

Pro Bono Practices and Opportunities in Italy

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

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In Italy, the U.S. notion of *pro bono publico* legal services does not exist. Moreover, *pro bono* work is not a common practice, and it is unusual for large law firms to engage in such activities. It appears that *pro bono* work simply is not part of the legal culture or framework in Italy. Instead, *pro bono* activities are restricted to (i) the state provision of free legal aid to those unable to afford a lawyer in judicial matters, and (ii) legal assistance based on ethical and social motivations of non-profit entities or individuals who cannot pay for legal services, as determined by scholarly and case law interpretation of the applicable rules to legal activity in Italy.

I. Legal Services and the Legal Profession in Italy

Section 24(3) of the Italian Constitution guarantees the fundamental right to proper representation in court.¹ This protection is an extension of the fundamental right of every person to have access to the courts to initiate legal proceedings to protect his or her rights. In the past, the protection of the right enshrined in Section 24(3) of the Constitution was ensured by a system of “free legal representation” (*gratuito patrocinio*) available to indigents.² Attorneys were required to provide free legal services to indigents if certain requirements were met (*i.e.*, the person seeking aid was able to prove that he or she was indigent and had a meritorious claim) and if they were called upon by a specific commission or the president of the competent court.³ Under the law, free legal representation of indigents was considered an attorney’s “honorary and mandatory task.”

However, the system did not work properly: indigents often received inadequate and inferior legal services from lawyers who lacked commitment to their cases. The need for reform became apparent, and in 1973 a new system of legal aid was introduced. Under the new system, entitled “*patrocinio a spese dello stato*”, the state bore the cost of the legal representation of indigents and marked the end of the older system of *gratuito patrocinio*. The current legal aid system is available in all phases of litigation and before any court.

A. Legal Aid

Legal aid is available only in litigation. Furthermore, it is available to Italian, non-Italian citizens, and stateless individuals who satisfy specific objective requirements of the law.⁴ In criminal cases, legal aid is available to non-citizens regardless of whether they are regularly present in Italy; in civil and administrative cases, residency in the country is required.⁵ Non-profit associations and entities that do not carry out economic activity are also entitled to legal aid, but only in civil and administrative cases.

In order to qualify for legal aid, an individual’s annual income must be below certain thresholds set every two years by a decree of the Ministry of Justice. The thresholds vary in accordance with the consumer price index for employees and workers ascertained by the Italian

¹ Pursuant to Section 24(3) of the Constitution, “[i]ndigents shall be entitled, through special legislation, to proper means for action or defense before any court.”

² See Royal Decree No. 3282 of December 23, 1923.

³ In civil and commercial matters, these specific commissions are composed of two judges and the president of the local bar; in criminal matters, it is the president of the competent court.

⁴ See Judgment No. 219 of June 1, 1995 of the Constitutional Court.

⁵ See Judgments No. 2684 of March 10, 2003 of the Supreme Civil Court and No. 144 of May 14, 2004 of the Constitutional Court.

National Institute of Statistics (“ISTAT”).⁶ In both civil and criminal proceedings, the court will also take into account the income earned by family members. In civil, administrative, and tax law proceedings, applicants for legal aid must also show that their claims are not manifestly unfounded.

In criminal cases, applications for legal aid are addressed to the court before which the case is pending. In all other cases, the request is addressed to the Bar, specifically to the Council or governing body of the Bar of the district where the competent court is located.

Once granted legal aid, the beneficiary can appoint the attorney of his or her choice, with one limitation: the attorney must have registered for legal aid purposes with the Court of Appeals in the district in which the court hearing the case is located. Registration is conditional upon meeting certain requirements, including membership in the Bar for at least two years.⁷

The fees paid to the attorney providing legal aid are determined by a ruling of the court that decided the case. Such fees may not exceed the average of those set by ministerial decree for the type of work done. In civil, administrative, and tax law proceedings if the legal aid beneficiary wins the case, the court may order the other party to refund to the state the fees paid to the attorney representing the indigent party.

B. Effect of the 2006 Abolishment of Fixed and Minimum Attorneys’ Fees

Law decree No. 223 (the “Bersani Decree”), dated July 4, 2006, became law on August 2, 2006. The Bersani Decree was designed to address competition concerns within the Italian legal market.

Specifically, the Bersani Decree: (1) abolished statutorily fixed and minimum attorney fees; (2) lifted the prohibition on contingency fees;⁸ and (3) permitted lawyers to advertise their title, professional specialization, the characteristics of their services, and the pricing and whole costs of their professional services.⁹

These reforms created the possibility for competitive pricing of legal services in Italy and removed, albeit unintentionally, the major obstacle to *pro bono* services in Italy – namely, statutorily imposed minimum attorneys fees.¹⁰ Still, while the new law did trigger controversy in

⁶ Section 77 of the Decree of the President of the Republic No. 115 of May 30, 2002.

⁷ Section 80 of the Decree of the President of the Republic No. 115 of May 30, 2002, as amended by Section 2 of Law No. 25 of February 24, 2005.

⁸ The Bersani Decree also abrogated the third paragraph of section 2233 of the ICC and added a paragraph stating that agreements between lawyers and their clients on legal fees must be in writing, otherwise they will be deemed null and void.

⁹ Such advertising is permissible provided that the advertisements satisfy a standard of transparency and truthfulness verified by the Bar Association (*Ordine degli Avvocati*). Such advertising, however, should not include clients’ names (even with the client’s authorization), prices for the services offered, the number of cases won, or the turnover generated by the attorney or the firm. Advertising should be limited to information such as the attorneys’ names and publications.

¹⁰ Historically, minimum fees effectively prevented attorneys from engaging in genuine *pro bono* work. There was an exception: an attorney could provide services for a fee below the statutory levels when the minimum fees were excessive in light of the specific circumstances of the case. However, attorneys could only utilize this exception with authorization from the Bar on a case-by-case basis and the exception could never be applied to criminal cases. According to the *Corte di Cassazione* (i.e., the Italian Supreme Court), the mandatory nature of the minimum fees was justified by the need to “protect the dignity of the legal profession from the harmful

Italy, the removal of minimum attorney fees has had no effect on the level of *pro bono* services in Italy. That is, *pro bono* legal services still are not part of the Italian legal culture. It is important to note that the motivation for the Bersani Decree did not stem from *pro bono* concerns. Instead, the rationale for the reform was to address changes in the legal profession, such as the globalization of legal services and the anti-competitive nature of the older minimum fee system. The European Union (“EU”) had also frowned upon the minimum fee system, noting that the anticompetitive nature of the system was at odds with the EU’s longstanding policy of promoting competitive behavior.¹¹

Taken together, it is not surprising that a law that was designed to foster efficiency and competitive pricing in the Italian legal market did not incentivize *pro bono* services. The fact remains that Italian lawyers do not consider *pro bono* services to be part of practicing law. It is not as if these attorneys actively decide not to provide the services; instead it is simply not part of the business plan.

In addition, it should be noted that the removal of minimum attorney fees, as provided by the Bersani Decree, does not expressly allow *pro bono* work. Furthermore, under the principles governing the legal activity in Italy provided by the Italian Bar Association’s Code of Professional Conduct rules (the “Professional Rules”), lawyers cannot carry out any conduct direct to the acquisition of clients’ relationships by means not conforming to principles of propriety and decorum (including the offer of legal services free of charge). In addition, lawyers must inspire their conduct to duties of probity, dignity, and decorum, and carry out their professional activities with honesty and integrity.

Scholars and case law has interpreted the Professional Rules to only allow legal services free of charge if they are based on ethical or social motivations. Accordingly, *pro bono* work in Italy is currently limited to legal services offered to nonprofit organizations, nongovernmental organizations, charity organizations, and foundations unable to pay for legal services in order to realize their ethical and social purposes.

In addition, it is generally difficult for Italian lawyers who intend to provide *pro bono* legal services to establish a professional relationship with nonprofit entities due to the fact that such organizations primarily focus on social activities, with a secondary focus on legal matters.

Finally, because *pro bono* services have historically not been part of the Italian legal culture, large law firms do not gain any goodwill or recognition for providing such services. Thus, a lack of financial or social incentives probably stymies any possibility for such *pro bono* legal services, even though the main statutorily imposed obstacle – minimum attorneys’ fees – has been removed.

consequences” of “price competition” among attorneys (see judgment No. 592 of March 22, 1962, of the Corte di Cassazione), as there is a widespread belief that price competition affects the integrity of the Italian legal profession. Similar beliefs led to the explicit prohibition of contingency fees. See ICC Section 2233(3).

¹¹ See European Parliament Resolution, *Market Regulations and Competition Rules for the Liberal Professions*, December 16, 2003; see also the conclusion of the General Advocate of the European Court of Justice delivered on February 1, 2006 in the case C-94/04 (*Federico Cipolla v. Rosaria Fazari née Portolese* – reference for a preliminary ruling from the Appeal Court of Turin), and in the case C-202/04 (*Stefano Macrino and Claudia Capodarte v. Roberto Meloni* - reference for a preliminary ruling from the Court of Rome), stating the noncompliance of the Italian legislation concerning the fixing of lawyers’ minimum fees with the competition rules and the principle of freedom to provide services established by the European Union regulation.

II. *Pro Bono Opportunities in Italy*

The primary means for attorneys who wish to provide legal assistance to persons who cannot afford such services is through the State's legal aid system.

Pro bono legal services can also be offered to nonprofit associations pursuing social objectives, non-governmental organizations, charity organizations, and foundations for nonjudicial matters, provided that *pro bono* work is carried out in accordance with the above-mentioned Professional Rules governing the legal profession in Italy.

III. *Conclusion*

Italian law firms generally do not engage in *pro bono* legal services, as it is not part of the Italian legal culture. However, some U.S. global firms operating in Italy, local firms, and individual attorneys provide free legal services to indigent persons (and then are reimbursed for their services by the Italian government under Italy's legal aid system) in judicial matters, and to nonprofit entities for deserving projects in nonjudicial matters.

Although statutorily-mandated minimum attorneys' fees were repealed, Italian attorneys largely have not embraced this change as an opportunity to engage in *pro bono* legal services. One contributing factor is that professional rules governing legal activity in Italy do not clearly support and sponsor *pro bono* work.

Finally, it remains to be seen whether the new EU regulations will effectively create a *pro bono* obligation for lawyers practicing in the EU member states. Not only could this create an obligation in Italy, but it could strongly affect the current Italian legal culture in relation to *pro bono* legal services.