



**PRO BONO WORK VS. LEGAL AID:
APPROACHES TO ENSURING ACCESS TO JUSTICE AND THE
SOCIAL RESPONSIBILITY OF THE ATTORNEY**

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ABSTRACT

In many jurisdictions middle- and low-income individuals obtain only a relatively modest share of lawyers' services. In a society ruled by law, every person should be able to expect key principles of justice to apply. Among the most important dimensions of a right to a fair trial is the right to equal access to an attorney. After all, the attorney is not merely a commercial actor but also represents the legal system. Access to an attorney is a key step in

providing justice in practice. Many states have developed programs of legal aid which aim at providing those who are in need of legal assistance but cannot afford to pay for legal services with a way to receive legal services. Scientific literature distinguishes various forms and instruments of legal aid: the court appointment of lawyers, free or low cost legal aid provided by public agencies and charitable and fraternal organizations, sometimes mixed with legal expenses insurance, contingency fee and the free services of lawyers who are serving *pro bono publico*. From the perspective of practicing attorneys, this article presents and compares existing systems of legal assistance in Lithuania and Germany, and their availability and effectiveness, in order to answer the question whether the social responsibility of attorneys and access to justice is obtained.

KEYWORDS

Pro bono work, legal aid, attorney, social responsibility, justice

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*Legally enforceable rights and duties underpin a democratic society, and access to justice is essential in order to make these rights and duties real.*¹

INTRODUCTION

Access to justice is emerging as an important contemporary legal topic, both in national and international law. In international law, access to justice norms have provided rights to individuals both within the context of but also (and arguably even more notably) outside the classical human rights regimes of the famous multilateral treaties such as the International Convention on Civil and Political Rights (ICCPR) or the European Convention on Human Rights (ECHR). These conventions presuppose the existence of an access to justice and consequently demand a fair trial. But a fair trial already starts with the question of who can actually seek justice through the courts. Outside human rights conventions, access to justice was one of the early rights which international law gave to individuals, for example with Article 36 of the Vienna Convention on Consular Relations (VCCR) or with the Northern Environmental Protection Convention (NEPC). Therefore, today the question is asked whether access to justice has already reached the status of a fundamental human right under international law.

This has implications not only on the international but also on the national level. States no longer may have to guarantee access to justice as part of the rule of law but also as a human right. This right not only requires the state to refrain from harming the individual but it requires the state to take positive action so that the person in question is able to enjoy this right. This means that states not only have to have a functioning judicial system but also that it has to be accessible *de facto*. Often, though, access to justice is limited by a lack of finances. Many who could claim legal rights in court are unable to do so because they lack the funds necessary to retain legal services, or even do not know their rights (including their right to access free or low paid legal services or how and where to apply for it).

Essentially, there are three approaches to this problem: 1) the state, on which the positive obligation to ensure access to justice in incumbent, provides free or cheap legal advice, or 2) the state relies on attorneys to provide the services which are required to ensure a fair access to justice, or 3) this State obligation is partially transferred onto the shoulders of the people themselves by forcing them to buy

¹ Tony Blair, "Foreword": xiii; in: D. Bean ed., *Law Reform for All* (1996); cited in: Hilary Sommerlad, "Some Reflections on Relationship between Citizenship, Access to Justice and the Reform of Legal Aid," *Journal of Law and Society* Vol. 31, No. 3 (September 2004): 345.

Legal Expenses Insurance.² Often, as we will see, these models are not realized in a “pure” but rather in a mixed form, combining the possibility of legal advice by the state or by attorneys working for a fraction of the price they would normally ask or completely for free.

In this article, we look at the issue from the perspective of the practicing attorney. Not taking into account the possibility that the state may provide legal services directly, we will look at how attorneys can approach this issue, leaving aside legal expenses insurance, because it is basically related with the clients themselves but not attorneys as such.

The question we ask is whether the social responsibility of the attorney is better realized through *pro bono* work or through institutionalized legal aid rules in the sense that the access to justice for those who do not have the money to pay an attorney is better realized. In this context one could ask if the *individual* client is better served by an attorney who is forced to provide cheap legal advice or by one who has been freely chosen to provide legal advice for free in this specific case. But we also have to ask if *all* potential clients are served better under one model or the other. The article takes into account examples from two countries: Lithuania and Germany. This comparison includes a small country which long suffered under Soviet occupation, only joining the European Union (EU) in 2004, and the EU’s most populous member state as well as one of the richest states in Europe. Both are involved in the Council of Bars and Law Societies of Europe (CCBE), discussing the general role of attorney and established systems of legal aid in both countries comparing their attitudes to the problem.

² Usually this insurance system, which is applied, for example, in Sweden, Netherlands, Germany and other countries, is mixed with State guaranteed legal aid. More details could be found in Francis Regan, “The Swedish Legal Services Policy Remix: The Shift from Public Legal Aid to Private Legal Expense Insurance,” *Journal of Law and Society* Vol. 30, No. 1 (March 2003); Ben C. J. von Velthoven and Carolien M. Klein Haarhuis, “Legal Aid and Legal Expenses Insurance, Complements or Substitutes? The Case of the Netherlands,” *Journal of Empirical Legal Studies* Vol. 8, No. 3 (2011).

In a society founded on respect for the rule of law the lawyer fulfils a special role. ... A lawyer must serve the interests of justice as well as those whose rights and liberties he or she is trusted to assert and defend and it is the lawyer's duty not only to plead the client's cause but to be the client's adviser.³

1. GENERAL CONSIDERATIONS

In both legal systems (Germany and Lithuania) an attorney (*advokatas* in Lithuania, *Rechtsanwalt* in Germany) is treated similarly as an independent and liberal servant of justice, but not commercial actor,⁴ i.e. the lawyer has a special place in society which gives him/her special power; but with this power comes heightened moral requirements.⁵ This also requires that each and every client is treated with respect and that every case is treated seriously – regardless of the potential amount of money earned.

The attorney therefore has a responsibility greater than that to his or her client⁶: to the judicial system as a whole.⁷

Since he is not as free as a normal commercial actor, an attorney under German law has obligations even when not entering into contractual relations, although the notion that there can be obligations which are similar to those under tort law but in fact stem from a nascent contractual relationship, has long been accepted in German private law.⁸

According to § 44 *Bundesrechtsanwaltsordnung* (BRAO), the German Federal Law on Attorneys, a German attorney “who is approached for professional services and who does not wish to accept the case must immediately state that this is so.” In both systems a great duty of care in such cases and some compensatory

³ *The CCBE's Code of Conduct for European Lawyers*, Article 1.1 // http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_Code_of_conductp1_1306748215.pdf.

⁴ Under German law, an attorney is not a commercial actor, rather, “[a] *Rechtsanwalt* is an independent agent in the administration of justice.”⁴ He or she is assumed to “practise [...] a liberal profession” (*Bundesrechtsanwaltsordnung* (*Federal Attorneys Law*), *Bundesgesetzblatt* (*Federal Gazette*), 1959, Vol. I, pp. 565 *et seq.* [hereinafter – BRAO], §2 sec. 2, § 1, § 2 sec. 1 // <http://www.gesetze-im-internet.de/bundesrecht/brao/gesamt.pdf>). Under Lithuanian law activities of advocates are not commercial but are restricted to the provision of legal services. Accordingly, attorneys are an independent part of Lithuanian system (*Law on the Bar of the Republic of Lithuania*, *Official Gazette* (2004, no. 50-1632), Article 4).

⁵ Scott De Vitto, “Justice and the Felonious Attorney,” *Santa Clara Law Review* 155 (2008): 165.

⁶ Stefan Kirchner, “Country Report: Germany (2012),” not yet published, p. 3 [footnotes adapted].

⁷ Under § 43 of BRAO: “A *Rechtsanwalt* must practise his/her profession conscientiously. A *Rechtsanwalt* must show that he/she is worthy of the respect and the trust that his/her status as *Rechtsanwalt* demands, both when practising and when not practising his/her profession” (BRAO, *supra* note 4, § 43). In Lithuania, Article 39 of the Law on the Bar states that an advocate must fairly discharge his duties, observe the sworn advocate’s oath and laws in his professional activities; continuously improve his professional qualifications and comply with the requirements of the Lithuanian Code of Ethics for Advocates and behave in an honest and civic-minded manner (*Law on the Bar of the Republic of Lithuania*, *supra* note 4, Article 39).

⁸ Stefan Kirchner, *supra* note 6, pp. 3 *et seq.* [footnotes adapted].

mechanisms for damages are foreseen by the law.⁹ Also legal acts and court practice establish an exemplary list of reasons when an advocate may refuse to provide legal services. For example, in Germany, “[a]ttorneys can be obliged from acting as counsel in court proceedings¹⁰ or may be limited in their capacity to render their services for example due to circumstances in their employment,¹¹ notably if they work in the public sector.”¹² In Lithuania important reasons for such refusal could be the advocate’s busy schedule, lack of experience, non-disclosure of the client’s secret, loyalty to the client and avoidance of any conflict of interests or other reasons preventing the advocate from adequate provision of legal services.¹³

Probably the main difference between the two systems is the one related to the provision of free legal services, because in Germany

it is illegal for attorneys to provide free legal advice or even to bill less¹⁴ than required by *Rechtsanwaltsvergütungsgesetz* (RVG), the Act pertaining to the Remuneration of Lawyers,¹⁵ while in Lithuania an advocate is entitled by law to provide legal services free of charge¹⁶ which means that an advocate is allowed to provide charitable activities.

Disadvantages of the German view – that attorneys are still obliged to provide legal advice for a small sum which is payable by the court in case the client is unable to pay,¹⁷ while the money earned in this way often is insufficient to cover the expenses incurred by the lawyer at the same time (rent for the office, salaries for staff etc.).

The second main difference in both legal systems is the one regarding contingency fee. No cure-no pay clauses are in principle illegal under German law (with only a few, and rarely applicable, exceptions in the RVG),¹⁸

while in Lithuania in civil cases, as well as where an action is brought in a criminal case, it shall be allowed to agree on the advocate’s fee so that the amount of the fee would depend on the outcome of the case, unless it contradicts the principles governing the practice of advocates, i.e. allows no cure – no pay clauses.¹⁹

⁹ The *Rechtsanwalt* must provide compensation for any damage resulting from any negligent delay in making such a statement” (BRAO, *supra* note 4, § 44). A similar legal norm is also included in the Law on the Bar in Lithuania, stating that an advocate must immediately notify the client of his refusal to provide legal services and reasons for such refusal (*Law on the Bar of the Republic of Lithuania, supra* note 4, Article 40).

¹⁰ BRAO, *supra* note 4, §§ 48 and 49.

¹¹ *Ibid.*, §§ 45 and 46.

¹² Stefan Kirchner, *supra* note 6, p. 4 [footnotes adapted].

¹³ *Law on the Bar of the Republic of Lithuania, supra* note 4, Article 40.

¹⁴ In individual cases they can agree to accept less after they have finished the case, e.g. if the client’s economic situation has worsened (BRAO, *supra* note 4, § 49 b sec. 1 sentence 2).

¹⁵ *Ibid.*, § 49 b sec. 1 sentence 1.

¹⁶ *Law on the Bar of the Republic of Lithuania, supra* note 4, Article 4.

¹⁷ BRAO, *supra* note 4, § 49 a.

¹⁸ Stefan Kirchner, *supra* note 6, p. 4 [footnotes adapted].

¹⁹ *Law on the Bar of the Republic of Lithuania, supra* note 4, Article 50.

In both legal systems every attorney must be a member of the chamber²⁰ headed by elected members and follow professional rules, which are not law but have been adopted by the attorneys themselves²¹ and where more detailed ruling regarding the legal practice and ethical behavior is established.²²

The conclusion could be made that the attorney's profession in both legal systems is one characterized by a large degree of freedom²³ and that attorneys also enable citizens to participate in the legal process.²⁴ The next sections analyze the historical development of legal aid and the models used in both countries.

2. THE LITHUANIAN MODEL OF STATE GUARANTEED LEGAL AID

In Lithuania the system of state guaranteed legal aid in which attorneys participate started to evolve after regaining independence and enactment of the Constitution.²⁵ Initially state guaranteed legal aid was exclusively associated with protection in criminal cases – which may possibly be the greatest intrusion and infringement of human rights. But this representation was more formal than real.²⁶ The first version of the Law on State guaranteed legal aid was enacted in 2000²⁷ implementing various international commitments taken by ratifying basic international and regional documents.²⁸ Since its enactment the law has changed already nine times; from the 1st of May 2005 a totally new version is enacted²⁹ which indicates that the policy is yet not stable and well developed. In Lithuania

²⁰ In Germany there are regional chambers of attorneys which have an overall body, the Federal Chamber of Attorney's (*Bundesrechtsanwaltskammer* or BRAK), while in Lithuania there is only one Bar.

²¹ In Germany it is done through their elected representatives while in Lithuania there is in general an annual meeting of attorneys.

²² In Germany it is named the *Berufsordnung für Rechtsanwälte* or Rules of Professional Practice (http://www.brak.de/w/files/02_fuer_anwaelte/berufsrecht/bora_stand_01.11.11.pdf; *Berufsordnung für Rechtsanwälte (Rules of Professional Practice for Attorneys)*, English translation // http://www.brak.de/w/files/02_fuer_anwaelte/berufsrecht/bora_engl_stand_1_11_2011.pdf).

In Lithuania Lithuanian Code of Ethics for Advocates is approved by the Minister of Justice where more detailed regulation is provided regarding the actual activities of advocates (*Order by the Minister of Justice No. 1R-345 "For Publishing Lithuanian Code of Ethics for Advocates,"* Official Gazette (2005, no. 130-4681), Section 19).

²³ *Berufsordnung für Rechtsanwälte (Rules of Professional Practice for Attorneys)*, § 1 sec. 1. ; *Law on the Bar of the Republic of Lithuania*, supra note 4, Article 3.

²⁴ BRAO, supra note 4, § 1 sec. 2 sentence 1. Article 1 of the Lithuanian Code of Ethics for Advocates states that "Lithuanian advocates participate in implementation of justice" (*Lithuanian Code of Ethics for Advocates*, supra note 22, Article 1). See also Stefan Kirchner, supra note 6, p. 6 [footnotes adapted].

²⁵ Article 31, declaring that from the moment of arrest or first interrogation, persons suspected or accused of a crime shall be guaranteed the right to defence and legal counsel (*Constitution of the Republic of Lithuania*, Official Gazette (1992, no. 33-1014), Article 31).

²⁶ Jolanta Samuolytė, Jolanta Aleknavičienė, and Regina Valutytė, *Valstybės garantuojamos teisinės pagalbos priemonumas: pirminė ir antrinė teisinė pagalba (Availability of State Guaranteed Legal Aid: Primary and Secondary Legal Aid)* (Vilnius: Human Rights Monitoring Institute: 2011), p. 5 // http://www.hrmi.lt/uploaded/TYRIMAI/VGTP_tyrimas_20111216_FINAL.pdf.

²⁷ *Law on State-Guaranteed Legal Aid of the Republic of Lithuania*, Official Gazette (2000, no. 30-827).

²⁸ Already in this act three possible kinds of legal aid were established: in criminal, administrative and civil cases. The regulation was rather complicated and in accordance with income and assets size even five different levels were established. According to which level the person belonged he/she could have been compensated from 100 up to 50 per cent of expenses.

²⁹ *Law on State- Guaranteed Legal Aid of the Republic of Lithuania*, supra note 27.

State-guaranteed legal aid is classified into two categories: primary³⁰ and secondary legal aid³¹. For the purposes of this article we will further discuss only secondary legal aid, the one provided by attorneys. Secondary legal aid (unlike primary legal aid, which every person may use regardless of income or property) is available to poor people³² and to special categories of people enumerated in legal act (regardless of their property and income) such as persons suffering serious mental disorders, seriously handicapped people, persons staying in stationary state care institutions and so on.³³ In taking account of a person's property and income level, the state undertakes to cover 50% or 100 % of the costs of secondary legal aid.³⁴

Probably the main difference between the Lithuanian and German models is the fact that Lithuanian law includes special rules and regulations as to how attorneys may become providers of secondary legal aid. In addition, the Lithuanian procedure is arguably a bit too complicated and not well grounded.³⁵ The fact that not all possible places are occupied by attorneys³⁶ indicates that the provision of

³⁰ The primary legal aid is available for every person. It is not more than one hour and basically is a legal consultation and drafting of the documents to be submitted to state and municipal institutions except procedural documentation and is provided by municipality institutions.

³¹ It consists of the drafting of documents, defence and representation in court, provided to natural persons.

³² Whose property and annual income do not exceed the property and income levels established by the Government. The system is not perfect because in some cases rather poor people whose earnings are very low but who have some property (example small flat in the big city) could not get free legal services but they cannot afford them by themselves.

³³ *Law on State-Guaranteed Legal Aid of the Republic of Lithuania*, supra note 27, Article 12.

³⁴ But it does not cover the costs which the court awards to the party for which the decision has been rendered from the losing party as well as the costs incurred by the debtor in the execution process (*Law on State-Guaranteed Legal Aid of the Republic of Lithuania*, supra note 27, Article 14).

³⁵ Secondary legal aid is provided in exceptional instances by attorneys who are selected by the state legal aid services using special selection procedure. The Minister of Justice established 5 such services in the 5 biggest cities in Lithuania: in Vilnius, Kaunas, Klaipėda, Šiauliai, Panevėžys (*Order by the Minister of Justice No. 1R-105 "For Establishing State Guaranteed Legal Aid Services and for Reorganization of Public Institutions Vilnius Public attorney and Šiauliai Public Attorney Offices,"* Official Gazette (2005, no. 47-1577), Section 1). An attorney willing to provide legal aid must provide the required documents to a State guaranteed legal aid service (which announced competition), including written opinion of the Bar if the person is suitable for provision of secondary legal aid. Lawyers willing to provide constant legal aid have additionally to take exam. It is a test consisting of 50 questions with three possible answers. Questions are created from the branch in which the attorney expects to provide legal aid. At least 20 questions should be answered in order to pass. At selection procedure personal and professional qualities, motivation for provision of legal aid, professional experience, opinion of the Bar and other additional personal information are taken into account while evaluating candidates willing to provide legal aid constantly. Selection procedure for attorneys willing to provide legal aid in a case of necessity is much simpler: a candidate must provide required documentation and if a positive conclusion is given by the Bar every candidate is included into the list without any competition or any additional requirements. Two different lists of attorneys providing secondary legal aid are established: one list of attorneys who continuously provide secondary legal aid and the list of attorneys who provide legal aid in a case of necessity. In the year 2011 there were 66 attorneys continuously providing secondary legal aid and 365 attorneys providing legal aid in a case of necessity (*Ataskaita apie antrinės teisinės pagalbos organizavimą ir teikimą 2011 metais (Report about the Organization and Provision of Secondary Legal Aid in 2011)*, The Ministry of Justice (2012), p. 13 // <http://www.teisinepagalba.lt/dok/2011%20ANTRINES%20ataskaita-final%202012-06.pdf>).

³⁶ By the order of the Ministry of Justice there is established a number of attorneys continuously providing legal aid which is 73 persons (*Order by the Minister of Justice No. 1R-99 "For the Establishment of the Number of Attorneys Continuously Providing Secondary Legal Aid,"* Official Gazette (2006, no. 35-1265; 2007, no. 78- 3163)). There is shortage of attorneys willing to provide legal aid in Kaunas and Šiauliai services (*Report about Organization and Provision of Secondary Legal Aid in 2011*, supra note 35, p. 24).

secondary legal aid is not very popular among attorneys, although there is no research concerning the reasons. In Germany, on the other hand, every attorney is obliged to provide legal aid unless there are very important reasons, such as complete lack of experience or knowledge in a difficult legal field with which the case of the potential client is concerned. One possible reason for the attitude of Lithuanian attorneys could be that attorneys are unwilling to lose their clients and independence because advocates constantly providing legal aid are not allowed to provide additional legal services. The second possible reason is that attorneys providing secondary legal aid are not adequately paid.³⁷ Taking into account the overall economic situation in Lithuania, attorneys who are continuously providing legal aid are paid relatively well, because their salary is more than twice the average monthly gross salary in Lithuania³⁸ and more than seven times the minimal monthly salary.³⁹ The third possible reason could be workload associated with these kind of legal services. By the decision of board⁴⁰ of 19 January 2010 an attorney continuously providing secondary legal aid and specializing in administrative and civil matters should have in average of 9 to 12 cases per month while an attorney specializing in criminal cases should have a monthly workload of 23 to 26 criminal cases. The actual numbers indicate that this is not the case because during 2011 on average there were 11.4 civil and administrative cases for one attorney and 26.4 criminal cases. Only in Šiauliai did the number of cases exceed the aforementioned limits in 2011.⁴¹

The state's position to reexamine attorneys who are already practicing and to require them to take an additional exam could be an additional reason scaring off attorneys, because even though they are already practicing attorneys and most of them⁴² had to take the exam before being admitting to the Bar, the quality of work is (as if) questioned and (as if) unsatisfactory. It might be that the State was not able to find better criteria for evaluation and selection of the best candidates for

³⁷ In opinion of attorney G. Bartkus average income of attorney before taxes in 2011 was 2567 Litas (743,45 Euros) (Gediminas Bartkus, "Advokatų pajamos: mitai ir realybė" (Attorneys' Income: Myths and Reality) (January 12, 2012) // <http://www.delfi.lt/news/daily/law/gbartkus-advokatu-pajamos-mitai-ir-realybe.d?id=53935043>). In other sources it is stated that young successful attorney earns about 4000 -7000 Litas (1158,48 - 2027,34 Euros) in Vilnius while best specialists – even 10-23 thousand of Litas (2896,20 - 6661,26 Euros) ("Profesija ta pati: darbas ir atlyginimas kitokie" (Profession the same: work and income different), *Veidas* (March 20, 2012) // <http://www.veidas.lt/profesija-ta-pati-darbas-ir-atlyginimas-%E2%80%93-kitokie>).

³⁸ In 2011 average gross salary for women was 1903 Litas, for men – 2199 Litas (see the site of Lithuanian Statistics // <http://www.stat.gov.lt>).

³⁹ Starting August 2012 it is 850 Litas (see the site of Lithuanian Statistics // <http://www.stat.gov.lt>).

⁴⁰ The body established by the order of the Minister of Justice while implementing the Law on State – Guaranteed Legal Aid (*Order by the Minister of Justice No. 1R-347 "For the Establishment of the Board structure and regulations of the State Guaranteed Legal Aid,"* Official Gazette (2008, no. 104-4005)).

⁴¹ All statistical data is taken from the Annual report (*Report about Organization and Provision of Secondary Legal Aid in 2011,* *supra* note 35, p. 13-14 // <http://www.teisinepagalba.lt/dok/2011%20ANTRINES%20ataskaita-final%202012-06.pdf>).

⁴² There are three exceptions: no exam requirements for previous judge (if he practiced not less than 7 years), for Doctor (Ph.D.) of social sciences (law) or a habilitated doctor.

provision of services. Maybe not just legal knowledge (which is evaluated already before admittance to the Bar) but other personal skills, such as the ability to react in conflicting situations, communication skills, experience, etc., are much more important and should be evaluated?

The second critical remark relates to the different selection procedure for attorneys continuously providing legal aid and attorneys providing legal aid only as is necessary. In the latter case there is neither a competition nor any exam; rather, every attorney who wishes can be allowed to provide such services. This of course raises questions of fairness and equality.

Only some data could be found regarding the effectiveness of legal aid. Data from annual reports indicate that the number of persons applying for legal aid and the number of persons obtaining legal aid is increasing every year, i.e. more people are able to use this instrument. Such developments, which could be evaluated either positively (that the State is able to ensure access to justice for more people in need) or negatively (that more poor people or more legal issues in which people need help by an advocate), are rising every year.

Table 1: Application for legal aid in 2007-2011⁴³

	2007	2008	2009	2010	2011
Number of requests for secondary legal aid	8191	11067	14697	16027	16833
Number of satisfied requests	7135	10131	13327	14589	15372
% of satisfied requests					

Accordingly, the provision of state legal aid in 2011 amounts to 1.14% to 1.76% of the total number of registered inhabitants⁴⁴ and dominated full compensation (100 % but not 50% expenses were covered by the state) for provided services.⁴⁵

Secondary legal aid is evaluated very positively both by clients and by legal institutions: the data shows that on average more than 80 percent of the respondents expressed trust in legal aid and satisfaction with the quality of the provided legal aid.⁴⁶

⁴³ Data taken from the *Report about Organization and Provision of Secondary Legal Aid in 2011*, supra note 35, p. 2.

⁴⁴ Calculating together both legal aid provided by the decision of legal services and by the decision of the officer of pre-trial investigation or by decision of prosecutor (*ibid.*, p. 7).

⁴⁵ From them 58,78 % were of first level (total compensation) while 14,45 % were second income and property level (50% compensated expenses) and 27,75 % were exception cases where persons, who are entitled to get free of charge secondary legal aid (example victims of crime, psychically ill persons). Even 68,03 % of all the requests were ones provided in criminal cases in accordance with the Code of Criminal Procedure when the participation of attorney was obligatory. Data are taken from the Annual Report (*ibid.*, p. 6).

⁴⁶ *Ibid.*, p. 25-30. One must have in mind the fact that only 176 questionnaires were answered – only about 1% of all persons applying for state legal aid and it could be the case that only people satisfied with the quality answered these questionnaires.

The quality of provided secondary legal aid was evaluated in the following grades⁴⁷:

- 5 (maximum grade) - 57.4 % of respondents;
- 4 - 24.3 % of respondents;
- 3 - 8.6 % of respondents;
- 2 - 6 % of respondents;
- 1 - 3.8 % of respondents.

The quality of services provided by attorneys in second legal aid based on quality of procedural documents⁴⁸:

- 80.7 % of respondents answered that procedural documents were accepted by the courts;
- 6.4 % were accepted partially- after shortcomings were removed;
- 2.6 % procedural documents were not accepted.

To the question if attorney properly represented the client in the court clients responded the following⁴⁹:

- 78 %- answered positively;
- 11.7 %- negatively;
- 5%- appealed actions of attorney and asked to change him/her.

Table 2: Opinion of courts, prosecutors and pre-trial institutions about the quality of attorneys⁵⁰

Evaluation	Attorneys providing secondary legal aid		Attorneys (%)
	Continuously (%)	In a case of necessity (%)	
Very bad	0	0	0.6
Bad	1.7	1.7	5.1
Satisfactory	22.7	21	29
Good	54.5	55.7	37.5
Very good	13.6	14.8	7.4
Did not answer	7.4	6.8	20.5

As the following data indicates, in the opinion of professionals, attorneys providing secondary legal aid sometimes are in better positions than attorneys in general practice and the quality of attorneys providing legal aid continuously and in

⁴⁷ *Ibid.*, p. 26-27.

⁴⁸ *Ibid.*, p. 26.

⁴⁹ *Ibid.*, p. 25-26.

⁵⁰ *Ibid.*, p. 29.

the case of necessity is the same, sometimes in the case of a necessity even better, regardless of the fact that attorneys do not take the second exam. Notwithstanding the rather good evaluation of the secondary legal aid, some suggestions from legal institutions indicate that the quality of advocates and their attitude towards clients may be improved.⁵¹ Critical remarks are expressed by the previous Minister of Justice R. Šimašius, indicating that secondary legal aid is usually not of proper quality because normal quality control instruments do not function properly, and it is usually abused, as it is attractive to use objects free of charge. He suggests some legal amendments, which could be evaluated critically, such as the right of a client by himself to choose an attorney while the state just pays his/her provided services, and that legal aid could be provided by adjuncts of attorneys and help could be not just representation in courts but also reached agreements in negotiations.⁵² In Lithuania the liberal model is dominant,⁵³ because a detailed list of criteria, oriented to the level of a person's financial status, is provided by the legislator and access to justice is provided only to especially very poor people who satisfy the established criteria.⁵⁴

3. LEGAL AID IN GERMANY

The approximately 150,000 attorneys in Germany are in principle obliged to provide legal aid if it is requested by a client. In most of Germany's sixteen federal states, it is attorneys who provide legal aid. Rarely, courts have employees who are tasked with providing such advice. In any case, the client does have to go to the local court (*Amtsgericht*) at his or her place of residence in order to apply for a document which states that the client has a case and is unable to pay. With this *Beratungshilfeschein* the client can go to any attorney and will receive legal advice aid (*Beratungshilfe*). This is one of the two main forms of assistance.

In practice one can make a distinction between legal advice aid (*Beratungshilfe*) and legal aid during a trial (*Prozesskostenhilfe*). It is only the former form of financial help for clients we are concerned with in this article. To

⁵¹ Law enforcement agencies and courts provided the following suggestions: to establish control system of attorney quality and their competence; to promote attorneys initiative; to make more strict control of attorneys providing secondary legal aid; to make more strict attorney responsibility against his/her client and other participants in the process; to increase number of attorneys, participating in provision of the secondary legal aid (*ibid.*, p. 33).

⁵² Remigijus Šimašius, "Protinga teisinė pagalba neturtingam žmogui" (Prudent legal aid for a poor person) (June 1, 2012) // <http://simasius.popo.lt/2012/06/01/protinga-teisine-pagalba-neturtingam-zmogui>.

⁵³ According to the state welfare theory three basic models of social welfare distinguished: liberal, socio-democratic and corporate one.

⁵⁴ Ingrida Krolienė, "Valstybės garantuojama teisinė pagalba kaip teisės į teisinę gynybą užtikrinimo priemonė. Teisė į teisminę gynybą civilinio proceso reformos kontekste" (State guaranteed legal aid as a mean of right to the judicial defense. The right to judicial protection in the context of the reform of civil procedure): 121; in: *Collection of Scientific Articles* (Vilnius: Mykolo Romerio universiteto Leidybos centras, 2010).

receive legal aid from an attorney, clients first have to fill out an income statement at the local court (supported by relevant documentation regarding income, property and financial obligations, e.g. towards children), after which the court gives them a *Beratungshilfeschein* with which they can go to any attorney who has to consult them for only 10 EUR. The attorney might ask that the client look for another attorney only if the attorney is absolutely unable to handle the case because it is far outside his or her scope of expertise, e.g. if an expert on transnational corporate law is asked to take a difficult divorce case or vice versa. But in principle every attorney is thought to be competent to take any case. In practice, clients who require this kind of help will primarily contact small local law firms. It is there that the bulk of the work is done. The number of cases is well documented, although it is hardly up to date. The information for the year 2002 was only published in 2008. This is explained more easily if one takes into account the de-centralized organization and the many layers and types of courts on the state and federal level. In 2002 alone, *Beratungshilfe* was granted in just under half a million (499,067) cases and a total amount of just over 25 million Euros was paid to attorneys.⁵⁵ In a slight majority of cases (approx. 260,000 vs. approx. 223,000 cases) the application was made not by the client but by the attorney to the court.⁵⁶ This indicates that about half of those who need and qualify for this kind of financial support might actually have been unaware of this option or otherwise felt unable to submit the application on their own. Only approx. 14,000 applications were rejected.⁵⁷

The fact that for half a million cases only a grand total of approx. 25 million Euros, i.e. just over 50 Euros per case, were paid, already indicates that an attorney who provides *Beratungshilfe* is paid less than the minimum fee he was required to ask for were it a regular case. The client only pays 10 Euros, which is not included in the aforementioned statistic. At approximately 60 Euros per case, it becomes nearly impossible to provide the legal services required by the law without incurring a loss during the time which is spent dealing with such a case. German law *de facto* forces an attorney to engage in *pro bono* activities. Under the current RVG, attorneys only have to ask for a minimum fee which varies depending on the value of the case and is set in the RVG in cases in which they not only consult but also represent a client. Under the old Federal Law concerning the Fees for Attorneys, *Bundesrechtsanwaltsgebührenordnung* or BRAGO, the predecessor of

⁵⁵ *Beratungshilfestatistik 2002*, Bundesministerium der Justiz (German Federal Ministry of Justice) (November 17, 2011) // <http://www.bmj.de/SharedDocs/Downloads/DE/pdfs/Beratungshilfestatistik2002.pdf>.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

the RVG, there was a minimum fee for consultations as well, also depending on the value of the case.

The legal basis for this legal aid service is the law concerning legal advice and representation for citizens with low income, the *Gesetz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen*, more commonly referred to as the *Beratungshilfegesetz* – BerHG for short – the Legal Aid Law.

Legal aid outside a court trial is granted if the client cannot afford an attorney; there are no alternatives to get help and the client's request is not done in a wanton manner.⁵⁸ This service can be provided by courts or attorneys;⁵⁹ the latter if the court does not provide it directly.⁶⁰ In the states of Bremen and Hamburg a specific system of public legal aid exists,⁶¹ which frees attorneys from this task.⁶² In these city states, court employees, rather than attorneys, provide legal advice for free. In the state of Berlin, the client can choose between a similar public service and the services of an attorney.⁶³ The consultants who provide the public service must be qualified in the same way as a person who wishes to become an attorney⁶⁴ and needs to pass the same exams.

It is the local court which decides if the client receives legal aid⁶⁵ based on whether the applicant could be right (thus excluding obviously frivolous claims) and on the economic situation of the applicant. When applying, the client has to give information about the case and his personal and financial situation.⁶⁶ If a request for legal aid is denied, there is only the possibility of a complaint (technically speaking even less, a reminder),⁶⁷ and the law does not provide for the possibility to sue in order to get a positive decision. In any case legal aid is only given once in each matter.⁶⁸

§ 16 of the *Berufsordnung für Rechtsanwälte* (BORA), the Ordinance for the Profession of Attorneys, regulates legal aid in more detail from the perspective of the attorney, who "has the duty to inform his client about the availability of legal aid where there is a justified reason to do so".⁶⁹ If the court found the client's case to merit legal aid, any "Rechtsanwalt may only accept any kind of payment from his client or third parties if it is made voluntarily and provided that the client or the

⁵⁸ *Beratungshilfegesetz* (Legal Aid Law), Bundesgesetzblatt (Federal Gazette) (1980, Vol. I, pp. 689 et seq.) [hereinafter: BerHG], § 1 sec. 1.

⁵⁹ *Ibid.*, § 3.

⁶⁰ *Ibid.*, § 6 sec. 1.

⁶¹ *Ibid.*, § 12 sec. 1.

⁶² Cf. *ibid.*

⁶³ *Ibid.*, § 12 sec. 2.

⁶⁴ *Ibid.*, § 12 sec. 3.

⁶⁵ *Ibid.*, § 4 sec. 1.

⁶⁶ *Ibid.*, § 4 sec. 2 sentences 1 and 2.

⁶⁷ *Ibid.*, § 6 sec. 2.

⁶⁸ Cf. *ibid.*, § 7.

⁶⁹ *Ibid.*, § 16 sec. 1.

third party know that they are not obliged to make such payments.”⁷⁰ This only refers to the legal aid paid by the court in a court proceeding but limits the income possibilities for the attorney.

The issue we are concerned with is *Beratungshilfe*, legal advice aid, in the pre-trial stage. This is covered in § 16a BORA: “The *Rechtsanwalt* is under no obligation to apply for legal advice aid.”⁷¹ This does not mean that the attorney is free to refrain from providing legal aid – but he is not obliged to ask the court for the document with which his client can request legal aid from him. The client can be reasonably expected to have obtained this document before consulting the attorney. As we have seen earlier, often the attorney will indeed apply for legal aid, rather than rely on the client doing so. While the client can choose the attorney, the attorney, who normally would be able to choose his client, cannot walk away from such a case at will but is under an obligation to provide legal services due to his or her position as an instrument of justice rather than as a commercial actor.

While the attorney is in principle obliged to provide this service, he can refuse to do so under certain conditions:

The *Rechtsanwalt* may refuse or terminate legal advice aid in a particular case for an important reason. An important reason may lie in the person of the *Rechtsanwalt* or in the person or the conduct of the client. An important reason may also be the fact that the approval of legal advice aid does not comply with the conditions set out in the Legal Advice Aid Act (*Beratungshilfegesetz*). An important reason exists, in particular, if: ... the *Rechtsanwalt* is prevented from providing advice/representing a client because of illness or an excessive workload; ... the client who is entitled to legal advice aid refuses the cooperation necessary to work on the case; ... the relationship of mutual trust between the *Rechtsanwalt* and the client is seriously disturbed for reasons related to the client as a person or because of the client’s conduct; [or if] it turns out that the client’s income and/or assets do not justify the granting of legal advice aid.⁷²

Every German attorney “has a duty to engage in continuing professional development”,⁷³ but often this duty is ignored – to the detriment of the client. There are many attorneys in Germany who have a lot of these cases while others simply see these cases as a burden which they are required to carry by law. In either case the attorney seems inclined to want to spend as little time as possible on such a case in order to avoid losing money. If one takes into account that handling such a case requires more than meeting with the client once but also includes (if only a few minutes) secretarial work and so forth, one can easily see

⁷⁰ *Ibid.*, § 16 sec. 2.

⁷¹ *Ibid.*

⁷² *Ibid.*, § 16 sec. 3.

how, given labor costs in Germany, this model is harmful to many attorneys. In some German states, the courts (which are allowed but in many cases are unable to provide this initial consultation) have begun to provide legal consultations themselves instead of paying attorneys to do so. In practice this means that a local court will pay an employee who will be prepared to provide free legal advice for a few hours every day. This is cheaper for the state than paying attorneys while it frees attorneys and enables them to use their time for paying clients. At the same time it removes the possibility of a contact between an attorney and a client who might come back with future – paid – business if he was satisfied with the service. A large part of the burden, though, is carried by the client, who no longer has a choice between different lawyers but is even more dependent, in that the person employed by the court for this purpose (usually part-time) will usually not be a specialist in the specific field of law in which consultation is required. Many courts that offer such services now only hand out vouchers for attorneys if their staff members are unable to provide the legal information required by the client.

This legal position limits the commercialization of law in Germany and contributes to the comparatively low income enjoyed by many attorneys in small law firms in Germany but also contributes to ensuring access to the law for everybody. However, the near monopoly of attorneys regarding the provision of legal services and the questionable legal status of law clinics associated with universities and the illegality of many other legal services provided by non-lawyers and the prohibition to dispense legal advice for free does protect attorneys against competition by non-attorneys. This is the price German attorneys pay for their status under German law. Notably through § 1 sec. 2 sentence 1 BORA – which is not a law made by parliament but a set of rules imposed by the elected representatives of the attorneys on all attorneys! – the community of attorneys has accepted this role.

4. PRO BONO WORK

Another possible form of satisfying the needs of the most vulnerable members of society in need of legal aid is *pro bono* service, in which services are provided for free. Sometimes *pro bono* services are treated as legal aid work, which “by definition does not constitute *pro bono* public legal work, because, while lawyers perceive that they receive less than the full value of work performed under legal aid certificates, they are paid”⁷⁴. For example, in the United Kingdom, the provision of *pro bono* legal services is rooted in the middle ages when the provision of free

⁷⁴ Andrew Boon and Robert Abbey, “Moral Agendas? *Pro Bono Publico* in Large Law Firms in the United Kingdom,” *The Modern Law Review Limited* (1997): 633.

services to the poor distinguished the emergent high status professions from other occupation groups.⁷⁵ In the United States, the American Bar Association's (ABA) code, which dates back to 1908, established a provision requiring lawyers to make *pro bono* contributions while the professional responsibility to provide *pro bono* legal services to the poor was first documented by Baltimore lawyer David Hoffman already in 1836.⁷⁶

The great benefit of *pro bono* work is that the attorney is free to choose (or decline) the case. This makes it more likely that *pro bono* work is done in an area in which the attorney has a personal interest. Often there are already close ties between the client and the attorney. This freedom to choose whether or not to engage in *pro bono* activities comes with an obligation to use it appropriately. It would appear to be inappropriate were an attorney to reject all requests for *pro bono* services without looking at the individual case.

Between the two analyzed countries, Lithuania and Germany, the views regarding *pro bono* work diverge widely: in Lithuania it is allowed⁷⁷ but not regulated while in Germany *pro bono* work in the classical sense of the term is still illegal, like all free legal advice by attorneys, unless it is given to close family members. This law, though, is broken very often, every time an attorney gives legal advice to somebody who is not a close relative. In Germany, this discussion could seem to be merely academic, were it not for the large number of cases which *de facto* amount to *pro bono*.

What is common in both countries is that *pro bono* services are not developed in a systematic or structural manner in either state. There is no official statistical data as to how many attorneys are providing *pro bono* services in Lithuania, but at least in some of their web pages such services are indicated.⁷⁸

⁷⁵ *Ibid.*: 632.

⁷⁶ Jason M. Thiemann, "The Past, the Present and the Future of *Pro Bono*: *Pro Bono* as a Tax Incentive for Lawyers, not a Tax on the Practice of Law," *Hamline Journal Public Law and Policy* Vol. 26 (2004-2005): 335.

⁷⁷ According to the article 4 (section 5) of Law on the Bar "An advocate shall be entitled to provide legal services free of charge, i.e. to provide legal aid" but there is no official explanation what does it mean to provide legal services free of charge, how and when an attorney is allowed to provide such services (*Law on the Bar of the Republic of Lithuania, supra* note 4, Article 4). In the opinion of J. Samuolytė this norm allows attorneys to provide *pro bono* services (Jolanta Samuolytė, "Pro bono Lietuvoje: iššūkiai ir galimybės" (*Pro bono* in Lithuania: challenges and opportunities), Konferencija *Teisingumas Lietuvoje: Teisė ar privilegija?* (Conference *Justice in Lithuania: Right or Privilege?*), Vilnius (December 16, 2011) // <http://www.hrmi.lt/uploaded/PDF%20dokai/Pro%20bono%20Lietuvoje.pdf>).

⁷⁸ Example, one Lithuanian Law firm states: "If your case is special and the decision of it can be significant for Lithuanian law, significant for some social group or if you can't have quality law help because of a financial condition, Law firm is ready to hear out your problem and if there is possibility, represent You 'pro bono' in all court procedures" (see web-page <http://www.stasaitis.lt/en/pro-bono.html>). This Law firm defines *pro bono* services as the ones provided for the public good. Another legal firm announces about possibilities to provide *pro bono* representation at the court: "The lawyers of the law firm "Markevičius, Gerasičkinas and partners" are expecting proposals concerning problematic cases, which can be exclusively significant for development of Lithuanian judiciary practice. Once the case has been selected, our lawyers would represent the aggrieved party at all levels of Court proceedings, free of charge. If You think that Your case may be of particular importance in this regard, please, provide us with a short description of the details to the office by e-mail marger@marger.lt. Our professionals will evaluate Your case and may select it for *pro bono* representation" (see web-page

For provision of *pro bono* services some attorneys (12 of them) were even honored by the Lithuanian Presidency in 2011 during a conference related to questions of *pro bono* legal services and legal aid.⁷⁹ The research done by Jolanta Samuolyte in 2011 shows that attorneys are not very interested in *pro bono* work. She distributed about 1300 questionnaires to attorneys and only 25 of them were answered. It appears that of the attorneys who are providing *pro bono* services, 24 answered positively that they do provide *pro bono* services.⁸⁰

Are *pro bono* services not sufficient to comply with the demand imposed on lawyers by society? The research about actual *pro bono* services in the UK reveals "that some large firms in UK have growing commitment to provide *pro bono* public legal services because large firm lawyers are taking responsibility for the image of the profession into their own hands."⁸¹ Perhaps such tendencies will appear in Germany and Lithuania in the future.

The former Lithuanian minister of justice⁸² is very positive about these services and the arguments provided are rather convincing and rational. In his opinion *pro bono* legal aid has more advantages in comparison with state legal aid because it is less impersonalized and less formalized. It means that the attorney providing these services may look into eyes of the client and make his/her own opinion whether a client has real case. People providing legal aid evaluate various circumstances, but clients expect that legal aid is provided when legal acts give such an opportunity but not only after somebody evaluates that such an aid is necessary and based.⁸³

5. EFFECTIVENESS

While individual clients are served better under the *pro bono* model because the attorney will have a greater interest in the case, an interest which is not solely motivated by money, both the German and Lithuanian approach ensures that everybody will at least get some legal advice.

Because attorneys are only paid once per case, this often means that the client is fully dependent on the first lawyer he or she goes to. This applies both in terms of quality and with regard to the time and energy that the lawyer is willing to

<http://www.marger.lt/index.php/pageid/558>). The third legal firm announces that provides *pro bono* legal consultations via website "15 min" and for the readers of the newspaper "15 min" (see web-page http://www.borenius.lt/advokatu_kontora_borenius/naujienos/naujienlaiskiai/reklamos_teises_naujienlaiskis/424.html).

⁷⁹ "Žmonėms reikia daugiau informacijos apie teisinės pagalbos gavimo galimybes" (People need more information about the possibility to obtain legal aid), (December 20, 2011) // http://www.tsajunga.lt/index.php/zmonems_reikia_daugiau_informacijos_apie_teisines_pagalbos_gavimo_galimybes/10050.

⁸⁰ Jolanta Samuolytė, *supra* note 77.

⁸¹ Andrew Boon and Robert Abbey, *supra* note 74: 654.

⁸² I.e. Mr. Remigijus Šimašius.

invest in a case. Both systems are a start in terms of providing access to justice, since it gives everybody a chance to receive some legal advice. Beyond this first step, ensuring the quality is the responsibility of each and every person involved in providing this legal advice. At the end of the day, the state continues to place a large part of the burden on the shoulders of the attorneys, as it sees them as organs of the judicial system rather than as commercial actors.

Pro bono services have advantages in comparison with state legal aid, because a client is free to choose an advocate but in this case, however, there would have to be a safety net for those who are unable to find a lawyer who is willing to take their case *pro bono*. These alternative forms of legal aid are not required due to rules relating to attorney but due to the right to access to justice mentioned earlier. Forcing attorneys to provide cheap legal services that in theory are accessible to everybody means that the state has fulfilled this positive obligation. By completely relying on *pro bono* and the related goodwill of attorneys, this would no longer be the case. Allowing *pro bono* and ending the current legal aid system would leave a gap which the state would have to close anyway in order to avoid violating the right to access to justice. From this perspective it is more convenient for the state to regulate the role of attorneys through the State legal aid system. If anything, *pro bono* can only be an addition but it cannot fully replace the existing model if we take the right to access to courts seriously.

CONCLUSIONS

We can therefore draw the following conclusions:

1. Access to justice is one of emerging legal rights both at the national and international level which requires a state to take positive action in order to ensure that the person in question gets the needed legal help.

2. The state guaranteed legal aid model in Lithuania ensures that legal aid is provided for everyone who satisfies the conditions defined by the legislature, but the system is very formalized and strictly regulated by the state. Both the client and attorney must follow rather strict and complicated legal rules, the client is not free to choose an attorney while the attorney providing such legal aid loses his independence—he has no right to have any additional clients.

3. The German model is more flexible—it allows a client to choose an attorney he wants but *pro bono* services are declared illegal.

4. While individual clients are served better under the *pro bono* model because the attorney will have a greater interest in the case, an interest which is

⁸³ Remigijus Šimašius, *supra* note 52.

not solely motivated by money, both the German and Lithuanian approach ensures that everybody will at least get some legal advice.

5. Neither system is perfect, but if we take seriously the obligation of an attorney as a part of the legal system rather than only as a commercial actor, we can understand the reduced income in legal aid cases as the price attorneys pay for their position in the legal market. Legal aid allows the maximum number of clients to receive some kind of legal service. Voluntary *pro bono* work cannot fully fulfill this function but plays an important role in providing clients with expert advice which goes beyond what could be offered in the context of a regular legal aid case.

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