

Pro Bono Practices and Opportunities in Kenya¹

I. Introduction

Access to justice in Kenya is still regarded as expensive due to high legal fees levied by lawyers. A majority of Kenya’s population cannot afford to retain the services of a lawyer and often resort to self-representation (mostly in criminal cases), legal aid and pro bono legal services. In practice, there is no clear-cut distinction between legal aid and pro bono legal services in Kenya. Whereas government driven aid or support is referred to as legal aid, some private firms and organizations offering such services also refer to their activities as legal aid. For example, *Kituo Cha Sheria*, a non-governmental organization that pools together volunteer advocates to take up matters on pro bono basis, refers to this service as legal aid. Private law firms, on the other hand, refer to these services as pro bono legal services. Use of the term “legal aid” by non-governmental organizations may therefore refer to pro bono legal services in some instances.

Kenya has for a long time lacked a substantial legal aid system. However, there have been noticeable improvements in the past few years. Whereas legal aid services are regulated by the recently enacted Legal Aid Act No. 6 of 2016 (the “Act”), the provision of pro bono legal services remains unregulated. The Act regulates the provision of legal aid services in Kenya and established the National Legal Aid Service (“NLAS”) to provide legal aid services at the expense of the State to persons who qualify for legal aid services under the Act. In 2017, the Office of the Attorney General and Department of Justice in conjunction with the NLAS launched the National Action Plan on Legal Aid, 2017-2022 which is expected to serve as a road map for coordinated implementation of legal aid interventions between the government and legal aid actors in Kenya. The National Action Plan, if successfully implemented, will facilitate the full implementation of the National Legal Aid and Awareness Policy, 2015 as well as the Legal Aid Act 2016.

II. Overview of Pro Bono Practices

(a)	Professional Regulation	
	1. Describe the laws/rules that regulate the provision of legal services?	<p>Lawyers in Kenya are primarily regulated by the Law Society of Kenya (established by an Act of Parliament in 1948²) under the Advocates Act³ and the regulations issued thereunder.</p> <p>The Advocates Act sets out the qualifications required for practicing as an advocate (including foreign advocates and in house advocates), the issue of practicing certificates, remuneration of advocates, and establishes and regulates a Complaints Commission for the purpose of enquiring into complaints against advocates.</p>
	2. Describe any licensure requirements governing the provision of legal services.	Lawyers in Kenya must be licensed and qualified to practice as Advocates of the High Court of Kenya

¹ This chapter was drafted with the support of Herbert Mwaura of Kaplan & Stratton.

² The Law Society was initially formed in 1948 under section three of the Law Society of Kenya Ordinance, 1949. That Act was later repealed by the current Law Society of Kenya Act, which came into force on October 30, 1992.

³ See <http://www.kenyalaw.org/lex/actview.xql?actid=CAP.%2016> (last visited on May 1, 2019).

		<p>in order to provide legal services (including pro bono legal services).</p> <p>Foreign-qualified lawyers are required to be admitted to practice in Kenya in order to provide legal services in Kenya (including pro bono legal services). The admission requirements are set out by the Advocates Act, Cap 16 Laws of Kenya.</p>
(b)	Pro Bono Practice and Culture	
	<p>1. Describe the rules that regulate the provision of pro bono legal services e.g. any explicit regulation or limitation on providing free legal services in some or all contexts, details of any mandatory or minimum fees imposed on provision of legal services.</p>	<p>There are no rules that specifically regulate the provision of pro bono legal services in Kenya. However, the Legal Aid Act No. 6 of 2016 (the “Act”)⁴, enacted in 2016, regulates the provision of legal aid services in Kenya and requires legal aid service providers (which includes in-house lawyers operating under the pro bono program of the Law Society of Kenya or other civil society organization or public benefit organization registered in Kenya) to be accredited by the NLAS established under the Act.⁵ The NLAS was established to provide legal aid services at the expense of the State to persons who qualify for legal aid services under the Act.⁶</p> <p>There is no statutory definition of the term “pro bono” under Kenyan law. However, this is generally accepted as the practice of advocates taking up legal briefs at no charge. In many cases, this is done where the client is unable to meet the costs incidental to their matter.</p> <p>There is no explicit regulation or limitation on providing free legal services in Kenya. There are no mandatory or minimum fees imposed on provision of legal services with respect to pro bono legal services.</p> <p>The Act defines “legal aid” as including:</p> <ul style="list-style-type: none"> (a) legal advice; (b) legal representation; (c) assistance in —

⁴ See <http://www.kenyalaw.org/lex/actview.xql?actid=No.%206%20of%202016> (last visited on May 1, 2019).

⁵ See Part VIII (Accreditation of Legal Service Providers) of the Act on: http://www.kenyalaw.org/lex/actview.xql?actid=No.%206%20of%202016#part_VIII (last visited on May 1, 2019).

⁶ See Part VI (Legal Aid Services), section 35(1) of the Act: http://www.kenyalaw.org/lex/actview.xql?actid=No.%206%20of%202016#part_VI (last visited on May 1, 2019).

		<p>(i) resolving disputes by alternative dispute resolution;</p> <p>(ii) drafting of relevant documents and effecting service incidental to any legal proceedings; and</p> <p>(iii) reaching or giving effect to any out-of-court settlement;</p> <p>(d) creating awareness through the provision of legal information and law-related education; and</p> <p>(e) recommending law reform and undertaking advocacy work on behalf of the community;</p> <p>In-house lawyers must be accredited by NLAS if they are providing pro bono transactional or research support to an organization.⁷</p>
	<p>2. Are lawyers required by such rules to work a minimum number of pro bono hours? If so, how many?</p>	<p>There are no rules requiring advocates to work a minimum number of pro bono hours in Kenya.</p>
	<p>3. Are aspiring lawyers required to complete a minimum number of hours of pro bono legal services in order to become licensed lawyers?</p>	<p>There are no rules requiring aspiring advocates to complete a minimum number of hours of pro bono legal services in order to become licensed advocates in Kenya.</p>
	<p>4. What are the main areas of law which require or present opportunities for the provision of pro bono legal services? What are the major unmet legal needs?</p>	<p>Typically, criminal law and civil law related cases present opportunities for provision of pro bono legal services in Kenya.</p> <p>In most criminal cases, defendants/accused persons are unable to afford legal services and therefore require legal aid.</p> <p>As regards civil cases, section 37 of the Act provides that the NLAS may not provide legal aid services in respect of civil proceedings:</p> <ul style="list-style-type: none"> • to a company corporation, trust, public institution, civil society, NGO or other artificial person; • in matters relating to tax; • in matters relating to the recovery of debts; • in bankruptcy and insolvency proceedings; and

⁷ See section 32A of the Advocates Act (Cap 16 Laws of Kenya):
[http://www.kenyalaw.org/lex//actview.xhtml?actid=CAP.%2016#KE/LEG/EN/AR/A/CHAPTER 16/sec_32A_t12](http://www.kenyalaw.org/lex//actview.xhtml?actid=CAP.%2016#KE/LEG/EN/AR/A/CHAPTER%2016/sec_32A_t12)
 (last visited on May 1, 2019).

		<ul style="list-style-type: none"> • in defamation proceedings.
	5. Who are the main providers of pro bono legal services? e.g., NGOs, governmental or other public services, schools and universities, private law firms (local or international) or corporate organizations?	Currently, the majority of pro bono legal services in Kenya are provided by non-governmental organizations (“NGOs”) which offer assistance to marginalized groups. The NGOs are located mainly in large cities and lack the resources and capacity to represent the large number of Kenyans in need of legal advice.
(c)	Obstacles to Provision of Pro Bono Legal Services	
	1. Do lawyers require a license to provide pro bono legal services?	There is no distinction in Kenya between the requirement for lawyers to be licensed to provide legal services and the requirement for lawyers to be licensed to provide pro bono legal services, therefore please see II.(a).1 above.
	2. Do foreign lawyers require any additional license(s) to provide pro bono legal services?	There is no distinction in the requirements for foreign lawyers to provide legal services in Kenya and the requirements for foreign lawyers to provide pro bono legal services in Kenya, therefore please see II.(a).1 above.
	3. Do lawyers require professional indemnity legal insurance cover for any pro bono legal services that they provide? If so, are they prohibited from working under the cover of another pro bono provider, such as a private law firm or organization working on the same pro bono project?	<p>The Advocates (Professional Indemnity) Regulations, 2004 requires advocates in Kenya (including in-house lawyers) to have professional indemnity legal insurance cover in place to compensate clients for loss or damage resulting from claims in respect of any civil liability or breach of trust by the advocate or his employees.</p> <p>The Regulations are not clear as to:</p> <ul style="list-style-type: none"> • whether in-house lawyers can be covered by insurance cover provided by their employers; and • whether the mandatory insurance cover relates to both paying and pro bono clients. As such, it is assumed that pro bono clients are also covered by such insurance. <p>In-house lawyers are not prohibited from working under the cover of another pro bono provider. If that pro bono provider is a private law firm, such firm is required to have a professional indemnity legal insurance cover of not less than KES 1,000,000 (approximately GBP 7,721.48).⁸</p>

⁸ See http://www.kenyalaw.org/lex//sublegview.xql?subleg=CAP.%2016#KE/LEG/EN/AR/A/CHAPTER_16/SUBLEG/HC_LN822004 (last visited on May 1, 2019).

	<p>4. Are there any rules that prohibit advertising of pro bono successes or soliciting new pro bono clients?</p>	<p>There are no rules in Kenya specifically prohibiting advertising of pro bono successes or soliciting of new pro bono clients. However, there are general limitations on advertising by advocates as provided in the Advocates (Marketing and Advertising) Rules, 2018⁹.</p>
	<p>5. Do lawyers receive any “Continuing Legal Education” or equivalent credit for pro bono hours worked?</p>	<p>Under the Advocates (Continuing Professional Development) Rules, 2014, the Law Society of Kenya regulates the continuing professional development (“CPD”) of advocates. CPD programs emphasize ethical as well as practical and professional aspects of legal practice and every member of the Law Society of Kenya must obtain a minimum of five CPD units in each CPD year.¹⁰</p> <p>Regulation 11 of the Advocates (Continuing Professional Development) Rules, 2014 states that regular or pro bono legal work is not an approved CPD activity except for legal work that is for the purposes of the Legal Aid Program and for which the Continuing Professional Development Committee of the Law Society of Kenya shall determine how many units an advocate may accrue in a CPD year for that work.</p>
<p>(d) Sources of Pro Bono Opportunities and Key Contacts</p>		
	<p>1. Describe any governmental sources of pro bono and/or other legal services in Kenya.</p>	<p>The Law Society of Kenya, in conjunction with the judiciary of Kenya, offers annual legal aid and pro bono legal services over a number of days at its branches throughout Kenya. In Nairobi, lawyers advise pro bono clients at the grounds in the High Court of Kenya and Milimani Law Courts.</p> <p>The Law Society, in its 2012-2016 strategic plan, set a performance objective of engaging 600 Kenyan lawyers in pro bono legal services by 2016.¹¹ The Law Society’s 2017-2021 strategic plan does not reference this and so it is unclear as to whether or not this target was achieved.</p> <p>The implementation plan within the Law Society’s strategic plan 2017-2021 allocates funding in 2019 specifically for providing a framework for the operationalization of a pro bono legal scheme, so it</p>

⁹ See <http://downloads.lsk.or.ke/downloads/downloads/the-advocates-act-2014-legislative-supplement.pdf> (last visited on May 1, 2019).

¹⁰ Advocates (Continuing Professional Development) Rules, 2014, regulation 4(a).

¹¹ The Law Society of Kenya, Strategic Plan 2012-2016, April 2012, at ¶7.3.

	<p>may be that we see further governmental sources of pro bono legal services in the near future.¹²</p>
<p>2. Describe the main non-governmental sources of pro bono and/or other pro bono resources in Kenya.</p>	<p>Notable NGOs in Kenya providing pro bono legal services include the Federation of Women Lawyers, The CRADLE, the International Commission of Jurists in Kenya, <i>Kituo Cha Sheria</i>, the Public Law Institute, Christian Legal Education Aid and Research and KELIN Kenya.</p> <p>Section 57 of the Act provides that the NLAS shall through regulation, develop and adopt a criteria for accreditation of persons and institutions to provide legal aid services. The NLAS has not issued any regulations/guidelines on such criteria.</p>
<p>3. Is there any public or private organization with which a local or foreign attorney can register in order to be made aware of pro bono opportunities?</p>	<p>Local attorneys who are registered with the Law society of Kenya usually receive frequent updates on pro bono opportunities. For foreign lawyers to take up pro bono opportunities in Kenya, they must meet the qualification criteria provided under the Advocates Act.</p>

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¹² The Law Society of Kenya, Strategic Plan 2012-2016, April 2012, at ¶5.3.