STATE OF MINNESOTA

IN SUPREME COURT

ADM10-8002

ORDER PROMULGATING AMENDMENTS TO THE RULES OF THE SUPREME COURT ON LAWYER REGISTRATION

O R D E R

The Minnesota State Bar Association (MSBA) filed a petition proposing amendments to the Rules of the Supreme Court on Lawyer Registration. Specifically, the MSBA requests that we adopt a rule that requires lawyers admitted to practice in Minnesota to report, on an annual basis, the hours of pro bono service and whether financial contributions to organizations that provide legal services to persons of limited means were made. We opened a public comment period and held a public hearing on the MSBA's proposal and proposed rule amendments.

The court received four comments, none of which opposed the general proposal: to require Minnesota lawyers to report pro bono contributions as part of the lawyer's annual registration submission. The question raised by some comments was whether lawyers would comply with a pro bono reporting requirement if the lawyer declined to provide a response. In other words, while a lawyer would comply with the reporting obligation by reporting that no hours of pro bono services were provided and no qualifying contributions were made, could a lawyer comply with the reporting obligation by selecting a "decline to

respond" option? Would a "decline to respond" option comply with the requirement to report, even though it does not provide substantive information about contributions?

Lawyers, by virtue of their profession and education, have an opportunity to "cultivate knowledge of the law," "further the public's understanding of and confidence in the rule of law and the justice system," and enhance the access to justice for all members of society. Minn. R. Prof. Conduct, Preamble, ¶ 6. Rule 6.1 of the Rules of Professional Conduct recognizes a lawyer's "professional responsibility to provide legal services to those unable to pay," states that Minnesota lawyers should "aspire to render at least 50 hours" of such services each year, and encourages lawyers to "provide a substantial majority" of those hours to persons of limited means without receiving a fee or the expectation of a fee. Minn. R. Prof. Conduct 6.1(a). Pro bono services can be provided with a substantially reduced fee in some circumstances or through "participation in activities for improving the law, the legal system, or the legal profession." Minn. R. Prof. Conduct 6.1(b). Finally, lawyers are encouraged to "voluntarily contribute financial support to organizations that provide legal services to persons of limited means." Minn. R. Prof. Conduct 6.1.

We first adopted Rule 6.1 in 1985, adding the 50-hour aspirational goal to the rule in 1996. Although we have declined to require the reporting of pro bono contributions previously, *see Order Regarding Petition to Amend the Rules of the Sup. Ct. for Registration of Att'ys*, No. C9-81-1206 (Minn. filed Apr. 18, 2000); *In re Petition to Amend the Rules for Registration of Att'ys*, No. C9-81-1206, Order (Minn. filed May 23, 1991), Minnesota lawyers now have more than 20 years of experience with the aspirational goal

of Rule 6.1. We cannot assess whether this aspirational goal serves its purpose unless we better understand how Rule 6.1 operates in practice across Minnesota's legal profession.[1] Thus, in granting the MSBA's petition, we conclude that an opt-out answer—an option to decline to provide any substantive information regarding pro bono services or contributions—will not advance the objectives of Rule 6.1 of the Rules of Professional Conduct.[2]

To be clear, a lawyer will satisfy the disclosure requirement by reporting "0 hours" of pro bono services and stating whether financial contributions were made. On the other hand, failure to provide any response will result in administrative suspension of the lawyer's license to practice. *See* Rule 14A, Rules of the Supreme Court on Lawyer Registration (directing the office to "place on noncompliant status any lawyer or judge who

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[1] The dissent has philosophical and practical concerns with mandating disclosure of compliance with Rule 6.1's aspirational goal. Although many of these points speculate about future repercussions from a mandatory reporting obligation, the public comment period drew *no* objections to mandated reporting—only to the form of that report. In addition, our focus is on the "responsibility" of Minnesota lawyers "to provide legal services to those unable to pay." Minn. R. Prof. Conduct 6.1. That responsibility is a hollow one if we cannot assess the extent to which Minnesota lawyers make an effort to comply with the rule.

[2] Rule 25 of the Rules of the Supreme Court on Lawyer Registration, as adopted here, encompasses pro bono services provided under paragraphs (a) and (b) of Rule 6.1. As the MSBA acknowledges, all of the categories of pro bono services embraced by Rule 6.1 have value, *see* Minn. R. Prof. Conduct 6.1 cmt.—2005, ¶ 8, and thus all categories of contributions should be captured in reporting. Further, given the limited scope of contributions that can be made by some government attorneys, or by judges under Rule 3.7 of the Code of Judicial Conduct (authorizing limited participation by judges in the activities sponsored by educational, charitable, and civic organizations, including activities concerned with the law, the legal system, or the administration of justice), it is critical to allow reporting for all categories of contributions.

fails to meet all of the criteria to be on active or inactive status by the first day of the month" required for registration). To ensure adequate time for Minnesota lawyers to adjust to the new reporting requirements, the administrative penalty for failure to respond to the pro bono inquiries on the annual registration statement will not be effective during the first year of the reporting requirement.

IT IS HEREBY ORDERED THAT:

1. The petition of the Minnesota State Bar Association is granted. The Rules of the Supreme Court on Lawyer Registration are amended as shown in the attachment to this order.

2. Rules 23 and 25 of the Lawyer Registration Rules, as amended here, are effective as of January 1, 2022. Rule 2A of the Lawyer Registration Rules, as amended here, is effective as of January 1, 2023.

3. The Lawyer Registration Office is directed to collaborate with State Court Administration and the Minnesota State Bar Association to develop materials to notify and educate members of the Minnesota bar about the reporting obligation that will be effective with these rule amendments.

Dated: February 17, 2021

BY THE COURT:

Margaret H. Chutich
Associate Justice

D I S S E N T

ANDERSON, Justice (dissenting).

As an aspirational goal, Minnesota Rule of Professional Conduct 6.1 sets a laudable standard by encouraging lawyers to render at least 50 hours of pro bono public legal service each year. The amendments the court adopts today for the Lawyer Registration Rules go a substantial step further by requiring lawyers to annually report "the approximate number of hours of pro bono service provided" and financial contributions, if any, "to organizations that provide legal services to persons of limited means." Failure to report will lead to informal discipline in the form of an administrative suspension; continued practice thereafter would constitute an ethical violation, leading to formal discipline.[1]

There is no question that pro bono service performed by lawyers and financial contributions made to legal services organizations are of great value. And it is reasonable to expect that mandatory reporting will provide data to assess "how Rule 6.1 operates in practice across Minnesota's legal profession," as the court states. Nevertheless, I conclude that it is not appropriate for our court to force lawyers to report compliance with a non-enforceable aspirational goal by subjecting them to the risk of administrative suspension, particularly when in doing so we collect nonessential data. Therefore, I respectfully dissent.

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[1] The 50-hour goal is couched in aspirational, not obligatory, terms: "Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should *aspire* to render at least 50 hours of pro bono publico legal services per year." Minn. R. Prof. Conduct 6.1 (emphasis added). Further, comment 12 to the rule states that this responsibility is not subject to the formal "disciplinary process."

There are both philosophical and practical reasons for rejecting the request of the Minnesota State Bar Association (MSBA) to mandate reporting of pro bono service. I begin with the philosophical concern. Put most bluntly, it is not the business of our court to demand that lawyers disclose whether they comply with an aspirational goal included in the Rules of Professional Conduct. As the court recognizes, the unique role that lawyers hold in the administration of justice provides the opportunity to "cultivate knowledge of the law," "further the public's understanding of and confidence in the rule of law and the justice system," and enhance access to justice. Minn. R. Prof. Conduct, Preamble, ¶ 6. Many of the professional conduct rules provide aspirational standards that are subject to a lawyer's decision not to act. *See* Minn. R. Prof. Conduct, Scope, ¶ 14 (explaining that the Rules of Professional Conduct "are rules of reason," some of which are permissive and subject to the lawyer's discretion). Aspirational goals and standards that are subject to permissive, discretionary, choices are not properly a concern of the judiciary to track by compelling disclosure on the lawyer's activities.

We do, of course, regulate the practice of law. We have a constitutional duty to do so and are also authorized by the laws of Minnesota to do so. *See In re Riehm*, 883 N.W.2d 223, 232 (Minn. 2016) ("Our constitutional duty to regulate the practice of law is derived from the separation of powers in the Minnesota Constitution."); Minn. Stat. § 480.05 (2020) (vesting our court with power to prescribe rules that govern lawyers' "conduct in the practice of their profession"). The focus of our duty to regulate the legal profession is to ensure that those who are given the public trust demanded by a license to practice law have the necessary competence and character to justify that trust. *See In re Zbiegien*,

433 N.W.2d 871, 874 (Minn. 1988) ("The State has a substantial interest in the qualifications of members of the legal profession."); Minn. Stat. § 480.05 (authorizing us to adopt rules governing "the examination and admission to practice of attorneys at law" and rules governing the practice of law).

Our duty to regulate the practice of law does *not* require that we undertake an annual collection of data on the pro bono activities of Minnesota lawyers. Because the goal of pro bono service in Rule 6.1 is purely aspirational, and because lawyers can fulfill their duty under the amended rules by reporting "0" hours and no financial contributions, it is clear that the amendments the court adopts are not focused on assessing the fitness of lawyers to practice law. Rather, the new reporting requirements are aimed at measuring the extent to which lawyers are meeting the aspirational goal of Rule 6.1 and at increasing pro bono services.[2]

I do not quarrel with the stated objectives of the MSBA. Obviously, it is not only permissible but also beneficial for professional legal associations, such as the MSBA, to encourage its members specifically and the profession generally to engage in pro bono services and make financial contributions. But it is not the business of the judiciary to implicitly coerce lawyers to provide such services or contributions through an annual reporting requirement. *See generally In re Amends. to Rules Regulating the Fla. Bar—1-3.1(a) & Rules of Jud. Admin.—2.065 (Legal Aid)*, 598 So. 2d 41, 55 (Fla. 1992) (Grimes, J., concurring in part, dissenting in part) ("I can envision circumstances where the accumulated data could be used to try to embarrass lawyers into doing something they have

[2] The petition specifically identifies both of these goals.

a right to refuse to do."); *Amends. to Rules Regulating the Fla. Bar—1-3.1(a) & Rules of Jud. Admin.—2.065 (Legal Aid)*, 630 So. 2d 501, 507 (Fla. 1993), *as clarified on denial of reh'g* (Feb. 3, 1994) (McDonald, J., specially concurring) (stating that rule-making related to pro bono legal services "unreasonably and unnecessarily trespass[es] upon both the independence and individual consciences of the members of The [State] Bar").[3] When we require disclosures about the extent or amount of pro bono service and financial contributions by lawyers on pain of administrative suspension, we must ask whether the aspirational goal of providing pro bono service to society is now just a pale version of mandatory.[4]

The amendments adopted today gather data that have nothing to do with the fitness of lawyers to practice law but, at least implicitly, pressure lawyers to comply with a conduct standard that is non-enforceable and voluntary. Put another way, as laudable as support for pro bono activity is, it has little to do with regulating the practice of law.

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[3] Those concerns, expressed more than 20 years ago, remain relevant. *See* Gary Blankenship, *Pro Bono Hours and Dollar Donations Are Up*, Florida Bar News (Dec. 2019) (reporting statements by co-chairs of the Florida bar's Pro Bono Legal Services Committee that failing to do any pro bono service is "a violation of the oath" taken when joining the Florida bar, and that the committee intends to send letters to those who reported no pro bono service in the prior year).

[4] The question of whether a court, using its regulatory power, may require lawyers to provide uncompensated legal services raises numerous issues, constitutional and otherwise. These issues are not identical in the civil and criminal contexts, but in any case are not directly presented here. *See, e.g.*, John M. Burkoff, *Criminal Defense Ethics: Law & Liability* § 12:5 (2d ed. 2020) (explaining that courts have reached different conclusions about the constitutionality of uncompensated appointments in criminal proceedings).

I turn next to the practical problems implicated by today's order. It is not a surprise to see the MSBA once again asking that we impose mandatory reporting. We have previously rejected two petitions that the MSBA filed that requested the same form of reporting, once in 1991 and again in 2000. *See Order Regarding Pet. to Amend the Rules of the Sup. Ct. for Registration of Att'ys*, C9-81-1206 (Minn. filed Apr. 18, 2000); *In re Pet. to Amend the Rules for Registration of Att'ys*, C9-81-1206, Order (Minn. filed May 23, 1991). Other than the adoption of some form of mandatory reporting in other states, little has changed that makes the decision to mandate reporting more compelling now.[5]

Critically, I also note our more flexible, and reasonable, approach to collecting similar non-essential data from members of the profession. For example, lawyers are required to respond to questions about race and gender on the annual lawyer registration statement, but they have the option to "Choose Not to Answer." At the very least, I urge a

[5] The MSBA points to several developments since its prior petitions: we have more data about the impact of mandatory reporting requirements in other states, other voluntary reporting initiatives have had only limited success, the administrative burden for mandatory reporting has decreased as technology develops, mandatory pro bono reporting accords with the Judicial Council's strategic goal to "provide resources to improve accessibility to the courts for self-represented litigants and vulnerable adults," and the need for pro bono legal services may increase due to COVID-19. But most of these developments are essentially extensions of the "developments" that the MSBA asserted in its 1999 petition. *See* Pet. Minn. State Bar Ass'n at 2–7, *In re Amend. to the Minn. Rules of the Sup. Ct. for Registration of Att'ys*, C9-81-1206 (filed Sep. 21, 1999) ("MSBA 1999 Petition") (explaining that, since the 1991 petition, the "unmet need for legal services" had grown, mandatory reporting had worked successfully in one state, and voluntary reporting had yielded "unacceptably low levels of response" in other states).

Whether these developments are sufficient to justify a change in course when we have twice rejected mandatory reporting is questionable. In any case, the primary arguments advanced by the MSBA relating to unmet legal need and the usefulness of collecting comprehensive data do not allay the philosophical or practical concerns that I raise.

similar option here; that is, lawyers should be allowed to choose not to answer the question about pro bono services.

We should also acknowledge that today's decision is merely the beginning. More petitions are coming, and we will receive requests to gather and report on even more data in the years to come. The demand for data—from professional associations, academic institutions, and various public policy nonprofit organizations—is insatiable, and there is no better way to collect that data than to enlist our court, with its power to command a response, as the collection agency. We should decline this opportunity.

It requires little effort to conceive of additional information that will be the subject of future petitions as organizations seek to enhance their ability to assess, advance, and promote pro bono initiatives. For example, in its current petition, the MSBA suggests that, for the purpose of the new reporting requirement, a lawyer should not count the number of hours a lawyer expends to improve "the law, the legal system, or the legal profession" under paragraph (b)(3) of Rule 6.1 because "the more urgent need is to document how our profession is meeting the needs of low income Minnesotans." The court correctly rejects this request because Rule 6.1 does not prefer one form of pro bono service over another.

But the current petition likely will be followed by additional petitions seeking to further refine the data gathering by, for example, differentiating between hours that benefit low-income Minnesotans directly and hours that serve the legal profession generally. Other future petitions likely will include any number of additional data-based questions to be posed, compiled, and analyzed: How much did a lawyer contribute to legal-aid organizations versus organizations that participate in legal activities to improve the law?

Who were the recipient organizations? What general subjects of practice were encompassed by the lawyer's provision of pro bono services? What was the geographic region in which the lawyer provided pro bono services? What is the size of the firm with which the lawyer is associated? How many years has the lawyer been in practice?

These possibilities are hardly unfounded speculation. Nearly all these data points were encompassed by previous petitions and again are suggested as possibilities in the current petition. *See* MSBA 1999 Petition, *supra* note 5, App. at 5–6; Pet. Minn. State Bar Ass'n at 14, *In re Petition to Require Att'ys Licensed in Minn. to Report* Pro Bono *Legal Servs. & Fin. Contributions*, C9-81-1206 (Minn. filed Jan 14, 1991). Notably, collecting these additional data arguably could be justified by the same reason the court gives today for adopting these rule amendments: mandatory reporting assists us in understanding "how Rule 6.1 operates in practice across Minnesota's legal profession."[6]

Nor is this "slippery slope" problem limited to the extent of data that the court may be asked to collect. Many pro bono organizations have dual purposes; these organizations provide free legal services but also have a particular viewpoint on how the law should develop. It requires little imagination to foresee requests for information that might favor some organizations over others, such as recognizing financial contributions to some types of pro bono organization for the purpose of the aspirational goal, but not financial contributions to other types of organizations.

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[6] Because none of the filed comments directly oppose the petition, the court's decision focuses on its reason for excluding an opt-out option, which the court concludes would thwart its goal of measuring the success of Rule 6.1 as an aspirational goal.

Finally, although collecting mere numbers may seem innocuous, the court fails to appreciate that lawyers may have a variety of reasons for preferring nondisclosure of pro bono contributions. For example, a lawyer may worry about confidentiality. Although the amendments the court adopts assure that the information reported by lawyers will not be directly "accessible to the public," the amendments permit disclosure of the data without limitation as ordered by this court. The amendments do not even require that any such disclosures contain only nonidentifiable aggregated data. In addition, even confidential information may find its way into unexpected hands. *See Ams. for Prosperity Found. v. Becerra*, 903 F.3d 1000 (9th Cir. 2018) (upholding the demand of the California Attorney General for the federal tax form filed by charities listing their largest donors), *cert. granted*, __ S. Ct. __, 2021 WL 77243 (U.S. Jan 8, 2021) (No. 19-255).

Other lawyers may have moral or religious objections to tallying their pro bono service or disclosing that service to anyone else. This concern was raised at the public hearing on the MSBA's petition and has been raised in other states that have considered similar requests to mandate reporting. *See* Charles R. Brown, *The Democratic Process & Rule 6.1*, 11-Oct. Utah Bar J. 7, 7 (1998) (explaining that Utah's mandatory reporting proposal received pushback for a variety of reasons, including from those who were "morally offended by the concept of reporting charitable work"). The new mandatory reporting requirement also presents an ethical dilemma for some lawyers: do they violate their conscience by counting and disclosing their contributions, or face administrative suspension of the license to practice law because of failure to report, or refrain from providing pro bono contributions altogether?

There may be any number of other reasons why an attorney would prefer not to disclose his or her pro bono service, not the least of which is that this aspirational standard of conduct is based on *volunteer* activities. *See, e.g.*, Gary G. Sackett, *Dear Access to Justice Task Force*, 11-Feb. Utah Bar J. 22, 22 (1998) (statement by then-Chair of the Utah State Bar Ethics Advisory Opinion Committee that the proposed mandatory reporting rule "seems philosophically discordant with the notion of '*pro bono* services' "). Whatever an attorney's reason, the court's order makes no accommodation because it gives no option to decline to respond.[7]

In sum, I do not believe the court should use its regulatory authority over the legal profession to compel reporting of a lawyer's compliance (or lack thereof) with the aspirational goal of Rule 6.1 of the Rules of Professional Conduct.

For the foregoing reasons, I respectfully dissent.

GILDEA, Chief Justice (dissenting).

I join in the dissent of Justice Anderson.

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[7] The court responds to my philosophical and practical concerns in two ways. First, it observes that the public comment period drew objections only to the "form" of reporting and not to mandatory reporting itself. Although technically correct, those objections to form urged the court to add a "Choose Not to Answer" option, which would in effect make the reporting voluntary. Second, the court insists that the "responsibility" of lawyers under Rule 6.1 rings hollow unless we can assess the scope of compliance with the rule. But assessment alone does not give that responsibility more weight. Further, there is an unexamined assumption lurking here—that assessment of compliance with an aspirational rule using mandatory disclosure is appropriate and proper. I suggest it is not. In any case, the amendments deviate from the court's practice of maintaining the right of a lawyer not to answer questions that collect data unrelated to protection of the public.

RULES OF THE SUPREME COURT ON LAWYER REGISTRATION

Rule 2. Definitions

A. "Active status" means a license status for a lawyer or judge who:

(1) has paid the applicable required lawyer registration fee for the current year;
(2) is in compliance with the requirements of the Minnesota State Board of Continuing Legal Education or with Minnesota Judicial Branch policies regarding continuing judicial education;
(3) is not disbarred, suspended, or on disability status pursuant to Rule 28 of the Rules on Lawyers Professional Responsibility;
(4) is in compliance with Rule 1.15 and Appendix 1 of the Minnesota Rules of Professional Conduct regarding trust accounts and has so certified on the Lawyer Registration Statement; ~~and~~
(5) is in compliance with Rule 22 of these Rules; and
(6) is in compliance with Rule 25 of these Rules.

A lawyer or judge on active status is in good standing and is authorized to practice law in this state.

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Rule 23. Access to Lawyer Registration Records

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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.

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 of the Minnesota Rules of Professional Conduct; and (2) whether the attorney has made any financial contributions to organizations that provide legal services to persons of limited means.