



Pro Bono: A Transformation Issue

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The majority of South Africans cannot afford legal representation. In 2011 the average monthly household income in South Africa was R9 962.¹ The average household income of a black family was R5 803 and that of households headed by a woman, black or white, R5 903. However much these figures may have improved, consider the cost of legal services: in Johannesburg, members of the bar typically charge from R6 000 to R8 000 per day immediately after pupillage. Two decades after the dawn of democracy, the majority of South Africans cannot afford legal services and race and gender still substantially determine access to the justice system. The inability of millions

to access legal services is not only unjust; it also perpetuates inequality, thus maintaining an untransformed society. The definition of transformation remains the topic of much debate.

I suggest that, at least, transformation is about improving the lives of those persons who still bear the brunt of discrimination, relative to those who face no such disadvantage, whilst still pursuing a better life for all. As advocates, we hold ourselves out as forensic specialists, professionals who focus on finding the best way of improving a client's position relative to others. How well we are suited to effect transformation! Unless lawyers accommodate the needs of those who cannot

afford their fees, society runs the risk of either tyranny or anarchy. The Constitutionally enshrined goal of access to justice for all cannot be realised without a hands-on commitment thereto by the legal profession. What role, then, do *pro bono* legal services fulfil in attaining a transformed society? *Pro bono publico* bears two meanings. It follows the literal meaning of the term – ‘*what is good for society*’ – when referring to activities primarily motivated by a desire to serve the interests of society. That does not mean that the work is done for free, although it is often done at reduced rates. Generally this type of work is referred to as public interest litigation. Much of public interest litigation, especially cases referred to as ‘impact litigation’, cannot practically be done for free, as it requires the commitment of substantial resources. There are always takers for this type of work, often at a lower than usual fee. Shaping the law and ensuring an alignment of society’s and Government’s actions with the laws of the land are, however, not sufficient to improve the lives of individuals faced with a myriad of crises on a daily basis: a mother battling to obtain payment of maintenance from a delinquent father, a grandmother who can’t produce paperwork to lay claim to the place she has called home for many years, and an unschooled worker whose loss of a menial job means children going to bed with empty stomachs. These are the people who cannot wait for the right test case to come along; and judicial pronouncements will not miraculously solve the hurdles they face in asserting their rights. They need immediate, effective and personal assistance – *pro bono* services in the narrow sense.

In the latter sense (the provision of free legal services to ordinary clients) our profession still has to show its commitment. The GCB Constitution is silent on the duty to render *pro bono* services, as are most, if not all, of the constitutions of the local bars. Only in 2002 was a reference to the duty to do *pro bono* work included in the Uniform Rules of Ethics. I do not suggest that advocates have not rendered *pro bono* services in the past; I do however suggest that our profession does not have an ethos of rendering *pro bono* legal services. There is hope, though. Over the last few years the law societies have adopted detailed *pro bono* rules, and so have the bigger bars, with the smaller bars relying directly on the Uniform Rules of Ethics to regulate their efforts. Most, if not all, of the large law firms have dedicated *pro bono* units and several law clinics work in dedicated areas where there are particularly pressing daily needs, such as realising housing, education and women’s and children’s rights. Nowadays there are actually colleagues who ask for *pro bono* work. Nevertheless, much more work still has to be done before we can call ourselves committed.

The fundamental challenge in rendering *pro bono* assistance is effectively to match a particular need, as and when it arises, with an appropriate available resource, and to do so expeditiously. On the demand side of this equation, the main difficulty is that the people in need of assistance are usually also those who are the least likely to know where and how to ask for assistance, or to persist with their efforts to obtain assistance in the face of what often seem to them to be insurmountable



hurdles. Someone who is used to being ignored easily gives up hope. If they find help, it is very often at a stage when the claim is about to or has prescribed, time periods have lapsed or are about to lapse, or it is too late to do something about an unfortunate history of events that could so easily have turned out for the better if adequate assistance had been rendered timeously. On the other side of the equation, two principal problems have to be addressed: obtaining and retaining commitment from practitioners over time, and implementing an easily maintained, low cost system efficiently to match an available advocate with the requisite skills for the particular problem of a client in need. An efficient distribution system requires administrative infrastructure of a size and complexity that is traditionally anathema to the Bar. Outsourcing therefore seems very attractive. It is thus no wonder that the larger bars, in particular, are forming closer relationships with organisations able to serve as match-makers. The two largest organisations with whom bars have built up such relationships are Legal Aid South Africa and ProBono.Org.

The aim of Legal Aid SA is to make legal aid available to indigent persons, within its financial means, so as to give content to the rights to legal representation at State expense.² Legal Aid SA requires that a household must show that it has a net monthly income of R6 000 per month or less to be considered for completely subsidised legal aid. Budgetary constraints prevent Legal Aid SA from significantly expanding its assistance in civil matters. Its focus thus remains on representation in criminal matters. At the initiative of Legal Aid SA some bars have entered into formal co-operation arrangements with Legal Aid SA, in terms of which members are to make themselves available to render *pro bono* services in cases where Legal Aid SA is unable

to subsidise legal representation in civil cases. This mechanism is still in its infancy but holds promise as an effective way of exposing advocates to opportunities to do *pro bono* work. We should, however, take care that the State does not abdicate its responsibility in this regard by letting individual practitioners pick up the tab for an underfunded statutory body.

ProBono.Org grew from little more than the vision and dedication of a handful of individuals at the beginning of 2007, to an organisation with offices in Johannesburg, Pretoria and Durban, opening in excess of 11 000 files in 2015. Its main activity is that of a clearing house which matches indigent clients' needs with appropriate legal expertise. Its training and education functions and awareness campaigns have expanded substantially over the years. ProBono.Org maintains helpdesks at several courts, including the Gauteng High Courts in Pretoria and Johannesburg in co-operation with the Office of the Judge President and the Law Society of the Northern Provinces. With the assistance of attorneys from a wide range of firms, the organisation interviews clients at its offices, clinics, seminars and helpdesks. This includes applying a means test similar to one used by Legal Aid SA. If they qualify, clients are assisted there and then, referred elsewhere or processed for further assistance, depending on the nature of the problem. Further assistance usually entails finding an attorney from the extensive panel of firms accepting referrals from ProBono.Org and obtaining a commitment from a member of the Bar to assist in the matter. Advocates render *pro bono* services pursuant to these referrals on brief from an instructing attorney, although each office of ProBono.Org is also a Law Clinic and sometimes gives instructions directly to advocates.

Legal Aid SA website: www.legal-aid.co.za

ProBono.Org website: www.probono.org.za

Many further stumbling blocks remain in the way of expanding the Bar's *pro bono* efforts. The following points give an idea of what needs to be addressed.

- A major obstacle in matching the need for legal services with willing and able practitioners is the discord between the areas where the greatest need exists and the areas of the law in which most practitioners earn a living. The majority of *pro bono* matters pertain to family law, women's and children's rights, estates, housing and residential property rights, labour disputes, refugees, access to grants and pensions and other social security related issues. This puts a disproportionate burden on members practising in these areas. To avoid rendering *pro bono* services on the grounds that the seniority of the work does not accord with a member's experience, or that the skills required fall outside of a member's area of specialisation, is often sought to be justified on the basis that these are legitimate reasons for not accepting a brief. This attitude should not be tolerated. Whilst a *pro bono* brief should be executed in the same manner as any other brief, it does not follow that the basis upon which an instruction is accepted should follow the usual rules. Specialist practitioners should pick an area in which they will do *pro bono* work.
- Too little use is made of contingency arrangements. In between impact cases and the run-of-the-mill cases there are many matters requiring more resources than can easily be mustered. A trial can seldom be run on a *pro bono* basis. In many matters the opposite party is able to pay an adverse costs order. A simple mechanism, catered for in the rules of ethics, is to conclude a contingency agreement on the basis that counsel shall be paid fees as allowed on taxation and when collected from the other party.
- The most junior members are generally very willing to do *pro bono* work, but lack the experience to deal confidently with some matters. On the other hand many senior practitioners do not often receive requests to do *pro bono* work. An area that has not been explored sufficiently is the combination of two counsel on one brief, with the more senior member serving as advisor and mentor to the more junior colleague over the period of execution of the brief. In this way, more people can obtain effective legal assistance, junior members with available time can gain experience under the guidance of an experienced practitioner and more senior members will be able to render *pro bono* services effectively.
- It is in the nature of an advocate's practice that the bulk of the administrative work is done by an attorney. In *pro bono* matters the lay client is often not even able to afford the basic costs associated with legal assistance. This situation is exacerbated by the fact that sometimes attorneys try to avoid carrying these costs in *pro bono* matters by pushing the burden onto counsel. Junior members, who are still struggling to build up their practices, find it difficult to fund typing, printing and copying costs, as well as travel costs, from their own pockets. With no mechanism to assist with these costs, *pro bono* work becomes burdensome and unattractive

to more junior members. Ideally a fund should be created from which disbursements could be recovered in circumscribed instances.

- One of the fundamental advantages of a split profession is that skills in every area of the law are available to every lay client. In *pro bono* matters it often happens that a law firm has to return a *pro bono* instruction referred to it because of a conflict of interest. Entities that litigate often, such as banks, have numerous firms on their panels. That immediately excludes all of these attorneys from assisting in, for instance, foreclosure matters, a familiar topic in *pro bono* work. Advocates are not as easily conflicted as attorneys, yet, because we work on referral, delays occur before counsel is instructed in these matters because cases have to be referred more than once to find an attorney who can take on the matter. Perhaps the Bar should be more willing to accept instructions directly from law clinics in matters where conflict of interest is a common problem.

Section 29 of the Legal Practice Act 28 of 2014, provides that the Minister of Justice and Constitutional Development, after consultation with the Legal Practice Council, must prescribe requirements for community service. The Minister must also prescribe a minimum period of recurring community service by practitioners upon which continued enrolment as a legal practitioner is dependent. *Pro bono* work should feature strongly on the Minister's list, thus giving statutory impetus to the rendering of *pro bono* services.

Irrespective of the ultimate form and place of the Bar as a professional organisation in the new dispensation, advocates should not take their place in society for granted. We should realise and appreciate that the privilege of pursuing such a noble profession carries obligations that cannot be avoided or disavowed. A failure to provide *pro bono* services projects a profession indifferent to the Constitution, insensitive to the needs of Society and unable to regulate its own affairs. **A**

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Endnotes

- 1 Statistics South Africa, Income and Expenditure of Households 2010/2011 Stats SA P0100, 6 November 2012. The results of the 2015/2016 survey are likely to be available only in 2017.
- 2 *Legal Aid Guide* 2014, 13th edition.