



Pro Bono Practices and Opportunities in Switzerland¹

INTRODUCTION

The Swiss judiciary has undergone many changes in the past decade, including comprehensive civil and criminal procedure reform and the establishment of new federal courts. Government-sponsored legal aid has supplied legal services to the needy since the Swiss Federal Supreme Court found an implicit constitutional right to legal representation in 1937. This well-established system, codified in federal (and for administrative proceedings, cantonal) statutes and administered at the cantonal level, has effectively supplanted traditional pro bono activity in Switzerland. This system waives court costs and may provide legal representation for those unable to pay, but it is conditioned in part upon the merits of the case at hand, and the party receiving aid is required to repay if possible within ten years after the close of the proceeding. Owing to the low hourly rate paid to legal aid attorneys, this work may be considered equivalent to pro bono by some. However, in practice and in large part due to this comprehensive state system, pro bono work is not otherwise part of the legal culture in Switzerland.

OVERVIEW OF THE LEGAL SYSTEM

The Justice System

Constitution and Governing Laws

Switzerland is a confederation of 26 cantons and half-cantons, and has a three-tiered federal structure: the Confederation (or federal state), the Cantons (or states), and the Municipalities (or local authorities).² The Federal Constitution is the legal foundation of the Swiss Confederation. The Swiss legal system is based on civil law, which as in other jurisdictions is divided into public law (governing the organization of the state, as well as the interaction between the state and private individuals or entities) and private law (governing interactions between private individuals or entities).

The Courts

Federal Judiciary

The Swiss federal judiciary consists of the Federal Supreme Court (sometimes called the Swiss Federal Tribunal), the Federal Criminal Court, the Federal Administrative Court, and the Federal Patent Court. Swiss federal judges are appointed to six-year terms by parliament.

The Federal Supreme Court (which sits in Lausanne and Lucerne) is the highest judicial authority of Switzerland.³ It is the court of appeal for all decisions of the cantonal courts of last instance (including cantonal supreme courts), and for most decisions of the three federal courts of first instance. The court generally sits in panels of three judges. (Five-judge panels sit to decide legal issues of basic significance, or at a judge's request). Final rulings in matters dealing with alleged violations of human rights may be referred to the European Court of Human Rights. The Federal Supreme Court lacks the authority to strike down unconstitutional laws at the federal level, although it has the power to review the constitutionality of cantonal laws.

¹ This chapter was drafted with the support of Dr. Ernst Staehelin (of Staehelin Olano Advokatur und Notariat, in Basel), and Birgit Sambeth Glasner and David F. Braun (both of Altenburger, in Geneva).

² For this and other general reference information, see THE SWISS CONFEDERATION: A BRIEF GUIDE 2015, available at <https://www.bk.admin.ch/dokumentation/02070/index.html?lang=en> (last visited on September 4, 2015).

³ See FEDERAL SUPREME COURT, Jurisprudence, <http://www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht.htm> (last visited on September 4, 2015). Note that decisions are not published in English, although English-language press releases concerning major decisions may appear at the Federal Office of Justice website. Available at <https://www.bj.admin.ch/bj/en/home/aktuell/news.html> (last visited on September 4, 2015).



The Federal Criminal Court (located in Bellinzona) tries those criminal cases subject to federal criminal jurisdiction (a small number, such as those involving terrorism, organized crime, and crimes against federal institutions).⁴ Since January 1, 2012, it also has an appeals chamber.⁵

The Federal Administrative Court (located in St. Gallen) reviews decisions applying federal administrative law.⁶

The Federal Patent Court (also located in St. Gallen) began operations on January 1, 2012, and is the court of first instance for all civil law disputes concerning patents, including litigation over patent validity and infringement and the granting of licenses. Its decisions can be appealed to the Federal Supreme Court.⁷

Cantonal Judiciaries

Each of the 26 cantons also has its own constitution, parliament, and courts. The cantons exercise all sovereign rights not explicitly or implicitly assigned to the Confederation. Cantonal judiciaries are generally organized in two levels: courts of first instance, in many cases with a single judge presiding, and courts of appeals, normally with three sitting judges (though cantonal procedures vary). There may be separate courts for criminal, civil, and administrative proceedings at each level. Decisions of last instance of cantonal courts can be appealed to the Federal Supreme Court.

The Practice of Law

Education

Switzerland has nine law faculties affiliated with cantonal universities. Legal training commences following high school with the three-year bachelor's degree. Admission to the bar requires a master's degree, which takes two years after obtaining the bachelor's degree; additionally, the graduate must apprentice in a canton, which consists of articling under the supervision of a qualified lawyer or at a cantonal court (for between 12 and 24 months).⁸ The graduate may then sit for that canton's bar exam. It is also possible, though not required, to complete a Ph.D. in law (*Doktor der Rechtswissenschaft* or *Doctorat en droit*), the highest academic qualification in the legal field. Although Swiss lawyers have a general duty to maintain current legal knowledge, there is no formal education certification, or mandatory continuing education hours requirement.

Licensure

Each canton has its own bar association,⁹ though the rules of professional conduct were harmonized in 2002, and further in 2005 as comprehensive "Swiss Ethical Rules."¹⁰ Swiss lawyers are not required to join either the Swiss Bar Association¹¹ or the relevant cantonal bar association, although most do so.¹²

⁴ See BUNDESSTRAFGERICHT (FEDERAL CRIMINAL COURT), <http://www.bstger.ch/> (last visited on September 4, 2015).

⁵ See, e.g., supra n.2.

⁶ See BUNDESVERWALTUNGSGERICHT (FEDERAL ADMINISTRATIVE COURT), <http://www.bvger.ch/index.html?lang=en> (last visited on September 4, 2015).

⁷ Like its companion federal courts, it offers free access to recent decisions. See FEDERAL PATENT COURT, Case Law, <http://www.patentgericht.ch/en/rechtsprechung/case-law/> (last visited on September 4, 2015).

⁸ See Free Movement of Lawyers Act of June 23, 2000, SR 935.61, available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/en_switzerland_feder1_1188890158.pdf (last visited on September 4, 2015) (hereinafter FMLA) at art. 7(b). Part of this apprenticeship (usually six months) can be performed in a local judicial authority, a public administration, or even abroad. Some streamlined options also exist. For instance, in January 2011 the Geneva canton established a six-month intensive course for all graduates wishing to obtain admission to the Bar. This practice-oriented school teaches procedural aspects of civil, administrative and criminal issues, courtroom practice, negotiation and ADR.

⁹ In two cantons, the bar associations are public law entities; in the remaining cantons, they are private associations.



Demographics

As of 2015, the Swiss Bar Association had 9,741 members,¹³ up 25% in a decade and almost double that of 20 years prior.¹⁴ A 2012 CCBE survey found Switzerland had 9,210 total lawyers, of whom 8,864 were active and 2,324 were women.¹⁵ Given that the Swiss population stands around eight million as of 2015, there are roughly 1.2 attorneys per 1,000 people in Switzerland. This sharp growth has led to increased competition in the legal market and an increased emphasis on advertising. In 2002, regulations were amended to provide lawyers in Switzerland with more freedom to advertise than lawyers in many other Western European nations.¹⁶

Typical Swiss law firms are small: the largest generally employ in the order of 100 lawyers.¹⁷ The Swiss Bar Association reports that as of January 2012, a dozen firms had more than 50 attorneys, together employing roughly 10% of bar members; by contrast, roughly 8% of bar members are in solo practice.¹⁸

The Swiss legal landscape includes Swiss offices of several large global firms.¹⁹ However, on May 6, 2010, the Canton of Zurich rejected the application of a foreign incorporated law firm to open a Swiss subsidiary.²⁰ Because a third of all Swiss lawyers practice in Zurich, this decision may effectively discourage (and if these views persist, effectively bar) large international law firms from opening Swiss subsidiaries.²¹

¹⁰ See Ernst Staehelin, *Le projet de loi sur la profession d'avocat (Bill on the Legal Profession)* SWISS BAR ASSOCIATION PUBLICATION (Apr. 12, 2012), available at [http://www.sav-fsa.ch/en/documents/dynamiccontent/128_le-projet-de-loi-sur-la-profession-davocat-1\).pdf](http://www.sav-fsa.ch/en/documents/dynamiccontent/128_le-projet-de-loi-sur-la-profession-davocat-1).pdf) (last visited on September 4, 2015); see also FMLA supra n.8. The FMLA came into effect on Jun. 1, 2002.

¹¹ See Swiss Bar Association, *Federal Laws*, <http://www.sav-fsa.ch/en/anwaltsrecht/gesetze-bund.html> (last visited on September 4, 2015). Every member of a cantonal bar association is also a member of the Swiss Bar Association.

¹² It is estimated that approximately 90-95% of lawyers in Switzerland are members of a bar association. Most cantonal bar associations are private professional associations (see supra n.9).

¹³ Swiss Bar Association, *Who We Are*, <https://www.sav-fsa.ch/en/portrait/wer-wir-sind.html> (last visited on September 4, 2015).

¹⁴ See Michael Hueppi, *Anwaltsberuf: Lagebeurteilung (Legal Profession: Assessment)* SWISS BAR ASSOCIATION PUBLICATION, (Apr. 12, 2012), available at http://www.sav-fsa.ch/de/anwaltsrecht/literatur/allgemeines.html#titel_anwaltsberuf-lagebeurteilung (last visited on September 4, 2015).

¹⁵ Council of Bars and Law Societies of Europe, *CCBE Lawyers' Statistics 2012*, available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/2012_table_of_lawyer1_1356088494.pdf (last visited on September 4, 2015).

¹⁶ See Hueppi, supra n.14, at nn. 16-18; see also Staehelin, supra n.10 (discussion of advertising limitations being entirely removed); see also FMLA, supra n.10 at art. 12(d).

¹⁷ Lenz & Staehelin advertises over 200 attorneys as "the biggest legal team in Switzerland." See Lenz & Staehelin Firm, available at <http://www.lenzstaehelin.com/en.html> (last visited on September 4, 2015); see also Hueppi, supra n.14 (identifying Lenz & Staehelin as the largest Swiss law firm in 2012).

¹⁸ See Hueppi, supra n.14.

¹⁹ For example, Baker & McKenzie has had offices in Zurich since 1958, and in Geneva since 1968. See <http://www.bakermckenzie.com/firmfacts/firmhistory/> (last visited on September 4, 2015); and <http://www.bakermckenzie.com/Switzerland/Geneva/> (last visited on September 4, 2015).

²⁰ See Matthias Kilian, *New Threads, Shrinking Lawyers and More: Correspondent's Report from Europe*, 14(1) LEGAL ETHICS 129 (Jun. 2011) at 130-31.

²¹ Id. In general, a foreign law firm can only incorporate in Switzerland if a two-thirds majority (and in some cantons, all) of its lawyers are registered to practice, and if majority shareholders are Swiss-registered attorneys. Accordingly, a lawyers' corporation in Switzerland cannot have a majority of foreign lawyers. International firms with Swiss offices (such as Baker & McKenzie) are not incorporated in Switzerland.



Types of Proceedings

In January 2011, new, unified federal codes of civil and criminal procedure replaced earlier, varied cantonal regulations.²²

The revised Swiss Civil Procedure Code (the “CPC”) provides for three main types of proceedings: ordinary, simplified, and summary proceedings. Ordinary proceedings²³ apply in disputes where the value in dispute exceeds 30,000 francs. Simplified proceedings,²⁴ which are streamlined and less formal, apply where the value in dispute does not exceed 30,000 francs, as well as in certain matters in which a party requires special protection (e.g., tenancy disputes). Summary proceedings²⁵ apply to court injunctions, interim measures, and non-contentious matters, among other things.²⁶

Fee Arrangements

In 2004, the Federal Supreme Court held that the fundamental right of economic freedom protects litigation funding (as opposed to legal costs insurance).²⁷ It is therefore permissible for an independent third party to offer funding for litigation proceedings *provided that* the lawyer representing the funded party acts independently of the funder.

While in the past fee arrangements were more restrictive,²⁸ Swiss legal fees today are almost exclusively organized as hourly rates freely agreed upon between lawyer and client; no fee schedule binds or limits attorneys in this regard.²⁹ Some forms of fee arrangements, notably true contingent fees (where the attorney waives compensation in the event of a loss), are prohibited in litigation proceedings.³⁰ However, it is possible, though unusual, to agree on reduced fees (covering the effective costs) with a premium paid for a successful outcome. From the would-be litigant’s perspective, legal aid has been described as a substitute for the contingency fee system in Switzerland.³¹

LEGAL RESOURCES FOR INDIGENT PERSONS AND ENTITIES

The Right to Legal Assistance

Unlike the constitutions of some other Western European nations (e.g., Italy, Portugal, the Netherlands), the Swiss Constitution does not expressly provide for the right to the assistance of counsel in legal proceedings.³² But in 1937 the Federal Supreme Court held that indigent Swiss citizens implicitly have

²² See Swiss Civil Procedure Code, SR 272 (Dec. 19, 2008). For non-binding English translation, see <http://www.admin.ch/ch/e/rs/c272.html> (last visited on September 4, 2015). See also Staehelin, *supra* n.10 (referencing codes’ adoption).

²³ See *id.* at tit. 3, arts. 219-242.

²⁴ See *id.* at tit. 4, arts. 243-247.

²⁵ See *id.* at tit. 5, arts. 248-270.

²⁶ See Richard Clark (ed.), *THE DISPUTE RESOLUTION REVIEW* 769 (4th ed. 2012).

²⁷ See Decision of the Federal Supreme Court, Dec. 10, 2004, FTD 131 I 223 (Switz.) (interpreting art. 27 of the Federal Constitution of the Swiss Confederation of 18 Apr. 1999, SR 101).

²⁸ See Peter Eggenberger, License to Bill = License to Kill? Ethical Considerations on Lawyers’ Fees (With a View to Switzerland), 20 PENN ST. INT’L L. REV. 505, 511-12 (2002).

²⁹ See *THE DISPUTE RESOLUTION REVIEW*, *supra* n.26, at 773.

³⁰ See FMLA, *supra* n.10 at art. 12(e).

³¹ See Eggenberger, *supra* n.28, at 527.

³² See Lua Kamal Yuille, Note, No One’s Perfect (Not Even Close): Reevaluating Access to Justice in the United States and Western Europe, 42 J. COLUM. TRANSNAT’L L. 863, 880 (2003-2004); see also Earl Johnson, Jr., Equal



this right and that cantonal governments were required to provide lawyers to all civil litigants unable to afford them.³³ Moreover, the Swiss Constitution does expressly provide the right to legal representation where necessary to safeguard basic rights, e.g., in guardianship proceedings.³⁴ Switzerland, as a member nation of the Council of Europe, also falls under the 1979 mandate to provide free legal services to indigents.³⁵

State-Subsidized Legal Aid

From the lawyer's perspective, participation in legal aid work in Switzerland is mandated by Article 12(g) of the Free Movement of Lawyers Act (the "FMLA").³⁶ Under this section, lawyers "are obliged to accept court-assigned defence and gratuitous mandates of judiciary assistance in the canton in which they are registered."³⁷ Lawyers receive reduced fees for such court-mandated representation. FMLA Article 25 of the FMLA states that, for lawyers from EU / EFTA member states (other than Switzerland) practicing law in Switzerland, "[t]he rules of professional conduct according to Article 12 are applicable to Lawyers providing services *with the exception of those relating to court-assigned defence and mandates of judiciary assistance.*"³⁸ In other words, foreign lawyers practicing in Switzerland are not required to accept these legal aid postings.³⁹

From the litigant's perspective, the CPC provides that a "person is entitled to legal aid if (a) he or she does not have sufficient financial resources; and (b) his or her case does not seem devoid of any chances of success."⁴⁰ If awarded, legal aid may include both an exemption from court costs and court appointment of a legal agent.⁴¹ Legal aid may be granted for all or part of a case, but does not relieve the receiving party from paying costs to the opposing party.⁴² A party in need may apply for legal aid before or during an action, but must disclose relevant financial circumstances, the party's position on the merits of the case, and any evidence to be produced.⁴³ The party may also name a preferred legal representative.

Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies, 24 FORDHAM INT'L L.J. S83, S89 (2000).

³³ See Yuille, *supra* n.32, at 880; see also Decision of the Federal Supreme Court, Oct. 8, 1937, BGE 63 I 209 (Switz.); SR 101 Federal Constitution of the Swiss Confederation, art. 8.

³⁴ See Federal Constitution of the Swiss Confederation of 18 Apr. 1999 art. 29 § 3 available at (SR 101 - <http://www.admin.ch/ch/e/rs/c101.html>) (last visited on September 4, 2015).

³⁵ See Yuille, *supra* n.32, at 882 (discussing the 1979 European Court of Human Rights decision finding Ireland in breach of its obligations relating to the right to a fair trial).

³⁶ FMLA, *supra* n.10 at art. 12(g).

³⁷ *Id.* This rule applies to those lawyers registered in a cantonal attorneys' register (i.e., all attorneys willing to represent parties in court). Independent lawyers who will not represent parties in court need not register and therefore are not subject to this duty.

³⁸ *Id.* at art. 25 (emphasis added).

³⁹ See Staehelin, *supra* n.10 ("des avocats étrangers qui exercent la profession d'avocat à titre permanent en Suisse . . . ne soient pas soumis à l'obligation d'accepter des défenses d'office ou des mandats de l'assistance judiciaire . . .") ("foreign lawyers working as attorneys on a permanent basis in Switzerland. . . are not obligated to accept legal aid postings").

⁴⁰ Swiss Civil Procedure Code, SR 272 tit. 8, ch. 4, art. 117.

⁴¹ *Id.* at tit. 8, ch. 4, art. 118. Such appointment occurs if "necessary to protect the rights of the party concerned, and in particular if the opposing party is represented by a legal agent."

⁴² *Id.*

⁴³ *Id.* at tit. 8, ch. 4, art. 119.



According to the CPC, the court decides the application for legal aid in a summary proceeding at which the opposing party may be heard.⁴⁴ These types of proceedings themselves incur no court costs (except in cases of bad faith). Any application for legal aid must be made anew for appellate proceedings. A court's refusal to allocate legal aid in a particular instance also can be appealed.⁴⁵

Switzerland is similar to other Western European nations in that the losing party generally pays legal fees. Where a legal aid recipient loses an action, the legal agent is paid by the canton, and the aid recipient must pay party costs to the prevailing party.⁴⁶ (If the losing legal aid recipient lacks the funds to pay costs, as with any debt, the claimant can institute debt collection proceedings). If a legal aid recipient prevails, the legal agent is paid by the canton only "where compensation from the opposing party is irrecoverable or likely to be irrecoverable," and by paying the agent the canton becomes entitled to enforce the claim for costs.⁴⁷ If able, a legal aid recipient must repay the legal aid within ten years after the close of the proceedings.⁴⁸

PRO BONO ASSISTANCE

Pro Bono Opportunities

As is the case elsewhere in Europe, government compensation of lawyers who take on work for those who qualify for legal aid has largely replaced pre-existing pro bono activities by members of the bar.⁴⁹ The Swiss Bar Association does not have a recognized definition of pro bono work, though law firms and corporations may maintain their own internal guidelines.

Private Attorneys

Swiss lawyers may serve on the boards of non-profit organizations without compensation, but other than this there is not a prevalent culture of free or reduced-fee legal work outside the established legal aid system.⁵⁰

Law Firm Pro Bono Programs

Although several international law firms maintain offices in Switzerland, their websites do not advertise any local pro bono activities; the Swiss firms surveyed similarly lack such content. (This may also have to do with the mentality of Swiss attorneys, who generally do not advertise their legal aid and pro bono work.)

Current State of Pro Bono Work

Socio-Cultural Barriers to Pro Bono

Although it appears that no regulatory barrier exists to limit lawyer flexibility with respect to fees charged, certain practical barriers to Swiss pro bono work exist. Chief among these is a perceived lack of need for

⁴⁴ Id.

⁴⁵ Id. at tit. 8, ch. 4, art. 121.

⁴⁶ Id. at tit. 8, ch. 4, art. 122.

⁴⁷ Id.; see also Federal Act on the Federal Patent Court, SR 173.41 ch. 4, art. 34. For the legal aid scheme for administrative law appeals, see Federal Act on Administrative Procedure, SR 172.021 § 3 art. 65.

⁴⁸ Swiss Civil Procedure Code, SR 272 tit. 8, ch. 4, art. 123.

⁴⁹ See Yuille, *supra* n.32, at 908.

⁵⁰ Some commenters additionally have noted that the Swiss civil law inquisitorial system generally requires less participation by lawyers than the adversarial common law system. See Eggenberger, *supra* n.28 at 510 (citing HEINRICH GATTIKER, DAS ERFOLGSHONORAR DES ANWALTS: CHANCENGLEICHHEIT IM RECHTLICHEN KONFLIKT? 134 (1975)).



pro bono representation due to the comprehensive and federally sponsored legal aid system. A related issue is the lack of pro bono clearinghouses or other centralized organizations. Additionally, the fact that lawyers may be called upon by their canton to undertake reduced-fee legal aid representation—and indeed that the aid recipient has some say in suggesting a lawyer to be appointed—may quench volunteerism in the legal field.

Pro Bono Resources

Switzerland does have a number of organizations that provide free legal services, although it is not clear whether all accept volunteer contributions or donations of time by lawyers:

- Swiss Refugee Council: Asylum seekers' queries are answered directly by the experts at the Swiss Refugee Council or forwarded to the appropriate authorities. This service is free. The Swiss Refugee Council also organizes training courses for lawyers and for the professional staff of legal advice centers. See <http://www.fluechtlingshilfe.ch> (last visited on September 4, 2015).
- ACOR (*L'Association Romande Contre Le Racisme*) in Lausanne provides legal aid services to victims of racism in Switzerland. See <http://www.prevention.ch/associationracisme.html> (last visited on September 4, 2015).
- International Bridges to Justice, located in Geneva, is an independent, non-profit and nongovernmental organization founded in 2000 that strives to protect due process and achieve fair trials for the accused throughout the world. See <http://www.ibj.org/> (last visited on September 4, 2015).
- *Juris Conseil Junior* (JCJ), located in Geneva, is an independent, non-profit association created in October 1995 where minors and young adults—as well as their families and the professionals who work with them—can seek free legal advice from attorneys on a pro bono basis. Services are free and confidential. See <http://www.jcj.ch/www/index.php> (last visited on September 4, 2015).
- Additionally, LexMundi lists several Swiss-based partner organizations, including the Schwab Foundation for Social Entrepreneurship (Geneva; see <http://www.schwabfound.org> (last visited on September 4, 2015)) and WomenChangeMakers (Geneva; see <http://www.womenchangemakers.org> (last visited on September 4, 2015)).

CONCLUSION

While no regulatory barriers exist to providing pro bono legal services in Switzerland, as a practical matter, the U.S. notion of pro bono legal services does not exist. Swiss-based lawyers interested in pro bono work are most likely to find it through the state-sponsored legal aid system, and many Swiss attorneys do provide a fair amount of *de facto* pro bono legal services through these programs.

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