



# Proposed Rule Seeks to Measure Pro Bono Contribution

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To better meet the needs of Coloradans who cannot afford a lawyer, the Colorado Access to Justice Commission (Commission) and the CBA Executive Council have unanimously approved a proposed rule change that would require Colorado attorneys to report annually and confidentially their pro bono hours and donations to organizations that assist low-income Coloradans in civil cases. The data collected would be used in the aggregate primarily to (1) better understand the extent of Colorado lawyers' pro bono service and

financial contribution, and (2) better assist the Colorado legal profession in encouraging pro bono service and financial contribution. The proposal parallels the reporting requirements in 10 other states and, importantly, does not mandate pro bono service or contribution.

A subcommittee of the Colorado Supreme Court's Advisory Committee on the Practice of Law is currently reviewing the proposal. That subcommittee will make a recommendation on the proposal to the Advisory Committee, which, in turn, will make a recommendation to the Supreme Court.<sup>1</sup>

## Background

In early 2021, a working group appointed by the Commission's Delivery Committee recommended the adoption of a rule to require pro bono reporting in Colorado. The working group considered the arguments for and against mandatory and voluntary pro bono reporting rules set forth on the American Bar Association's website.<sup>2</sup> The arguments in favor of mandatory pro bono reporting are set forth in the working group's report (Commission Report), including that such rules increase access to justice and provide an effective mechanism for collecting reliable, accurate, and consistent data to evaluate the delivery of pro bono legal services.<sup>3</sup> The report also refutes the arguments against required pro bono reporting rules, including that requiring pro bono reporting inevitably leads to a mandatory pro bono service requirement and that such rules violate the constitutional right to privacy. Further, the report contains information on other states' pro bono reporting provisions,<sup>4</sup> analyzes Colorado's past efforts to amend its pro bono rule, and recommends that Colorado adopt its own required pro bono reporting rule.

The Delivery Committee—made up of Colorado lawyers, judges, and legal profes-

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sionals—unanimously approved the working group’s recommendation. The Commission and the CBA’s Executive Council subsequently approved it unanimously.

### **The Proposed Pro Bono Reporting Rule**

The Commission has since recommended that the Colorado Supreme Court adopt a rule to obtain an annual, aggregate, and confidential reporting of Colorado lawyers’ pro bono service and their contributions to organizations that provide legal services to low-income Coloradans. Under the recommendation, (1) pro bono work would remain voluntary, and (2) the collection of information regarding Colorado lawyers’ pro bono hours and financial contributions would only be made available in the aggregate to protect individuals’ private information.

Lawyers would continue to be free to do as much or as little pro bono work as they wish and donate as much or as little to pro bono programs as they choose. But they would be required to report each. If zero is the number, then the lawyer would report zero and face no repercussions.

The pro bono reporting requirement would provide a baseline to measure Colorado lawyers’ pro bono service and financial contributions to organizations providing legal services to low-income individuals. The baseline would then be used to assess the effectiveness of new or existing programs in increasing pro bono participation and contributions.

### **What Would Lawyers Be Required to Report?**

The Commission Report specifically recommends that the Colorado Supreme Court require the reporting of voluntary “pro bono work,” as defined in Rule 6.1 of the Colorado Rules of Professional Conduct, in the annual attorney registration statement. Colorado Rule of Civil Procedure 227(A)(2)(a) sets forth the current contents of the statement. It provides that attorneys and attorney judges must provide information regarding child support, their Colorado Lawyer Trust Account Foundation (COLTAF) account (if applicable), and professional liability insurance. If the Supreme Court

adopts the proposed pro bono reporting requirement, this rule would also require attorneys to report annually the number of pro bono hours they performed and the financial contributions they made to pro bono providers during the preceding year. The Colorado Supreme Court would appoint its Advisory Committee or create a new committee to review the aggregate data gathered after three years of the effective date of the new requirement. That committee would analyze the aggregate information to determine

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whether the rule should be further modified, remain as is, or revert to its pre-amendment version.

As discussed further below, the likely benefits derived from gathering Colorado lawyers’ aggregate pro bono hours and financial contributions to pro bono organizations would substantially outweigh the minimal burden of reporting. Just like the current requirement that Colorado lawyers annually report certain information (e.g., whether an attorney has outstanding child

support obligations), the collection of this data would be the judicial branch’s responsibility. The report recommends that the new rule be enforced in the same manner as the current requirement for providing information necessary to complete the annual registration form. However, the information provided could not be a basis of a disciplinary complaint.

### **Why Now?**

Coloradans of limited means face more challenges in obtaining legal assistance than ever before. A recent study by the Colorado Center on Law and Policy discovered that Colorado has fewer than one legal services lawyer for every 30,000 people living in poverty.<sup>5</sup> According to the Legal Aid Foundation of Colorado’s 2020–21 report, Colorado Legal Services handled 9,185 cases in 2020, benefiting 18,412 individuals.<sup>6</sup> In contrast, recent US Census Bureau data showed that 377,014 residents in the six-county Denver metropolitan area alone qualified for free legal services because their incomes were at or below 125% of the federal poverty level.<sup>7</sup> Further, 71% of Coloradans, or 267,680 individuals, may have experienced a legal problem of some kind in 2020.<sup>8</sup> Plainly, there is an access to justice gap in Colorado.

Statistics from the Colorado Judicial Branch have consistently shown that approximately 75% of all litigants in domestic relations cases do not have a lawyer.<sup>9</sup> Ninety eight percent of defendants in county court civil cases and approximately 40% of district court civil litigants in cases outside of family law do not have lawyers.<sup>10</sup> Most pro se litigants do not have lawyers because they cannot afford one and cannot obtain representation from a legal services or pro bono lawyer.

Despite that extreme unmet need, we do not know the number of pro bono hours and financial contributions to pro bono organizations that Colorado lawyers provide each year. Neither the Colorado Judicial Branch nor any other entity collects this data. Available statistics, while not conclusive, are far from encouraging. Pro bono work appears to be declining. According to information provided to the Delivery Committee in April 2021, only 225 out of approximately 10,000 available lawyers in the Denver metro-

politan area provided pro bono representation in 2020 through Metro Volunteer Lawyers, the Denver Bar Association's pro bono program. Similarly, only about 100 of approximately 2,000 lawyers in El Paso County provided pro bono service through its Justice Project in Colorado Springs.<sup>11</sup> In addition, the number of law firms participating in the Colorado Supreme Court's Pro Bono Recognition Program has dropped by more than 100 over the past few years.<sup>12</sup> (Under that program, law firms and individual lawyers pledge to contribute an average of 50 hours of pro bono service per lawyer during the coming year.)

Although some Colorado lawyers provide pro bono service through other pro bono programs across the state, these statistics suggest that many Colorado lawyers are not meeting their 50-hour annual aspirational responsibility under Rule 6.1 of the ethics rules. The proposed rule would establish a baseline to measure the number of hours of pro bono service and the amount of financial contributions to assist low-income Coloradans. This, in turn, would enable the Commission, the CBA, and local bar associations to measure the success of programs that seek to increase pro bono service and financial contributions to help low-income Coloradans.

### Reporting Requirements in Other States

The reporting requirement proposal comes nearly a quarter century after Colorado last considered pro bono reporting in 1998. Significantly, one state required pro bono reporting at that time; today, 10 states require their lawyers to report their annual hours of pro bono service: Florida, Hawaii, Illinois, Indiana, Maryland, Minnesota, Mississippi, Nevada, New Mexico, and New York.

States differ in their approaches. Florida and Indiana expressly implement their reporting rules via their ethics rules.<sup>13</sup> Nevada imposes a \$100 fine for failure to comply with its reporting rule. Mississippi and New Mexico treat the failure to comply with the reporting rule the same as a failure to pay annual bar dues or to comply with CLE requirements. Hawaii, Illinois, and Maryland may suspend attorneys who fail to comply with their rules. Florida and New York

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make reporting financial contributions—but not reporting pro bono hours—voluntary. Two states, Illinois<sup>14</sup> and Hawaii,<sup>15</sup> have adopted ethical or court rules that specifically allow for the publication of the pro bono data on an aggregate basis. While their rules do not mention it, Indiana<sup>16</sup> and Maryland<sup>17</sup> both publish the data they gather only on an aggregate basis. Effective this year, Minnesota's Rules of the Supreme Court on Lawyer Registration make it mandatory for its lawyers to report the approximate number of hours of pro bono service and whether the attorney has made any financial contributions to organizations that provide legal services to persons of limited means.<sup>18</sup>

While most states have not made their statistics public, both Florida and New York have noted an increase in pro bono service and benefits after pro bono reporting was implemented in their states. Since Florida began to require the reporting of pro bono efforts in 1993, it has

experienced a noticeable increase in lawyers' pro bono hours and a steady increase in pro bono charitable contributions. Florida's pro bono hours have increased from approximately 800,000 to approximately 1.5 million since 1993.<sup>19</sup> It also went from having nearly \$1.5 million to just over \$6.7 million donated to pro bono organizations in the state.<sup>20</sup>

The Delivery Committee rejected the alternative of voluntary pro bono reporting. Information from the 13 voluntary reporting states (listed in the Commission Report) indicated that, unlike required reporting, such reporting has not had a significant impact on pro bono hours or contributions to pro bono organizations and has not provided reliable data.<sup>21</sup> States that have implemented voluntary pro bono reporting note that a relatively small percentage of lawyers report their pro bono hours.

### Arguments Concerning Required Pro Bono Reporting

As noted above, the America Bar Association has listed numerous reasons to implement required pro bono reporting,<sup>22</sup> such as its tendency to increase delivery of legal services, its effectiveness for collecting accurate and useful data, its tendency to increase monetary contributions, its tendency to create a culture of positive peer pressure, and its ability to promote increased involvement in pro bono work. Required pro bono reporting may raise awareness about a lawyer's professional responsibility to provide pro bono legal services and the need for free or reduced fee legal services, as well as opportunities for pro bono involvement.

Some who oppose required reporting argue that such rules violate a right to privacy by publicizing private acts of charity, violate the right to be free from involuntary servitude, invite political opposition to pro bono work, and may encourage negative peer pressure by singling out lawyers who don't do pro bono work, as well as that judicial aspirants could be negatively affected by information provided in past years.<sup>23</sup> The confidentiality requirement refutes the majority of these arguments. Under the proposed rule, the information collected would be kept confidential and would not

be publicly accessible (except as aggregate numbers). Therefore, no individual lawyer's hours, contributions, or lack thereof would be subject to public examination. Moreover, lawyers are already required to provide information regarding their child support, COLTAF, and professional liability insurance on their annual Colorado registration forms. If the proposed rule were adopted, attorneys would merely be required to report a small amount of additional information. Colorado attorneys would not be required to take on any additional pro bono cases or hours or make any financial contributions to assist low-income Coloradans.

While some argue that required reporting may impose a financial burden on the state, and enforcing a required reporting rule may be cost-prohibitive, the Commission's proposal does not include the imposition of disciplinary sanctions.<sup>24</sup> As for the responsibility it would place on Colorado attorneys, many lawyers already maintain an hourly accounting of their work. Additionally, lawyers in the 10 states requiring pro bono reporting have not expressed difficulty in complying with their reporting requirements. Similarly, the administrative costs in these states have not been cost-prohibitive.

The largest and most widely supported reason for opposing required reporting is that it is a step toward mandating that lawyers contribute a minimum number of pro bono hours. This fear is unfounded. No jurisdiction with a mandatory reporting rule has adopted a pro bono requirement. In fact, the very same reporting requirement has been in place in New York and Florida for over two decades and in at least six other states for more than a decade. None of these states has adopted a mandatory pro bono requirement. There is no basis to expect that requiring confidential, aggregate reporting of pro bono information would lead to mandated pro bono service in Colorado.

## Conclusion

The overarching goal of the proposed pro bono reporting rule is to better serve the growing number of Coloradans who cannot afford a lawyer. We cannot effectively work to broaden pro bono service in Colorado without a way to measure success. **CL**

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## NOTES

1. The Advisory Committee to the Supreme Court is expected to make its recommendation to the Supreme Court in early 2023.
2. See ABA Standing Committee on Pro Bono and Public Service, Pro Bono Reporting, [https://www.americanbar.org/groups/probono\\_public\\_service/policy/arguments](https://www.americanbar.org/groups/probono_public_service/policy/arguments).
3. See 2022 Access to Justice Commission Pro Bono Report: Recommendations on Pro Bono Reporting in Colorado at 13-16 (2022), <https://www.coloradoaccesstojustice.org/reports> (hereinafter Commission Report).
4. To obtain this information, the working group asked representatives of states that adopted pro bono reporting rules: (1) how long has your pro bono reporting rule been in effect; (2) what percentage of lawyers in your state report their pro bono service; (3) does your reporting form define pro bono service; (4) does your reporting form ask lawyers to break down their pro bono service into categories, such as representing indigent people without charge, reduced fee representation, or representation of organizations; and (5) has your reporting rule increased the amount of pro bono service or the number of lawyers providing pro bono service? The answers provided by each state are found in Appendix A to the Commission Report.
5. See Bryson, "Getting Legal Help Can Be a Barrier for Low-Income Colorado Families Who Need Safe, Clean Housing," *Denverite* (May 28, 2019), <https://denverite.com/2019/05/28/getting-legal-help-can-be-a-barrier-for-low-income-colorado-families-who-need-safe-clean-housing>.
6. See Legal Aid Found. Colo., Commitment + Action: Annual Report 2020-21 at 2 (2021).
7. See Taubman, "Has the Time Come to Revise Our Pro Bono Rules?," 97 *Den. L. Rev.* 395, 405-09 (2020).
8. See *id.*
9. Hood and Cordova, "The Colorado Equal Access Center: Connecting Unrepresented Litigants to Legal Resources Through Technology," 45 *Colo. Law.* 55, 55 (Oct. 2016). See also Hobbs Jr., "Judicial Support for Pro Bono Legal Service," 89 *Den. U. L. Rev.* 851, 853 (2012).
10. Office of the State Court Administrator, Court Services Division, Cases and Parties without Attorney Representation in Civil Cases FY 2015 at 3, 5 (Dec. 2015).
11. Commission Report at 5.
12. See Taubman, *supra* note 7 at 434.
13. See Commission Report, Exhibit D.
14. See Illinois Supreme Court Rule 756, Registration and Fees, <https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/fc6a5c0d-8160-4132-9a40-28f702dc0a55/Rule%20756.pdf>.
15. See Rules of the Supreme Court of the State of Hawai'i, [https://www.courts.state.hi.us/docs/court\\_rules/rules/rsch.htm#Rule%2017](https://www.courts.state.hi.us/docs/court_rules/rules/rsch.htm#Rule%2017).
16. See Kile-Maxwell and Coleman, "Pro Bono Matters: Indiana's Pro Bono Reporting System Reflects Growing Participation," *Ind. Law.* (Aug. 19, 2020), <https://www.theindianalawyer.com/articles/pro-bono-matters-indianas-pro-bono-reporting-system-reflects-growing-participation>.
17. See Maryland Courts website, <https://www.courts.state.md.us/probono/reportsinfopackets>.
18. See Minnesota Rules of the Supreme Court on Lawyer Registration, Rule 25, Uniform Reporting of Pro Bono Service and Financial Contributions, [www.lro.mn.gov/rules](http://www.lro.mn.gov/rules).
19. See Florida Bar website, Facts and Statistics, <https://www.floridabar.org/public/probono/probono002>.
20. See *id.* The Florida bar does not report the average number of pro bono hours or financial contributions per lawyer.
21. See Commission Report at 45.
22. ABA Standing Committee on Pro Bono and Public Service, Pro Bono Reporting, [https://www.americanbar.org/groups/probono\\_public\\_service/policy/arguments](https://www.americanbar.org/groups/probono_public_service/policy/arguments).
23. *Id.*
24. *Id.*