**Ombudsman: Helping Without Giving Legal Advice**

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The General Assembly passed a law in July, 2021, granting to the Virginia Workers’ Compensation Commission the ability to create an Ombudsman program, designed to assist unrepresented parties with navigating the workers’ compensation process by providing neutral educational information. The statute reads:

**§ 65.2-205. Ombudsman program; confidentiality.**

A. The Commission may create an Ombudsman program and appoint an ombudsman to administer such program. The purpose of the Ombudsman program shall be to provide neutral educational information and assistance to persons who are not represented by an attorney, including those persons who have claims pending or docketed before the Commission. The ombudsman shall be an attorney licensed by the Virginia State Bar, in active status, and in good standing. The ombudsman and any Ombudsman program personnel shall carry out their duties with impartiality and shall not serve as an advocate for any person or provide legal advice.

B. All memoranda, work products, and other materials contained in the case files of the ombudsman or Ombudsman program personnel shall be confidential. Any communication between the ombudsman or Ombudsman program personnel and a person receiving assistance as provided by this section that is made during or in connection with the provision of Ombudsman program services, including screening, intake, and scheduling, shall be confidential.

Confidential materials and communications are not subject to disclosure and shall not be admissible in any judicial or administrative proceeding except where (i) a threat to inflict bodily injury is made; (ii) communications are intentionally used to plan, attempt to commit, or commit a crime or conceal an ongoing crime; (iii) a complaint is made against Ombudsman program personnel by a person receiving assistance to the extent necessary for the complainant to prove misconduct or the Ombudsman program personnel to defend against such complaint; or (iv) communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against the legal representative of a person who received assistance from the Ombudsman program.

Confidential materials and communications as described in this section are not subject to mandatory disclosure under the Virginia Freedom of Information Act (§ [2.2-3700](https://law.lis.virginia.gov/vacode/2.2-3700/) et seq.).

C. The ombudsman and Ombudsman program personnel are immune from civil liability in their performance of the duties specified in this section.

2020, c. [616](http://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+CHAP0616).

As the statute indicates, the Ombudsman must remain impartial, and shall not serve as a legal advocate, or give legal advice. Most people then want to know what kind of help the Ombudsman can offer unrepresented parties if the Ombudsman cannot offer legal advice.

The Supreme Court of Virginia has defined the practice of law as representing to another, either by words or conduct, that a person is able to:

1. Undertake for compensation, direct or indirect, to give advice or counsel to in any matter involving the application of legal principles to facts.
2. Select, draft, or complete legal documents or agreements which affect the legal rights of an entity or person
3. Represent the interest of another before any tribunal
4. Negotiate the legal rights or responsibilities on behalf of another entity or person.

Rules of the Supreme Court of Virginia Pt. 6, § I(2).

There are then eighteen exceptions specifically noted in the Rule. Rules of the Supreme Court of Virginia Pt. 6, § I(3). These exceptions include things such as third year practice, foreign attorneys appearing *pro hac vice*, acting as a real estate settlement agent, preparing legal documents that are incidental to an employer’s business, preparing Advanced Medical Directives and the like. Id. Most of these exceptions are not actions that the Ombudsman for the Virginia Workers’ Compensation Commission would do. However, there is one exception that gives some guidance. That is “[p]roviding assistance as a court clerk to litigants in completing for filing, forms prescribed by the Supreme Court of Virginia or other tribunal; information shall be limited to description of forms, instructions for use, and required sections to complete.  Court clerks shall not engage in providing legal advice, recommendations or opinions as part of the court clerk’s assistance.” Id.

There are also several exclusions to the general definition of the practice of law listed in the Rules. Rules of the Supreme Court of Virginia Pt. 6, § I(3). The exclusions include:

**EXCLUSIONS**: The following actions do not constitute the practice of law:

1. Providing translation services.
2. Selling legal forms.
3. *Pro se*representation.
4. Serving as a mediator, arbitrator, conciliator, or facilitator.
5. Serving as a fiduciary.
6. Acting as a lobbyist.
7. Teaching law or providing legal information.
8. Negotiating settlements and preparing releases in the course of employment as an adjuster or agent for an insurer.
9. Preparing tax returns to the extent authorized by the Internal Revenue Service or other state law.

Rules of the Supreme Court of Virginia Pt. 6, § I(4).

Of these exclusions, the only ones that potentially may apply would be providing translation services and providing legal information. The current Ombudsman is not sufficiently fluent in any language other than English to perform the translations services herself, but, she can offer translation services by a third-party company. Also, there is always a chance that a future Ombudsman, or employee of the Ombudsman Program would be able to translate, so it is included. The other exclusion that would apply is that providing legal information is not considered the practice of law. This then leads to the question of what legal information can the Ombudsman provide.

The Comments to the Rule of the Supreme Court of Virginia give an example of what is considered to be providing legal information. Rules of the Supreme Court of Virginia Pt. 6, § I(5)(F). “Non-lawyer employees of an entity or organization providing legal information or education about law, regulations, legal procedures or compliance issues for the purpose of training other employees or members of the entity or organization. For example, a human resource manager or FOIA officer is not engaged in the practice of law when advising the employer as to what the employer must do to comply with state or federal laws.” Id.

While this comment is instructive, it can be distinguished from what the Ombudsman does since the example only refers to giving information for the purposes of training other employees of the same organization, while the Ombudsman will also need to give information and education to parties outside the Commission. Legal Ethics Opinions and Unauthorized Practice of Law Opinions provide additional direction on what legal information can be provided, and how it can be provided by the Ombudsman Program to unrepresented parties.

In UPL Opinion 104, the Committee stated, “It is not the unauthorized practice of law for an attorney licensed in a foreign jurisdiction to publish newspaper articles containing general legal information in a Virginia Newspaper. General legal information is distinguished from specific legal advice to specific clients with regard to their respective problems.” Virginia Unauthorized Practice of Law Advisory Opinion 104 (April 17, 1987).

In UPL Opinion 131, the Committee found, “It is not the unauthorized practice of law for the non-lawyer staff members of a not-for-profit corporation, qualified to do business in Virginia and maintaining an office in Virginia, to provide general information and education on legal matters pertaining to issues of religious freedom to members of the public through seminars, publications and responses to letters and phone inquiries.” Virginia Unauthorized Practice of Law Advisory Opinion 131 (February 22, 1989).

In Unauthorized Practice of Law Opinion 179, the Committee stated that it would not be the unauthorized practice of law for a Virginia State Bar associate member to provide training on the statutory changes, probable cause determination, and offenses to be charged related to matters involving youth and family services, since the information being provided in the training sessions would not constitute the rendering of specific legal advice and would only constitute the provision of general legal information and training. Virginia Unauthorized Practice of Law Advisory Opinion 179 (December 19, 1994).

In Legal Ethics Opinion 1869, a bar association was considering creating a Family Court Self-Help Center to assist unrepresented people in family law cases by providing education, materials, legal forms, sample pleadings and general legal information already found on the court's website or the website of other legal services organizations. Virginia Legal Ethics Op. 1869 (2013). The volunteers were both licensed attorneys and paralegals trained in family law who intended help the pro se party in completing the documents and pleadings. Id. The customers would acknowledge in writing that:

* I do not have an attorney.
* I understand that the Facilitator is not my attorney.
* I understand that nothing I tell the Facilitator is confidential.
* I understand that the Facilitator will not represent me in court.
* I understand that the Facilitator may assist the other party or parties in my court case.
* I understand that the Facilitator cannot give me legal advice.
* I understand that some issues cannot be addressed without the assistance of an attorney and that I may be referred to an attorney.

Id.

Several questions were presented to the Committee. The first question asked whether the Customer Service Agreement violated any Rules of Professional Conduct. Id. The Committee indicated that it has decided previously that a law firm could use a disclaimer (citing Virginia Legal Ethics Opinion 1842 (2008)), and that Rule 1.2(b) allows a lawyer to limit the objectives of the representation if the client consents. Virginia Legal Ethics Op. 1869 (2013).

The second question presented was whether an attorney would be providing “short-term limited legal services in violation of Rule 6.5 of the Virginia Rules of Professional Conduct by participating in a legal education seminar or other information session sponsored by the local courts which is open to the members of the public which includes presentation of educational material, forms, sample pleadings, and information already found on the court’s website and the websites of legal services groups, as well as a mock demonstration of how to present evidence in a hearing. Id. The Committee stated that none of the activity described would be considered “short-term legal services” to violate Rule 6.5 as, “Merely providing sample pleadings or forms to a pro se litigant is not the practice of law; however, the completion of a form pleading or legal documents for the pro se litigant would be.” Id. (citing Virginia Legal Ethics Opinion 1761 (2002)).

Another question presented was whether a lawyer provided “short-term limited legal services” by participating in a self-help or pro se legal information center housed in a courthouse and doing basically the same activities as in the second question. Virginia Legal Ethics Op. 1869 (2013). The Committee opined that such activity would not be considered short term limited legal services, but whether it was considered the practice of law was outside the purview of the Committee. Id. They did indicate in a footnote that it is not the unauthorized practice of law for a non-lawyer to prepare form documents such as wills, leases, power-of attorney, bills of sales for sale to the general public, but that completing the forms, or rendering legal advice to complete the forms would be the unauthorized practice of law. Id at FN 6.

The final question asked if guidelines were established for attorney volunteers distinguishing between “legal information” and “legal advice”, would it assist in preventing the creation of an attorney client relationship. Virginia Legal Ethics Op. 1869 (2013). The Committee stated:

Guidelines that assist the volunteers in distinguishing between "legal information" and "legal advice" would help to prevent the inadvertent provision of "legal advice" to a pro se litigant and the unintended creation of a client-lawyer relationship. For further guidance on this subject, there are articles and resources on the Internet often used for training court personnel so that they do not inadvertently engage in the ***unauthorized practice of law*** when they assist pro se litigants.

Id.

Exact citations for recommended articles and resources were listed in a footnote, only one of which (a ten-question internet quiz) was found currently. Virginia Legal Ethics Op. 1869 FN 14. However, there is a website not listed that provides guidance. The Virginia Access to Justice Commission, through the Office of the Executive Secretary of the Supreme Court of Virginia, hosts a website called the Virginia Judicial System Court Self- Help: Resources for Self-Represented Litigants in Virginia. <https://selfhelp.vacourts.gov/>. The website has a disclaimer that it “provides *neutral legal information only* as a public service by the Virginia Access to Justice Commission for self-represented litigants.” This website explains that judges, court employees, and librarians must be neutral and impartial and can give legal information. A simple click then takes the reader to a list of actions which court employees and librarians can and cannot do is included. A copy of this is attached at the end.

In sum, it appears that there are things that the Ombudsman can do to assist unrepresented parties without giving legal advice, the most important of which is giving legal information. Rules of the Supreme Court of Virginia Pt. 6, § I(B). Legal information is distinguished from legal advice in that is it not specific to an individual. Unauthorized Practice of Law Advisory Opinion 104 (April 17, 1987). The general legal information can be provided through seminars and publications as well as letters and phone calls. Unauthorized Practice of Law Advisory Opinion 131 (February 22, 1989). Additionally, the Ombudsman can provide a mock demonstration of how to present evidence in a hearing. Virginia Legal Ethics Op. 1869 (2013).

Based on the recommendations of the Legal Ethics Committee, the Ombudsman Program has created Guidelines for what the Ombudsman can and cannot do to give everyone a better idea of what benefits the Ombudsman can provide.

**Virginia Judicial System Court Self-Help**

How We can Help you

Court Employees and Librarians must be neutral and impartial and can give legal information. Only a lawyer representing you can give you legal advice.

**We can:**

* Provide you with the number of a local lawyer referral service, legal services program or other service where you can get legal help.
* Give you information about law libraries and online resources.
* Explain and answer question about how the court works.
* Give you general information about court rules, procedures and practices.
* Provide you with available court forms and instructions.
* Provide court schedules and information about how to get a case scheduled.
* Provide you information from your case file.
* Provide additional assistance in some circumstances to aid you if you have special needs.
* Provide information, brochures, and contact information about mediation and ADR programs in your court.
* Assist you in your own language.

We cannot:

* Tell you whether or not you should bring your case to court;
* Tell you what words to use in your papers. We can, however, check your papers for completeness before you file them.
* Tell you what to say in Court.
* Give you an opinion about what will happen if you bring your case to Court.
* Talk to the judge for you.
* Let you talk to the judge outside of court.
* Change an Order signed by a judge.
* Give you information about a judge’s decision until the judge makes that decision public.
* Give you information that we would be unable or unwilling to give to the other side in your case.
* Interpret court documents or tell you what you should do.

**OMBUDSMAN GUIDELINES**

**An Ombudsman can:**

* Provide information on where to find a lawyer.
* Tell a party about law libraries and websites where case law can be found.
* Provide related Rules, Statutes and case law as they apply to workers’ compensation.
* Give a party information about the Statutes and Rules of the VWC.
* Explain VWC’s procedures, as well as what a party can expect in a hearing, and what steps need to be taken to appeal.
* Supply information, brochures, and contact information about mediation and ADR programs.
* Give information to unrepresented parties about how to get a hearing scheduled.
* Explain the importance of giving important documents and other information to the VWC and other parties as required by the Rules.
* Give information from a party’s file.
* Explain and answer questions about how the VWC works. This includes explaining basic workers’ compensation legal terms, basic legal principles, the burden of proof required to win at a hearing, explain any defenses raised and what each defense means, and what types of information may be used to defend against such a defense, explain how to obtain medical evidence and how to calculate average weekly wage and how to use that number to then calculate other benefits, and offer options and discuss the potential ramifications of those options.
* Give information about other local, state, and federal agencies that may be able to help.
* Talk to a party in their own language.

**An Ombudsman cannot:**

* Give the name of a specific lawyer.
* Do legal research for any specific fact issue.
* Interpret any VWC documents or tell any party what they should do.
* Tell a party whether or not they should file a claim or ask for a hearing.
* Evaluate the claim and explain the strengths and weaknesses of the case to the unrepresented party.
* Tell a party whether to appeal or what issues to appeal.
* Tell a party what words to use on any paperwork.
* Tell anyone what to say in a hearing, mediation, or a deposition.
* Review or comment on intended statements anyone intends to make in writing prior to the mediation, deposition or hearing;
* Appear at a hearing, mediation, or at a deposition for or with anyone.
* Give legal advice, or tell anyone what to do.
* Tell a party what the value of the claim is.
* Talk to the judge or anyone else about the workers’ compensation case.
* Testify for or against anyone in a workers’ compensation hearing.