

Pro Bono Practices and Opportunities in Brazil

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

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Brazil is Latin America's largest country and arguably the region's leading economy, home to a vibrant and developed legal community. Despite these and its many other positive attributes, it is also a country suffering from blatant inequality. While this combination would appear to present meaningful opportunities for the provision of *pro bono* legal services, the Brazilian legal community does not have a tradition of providing such services and regulatory restrictions have significantly contributed to hinder the development of *pro bono* work in the country. However, this scenario has seen important changes in the last few years, with gradual but clear signs of evolution in terms of regulation and the mentality of the legal community in general. Now, many leading practitioners and law firms devote ever-increasing resources to *pro bono* services and it appears that such activities will only increase further in the future. This chapter describes the current regulation of *pro bono* legal advice in Brazil and addresses the opportunities available to international law firms in this area.

I. *Legal Services and the Legal Profession in Brazil*

Brazil is a federated nation comprised of 26 states (*estados*) and the federal district, where the capital *Brasília* is located. The practice of law is organized through bar associations in each of these jurisdictions (each jurisdiction has a distinct "Bar Association"). These Bar Associations are in turn joined into the *Ordem dos Advogados do Brasil* (the "Brazilian Bar Association"),¹ which is empowered by federal law to regulate the profession. The practice of law in Brazil is regulated by means of a federal statute – Law No. 8906 of 4 July 1994 – and of enacting legislation, among which the Brazilian Bar Association's Code of Ethics and Discipline of 13 February 1995.

A. Law No. 8906, Regulating the Legal Profession in Brazil

Each of the states and the federal district is responsible for licensing attorneys in their territories, through the respective Bar Associations. For example, an attorney must have gained admission to the Bar Association of Sao Paulo² prior to practicing law in that jurisdiction. In order to be admitted to a Bar Association, a lawyer must have obtained a law degree from an accredited university and must have passed the applicable state bar examination.³ Prospective attorneys may register with a Bar Association as trainees, in order to follow a two year internship at a registered legal practice, usually a law firm.⁴ This internship is typically performed concurrently with the prospective attorney's legal studies.

While there is a significant and growing number of international law firms that have established offices in Brazil, foreign lawyers are not authorized to practice Brazilian law. The Brazilian Bar Association authorizes foreign lawyers to act as consultants in foreign law, as long as they are registered with the Brazilian Bar Association for this purpose.⁵ Many international firms have established offices in Brazil by entering into close affiliations with local Brazilian firms. Alliances between international and Brazilian firms have been subject to increasing scrutiny from Bar Associations, as local firms argue that in some cases these alliances in practice serve to bypass the existing restrictions for foreign lawyers to practice law in Brazil.

¹ <http://www.oab.org.br>.

² <http://www.aasp.org.br>.

³ Law No. 8906 of 4 July 1994, Article 8.

⁴ Law No. 8906 of 4 July 1994, Article 9.

⁵ Ruling No. 91 of 13 March 2000 of the Brazilian Bar Association.

B. Rules on Legal Ethics and Professional Conduct

The Brazilian Bar Association's Code of Ethics and Discipline sets forth the rules of professional conduct and ethics concerning issues such as advertising, client relationship and legal fees. These regulations are also embodied in professional conduct codes enacted by the individual Bar Associations.

In Brazil, lawyers enjoy wide latitude to enter into fee arrangements with their clients, as long as they observe the more general rules of ethics and professional conduct. Legal fees can be agreed in the form of billable hours, flat fees and contingent or success fees. Bar Associations restrict, however, the terms on which free legal services can be provided. Lawyers that do not charge for legal services are generally deemed to breach professional ethics rules. Bar Associations generally view *pro bono* work as an unethical marketing tool, which would withdraw low-income clients from lawyers that could rely on such type of work. As an exception to this rule, the Bar Associations of São Paulo and Alagoas have recently edited resolutions that allow *pro bono* services to be supplied to NGOs and other legal entities without profitable purposes, as detailed below.

Pro bono work is subject to the general advertising restrictions imposed by the different Bar Associations on their members: Brazilian lawyers cannot advertise their clients, publicise the value of their services (paid or free) or solicit legal work; they may only inform the public about the type of legal services that they provide.⁶

II. *The Provision of Non-Remunerated Legal Services in Brazil*

Non-remunerated legal services may be made available in Brazil as follows:

- through the appointment of a lawyer (Public Defender) by the state;
- under Law 1060 of 5 February 1950, concerning legal assistance;
- through the operation of legal clinics; and
- through the rendering of *pro bono* legal advice by qualified lawyers, either individually or collectively.

A. Appointment of Lawyers by the State

Where a person is unable to pay for legal representation, the Brazilian State must appoint an attorney free of charge to ensure the exercise of the constitutional right of access to justice.⁷ In such cases, counsel is appointed from the Public Defenders Office, at Federal or State level. Public Defenders are bachelors in law who must pass a public concours to join the Public Defenders Office. Usually, individuals who demonstrate that their monthly income is lower than three times the minimum wage in Brazil (around US\$ 600/month) are considered to be unable to pay for legal representation and may thus be assisted by a Public Defender; individuals who earn more than this amount may also qualify for the benefit.

⁶ Ruling No. 94 of 5 September 2000 of the Brazilian Bar Association.

⁷ Brazilian Federal Constitution, Article 5, LXXIV and Article 134.

Public Defenders may provide legal assistance in relation to a broad range of matters. Typical examples are assistance to criminal defendants, individuals seeking alimony payments or other family law rights, as well as individuals involved in civil law disputes of all sorts. The number of Public Defenders is often insufficient to handle the large demand for legal assistance and it is common for the different Public Defenders Offices to establish cooperation agreements with local Bar Associations to ensure additional legal support where needed. Lawyers that register with their Bar Associations to assist the Public Defenders Office are remunerated by the State in accordance with a pre-approved table of fees. Such fees are not high and the lawyers available to take on this type of work are usually themselves in need; being overworked and underpaid, the quality of their legal services is often questionable.

The obligation of the State to provide access to the Courts and free legal advice to the public is also foreseen in Brazil in specific legislation concerning, for instance, consumer rights, labor unions and access to small claims courts.

B. Legal Assistance Legislation

Law 1060 of 5 February 1950 ensures legal assistance to any person who alleges he is unable to bear legal costs without affecting the financial ability to support his or her own family or himself or herself.⁸ Legal assistance in this sense is ensured to Brazilian nationals and also foreigners resident in Brazil and can be provided in relation to any legal matter. It is granted by the Judge, in view of the request formulated by the interested party as plaintiff or defendant in a legal proceeding. The person who invokes Law 1060 is presumed to have the right to legal assistance and does not need to prove such inability to support himself or herself; however, the Judge may withdraw such benefit in case the other party to the proceedings is able to rebut such presumption. Recent case law has recognized that legal entities, and not only individuals, may be entitled to legal assistance based on Law 1060, as long as inability to pay is demonstrated.

In addition to legal fees, beneficiaries of Law 1060 may be exempt from the general fees involved in judicial proceedings, such as fees to the Court, DOJ publications, experts and witnesses. The law does not, however, prevent bar attorneys that represent clients who benefit from legal assistance based on Law 1060 from charging fees for their work. For instance, if the beneficiary of the legal assistance wins the claim, fees will be due by the sucumbent party. Also, if the beneficiary of the legal assistance wins the case and if contingent fees have been agreed, they may be due by the beneficiary himself or herself, as long as they do not affect the beneficiary's ability to provide for his or her family or himself or herself.

C. Legal Clinics

The operation of legal clinics is not specifically regulated in Brazil. Legal clinics are normally run by qualified lawyers that supervise a group of junior and trainee lawyers, who in turn have the most interaction with the client. Traditionally, legal clinics have been organized through Brazilian universities and law schools.⁹ In view of the regulatory restrictions from Bar Associations to the provision of unpaid legal services, legal assistance provided by legal clinics is largely based on the provisions of Law 1060.

⁸ Law No. 1060 of 5 February 1950, Article 2, sole paragraph.

⁹ For instance, since the early 1920s *pro bono* legal assistance is provided by students of the Law School of the University of São Paulo through the “*Departamento Jurídico XI de Agosto*” (<http://www.djonzedeaugosto.org.br>).

There is a growing movement in Brazil of “third sector” initiatives. These are essentially NGO-driven initiatives meant to provide various forms of social services. There have been attempts to set up NGOs to provide legal services, but these have generally been prohibited by Bar Association rules.

D. Pro Bono Services

It is often argued that Article 133 of the Brazilian Constitution provides support for *pro bono* legal services, for it states that advocacy is an essential component of the proper administration of justice to which the state is bound. Notwithstanding such argument, there is no specific requirement for individual attorneys to provide *pro bono* legal services.

Bar Associations and local lawyers in general have not historically given much attention to the provision of *pro bono* legal services in a systematic and consistent manner. This has been in part due to the sharp growth in the number of lawyers in Brazil and the difficulty in finding work for these new lawyers. As explained above, Bar Associations have tended to focus greater attention on the needs of their less successful members than on making legal services available to civil society at large. For these reasons, Bar Associations have traditionally banned *pro bono* work as adversely affecting the ability of other attorneys to earn a livelihood.

In 2001, a group of lawyers from São Paulo created the *Instituto Pro Bono*,¹⁰ a groundbreaking organization designed to organize, expand and promote the provision of *pro bono* legal services in Brazil. One of the first tasks undertaken by this group was to overturn the São Paulo Bar Association’s prohibition on performing *pro bono* services. *Instituto Pro Bono* was able to overcome resistance from other members in lobbying the São Paulo Bar Association to pass a resolution permitting attorneys to provide free assistance to non-profit organizations, though not to individuals. This resolution was passed in 2002. As São Paulo is the state boasting the most sophisticated legal practice and practitioners in Brazil, this was an important step to the wider spread of *pro bono* services throughout the country. In 2008, the Bar Association of the State of Alagoas issued a similar resolution to allow *pro bono* work, although also not to individuals.

Launched with the advice and cooperation of the Public Counsel Law Center in Los Angeles,¹¹ the *Instituto Pro Bono* serves as a clearing house for *pro bono* cases, though it also has a number of in-house attorneys who provide *pro bono* services directly. It works with a network of Brazilian attorneys and law firms, referring cases to qualified attorneys who have volunteered to accept these on an unpaid basis. This organization often deals with cases asserting the public interest right of action, known as *interesses difusos e coletivos*, comparable to a class action. Since its first years, *Instituto Pro Bono* has advised NGOs in matters concerning children’s rights, women’s rights, rights of minorities and persons with special needs, environment law, etc. It has also established wide international alliances with similar organizations in the Americas and elsewhere. It was active, for example, in the drafting of the Pro Bono Declaration for the Americas, undertaken by the Cyrus R. Vance Center for International Justice Initiatives of the New York City Bar, and launched in January 2008.¹² Furthermore, it is active in lobbying the Brazilian Bar Association and the various Bar Associations to legalize *pro bono* legal services

¹⁰ <http://www.institutoprobono.org.br>.

¹¹ <http://www.publiccounsel.org>.

¹² <http://www.nycbar.org/VanceCenter/Projects/PBDA.htm>.

throughout the country and to permit attorneys to provide *pro bono* legal services not only to NGOs but also directly to individuals.

A type of *pro bono* practice that has been growing among law firms in Brazil is to have some lawyers act as board representatives in NGOs and other “third sector” entities and thereby participate in the administration of such entities free or charge.

III. *Pro Bono Opportunities in Brazil for International Law Firms*

Bearing in mind that foreign lawyers (*i.e.*, lawyers that are not registered with the Brazilian Bar Association) may not practice Brazilian law, opportunities for an international law firm to provide *pro bono* legal services in Brazil may still arise from relations with established local law firms, with Brazil-based NGOs and other entities of the “third sector” (such as Ashoka Organization¹³ and Connectas Human Rights¹⁴), as well as from Contacts with the *Instituto Pro Bono*, which can be particularly valuable to help matching up institutions in need of *pro bono* work and capabilities available from international law firms. There are presently several websites which concentrate a list of entities of the “third sector” in Brazil and specify areas in which they may need assistance.¹⁵ The Cyrus R. Vance Center at the New York City Bar is another potential source of *pro bono* cases.

IV. *Conclusion*

There is a growing awareness and willingness in Brazil to provide *pro bono* legal services in a systematic and organized manner. Access to justice remains an unattainable right for many in Brazil and *pro bono* advocacy could play a much more instrumental role than it currently does to help achieve such objective. Bar Association rules remain an obstacle for the development of *pro bono* initiatives in the legal field, but activities such as the work from *Instituto Pro Bono* and the regulations passed by the São Paulo and Alagoas Bar Associations point towards a gradual change. Although it is clear that much work remains to be done, the opportunities available to local and international law firms in the *pro bono* arena will certainly only increase in the years to come.

¹³ <http://www.ashoka.org/>; <http://www.ashoka.org.br>.

¹⁴ <http://www.conectas.org/index.php/Home/index>.

¹⁵ <http://www.terceirosetor.org.br/>; www.portaldovoluntario.org.br; www.voluntariado.org.br; www.voluntarios.com.br.