

Pro Bono Practices and Opportunities in South Africa

Excerpt from: A Survey of Pro Bono Practices and Opportunities in Selected Jurisdictions

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South Africa operates a state system of legal aid which uses public funds to assist those in need of legal services. Nevertheless, it is widely recognized that the legal aid system falls short of meeting the needs of the poorest South Africans, particularly in view of the specific challenges facing a country that has seen such significant changes over the last 20 years.

The legal profession in South Africa had a long history of involvement with voluntary work during the apartheid era, and in recent years there have increasingly been calls for lawyers to redouble their *pro bono* efforts as part of a new spirit of volunteerism which the South African government sees as key to the country's ongoing development. Following a national conference in 2002 entitled "*The Responsibility of Lawyers in South Africa to Undertake Pro Bono Publico and Public Interest Work*", one of South Africa's regional law societies, the Law Society of the Cape of Good Hope (the "Cape Law Society"), introduced a mandatory *pro bono* initiative for its members. Since then, several other regional law societies have followed suit such as the Black Lawyers Association and Kwa Zulu Law Society. In addition, a number of South Africa's leading law firms have made significant efforts to develop and increase their *pro bono* activities, including the implementation of a *pro bono* website seeking to match firm lawyers with organizations in need. It is expected that *pro bono* work will continue to grow in importance for the South African legal profession over the next several years, as law professionals are increasingly encouraged to establish their social responsibility credentials consistent with principles embedded in the South African Constitution.

I. *Legal Services and the Legal Profession in South Africa*

The legal profession in South Africa is comprised of two types of lawyers: attorneys and advocates. No dual practice is permitted. Attorneys provide advice on matters ranging from commercial transactions to the drafting of wills. Advocates represent clients in major court proceedings and some arbitrations, and may also be instructed to provide written or oral opinions on matters involving South African law. The advocates' profession in South Africa is a referral profession, meaning that those seeking advice from or representation by an advocate must first approach an attorney who, in turn, will instruct an advocate. Attorneys are regulated by the regional law societies – the Black Lawyers Association, Law Society of the Northern Provinces, the Cape Law Society, the Kwa Zulu Law Society, the Law Society of the Free State and the National Association of Democratic Lawyers, under the umbrella body of the Law Society of South Africa ("LSSA").¹ The advocates' profession in South Africa is represented by the General Council of the Bar ("GCB"), a federal body comprising ten societies of practicing advocates known as Bars. There is a Bar at the seat of every provincial and local division of the High Court of South Africa.²

II. *Legal Aid*

Separate from *pro bono* practices, South Africa has a system of legal aid which uses public funds to assist those unable to afford legal services. The Legal Aid Board of South Africa (the "Board") is an autonomous statutory body established by the Legal Aid Act (Act 22 of 1969) and the Legal Aid Amendment Act (Act 20 of 1996). Its objective is to afford every citizen access to justice, as contemplated in the Constitution of South Africa (Act 108 of 1996), by providing legal representation to indigent persons at the State's expense.³ The Board's work covers both civil and

¹ See www.lssa.org.za.

² See www.sabar.co.za.

³ See Annual Report for the period 2008 – 2009 of the Legal Aid Board; Legal Aid Guide 2009.

criminal cases, although criminal matters comprise a larger percentage of its services and budget. In its civil work, the Board is particularly dedicated to providing legal advice and protecting and defending the rights of women, children and the homeless.

The Board is accountable to the Minister of Justice and Constitutional Development, and ultimately to Parliament, for service delivery and the efficient and effective use of its budget allocation. In 2008, the Board secured Parliament's approval on a new Legal Aid Guide, which was prepared for the first time in plain English to improve comprehension and to make the guide more accessible to legal practitioners, community organizers, and clients.

According to its Annual Report,⁴ during the year 2008 to 2009, the Board provided:

- the delivery of legal services in 434,932 new legal matters;
- legal assistance in 46,194 matters involving children; and
- assistance in 404,613 new criminal matters and 30,309 civil matters.

The Board uses three principle outlets to fulfill its mandate:

- justice centers;
- cooperation agreements with university law clinics; and
- special litigation.

The Board also continues to explore other effective and efficient access-to-justice models to complement the outlets outlined above.

A. Justice Centers

The justice centers operate in a similar fashion to private practice firms and are the primary source for applicants seeking legal aid in South Africa. Each justice center is headed by a principal attorney, with assistance from professional assistants, candidate attorneys and paralegals. Justice centers offer legal assistance for certain defined criminal and civil matters and the services offered include advice, referrals and litigation.⁵ The Board has established approximately 62 justice centers as of 2009 with 55 satellite offices serving mostly rural areas. Through its justice

⁴ See page 5 and 19 of the Annual Report for the period 2008-2009 of the Legal Aid Board.

⁵ Matters eligible for legal aid are outlined in Chapter 4 of the Legal Aid Guide 2009. Criminal and civil matters eligible for representation are offense and jurisdiction specific. For example, legal aid may be granted in matters where District Courts have increased penal jurisdiction, such as theft, dealing in drugs and drunk driving. Legal aid is available for many common law offenses such as arson, assault, bribery, fraud, rape, murder, kidnapping, and robbery. Covered statutory offenses include those relating to children, mental disability, corruption and vehicle theft. Legal aid is also available for miscellaneous offenses such as bail reviews and HIV testing. In addition, legal aid is available for certain High Court appeals if the client qualifies under the means test. On the civil side, legal aid is available for family law issues including divorce, child custody and domestic violence and in a range of other civil matters such as labor dispute, housing law and asylum. There are many limitations placed on the scope of civil legal aid, such as no representation for certain personal torts (infringement of privacy and adultery); for cases in small claims court; and in the administration of estates.

centers, which employ a total of approximately 1,600 salaried lawyers, the Board estimates that it provides legal aid to approximately 114,000 people in South Africa each year.⁶

B. Cooperation Agreements

The Board enters into cooperation agreements with certain university law clinics to provide additional legal assistance to the local communities. As of 2009, cooperation agreements are in place with the following universities:

- Potchefstroom University for Christian Higher Education;
- University of the Witwatersrand;
- University of Venda;
- Stellenbosch University; and
- University of Port Elizabeth.

C. Special Litigation

Special litigation involves cases which, if successful, would have a major impact on South African law. These types of cases primarily involve class actions suits as a means to challenge constitutional violations and require special teams of legal representatives to assist them. The legal representatives may be chosen from the justice centers or they may be private practice attorneys. The Board considers special litigation on a case-by-case basis, and the cost is covered through a dedicated fund.

D. Eligibility for Legal Aid

Legal aid in South Africa is generally means-tested.⁷ The Board grants legal aid in criminal cases to any indigent person, defined generally as a person with no income or income less than 5,000 rand (approximately \$700 US) per month. In determining whether a person qualifies for legal aid in criminal matters under this standard, the Board will consider the income of the applicant and his or her assets. The Board grants legal aid in civil matters to all children resident in South Africa or any indigent person. In determining whether a person qualifies for legal aid in civil matters, the joint income and assets of an applicant and his or her spouse are considered, except in certain situations, for example, divorce proceedings.

⁶ See Annual Report for the period 2008 – 2009 of the Legal Aid Board.

⁷ See Legal Aid Guide 2009. For Special Litigation matters, the Board operates under an Impact Services Policy, which recognizes that the Board may have opportunities to assist or fund litigation with the potential to positively effect the lives of a large number of indigent persons. The Board looks at whether an opportunity exists to establish legal precedent either by class action or strategic intervention and rendering of non-litigious services. Rather than evaluate each client individually, special litigation matters are submitted to the Board through written proposals and approved on a case-by-case basis.

III. *Pro Bono Legal Advice*

Although *pro bono* work had been carried out by legal practitioners on an informal basis for many years,⁸ no formal initiative in respect to *pro bono* practice developed in South Africa until 2003, when one of the regional law societies regulating attorneys, the Cape Law Society, instituted a mandatory *pro bono* rule for its members. All attorneys practicing in the Northern, Western and Eastern Cape Provinces are required to register as members of the Cape Law Society. The society's initiative was prompted by the recognition that the legal aid system, even coupled with the *pro bono* work being carried out, was not adequate to address the South African public's legal needs, particularly those of the poorest members of South African society.

A. The Cape Law Society Rules

"*Pro Bono Services*" are defined under the rules of the Cape Law Society (the "Cape Rules") as including, but not limited to:

*"the delivery of advice, opinion or assistance in matters falling within the professional competence of an attorney, to facilitate access to justice for those who cannot afford to pay, through recognised structures [...]. Recognised structures shall include, but not be limited to, the office of the Registrars of the High Court when issuing in forma pauperis instructions, Legal i, small claims courts, community (non-commercial) advice offices, university clinics, non-governmental organizations, the office of the Inspectorate of Prisons, Circle and specialist committees of the Society, etc [...]. Those who cannot afford to pay shall be those who ordinarily qualify for assistance through recognised structures."*⁹

The Cape Law Society requires each of its members¹⁰ to perform at least 24 hours of *pro bono* services per calendar year (subject to their being approached to do so).¹¹ Refusing to perform *pro bono* services without good cause amounts to unprofessional conduct.¹²

Members may submit to the Cape Law Society a written description of areas of professional work proposed for recognition as "*Pro Bono Services*".¹³ The Cape Law Society is obliged to publish, through "The Cape Attorney," a list of services which, when performed by

⁸ Indeed, it was noted during the introduction to the May 2002 conference on "*The Responsibility of lawyers in South Africa to undertake Pro Bono Publico and Public Interest Work*" that "the legal profession in South Africa has a long history of engagement in voluntary legal service. During the apartheid era, it was largely *pro bono* lawyers who actively challenged the racist and oppressive laws of the time."

⁹ Rule 21.1 of the Cape Rules.

¹⁰ Practicing members who have practiced for less than 40 years and who are less than 60 years of age.

¹¹ Rule 21 of the Cape Rules. This is also subject to limited carve-outs for attorneys who either became practicing members in the year of publication of the Cape Rules or become practicing members during the course of a year.

¹² Under Rule 21.16 of the Cape Rules, "*it shall be unprofessional conduct for a practicing member who has still to perform pro bono service hours to refuse, with no good cause, to deliver pro bono services.*" Members guilty of unprofessional conduct are referred to the Cape Law Society Disciplinary Committee who may elect to impose a fine as punishment. The maximum punishment for unprofessional conduct is R10,000 (approximately \$1,500 US). Rule 15.9.3 of the Cape Rules.

¹³ Rule 21.3 of the Cape Rules.

attorneys at no charge for those who cannot afford to pay, are recognized as *pro bono* services capable of being delivered in compliance with the provisions of the Cape Rules.¹⁴

Several other South African law societies have followed the lead of the Cape Law Society and implemented their own *pro bono* requirements. In 2009, the Black Lawyers Association instituted a *pro bono* requirement nearly identical to the Cape Law Society's, including a 24 hour *pro bono* requirement per calendar year, a provision calling for the publication of those lawyers meeting requirements in a Society circular, and deeming the failure to deliver *pro bono* services unprofessional conduct.¹⁵ Similarly, the Kwa Zulu Law Society implemented a *pro bono* rule that mirrors the Cape Law Society's requirements.¹⁶ At a recent annual meeting of the Law Society of the Northern Provinces, the Society decided that all member attorneys should be required to provide *pro bono* legal services as well.

B. Non-mandatory Pro Bono Services

In addition to the efforts of the law societies, individual legal practitioners and firms in South Africa are continuing to provide *pro bono* services on a voluntary and informal basis. In 2006, one of South Africa's biggest law firms, Edward Nathan Sonnenbergs, introduced a scheme under which each of its attorneys is required to carry out a minimum of 32 hours of *pro bono* work per calendar year, and established a dedicated *pro bono* office in Mitchells Plain, an impoverished township on the outskirts of Cape Town. The aim of the Mitchells Plain office is to provide a convenient location for township residents to access free legal advice and be educated about their legal rights. As another example, the law firm Webber Wentzel has a permanent *pro bono* partner to coordinate the firm's *pro bono* practice. According to the firm's *pro bono* department 2009 Annual Report, Webber Wentzel attorneys provide services on a wide-range of cases and issues including police misconduct, land reform and housing, HIV/AIDS discrimination and violence against women.

Bowman Gilfillan, another prominent South African law firm, expects each of its attorneys to contribute an average of 50 hours of *pro bono* work annually. Since 2003, Bowman Gilfillan attorneys have contributed over 51,000 hours of *pro bono* worth an estimated 43 million rand. Bowman Gilfillan also implements a program whereby attorneys are placed on six-month assignments with the Public Defenders office. Additionally, in 2005, Bowman Gilfillan helped launch ProBono.org, a website based out of Johannesburg which matches law firm attorneys interested in practicing *pro bono* with cases provided by outreach programs specializing in high need areas such as HIV/AIDS organizations and refugee legal clinics.¹⁷

At the University of Cape Town, it is a compulsory graduation requirement for law students to complete a total of 60 hours of community service. The service need not be legally oriented, but must provide a direct service or benefit to an underprivileged or vulnerable group or to a social or economic uplift organization.

¹⁴ Rule 21.4 of the Cape Rules.

¹⁵ Rule 25 of the Black Lawyers Association Rules.

¹⁶ Rule 27 of the Kwa Zulu Law Society Rules.

¹⁷ See www.bowman.co.za/pro-bono.asp

IV. *Conclusion*

It has long been recognized that access to justice for the poorest in society is crucial to South Africa's ongoing development. The organizers of the 2002 national conference on "*The Responsibility of lawyers in South Africa to undertake Pro Bono Publico and Public Interest Work*" noted that the culture of *pro bono* work was underdeveloped in South Africa compared to other jurisdictions, and that developing a *pro bono* policy was one means of rising to President Thabo Mbeki's call for South Africans to engage in a new spirit of volunteerism in order to help the country consolidate the democratic gains achieved since 1994. In preparation for the conference, the organization Lawyers for Human Rights conducted a survey of over 6,000 law firms in South Africa, examining their involvement in *pro bono* work. Of the responding firms (with a response rate of only 2.5%), the majority indicated that they were involved in *pro bono* work, yet only a third considered themselves "very familiar" with the concept, often mistaking it for community service or charity work. The findings of the survey indicated that, despite the confusion over the concept of *pro bono* work, law firms were in favor of developing a more formal *pro bono* system, but one that was based on voluntary input.

As noted above, in the period since the conference, the Cape Law Society's mandatory *pro bono* initiative has been introduced, a number of South African law firms have independently developed more structured *pro bono* practices and engaged in *pro bono* beyond the firm in efforts like ProBono.org. In recent years, the Black Lawyers Association and the Kwa Zulu Law Society have followed the Cape Law Society's lead and implemented their own *pro bono* policies. The trend illustrates a renewed commitment to *pro bono* among formalized South African legal organizations. Nevertheless, access to justice, particularly for the poorest communities, continues to be a significant problem in South Africa. In light of numerous pressures on State funding, it is likely that the legal profession will increasingly be looked on to develop and broaden voluntary *pro bono* practices in an effort to address the problem. In a country where the gap between the wealthy and poor is vast, the need for *pro bono* legal services for South Africa's most underserved populations continues.