

No resolution presented herein reflects the policy of the Minnesota State Bar Association until approved by the Assembly. Informational reports, comments, and supporting data are not approved by their acceptance for filing and do not become part of the policy of the Minnesota State Bar Association unless specifically approved by the Assembly.

Report and Recommendation to the MSBA

Regarding Amendment of the Minnesota Rules of the Supreme Court on Lawyer Registration to Require Uniform Data Collection Regarding Pro Bono Service

MSBA Access to Justice Committee
_____, 2020

RECOMMENDATION

Resolved, that the Minnesota State Bar Association petition the Minnesota Supreme Court to amend the Minnesota Rules of the Supreme Court on Lawyer Registration to require uniform reporting of pro bono service and financial contributions by adding the following language:¹

Rule 25 Uniform Reporting of Pro Bono Service and Financial Contributions

As part of the Lawyer Registration Statement, all attorneys who are authorized to practice law in Minnesota must report for the preceding calendar year: (1) the approximate number of hours of pro bono service provided as defined in Rule 6.1(a), (b)(1) and (2) of the Minnesota Rules of Professional Conduct and; (2) whether they have made any financial contributions to nonprofit organizations that provide legal services to persons of limited means.

In addition, Rule 23 (Access to Lawyer Registration Records) should be modified as follows:

H. Pro Bono Service and Contribution Reporting Information. Pro bono reporting and contribution information collected from lawyers and judges as part of the Lawyer Registration Statement is not accessible to the public. The Lawyer Registration Office may publish information based on reported pro bono and contribution data as directed or ordered by the Court.

REPORT

Summary

The MSBA Access to Justice Committee proposes amending the Minnesota Rules of the Supreme Court on Lawyer Registration to require uniform reporting of voluntary pro bono service and financial contributions to organizations that provide legal services to persons of limited means. The purpose for requiring uniform pro bono reporting is to (1) heighten awareness of this ethical responsibility among the attorneys practicing in Minnesota; (2) provide a comprehensive mechanism for the bar to report and measure its collective performance vis-a-vis the aspirational goal set by Rule 6.1; (3) provide comprehensive data for the judiciary, bar association, and legal community to support efforts to

¹ <https://www.lro.mn.gov/wp-content/uploads/2018/05/LRO-Rules-7-1-2018-booklet.pdf>

promote and recognize pro bono work on a local, regional and statewide basis; and (4) enable the bar to educate the public regarding the amount of pro bono legal services provided by its membership to the community, thereby improving the image and standing of the profession and its membership. Also, based on the experience of states that have already adopted a uniform reporting rule, the Access to Justice Committee hopes to see an increase in the amount of pro bono services performed and funds contributed to legal service providers.

Background

In 1996, the Minnesota Supreme Court adopted Rule 6.1 of the Rules of Professional Conduct concerning pro bono service. The first sentence of the Rule states, “[e]very lawyer has a professional responsibility to provide legal services to those unable to pay,” and sets forth the aspirational goal that each should provide at least 50 hours of pro bono service. The succeeding subsections of the Rule explain the categories of pro bono service:

legal services without expectation of fee to persons of limited means ((a)(1)) or to charitable organizations in matters that are designed primarily to address the needs of person of limited means ((a)(2)); and

additional services, such as legal services at no or limited fee to secure civil or public rights “where the payment of standard legal fees would significantly deplete the organization’s economic resources” ((b)(1));

legal services delivered at a substantially reduced fee to persons of limited means ((b)(2));
or

participation in activities that improve “the law, the legal system or the legal profession” ((b)(3)).²

The rule also asks lawyers to voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

Over the intervening 23 years, Minnesota has lacked a systematic means for assessing the extent to which licensed attorneys are meeting the aspirational goals of Rule 6.1. In the 2018 fiscal year, private attorneys closed approximately one-third of the cases handled by legal services organizations funded by the Supreme Court’s Legal Services Advisory Committee (LSAC). Indeed, as staffed civil legal aid organizations struggle to meet the increasing legal needs of low-income Minnesotans, pro bono representation has become an important component of the civil legal services delivery system. Yet, staff- and volunteer-based legal aid organizations still must turn down two cases for every one they are able to accept, whether represented by a staff legal aid or pro bono attorney.

² The purpose of collecting data under the proposed rule is to document pro bono service to low income individuals and/or organizations that serve them, as well as legal service to protect the public interest. Therefore, the more general service to the profession under subsection (b)(3) is not included. The Committee does not question the value of (b)(3) service to the profession; however, it believes the more urgent need is to document how our profession is meeting the needs of low income Minnesotans.

In 2012, the MSBA created the North Star Lawyers recognition program as an effort to both recognize the service of members who are meeting the 50 hour standard from Rule 6.1 and document this service for the profession and general public.³ In 2018, 934 members provided over 110,500 hours of service. Yet, the North Star Lawyers program only captures a small subset of the overall service provided in the state – members who provide less than 50 hours, members who do NOT wish to be recognized and non-MSBA members are left out of the program and, as a result, their service is not captured.

Many larger private law firms and corporations in Minnesota participate in national pro bono recognition and encouragement efforts, such as the Pro Bono Institute’s Law Firm and Corporate Pro Bono Challenges. However, these programs only ask for organizations to meet certain standards (3% of annual billable hours for law firms, 50% participation of legal staff for corporations) and do not provide much additional data about the amount or nature of this service. Moreover, the programs only apply to a relatively small slice of the active licensed bar in Minnesota.

Not long after the adoption of Rule 6.1, in 1999, the Legal Assistance to the Disadvantaged (LAD) Committee asked the MSBA Assembly to petition the Court to adopt uniform mandatory reporting of pro bono service and contributions. The Assembly passed a resolution to this effect and the MSBA filed a petition making such a request to the Court, which was subsequently denied without prejudice. In so doing, the Court was concerned about the administrative burden of collecting the requested information and whether the information would actually result in an increase in service and contributions. At the time, only one state – Florida – had moved to require uniform pro bono reporting. In the intervening years, ten more states have adopted uniform reporting.⁴

We now have 20 additional years of experience since that MSBA petition. Civil legal aid organizations continue to struggle with meeting client needs due to lack of human and financial resources. Moreover, the Court and the profession still lack crucial data about the nature of pro bono service that could both document current service and provide a baseline for the profession to assess the effectiveness of recruiting efforts. We are also missing an opportunity to better tell the story of the work lawyers are doing in service to their community. The time has come to again approach the Court and request the adoption of uniform pro bono and contribution reporting.

Further, the Minnesota Judicial Council, the administrative policy-making authority for the Minnesota Judicial Branch, has identified increasing pro bono service as part of its most recent strategic plan for the Branch.⁵ Under Strategic Goal 1, Priority 1B seeks to “provide resources to improve accessibility to the courts for self-represented litigants and vulnerable adults.” Under that Priority, the plan highlights the following: “Promote access to pro bono services.” Now is an appropriate time to encourage the Court to take concrete steps to make that happen by systematically collecting and publicizing data on attorney pro bono service.

³ Only service under subsections (a), (b)(1) and (b)(2) of Rule 6.1 qualifies for consideration under the MSBA North Star Attorney program. <https://www.mnbar.org/about-msba/what-we-stand-for/access-to-justice/pro-bono/northstar>

⁴ In addition to Florida, these states are Hawaii, Illinois, Indiana, Maryland, Mississippi, Nevada, New Mexico, New York, Tennessee and Virginia.

⁵ See Minnesota Judicial Branch, [Priorities & Strategies for Minnesota’s Judicial Branch Focus on the Future, FY2020-21](http://www.mncourts.gov/mncourtsgov/media/scao_library/MJB-Strategic-Plan.pdf), http://www.mncourts.gov/mncourtsgov/media/scao_library/MJB-Strategic-Plan.pdf

Why Uniform Reporting – The Experience of Other States

In the last 25 years, eleven states have adopted uniform reporting of pro bono hours and contributions. (All but two make reporting mandatory.) While there is some variation among them in terms of implementation, almost all acknowledge several important reasons for this effort. Most recently, in February 2018, the Virginia Supreme Court listed the following in its order establishing a voluntary reporting system in that state:

(1) heighten awareness of this ethical responsibility among the bar membership by serving as an annual reminder; (2) provide a comprehensive mechanism for the bar to report and measure its collective performance vis-a-vis the aspirational goal set by Rule 6.1; (3) provide comprehensive data for the judiciary to support its efforts to promote and recognize pro bono work on a local, regional and statewide basis; (4) provide crucial benchmark data to the Virginia Access to Justice Commission to support its work promoting equal access to justice for Virginia residents; and (5) enable the bar to educate the public regarding the amount of pro bono publico legal services provided by its membership to the community, thereby improving the image and standing of the profession and its membership.

As a result of adopting uniform reporting rules, states have seen a variety of positive results, including the following:

Florida, the first state to adopt a rule in 1993, saw increases in overall number of hours and hours per attorney in the first few years after adoption;

In the 10 years after Maryland adopted its rule in 2002, the state saw a 16.75% increase in the number of pro bono hours, an 89% increase in the amount of financial contributions made by attorneys to legal aid programs and a 25% increase in the number of full-time lawyers meeting the 50 hour standard;

Since instituting its rule in 2008, New Mexico has seen an increase in the number of pro bono hours and greater participation in law clinics, as well as a doubling of financial contributions in the first year alone after the rule was adopted; and

In 2017, six years after Tennessee adopted uniform voluntary reporting, the Tennessee Access to Justice Commission reported that pro bono participation exceeded 50% for the first time ever, with lawyers providing over 650,000 total hours of service at an average of 73 hours per attorney who reported.

While Minnesota has been ahead of many states in adopting rules, structures and funding mechanisms to support access to justice for low income people, the absence of a reporting rule leaves our state lagging behind national leaders in this effort. However, we can learn from the experience of those states that have already implemented reporting rules, particularly as they have grappled with some common implementation issues.

a. Mandatory vs. voluntary reporting

All the states that have adopted rules, with the exception of Tennessee and Virginia, have chosen to make reporting mandatory. The reasons echo what has been mentioned earlier – (a) mandatory reporting helps expand pro bono service and contributions, and (b) the requirement to record and report

activity will help focus attorney attention on professional and ethical obligations and the importance of furthering access to justice (thus helping attorneys to fulfill their general responsibility to serve interests of justice and promote universal access to justice). In addition, pro bono reporting can provide useful data on the extent to which pro bono activity contributes to fill justice gaps and whether financial contributions are growing. Analyzing reporting data may help efforts to promote pro bono activity in areas that are underserved and tailor pro bono programs. Finally, in several of the states with mandatory rules, there has been some evidence of increases in the number of hours reported, in the amount of contributions, and the number of attorneys participating.

b. Public disclosure

Most states do not feature public disclosure of reported information, often based on arguments that fear of exposure is not an ideal motivator, and that it is better to rely on good will and high ethical values of attorneys as the motivating force than rely on a prospect of disclosure (i.e., a “carrot” is generally better than a “stick”). The Indiana Pro Bono Reporting Task Force recommended against publicly reporting pro bono legal services data because the purpose of the reporting requirement was to gather more accurate data for measurement purposes, and not having public disclosure would help avoid any appearance that the requirement was a first step towards auditing reported pro bono hours or mandating pro bono services. However, states such as Florida do disclose information reported by individual attorneys and arguably have demonstrated some success in advancing the amount of pro bono activity and contributions.

c. Contributions reporting

Most states offer attorneys an opportunity to report contributions, and sometimes provide some metric for determining contribution levels that are “equivalent” to a given number of pro bono work hours. Some attorneys give contributions instead of providing pro bono legal services because they are too busy or lack expertise needed to provide pro bono legal services themselves. To the degree allowing contribution reporting could increase contributions, this could constitute an important revenue source for some legal aid organizations. The counter-argument is that contributions should not be treated as equivalent to (or as more important than) pro bono legal services, that the value of actual pro bono services is greater than contributions.

d. Method of reporting

Some states require paper reporting, other states require online reporting and some offer both as options. The argument against paper reporting is that it can increase administrative difficulty and may lead to inaccurate aggregate reports (as paper reporting requires manual data entry). Reports issued regarding Maryland’s reporting requirement found that the quality of data improved as on-line reporting increased. States with high compliance rates generally require online reporting or at least have an online option. Online reporting would also permit requiring a report to be submitted as part of annual registration or payment of fees, provided these also take place online (e.g., Indiana requires annual registration to be completed online, and pro bono reporting questions must be answered to complete registration).

e. Amount of information collected

States that have reporting requirements vary as to what type of information is collected. Most do not require much information to be provided beyond the number of pro bono hours. Florida, in contrast,

requires some description of pro bono services provided. Other than information describing the pro bono services provided, information could also be collected regarding years in practice, size of firm, geographic location or general subject areas of practice. Requiring more data to be reported may promote more meaningful analysis of reported data, but may also potentially make reporting onerous enough that it dissuades compliance, and could lead to more administrative difficulty.

f. Enforcement for failure to report

Some states do not provide any specific penalty for failure to comply with reporting requirements, while others do provide some sort of penalty (or indicate that reporting will be reviewed and taken into account if an attorney has disciplinary allegations or charges against them). For example, New York rules provide that failure to comply may result in referral for disciplinary action. States that provide for a penalty generally treat a violation the same as a failure to pay dues or comply with CLE requirements. Some states that do provide specific penalties do not in practice enforce compliance (for example, the Florida Bar does not follow up with attorneys that do not complete the pro bono report and does not discipline them). Including a penalty for violations may increase objections to instituting the reporting requirement, although it may increase compliance rates.

Proposed Reporting Rule

The ATJ Committee proposes that the Minnesota Supreme Court adopt a uniform reporting rule (a new Rule 25 of the Rules of the Supreme Court on Lawyer Registration) modeled on the New York experience. The New York Rules of the Chief Administrator (22 NYCRR Part 118) set forth the registration requirements for New York licensed attorneys and were modified in 2013 to require all New York attorneys to report law-related pro bono services and charitable contributions. After review, the Committee proposes adopting the following components:

Mandatory reporting of pro bono service and contributions, as defined in Rule 6.1(a), (b)(1) and (b)(2);

Data reported publicly will not be identifiable by attorney; and

Data can be reported in aggregate by the court.⁶

The Committee believes that filing should be mandatory as part of the Lawyer Registration Statement to ensure maximum participation and data accuracy, as well as to reaffirm the importance and applicability of Rule 6.1 to all licensed active lawyers in the state. Voluntary reporting does not offer the same benefits as mandatory reporting. Response rates will be lower, as evidenced by the experience of voluntary reporting states, such as Tennessee, where it took six years from the start of the program to reach only 50% of licensed attorneys reporting any pro bono service.⁷ Only the most committed and active attorneys will be likely to report pro bono service, undermining the benefit of understanding pro bono service throughout all sectors of the profession and in all parts of the state.

⁶ New York uses a biennial registration period. Pro bono reporting is done via a separate anonymous statement to be filed at the time of registration reporting for the prior two calendar years. Rather than create a separate statement, the Committee proposes addressing access to reported data through an amendment to Rule 23, discussed below. This would allow the Court to report aggregate data using the existing lawyer registration form.

⁷ http://www.tncourts.gov/sites/default/files/docs/atj_pro_bono_report_2017.pdf

Moreover, the track record for voluntary reporting in Minnesota has been spotty. The MSBA North Star Lawyers recognition program is voluntary and only captures service from approximately 6% of the association membership. Also, in early 2017, the American Bar Association surveyed attorneys nationally regarding their pro bono service. The Minnesota Judicial Branch agreed to promote the ABA survey to licensed Minnesota attorneys on active status and sent over 20,000 emails from Justice Margaret Chutich. In addition, the MSBA offered a free on-demand CLE to all respondents. Nevertheless, only 16% of eligible Minnesota attorneys participated in the survey.

To address administrative concerns, the Committee suggests the data fields be limited to the following: 1) the approximate number of hours of pro bono legal service, pursuant to Rule 6.1(a), (b)(1) and (2); and 2) a check box indicating whether a personal contribution was made to civil legal aid.⁸ In aggregate, this information can be combined with demographic data about attorneys from their registration statement to better understand pro bono trends around the state, by years of practice, etc.

To address privacy concerns, the Committee suggests modifying Rule 23 of the Rules of the Supreme Court on Lawyer Registration to specify that data reported under Rule 25 is NOT public, except as reported by the Court in aggregate. The Committee believes it is important for the Court to provide public annual aggregate data for the purposes of establishing baseline information, demonstrating the impact of the reporting requirement on pro bono service and contribution information, and documenting the important service of Minnesota's lawyers to the public at large.

Finally, because the Committee proposes mandatory reporting, it would be an enforceable part of the registration requirement.⁹ The ATJ Committee acknowledges that requiring pro bono and contribution reporting as part of the annual registration process could lead to attorneys facing negative consequences for failure to file and additional follow up by the Office of Lawyer Professional Responsibility (OLPR). However, this has not been a significant issue in other states that have adopted the rule. Nevertheless, once the proposed rule is fully implemented, the failure to answer these questions would be considered the same as the failure to respond to other required elements of the attorney registration form with the same consequences, including potentially late fees and administrative suspension if the noncompliance is not cured.¹⁰ The Committee consulted with the Directors of OLPR and Continuing Legal Education in the creation of this Report and Recommendation and acknowledges the potential for additional administrative effort to enforce this new requirement.

In addition, the Committee understands the need for time to educate members of the bar about the requirement and helpful guidance. The Committee recommends the Court phase in the proposed rule over a two year period. The first year would be solely for the purpose of educating the profession

⁸ This is consistent with the existing North Star Lawyers program. The ATJ Committee recognizes that new information collected on the form will necessitate additional administrative support within the Judicial Branch in order to enter and tabulate results. In addition, to make the data meaningful for programs and tracking, there should be some categorization of the pro bono information reported by attorneys.

⁹ It bears stating that mandatory disclosure of pro bono hours does NOT mean attorneys will or should be required to do pro bono service. The ATJ Committee has not taken a position on mandatory pro bono and none should be construed from this report and recommendation. Rather, for the purposes of the proposed rule, an attorney who states she did "0 hours" of pro bono service has satisfied the disclosure requirement.

¹⁰ Rule 14 of the Rules of the Supreme Court on Lawyer Registration provides as follows: "The Lawyer Registration Office will place on noncompliant status any lawyer or judge who fails to meet all of the criteria to be on active or inactive status by the first day of the month following the due date established by Rule 11A. Once placed on noncompliant status, a lawyer's or judge's right to practice law in this state is automatically suspended." Rule 2A, which sets forth the requirements for "active" status, would need to include a subsection (6) that specifically refers to compliance with the proposed Rule 25.

before the rule takes effect. Once the rule takes effect, the Committee proposes the Court waive any penalty for non-disclosure for a period of one year. Other state court systems and bar entities have created frequently asked question (FAQ) documents to guide pro bono reporting. Please see examples from Maryland (<https://mdcourts.gov/probono/faqs>), New York (<https://ww2.nycourts.gov/attorneys/probono/reportingreq-faqs.shtml>) and Virginia (https://www.vsb.org/site/members/voluntary_pro_bono_reporting_faqs). If the Court decides to implement the proposed rule, the Committee and MSBA staff could assist in creating a FAQ document, as well as in developing programming and educational promotion over the one year phase-in period before the rule takes effect.¹¹

Conclusion

Many of the most significant features that support our state's civil legal aid system originated in proposals by the MSBA. From the creation of IOLTA accounts and the use of interest to support civil legal aid, CLE credit for pro bono service and the emeritus rule that enables retired lawyers to continue to provide pro bono representation, the MSBA has been at the forefront of successfully proposing mechanisms to increase access to justice. Over 20 years ago, the MSBA unsuccessfully sought to convince the Minnesota Supreme Court to adopt uniform mandatory reporting of pro bono service and contributions. In the intervening time, we have seen continued – and, indeed, increasing – demand for civil legal aid services to meet the needs of a more diverse low-income population.

Now is the time to once again petition the Minnesota Supreme Court to institute a uniform reporting system to evaluate the impact of Rule 6.1 and track the ongoing service of Minnesota's lawyers. The Judicial Branch's own strategic plan highlights its interest in increasing pro bono service, further supporting the urgency to adopt a reporting system. We can learn from the positive experiences of other states that have seen an increase in pro bono service and support after their rules were instituted. Minnesota will benefit from a reporting requirement that will provide necessary information while reinforcing the commitment to access to justice we all made when we received our licenses to practice law.

Kelly Tautges, ATJ Committee Co-chair

Tom Walsh, ATJ Committee Co-chair

¹¹ The MSBA has numerous channels through which it can educate members and the profession at large, including live and on demand CLEs, email and section newsletters, and statewide programs, such as the One Profession series.