Report carried out within the Network of Studies in Pro Bono Advocacy and Access to Justice in the first half of 2016, aimed at identifying the structural assumptions of pro bono advocacy in Brazil; the concrete analysis of regulations and policies to promote pro bono activity at national and international levels; the recognition of regulatory mechanisms to stimulate activity, its limits and perspectives in Brazil.
SUMMARY

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THE PROJECT

There are numerous motivations that draw law students, lawyers, law firms and the legal departments of companies to the practice of pro bono advocacy. The reasons which stimulate interest in practice include awareness of social responsibility; the notion of democratizing access to justice and even the search for personal and professional development. However, although pro bono advocacy is a practice as traditional as the practice of law itself, it is estimated that in Brazil it has only been in recent years that various figures on the legal scene have developed an interest in, and begun to improve, this practice in a structured way within their own fields of expertise.

The expanding interest in pro bono advocacy, coupled with the need for a national guideline for structuring activities, has generated several theoretical and regulatory consequences for pro bono practice in Brazil. The recent regulation of the subject, the encouragement for the creation of specialized departments, the organization of fields of action for freelance lawyers and the establishment of spaces for discussion on the subject are a reality, which requires a qualified reflection for the development of this practice in an efficient and democratic manner.

It is in this sense that the Escola de Direito da FGV Direito SP, through their Post-grad Programme Lato Sensu (FGV Direito SP GVlaw), and the Instituto Pro Bono, have created the Network of Studies in Pro Bono Advocacy and Access to Justice, a group of students, researchers, professionals and institutional figures who conducted theoretical and practical research pertinent to the Pro Bono and Access to Justice issues in the first half of 2016, in São Paulo and the FGV Direito SP.

From a heterogeneous and horizontal structure, composed of actors inserted in pro bono practice, gathered in a stimulating environment to the creation of new ideas, the Pro Bono Studies Network has these objectives:

- Identifying the structural assumptions of Pro Bono Advocacy in Brazil
- Concrete analysis of regulations and policies to promote pro bono activity at national and international levels, seeking to identify the best regulatory mechanisms to stimulate activity
- The study and dissemination of good practices in Pro Bono Advocacy to promote broad access to justice.

1 Rede De Informações Para O Terceiro Setor – RITS; Atados; and Serviço Nacional de Aprendizagem Comercial are a few examples of network action. The following interview with Manuel Castells tackles the subject. Available from (in Portuguese): http://www.fronteiras.com/entrevistas/manuel-castells-a-comunicacao-em-rede-esta-revitalizando-a-democracia
Lately there has been a multidisciplinary reflection on networks, both in business and in the social sphere.

The proposed network structure of connections and partnerships has as its central objective that ideas and good practices are reproduced externally, through more than one form of circulation. Whether for the development of projects in the companies and offices of the participants, the third sector and the partner public institutions, or because of the production carried out by the researchers or partnerships created. One of the ideas of the network is also to disseminate outside the good practices and products of the constituted working groups, through an online platform. Through an innovative structure and a stimulating and current theme, FGV DIREITO SP and the INSTITUTO PRO BONO identify this moment as conducive to the deepening of studies on the practice of pro bono advocacy, both with respect to its assumptions and limits, as well as its effectiveness.

Based on the discussions that took place in the meetings of the network in person and by e-mail, it was possible to raise three final outcomes of the Pro Bono Network, which follow in this report:

**Outcome n.1: Pro Bono Advocacy Regulation Report in the New Code of Ethics and Discipline**

From the empirical analysis of data, historical retrieval of national and international regulations on the subject, practical experiences in the promotion of the activity and academic reflections on its parameters and purposes, we prepared a concise and systematized report, seeking clarification of the concepts and perspectives adopted for the broad regulation of the pro bono present in the text of art. 30 of the New Code of Ethics approved on 14 June 2015. The purpose of the report is to guide the interpretation of the central points of pro bono activity in Brazil.

**Outcome n.2: Best Practices in Pro Bono Advocacy**

Dissemination and reflection on good examples of pro bono advocacy methods, structures and initiatives. Practical cases and brief reports on individual or group experiences were analyzed by other members of the working group and reported in a structured form. The purpose of disclosure is to stimulate good pro bono advocacy ideas in a variety of venues.

**Outcome n.3: OAB (Order of Attorneys of Brazil) Consultation and Defense**

Consultation with those who practice pro bono advocacy on the central issues of pro bono advocacy. Rather than a final opinion of these bodies, it was sought to raise some different points of view that would complement the group’s view on pro bono advocacy.
The purpose of the OAB consultation was also to verify how the new regulation has been applied by the Tribunais de Ética e Disciplina (Courts of Ethics and Discipline) in the state OAB.

We thank you in advance for all the support granted by FGV Direito SP and by the Instituto Pro Bono and dedicate the project to all involved in the search for broad access to justice and for the effectiveness of rights. It should be noted that the conclusions contained in this report are from the group, and not of each individual member, given the existence of differences in the discussions.
INTRODUCTION

From the discussions in the Pro Bono Advocacy Network regarding the nature and role of pro bono advocacy, we realize that this activity is very particular in its diverse conceptions around the world. We have seen that each country regulates how the lawyer must fulfill their social role in their activity in a different way, and it was possible to perceive that the activity regulation models influence all the permissibility and concretization of these forms of legal activity in a structural way, whether by persons, the stimulation of companies and offices, the advocacy provided by structures within Universities and Law Courses, including the role of the third sector in the promotion and structuring of pro bono.

Pro bono advocacy is not part of the reasoning for promoting social welfare, but according to our point of departure it is a social duty that stems from the activity of the lawyer, and a citizen’s right to have his rights guaranteed in the justice system (Access to Justice) bypassing the logic of social responsibility. It also stems from the exclusivity that the lawyer has in exercising this essential function of justice.

Therefore, the more care networks and possibilities of assistance services for citizens can be linked to the guarantee of rights, the more beneficial it will be for the building of a democracy. In this sense, the creation of institutional bodies that promote legal assistance to the population, such as the Defensoria Pública (Public Defender’s Office), is a healthy practice and must be seen as one of the possible means of exercising and controlling the quality of this service. In addition to the Defensoria Pública, we cannot forget the care provided by the administrative agencies, the police stations, the PROCON (Consumer Protection Program), and other legal services for the general population.

The concept of pro bono advocacy, therefore, in view of this scenario of promoting legal demands and access to justice, must be seen with dynamism, since the activity is subject to innovations and new perspectives, which are very much aligned with the social context applied and within models of companies and offices. In the various countries which we have been able to research, we have seen that regulation, where it exists, should stimulate the various possible models. In this way, the exchange and experiences of countries in Latin America, the United States and Europe for the development of pro bono advocacy in Brazil and the promotion of activity, which is still incipient in our national culture, are presented as beneficial.

In our work model, we were able to first raise specific cases of successful pro bono practices, and from the concrete cases we were able to compare how regulation could
promote and stimulate other forms of pro bono. It was possible to perceive that several factors are essential in the promotion of the practice and new ideas are to be developed, especially when we saw the American model of low bono\(^1\) and the possibility of civil liability insurance for pro bono performance.

This report, therefore, is an attempt to synthesize part of the discussions on some of the issues surrounding pro bono advocacy. There is no pretension of exhaustion of the theme, since it is known that the dynamicity of this activity prevents the project from being something ready and finished, but that evolves over time. In this line, we will bring some essential aspects to understand pro bono advocacy, a first effort to understand and suggest interpretations for the newly inaugurated regulation in Brazil and we will bring our contributions of innovative ideas that could guide the future of this practice in the country.

We intend to contribute to a rich and empowering debate on the social function of advocacy, treating the issue as a matter of professional duty and encouraging lawyers to participate more and more in these diverse spaces and in these ever-evolving opportunities for the population’s access to a more just society.

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1 Low bono is a recent initiative in the United States aimed at those in the income bracket which does not qualify for pro bono advocacy but could not afford the costs of regular advocacy: “Poverty is so much more fluid now, and you have people coming in and out of the middle class and people…living paycheck to paycheck,” says Herrera, who is considered a pioneer of low bono. See more at: <https://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/september-2013-lowbono.cfm>. Accessed in 9 Sept. 2016


3 Ibid. p.606.

4 Ibid.
Thus, the current Constitution, to give effective legal assistance to the most vulnerable, stipulated a model of legal assistance to be provided by the State in an integral and gratuitous way, to all those with insufficient resources\(^5\), an institution essential to the judicial function, the responsibility to provide the legal and gratuitous guidance of those in need\(^6\).

Pursuant to article 134 of the Federal Constitution\(^7\):

> The Public Legal Defense is an essential institution to the jurisdictional function of the State and is responsible for the judicial guidance and the defense, in all levels, of the needy, under the terms of article 5, LXXIV. (ca 45, 2004)

As seen above, the role of the (Public Defender’s Office) is to meet the legal needs of the vulnerable population. Thus, in order to define the criterion of socioeconomic vulnerability subject to the tutelage of this body, restrictive income criteria are adopted, in order to select from the population most in need of free legal advice.

In order to do so, the Public Defender of the Union adopts as parameters for attendance “the natural person within the family nucleus, whose gross monthly income does not exceed the total value of 3 (three) minimum wages”, being sure that the gross monthly income of 4 Minimum wages will be adopted in cases of family nuclei with 6 or more members\(^8\).

On the other hand, the state Public Defender’s Office adopts different criteria. As an illustration, we can highlight the criteria adopted by the Public Defender of the State of São Paulo, which, in general, serves people who earn up to 3 minimum wages per month\(^9\).

Despite the importance attributed to the Public Defender by the Federal Constitution, it is known that it cannot fully meet all those in need of free legal advice. In this sense, we highlight the data collected by Groterhorst\(^10\) (2014), pointing out that, in 2,680 judicial districts in Brazil, the Public Defender’s Office is present in only 754.

In addition to the lack of Public Defender’s Office in the districts, it is also important to note that it cannot meet all the demands it receives\(^11\). As an example, we highlight the

\(^5\) Constitution of the Federal Republic of Brazil, art. 5, LXXIV: “LXXIV – the state shall provide full and free-of-charge legal assistance to all who prove insufficiency of funds”.


\(^11\) Ibid.
research carried out by the Instituto Pro Bono, which found that the Public Defender’s Office of the State of São Paulo is able to act in approximately half of the demands it receives in the majority of its areas of activity.\(^{12}\) It should be noted that the constitutional model of legal assistance cannot be confused with pro bono advocacy, since, while pro bono advocacy is voluntary and supportive, the work carried out by the Public Defender’s Office consists of an obligation on the State to guarantee the defense of those who are underinsured.\(^{13}\) Thus, pro bono advocacy distinguishes itself from and complements the constitutional model of legal assistance, being fundamental the role of the OAB (Order of Attorneys of Brazil) in regulating the issue.

The term pro bono literally means “for good”. When applied to the practice of law, it constitutes the provision of legal services without the collection of fees or any kind of consideration of the assisted. It is, therefore, an activity based on professional character and skills.\(^{14}\)

Advocacy, alongside the Public Defender’s Office and the Public Prosecutor’s Office, is elevated to the level of essential function of justice. And, as such, it has a very important role for the defense of constitutional laws and the Democratic Rule of Law.

This role is expressly provided for in the OAB Statute (EOAB, Law 8,906 / 94), specifically in art. 44, item I. In addition, as a class entity, only the Brazilian Bar has the attribution of disciplining and regulating the provision of legal services, as provided for in item II of said legal diploma.

**Article 44.** The Brazilian Bar Association (OAB), a public service endowed with legal personality and federative form, has the following purposes:

**I - to defend the Constitution, the legal order of the democratic State of law, human rights and social justice, and to strive for the proper application of the laws, for the rapid administration of justice and for the improvement of culture and legal institutions.**

**II - to promote, exclusively, the representation, defense, selection and discipline of lawyers throughout the Federative Republic of Brazil.**

Considering the institutional commitment of the OAB to the constitutional laws and its exclusivity regarding the discipline of those enrolled in its staff, the regulation of pro bono advocacy acquires special importance. This is because, pro bono action not only complements the work of the Ombudsman, but it is a civic duty of the lawyer to work to ensure equal access to specialized services.

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\(^{12}\) Ibid.

\(^{13}\) Instituto Pro Bono

\(^{14}\) Instituto Pro Bono
In addition, it is the citizen's right to choose what kind of care will be useful and appropriate, either through the Public Defender's Office, or through non-governmental organizations, or through the hiring of a liberal professional.

The OAB therefore has a unique opportunity in this historic moment to simultaneously comply with the constitutional laws regarding the construction of a free, fair and united society, as well as to follow the world trend by allowing pro bono practice. It should be considered that pro bono advocacy has undergone several restrictions and controversies in Brazil. Although this practice has always existed, with Luiz Gama and Ruy Barbosa being some of their historical figures, it was only in 2002 that the OAB, through the São Paulo Section, first published a Pro Bono Resolution.

This resolution of OAB São Paulo, also reproduced in Alagoas in 2008, restricted pro bono advocacy only to non-profit entities, preventing the care of individuals in these states. This has had an impact throughout the country as it left voluntary advocacy under a veil of uncertainty where there was no regulation by the OAB.

It was only in 2015 that the OAB finally reformulated the Code of Ethics of Brazilian Lawyers, allowing the practice of pro bono advocacy, with some restrictions, at a national level. However, this step can be seen as a step forward in promoting voluntary advocacy and access to justice, which is in line with the encouragement of pro bono advocacy in other countries, especially in Latin America, where the social context, and therefore, legal and political contexts, are very similar to the Brazilian scenario.

Unlike within Brazilian history, other Latin American countries have never restricted pro bono advocacy. In Mexico, for example, the Fundación Barra Mexicana\textsuperscript{15}, similar to the OAB in Brazil, encourages practice and is part of networks which promote voluntary advocacy. Of course, due to differences in context and legal system, pro bono advocacy is not as widespread in Latin America as in the United States, where it is an essential part of the organization of the justice system. However, the practice is seen as an important tool in guaranteeing access to justice, especially for populations in greater vulnerability. It is important to emphasize that the idea of vulnerability in these countries is not restricted to economic issues, but is related mainly to social markers that impose on some groups a situation of discrimination and difficulty in full access to human rights. It can thus be said that vulnerability is related to income, but also to gender, race, ethnicity, sexual orientation, nationality, age and ability.

Thus, it is possible to verify that countries such as the United States, Chile, Peru, Colombia, Venezuela, Australia and the United Kingdom encourage this form of advocacy\textsuperscript{16}. As an example, there are some non-governmental organizations that work


\textsuperscript{16} Repórter Brasil. Por que os advogados brasileiros não podem atender de graça? Available from (In Portuguese)<\url{http://reporterbrasil.org.br/2013/12/por-que-os-advogados-brasileiros-nao-podem-atender-de-graca/> Accessed 8 July 2017.
In each of them: in the United States, Pro Bono Institute\(^1\); In Chile, Fundación Pro Bono Chile\(^2\); In Peru, Pro Bono Perú\(^3\); In Colombia, Fundación Pro Bono Colombia\(^4\); In Venezuela, Provene - Fundación ProBono Venezuela\(^5\); In Australia, the Australian Pro Bono Centre\(^6\) and finally in the United Kingdom, The National Pro Bono Centre\(^7\).

**WHO PRACTISES PRO BONO IN BRAZIL**

After intense debates and a long democratic process of elaboration and approval, the New Code of Ethics and Discipline of Advocacy, which came into force about a year ago (September 2015), establishes norms that regulate conduct in the professional practice of Brazilian law. We have seen in the above topic that there is a history behind the regulation on which the current wording of Article 30 is based. In this topic, we will study the wording of the rules of pro bono and its interpretation. We will go through the definition of the themes of pro bono advocacy, soon after the requirements, and finally, we will describe the issue of avoidance of deviations in the two intended purposes. Regarding the themes of pro bono advocacy, art. 30 of the new OAB Code of Ethics provides that:

*In exercising pro bono advocacy, and acting as a nominee, co-defendant or a lay lawyer, the lawyer will use the usual zeal and dedication, so that the party assisted by him feels supported and relies on his or her sponsorship.*

The essential element to characterize the subject responsible for the pro bono practice is verified, according to this first article and consists in its characterization like lawyer or lawyer. Indeed, pro bono practice cannot be confused with other forms of voluntary or unpaid work.

In order for the subject to be an effective practitioner of pro bono advocacy, it is necessary for the subject to carry out activities that are exclusive to advocacy - such as postulating in court or legal advice. We understand that such a requirement does not prevent pro bono work from being complemented by the activities of other professionals, such as psychologists or social workers. Collaboration with other areas does not denote the pro bono practice and allows a more complete and effective...
service, and there should be no obstacle to doing so.

Provision 166/2015, which regulates the practice of pro bono advocacy based on its prediction in the new OAB Code of Ethics and Discipline, provides, in its art. 3rd, that:

This Provision does not apply to public legal assistance, provided for in art. 5th, LXXIV, and in art. 13424 of the Constitution of the Republic, it is fundamentally carried out by the Public Defender’s Office of the Union and the States. Also, this Appointment does not apply to legal aid resulting from agreements entered into by the Brazilian Bar Association.

It is observed that, in regulating pro bono advocacy, the Brazilian Bar Association understands that the activity carried out by the Public Defender’s Office and the assistance resulting from the agreements signed with the OAB are not characterized as pro bono and are not regulated by the Provision. Finally, art. 4th of Judgment 166/2015 provides that:

Lawyers and members of law firms and legal departments of companies carrying out pro bono advocacy as defined in art. 1 of this Provision are prevented from exercising the remunerated law, in any sphere, for the natural or juridical person who uses their pro bono services.

Here, we have synthesized the agents understood, under the terms of existing regulation, as practitioners of pro bono advocacy - lawyers, law firms and legal departments of companies. In relation to the latter two, the wording of the article allows a double interpretation on who performs the practice - members of law firms and legal departments or the law firm itself and legal departments. In our view, the pro bono activity is exercised by the law firm and legal departments, since they are such organizations that provide assistance free of charge and are accountable to the assisted - not the case of a person who is part of the office or legal department performing the pro bono individually, but rather an institutional performance.

In general, therefore, it appears that the existing rules do not present a clear determination on who the pro bono advocacy agents are. Article 166/2015, Article 3, expressly excludes from this practice the Public Defender’s Office and the lawyers’ dative, while in its art. 4, points to the understanding that agents are only autonomous lawyers, law firms and legal departments.

As mentioned previously, it is necessary to understand pro bono advocacy in a dynamic way, given its multiple possible configurations, as well as its fundamental role in guaranteeing access to justice and the effective public function of advocacy. In this

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24 Constitution of the Federal Republic of Brazil, art. 5, LXXIV: “LXXIV – the state shall provide full and free-of-charge legal assistance to all who prove insufficiency of funds”
way, the agents must also be seen on a broad aspect, and bearing in mind the reality of the practices already exercised in the country and the international experiences.

The differentiation between pro bono advocacy and the Defensoria Pública (Public Defender’s Office) must be verified, in this sense, in this context. The Defensoria Pública (Public Defender’s Office) reflects the State’s duty to guarantee access to justice. Advocacy on behalf of those with insufficient resources, therefore, does not represent a voluntary act on the part of the defenders, but rather a true duty of the institution, as it is focused on access to justice. Pro bono advocacy, in turn, despite having a clear public function and social relevance, consists of a practice of private persons and entities. As a result of the professional duty to guarantee human rights and citizenship, pro bono advocacy is carried out.

In addition to the practices defined as pro bono and those expressly excluded as such, it is important to mention that there are other agents who are dedicated to the accessibility of justice through a very similar action and that deserve attention at this moment of discussion. Without the pretension of exhaustion or taxation, we mention entities of the third sector and nuclei of legal practice linked to faculties of law.

The nuclei of legal practice, thus generically called the nuclei existing in faculties of law that are dedicated in some way to the provision of advice or legal assistance, differ from the Defensoria Pública (Public Defender’s Office) precisely because they are not linked to any state duty. They are part of an initiative of the college itself or of the students themselves and although they are members and members of public universities, this fact does not bind them to any type of benefit. In this way, its action in search of access to justice would also be characterized as a pro bono practice, whose initiative is private.

In addition, third sector entities may also feature pro bono practitioners and not only as beneficiaries of such practice. This is the case, for example, in an association that has, within the framework of employees, lawyers and those who provide free legal advice. Also in this hypothesis, we do not see impediments to the practice being seen as a regular exercise of pro bono advocacy, under the terms of the Code of Ethics and Discipline of the OAB and the Provision 166/2015.

In this way, we understand that the OAB should adopt a broad interpretation when it comes to understanding the possible themes involved in practicing pro bono

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25 Considering Law 11.788 / 2008, which deals with the Professional Internship of Students, in article 1, it is literal in the sense of affirming the educational character of the internship. In its second paragraph, we verify the goal of development of the student (law student inclusive) in the plane of the citizen life. That is, the legislator sees in the practice of the stage something beyond the pragmatism and the exclusively professional, pro-market activity.
advocacy. The content of art. 4 of Provision 166/2015 cannot be understood as a limiting role of the agents that perform such practice, otherwise it may be inhibited that different forms of pro bono advocacy may be exercised, such as in the case of legal practice centers or third sector entities.

WHO PRACTISES PRO BONO IN BRAZIL: THE CONCEPT OF VULNERABILITY IN PRO BONO ADVOCACY

According to the New Code of Ethics, pro bono advocacy has these guidelines:

CHAPTER V PRO BONO ADVOCACY

Art. 30. In exercising pro bono advocacy, and acting as a nominee, contractor, or decedent, the lawyer will employ the habitual zeal and dedication, so that the party assisted by him feels supported and relies on his patronage.

§ 1o Pro bono advocacy is considered to be the free, occasional and voluntary provision of legal services in favor of non-economic social institutions and their beneficiaries, whenever the beneficiaries do not have the resources to hire professionals.

§ 2 Pro bono advocacy may be exercised in favor of natural persons who, likewise, do not have the resources to hire lawyer, without prejudice to their own livelihood.

§ 3o Pro bono advocacy cannot be used for political-partisan or electoral purposes, nor to benefit institutions that aim at such objectives, or as an advertising tool to attract clients.

Based on the regulation, this text seeks to investigate the concept of vulnerability employed by the OAB (Order of Attorneys of Brazil) and its limits regarding the attachment of the recipient of the service to exclusively economic insufficiency.

In order to achieve this objective, it is necessary to understand in general terms, what constitutes the constitutional guarantee of free legal assistance to those in need and its relation to access to justice, specifically concerning to the normative concepts employed as requirements for such provision in different situations. Next, the analysis should focus on pro bono advocacy itself and its relationship of complementarity with the provision of free legal assistance, seeking to understand the new position that pro
bono advocacy can take in Brazilian law with the new wording of the Code of Ethics and Discipline of the OAB.

From the relationship between the benefits of pro bono advocacy and access to justice in Brazil and the limitation of the requirement for the exercise of this activity, a criticism will be made for linking the benefit to an exclusively economic issue, seeking to suggest a broader criterion that includes the various classes of vulnerable who should be able to benefit from free legal aid.

**Free legal assistance and the requirements for its provision**

Full and free legal assistance is a fundamental right for those "who prove the insufficiency of funds", according to item LXXIV of art. 5 of the Constitution.

Although the constitutional provision and the legal regulations regarding the subject do not establish a rigid criterion to determine who can be the recipient of this assistance, the Brazilian legislation on the subject is historically linked to the criterion of economic insufficiency stated, one considered as sufficient but who cannot afford with procedural costs and attorney's fees without prejudice to their own livelihood and maintenance of their conditions of "dignified survival."27

Likewise, the main public institution for the provision of this assistance, the *Defensoria Pública* (Public Defender’s Office of the States and of the Union) as provided in art. 134 of the Federal Constitution and Complementary Law 80/1994, is aimed at “legal guidance and defense, to all degrees, of the needy, in the form of art. 5 °, LXXIV”. There is also an undetermined criterion of assessment of necessity, linked indirectly to economic insufficiency.

Although the lack of economic resources to pay for an adequate provision of legal services is expressly mentioned in the constitutional text and in the law, the State’s mandatory role in providing legal assistance is not limited to these hypotheses. Due to other situations of insufficiency that hinder access to justice, there are legal forecasts of the need for assistance that do not make any consideration about the economic situation of the assisted.

The first hypothesis provided for by the law is the case of deliberate arrest, and

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26 Decree 2,457 / 1897 and Law 1,060 / 1950.
if the plaintiff does not inform the name of his lawyer, the Public Defender must receive a copy of the arrest warrant, according to art. 306, paragraph 1, of the Code of Criminal Procedure. In this situation, sufficiency arises from the deprivation of liberty itself\textsuperscript{28}, since it occurs precariously, in the form of a mere detention that has not yet been judicially analyzed\textsuperscript{29}, a de facto situation that prevents access to independent legal assistance from any economic consideration.

For this same reason, the Defensoria Pública (Public Defender’s Office) has the institutional function of providing legal assistance to police and penitentiary establishments, according to art. 4, item VIII, CL 80/1994. Inequality resulting from deprivation of liberty is the determining factor in the face of state surveillance, creating a concrete obstacle to the pursuit of legal assistance\textsuperscript{30}.

Furthermore, due to the specific characteristics of the criminal sphere, there can be no limitation of the right to technical and adversarial defense during criminal proceedings. This is because any condemnatory sentence must presuppose the effective exercise of the adversary, which can only be achieved with effective technical defense. Accordingly, regardless of the economic condition of the accused, the State cannot fail to aid those who are in need because they have been restricted by criminal proceedings without adequate legal assistance\textsuperscript{31}.

Another situation of need that demands free legal assistance in Brazilian law is that of children and adolescents who, according to art. 141 of the Statute of the Child and Adolescent, has guaranteed access to the Defensoria Pública (Public Defender’s Office), the Ministério Público (Public Prosecutor’s Office) and the Judiciary. What determines the insufficiency in the case is the status of the child and the adolescent as a developing person\textsuperscript{32}, which means that the assistance provided in relation to their special demands cannot have as a criterion the economic situation of the family. The possibility of legal assistance in the procedure of the Juizados Especiais (Special Courts), “if one of the parties is assisted by a lawyer, or if the defendant is a legal entity or individual firm” also independent of any consideration of the economic resources of the party or his ability to hire counsel, in order to enable the exercise of technical defense on an equal footing even in a more rapid and flexible procedure with regard to procedural forms. In this way, the provision of legal assistance by the State is not limited to the hypotheses of insufficient economic resources to bear the costs of defense or access to justice in general. If there are other ways of limiting the exercise of rights beyond the economic restriction, the assistance provided for in the Constitution must be read in a wide way to consider all the hypotheses provided for in the Brazilian infra-constitutional order.

By this question, the concept of insufficiency must be expanded to include any factual or legal inequality that is not exclusively economic in nature.

The need for assistance also exists for any form of “organizational sufficiency,” which concerns the lack of technical or structural support in legally unequal relationships. The need, in this sense, includes social, cultural or organizational factors that can impede the exercise of rights, therefore, it is essential to arrive at a legal concept of necessity that includes all these situations, so as to complete the meaning of the expressions used in the constitutional text in a way that is not limited to the strict reading of a lack of economic resources.

**In search of a broad concept of vulnerability**

In order to construct this concept, it is appropriate to refer to the so-called “100 rules of Brasilia on access to justice for persons in vulnerable condition.”

It is a document prepared at the XIV Iberian-American Judicial Conference in 2008, due to the diagnosis that people in situations of “vulnerability” find greater difficulty in accessing their rights and that, even if they are formally foreseen, there is no effectiveness if there is no adequate legal assistance. Faced with this situation, the rules and guidelines have the scope to eliminate or mitigate such obstacles.

Despite the value of the rules in relation to public policies or to the judiciary itself, since the focus of this analysis lies in the provision of the assistance itself, that is, in the services of advocacy itself, the reference to the document is particularly useful regarding the definition of vulnerability, considering that it materializes the abstract concept of “organizational insufficiency” stated above. The general concept of people in situations of vulnerability used by the document is:

> Those persons who, because of their age, gender, physical or mental state, or because of social, economic, ethnic and / or cultural circumstances, find particular difficulties in exercising fully before the justice system the Rights recognized by the legal system.

This definition is not intended to establish a criterion for defining the need for legal assistance for whom access to justice should be promoted. Rather, there is only one general set of circumstances that can obstruct access to justice. The concept is based on a general idea of the need for assistance, which consists in the difficulty in exercising rights before the justice system, and then investigates the circumstances that condition this fact. From this concept, several reasons are given that can cause this difficulty.

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35 Ibid.
36 Ibid. Capítulo 1, Seção 2.
37 Ibid.
Although they do not exhaust the issue, the circumstances listed are broad enough to give substance to the concept of vulnerability in several areas, being: age, both for the child and the adolescent as for the elderly; physical, mental or sensory disability; belonging to indigenous communities; primary victimization (due to the effects of crime) and secondary victimization (contact with the justice system as a victim); migration and internal displacement; poverty, both economic and social and cultural; gender discrimination in relation to women; belonging to national, ethnic, religious or linguistic minorities; as well as deprivation of liberty, either during the investigation or prosecution or through execution of sentence or security measure.\textsuperscript{37}

In this way, it is perceived that the recipients of access to justice policies must be all those who, for reasons of fact, may have some difficulty in exercising their rights in due form. The Brazilian legislation on access to justice, however, does not contemplate this myriad of hypotheses, limiting itself to consecrating constitutionally only the assistance to those with insufficient income and, in a wide way when dealing with the institutional function of the Defensoria Pública (Public Defender's Office), to those in need.

Therefore, it is necessary to dedicate this assistance as a fundamental right to all those who are in this broad situation of vulnerability, extending the institutional function of the Defensoria Pública (Public Defender's Office) beyond the economic sense present in the Constitution and consecrating the actions in diverse insufficiencies.

**The role of pro bono advocacy in access to justice**

Although the role of legal assistance to the vulnerable is primarily of the Defensoria Pública (Public Defender's Office), there is still a great insufficiency in serving those in need, even with the concept of necessity strictly limited to the economic question\textsuperscript{38}.

As seen in the survey carried out by the Instituto Pro Bono in 2014, entitled "The right of access to justice and the practice of pro bono advocacy", when analyzing statistical data regarding the Defensoria Pública (Public Defender's Office) in the State of São Paulo in 2013, the existing problems could be related to the performance of the organization.

Firstly, there was a concentration of care in São Paulo and in some areas of the State of São Paulo, with 95 municipalities in the State being assisted by the Defensoria, which had units in 29 municipalities, while the others were not reached by the agency's actions\textsuperscript{39}.

\textsuperscript{37} Available from (in Portuguese)

\textsuperscript{38} Ibid, pp. 12-13.

\textsuperscript{39} Ibid, p. 28.

\textsuperscript{40} Ibid, p. 14.
The second problem is the need to use the agreement signed between the *Defensoria Pública* (Public Defender’s Office) of the State of São Paulo and the OAB (Order of Attorneys of Brazil) to provide a minimum of legal assistance for individuals not reached by the *Defensoria Pública* (Public Defender’s Office), both in the districts where the institution is present and in the others where the demand cannot be fully absorbed by public defenders.\(^\text{40}\)

Regarding the agreement, it is worth noting that it represents more than 50% of the total expenses of the *Defensoria Pública* (Public Defender’s Office) of the State of São Paulo, and has remained stable in absolute terms even with the accelerated expansion in the number of defenders being analyzed.\(^\text{41}\)

Additionally, the research itself draws attention to the fact that the work of the lawyers in these cases, which should be supplementary, ends up receiving the main allocation of funds of the *Defensoria Pública* (Public Defender’s Office), in view of the fact that the technical quality of this assistance is presumably of inferior quality (due to the absence of criteria for assessing legal training and supervision of their work). Due to the low value of fees, lawyers are encouraged to participate in this activity and to assume as many cases as possible in all areas of law.\(^\text{42}\)

In addition to the statistical analysis, the research included a survey conducted with professionals in the area to understand their perception of access to justice and pro bono advocacy. In summary, it was found that the respondent general perception is that the state does not offer legal assistance services sufficiently and effectively and that pro bono advocacy would contribute in a complementary way to the legal assistance system.\(^\text{43}\)

The research concludes that the underprivileged population’s access to justice is deficient being insufficiently accessible, even with the high number of lawyers per inhabitant, it is of low quality yet still a drain for the public resources. It has also been pointed out that the most efficient way to overcome this situation would be to strengthen the *Defensoria Pública* (Public Defender’s Office), combined with the revision of the system of agreement with the OAB and the repeal of the prohibition of pro bono practice in force at the time.\(^\text{44}\)

Such research is of instructive value because it shows that, in the State with the largest structure of Judiciary, with a larger population and greater number of cases, legal assistance is perceived as insufficient and problematic, whilst pro bono advocacy has been identified as an enabler to carry it out.

\(^{40}\) Ibid, pp. 28-29.
\(^{41}\) Ibid, p. 29.
\(^{42}\) Ibid, p. 30.
This situation was remedied, however, with the publication of the New Code of Ethics and Discipline of the OAB. Pro bono law is now regulated, provided that it is exercised in a free and voluntary manner for people who do not have the resources to hire a lawyer, without prejudice to their own livelihood.

However, whilst this represents a step forward to allow a complementary action of the lawyers regarding access to justice, there are still limits to its exercise, especially regarding the economic criterion of selection of the potential beneficiaries, object of the present report.

Given that in a State such as São Paulo, the Defensoria Pública (Public Defender’s Office) cannot meet the demand even starting from a limited concept of economic insufficiency that does not reach all possible vulnerabilities, making legal assistance depend on a very expensive agreement with the OAB, it is a relevant limitation factor to adopt a similar criterion for the practice of pro bono advocacy. The complementary role that pro bono advocacy could exert in access to justice is hampered by determining its scope of action in attention only to the narrower economic criteria.

Considering that the Public Defender’s Office adopts this criterion for assistance, pro bono advocacy should adopt flexible criteria to mitigate all potential vulnerabilities that are not reached by the Brazilian system of free legal assistance.

It is concluded that the criterion adopted to regulate the provision of pro bono advocacy by the OAB was inadequate and excessively restrictive, since it goes against the movement that identifies, within access to justice, a broader scope than the merely economic one, in tune with the needs and difficulties brought by contemporary society regarding the exercise of rights.

Moreover, although the criterion of vulnerability enshrined in the Brazilian Constitution and adopted by several Defensorias Públicas (Public Defender Offices) 45, it is excessively restrictive in view of the modern reality of access to justice, it is perceived that there are difficulties in dealing with the demand for assistance even with the adoption of a rigid and strictly economic criterion of selection of those who can be assisted. With this, pro bono advocacy could be an important instrument in access to justice for the vulnerable who are not covered by the criteria generally adopted in care and are no longer subject to the criteria imposed.

Likewise, in the specific case of the State of São Paulo, the incentive to pro bono advocacy in a broader manner could serve to relieve public defense expenses with the agreement entered into with the OAB. This is reinforced by the good impressions of

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the professionals in the field regarding the practice of pro bono advocacy, as demonstrated by the research.

That is, both from a general point of view regarding the modern definitions of vulnerability and from a practical perspective to identify the concrete problems of access to justice in Brazilian law, the regulation given to pro bono advocacy was a timid advance in what could have been a broad and flexible criterion of vulnerability adopted.

For this reason, the recommendation made here is to seek to reform these regulations in order to adopt the concept of vulnerability present in the “Rules of Brasilia on Access to Justice for Persons with Vulnerability”, taking into account the vulnerabilities arising from age, gender, physical or mental state, as well as those conditioned by social, economic, ethnic or cultural circumstances, which may cause difficulties in the exercise of rights before the justice system.

**ADVOCACY PRO BONO: A DYNAMIC CONCEPT**

As it was possible to confirm from the previous topics, the pro bono advocacy is constituted by who carries out and who receives the service. Such concepts are essential to define and understand the dynamics and guidelines of this activity. However, it is not enough to understand the subjects of the activity, but its characteristics. We will briefly see how we could understand some key hypotheses for the conceptualization of pro bono advocacy.

We start from a simple thesis, but that says a lot about what would be the best interpretation for the new regulation: pro bono advocacy is a dynamic concept, that is, its various elements must be analyzed together and articulated to reach a conceptualization that is at the same time more precise, but not cast or static.

From this premise, we follow our considerations on each of the elements brought in in article 30, which are, free, occasional and voluntary.

**Pro Bono – unpaid practice**

During our Network meetings, the issue of unpaid legal practice had as its main controversy the possible compensation of providers of pro bono advocacy. To better understand this issue, it is necessary to propose a distinction between who is the beneficiary of pro bono advocacy and who lends it or performs it.
In this sense, the characterization of gratuity refers to the beneficiary, that is, to be considered pro bono advocacy, the practice should be free of charge to the individual or entity that will receive the legal services, since they do not have to pay the lawyer’s fee.

However, this does not prevent those who carry out pro bono advocacy from being paid otherwise. The main example is the compensation of pro bono hours by firms. The compensation in this case is tied to the idea of sustainability and appreciation of the practice within the office environment. So, not only is it allowed, it is encouraged.

It should be remembered that while the lawyer and the firm itself are voluntarily promoting this practice (although compensation is used as an incentive), they, and the public defender’s office, are linked to a state activity provided for in the Constitution, there is therefore no voluntary aspect. As stated above, the constitutional model of legal assistance cannot be confused with pro bono advocacy, since, while pro bono advocacy is voluntary and supportive, the work done by the Defensoría Pública (Public Defender’ Office) consists of a State obligation to guarantee the defense of the disadvantaged.

We can cite the systems of practice of advocacy for the disadvantaged in other countries:

- **Portugal** - Lawyers are freely appointed by the Court, receiving compensation from the State.

- **Germany** – there is a system of financial compensation by the State to lawyers who are interested in providing legal aid.

- **Chile** - Servicio de Asistencia Judicial, whose money is handed over to the Bar Association.

- **Japan** - Japan Legal Aid Association and Japan Federation of Bar Association, as well as various local associations - receive grants from the Ministries of Justice and Transportation, local governments, private donations and contributions from the Asia Foundation. Criminal causes - fees paid by the State.

- **US** - Legal Services Corporation - Office of Economic Opportunity (OEO) - transfer of federal resources to community action programs.

- **Italy** - commission formed by judge, the Prosecutors Office and the Bar, is responsible for receiving orders. Lawyers only receive a fee if they win the case.
Volunteering

The focus here is on contrasts between voluntary and obligatory practice, and which would be more adequate the practice of pro bono, based mainly on the North American experience of the concept.

In the United States, there is an interesting debate about how to draw this line and whether the idea of obligatory practice may distort the attitude towards pro bono. Recently in New York, the mandatory provision of 50 pro bono hours was approved so that law graduates can be accredited to the Bar Association, this same issue is also being discussed in California. We have seen from the studies on the American experience that the idea of voluntary practice does not exclude affirmative action in order to stimulate or even create reinforcements to stimulate pro bono practice. This can be thought of in terms of bonuses or compensation within firms and companies, and this incentive should be encouraged for wider promotion of pro bono practice and strengthening of a national culture.

Eventuality

The concept of eventuality generates many discussions due to the very ambiguity in the use of the term. One can speak in the event of pro bono assistance to a beneficiary or one can speak in the eventuality of the practice.

When we think about the eventuality of pro bono practice, we have a clear conflict with the quest for its sustainability. If we think of a large firm, the legal department of a company or even an individual lawyer, the interesting thing is that this practice is just continuous and not eventual.

It is known that for effective promotion of access to justice through pro bono it is imperative that the practice is not limited to occasional and disjointed assistance, but that it is built to the point of consolidating itself as a firm or company policy.

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46 50 Hour Pro Bono Requirement for the New York State Bar: Under the New York State bar admission requirements, all persons admitted to the New York State bar after January 1st, 2015 must file an affidavit by a lawyer admitted in the jurisdiction where the work is performed showing that they have performed fifty hours of qualifying pro bono service. Available from: [http://web.law.columbia.edu/social-justice/students/pro-bono/50-hour-pro-bono-requirement-new-york-state-bar](http://web.law.columbia.edu/social-justice/students/pro-bono/50-hour-pro-bono-requirement-new-york-state-bar) Accessed: 11 July 2017
Concerning the possibility of pro bono assistance to a beneficiary, one of the criticisms raised was that such assistance should be contingent in order to prevent an entity or individual from benefiting forever from pro bono assistance, even when they have the means to bear the costs of a lawyer. This criticism, however, is mistaken, since this hypothesis is not inherent to a non-contingent service, but rather a problem to be solved by the analysis of the vulnerability criterion.

Additionally, there is a strong incentive for pro bono aid to be given on an ongoing basis, even more so in the case of an organization. For example, it is interesting that a firm may only assist an organization that works with refugee law in an ongoing labor claim, and that after its resolution it may never again contact the NGO, but may engage with the NGO’s mission, taking on related demands, as well as in drawing up an opinions advocating the facilitation of the recognition of foreign diplomas so that refugees can acquire positions in the labor market that are more in line with their training and promoting an improvement in their quality of life.

Thus, in the two senses in which the eventuality can be thought, it would be detrimental as a criterion delimiting the practice.

Added to this is the notion that non-contingency fosters strategic litigation in the degree of specialization in the demands of vulnerable people; impersonal action; possibility of molecular performance, that transcends the individual, extrajudicial and judicial orbit - education in rights, and collective tutelage; frequent way of exposing the main contours of the causes.

THE CHALLENGE OF CREATING DYNAMIC AND INNOVATIVE PRO BONO ADVOCACY AND PREVENTING ITS MISUSE

Apart from all that has been discussed, there is also a brief reflection on the final part of the regulation of pro bono activity, which provides that “pro bono advocacy cannot be used for political, partisan or electoral purposes, nor benefit Institutions that aim at such objectives, or as an advertising tool for attracting customers.”\(^\text{47}\)

There has been an emerging concern about the very creation of this space for dialogue and discussion on pro bono: the risks associated with engaging in the activity. Some examples that have been raised include; fear of using pro bono advocacy for political or electoral purposes, pro bono should not benefit community leaders or

\(^{47}\) Art. 30, §3, Code of Ethics and Discipline of the Brazilian Bar Association.
community meeting spaces with political allegiances. Are non-profits, such as consumer assistance agencies, already practicing pro bono? Is it possible to organize a firm that, through private donations and / or projects funded by state or private entities, can work exclusively with pro bono beneficiaries?

Also, the non-disclosure of beneficiaries would avoid attracting clients, but would also restrict the possibility of disseminating the opportunity to other stakeholders and improving the service at a specialized level.

Our concern was, from the studies of the guidelines for pro bono advocacy in Brazil and globally, to stimulate good practices and new ways to develop this activity.

We have been able to introduce excellent initiatives around the world that need to be publicized and encouraged, for example, the idea of low bono that have already been mentioned, which aims to provide legal assistance with a rate below normal value to increase access to justice, or the idea that emerged concerning the compensation of law firms of a specific branches within the firm or legal departments of businesses could be aimed at social projects.

In common law countries, we could still see innovative designs to deal with the difficulty of pro bono action, for example, the idea of contracting civil liability insurance when pro bono practice is done by a lawyer linked to a company. Based on these reflections, we aim at bringing a current and dynamic panorama of the practice of pro bono advocacy, with a transformative perspective and a view to generate good initiatives. We seek, therefore, to highlight all the possible interpretations and readings of the devices of the new code of ethics and discipline of the OAB with this perspective.

48 The Centre established the National Pro Bono Professional Indemnity Insurance Scheme to encourage in-house corporate and government lawyers to undertake pro bono legal work. The Scheme removes one of the key barriers for in-house, private and career break lawyers who wish to engage in pro bono legal work – the need for professional indemnity (PI) insurance to cover them for any civil claims arising from their pro bono legal work”. http://probonocentre.org.au/provide-pro-bono/pi-insurance-scheme/ - http://probonocentre.org.au/provide-pro-bono/pi-insurance-scheme/ “The work is covered by an indemnity insurance equivalent to that required under the SRA Indemnity insurance rules” – http://www.dlapiperwin.com/export/sites/win/downloads/WIN_Pro_Bono_Guidance.pdf