to identify any barriers to attorneys' performance of pro bono work and potential solutions to those barriers. For purposes of the survey, pro bono was defined as free or reduced fee legal services provided to persons of limited means or organizations that address the needs of persons of limited means. A link to the survey was emailed to all attorneys with an active registration statement with the Delaware Supreme Court. 281 people responded to the survey. The survey results appear at Appendix Exhibit K. The survey was not prepared in a scientific manner and should not be viewed as scientifically or statistically accurate.

2. Focus groups

Working group members conducted focus groups to gain additional insights into the barriers to attorneys' performance of pro bono work and potential solutions to those barriers. Working group members held focus group sessions with: (i) attorneys at large law firms; (ii) attorneys at law firms with five to twenty attorneys; (iii) attorneys in Kent County and Sussex County; (iv) government attorneys; and (v) in-house attorneys. Focus group participants understood that their identities would remain anonymous.

3. Meetings with DVLS and OCA

Working group members met with two of the organizations that use the largest number of volunteer attorneys, DVLS and OCA, to learn about their experiences in the recruitment and retention of volunteer attorneys.

4. Discussions with other subject matter experts

Working group members spoke with Steve Crossland, chair of the Washington Limited License Legal Technician Board, and Paula Littlewood, executive director of the Washington State Bar Association, about Washington's new limited license legal technician program. Working group members also spoke with Larry Zutz, President of USI, Delaware and Judy Grater, Client Services Specialist, USI Insurance Services, LLC about legal malpractice insurance for pro bono work.

E. Findings on the Most Significant Barriers to Attorneys’ Performance of Pro Bono Services

Based upon the methodologies described above, the Promoting Representation Subcommittee makes the following findings. Although the list of specific obstacles is extensive, most of the obstacles lawyers face regarding pro bono service fit into one of three main categories: lack of prioritized time, fear, and perceived lack of knowledge. Addressing these three obstacles, will require significant and sustained leadership from the Court and from various sectors of the bar.

1. Although many attorneys perform pro bono work, fewer attorneys provide more than twenty-five hours of pro bono service a year

Almost 75% of survey respondents indicated that they had performed pro bono work in the past twelve months.¹⁶ However, more than half of the survey respondents had performed less than 25 hours of pro bono service in the past twelve months.¹⁷ 26% of the survey respondents performed no pro bono service in the past twelve months.¹⁸ If this survey is statistically reflective of the bar as a whole, it appears that more than half of the members of the bar are spending, on average, fewer than 30 minutes each week providing pro bono service to the poor.

Percentage of Respondents	Hours of pro bono service in last 12 months
26%	0
26%	Less than 25 hours
48%	More than 25 hours

The results did not significantly vary between respondents who identified themselves as litigation attorneys versus respondents who identified themselves as transactional attorneys:¹⁹

¹⁶ App. Ex. K at 10.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ App. Ex. L.

Percentage of Litigation Respondents	Hours of pro bono service in last twelve months
23%	0
28%	Less than 25 hours
49%	More than 25 hours

Percentage of Transactional Respondents	Hours of pro bono service in last twelve months
28%	0
25%	Less than 25 hours
48%	More than 25 hours

Notwithstanding the similarity in these responses, 73% of transactional attorneys who responded to the question asking if they were reluctant to provide pro bono services in the litigation context responded affirmatively.²⁰

2. Lack of available or prioritized time is the primary barrier to attorneys’ performance of pro bono services

Increasingly, lawyers are facing fierce and competing demands on their time, which makes it difficult to prioritize pro bono service. 76% of survey respondents ranked lack of available time as a 4 or 5, with 1 having no effect and 5 having the most effect, among potential reasons for why they could not perform more pro bono work.²¹ Focus group participants also identified lack of time as the primary barrier to their pro bono work.

Although there are several positive examples of excellent leadership in this area, significant doubt continues to exist about whether all law firm and law department leaders genuinely support a culture of pro bono in the face of law firm economics and law department priorities. New lawyers are likely to want to do pro bono work, in part to get practical experience, but may be reluctant to do pro bono work out of concern that it might impact their career development and/or remuneration. The “middle lawyers” (in between the newest members of the bar

²⁰ App. Ex. M.

²¹ App. Ex. K at 11-13.

and the leaders of firms/departments) may have the greatest difficulty managing their time due to heavy workloads and competing work/life priorities.

3. Secondary barriers to attorneys' provision of pro bono services include fear, a perceived lack of expertise, and a lack of awareness of the available pro bono opportunities and resources

Lawyers are concerned whether they have the expertise and support to competently deliver pro bono services, and they worry representations that start as limited in scope may grow to be more than they can handle. A single CLE may not be sufficient for lawyers to be confident that they can competently represent a client in a legal area that is new to them. Many in-house counsel do not have paralegals or administrative assistants with skills in creating or filing pleadings. Lawyers are also concerned about whether the scope of representation is predictable and worry that what seems like a simple matter may turn into something more complicated that exceeds the level of training they have received.

Almost 35% of survey respondents ranked lack of subject matter knowledge/experience as a 4 or 5 among potential reasons for their lack of pro bono work.²² The focus group sessions also reflect that lack of subject matter expertise and training, as well as a lack of awareness of the different types of pro bono opportunities, training, and training materials available discourage attorneys from pro bono service.

Despite the many communications that exist today regarding pro bono needs, opportunities for service and training materials, it appears that many lawyers remain unaware of specific opportunities for service and of the tools available to help them. A number of attorneys were unaware, for example, of the Limited Pro Bono Legal Assistance Program at the Leonard L. Williams Justice Center (formerly the New Castle County Courthouse) in which volunteer attorneys answer family law questions of eligible litigants for a few hours a week. Other attorneys did not know that they could earn CLE credit for certain types of pro bono work.²³ Attorneys also expressed interest in access to subject matter experts

²² *Id.* at 12.

²³ Continuing Legal Education Rule 9(D) (providing that attorneys can earn one hour of CLE credit for every six hours of pro bono legal services performed, with a maximum of six hours of CLE credit in every two-year compliance period).

when working on pro bono matters outside their areas of expertise, even though agencies like OCA and DVLS provide such access to their volunteers.

It is possible that there are too many sources of duplicative, uncoordinated information. Although the service providers appear to collaborate well with each other, the bar appears to be confused by disparate and inconsistent messaging. Thus, there appears to be a need for a more efficient, effective, well-known and widely used, single-source of information that provides members of the bar with: relevant and varied pro bono opportunities; relevant, impactful and easily-digestible training materials and templates; and information regarding malpractice insurance coverage via DVLS, statutory and case law immunity for OCA matters and court appointments, and the availability of insurance for other matters.

4. Depending on the nature of their practice, attorneys face additional barriers to pro bono service

Depending on the nature of an attorney's practice, she will face additional barriers to pro bono work. Within the large firm focus group, participants indicated that real support and expectation of pro bono service is sometimes questionable from the highest firm levels and most powerful partners. Some firms give billable hour credit for pro bono hours and track pro bono hours, but other firms do not.

Within the focus group for smaller firms, participants indicated that economic pressures, such as healthcare costs and information technology expenses, make it more difficult for them to do pro bono work without negatively impacting their firm's finances. The survey directed to solo/small firm practitioners also reflects that a number of respondents believe their status as solo or small firm practitioners negatively impacts their ability to do pro bono work because they need to generate revenue, spend time on administrative matters, and lack back-up coverage. A few respondents indicated, however, that working as a solo/small firm practitioner positively impacted their ability to provide pro bono services because they had more flexibility.

Attorneys in Kent County and Sussex County, which have a significantly smaller bar than New Castle County, noted that the survey results probably did not accurately reflect the real number of pro bono hours spent in Kent and Sussex. They also noted that court appointments accounted for much of their organized pro bono hours. Sussex County attorneys indicated that there are few organized opportunities, like Wills for Heroes, to do pro bono work.

Many in-house attorneys are not Delaware lawyers and remain unclear about the unauthorized practice of law, despite Supreme Court Rule 55.1. A number of in-house attorneys are not based in downtown Wilmington where the Leonard L. Williams Justice Center is located. In-house attorneys may also lack company support, administrative staff assistance, and electronic filing access for pro bono work. While more than 75% of survey respondents indicated that a lack of malpractice insurance was not a significant factor in their willingness to do pro bono work, 35% of in-house attorneys who identified the reasons preventing them from performing more pro bono services over the past year ranked malpractice insurance as a 4 or 5 (with 1 having no effect and 5 having the most effect).²⁴ Subcommittee members with in-house experience have indicated that companies do not typically buy employed lawyers professional liability (“ELPL”) insurance so that in-house counsel can perform pro bono work.

Due to 29 *Del. C.* § 2509, government attorneys are barred from performing many types of pro bono work. Section 2509 provides that “[n]o member of the Department of Justice shall act as attorney or counsel in any controversy in which the State, a county or a municipality has an interest in the member’s official capacity.” Malpractice insurance is also an issue for government attorneys.

F. Recommendations

Rather than divide the bar, we recommend ideas that we hope would serve to further unite the bar, create friendly competition regarding pro bono service, and better recognize and reward those individuals and organizations who are leading in creating a culture that values pro bono service. We have attempted to organize our recommendations by what can be done in the short term versus what will take longer to complete.

The Promoting Representation Subcommittee does not recommend mandatory pro bono service. According to the survey, more than 50% of respondents had a somewhat negative or very negative view of a mandatory pro bono requirement.²⁵ This reaction was reinforced in various subsequent focus group discussions. OCA and DVLS representatives expressed concern with forcing attorneys to do something they do not want to do and the negative impact that could have on the pro bono clients of unwilling attorneys. A majority of the voting members of the Promoting Representation Subcommittee also do not

²⁴ App. Ex. K at 11-12; App. Ex. N.

²⁵ App. Ex. K at 25.

recommend instituting a mandatory pro bono hour reporting requirement as part of annual registration.

1. In 2017, institute a standing pro bono leadership committee

In 2017, institute a standing committee with membership from the Court, leaders of law firms and law departments, leaders of the Pro Bono Inn of Court, and leaders of the service providers (e.g. DVLS, LSCD, CLASI, and OCA) whose charge would be to educate (and challenge) leaders of the bar regarding the current critical needs for pro bono service and to create, support and sustain both existing and new statewide infrastructures necessary for maintaining a high level of pro bono participation from members of the bar. It is likely that the bar will respond most effectively if a Justice of the Delaware Supreme Court were a member and sponsor of such a committee. The committee should focus on pro bono family law representation in 2018 and pro bono consumer law representation in 2019.

The focus on each area of law would include identification of existing training and practice guides, preparation of additional training and practice guides if necessary, establishment of a system of resource attorneys, training, meeting with firm leaders about increasing representation in the designated area of law, encouraging the participation of transactional attorneys, and setting goals for representation.

2. Beginning in 2017, develop statewide pro bono practice groups to share ideas and information

Develop pro bono practice groups, networks, and/or listservs where lawyers in different firms and departments with interest in providing pro bono service in similar substantive areas can easily contact each other to share ideas and information. This could serve as a platform where lawyers new to the substantive legal area could quickly reach an experienced practitioner for guidance. This might also be a forum where lawyers in different firms and legal departments could connect and develop cross-organizational teams to take on specific matters. Start with family law.

3. Beginning in the first half of 2018, hold an annual pro bono summit/fair

Beginning in the first half of 2018, hold an annual event, similar to the Pro Bono Summit held on June 28, 2016 sponsored by the Delaware Supreme Court and the Carpenter-Walsh Delaware Pro Bono Inn of Court, where organizations

providing pro bono services to the poor (e.g., DVLS, LSCD, CLASI, OCA), law firms, law departments, and individual lawyers gather to share best practices, identify upcoming needs and opportunities for service, create teams to work on specific pro bono matters, exchange the latest versions of training materials, find a mentor for specific type of pro bono matter, celebrate successes, and recognize individuals and organizations who are leaders in creating a culture of pro bono service. The pro bono summit could focus on family law in 2018 and consumer law in 2019. The key here is to create and sustain dialogue, collaboration and teamwork across law firms, corporate law departments, government agencies, the courts and the service providers in a collegial manner. The Pro Bono Inn could assist in developing the programming for such an event.

4. Create a pro bono challenge for attorneys to meet a clear, measurable, and collective pro bono target

Set one or more clear, measurable and collective pro bono targets for the members of the Delaware bar. For example, a challenge might be: over the next three years, members of the Delaware bar will individually or collectively (as a firm, as a law department) donate [XXX] hours of time to the provision of legal service to the poor. Law firms, law departments, and individual attorneys wishing to participate in the challenge could voluntarily report their hours to the Court or the Pro Bono Committee. Progress could be shared annually at the Bench and Bar and perhaps at an annual Pro Bono Fair. To ensure the success of a pro bono challenge, effective marketing and bench and bar leadership will be important.

5. By the end of 2018, create a single source for pro bono information and increase awareness of the variety of pro bono opportunities and assistance available

Create a central, consolidated, non-territorial database (similar to what is available in other jurisdictions) of helpful information for attorneys performing pro bono work. Attorneys who perform pro bono work should have free access to this database. The database should include, among other things, a calendar with upcoming pro bono training sessions, information about the different types of pro bono opportunities available, training materials, and forms and templates. In states like Massachusetts and Minnesota, one or more legal service agencies and a bar association work together to create and maintain these databases. The Delaware Bar Foundation recently signed a contract with Pro Bono Net to create an online legal services portal for Delaware. The portal is expected to provide access to information and resources for pro bono opportunities.

Routinely and effectively remind all Delaware lawyers regarding the existence of such a database and the related opportunities and resources. Make attorneys aware of the diversity and breadth of pro bono opportunities available. Make attorneys aware of the amount of resources and help available. OCA and DVLS have experienced people to answer the questions of their volunteers. DVLS also has training binders with helpful information and forms for custody and visitation cases, protection from abuse cases, and wills. The OCA has helpful information and materials online for their volunteers. The Promoting Representation Subcommittee is working on the creation of training binders in the other area of greatest need, consumer debt. Scanned versions of all of these materials should be included in or linked to the pro bono information database.

Educate attorneys that even in the absence of malpractice insurance from an employer, there are ways to provide pro bono legal services without the risk of malpractice liability. Attorneys who volunteer for a legal aid organization like DVLS will be covered by those organizations' professional liability policies. Attorneys who volunteer for the OCA are indemnified from liability for acts within the scope of their appointment, unless the act or omission was done with gross or wanton negligence, maliciously, or in bad faith.²⁶ Attorneys who are appointed by the Family Court to represent an indigent parent in dependency and neglect proceedings are entitled to qualified immunity under the Tort Claims Act.²⁷ It is also important to note that malpractice claims related to the provision of pro bono services are rare. A Westlaw search did not reveal any Delaware cases in which an attorney who provided pro bono services was successfully sued for malpractice.

6. Remind the bar early and often of areas of critical need and ways to address those needs

Routinely and effectively remind all Delaware lawyers of areas of critical unmet need and how Delaware lawyers can address those needs (either with their time or financial contributions to the Combined Campaign for Justice). Publicize pro bono opportunities as far in advance as possible so that lawyers can schedule the event before their calendars fill with other matters.

²⁶ 29 Del. C. § 9008A.

²⁷ *Hanson v. Morton*, 67 A.3d 437, 442 (Del. 2013).

7. Devote more time to consideration of a legal technician program

Even if pro bono services increase, there will still be people with legal needs who cannot afford an attorney. Although indigent people may not have a lay person represent them in court, non-lawyer officers or employees of artificial entities may represent those entities in the Justice of the Peace Court. To address the access to justice gap, an increasing number of states are considering the adoption of legal technician programs. Legal technicians have been described as the nurse practitioners of the legal profession. The subcommittee has investigated the legal technician program of Washington, which leads the legal technician movement, and believes there should be further investigation of a legal technician program in Delaware.

In an order dated June 15, 2012 and effective on September 1, 2012, the Supreme Court of Washington adopted Admission to Practice Rule 28, the Limited Practice Rule for Limited License Legal Technicians (“LLLTs”). This order, Admission to Practice Rule 28, Regulations of Admission to Practice Rule 28, and the Rules of Professional Conduct for LLLTs are available at <http://www.wsba.org/licensing-and-lawyer-conduct/limited-licenses/legal-technicians>.

LLLTs are currently limited to certain types of family law matters (e.g., child support modification, dissolutions, some domestic violence actions), but in the future they may also be able to work in other areas of law such as elder law and landlord/tenant law. In the area of family law, LLLTs may: (i) obtain facts and explain the relevancy of those facts to the client; (ii) inform the client of deadlines, service and filing procedures, documents that must be filed, and how the matter is likely to proceed; (iii) provide the client with self-help materials prepared by a Washington lawyer or the LLLT Board; (iv) review and explain documents the client has received from the opposing party; (v) select, complete, and file approved forms; (vi) perform legal research; (vii) draft legal letters and documents beyond the approved forms if the work is approved by a Washington attorney; and (viii) advise the client of documents that may be necessary for the case and assist the client in obtaining those documents.²⁸

²⁸ Admission to Practice Rule 28(F), available at http://www.wsba.org/~media/Files/Licensing_Lawyer%20Conduct/LLLT/APR%2028%20and%20Regs%203-31-2015.ashx.

LLLTs cannot represent clients in court or negotiate on behalf of their client with another party.²⁹ LLLTs may work in a law firm, open their own office, or own a minority interest in a firm with a lawyer. A thirteen-member LLLT Board oversees LLLTs.³⁰

Educational requirements for LLLTs include: (i) an associate level degree or higher; (ii) 45 credit hours of core curriculum instruction in paralegal studies as approved by the LLLT Board with instruction to occur at an ABA approved law school or ABA approved paralegal education program³¹ (1 credit hour = 450 minutes of instruction); and (iii) completion of the practice area curriculum (5 credit hours in basic domestic relations subjects and 10 credit hours in advanced and Washington specific domestic relations subjects).³² There is a limited time waiver of the associate level degree and core curriculum requirements if an applicant can show that they have passed a LLLT Board approved national paralegal certification exam, have an active Board approved national paralegal certification, and have 10 years of substantive law-related experience supervised by a licensed attorney.³³

LLLTs must also: (i) be at least eighteen; (ii) pass the legal technician exam; (iii) pass a character and fitness review, which includes a background check; (iv) complete 3,000 hours of paralegal experience involving substantive legal work in any practice area under the supervision of a lawyer; (v) demonstrate financial responsibility (professional liability insurance or proof of indemnification if employer is a government entity); (vi) pay an annual license fee; and (vii) complete 10 hours of approved continuing education each year.³⁴ The LLLT educational and licensing requirements are intended to be less than \$15,000.

Washington spent a number of years developing the LLLT program. There was initially resistance to the LLLT program, with some attorneys concerned about loss of business and others concerned about the quality of work provided by LLLTs. According to Steve Crossland, chair of the Washington Limited License Legal Technician Board, and Paula Littlewood, executive director of the Washington State Bar Association, there is increasing acceptance and enthusiasm

²⁹ Admission to Practice Rule 28(H).

³⁰ Admission to Practice Rule 28(C).

³¹ Washington expanded this to schools approved by the LLLT Board because parts of the state lack ABA-approved paralegal programs.

³² Admission to Practice Rule 28(D); Regulation 3(B).

³³ Regulation 4.

³⁴ Admission to Practice Rule 28(D), (E); Regulation 5(D), 11(A), 12(A), 14(A).

for the program in Washington. Crossland and Littlewood recommend an open and transparent process for consideration of a legal technician program. Based on our conversations with members of the Delaware legal community about legal technicians, there is a general lack of awareness about the existence and possible role of legal technicians. Crossland and Littlewood also indicated that strong court support is critical for adoption of a legal technician program.

Since the first LLLT exam in June 2015, 14 people have completed the program and are licensed in Washington.³⁵ The program is still in its early stages. At this point, it is difficult to tell how effective the program will be in addressing the access to justice gap. As the program continues, there will be additional data that will shed more light on how well the program operates. The Public Welfare Foundation recently completed a preliminary evaluation, which is available at <http://www.publicwelfare.org/new-ways-to-increase-access-to-justice/>, of Washington's LLLT program.

Given the early stages of the Washington LLLT program (which is still well ahead of any other state legal technician programs), the current lack of data on the effectiveness of the program, the current lack of awareness in the Delaware legal community about legal technicians, and the potential concerns of the bar, we recommend further investigation of a legal technician program. We recommend that the pro bono leadership committee to be established monitor the progress of legal technician programs in Washington and other states. Depending on the progress and success of those programs, the pro bono leadership committee can create a new subcommittee to examine the possible adoption of a legal technician program. Subcommittee members should include Family Court judges and practitioners (as family law is an area of need and where the Washington LLLT program has started), at least one paralegal (as paralegals are a likely source of legal technicians), and representatives from Delaware Law School and other law schools in the region. Among other things, the subcommittee could increase awareness of legal technicians in the Delaware legal community, consider adoption of a modified version of the Washington LLLT program (some states have expressed concern that the educational and practice requirements are too rigorous or that legal technicians should have additional powers like the ability to negotiate on behalf of their clients), explore a regional approach to an affordable curriculum

³⁵ Jessica Prokop, *Legal technicians provide family law assistance*, The Columbian, June 27, 2016, <http://www.columbian.com/news/2016/jun/27/legal-technicians-provide-family-law-assistance/>.

and standards for legal technicians, and consider the regulation of and rules for legal technicians.

THE EXHIBITS TO THIS REPORT ARE
AVAILABLE AT:

<http://courts.delaware.gov/supreme/access.aspx>