Funded
by the European Union
and the Council of Europe

EUROPEAN UNION

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Implemented
by the Council of Europe

European Union and Council of Europe
Partnership for Good Governance 2019-2021

PGG II Regional Project
"Strengthening the profession of lawyer in line with European standards"

CROSS-COUNTRY REVIEW
ON
PROCEDURAL SAFEGUARDS AND PROTECTION AGAINST UNDUE INTERFERENCES FOR LAWYERS IN ARMENIA, BELARUS, GEORGIA, REPUBLIC OF MOLDOVA, AND UKRAINE

June 2021

TABLE OF CONTENTS

List of Abbreviations 4
1. INTRODUCTION 6
2. EXECUTIVE SUMMARY 7
3. APPLICABLE STANDARDS 11
4. COUNTRY ANALYSES 12
4.1 ARMENIA 12
4.1.1 Procedural safeguards for the independence of lawyers. 12
4.1.2 Lawyer-client confidential relationship. 18
4.1.3 Issues related to the proposed European Convention on Lawyers. 22
4.1.4 Recommendations. 22
4.2 BELARUS 24
4.2.1 Procedural safeguards for the independence of lawyers. 24
4.2.2 Lawyer-client confidential relationship. 34
4.2.3 Issues related to the proposed European Convention on Lawyers. 37
4.2.4 Recommendations. 37
4.3 GEORGIA 39
4.3.1 Procedural safeguards for the independence of lawyers. 39
4.3.2 Lawyer-client confidential relationship. 42
4.3.3 Issues related to the proposed European Convention on Lawyers. 45
4.3.4 Recommendations. 46
4.4 REPUBLIC OF MOLDOVA 47
4.4.1 Procedural safeguards for the independence of lawyers. 47
4.4.2 Lawyer-client confidential relationship. 56
4.4.3 Issues related to the proposed European Convention on Lawyers. 59
4.4.4 Recommendations. 60
4.5 UKRAINE 61
4.5.1 Procedural safeguards for the independence of lawyers. 61
4.5.2 Lawyer-client confidential relationship. 69
4.5.3 Issues related to the proposed European Convention on Lawyers. 74
4.5.4 Recommendations. 74

This comparative review has been produced as part of a project co-funded by the European Union and the Council of Europe. The views expressed herein can in no way be taken to reflect the official opinion of either party.

The reproduction of extracts (up to 500 words) is authorised, except for commercial purposes as long as the integrity of the text is preserved, the excerpt is not used out of context, does not provide incomplete information or does not otherwise mislead the reader as to the nature, scope or content of the text. The source text must always be acknowledged as follows "© Council of Europe, 2021".

All other requests concerning the reproduction/translation of all or part of the document, should be addressed to the Directorate of Communications, Council of Europe (F-67075 Strasbourg Cedex or publishing@coe.int).

List of Abbreviations

General

CCBE Code of Conduct: Council of Bars and Law Societies of Europe, Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers (2019).[1]

ECHR: European Convention on Human Rights.[2]

ECtHR: European Court of Human Rights

IBA Principles: the International Bar Association's International Principles on Conduct for the Legal Profession.[3]

Recommendation 2000: Recommendation Rec (2000) 21 of the Committee of Ministers of the Council of Europe to the Member States "On the freedom of exercise of the profession of lawyer."[4]

UNBP: United Nations Basic Principles on the Role of Lawyers (1990).[5]

Armenia

Law on Profession of Advocate: Law of the Republic of Armenia on the Profession of Advocate.[6]

Belarus

Constitution: Constitution of the Republic of Belarus

Ethics Rules: Rules of Professional Ethics of Advocates

Law on the Bar - Law of the Republic of Belarus on the Bar and Advocacy Activity in the Republic of Belarus 334-Z dated 30 December 2011 (as amended by the Law 7-Z dated 29.12.2012 and Law 42-Z dated 11.07.2017)

Georgia

Law on Lawyers: Law of Georgia on Lawyers

GBA: Georgian Bar Association

Republic of Moldova

Code of Ethics: Code of Ethics for lawyers of the Republic of Moldova (Adopted by the Congress of Lawyers on 20/12/02, as amended, and additions on 23/03/07 and 1/07/ 2016).

Constitution: Constitution of the Republic of Moldova.[7]

Law on Advocacy: Law on Advocacy N 1260-XV of 19.07.2002

---

[1] https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/EN_DEON_CoC.pdf
[2] https://www.echr.coe.int/Documents/Convention_ENG.pdf
[3] https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx
[4] https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804d0fc8
[5] https://www.ohchr.org/en/professionalinterest/pages/roleoflawyers.aspx
[6] https://www.legislationline.org/download/id/5472/file/Armenia_law_advocacy_2004_am2006_en.pdf
[7] http://www.constcourt.md/public/files/file/Actele%20Curtii/acte_en/MDA_Constitution_EN.pdf

Ukraine

Conduct Rules: Rules of Professional Conduct approved by Congress of Advocates of Ukraine

Criminal Procedure Code: Criminal Procedure Code of Ukraine

Law on the Bar: Law of Ukraine on the Bar and Practice of Law (Bulletin of the Verkhovna Rada (BVR), 2013, No. 27, p. 282).[8]
UNBA: Ukrainian National Bar Association

[8] https://en.unba.org.ua/assets/uploads/legislations/Dec%202016%20Amendments%20to%20LOU%20On%20the%20Bar%20and%20Practice%20of%20Law.pdf

1. INTRODUCTION

This comparative review has been prepared in the framework of the regional project on "Strengthening the profession of lawyer in line with European standards" (hereafter called "the Project"), which is funded by the European Union and the Council of Europe and implemented by the Council of Europe. The Project is being implemented under the "European Union/Council of Europe Partnership for Good Governance" Phase II (PGGII) programme.

There are five EaP countries covered by the Project: Armenia, Belarus, Georgia, Republic of Moldova and Ukraine.

This cross-country review was undertaken through desk research, based on the current legal and institutional frameworks of the five participating countries. Experts also had on-line meetings with representatives of the main stakeholders – bar associations, Ministries of Justice, courts and other relevant organisations from four of those countries - Armenia, Georgia, Republic of Moldova and Ukraine, with a more limited group of stakeholders interviewed in Belarus.

The consultants were Dr Asbed Kotchikian[9] (responsible for the country reports on Armenia and Georgia) and Mr Jonathan Goldsmith[10] (responsible for the country reports on Belarus, Republic of Moldova and Ukraine). They compiled the country reports through a combination of desk research and interviews with relevant stakeholders. Mr Goldsmith was responsible for assembling this cross-country review.
The methodology for development of the country reports were developed by Prof Dr Lorena Bachmaier[11].

Each of the country reports has the following structure:

- Introduction
- Procedural safeguards for the independence of lawyers
- Lawyer-client confidential relationship
- Issues related to the proposed European Convention on Lawyers
- Recommendations

Additionally, there is some more information that was discussed during the interviews with the stakeholders and raised attention.

[9] International consultant, Senior Lecturer (Bentley University, USA).
[10] International consultant, former Secretary General of CCBE, Former Head of International at the Law Society of England and Wales.
[11] International consultant, Professor of Law, Law School, Universidad Complutense Madrid.

2. EXECUTIVE SUMMARY

General

Although four of the five countries reviewed in this cross-country report - Armenia, Georgia, Republic of Moldova and Ukraine (hereafter "the four countries") - are obviously very different in most ways, they show a remarkable similarity in the issues under consideration, which is the way in which lawyers' procedural safeguards are treated.

The institutional structure in Belarus shows a very significant role for the state in the regulation of lawyers, which is not considered in line with European and international norms on the independence of the legal profession. Given this, there are separate recommendations for Belarus.

By and large, the procedural guarantees laid down in the applicable constitutions, laws, charters and codes of the four countries are similar from country to country and in line with European standards. But they differ in their application, and that difference is most serious when a government is in power which does not care about them. Of course, the procedural safeguards, once incorporated into laws and codes, should not be applied differently, and some of the recommendations listed below attempt to deal with this point.

Where a particular country's provision falls short in some details from European standards, that is pointed out in the commentary provided in each country report under that particular provision. And there are detailed recommendations at the end of each country report about particular issues arising in that country.

Just as one example of the similarity in content and compliance with European standards, here are the rules on lawyers' independence from each of the four countries:

- Article 21 of the Law on Profession of Advocates in Armenia:

> *The advocate shall be independent in his/her activities and shall be guided only by the Constitution, International Treaties and Laws of the Republic of Armenia, Code of Advocate's Conduct and Charter of the Chamber of Advocates.*
>
> *Interference of national or local self-governing authorities, the officials thereof, legal and physical entities (including the mass media) with the activity of an advocate shall be prohibited.*

- Article 38.1 of Law on Lawyers in Georgia:

> *A lawyer shall practise the profession of lawyer independently. Unlawful interference with the activities of a lawyer or their hindering, inappropriate influence on the lawyer on the part of a state body and/or other person, his/her intimidation, harassment, coercion, persecution, oppression, causing moral or material damage to him/her, violence against him/her or offering violence as well as any other action that might interfere with the independence of a lawyer, shall not be allowed.*

- Article 51 and 52 of the Law on Advocacy in the Republic of Moldova:

> *Article 51. Independence of an advocate.*
>
> *In the course of exercising his/her activities, an advocate shall be independent and be subject only to law, the Advocacy Charter and the Code of the Advocate's Ethics. An advocate shall be free to choose his/her position and shall not be required to discuss it with anybody except his/her client.*
>
> *Article 52. Guarantees of independence.*

The interference in the professional activity shall be prohibited. The state shall ensure the exercise and protection of the freedom of the advocate's practice without discrimination and without undue interference by state authorities or public.

- Articles 4 and 23 of the Law on the Bar in Ukraine:

  Article 4. Principles of and standards for practice of law

  The practice of law shall be based on the principles of the rule of law, legality, independence, confidentiality and avoidance of conflict of interest.

  Article 23. Guarantees of practice of law.
  1. Professional rights, honour and dignity of the advocate are guaranteed and protected by the Constitution of Ukraine, this Law, and other laws, in particular:
  1) any interference and obstruction of the practice of law is prohibited.

Accordingly, there would be little merit in comparing the essentials in each country against one other, because they would yield the same kind of result as above, meaning that they would be very similar and in compliance with European standards. The details in each country are laid out in the country reports, with commentary where relevant.

Instead, the remaining part of this executive summary proposes recommendations which apply broadly to all countries, taking into account the similarities mentioned above. It does not deal only with misconduct by a particular government or its agencies, but other common problems which appear in the application of the standards.

<u>Procedural safeguards</u>

As mentioned above, paper compliance with European standards through laws and codes is not enough on its own, since there are gaps, as follows:

1. Court officers (such as secretaries, assistants and bailiffs) or legal aid officials may not be familiar with lawyers' rights, so frustrating the lawyers, and making the principles that conform on paper not so useful in practice; for that reason, education of public officials dealing with lawyers is an important goal.
2. Even where public officials are aware of lawyers' procedural rights, the sanctions on such officials for breaching them are not severe enough to discourage breaches. In those cases, the level of sanctions should be increased, including consideration of financial penalties being paid out of the guilty officials' own pockets.
3. At least in some countries sometimes, the level of respect by the authorities for lawyers' procedural rights seems to depend on the political colour of the government in power, which again renders the written guarantees more or less useless at those times. However, the guarantees should be seen as sacrosanct regardless of which political party is in power. This is a question of the culture in the courts and among the prosecution and other investigation and detention authorities, which can be dealt with by training and by relevant leaders setting an example.
4. There is not sufficient detail in some of the procedural guarantees, meaning that there are areas of behaviour which are not covered. For instance, there are gaps in the full application of lawyer-client confidentiality, where there is not sufficient detail in the procedures for seizure of documents during the search of lawyers' premises, or in the procedures for intercepting lawyer-client conversations, or in interviewing lawyers about their clients' cases. These gaps should be filled by specific and more detailed provisions covering all of these scenarios, including penalties for their breach, so that lawyer-client confidentiality can be protected in all cases.

5. Similarly, there should be clear provisions that state authorities are under a duty to respond to lawyers' legitimate enquiries when seeking evidence, for instance regarding information held in public registries.
6. The role of bars in terms of enforcement of procedural safeguards should be enhanced, in particular during authorised search and seizure operations, for instance regarding who may be notified and present during the search, which documents may be read by the authorities etc.

Gender issues

Apart from a general section of Principle 2.1 of the IBA Principles ('A lawyer shall also ensure that equality of opportunity and respect for diversity govern all aspects of conduct in the lawyer's exercise of the profession'), there are no comprehensive international standards aimed specifically at promoting gender mainstreaming among lawyers. It is recommended that this aspect nevertheless deserves to be addressed.

By and large, the numbers of men and women lawyers in the legal professions in the four countries did not give rise to serious questions of imbalance. But there were anecdotal experiences of women being taken less seriously in some instances as advocates in the criminal courts. The main policy issues were the following:

1. None of the countries' legal professions kept detailed statistics on gender breakdown, showing not only the numbers, but also where men and women lawyers work and how they progress through the profession. Without such statistics, it is difficult for the legal professions to develop meaningful policies to promote equality between the sexes. The capacities of the bars on the proposed statistical exercises could be also supported by donor projects.
2. By and large, women lawyers are very under-represented in the ruling councils of the bars, in their committees and in the disciplinary commissions. This is also likely to lead to inaction in tackling issues on inequality between the sexes. Policies to address such under-representation should be developed.

European Convention on Lawyers

Regarding the European Convention on Lawyers, currently being discussed within the Council of Europe, there was general agreement among interviewees that such a convention would be good for the further protection of lawyers' procedural safeguards in the four countries. The Council of Europe's standards are generally held in high esteem in the four countries, and their governments would pay attention to the standards in a new convention, if drawn up and signed. Such a Convention would help bring lawyers to their rightful place as equal players with prosecutors and judges, each with a role to play in the administration of justice. It would give lawyers directly the rights that they need to carry out their role. There is also a hope that it could lead to equality among different groups of lawyers, and better access to the profession.

Belarus is not yet a member of the Council of Europe, although it has signed and ratified 12 Council of Europe treaties and protocols, as well as joined 4 Partial Agreements. It is possible, therefore, that it may sign a future Convention on Lawyers. The stakeholders who were interviewed expressed themselves in favour of the kinds of principles which are likely to be found in a future Convention.

Belarus.

The specific recommendations in relation to Belarus are of a different nature to those of the other four countries for the following reasons:

1. It was not possible, due to the difficulties following the August 2020 Presidential election, to interview as wide a range of stakeholders as in the other four countries. For instance, there were no interviews with the government or state agencies, or a range of private organisations. That has given a narrower overview.
2. There is one very serious problem in relation to the structure of the Belarus legal profession, which is the extensive reach of the state into the regulation of lawyers. The analysis of this problem takes precedence over other considerations, particularly in the light of the serious fate that has befallen some lawyers as a result of their defence activities after the Presidential election.
3. Belarus is not a member of the Council of Europe, and so the standards and judgements which come from membership, such as the decisions of the ECtHR, are not mandatory for the country.

Nevertheless, the following recommendations are made in relation to Belarus:

1. There needs to be rebalancing of the structure of the Belarus legal profession, to bring it into line with European and international standards in relation to the level of state control. At present, the state has a very extensive role in controlling the legal profession, which has a clear impact on its independence. Lawyers should not be licensed by the state, nor should the leadership of its professional bodies require state approval.
2. There should be an obligation on state authorities to respond to advocates' nquiries on behalf of their clients, so that the right in Clause 17 of the Law on the Bar for lawyers to ask for information and documents from public authorities can be enforced by a corresponding duty on state authorities to provide answers. The liability of state officials needs to be at an appropriate level to guarantee that lawyers' right.
3. There should also be a right for lawyers to have access to public registers containing information relating to official acts, to guarantee their ability to represent their clients.
4. The arrangements in pre-trial detention centres need to be modified to ensure that there is an absolute guarantee for lawyer-client confidentiality when lawyers meet their clients in such centres for the purposes of representing them.
5. The provisions in Clause 35 of the Ethics Rules regarding the right of a lawyer to withdraw from a case should be amended to remove the provision forbidding the lawyer from acting where the requirements of the person seeking legal assistance evidently go against the law, and related provisions, since it leaves the lawyer to decide the rights and wrongs of the legal matter before the court has had the opportunity to consider it, and runs the risk of the client being left without legal representation. Consideration should also be given to removing two other provisions which cause concern: that the investigator or court might call the lawyer as a witness to the case, or that there might be a breach of confidentiality.

3. APPLICABLE STANDARDS

The following standards have been used in this review in order to compare the position of laws and rules in the various countries against European and international norms:

European standards:

- Recommendation Rec (2000) 21 of the Committee of Ministers of the Council of Europe to the Member States "On the freedom of exercise of the profession of lawyer."[12]
- European Convention on Human Rights.[13]
- European Court of Human Rights judgements.
- Council of Bars and Law Societies of Europe, Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers (2019).[14]

In addition, the Council of Europe's Parliamentary Assembly Recommendation Rec 2121 (2018) on the case for drafting a European convention on the profession of lawyer[15] has been used for background to the recommendations regarding such a convention.

International standards:

- United Nations Basic Principles on the Role of Lawyers (1990).[16]
- The International Bar Association's International Principles on Conduct for the Legal Profession.[17]

The relevant standards have been quoted at appropriate places throughout the text, for a comparison to be made between what exists in the country's laws and codes, and what is recommended by the Council of Europe and others.

[12] https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804d0fc8
[13] https://www.echr.coe.int/Documents/Convention_ENG.pdf
[14] https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/EN_DEON_CoC.pdf
[15] http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=24466&lang=en
[16] https://www.ohchr.org/en/professionalinterest/pages/roleoflawyers.aspx
[17] https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx

4. COUNTRY ANALYSES

4.1 ARMENIA

4.1.1 Procedural safeguards for the independence of lawyers.

Existing mechanisms to ensure that lawyers can exercise their profession without undue interferences.

The issue of independence of lawyers in Armenia is dealt with by a number of legal instruments which establish codes of conduct as well as institutional structures to guarantee the independence, self-government and conduct of lawyers. These documents include:

1. Article 64 of Armenia's Constitution which states "Advocacy based on independence, self-governance and legal equality of advocates shall be guaranteed with a view of ensuring legal aid."[18]
2. The Law on Profession of Advocate adopted in 2004 establishes an independent association for lawyers ("Chamber of Advocates") and defines lawyers' rights and obligations.[19]
3. Once established, the Chamber of Advocates (which has similar functions to a national Bar) further developed mechanisms and regulations with a view to protecting lawyers' legal practice; a "Code of Conducts of Advocates" and its appendix entitled "Regulation on Disciplinary Proceedings against Advocates".[20]
4. To address the issue of protecting lawyers' rights and their independence, the Chamber of Advocates has established internal as well as joint committees with various state agencies. These include:
    a. Rapid Response Committee: aims at responding to calls from lawyers who feel their rights are being violated to record and document those violations.
    b. Advocates' Rights Protection Committee: discusses the cases of violation of advocates' rights and disseminates announcements and analyses.
    c. Joint Commission of the Police and the Chamber of Advocates (6 members, including 3 police officers, 3 lawyers): addresses any issues related to lawyers' visiting their clients at police stations.
    d. Joint commission of State Revenue Committee and the Chamber of Advocates (6 members, including 3 civil servants, 3 lawyers): aims at eliminating obstacles to exercising the rights of lawyers in tax and customs cases.
5. The Chamber of Advocates also signed memoranda of understanding with the Human Rights Defender, the Minister of Justice, and the National Bureau of Expertise on issues related to the protection of lawyers' rights and independence.

While there are other legal documents governing and regulating lawyers' practice, the above seem to encapsulate the foundations of lawyers' rights and obligations.

The Law on Profession of Advocate is the law which sets the main guarantees for lawyers to practise law unimpeded - their rights are defined, and they are shielded from political and state

[18] Constitution of the Republic of Armenia, available at https://www.president.am/en/constitution-2015.
[19] Law of the Republic of Armenia on the Profession of Advocate, available at https://www.legislationline.org/download/id/5472/file/Armenia_law_advocacy_2004_am2006_en.pdf.
[20] Code of Conducts of Advocates, available at http://advocates.am/images/Eng_Kanonagirk_19.10.2019_003.pdf.

interference. Some of the key provisions highlighting the protection of the rights of lawyers in the Law on Profession of Advocate are discussed below.

The Law on Profession of Advocate puts an emphasis on the basic rights of lawyers as well as their safety and independence while practising law (including but not limited to mechanisms ensuring that lawyers can exercise their profession without interference and be able to gather evidence). Thus, lawyers in Armenia have the right to practise law with unimpeded access to evidence as well as filing requests with state and local authorities to obtain documents necessary for the fair representation of their clients.[21]

Article 21 of the Law on Profession of Advocates defines the main guarantees for unimpeded exercise of their professional duties. Some of the key provisions of Article 21 as they relate to this issue include:

1. *The advocate shall be independent in his/her activities and shall be guided only by the Constitution, International Treaties and Laws of the Republic of Armenia, Code of Advocate's Conduct and Charter of the Chamber of Advocates.*
2. *Interference of national or local self-governing authorities, the officials thereof, legal and physical entities (including the mass media) with the activity of an advocate shall be prohibited.*
3. *An advocate cannot be prosecuted, incur liability or be taken to police, arrested or be subject to restriction of rights with regard to the performance of his/her professional duties, including expressing his or her opinion or position before the body in charge of the proceedings and other bodies, for.*
4. *An advocate shall not be identified with his/her client relying on the performance of professional duties by the advocate.*
5. *An advocate shall not be prohibited to get acquainted with all court materials that deal with his client, as well as to take as many notes and copies as necessary, except for data affirming the defendant's identity.*

Establishing the independence of lawyers is also dealt with both in Article 2.1 ("Independence") of Code of Conducts of Advocates (Article 2.1) and by Article 6 ("The Principle of Independence") of Code of Advocate's Ethics. Thus Article 2.1 of Code of Conducts of Advocates provides:

> *In the performance of professional activities, an advocate shall be independent, i.e. free from influences, especially influences that may arise out of the advocate's personal interests or external pressure and may negatively affect the client's case. An advocate shall avoid weakening of his independence and be attentive to the professional standards, so as not to adapt them in order to please the court or third parties.*
>
> *This independence is necessary also in undisputed cases and in court proceedings.*
>
> *When representing the interests of his client, an advocate shall refrain from actions that may identify the advocate with the client. Actions performed in the client's interests in the frame of the advocate's professional duties may not be deemed identification with the client.*

To further ensure that lawyers can perform their duties without concerns about their, as well as their families', safety, Article 22 of the Law on Profession of Advocate provides:

> *Advocates, as well as members of their family, and their property, shall be under state protection.*

[21] Article 18 of the Law on Profession of Advocate.

Authorised state bodies shall undertake the necessary measures prescribed by law to protect advocates when, in connection with the performance of their professional duties, they or members of their family have been threatened with physical violence, destruction of their property or any other unlawful act.

When arresting or detaining an advocate, the authority conducting the proceedings shall immediately inform thereon the Chairperson of the Chamber of Advocates.

Furthermore, Article 21(4) of the Law on Profession of Advocate states:

An advocate cannot be prosecuted, incur liability or be taken to police, arrested or be subject to restriction of rights with regard to the performance of his/her professional duties, including expressing his or her opinion or position before the body in charge of the proceedings and other bodies.

Commentary: The national legislation and regulations described above dealing with the issue of lawyers' independence are in accordance with Recommendation 2000 and more specifically the provisions:

1.1: All necessary measures should be taken to respect, protect and promote the freedom of exercise of the profession of lawyer without discrimination and without improper interference from the authorities or the public…

1.4: Lawyers should not suffer or be threatened with any sanctions or pressure when acting in accordance with their professional standards.

a. While the issue of lawyers' safety is dealt with by various laws, one issue that remains ambiguous is the issue of insulting lawyers. This is an aspect that was raised during two separate interviews. This stems from the fact that—especially in criminal cases—advocates are often identified with their clients. This in turn creates an environment where members of the public insult the lawyers for carrying out professional activities. From this perspective, the Chamber of Advocates drafted an amendment to the law to criminalise insulting any lawyer carrying out their professional activities. In 2018, this draft proposal was "killed" in the judicial committee of the National Assembly and was not voted on.

The need to have legal provisions protecting lawyers from insults is not just to protect the dignity of lawyers but also their client's right to receive quality legal assistance. Moreover, while state officials can be subjected to criminal liability for obstructing the professional activities of lawyers, there are no legal provisions establishing criminal (administrative) liability for individuals or private entities who might hinder the professional activity of lawyers.

The circumstances described above should be addressed to be in line with international standards.[22]

b. To further guarantee the rights of lawyers (especially ones who are detained) the Chamber of Advocates proposed to the Ministry of Justice to supplement Article 15 of the Law on Detention of Arrested and Detained People with the following provision:

An arrested or detained advocate has the right to meet with the Chairman of the Chamber of Advocates of the Republic of Armenia privately, without hindrance, without restriction on the number and length of visits, regardless of working days or hours. The appointment of an arrested or detained advocate with the Chairman of the Chamber of Advocates shall be provided in conditions in which the staff of the detention facility can see them but cannot hear them.[23] As of the writing of this report the amendment has not yet been adopted.

Another issue that is related to the independence of lawyers is the possibility for the court to fine an advocate. Along with the provision of the Regulation on Disciplinary Proceedings that

[22] According to Principle N° 18 of the UN Basic Principles adopted by the Eight UN Congress on the Prevention of Crime and the Treatment of Offenders (1990) and endorsed by the UN General Assembly "Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions".

[23] http://advocates.am/images/khorhrdi_voroshumner/2019/Amendment-pastabani-teskacutyun.pdf

the court can apply to the Chamber requesting disciplinary liability against a lawyer, the court can also sanction a "judicial fine" (a fine of up to 100,000 AMD/200 Euros) on the spot without referring it to the Chamber of Advocates. It appears from the interviews, that as a result, the possibility of such a sanction, could be perceived by lawyers as a threat to their freedom of action. Consequently, lawyers might be constrained from conducting their duties towards their clients as they might not be willing to be more assertive in their arguments, being afraid of being fined repeatedly.

Lawyers' powers to gather evidence.

One dimension of lawyers' independence is their ability to gather evidence without undue interference, an issue that is dealt with in Article 18 of the Law on Profession of Advocate where the law establishes that advocates shall have the right to:

> *apply to state, local self-government bodies, individual proprietors, legal entities (hereinafter referred to as business entities) by requesting the necessary documents (information) in order to provide legal assistance. State and local self-government bodies are obliged to provide the required documents (information) or their copies to the advocate within ten days, unless otherwise provided by the laws regulating the activities of those bodies, or the required documents (information) contain a secret protected by law. Refusal to provide documents (information) must be given in writing and reasoned.*[24]

The same Article also posits the necessity of a call on witnesses and/or individuals who "allegedly possess information related to the case on which the advocate is providing legal assistance."[25]

According to Article 21(9) of the Law on Profession of Advocate:

> *An advocate shall not be prohibited to get acquainted with all court materials that deal with his client, as well as to take as many notes and copies as necessary, except for data affirming the defendant's identity.*

The issue of lawyers meeting their clients while the latter are detained might also fall under the discussion of lawyers having access to their clients. Article 18(6) of Law on Profession of Advocate states:

> *Advocates have private and confidential meetings with his/her client with no limitation as to the number and length of the meetings, as well as involve a licensed interpreter unless otherwise is prescribed by law.*

Article 15 of the Law on Detention of Arrested and Detained people states:

> *Arrestees and detainees shall receive private and hindrance-free meetings with their attorney; without restriction on the number and length of visits, regardless of working days or hours.*26

Commentary: The rights of advocates to gather evidence and to have access to court material as defined by the laws above are in accordance with Principle I (5) and (7) of Recommendation 2000:

Principle I (5): Lawyers should have access to their clients, including in particular to persons deprived of their liberty, to enable them to counsel in private and to represent their clients according to their established professional standards.

[24] Article 18 (3) of the Law on Profession of Advocate.
[25] Article 18 (4) of the Law on Profession of Advocate.
[26] https://www.justice.gov/sites/default/files/eoir/legacy/2013/11/08/Treatment%20of%20Arrestees%20and%20Detainees.pdf

Principle I (7): Lawyers should not be refused access to a court before which they are qualified to appear and should have access to all relevant files when defending the rights and interests of their clients in accordance with their professional standards.

According to the interlocutors interviewed, despite the legal guarantees, there are cases when the corresponding authorities do not respond to advocates' inquiries for provision of documents, arguing that the information requested by the advocate contains personal information about third parties. Such an issue arises when requesting information: from the National Security Service on whether a citizen has entered or left the country; on the marriage status of individuals/clients from authorities handling civil registration; or from other public and private registries.

To address this issue, the Chamber of Advocates has already prepared a package of draft amendments to the "Code of Civil Acts", "Law of State Registration of Legal Entities, Institutions of Separate Subdivisions of Legal Entities and Individual Proprietorships", "Law of National Security Bodies", the "Code on Administrative Offenses" and is taking steps for the amendments to be tabled at in the National Assembly.[27]

Disciplinary procedures.

The Chamber of Advocates is the main body supervising lawyers' integrity and conduct and, has the power to instigate disciplinary procedures when a complaint is received and verified. Articles 39 and 40 of the Law on Profession of Advocate outline the disciplinary liabilities as well as the types of disciplinary actions that could be taken in case a lawyer is found in violation of her/his obligations. The procedures with respect of the lawyers in case of alleged violations are defined in the Regulation on Disciplinary Proceedings against Advocates.[28] This document describes in detail the instances when disciplinary action can be initiated against a lawyer, as well as the rights of a lawyer during those disciplinary proceedings.

According to Article 2.1.1 of the Regulation on Disciplinary Proceedings against Advocates, the grounds for initiating disciplinary proceedings against a lawyer are:

1. *applications (complaints) of state, local self-government and non-state bodies, as well as other persons (applicants), and the media publications;*
2. *a court sanction on making submission to the Chamber for bringing the advocate to liability;*
3. *a certificate submitted by the Accountant of the Chamber on non-payment by the advocate of membership fee within the established period;*
4. *a note by the Director of the School of Advocates on the advocate's failure to pass a training within the set period;*
5. *a motion of the head of the Public Defender's Office to initiate disciplinary proceedings against the Public Defender.*

All complaints on disciplinary matters are presented to the Board of the Chamber, and until a decision is made the lawyer under investigation is presumed innocent.[29] During the disciplinary proceedings the rights of an accused lawyer to be heard and to have access to the proceedings' documents are also guaranteed by Article 1.9 of the Regulation on Disciplinary Proceedings against Advocates. When it comes to receiving complaints and initiating disciplinary proceedings the Regulation on Disciplinary Proceedings against Advocates

[27] http://advocates.am/images/khorhrdi_voroshumner/2019/lramshakvac_ViVO-Amendment.pdf
[28] The Regulation was approved by the General Assembly of the Chamber of Advocates of the Republic of Armenia in October 2019.
[29] Article 1.7 of the Regulation on Disciplinary Proceedings against Advocates.

describes precisely the initiation of proceedings making sure that the accused lawyer is informed in a timely manner.[30]

There are various levels of disciplinary actions against a lawyer when found guilty of a violation of her/his duties and responsibilities. These sanctions include:

- reprimand (valid for three months);
- severe reprimand (valid for 6 months);
- fine (not more than 100 times the minimum wage in the country).[31]

A lawyer can appeal a decision establishing his liability in court within a month of that decision rendered.[32]

Commentary: The above legal frameworks on disciplinary issues related to advocates conform with Principle 6 of Recommendation 2000.

Principle VI – Disciplinary proceedings

2. *Bar associations or other lawyers' professional associations should be responsible for or, where appropriate, be entitled to participate in the conduct of disciplinary proceedings concerning lawyers.*
3. *Disciplinary proceedings should be conducted with full respect for principles and rules laid down in the European Convention on Human Rights, including the right of the lawyer concerned to participate in the proceedings and to apply for judicial review of the decision.*
4. *The principle of proportionality should be respected in determining sanctions for disciplinary offences committed by lawyers.*

There are CCBE recommendations on disciplinary process for the legal profession as follows[33]:

(a) *although the State may set the framework within which disciplinary proceedings should take place, the proceedings should be independent of state authorities (excluding the ordinary court system);*

(b) *the primary responsibility of the conduct of disciplinary proceedings at first instance concerning lawyers preferably lies with the Bar or Law Society;*

(c) *disciplinary proceedings should be carried out in accordance with the principles of due process, as laid down in the European Convention on Human Rights, including the right to defend himself/herself through legal assistance;*

(d) *disciplinary proceedings should be separate from criminal trials of the same alleged misconduct;*

(e) *attorney-client privileged confidential information should be protected throughout the disciplinary proceedings, without prejudice to the lawyer's right to self-defence.*

The explanatory note to Principle 1 (independence) of the IBA Principles states:

Independence of a lawyer requires also that the process for the lawyer's admission to the Bar, professional discipline, and professional supervision in general, are organised and carried out in a manner that guarantees that administration of the legal profession is free from undue or improper influence, whether governmental, by the courts or otherwise.

[30] Article 2 of the Regulation on Disciplinary Proceedings against Advocates.
[31] Article 40 of the Law on Profession of Advocate.
[32] Article 40 of the Law on Profession of Advocate and Article 7.2.8 of the Regulation on Disciplinary Proceedings against Advocates.
[33] https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DISCIPLINE/EN_DISC_20070917_CCBE_Recommendations_disciplinary_proceedings.pdf

Gender issues.

Article 29 of the Law on Profession of Advocate explicitly mentions that "Discrimination of any kind on the basis of national origin, nationality, race, sex, language, religion, political or other opinions, social origin, property or any other status shall be prohibited."

Commentary: The number of advocates in Armenia is 2264, out of which 1022 (45.14%) are female advocates. The Board of Advocates consists of 12 members, out of which 2 are women. There are women in prominent places in the Bar structure, including on the Youth Council. There are no special committees or associations for women advocates in the Chamber of Advocates.

While the law does not discriminate between female and male lawyers, several female lawyers did say that thinly veiled sexism hinders the work of female lawyers. For instance, in some cases when a client has two lawyers, one male and one female, the prosecutors and judges would address the male lawyer in the court room ignoring the female lawyer, even if the latter is the main counsel of a client.

In order to conduct a complete analysis, the data as to whether there are differences in the remuneration of male and female lawyers, and for the ratio of male and female lawyers' participation in ruling councils, are lacking.

4.1.2 Lawyer-client confidential relationship.

Scope and meaning.

Article 21 of the Law on Profession of Advocate states: "*advocates shall be provided with an opportunity of individual, unhampered, confidential communication with their clients and provision of advice thereto.*"

Article 18 (6) of the Law on Profession of Advocate states that advocates:

> *have private and confidential meetings with his/her client with no limitation as to the number and length of the meetings, as well as involve a licensed interpreter unless otherwise is prescribed by law.*

Article 21(3) of the Law on Profession of Advocate states:

> *An advocate shall be provided an opportunity to have individual, unhampered, confidential communication and consultation with his or her clients in state bodies and institutions, including also judicial bodies. State and judicial bodies and institutions and their officials must undertake all necessary measures to ensure the advocate's right to communicate with his client in an individual, unhampered and confidential manner.*

Article 25(4) to the Law on Profession of Advocate deals with issues of confidentiality titled "Advocate's secrets". This article elaborates on the lawyer-client confidentiality and establishes instances where such confidentiality can be breached. Thus Article 25(4) states:

> *Advocate discloses advocate's secret if there is information about preparation of grave or especially grave crime provided by the Criminal Code of the Republic of Armenia.*

Consequences of breaches of confidentiality.

Article 25(3) of the Law on Profession of Advocate defines the instances where a breach of confidentiality is possible. These include:

1. *Client consent is available;*
2. *It is necessary for supporting the claims in a dispute arisen between the advocate and the client, or for advocate's defence;*
3. *Advocate discloses advocate's secret if there is information about preparation of grave or especially grave crime provided by the Criminal Code of the Republic of Armenia.*
4. *The obligation to preserve the advocate's secret shall not be limited in time and applies to the person whose license for advocate's activities has been suspended or terminated.*

Article 2.3 of Code of Conducts of Advocates outlines the issue of confidentiality as follows:

2.3. Confidentiality

2.3.1 Confidentiality is the essence of an advocate's work, i.e. the client communicates to the advocate information that the advocate will not disclose to others, and the advocate shall possess such information on the basis of confidentiality.

2.3.2 Advocacy secrets shall include information and evidence that a person seeking legal assistance has communicated to the advocate, as well as the content and nature of advice given by the advocate, and information and evidence (materials and media) that the advocate has obtained on his own during the performance of advocate activities.

There can be no trust when confidentiality is uncertain. Therefore, confidentiality shall be a primary and core right and duty of the advocate.

The advocate's duty of confidentiality shall serve the interests of the administration of justice and the interests of the client.

2.3.3 The advocate shall maintain the confidentiality of all the information about which the advocate has learned during his professional activities.

2.3.4 The duty of confidentiality is not time-barred.

2.3.5 An advocate office or an advocate shall conclude an agreement on non-disclosure of information with his assistants, employees, and professional service providers engaged in the activity by the advocate or shall incorporate provisions on such non-disclosure in an employment contract concluded with such persons.

2.3.6 The disclosure of an advocacy secret shall be permitted only in cases directly prescribed by the Law.

Furthermore, the Code of Advocate's Ethics deals with the issue of confidentiality.

Article 9. Confidentiality

1. *An advocate's confidential information is information which the client provided an advocate on confidentiality condition, as well as such information and evidence that an advocate obtained through his or her own activities and which is not known to the public.*
2. *An advocate cannot be interrogated as a witness about circumstances with which he or she became aware as a result of legal assistance.*
3. *An advocate shall publicise confidential information if:*
    1) *written consent of the client is available;*
    2) *that is necessary for grounding and reasoning of the claims between him or her and the client arisen in the judicial dispute,*

3) *an information is available about a grave and a particularly grave crime as proscribed in Criminal Code of Armenia preparing to be committed.*

4. *An Advocate's confidentiality's maintaining requirement has no time limits.*

Commentary: Regarding European and international standards, the following apply:

Recommendation 2000:

Principle I. (6) All necessary measures should be taken to ensure the respect of the confidentiality of the lawyer-client relationship. Exceptions to this principle should be allowed only if compatible with the Rule of Law.

UNBP:

22. Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.'

The CCBE Code of Conduct:

2.3.4. A lawyer shall require his or her associates and staff and anyone engaged by him or her in the course of providing professional services to observe the same obligation of confidentiality.

While the law emphasises the importance of lawyer-client confidentiality, there are no specific provisions about disciplinary actions against a lawyer who might have breached the lawyer-client confidentiality. The closest provision that would cover the breach of confidentiality is Article 2.1.3 of Regulation on Disciplinary Proceedings against Advocates, which states:

The grounds for initiating disciplinary proceedings are the existence of features of prima facie violation of the requirements provided by this Law or the Code of Conduct for Advocates in the performance of an advocate.

The fact that specific provisions for disciplinary actions for breach of lawyer-client confidentiality are lacking should be addressed, as this is one of the core obligations of a lawyer.

Lawyers as witnesses.

To provide lawyers with immunity to not be called as witnesses and forced to testify against their clients, Article 21(8) of the Law on Profession of Advocate stipulates:

> *It is prohibited to question the advocate as a witness about events that became known to him at the time of providing legal aid or referrals. In the meaning of this part any person, who is not an advocate and is employed by an advocate shall be equal to the status of an advocate.*

Also, according to Article 86(2.2) of the Criminal Procedure Code of Armenia:

> *Advocates may not be called as witnesses and interrogated in order to find out information that may be known to them in connection with seeking or providing legal assistance.*

Commentary: One of the core principles of the European legal profession is "the right and duty of the lawyer to keep client's matters confidential and to respect professional secrecy".[34] "The lawyer's obligation of confidentiality serves the interest of the administration of justice, as well as the interest of the client. It is therefore entitled to special protection by the State" [35] While these provisions establish immunity for lawyers, based on the interviews, it has been revealed that there have been instances when lawyers have been called to testify against their clients.

[34] Charter of core principles of the European legal profession

[35] Code of conduct for European lawyers

In-house lawyers' rights.

Article 5(5) of the Law on Profession of Advocates states:

> *Rendering legal aid to the employer by the advocate based on the employment contract shall not be considered as advocate activity, except for the activity carried out by an advocate employed by an advocate.*

Commentary: It may be indirectly concluded from this provision that a lawyer working for a company/employer (in-house lawyer) is not covered by the legal guarantees related to advocacy. In this case, the employer may not be considered a client, which deprives them of the attorney-client privilege.

Searches of lawyers' premises.

Article 21(6) of the Law on Profession of Advocate states:

> *An advocate's apartment, transportation means and office or the office of an advocate organisation cannot be searched with regard to divulging such circumstances that are related to advocate's activity. It is not allowed to search an advocate at the time of direct performance of his/her professional duties.*

Commentary: Despite the clear legal prohibition, the existing international standards, and the case-law of the ECtHR there are cases reported during the interviews when investigative bodies conducted searches in advocates' offices.[36] The investigative bodies justify their actions with the argument that only after a search is it possible to determine whether any given material is related to the advocates' advocacy activities or not, an issue that some interviewees found unacceptable and in violation of attorney-client privileges.

While the Law on Profession of Advocates protects lawyers from undue searches, there are no provisions about in-house counsel which could allow authorities to carry out searches of the offices and houses of in-house lawyers.

Interception of confidential communications.

Article 25(1) of the Law on Profession of Advocates states:

> *The information and evidence confidentially provided to an advocate by the person who seeks free legal aid, the conversation between the advocate and the client, the essence and contents of the consultation given by the advocate as well as the information and evidence (materials, CDs) obtained by an advocate independently in the course of his or her advocate activity, shall be considered as advocate's secret.*

While not directly related to the issue of surveillance and wiretapping, this law prohibits wiretapping the communications of a lawyer with their client.

Commentary: The European and international standards here are the same as those already quoted under the general heading of lawyer-client confidentiality.

According to the Chamber of Advocates, legal wiretapping in Armenia is carried out through one of two mechanisms: based on the Law on Operative-Investigative Activity (with a court decision and where there is no criminal case yet); and in application of the Criminal Procedure Code, based on a court decision.

[36] Iliya Stefanov v. Bulgaria, Wieser and Bicos Beteiligungen GmbH v. Austria, Mancevschi v. Republic of Moldova etc.

Thus, according to Article 31(7) of the Law on Operative-Investigative Activities:

It is prohibited to carry out operational measures laid down in points 8, 11 and 12 of part 1 of Article 14 of this Law, if a person, with respect to whom the measure concerned is to be carried out, is communicating to his/her lawyer. Information containing lawyer's secret - obtained in the process of carrying out operational intelligence measures referred to in points 8, 11 and 12 of part 1 of Article 14 by reasons not related to the objective of carrying out operational intelligence - shall be immediately destructed.[37]

The Criminal Procedure Code, however, does not define the procedure for destroying acquired information, which is why the entire wiretapped conversation is submitted to the court. Although this conversation is not used as evidence, the parties to the case become aware of the content of the confidential information.

4.1.3 Issues related to the proposed European Convention on Lawyers.

Commentary: Few interviewees provided feedback on the proposed European Convention on Lawyers. Those who commented generally expressed a positive opinion about the possible drafting of the Convention and its future signing by Armenia. There was a general agreement that the Convention could provide further tools to protect the independence of lawyers and the practice of their profession.

4.1.4 Recommendations.

1. A key issue that came up in multiple interviews is that court officers (secretaries, assistants and bailiffs) are quite often unfamiliar with lawyers' rights, which then requires a lot of effort on behalf of the lawyers so as to clarify and reassert their rights, resulting in precious time being wasted that they could otherwise utilise to carry out their duties. As such, it is recommended that court officers as well as representatives of other relevant state institutions (such as the police) undergo periodic training on the key components of lawyers' rights and responsibilities, to avoid any obstacles for lawyers to conduct their duties.
2. There should be clear legal provisions defining the legal status (including rights and responsibilities) of in-house lawyers.
3. Court ordered wiretapping, which can be submitted as evidence, raises the challenge that in some instances there are conversations between lawyers and their clients that are also included in the transcripts which violate lawyer-client confidentiality. These transcripts, while not admissible as evidence (based on the confidentiality clause), are nevertheless viewed by judges and prosecutors, hence creating bias. There should be clear mechanisms spelled out under the law that makes sure that any communication between a client and her/his lawyer is removed and destroyed BEFORE the evidence is submitted to the court.
4. While there is a provision that a lawyer should not be interrogated and forced to divulge information about her/his client, it is recommended that the law should go further and cover the issue of inadmissibility of evidence if it is obtained with a breach of lawyer-client privilege in general.
5. The fact that female lawyers make up almost half the lawyers in Armenia is not reflected in the Chamber of Advocates or its committees (for instance, only two out of the ten members of the board are women). There should be more attention to achieve a gender balance in the Chamber of Advocates and other lawyers' associations. This stems not just

[37] https://www.legislationline.org/download/id/5476/file/Armenia_law_operational_inteliligence_activity-2007_en.pdf

from the concern of having female lawyers represented in decision-making bodies but also to provide more visibility for them, so as to decrease the chances of their being discriminated against.

6. It is recommended to consider, based on international standards draft legal provisions which will establish criminal/administrative responsibility for individuals and legal entities for insults on lawyers in conjunction with the fulfilment of their professional obligations.
7. It is recommended that the draft amendments prepared by the Chamber of Advocates regarding access to information which relates to the cases (files) of their clients and provisions regarding insulting lawyers be reviewed by CoE experts.
8. It is recommended to address the issue of imposition of monetary sanctions against lawyers by judges in the court room with the support of CoE expertise.
9. It is recommended for data to be gathered as to the alleged practices attempting to breach the lawyer-client confidentiality relationship for further in-depth analysis and consideration.

4.2 BELARUS

4.2.1 Procedural safeguards for the independence of lawyers.

Existing mechanisms to ensure that lawyers can exercise their profession without undue interference.

Clause 16 of the Law on the Bar states:

Clause 16. Guarantees of advocacy activity:

1. An advocate is independent in his/her activity and obeys only the law.

2. It is forbidden to interfere with the professional activity of an advocate, which is carried out in accordance with the law, or to impede this activity in any way, as well as to require the advocate to report any information constituting an advocate-client privilege, or to require such information from interns and assistants' advocates.

Clause 38 (2) of the Law on the Bar states:

2. For the purposes of proper organisation of the provision of legal assistance and the activities of Bar associations the Ministry of Justice of the Republic of Belarus:

- *summarises data on the activities of advocates, examines and distributes the positive experience of their work;*
- *takes measures to protect the interests of advocates from illegal and unjustified interference in their professional activities, to ensure the protection of the professional rights of advocates.*

Chapter 1.6 of the Ethics Rules state:

6. An advocate is absolutely independent in course of his professional activity. An advocate should perform his obligations to defend the client's rights and interests with ease and independence, politely, honestly and following the principles, conscientiously and confidentially, free of any interruption or external pressure.

Chapter 2.9 of the Ethics Rules state:

9. In order to maintain honour and dignity an advocate should: be polite, discreet, diligent, essential and independent.

Commentary: The above provisions maintain sound principles regarding the independence of lawyers, which is recognised everywhere as a cardinal value of the rule of law (see, for instance, Principle 1 of Recommendation 2000).

However, this is undermined repeatedly elsewhere in the text of the Law on the Bar (see various citations below, outside the commentary box), where it is clear that the state, through the Ministry of Justice, exercises control over access to the profession of lawyer.

This is contrary to Principle 1 of Recommendation 2000, which says that decisions concerning authorisation to practise as a lawyer should be taken by an independent body and should be subject to review by an independent and impartial judicial authority. It is clear that the ability to control access to the profession gives the government unacceptable control over who might be acting in cases against the government, which is not in accordance with the tenets of the rule of law.

By way of confirmation, in 'A commentary on the charter of the core principles of the European legal profession', which is part of the CCBE Code of Conduct, the following appears:

A lawyer needs to be free - politically, economically and intellectually - in pursuing his or her activities of advising and representing the client. This means that the lawyer must be independent of the state and other powerful interests and must not allow his or her independence to be compromised by improper pressure from business associates. … The lawyer's membership of a liberal profession and the authority deriving from that membership helps to maintain independence, and bar associations must play an important role in helping to guarantee lawyers' independence. Self-regulation of the profession is seen as vital in buttressing the independence of the individual lawyer.

This lack of independence of the legal profession is a stark feature of the Belarus legal system, with current consequences (as explained in the next commentary box).

In this context, it is worth referring to a report prepared in 2019 by the Helsinki Foundation for Human Rights in partnership with the World Organisation Against Torture on the independence of the legal profession in Belarus, it was reported that lawyers in Belarus must undergo requalification at the Qualifications Commission of the Ministry of Justice or on its behalf, at the territorial bar association, every five years. In addition, a special qualification can be carried out upon the recommendation of the Minister of Justice. Yet lawyers are a minority in the Qualifications Commission: 8 out of 17 members, whereas there are 5 representatives of the Ministry of Justice.

The report concluded: 'The Bar of Belarus does not represent an independent self-governing organisation, neither *de jure* nor *de facto*. The Bar and the lawyers are controlled by the Ministry of Justice.'[38]

So long as that position continues, any written procedural guarantees, while maybe perfect in form, cannot be guaranteed, because they are exercised at the will of the government. The events which followed the August 2020 Presidential elections have borne this out, as will be explained in the commentary below under "Sensitive cases."

Some representatives of the Belarus legal profession have said that they believe that the Bar should be given regulatory control of the legal profession, as happens in other countries. Some believe that the present position leads to serious wrongs (see more on this in the next commentary). However, the view of the Bar representatives is that the scope of control by the government is a formal matter only and does not cause everyday problems. A Bar representative also pointed out that there was a financial advantage to state control because those lawyers housed in state office buildings pay a lower rent on the grounds that they work for the poor.

The citations which undermine the independence of the profession are as follows:

Clause 33 (3) of the Law on the Bar states:

3. Prior to the start of individual advocacy activity an advocate is required to register with the Ministry of Justice of the Republic of Belarus and receive a certificate of registration.

[38] https://www.hfhr.pl/wp-content/uploads/2019/11/hfhr_omct_raport_UPR_Belarus_eng.pdf

Clause 29 (3) of the Law on the Bar states:

3. An advocate who has decided to carry out advocacy activity individually or to become the founder (participant) of an advocate's bureau (hereinafter a partner) must have at least three years of experience as an advocate.

The decision of an advocate to carry out advocacy activity individually, or the decision of advocates to establish an advocate's bureau, or the decision of an advocate to conduct advocacy activity as part of an advocates bureau on the territory of a certain administrative division and territorial unit shall be subject to agreement with the council of the territorial bar association. The approval may be refused if such a decision would impede the availability of legal assistance in criminal matters in the relevant territory upon appointment through the territorial bar association at the request of the authority conducting the criminal process or contradict other requirements of this Law.

The decision of the council of the territorial bar association to refuse approval may be appealed in court within a month from the date of its adoption.

Clauses 37 and 38 of the Law on the Bar states:

Clause 37. The Bar and the state:

1. *The state guarantees to advocates the possibility of advocacy activity and contributes to the creation of the necessary conditions, ensures the independence of activities of the bar, availability of legal assistance, as well as cooperation of state authorities and advocates' self-governance bodies in ensuring the protection of rights, freedoms and interests of citizens, provision of legal assistance to natural and legal persons.*
2. *Control over the financial and economic activities of bar associations and advocate formations is carried out by state authorities and other state organisations within their competence.*

Clause 38. The Bar and the Ministry of Justice of the Republic of Belarus:

1. *The powers of the Ministry of Justice of the Republic of Belarus in the field of advocacy activity are:*

- *adoption of normative legal acts regulating the activities of the bar, within the powers provided for by this Law;*
- *creation of the Qualification Commission and organisation of its activities;*
- *state registration of bar associations, advocates bureaus, amendments and (or) additions to the charters of bar associations and advocates bureaus, registration of individual advocates;*
- *establishment, upon agreement with the Belarusian Republican Bar Association, of the minimum number of advocates in legal consultations in the territory of administrative divisions or territorial units;*
- *development of the Rules of Professional Ethics of an Advocate on the proposals of advocates and advocate formations and their approval, upon agreement with the Belarusian Republican Bar Association;*
- *maintenance of the Register of Advocates, determination of the procedure of inclusion in the Register of Advocates of the advocates of foreign states acting in accordance with international treaties of the Republic of Belarus;*
- *making submissions to the bar association on bringing advocates to disciplinary responsibility, on holding a general meeting (conference) of members of the territorial bar association, as well as making submissions to the Qualification*

Commission on holding an extraordinary certification of an advocate to determine the possibility of performance of advocate's professional duties in cases when facts indicating advocate's insufficient qualification are revealed;

- *determination of the procedure for certification of advocates;*
- *obtainment of information related to the advocacy activity from state authorities and other organisations that are obliged to submit it within fifteen business days from the date of receipt of the request;*
- *obtainment from the bar associations, legal consultations, advocates bureaus, lawyers of information and documents necessary for the exercise of statutory powers, subject to the observance of advocate-client privilege;*
- *removal of the advocate from performance of professional duties for the period of disciplinary proceedings in the event of their initiation by the Minister of Justice of the Republic of Belarus;*
- *submission of proposals to the governing bodies of the bar associations on candidates for election to the positions of chairmen of bar associations;*
- *approval of candidates for the positions of chairmen of bar associations and heads of legal consultations;*
- *making a submission for consideration of the general meeting (conference) of the territorial Bar Association (council of the Belarusian Republican Bar Association) on early withdrawal of the chairman of the territorial bar association (chairman of the Belarusian Republican Bar Association) who systematically violates the requirements of the law, taking other measures to eliminate the identified violations;*
- *early termination of the powers of the chairman of the bar association based on the Qualification Commission's conclusion in case of unjustified refusal to satisfy the submission of the Ministry of Justice of the Republic of Belarus on early withdrawal of the chairman of the bar association for systematic violation of the requirements of the law;*
- *control, as prescribed by law, over the compliance of lawyers, bar associations, legal consultations and advocates bureaus with the law;*
- *suspension of decisions of bar associations governing bodies, bar associations chairmen (deputy chairmen) which do not correspond to the law or are adopted in violation of the established procedure and making submissions to these bodies (officials) to abolish such decisions, as well as approaching the court with applications to abolish these decisions in case of unjustified refusal to satisfy the relevant submission;*
- *exercise of other powers related to the regulation of advocacy activity in accordance with the legal acts.*

Commentary: This degree of control over the legal profession by the Belarus Ministry of Justice has led to grave consequences following the disputed Presidential election of August 2020. This is dealt with separately under the heading of 'Sensitive cases' below.

Conflicts of interest.

Clause 18 of the Law on the Bar states:

2. An advocate is not entitled to provide legal assistance to a client in cases where he/she provides or has previously provided legal assistance to a client whose interests are contrary to the interests of a natural person or legal entity that has

applied for legal assistance, or participated as a judge, prosecutor, investigator, person who conducted the inquiry, expert, specialist, translator, court clerk, affiant, attesting witness, arbitrator, patent advocate, mediator, or took part in a conciliation procedure or mediation, as well as if an official who is the spouse, father, mother, son, daughter, brother or sister of an advocate takes or took part in the investigation or case hearing, and in other cases stipulated by legal acts and the Rules of Professional Ethics of an Advocate.

3. An advocate shall not have the right to act contrary to the interests of the client, take a legal position, disagree with him, except for the rights of advocates if the client pleads guilty by contesting such a decision and asking for acquittal or termination of criminal prosecution.

4. An advocate is prohibited from buying or otherwise acquiring client's property, which is the subject of a dispute, including property rights, both in advocate's own name and in the name of other persons.

Clause 35 of the Ethics Rules states:

35. An advocate cannot provide legal assistance to a client and shall refuse from undertaking obligations on legal assistance rendering or their further fulfilment if:

- *he is rendering now or has been rendering before legal assistance to another client whose interests contradict the interests of individual or legal entity seeking for Advocate's legal assistance;*
- *he took part as a judge, public prosecutor, investigator, person conducting inquiry, expert, specialist, interpreter, secretary of court session, witness, arbitrator, patent attorney, mediator or participated in conciliation or mediation, as well as if the official person involved or had been involved in the investigation or trial, is a spouse, father, mother, son, daughter, brother or sister of the Advocate;*
- *a close relative of the Advocate is a judge in the court hearing the case as the court of first instance;*
- *he is a close relative of the Advocate involved in the same case as legal representative of the person whose interests contradict interests of the person seeking for legal assistance.*

Commentary: The principles and provisions on loyalty provided above are in line with European standards on conflicts of interest. However, the general principle on conflicts of interest is usually drawn more broadly, to include:

(i) conflicts with other lawyers with whom the lawyer is associated in a business partnership;

(ii) not only conflicts of interest, but also risks of breach of confidence between clients; and

(iii) risks to the lawyer's independence.

These issues should be considered when the provisions quoted above are due for revision.

The CCBE Code of Conduct says this:

3.2.1. A lawyer may not advise, represent, or act on behalf of two or more clients in the same matter if there is a conflict, or a significant risk of a conflict, between the interests of those clients.

3.2.2. A lawyer must cease to act for both or all of the clients concerned when a conflict of interests arises between those clients and also whenever there is a risk of a breach of confidence or where the lawyer's independence may be impaired.

3.2.3. A lawyer must also refrain from acting for a new client if there is a risk of breach of confidence entrusted to the lawyer by a former client or if the knowledge which the lawyer possesses of the affairs of the former client would give an undue advantage to the new client.

3.2.4. Where lawyers are practising in association, paragraphs 3.2.1 to 3.2.3 above shall apply to the association and all its members.

The IBA principles say:

3. A lawyer shall not assume a position in which a client's interests conflict with those of the lawyer, another lawyer in the same firm, or another client, unless otherwise permitted by law, applicable rules of professional conduct, or, if permitted, by client's authorisation.

<u>Right to withdraw from a case.</u>

Apart from the conflict clauses in Clause 35 of the Ethics Rules above, there are other parts of Clause 35, and all of Clauses 36 and 39 which are relevant to the lawyer's right to withdraw from a case:

35. An advocate cannot provide legal assistance to a client and shall refuse from undertaking obligations on legal assistance rendering or their further fulfilment if:

…

- *requirements of the person seeking for legal assistance evidently go against the law, or in case such demands to accept for the purpose of his defence deliberately false or obtained with violation of the law evidence or to use any other illegal means and methods.*
- *he is aware that the investigator, person conducting inquiry or court might call him as a witness to the case;*
- *there can arise circumstances requiring disclosure of other person's secret, excluding case if written consent of the interested person was received;*
- *undertaking obligations on rendering legal assistance may hinder legal assistance provision to another client;*
- *legal assistance might be so complicated that an Advocate is not sure that he possesses sufficient knowledge and experience;*

36. In case of refusal of perform the obligations on legal assistance rendering, an Advocate shall inform the client on the matter in advance so the client is able to engage another Advocate.

An advocate practicing in any form of legal formation shall immediately inform the manager of the formation.

…

39. If the agreement on rendering legal assistance is terminated, the Advocate should at the client's request return to him all the documents received from him or issued to the Advocate by other persons in course of the commission, inform the client on the work performed in relation thereto and transfer the copies of procedural documents prepared by the Advocate.

<u>Commentary:</u> The right of a lawyer to withdraw from a case is normally a free right. This matter is usually regulated by codes of conduct, where the following appears.

The CCBE Code of Conduct says this:

3.1.4. A lawyer shall not be entitled to exercise his or her right to withdraw from a case in such a way or in such circumstances that the client may be unable to find other legal assistance in time to prevent prejudice being suffered by the client.

And this:

3.1.3. A lawyer shall not handle a matter which the lawyer knows or ought to know he or she is not competent to handle, without cooperating with a lawyer who is competent to handle it.

The IBA Principles say:

7.1 … Unless prevented by professional conduct rules or by law, a lawyer shall be free to take on or reject a case.

7.2 … A lawyer should not withdraw from representation of a client except for good cause or upon reasonable notice to the client and must minimise any potential harm to the client's interests, and (where appropriate or required) with the permission of the court. A lawyer should do everything reasonable to mitigate the consequences of the change of instructions.

Some of the Belarus provisions fall within these European and international standards, for instance the provision regarding not acting outside the lawyer's own competence.

But it is unusual to find a provision such as the one where the lawyer must not act where the 'requirements of the person seeking for legal assistance evidently go against the law, or in

case such demands to accept for the purpose of his defence deliberately false or obtained with violation of the law evidence or to use any other illegal means and methods, since this will often be subject to the legal dispute itself and may be the reason why the client needs the case to be handled by the lawyer in the first place. In other words, the investigative and prosecutorial authorities may think that there is no legal basis for the claim, but the client – through the lawyer – may dispute this. It would be wrong for the lawyer to decide the rights and wrongs of the legal matter before the court has had the opportunity to consider it, which runs the risk of the client being left without legal representation. In a jurisdiction where the government already has significant control over the legal profession, this provision is a risk to the rule of law and should be removed.

There are two other provisions which cause concern, too: that the investigator or court might call the lawyer as a witness to the case, or that there might be a breach of confidentiality. In principle, a lawyer should not be called as a witness to the client's case precisely because of the danger of breach of lawyer-client confidentiality, and because there is a risk that the state authorities use the interview as a way of removing lawyer, they consider undesirable from a case in which they are the opposing party. And there should not be a provision in the law, either, which anticipates a breach of confidentiality since this should always be strictly protected. These provisions should also be reconsidered by the Belarus authorities, and it is recommended that they also be removed.

Lawyers' powers to gather evidence.

Clause 17 of the Law on the Bar states:

Clause 17. Rights of an advocate:

1. *An advocate is entitled to provide clients with any legal assistance, that they need.*
2. *An advocate acting as a representative or defender has the right:*

…

to independently collect and submit information regarding the circumstances of the case;

to request certificates, characteristics and other documents required in connection with the provision of legal assistance from state authorities and other organisations that are required to issue these documents or their copies in the established manner;

to request, with the consent of the client, expert opinions for resolving issues arising in connection with the provision of legal assistance and requiring special knowledge in the field of science, technology, art and other areas of activity;

Commentary: The provisions above appear to be in accordance with Principle I (5) and (7) of Recommendation 2000:

Principle I (5) states: Lawyers should have access to their clients, including in particular to persons deprived of their liberty, to enable them to counsel in private and to represent their clients according to their established professional standards.

Principle I (7) states: *Lawyers should not be refused access to a court before which they are qualified to appear and should have access to all relevant files when defending the rights and interests of their clients in accordance with their professional standards.*

However, there was evidence that this law does not work because there is no liability on state officials if they refuse to comply with a lawyer's request. In addition, there may be a payment for the information. That there are no open databases, and lawyers as a result do not know what information is needed and how much to pay – in other words, they are targeting evidence in the dark. This is a systemic problem.

It is therefore recommended that there should be provisions ensuring compliance by state officials with requests by lawyers for evidence in the state's possession relevant to the client's case, with appropriate penalties attached for failure to comply, and that the kinds of databases which are usually open in other European countries should be open in Belarus.

Disciplinary procedures.

Chapter 3 of the Law on the Bar provides the legal framework for disciplinary liability of lawyers.

The Law provides that the grounds for discipline of advocates shall be the commission of acts contrary to the Law, the Rules of professional ethics, other legislative enactments in connection with the bar, the charters of the local bar associations and advocates' bureau, the resolutions of the Republican and local bar associations.

Any complaint about the alleged misconduct shall be lodged with the local bar association of which the advocate is a member. If the complaint is against the Head or members of the Council of the Republican Bar Association and the heads or members of the Council of the local bar associations, it shall be lodged with the Republican Bar Association.

After the examination of the complaint two types of decisions can be taken: to declare the complaint unsubstantiated or to institute the disciplinary proceedings.

There are three types of disciplinary sanctions:

- a warning;
- a severe warning;
- disbarment from the local bar association.

The Law provides specific procedural rules of disciplinary proceedings. Thus, the disciplinary proceedings can be instituted by a General assembly (conference) of the local bar association, the Council of the bar association, the Head (or his deputy) of the bar association or the Minister of Justice on their own motion or on the basis of a complaint. Before the disciplinary proceedings are initiated, a preliminary assessment of the alleged facts shall be conducted.

To that end, the lawyer and any other persons are requested to provide their statements in writing.

If the disciplinary proceedings are instituted by the Minister of Justice, a special order is issued, in which the grounds for the proceedings as well as the time-limits for the examination of the case by the disciplinary commission of the bar association are indicated. The order, together with all the relevant documents, is sent to the disciplinary commission of the bar association. The Minister of Justice has the right to revoke his order at any time before the decision on the case is adopted.

As a result of the examination of the case, the disciplinary commission of a local bar association can adopt one of the following decisions:

- to impose a disciplinary sanction,
- to discontinue the disciplinary proceedings.

The disciplinary sanction shall be imposed not later than one month from the date when the lawyer's misconduct is discovered. In addition, the statutory time-limit for the institution of the disciplinary proceedings is 6 months, with some exceptions.

The Law provides that if the lawyer does not commit a new misconduct during one year from the date when a disciplinary sanction is applied, it shall be considered that this disciplinary sanction is annulled. Exceptionally, a disciplinary sanction can be revoked by a decision of the disciplinary commission of the local bar association, and upon agreement of the person or authority which initiated the case, but not earlier than after 6 months from the date when the disciplinary sanction was imposed.

The grounds for the disbarment of a lawyer from the local bar association are different from those for the disciplinary liability. The lawyer shall be disbarred when his or her licence is annulled, and in certain other cases (for instance: failure to practice law for a period of 1 year; commission of acts incompatible with the profession of lawyers whose list is provided in the Rules of professional ethics; impossibility to perform its duties owing to the lack of the necessary skills, which is confirmed by a decision of the Qualification Commission; the loss of the Belarus citizenship; the criminal conviction of the lawyer; the failure to pay the fees for the membership in the local bar association; the refusal to provide free legal aid etc.).

The decision of the disciplinary commission of a local bar association adopted after the examination of the disciplinary case may be appealed during one month after its adoption to the disciplinary commission of the Republican Bar Association. The decision of the Republican Bar Association can be appealed during one month from the date of its adoption to a court.

The Republican Bar Association summarises on a regular basis the statistics of the disciplinary proceedings in each region. Regular overviews of those proceedings are published and circulated to the local bar associations. The overviews provide the number of the disciplinary proceedings in each region, their type, and the summary of the most significant cases. It appears that those overviews provide lawyers with useful information about the practice of each regional bar association in connection with the disciplinary cases. This enables lawyers to be aware of the situations of misconduct that might lead to the disciplinary proceedings, and, therefore, to avoid the commission of such acts of misconduct.

During the fact-finding mission to Belarus, it was demonstrated that the number of lawyers on whom the disciplinary sanctions are imposed every year is relatively small. In 2018, a total of 366 complaints against lawyers have been lodged. It resulted in 15 warnings, 8 severe warnings and 4 disbarments of lawyers.

Commentary: Recommendation 2000 says:

Principle VI – Disciplinary proceedings:

2. Bar associations or other lawyers' professional associations should be responsible for or, where appropriate, be entitled to participate in the conduct of disciplinary proceedings concerning lawyers.

3.Disciplinary proceedings should be conducted with full respect for principles and rules laid down in the European Convention on Human Rights, including the right of the lawyer concerned to participate in the proceedings and to apply for judicial review of the decision.

4.The principle of proportionality should be respected in determining sanctions for disciplinary offences committed by lawyers.

There are CCBE recommendations on disciplinary process for the legal profession as follows[39]:

(a) although the State may set the framework within which disciplinary proceedings should take place, the proceedings should be independent of state authorities (excluding the ordinary court system);

(b) the primary responsibility of the conduct of disciplinary proceedings at first instance concerning lawyers preferably lies with the Bar or Law Society;

(c) disciplinary proceedings should be carried out in accordance with the principles of due process, as laid down in the European Convention on Human Rights, including the right to defend himself/herself through legal assistance;

(d) disciplinary proceedings should be separate from criminal trials of the same alleged

misconduct;

(e) attorney-client privileged confidential information should be protected throughout the disciplinary proceedings, without prejudice to the lawyer's right to self-defence;

The explanatory note to Principle 1 (independence) of the IBA Principles says:

Independence of a lawyer requires also that the process for the lawyer's admission to the bar, professional discipline, and professional supervision in general, are organised and carried out in a manner that guarantees that administration of the legal profession is free from undue or improper influence, whether governmental, by the courts or otherwise.

The evidence from the interviews is that the disciplinary process works fairly and appropriately. However, there appears to be a concern by some for the small minority of cases which are instigated by the Ministry of Justice, where unknown pressures may be at play to arrive at a certain result.

Sensitive cases (for instance, cases of political importance or delicacy).

Given that the principal problem here is identification of the lawyer with the client's cause, the following international principle applies, which is applied in other European countries:

UNBP:

18. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

There are persistent reports[40] that lawyers in Belarus are being discredited, intimidated and harassed while working on politically sensitive cases directly or indirectly related to the Presidential election. Belarusian lawyers are currently at risk for exercising their professional activities as lawyers, especially those representing clients who have been either charged with

[39] https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DISCIPLINE/EN_DISC_20070917_CCBE_Recommendations_disciplinary_proceedings.pdf

[40] https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/HUMAN_RIGHTS_LETTERS/Belarus_-_Bielorussie/2020/EN_HRL_20200817_Belarus_Concerns-regarding-the-situation-of-lawyers-in-Belarus.pdf

penal offences for their participation in peaceful gatherings, or who were politically active during the Presidential election campaign, or who challenged decisions of the Central Commission of the Republic of Belarus on Elections. Lawyers are consequently being identified with their clients' cases, as the following reports show.

Lawyers do not get timely access to their clients and to crucial information they need regarding their clients' case, such as the time and place of court hearings. Pre-trial detention centres do not offer sufficient guarantees to safeguard the confidentiality of communications with clients, which seriously prevents lawyers from providing efficient and timely legal assistance.

There are serious restrictions on lawyers' freedom of expression. Lawyers are "recommended" not to comment or argue publicly in politically sensitive cases, while some State actors produce mass-media material to discredit arrested political opponents. It is also reported that lawyers are prevented from pleading publicly and are as a rule obliged to sign a non-disclosure document in criminal cases.

There have been some high-profile cases of arrests and harassment of lawyers who are undertaking such work[41] [42] [43].

Gender issues.

Commentary: The overwhelming evidence from all stakeholders who were interviewed was that there was no gender problem in the Belarus legal profession. Women lawyers held positions of responsibility throughout the bar – indeed, there are more women chairs of regional bars than men chairs.

The figures bear this out: there are currently 2047 lawyers in Belarus, of whom 1272 (62%) are women; and the Council of the Republican Bar is composed of 21 lawyers, 15 of whom are women (71%). There is no special committee in the Republican Bar for the protection of women's rights.

Assessment of any gender-based discrimination against female lawyers requires additional statistical data, which are currently lacking.

4.2.2 Lawyer-client confidential relationship.

Scope and meaning.

Clause 1 of the Law on the Bar defines advocate-client privilege as follows:

> *Advocate-client privilege - information about issues on which the client has applied for legal assistance, the essence of consultations, clarifications, certificates received by the client from the advocate, information about the client's personal life, information received from the client, circumstances of the commission of a crime in a criminal case in which the advocate provided protection of the rights, freedoms and interests of the client, as well as information constituting a trade secret of the client;*

Clause 16 (3) – (5) of the Law on the Bar states:

[41] https://www.lawsociety.org.uk/en/campaigns/international-rule-of-law/intervention-letters/arrest-and-detention-of-lawyers-in-belarus

[42] https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/HUMAN_RIGHTS_LETTERS/Belarus_-_Bielorussie/2020/EN_HRL_20201019_Belarus_Revoked-license-of-lawyers-Aleksandr-Pylchenk-and-Yulia-Levanchuk.pdf

[43] https://www.rferl.org/a/lawyers-in-belarus-face-disbarment-arrest-just-for-representing-opponents-of-lukashenka/30898088.html

3. Information constituting an advocate-client privilege cannot be obtained from an advocate, as well as interns and assistants advocates, and used as evidence in criminal, civil, economic and administrative processes.

4. An advocate, interns and advocates' assistants may not be questioned as witnesses about circumstances constituting an advocate-client privilege, and state authorities and other organisations shall not have the right to seek, seize and otherwise obtain from an advocate, interns and assistants advocates information constituting an advocate's secret.

5. It is forbidden to prevent an advocate from providing meetings in private with the client in conditions that ensure the confidentiality of such meetings, as well as limiting their number and duration.

Clause 18 of the Law on the Bar states:

1. An advocate in his/her activity is obliged …

to provide conditions for observance of advocate-client privilege.

Clause 6 (3) of the Law on the Bar states:

3. Detained person, administratively arrested person, a person taken into custody, a person under house arrest, a person on whom coercive measures of security and treatment have been imposed or a convicted person are guaranteed the conditions necessary for meetings and consultations with an advocate in full confidentiality while the legal assistance is provided.

Chapter 3 of the Ethics Rules is devoted to the same subject:

14. Adherence of legal privilege (Advocate's secret) is a top priority of Advocate's practice. Obligation of non-disclosure of Advocate's secrets is unlimited in time.

15. The rules of adherence of legal privilege are applied to:

- *information concerning client's request for legal assistance;*
- *essence of consultations, explanations and references received by client from Advocate;*
- *information on client's private life;*
- *information received from a client concerning crime circumstances in relation to the criminal case in which the Advocate provided legal defence to rights, freedoms and interests of the client;*
- *business secrets of clients.*

16. All materials included into Advocate's files on the case as well as any correspondence between Advocate and his client shall be clearly and explicitly marked as belonging to the Advocate;

17. Advocate may disclose confidential information trusted by client in amount considered reasonably necessary in the following cases:

- *upon client's consent if the information disclosure is necessary for legal assistance;*
- *for substantiation of Advocate's position in case of dispute resolution between the Advocate and his client, or for substantiation of personal defence in a case initiated against him and based on actions which involve the client;*
- *consulting with other Advocates in case the client has no objections thereto.*

18. An advocate is prohibited to give witness statements and explanations on legally privileged issues.

In case an Advocate is summoned by bodies, conducting administrative, criminal, civil, economic proceedings for questioning or examination as a witness on the issues related to his professional activity, the Advocate shall inform the manager chairman of Advocates' self-management body.

The obligation to keep advocate-client privilege is the responsibility of the Advocates, carrying out activity in Advocates' self-management bodies.

Clause 16 (4) of the Law on the Bar states:

1. *An advocate, interns and assistants advocates may not be questioned as witnesses about circumstances constituting an advocate-client privilege, and state authorities and other organisations shall not have the right to seek, seize and otherwise obtain from an advocate, interns and assistants advocates information constituting an advocate's secret.*

Clause 18 of the Ethics Rules states:

18. Advocate is prohibited to give witness statements and explanation on legally privileged issues.

In case an Advocate is summoned by bodies, conducting administrative, criminal, civil, economic proceedings for questioning or examination as a witness on the issues related to his professional activity, Advocate shall inform manager chairman of Advocates' self-management body.

The obligation to keep advocate-client privilege is the responsibility of the Advocates, carrying out activity in Advocates' self-management bodies.

Clause 16 (3) of the Law on the Bar states:

3. Information constituting an advocate-client privilege cannot be obtained from an advocate, as well as interns and assistants advocates, and used as evidence in criminal, civil, economic and administrative processes.

Commentary: Regarding European and international standards related to the confidential relationship between lawyer and client, the following apply:

Recommendation 2000:

I.6 All necessary measures should be taken to ensure the respect of the confidentiality of the lawyer-client relationship. Exceptions to this principle should be allowed only if compatible with the Rule of Law'.

UNBP:

22. Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.'

The CCBE Code of Conduct:

2.3.4. A lawyer shall require his or her associates and staff and anyone engaged by him or her in the course of providing professional services to observe the same obligation of confidentiality.

There is strong evidence that pre-trial detention centres do not offer sufficient guarantees to safeguard the confidentiality of communications with clients, which seriously prevents lawyers from providing efficient and timely legal assistance. This has been particularly the case with lawyers for those who have been arrested following the upheavals after the August 2020 Presidential election. During some interviewed it was admitted that there was a problem. For instance, there was a suggestion that measures taken to control the coronavirus epidemic

may have played a role in this absence of confidentiality in terms of the conditions under which lawyers were allowed to have access to detained clients, and that things would improve once the pandemic was under control.

Wire-tapping is suspected, but unproven, particularly in sensitive cases.

As mentioned above under the lawyer's right to withdraw from a case, there are also two other provisions in Clause 35 of the Ethics Rules which cause concern, too: that the investigator or court might call the lawyer as a witness to the case, or that there might be a breach of confidentiality.

Searches of lawyers' premises.

There was no evidence from the interviewed stakeholders of serious or systemic problems in relation to search and seizure of documents held in lawyers' premises, nor of interviews of lawyers in relation to their clients' cases.

The duties of lawyers towards the administration of justice and to their clients (including on how conflicts are settled between the lawyer and the client).

Chapter 5 of the Ethics Rules (Clauses 32–53) deals with the regulation of matters between the lawyer and client, many of the clauses of which have been quoted above in other contexts. No issues arose in the interviews with stakeholders in relation to the relationship between lawyers and the courts.

4.2.3 Issues related to the proposed European Convention on Lawyers.

Commentary: Belarus is not yet a member of the Council of Europe, although it has signed and ratified 12 Council of Europe treaties and protocols, as well as joined 4 Partial Agreements. The stakeholders felt that strong European and international standards protecting lawyers could only be a good thing, but clearly it will be a matter for the government of Belarus to decide in due course whether to be bound by a future convention on this topic.

4.2.4 Recommendations.

The recommendations in relation to Belarus are of a different nature to those of the other four countries for the following reasons:

1. It was not possible, due to the upheaval following the August 2020 Presidential election, to interview as wide a range of stakeholders as in the other four countries. For instance, there were no interviews with the government or state agencies, or a range of private organisations. That has given a narrower overview.
2. There is one very serious problem in relation to the structure of the Belarus legal profession, which is the extensive reach of the state into the regulation of lawyers. That has overshadowed other, lesser considerations, particularly in the light of the serious fate that has befallen some lawyers as a result of their defence activities after the Presidential election.
3. Belarus is not a member of the Council of Europe, and so has not been subject to the same standards and judgements which come from membership, such as the decisions of the ECtHR.

Nevertheless, it is possible to make the following recommendations:

1. There needs to be rebalancing of the structure of the Belarus legal profession, to bring it into line with European and international standards in relation to the level of state control. At present, the state has an unacceptably extensive role in controlling the legal profession, which has a clear impact on its independence. Lawyers should not be licensed by the state, nor should the leadership of its professional bodies require state approval.
2. There should be an obligation on state authorities to respond to advocates' enquiries on behalf of their clients, so that the right in Clause 17 of the Law on the Bar for lawyers to ask for information and documents from public authorities can be enforced by a corresponding duty on state authorities to provide answers. The liability of state officials needs to be at an appropriate level to guarantee the lawyers' right.
3. There should also be a right for lawyers to have access to public registers, to guarantee their ability to represent their clients.
4. The arrangements in pre-trial detention centres need to be modified to ensure that there is an absolute guarantee for lawyer-client confidentiality when lawyers meet their clients in such centres for the purposes of representing them.

The provisions in Clause 35 of the Ethics Rules regarding the right of a lawyer to withdraw from a case should be amended to remove the provision forbidding the lawyer from acting where the requirements of the person seeking legal assistance evidently go against the law, and related provisions, since it leaves the lawyer to decide the rights and wrongs of the legal matter before the court has had the opportunity to consider it, and runs the risk of the client being left without legal representation. Consideration should also be given to removing two other provisions which cause concern, that the investigator or court might call the lawyer as a witness to the case, or that there might be a breach of confidentiality.

4.3 GEORGIA

4.3.1 Procedural safeguards for the independence of lawyers.

The issue of independence of lawyers in Georgia is dealt with by a number of legal instruments which establish codes of conduct as well as institutional structures to guarantee the independence, self-government as well as the conduct of lawyers. These provisions include:

1. Article 31(3) of the Constitution of Georgia guarantees "… the unrestricted exercise of the rights of lawyers, as well as the rights of lawyers to self-organisation, shall be guaranteed by law".
2. Chapter VI of the 2004 "Law of Georgia on Lawyers" (Law on Lawyers) establishes the Georgian Bar Association (henceforth GBA) to help define the responsibilities and protect the rights of lawyers.
3. The GBA charter (most recently amended on 23 December 2018) further develops mechanisms and regulations with a view to protecting the lawyers' legal practice as well as their integrity. These include but are not limited to: "Code of Professional Ethics for Lawyers"; Regulation on Disciplinary Liability and Disciplinary Proceedings against Lawyers.

Existing mechanisms to ensure that lawyers can exercise their profession without undue interferences.

The Law on Lawyers is the law which sets the main guarantees for lawyers to practise law unhindered - their rights are defined, and lawyers are shielded from political and state interference. Some of the key provisions highlighting the protection of the rights of lawyers in the Law on Lawyers are discussed below.

Article 364 of the Criminal Code of Georgia:

> *1. The unlawful interference with the activities of a prosecutor or investigator in any manner in order to disrupt the comprehensive, complete and objective investigation of a case, -*
> *shall be punished by a fine or community service from one hundred and eighty to two hundred and forty hours or with imprisonment for up to a year.*
> *2. Gross interference with judicial activities in any manner in order to influence the legal proceedings, -*
> *shall be punished by a fine or imprisonment for up to two years.*

Article 38.1 of Law on Lawyers:

> *A lawyer shall practise the profession of lawyer independently. Unlawful interference with the activities of a lawyer or their hindering, inappropriate influence on the lawyer on the part of a state body and/or other person, his/her intimidation, harassment, coercion, persecution, oppression, causing moral or material damage to him/her, violence against him/her or offering violence as well as any other action that might interfere with the independence of a lawyer, shall not be allowed.*

Article 2.1 of Code of Professional Ethics for Lawyers further cements the principle of lawyer's independence:

> *Article 2.1*
>
> *In performing his professional activities, a lawyer shall be free from any influence or pressure including his personal interest and shell be directed only by the Georgian legislation, international law and standards of professional ethics.*

Commentary: The national legislation and regulations described above dealing with the issue of lawyers' independence are in accordance with Recommendation 2000 "On the freedom of exercise of the profession of lawyer," and more specifically the provisions:

Principle 1.1: All necessary measures should be taken to respect, protect and promote the freedom of exercise of the profession of lawyer without discrimination and without improper interference from the authorities or the public, in particular in the light of the relevant provisions of the European Convention of Human Rights.

Principle 1.4: Lawyers should not suffer or be threatened with any sanctions or pressure when acting in accordance with their professional standards.

Lawyers' powers to gather evidence.

Article 4.1(b) of the Law on Lawyers guarantees the right of lawyers to gather evidence during pre-trial investigation:

> *In order to protect the interests of a client, request and receive necessary documents, information and other factual data in the manner established by legislation.*

Moreover Article 4.1(c) of the same law provides:

> *At any time and without any obstacles and control, and in the manner established by criminal procedural legislation, meet and communicate in person with a detained or arrested person, or a person held in any other liberty restriction facility.*

Commentary: In various interviews, the issue of access to case file materials came up as a concern for lawyers. Thus, in many cases, lawyers trying to have access to case file materials of their clients are able to do so only through investigative bodies (for instance the Prosecutor's Office or the Ministry of Internal Affairs, which is in accordance with international standards and practice). However, the main concern expressed is that even when they have access to case materials, defence lawyers are not allowed to make copies of the evidence and have to examine the material on the spot, giving them limited time to study the case material properly, and thus ensure the proper defence of their client.

Moreover, it has been argued that in certain cases, investigators do not appear to have benefited from training which provides them with a comprehensive understanding about the full range of their responsibilities, with regard to their interaction with lawyers. Article 31(1) of the Law of Georgia on the Prosecutor's Office sets the following requirements for the appointing investigators:

Law of Georgia on the Prosecutor's Office:

Article 31 - Requirements set for persons to be appointed to the positions of a prosecutor and an investigator in the Prosecutor's Office.

1. Any citizen of Georgia who has a higher legal education, has a command of the language of proceedings, has completed six months to one year internship in the bodies of the Prosecutor's Office and has passed a qualification exam with the Qualification Examination Commission in the following disciplines: Constitutional Law, International Human Rights Law, Criminal Law, Law of Criminal Procedure, Penitentiary Law, and Principles of Criminal Intelligence, has taken the oath of an employee of the Prosecutor's Office, and can, based on his/her working and moral qualities, as well as his/her health status, perform the duties of a prosecutor or an investigator of the Prosecutor's Office, may be appointed to the position of a prosecutor or an investigator in the Prosecutor's Office.

It is recommended that the above issue is synergised with Principle I (7) of Recommendation 2000:

Principle I (7): Lawyers should not be refused access to a court before which they are qualified to appear and should have access to all relevant files when defending the rights and interests of their clients in accordance with their professional standards.

Admissibility of evidence.

Article 31(10) of the Constitution of Georgia states "Evidence obtained in violation of the law shall have no legal force."

Commentary: While the law is clear on inadmissibility of evidence, it should be further defined in the Law on Lawyers. Further, several interviewees mentioned that even though sometimes evidence is deemed inadmissible, prosecutors would still present it to judges to influence the latter's perception of, and decision in, the case.

Disciplinary procedures.

Disciplinary matters of the GBA members are determined in accordance with the Law on Lawyers and the Code of Professional Ethics for Lawyers. Consequently, the Charter of the Georgian Bar Association established the Ethics Commission,[44] the independence of which is guaranteed by the Law on Lawyers.[45]

Article 34 of the Law on Lawyers defines the types of disciplinary measures that could be applied with respect to lawyers:

Article 34 - Types of disciplinary sanctions and disciplinary measures applied against lawyers.

1. *The following shall be the types of disciplinary sanctions applied against lawyers:*

   a) a warning;

   b) deprivation of the right to practise the profession of lawyer for a period of between six months up to three years;

   c) termination of membership of the Bar Association.

2. *The following shall be the disciplinary measures applied against lawyers:*

   a) the giving of a private recommendation letter;

   b) termination of authority of a member of the Bar Association, Executive Board, Ethics Commission and Audit Commission.

Commentary: Recommendation 2000 establishes:

Principle VI – Disciplinary proceedings

2.Bar associations or other lawyers' professional associations should be responsible for or, where appropriate, be entitled to participate in the conduct of disciplinary proceedings concerning lawyers.

3.Disciplinary proceedings should be conducted with full respect for principles and rules laid down in the European Convention on Human Rights, including the right of the lawyer concerned to participate in the proceedings and to apply for judicial review of the decision.

4.The principle of proportionality should be respected in determining sanctions for disciplinary offences committed by lawyers.

[44] Article 21, GBA Charter
[45] Article 28(4), Law of Georgia on Lawyers

There are CCBE recommendations on disciplinary process for the legal profession as follows:[46]

(a) although the State may set the framework within which disciplinary proceedings should take place, the proceedings should be independent of state authorities (excluding the ordinary court system);

(b) the primary responsibility of the conduct of disciplinary proceedings at first instance concerning lawyers preferably lies with the Bar or Law Society;

(c) disciplinary proceedings should be carried out in accordance with the principles of due process, as laid down in the European Convention on Human Rights, including the right to defend himself/herself through legal assistance;

(d) disciplinary proceedings should be separate from criminal trials of the same alleged misconduct;

(e) attorney-client privileged confidential information should be protected throughout the disciplinary proceedings, without prejudice to the lawyer's right to self-defence;

The explanatory note to Principle 1 (independence) of the IBA Principles provides:

Independence of a lawyer requires also that the process for the lawyer's admission to the bar, professional discipline, and professional supervision in general, are organised and carried out in a manner that guarantees that administration of the legal profession is free from undue or improper influence, whether governmental, by the courts or otherwise.

Some interviewees expressed concerns of the makeup of the Ethics Commission of the GBA, specifically the issue that the Commission includes non-lawyers whom they viewed as sometimes lacking perspective. However, Article 21.1 of the Charter of the GBA and Article 28(1) of Law on Lawyers both make sure that members of the Ethics Commission are predominantly lawyers by stating "The Ethics Commission shall be composed of 15 members, at least 12 of whom shall be lawyers."

However, the overall consensus is that the disciplinary procedures are fair and effective.

Gender issues.

Commentary: There are 9455 lawyers registered with the GBA, of whom 4858 are active: 2332 female active members and 2526 male active members (4597 members are not active). The GBA Executive Board consists of 12 members, of which 3 are women and 9 are men. There is no special women's committee or association within the Bar.

In order to assess the real situation as it relates to gender-based discrimination against female lawyers, one has to rely on some statistical data—not about the number of female lawyers, but rather about alleged cases of discrimination, difference in remuneration, membership in ruling councils, etc.—which are currently lacking.

4.3.2 Lawyer-client confidential relationship.

Scope and meaning.

Article 7 of Law on Lawyers reads:

Article 7 - Professional secrecy.

[46] https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DISCIPLINE/EN_DISC_20070917_CCBE_Recommendations_disciplinary_proceedings.pdf

1. A lawyer shall:

a) respect professional secrecy, regardless of the time elapsed;

b) not disseminate, without the consent of the client, information that was obtained from the client in the course of the practice of the profession of lawyer or the information (confidential information) that is related to the case. At the same time, a lawyer shall not disclose the identity of a client if he/she requested this in advance in writing.

Articles 38.6 & 38.7 of the Law on Lawyers emphasise that:

6. Any information received by a lawyer from a client or from another person seeking legal advice shall be confidential.
7. Any kind of eavesdropping and recording of conversations between a lawyer and a client shall be impermissible, and written communication between them shall be inviolable.

Code of Professional Ethics for Lawyers provides in:

Article 3. The principle of Confidence.

A client-lawyer relationship shall be based on trust. Client's confidence in a lawyer shall be based on lawyer's personal dignity, honesty, integrity, competence and independence. A lawyer shall not act in such a manner as to question a client's confidence in him/her. These qualities shall be a lawyer's professional duty.

and

Article 4. The Principle of Confidentiality.

1. Information that becomes known to a lawyer in the course of performing his/her professional activity shall be confidential. A lawyer shall keep the information confidential in a manner to prevent third parties' access to it. The principle of confidentiality shall apply to any information that has become known to a lawyer from a client or other person willing to receive legal counselling that had been provided by the lawyer to the client or the lawyer had learned from other sources in relation to the client or his/her case.

2. The confidentiality duty shall not be limited in time.

Commentary: The concept of lawyer-client confidentiality, including the issue that confidentiality is not limited in time (statute of limitations) is in accordance with Article 2.3 of CCBE Code of Conduct for European Lawyers which states:

2.3. Confidentiality.

2.3.1. It is of the essence of a lawyer's function that the lawyer should be told by his or her client things which the client would not tell others, and that the lawyer should be the recipient of other information on a basis of confidence. Without the certainty of confidentiality there cannot be trust. Confidentiality is therefore the primary and fundamental right and duty of the lawyer.

The lawyer's obligation of confidentiality serves the interest of the administration of justice as well as the interest of the client. It is therefore entitled to special protection by the State.

2.3.2. A lawyer shall respect the confidentiality of all information that becomes known to the lawyer in the course of his or her professional activity.

2.3.3. The obligation of confidentiality is not limited in time.

Right of lawyer not to testify.

According to the Law on Lawyers, a lawyer can disclose confidential information only:

a) *by consent of a client;*

b) *in case the disclosure of such information is necessary in the process of representation or defence based on the interests of the client; and if the latter has not prohibited the disclosure of this information in advance;*

c) *in case it is necessary to defend himself/herself from the charges or claims brought against him/her or in case there is a lawsuit pending in the court about the fees received by him/her.*[47]

Commentary: The provisions of the Law on Lawyers with regard to confidentiality is in accordance with international standards in particular with those established by Recommendation 2000, specifically with principal I.6 which states:

All necessary measures should be taken to ensure the respect of the confidentiality of the lawyer-client relationship. Exceptions to this principle should be allowed only if compatible with the Rule of Law.

However, Article 7(3)c of Law on Lawyers needs to be clarified further as, at least in the English translation, it is unclear whether a lawyer can disclose confidential information when (s)he is under investigation or if it is vis-à-vis a claim brought against her/him by a client.

Consequences of lawyer breaching the duty of confidentiality to client.

Commentary: Neither the Law on Lawyers nor the GBA documents (Code of Professional Ethics of Lawyers, Disciplinary Procedures) have clearly defined provisions on the issue of consequences of breach of confidentiality.

Article 4(4) of The Code of Professional Ethics for Lawyers reiterates the same provisions as the Law on Lawyers:

4. Lawyer may disclose the confidential information:

a) Upon client's consent;

b) If such use of information is justified during representation or defence based on the client's interests, provided the disclosure of such information had not been prohibited to the lawyer by the client in advance;

c) If it is necessary for defending himself/herself against accusation or requirement brought by the lawyer to him/her or for earning his/her own fee.

Other than the above-mentioned exceptions, Article 7.1[1] of the Law on Lawyers establishes that in the case of reasonable suspicion of money laundering or financing of terrorism the confidentiality can be breached, in keeping with a certain procedure:

Commentary: Given the international practice on disclosures related to suspicious transactions, the regulation provided within the Law of Georgia on Facilitating the Prevention of Money Laundering and Financing of Terrorism seems in compliance with European standards, subject to proper implementation of the relevant procedures set forth by the legislation.

[47] Article 7(3) of the Law on Georgia on Lawyers.

Interviewing lawyers.

Article 38(3) of Law of on Lawyers states:

> *A lawyer may not be interrogated as a witness with respect to a case in which he/she has participated as a lawyer (as a defence counsel or representative).*

Commentary: While the law protects lawyers from interrogation in relation to a case involving their client, in several interviews it was mentioned that lawyers are sometimes questioned on cases involving their clients. This could happen tangentially or under the guise of general information meetings between lawyers and state investigative bodies. If data is gathered on this issue, a better assessment can be made of whether this is a serious problem.

In-house lawyers' rights.

Commentary: There are currently no legal provisions that define the different status of lawyers on the one hand and in-house legal counsellors (who normally do not hold a license to practice law) on the other. The phenomenon of corporate (in-house) counsellors is quite common and the "market" for in-house lawyers is quite large in the Georgian corporate landscape.

Interception of confidential communications.

Article 38(7) of Law on Lawyers states:

> *Any kind of eavesdropping and recording of conversations between a lawyer and a client shall be impermissible, and written communication between them shall be inviolable.*

Commentary: Some of the interviewees mentioned that legal provisions prohibiting surveillance and communications tapping for lawyers in Georgia are vague. While there are other legal acts, such as "The law of Georgia on personal data protection",[48] which provides some protection, there is a need to develop further legislation to safeguard lawyers from electronic surveillance or wiretapping.

With the Covid-19 pandemic, one issue that many lawyers have been facing is accessing their clients who are in detention via videoconferencing platforms and whether or not protecting the client's privacy and confidentiality is guaranteed on such platforms. While this might be a temporary issue, the law should try to cover contingencies for not only the Covid-19 pandemic, but any future unforeseen conditions.

4.3.3 Issues related to the proposed European Convention on Lawyers.

Commentary: Most interviewees agreed that the legal provisions and regulations related to lawyers in Georgia are on a par with European standards, and there was a general agreement among all interviewees that a European Convention on Lawyers would be good for the further protection of lawyers' procedural safeguards in Georgia.

---

48 https://matsne.gov.ge/en/document/download/1561437/5/en/pdf#:~:text=A%20legal%20entity%20under%20private,or%20require%20unjustifiably%20great%20efforts

4.3.4 Recommendations.

1. The practices related to lawyers' access to the files/evidence of their clients should be reviewed and addressed. One avenue could be to introduce similar to the provision in the Armenian legislation.[49]
2. Specific legal provisions establishing the rights and obligations of in-house lawyers (licensed or otherwise) should be adopted to give corporate lawyers the same rights and protections as other lawyers.
3. It is recommended that data be gathered as to the reported statements about the wiretapping of lawyers for further analysis and consideration.
4. The interviews did not identify any issues related to the role of women lawyers but in all European societies there is a room for improvement in this aspect. Hence, it is recommended that some data be collected as to women's perception of professional gender equality as well on the types of cases female lawyers are assigned or deal with.
5. There should be clear provisions in the Law on Lawyers and in the Code of Professional Ethics that would define the consequences of a lawyer breaching the duty of confidentiality to their client.
6. It is recommended to look into and gather data as to the issue of reported "interviewing" of lawyers by state authorities and the use of inadmissible evidence by state authorities for further analysis and consideration.

[49] An advocate shall not be prohibited to get acquainted with all court materials that deal with his client, as well as to take as many notes and copies as necessary, except for data affirming the defendant's identity.

4.4 REPUBLIC OF MOLDOVA

4.4.1 Procedural safeguards for the independence of lawyers.

Existing mechanisms to ensure that lawyers can exercise their profession without undue interference.

The issue of the independence of lawyers in the Republic of Moldova is dealt with by a number of legal instruments.

Article 3 of the Law on Advocacy states:

Article 3. Principles of advocacy.

Advocacy shall be carried out on the basis of following principles:

a) ensuring the right to defence guaranteed by the Constitution;

b) freedom and independence of advocacy;

c) democracy and collegiality in relationships between advocates;

d) voluntary membership in professional associations of advocates;

e) ensuring lawfulness and humanity.

This is echoed in the Advocacy Charter, which Article 4 of the Law on Advocacy includes among the instruments which form the legal basis for advocacy in the Republic of Moldova. Article 3 of the Advocacy Charter states:

Article 3. Principles of advocacy.

(1) Advocacy shall be practiced on the basis of the following key principles:

a) principle of lawfulness;

b) principle of freedom;

c) principle of independence;

d) principle of humanism;

e) principle of confidentiality;

f) principle of ensuring the right to defence guaranteed by the Constitution;

g) principle of democracy and collegiality in relationships between advocates;

h) principle of a voluntary membership in professional associations of advocates.

(2) The principles define the status, as well as guarantee the professional activity of advocates.

These are supplemented later in the Advocacy Charter by various provisions which provide more detail, as follows:

Article 54. Independence of the lawyer.

In the exercise of his profession, the lawyer is independent and is subject only to the Law, the Statute of the legal profession and the Code of Ethics of the lawyer. The lawyer is free to choose his position and is not obliged to coordinate this position with anyone but the client.

Article 55. Guaranteeing independence.

(1) The State ensures the observance and protection of the freedom in the exercise of the legal profession, without discrimination and without interventions from the authorities or the public.

(2) The independence of the profession, the autonomy of the Bar Union and the free exercise of the legal profession may not be restricted or limited by the acts of the public administration authorities or of other authorities, except in the cases and under the conditions expressly provided by law.

(3) It is prohibited by law to interfere in the exercise of the profession of lawyer.

(4) In the exercise of the profession, the lawyer may not be subject to any restrictions, pressures, constraints, or intimidation on the part of the public authorities or institutions or of other natural persons.

Article 56. Rights of the lawyer.

(1) In exercising the right to defence, recognised and guaranteed by the Constitution, the Law, the international pacts and treaties to which the Republic of Moldova is a party, the lawyer has the right to opt, by all legal means, for the achievement of free access to justice, the process fair and settled in - a reasonable period, irrespective of the nature or cause of quality parties.

(2) The right of the lawyer to assist, to represent or to exercise any other activities specific to the profession appears from the legal assistance contract, in accordance with the provisions of the present Statute. The contract expressly provides for the object and limits of the mandate.

(3) Unless otherwise provided, the lawyer has the right to perform any act specific to the profession, which he considers necessary for the promotion of the rights and legitimate interests of the client.

(4) A lawyer shall not be held liable for statements made orally or in writing before instant court, other organs of jurisdiction, the prosecution authorities, or other authorities if the allegations are related to defence and are necessary to establish the truth.

But the real guarantees are to be found later in the Law on Advocacy, where there is a chapter – Chapter VIII – on 'Guarantees of the advocate's practice. Rights and duties of an advocate'. The principal provisions are as follows:

Article 51. Independence of an advocate.

In the course of exercising his/her activities, an advocate shall be independent and be subject only to law, the Advocacy Charter and the Code of the Advocate's Ethics. An advocate shall be free to choose his/her position and shall not be required to discuss it with anybody except his/her client.

Article 52. Guarantees of independence.

(1) The interference in the professional activity shall be prohibited. The state shall ensure the exercise and protection of the freedom of the advocate's practice without discrimination and without undue interference by state authorities or public.

<u>Commentary:</u> Although it is welcome to see that a lawyer should be allowed to practise without interference, this is nevertheless an unusual provision to see in a law because it is so broad and general in its scope. There are bound to be exceptions to it, such as disbarment for misconduct or bankruptcy, and so it would be better if there were a qualification introduced into its wording at the end of the sentence, such as 'other than as permitted by law'.

In any case, there are specific concerns arising out of this article.

The first is that the Ministry of Justice issues licences to lawyers (see Article 12 of the Law on Advocacy). This would normally be considered unacceptable in accordance with the norms of the rule of law and the administration of justice because lawyers should be independent of the state. If the state has the power to issue licences, then it could be considered to hold unacceptable power over the lawyer, which could be used in cases against the state's interests, among others.

Interviewees felt this power should be allocated to the Bar, as is the practice in most European countries. It was true that its exercise by the state to date had usually been a formality and without substance. Nevertheless, there are concerns that it might be abused by a different government in the future. So, it is recommended that Article 12 be reviewed and changed, to ensure that the legal profession is not only independent of the state but seen to be so.

The second area of concern is that there are reports that the National Council for Legal Aid (NCLA) checks the court cases and even interferes in the strategy of legal aid lawyers who carry out work for the NCLA funded by the state budget. The NCLA disputes this and says that it has only a monitoring function in relation to quality, to ensure value for money for the money it spends, but that it does not have any input into the lawyer's strategy for the case.

The relationship between lawyers and the Bar on the one hand, and the NCLA on the other, is a sensitive one. About a quarter of practising lawyers in the Republic of Moldova (around 500 out of 2,000) undertake work for the NCLA. Clearly, a dependency can build up when there is such a large provider of work in the market, particularly when rates for criminal work are not high and lawyers need a decent turnover of cases to make a living (the rates in private civil and commercial work are higher). This could potentially undermine the independence of lawyers, who might seek to please their funder (the NCLA) in place of the individual clients that they serve.

One solution is to ensure that the criteria for selection and monitoring used by the NCLA are transparent, in accordance with the rules on independence of lawyers, and rigorously enforced. Another is to consider how the independence of lawyers can be strengthened by reducing their dependence, by launching a structured dialogue between the government, the NCLA and the bar.

There are also concerns about the NCLA and confidentiality, which are dealt with further under the 'Lawyer-client confidential relationship' below.

Finally, there is some evidence that prosecutors and other investigation authorities interview lawyers as witnesses in their own clients' cases. This was apparently more widespread before the change in government in June 2019, but still goes on to some extent. It is a way of intimidating lawyers, and more of removing them from a client's case. It is clearly a breach of Article 52 above and has serious implications for the lawyer-client confidential relationship.

(2) A search of the home or a working office of an advocate, means of transport, a seizure of his/her possessions and documents, an inspection and seizure of his/her correspondence, wiretapping shall be admissible only on the basis of a court decision.

(3) An advocate cannot be subjected to a personal search while he/she carries out professional duties, except in case of an obvious offense.

(4) In case of arrest of an advocate, or opening of criminal proceedings against an advocate, an authority which took these measures shall notify the Ministry of Justice and the Council of the Association of Advocates within 6 hours from the moment of arrest or opening of criminal case.

(5) Insulting of an advocate, slander, threats against him/her, violence against an advocate while he/she carries out professional duties, or in connection with their exercise shall entail liability established by law.

(6) *An advocate cannot be questioned on the subject of his/her relationships with a person to whom he/she afford, or afforded earlier, legal assistance.*

(7) *Courts and the criminal justice system shall provide an advocate with a place for carrying out professional duties in their premises.*

(8) *No public authority may directly or indirectly influence on an agreement between an advocate and a client.*

Commentary: Regarding European and international standards, the following apply:

Recommendation 2000:

I.6 All necessary measures should be taken to ensure the respect of the confidentiality of the lawyer-client relationship. Exceptions to this principle should be allowed only if compatible with the Rule of Law'.

UNBP:

22. Governments shall recognise and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.'

The CCBE Code of Conduct:

2.3.4. A lawyer shall require his or her associates and staff and anyone engaged by him or her in the course of providing professional services to observe the same obligation of confidentiality.

On top of that, there is the general principle that lawyers should not be identified with their clients' interests. See for instance:

UNBP:

18. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

The general view is that the law and regulations are more or less in line with European and international standards, but that the practice varies depending on who wields political power. Many interviewees believed that there was a kind of state immunity before the middle of 2019 because of the nature of the government, but that matters in relation to the reality of lawyers' procedural safeguards have improved since the change of government.

It is difficult to protect lawyers' procedural safeguards, and in particular their independence, if the government does not itself believe in such things. Maybe the only solution is for the local application of an enforceable international convention, and for that reason this matter will again be discussed under the European Convention on Lawyers below.

However, it appears that there is some leftover of the previous attitudes in the prosecution and the judiciary in criminal cases, where lawyers are alone against the power of the state, and there is no equality of arms. This is because of a perceived common interest between the prosecution and the judiciary. It was suggested that there needs to be a culture change, particularly among the judiciary hearing criminal cases, so that both sides of a case are equally heard. The Ministry of Justice is preparing a new policy on ensuring the independence and integrity of the justice sector, aimed mainly at judges and prosecutors, and this may help improve the culture in this area.

Conflicts of interest.

Article 54 (2) and (3) of the Law on Advocacy state:

(2) *An advocate may not provide legal assistance to a person if:*

a) he/she provides or previously provide legal assistance, in connection to the case at issue, to persons whose interests contradict to interests of the person at issue;

b) he/she previously participated in the case at issue in the capacity of a judge, a prosecutor, an investigator, an expert, a specialist, an interpreter, a witness or an attesting witness;

c) a family member, a relative or a cousin of an advocate participated in the investigation or the adjudication.

(3) An advocate shall not have a right to act contrary to legitimate interest of a client, to take a legal position which was not agreed with by a client (with exception of cases of pleading guilty), to refuse without a valid reason to continue defending of a suspect, accused or convicted person.

<u>Commentary:</u> This is in line with European standards on conflicts of interest. However, the general principle on conflicts of interest is usually drawn more broadly, to include:

(i) conflicts with other lawyers with whom the lawyer is associated in a business partnership;

(ii) not only conflicts of interest but also risks of breach of confidence between clients; and

(iii) risks to the lawyer's independence.

These issues should be considered when the provisions quoted above are due for revision.

The CCBE Code of Conduct says this:

3.2.1. A lawyer may not advise, represent, or act on behalf of two or more clients in the same matter if there is a conflict, or a significant risk of a conflict, between the interests of those clients.

3.2.2. A lawyer must cease to act for both or all of the clients concerned when a conflict of interests arises between those clients and also whenever there is a risk of a breach of confidence or where the lawyer's independence may be impaired.

3.2.3. A lawyer must also refrain from acting for a new client if there is a risk of breach of a confidence entrusted to the lawyer by a former client or if the knowledge which the lawyer possesses of the affairs of the former client would give an undue advantage to the new client.

3.2.4. Where lawyers are practising in association, paragraphs 3.2.1 to 3.2.3 above shall apply to the association and all its members.

The IBA principles say:

3. A lawyer shall not assume a position in which a client's interest conflict with those of the lawyer, another lawyer in the same firm, or another client, unless otherwise permitted by law, applicable rules of professional conduct, or, if permitted, by client's authorisation.

<u>Right to withdraw from a case.</u>

Article 2 (5) of Chapter II of the Code of Ethics (Relations with the client) states:

(5) If the lawyer is unable to fulfil his/her duties, he/she must ensure that the client can hire another lawyer in due time to provide the client with the necessary legal assistance in order to avoid damage to the client.

Article 1 (3) Chapter IV of the Code of Ethics (Legal fees) states:

(3) In the event of non-payment of debts related to fees and expenses, the lawyer has the right to refuse to handle the relevant case and may withdraw from it in compliance with the provisions of this Code.

Article 57 of the Advocacy Charter states:

(24) In any case of termination of the mandate, the lawyer has the obligation to take in due time and reasonably appropriate measures to protect the client's interests, such as: his notification, giving the client sufficient time to hire another lawyer, handing over documents and customer goods.

Commentary: The right of a lawyer to withdraw from a case is normally a free right, and the above provisions appear in line with international practice. This matter is usually regulated by codes of conduct, where the following appears.

The CCBE Code of Conduct says this:

3.1.4. A lawyer shall not be entitled to exercise his or her right to withdraw from a case in such a way or in such circumstances that the client may be unable to find other legal assistance in time to prevent prejudice being suffered by the client.

And this:

3.1.3. A lawyer shall not handle a matter which the lawyer knows or ought to know he or she is not competent to handle, without cooperating with a lawyer who is competent to handle it.

The IBA Principles say:

7.1 … Unless prevented by professional conduct rules or by law, a lawyer shall be free to take on or reject a case.

7.2 … A lawyer should not withdraw from representation of a client except for good cause or upon reasonable notice to the client and must minimise any potential harm to the client's interests, and (where appropriate or required) with the permission of the court. A lawyer should do everything reasonable to mitigate the consequences of the change of instructions.

Lawyer's powers to gather evidence.

Article 53 of the Law on Advocacy states:

(1) An advocate shall have the right to:

a) represent legitimate interests of clients before courts, law enforcement bodies, public authorities and in other organisations;

b) to study all materials in relating to a client's case and make notes and copies from the moment of the conclusion of an agreement;

c) independently collect, fix and submit information concerning circumstances of a case;

d) make enquiries, ask reviews and copies of documents necessary for providing legal assistance from courts, law enforcement bodies, public authorities and other organisations which are obliged to serve the requested documents;

e) with the consent of a client, ask conclusions of experts for resolving issues which arise in connection with providing legal assistance and require special knowledge in various fields of activity;

f) submit to competent authorities, as well as mass media, applications, and requests; in compliance with the procedure established by law submit complaints on actions and decisions which violate rights of a client, as well as the right of an advocate to practise.

(2) A failure of officials to comply with requirements specified in point d) of paragraph shall entail a liability established by law.

(3) In order to provide legal assistance to an arrested, detained or convicted person an advocate, at any stage of criminal proceedings, shall be afforded appropriate conditions for confidential meetings and consultations without limitations on their duration and number.

(4) Officials of bodies which are responsible for the exercise of control over arrested, detained or convicted persons shall be obliged to ensure unhindered access of an advocate to these persons on the basis of an agreement on providing legal assistance.

(5) A failure to comply with requirements specified in points (3) and (4) shall be considered a violation of the right to defence and shall entail a liability established by law.

(6) An application of an advocate on the subject of a violation of requirements specified in points (3) and (4) shall be examined by a court.

Commentary: There is evidence that state authorities do not respond to advocates' enquiries on behalf of their clients. Although Article 53 says that advocates have the right to ask for information and documents from public authorities, there are credible reports that this is not happening because there is no corresponding duty on public authorities to respond to advocates (despite Article 53 (2)), nor any appropriate liability for failure to respond. Although public authorities have access to public registers, advocates do not – and this hampers their ability to represent their clients.

The provisions relating to the confidentiality of obtaining evidence from the client comply with European and international standards, as cited below under 'Lawyer-client confidential relationship'.

Disciplinary procedures.

The Commission on Ethics and Discipline consists of 11 lawyers (6 are elected by the Congress and 5 are delegated by bars). The Commission examines the complaints against lawyers and trainee lawyers, investigates the respective cases, launches and conducts disciplinary proceedings against lawyers.

Any breach of lawyer's professional duties may lead in principle to disciplinary liability. The sanctions that can be applied for disciplinary and professional violations by lawyers can be as follows:

- warning;
- reprimand;
- fine (of MDL 1000-3000 – approx. EUR 50-150);
- suspension of activity (suspension of licence) – in cases of incompatibility or for non-payment of fees for more than 6 months;
- withdrawal (annulment) of licence (disbarment).

The disbarment sanction can be applied for the following violations:

a) A repeated failure by the lawyer, within one year, to fulfil his/her professional duties if the disciplinary sanctions have been previously applied to him/her.

b) Practicing legal profession during the period on which the lawyer's licence was suspended or failing to submit the licence or lawyer's ID within the established period to the Council of the Union of Lawyers by a lawyer whose activities are suspended.

c) Systematic violations by a lawyer of the requirements on providing legal aid guaranteed by the state.

d) A repeated unreasonable refusal to provide legal aid guaranteed by the state at the request of the territorial offices of the National Council for Legal Aid Guaranteed by State.

e) Unlawful actions by a lawyer in the process of obtaining a licence.

f) A gross violation of the Code of Ethics of Lawyers.

g) Conviction of the lawyer for committing a criminal offence which has become enforceable.

h) Losing the citizenship of the Republic of Moldova.

i) Gross violation of the provisions of the contract for legal assistance.

j) Failing to indicate in the contract for legal assistance the amount of the legal fees received from the client or indicating a lower (than the actual) amount of fees.

Sanctions shall be imposed within 2 months from the moment the respective violations are identified. The overall limitation period is 1 year from the moment of committing a violation. Decisions on sanctioning of lawyers can be challenged in the court of law.

Initiating disciplinary proceedings, investigation and examination of the violation fall under the competence of the Commission on Ethics and Discipline of the Union of Lawyers. The proceedings can be initiated if the Commission has sufficient grounds for that. That implies that the proceedings can be launched upon a complaint from a third party (clients, judges, other persons) or by the Commission ex officio (should it get hold of certain information on the violations committed by lawyers).

As a rule, the hearings held by the Commission on Ethics and Discipline are public. However, the Commission may take a decision to hold a closed hearing. The decisions taken by the Commission are published on the Union of Lawyers' website.

Commentary: Recommendation 2000 says:

Principle VI – Disciplinary proceedings:

2.Bar associations or other lawyers' professional associations should be responsible for or, where appropriate, be entitled to participate in the conduct of disciplinary proceedings concerning lawyers.

3.Disciplinary proceedings should be conducted with full respect for principles and rules laid down in the European Convention on Human Rights, including the right of the lawyer concerned to participate in the proceedings and to apply for judicial review of the decision.

4.The principle of proportionality should be respected in determining sanctions for disciplinary offences committed by lawyers.

There are CCBE recommendations on disciplinary process for the legal profession as follows[50]:

(a) although the State may set the framework within which disciplinary proceedings should take place, the proceedings should be independent of state authorities (excluding the ordinary court system);

(b) the primary responsibility of the conduct of disciplinary proceedings at first instance concerning lawyers preferably lies with the Bar or Law Society;

50 https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DISCIPLINE/EN_DISC_20070917_CCBE_Recommendations_disciplinary_proceedings.pdf

(c) disciplinary proceedings should be carried out in accordance with the principles of due process, as laid down in the European Convention on Human Rights, including the right to defend himself/herself through legal assistance;

(d) disciplinary proceedings should be separate from criminal trials of the same alleged misconduct;

(e) attorney-client privileged confidential information should be protected throughout the disciplinary proceedings, without prejudice to the lawyer's right to self-defence.

The explanatory note to Principle 1 (independence) of the IBA Principles says:

Independence of a lawyer requires also that the process for the lawyer's admission to the bar, professional discipline, and professional supervision in general, are organised and carried out in a manner that guarantees that administration of the legal profession is free from undue or improper influence, whether governmental, by the courts or otherwise.

There were varying reports about the effectiveness of the Disciplinary Commission of the Bar. There are very few women members of the Commission. It was felt that candidates should stand for election, and the subsequent elections held, subject to transparent criteria. From the public authorities and others, there was a view that the Disciplinary Commission protected members of the Bar. On top of that, some interviewees said lawyers usually win on appeal against a disciplinary sanction in the courts whereas clients do not, possibly because the statute of limitation in such cases is too short.

Overall, there was dissatisfaction with the working of the Disciplinary Commission, and some suggestion that disciplinary proceedings might in some cases be used for improper reasons e.g., on personal rather than professional grounds. More transparency of election, and more analysis and statistics regarding the outcome of cases, might improve the working and reputation of the Disciplinary Commission.

<u>Sensitive cases (for instance, cases of political importance or delicacy).</u>

<u>Commentary</u>: The position on sensitive cases has clearly improved since the change in government in June 2019, according to most interviewees. There was severe harassment of some lawyers in such cases before the change of government.

The NCLA has a particular problem with sensitive cases, because clients may have a private lawyer, but the court may appoint a legal aid lawyer, for instance if the private lawyer does not want to continue with the case or does not show up in court, or if the court appoints a legal aid lawyer in case either of those things might occur in future. In those cases, it can happen that two lawyers turn up in court for the client, one private and one legally aided. The private lawyer has the right to withdraw, but the legal aid lawyer has no such right – only the court has the right to dismiss the lawyer. The court has the right to fine the legal aid lawyer if he or she does not pursue the case, and the NCLA has known cases where the lawyer prefers to terminate his or her contract with the NCLA rather than take on a sensitive case in these circumstances. The NCLA's experience is that lawyers often prefer to avoid sensitive cases.

<u>Gender issues.</u>

<u>Commentary</u>: Most interviewees said that there were no gender problems as regards procedural safeguards.

That is not to say that there are no gender issues in the legal profession. The hard data is missing, and this is the first problem to be resolved. The Bar does not keep detailed statistics or analysis about the number of women in the profession, where they work, how much they are paid etc., although figures show that there are 1995 licensed lawyers, of whom 365 (18%)

are women. Without such analysis, it will not be possible to direct policies to resolve any problem which exists. For instance, there was evidence that it was sometimes difficult to find a woman advocate outside Chisinau for a woman victim of a crime.

In addition, the statistics of representation in the Bar's own bodies do not appear to show a balanced picture, with very few women on the Board or the Disciplinary Commission.

On an anecdotal basis, although legal aid rates are obviously the same for men and women, women are paid less than men in the private sector. There was also a question of whether men and women lawyers were treated with the same respect by judges and prosecutors in court, and of possible difficulties facing women lawyers, particularly young women lawyers, representing male clients in prison.

By and large, the issue of gender-based discrimination against female lawyers requires more detailed observation through statistical data.

4.4.2 Lawyer-client confidential relationship.

Scope and meaning

The principal legal provisions regulating the lawyer-client confidential relationship are Articles 52 (6) and 55 of the Law on Advocacy, which state:

Article 52

(6) An advocate cannot be questioned on the subject of his/her relationships with a person to whom he/she afford, or afforded earlier, legal assistance.

Article 55. Professional secrets:

An advocate may not disclose confidential information which he/she received in connection with providing legal assistance, as well as to share with third parties documents relating to discharging, of his/her duties, without the consent of a client.

The obligation to keep professional secrets shall not have time limitations.

Article 3 of Chapter 1 (General Principles) of the Code of Ethics states:

3. Confidentiality.

(1) It is assumed that the mission of a lawyer is to keep secrets of his/her clients and confidential communications, which is the lawyer's fundamental right and duty.

(2) The duty to maintain the professional secrecy is absolute and unlimited in time.

The object of professional secrecy are the questions that a person has addressed seeking legal assistance, the essence of the consultations offered by the lawyer, the procedures of the strategy and tactics of defence or representation, information about the person who sought assistance, and other circumstances arising from the professional activity of a lawyer.

(3) Confidentiality applies both to all professional activities of a lawyer and to employees of the lawyers' office or associated lawyers' office, as the case may be.

(4) No pressure or interference on the part of a public or any other body can compel a lawyer to disclose professional secrets, except as expressly provided by law, or to bring an action or to ensure defence in a dispute between the lawyer and the client.

And Article 3 of Chapter VI (Relations between lawyers) of the Code of Ethics states:

3. Correspondence transmitted between lawyers.

(1) The lawyer who sends to another lawyer a message upon which the former wants to confer a confidential nature will have to indicate this from the moment the message is sent.

(2) If the addressee of the message is unable to keep it confidential, he/she will have to return it to the sender without knowing its content.

Article 58 (Professional Secrecy) of the Charter states:

(1) The lawyer is bound by professional secrecy regarding any aspect of the case which he or she is entrusted.

(2) The lawyer may not be obliged under any circumstances and by any person to disclose professional secrecy. The lawyer can be acquitted of professional secrecy neither by his client nor by another authority or person. However, the exceptions are the cases in which the lawyer is prosecuted, disciplinary or when there is a contestation regarding the agreed fees, exclusively for the strict needs of his defence.

(3) Disclosure of professional secrecy constitutes a serious disciplinary violation.

(4) The obligation to maintain professional secrecy extends to all the bodies of the legal profession and their employees regarding the information known in the exercise of their functions and attributions, is absolute, unlimited in time and affects all the activities of the lawyer.

(5) Professional secrecy covers all information and data of any kind, in any form and on any medium, as well as any documents drafted by the lawyer, which contain information or data provided by the client or are based on them for the purpose of providing legal assistance and whose confidentiality has been requested by the customer.

(6) In order to ensure professional secrecy, the lawyer shall keep the files only at the professional premises.

(7) Professional acts and works are inviolable. The lawyer has the obligation to oppose the actions of search of the domicile, of the professional headquarters of the office, as well as of the corporal search, of the acts or works of professional character located in the mentioned places or on him.

(8) The lawyer is obliged to oppose the actions of collection of documents and goods consisting of acts and works of a professional nature if the conditions of the law are not met. The lawyer is obliged that immediately to - it had happened announce the Bar Association.

(9) Any communication or professional correspondence between lawyers, between lawyer and client, between lawyer and the bodies of the profession, regardless of the form in which it was made, is confidential.

(10) In relations with a lawyer registered in a bar outside the Republic of Moldova, the lawyer must ensure, before exchanging confidential information, that in the country where the foreign colleague practices his profession there are rules that allow the confidentiality of correspondence and, otherwise, enter into a confidentiality agreement or - ask his client whether to accept, in writing, the risk of an exchange of non-confidential information.

(11) Correspondence and information transmitted between lawyers or between a lawyer and a client, regardless of the type of support, may in no case be brought as evidence in court, nor may they be devoid of any confidentiality.

Commentary: The principals and provisions on confidentiality are in line with Council of Europe standards.

Regarding European and international standards, the following apply:

Recommendation 2000:

I.6 All necessary measures should be taken to ensure the respect of the confidentiality of the lawyer-client relationship. Exceptions to this principle should be allowed only if compatible with the Rule of Law'.

UNBP:

22. Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.'

The CCBE Code of Conduct:

2.3.4. A lawyer shall require his or her associates and staff and anyone engaged by him or her in the course of providing professional services to observe the same obligation of confidentiality.

However, there is evidence that the theory and practice may vary.

First, there are the practices of the NCLA. It appears that clerks of the NCLA look at the files that legal aid lawyers must keep, in order to assess the work done so as to calculate the fee to be paid and to be sure that the work was of sufficient quality. This would be in breach of Article 55 of the Law on the Bar. The NCLA says that its officers and Council are subject to non-disclosure requirements, with sanctions if there is any breach of non-disclosure, and that it aims to keep everything confidential. Nevertheless, this practice is still in breach of the lawyer-client confidentiality rule, no matter how tight any NCLA non-disclosure rule might be. The NCLA should not have access to lawyer-client confidential material, according to the law.

Second, there is evidence that, due to their economic condition, many lawyers do not have their own offices, but share large rooms together, with maybe 10 lawyers per room. This is a matter of the economics of practice. In such circumstances, when the lawyers are all busy, it is evidently impossible for lawyer-client confidentiality to be maintained. The Bar should be encouraged to work with lawyers to remedy this problem.

Third, the problem, apparently diminishing, of lawyers being interviewed in respect of their clients' cases, sometimes to remove them as lawyers from the case, has been discussed above, and is discussed again below in relation to the arrest and interrogation of a lawyer by the police. Such behaviour clearly breaches the lawyer-client confidential relationship, which is protected by law.

Lawyers as witnesses.

Article 52 of the Law on Advocacy states:

(5) An advocate cannot be questioned on the subject of his/her relationships with a person to whom he/she afford, or afforded earlier, legal assistance.

Arrest and interrogation of lawyers by police regarding clients' cases.

Article 52 of the Law on Advocacy states:

(4) In case of arrest of an advocate, or opening of criminal proceedings against an advocate, an authority which took these measures shall notify the Ministry of Justice and the Council of the Association of Advocates within 6 hours from the moment of arrest or opening of criminal case.

Commentary: The European principles concerned here are the same as those cited for lawyer-client confidentiality in general. On top of that, there is the general principle that lawyers should not be identified with their clients' interests. See for instance:

UNBP:

18. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

There is evidence that lawyers are being called as witnesses in their clients' criminal cases, for instance to remove them from the trial if they are seen by the authorities as not being helpful – for instance, if another lawyer would be seen as more helpful to the authorities' case. This results in the lawyer facing a dilemma: either to give evidence and so face disciplinary proceedings and possible disbarment for breaching confidentiality or being subject to criminal prosecution for failing to give evidence. It appears, nevertheless, that there are few, if any, actual prosecutions, and that the matter is dealt with by either the bar or the lawyer settling the matter with the authorities. However, a lawyer should not be confused with the client's interest, and so, apart from where there is evidence of collusion between lawyer and client, a lawyer should not be interviewed by the investigation authorities about the client's case.

Searches of lawyers' premises.

Article 52 of the Law on Advocacy states:

> *(2) A search of the home or a working office of an advocate, means of transport, a seizure of his/her possessions and documents, an inspection and seizure of his/her correspondence, wiretapping shall be admissible only on the basis of a court decision.*
>
> *(3) An advocate cannot be subjected to a personal search while he/she carries out professional duties, except in case of an obvious offense.*

Commentary: The evidence was that searches of lawyers' premises were not a frequent occurrence and were not seen as a major problem.

There is considerable jurisprudence from the ECtHR on the parameters of lawful searches of lawyers' offices – see paragraphs 450-457 of the 'Guide on Article 8 of the European Convention on Human Rights'.

Interception of confidential communications.

Commentary: The European and international standards applicable here are the same as those which apply to the general principles of lawyer-client confidentiality, already cited.

There was some anecdotal evidence of electronic surveillance of lawyers, particularly in sensitive cases. But there was no hard information on whether it still takes place after the change of government in June 2019, and, if so, how widespread it is.

4.4.3 Issues related to the proposed European Convention on Lawyers.

Commentary: There was a general agreement among all interviewees that a European Convention on Lawyers, signed by the Republic of Moldova, would be good for the further protection of lawyers' procedural safeguards.

Many felt that the government would always listen to what is laid out in European and international standards, and so it is helpful in advancing the cause of lawyer's procedural

safeguards. Lawyers are seen as the lowest in the sector's pecking order, and so a Convention might help bring them to their rightful place as equal players with prosecutors and judges, each with a role to play in the administration of justice. It would give lawyers directly the rights that they need to carry out their role. Some also hoped that it would lead to equality among different groups of lawyers, and better access to the profession.

4.4.4 Recommendations.

1. There should be an obligation on state authorities to respond to advocates' enquiries on behalf of their clients, so that the right in Article 53 for advocates to ask for information and documents from public authorities can be enforced by a corresponding duty on state authorities to provide answers. The liability of state officials in Article 53 (2) if they have not responded is not sufficient at present to guarantee the advocates' rights.
2. There should be a right for advocates to have access to public registers, to guarantee their ability to represent their clients.
3. Consideration should be given whether the Ministry of Justice should continue to issue licences to lawyers under Article 12 of the Law on Advocacy, since this would normally be considered unacceptable in accordance with the norms of the rule of law and the administration of justice - lawyers should be independent of the state, and of its power to influence them.
4. It is recommended that the new policy on ensuring the independence and integrity of the justice sector being prepared by the Ministry of Justice tackles the need for a culture change in the criminal courts, where at present there is a perceived common interest between the prosecution and the judiciary, meaning that both sides of the case (prosecution and defence) are not equally heard.
5. The relationship between lawyers and the NCLA needs to be reviewed to ensure that the financial dependency of some lawyers on a continuing relationship with the NCLA does not lead to any weakening of the independence of the lawyers' profession.
6. The Disciplinary Commission needs to consider more transparency of election, and more analysis and statistics regarding the outcome of cases, to improve its working procedures and reputation.
7. The Bar should aim to keep statistics regarding the gender of the profession and its activities and should also aim to help lawyers whose economic condition does not permit them to offer full confidentiality when interviewing their clients.
8. The proposed European Convention on Lawyers is viewed as contributing positively to bringing lawyers into an equal position as justice players with prosecutors and judges, each with a role to play in the administration of justice, and so is to be encouraged.

4.5 UKRAINE

4.5.1 Procedural safeguards for the independence of lawyers.

Existing mechanisms to ensure that lawyers can exercise their profession without undue interference.

Although the Conduct Rules have various articles on the lawyer's independence and freedom to practise, this is not so much a guarantee for lawyers as a standard to which they will be kept by their professional body. Accordingly, this section will concentrate on the law instead.

Article 131-2 of the Constitution of Ukraine says that the 'independence of the bar is guaranteed'.

Article 23 of the Law on the Bar outlines the "Guarantees of practice of law", which are stated to be:

1) *It is prohibited to interfere with or obstruct the practice of law.*

Commentary: Although it is welcome to see that a lawyer should be allowed to practise without interference, this is nevertheless an unusual provision to see in a law because it is so broad and general in its scope. There are bound to be exceptions to it, such as disbarment for misconduct or bankruptcy, and so it would be better if there were a qualification introduced into its wording at the end of the sentence, such as 'other than as permitted by law'.

2) *It is prohibited to demand disclosure of advocate-client privilege from an advocate or those working in the advocate's law firm, as well as from a person whose right to practise is suspended or terminated. These individuals cannot be questioned regarding these issues, either save on waiver from the obligation by the person who entrusted the information to the advocate.*
3) *Law enforcement intelligence-gathering or investigative activities that may be carried out exclusively with the court's permission shall only be conducted based on the court judgment passed on the motion filed by the Prosecutor General, its Deputies, Prosecutor of the Autonomous Republic of Crimea, the region, cities of Kyiv and Sevastopol.*

Commentary: Regarding the context of intelligence gathering and investigative activities, Article 8 of the ECHR has been interpreted as saying:

441. In view of the impact of such measures, their adoption and implementation must be subject to very clear and precise rules (Petri Sallinen and Others v. Finland, § 90; Wolland v. Norway, § 62).

In other words, a general rule such as outlined above in relation to how such activities are to be carried out might fall foul of Article 8 of the ECHR. And see further commentary below in relation to Article 23 1. 4).

4) *Disclosure, request or seizure of documents related to the practice of law is prohibited.*

Commentary: There is further commentary in the separate section on 'Lawyer-client confidential relationship' below'.

See also Article 23 1. 8 below.

5) *An advocate is guaranteed equal rights with that of other participants in the proceedings, observance of the principles of competition and freedom in the provision of evidence and proving its strength.*

Commentary: *This is in accordance with Recommendation 2000:*

1.7 'Lawyers should not be refused access to a court before which they are qualified to appear and should have access to all relevant files when defending rights and interests of their clients in accordance with their professional standards.

I.8 'All lawyers acting in the same case should be accorded equal respect by the court.

6) *The life, health, honour and dignity of the advocate and that of his or her family and their property are protected by the state, and any encroachment on them entails liability under the law.*

Commentary: This appears to go further than existing guidelines and to be very broad, covering all kinds of incidents which might have nothing to do with the practice of law, such as a civil suit for bankruptcy.

See, for instance, the UNBP:

'17. Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.

See also Article 23 1. 7 below, which appears to be narrower and in line with existing guidelines.

7) *An advocate is guaranteed the right to safety while participating in criminal proceedings in the manner provided for by the law.*
8) *Involving an advocate in confidential cooperation during law enforcement intelligence-gathering or investigative activities, if such cooperation is related to or may lead to the disclosure of advocate-client privilege, is prohibited.*
9) *Interference with the advocate's private communication with a client is prohibited.*
10) *The investigator or prosecutor are prohibited from submitting a motion, as well as from passing a separate court ruling (resolution), against the advocate's legal reasoning in the case.*

Commentary: Articles 23 1. 7 – 10 above are in accordance with Recommendation 2000:

1. All necessary measures should be taken to respect, protect and promote the freedom of exercise of the profession of lawyers without discrimination and without improper interference from the authorities or the public, in particular in the light of the relevant provisions of the European Convention of Human Rights.'

'4. Lawyers should not suffer or be threatened with any sanctions or pressure when acting in accordance with their professional standards.

See also UNBP:

18. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

See also Articles 23 1. 11 and 23 1. 14 and 15 below.

11) *Interference with the advocate's legal reasoning is prohibited.*
12) *A body or officials that have detained an advocate or imposed restrictive measures on him or her are obliged to notify it immediately to the relevant regional advocate's council.*
13) *Notice of charges of a criminal offence against an advocate may be issued only by the Prosecutor General, his or her Deputy, Prosecutor of the Autonomous Republic of Crimea, the region, cities of Kyiv and Sevastopol.*

14) *It is prohibited to bring criminal liability proceedings against an advocate (or individual whose right to practise law is suspended or terminated) or threaten to bring such proceedings because of an advocate's practice of law under the legislation.*

15) *An advocate's statements in a case, including those reflecting the client's position, and statements in the media, may not serve as grounds to bring the advocate to liability unless they violate the professional duties of the advocate.*

16) *Identification of the advocate with a client is prohibited.*

Commentary: This is in line with the UNBP:

18. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

17) *Disciplinary proceedings against the advocate shall take place under a special procedure.*

Commentary: There is a problem with the enforcement of the procedural safeguards enumerated in Article 23 of the Law on the Bar above, relating to the impunity of state officials, particularly investigation authorities, of which the anti-corruption authorities were mentioned most often.

The Council of Europe has addressed in the past the impunity of state officials in Ukraine as regards the breaches of lawyers' procedural rights.

The 2011 report from its Commissioner for Human Rights on 'Administration of justice and protection of human rights in the justice system in Ukraine' said that every effort should be made to remove the existing obstacles to accountability for law enforcement officials, and to ensure that any criminal act committed by them is effectively investigated by the competent authorities, in full compliance with the criteria established by the ECtHR.

The Commissioner particularly noted in the same report instances of harassment and intimidation of defence lawyers and stated that the Commissioner is concerned about reports of abusive prosecutions, harassment, and other forms of pressure on lawyers. Such pressure seriously impairs defence rights and prevents lawyers from effectively serving the cause of justice.

The Office for Democratic Institutions and Human Rights of the Organisation for Security and Cooperation in Europe (OSCE) published in 2017 a report on 'Rule of law in Ukraine: Human Rights in the Criminal Proceedings'. It noted the frequent cases of violation of a person's right to defence through the absence of a defence counsel to a detainee at the time of detention, or non-provision of a chosen defence counsel. It recommended increased responsibility for law enforcement officials and the court for an inadequate level of ensuring that the suspect or accused enjoys the right to defence, in particular through exclusion of a chosen defence counsel. The OSCE report also noted the practice of courts and prosecutors to substitute a defendant's chosen lawyer with another lawyer.

The statistics on the abuse of lawyers' rights, and on the authorities' failure to take appropriate action in response, make painful reading: murders and attempted murders of lawyers and bodily injuries are clearly the worst, but there are also many, many overt and covert operations against lawyers to make them ineffective in the defence of their clients, without proper response from the authorities.

The current position in relation to criminal liability for interfering with lawyers' procedural rights is found in Articles 397-400 of the Criminal Code of Ukraine.

There is first a general provision about liability for Interference in any form with the lawful activity of a defence lawyer or a representative in connection with legal assistance, or violation of legal guarantees of their activity and professional secrets. This is followed by a provision

specifically aimed at those same actions when they constitute an abuse of office. The financial penalty is expressed in multiples of the minimum income, and there are also potential prison terms.

There are further provisions on threats or violence or indeed murder attempts against a defence lawyer or representative (or indeed their murder), plus provisions on damage to property, with prison terms as sanctions, and also fines for damage to property.

However, the statistics show that, set against the numbers of cases opened under these various criminal provisions, the numbers which lead to indictments are extremely low.

Given that the problems of impunity of the authorities from breaches of lawyers' procedural rights have been known for some time, the question arises as to the solutions. There is currently a system of fines and prison terms for those who breach the provisions, but the fines are apparently far too low and the number of cases which actually make it to court similarly very low. There appears to be no disincentive for disrespecting lawyers' procedural guarantees, and this should clearly be remedied through appropriately severe sanctions, to act as a disincentive.

There was a suggestion that those who abuse the safeguards should be made to pay the fines out of their own pockets, instead of out of state coffers, and that merits further investigation. There needs to be a change in culture among the investigation authorities, the courts, and the prosecution.

This is one of the most urgent recommendations in this analysis, without which the other recommendations, even if implemented, will remain much less effective. The importance of acting against state impunity in relation to abuses committed against lawyers' procedural rights cannot be emphasised enough, even if the other recommendations in this report should also act to improve matters.

Conflicts of interest.

The Conduct Rules have a section on "Priority of the client's interests" (Article 8) and "Impermissibility of the conflict of interest" (Article 9). The essence of the two rules appears from the following short extracts from each:

Article 8 begins as follows:

> *The advocate shall be independent of his or her client.*
>
> *Subject to observance of the principle of legality, in his or her professional activity the advocate shall act on the basis of the priority of his or her clients' interests.*
>
> *If possible, the advocate shall facilitate the pre-trial and out-of-court settlement of disputes between a client and other persons.*

Article 9 contains the following sentence:

> *Without the written consent of a client, in respect of whom a conflict of interest exists, the advocate cannot represent, defend the client or provide him or her with legal aid (assistance) if the client's interests are in conflict with the advocate's own interests.*

Commentary: This is in line with European standards on conflicts of interest. However, the general principle on conflicts of interest is usually drawn more broadly, to include:

(i) conflicts with other lawyers with whom the lawyer is associated in a business partnership;

(ii) not only conflicts of interest but also risks of breach of confidence between clients; and

(iii) risks to the lawyer's independence.

These issues should be considered when the provisions quoted above are due for revision.

The CCBE Code of Conduct says this:

3.2.1. A lawyer may not advise, represent or act on behalf of two or more clients in the same matter if there is a conflict, or a significant risk of a conflict, between the interests of those clients.

3.2.2. A lawyer must cease to act for both or all of the clients concerned when a conflict of interests arises between those clients and also whenever there is a risk of a breach of confidence or where the lawyer's independence may be impaired.

3.2.3. A lawyer must also refrain from acting for a new client if there is a risk of breach of a confidence entrusted to the lawyer by a former client or if the knowledge which the lawyer possesses of the affairs of the former client would give an undue advantage to the new client.

3.2.4. Where lawyers are practising in association, paragraphs 3.2.1 to 3.2.3 above shall apply to the association and all its members.

The IBA principles say:

3. A lawyer shall not assume a position in which a client's interests conflict with those of the lawyer, another lawyer in the same firm, or another client, unless otherwise permitted by law, applicable rules of professional conduct, or, if permitted, by client's authorisation.

<u>Right to withdraw from a case.</u>

Articles 32-35 of the Conduct Rules govern the procedures for an advocate's withdrawal from a case. The basic principle is enunciated in Article 32:

> *The advocate shall have a right to unilaterally terminate the agreement early (prior to the completion of performance of the assignment) with a client and/or the person, who has concluded the agreement in the interests of the client, under conditions, provided for in the agreement.*

Article 47.4 ("Duties of defence counsel") of the Criminal Procedure Code states:

> *4. After having been admitted to the case, defence counsel may refuse performing his/ her duties only in the following cases:*
>
> > *1) if there are circumstances that, under the present Code, exclude his participation in the case;*
> >
> > *2) disagreement with the suspect, the accused concerning the defence method he has chosen, except for cases when participation of the defence counsel is mandatory;*
> >
> > *3) if the suspect, the accused intentionally fails to follow the agreement he concluded with the defence counsel, such failure consisting, in particular, in systematic disregard of lawful advice of the defence counsel, provisions of the present Code, etc;*
> >
> > *4) where he justifies his refusal by the lack of appropriate skills in rendering legal aid in a specific proceeding, which is particularly complex.*

<u>Commentary:</u> The right of a lawyer to withdraw from a case is normally a free right, and it seems unusual for the state to be regulating so many circumstances in which it cannot be exercised. However, there is nothing in the texts which prevents the state from doing so. This matter is normally regulated by codes of conduct, though, where the following appears.

The CCBE Code of Conduct says this:

3.1.4. A lawyer shall not be entitled to exercise his or her right to withdraw from a case in such a way or in such circumstances that the client may be unable to find other legal assistance in time to prevent prejudice being suffered by the client.

And this:

3.1.3. A lawyer shall not handle a matter which the lawyer knows or ought to know he or she is not competent to handle, without cooperating with a lawyer who is competent to handle it.

The IBA Principles say:

7.1 … Unless prevented by professional conduct rules or by law, a lawyer shall be free to take on or reject a case.

7.2 … A lawyer should not withdraw from representation of a client except for good cause or upon reasonable notice to the client and must minimize any potential harm to the client's interests, and (where appropriate or required) with the permission of the court. A lawyer should do everything reasonable to mitigate the consequences of the change of instructions.

Lawyer's powers to gather evidence.

Article 93 of the Criminal Procedure Code states:

> *Article 93. Collection of evidence.*
>
> *Collection of evidence is carried out by parties to criminal proceedings, victim and*
>
> *representative of a legal person in whose respect proceedings are taken in accordance with the procedure laid down in by the present Code.*
>
> *3. The defence, victim, and representative of the legal person in whose respect proceedings are taken carries out collection of evidence by way of demanding and obtaining from state authorities, bodies of local government, enterprises, institutions, organisations, officials and natural persons objects, copies of documents, information, expert reports, audit and inspection reports; by initiating the conduct of investigative (search) activities, covert (search) activities and other procedural actions, as well as by way of carrying out other activities capable of ensuring the production of relevant and admissible evidence in court.*
>
> *Investigative (search) activities are initiated by the defence, victim or representative of the legal person in whose respect proceedings are taken by way of filing appropriate request with the investigator, public prosecutor, which are considered under the rules of Article 220 of this Code. A decision of the investigator, public prosecutor to dismiss a request for the conduct of investigative (search) activities, covert (search) activities may be appealed to the investigating judge.*

Article 46.7 of the Criminal Procedure Code states:

> *'7. State authorities and local self-government authorities and their officials must obey the legitimate demands of defence counsel.'*

Commentary: Article 46.7 is a very general article, and it is difficult to know what it means on its own, particularly regarding the meaning of the word 'legitimate'.

If it refers to demands in relation to the disclosure of evidence, then there is a sizeable body of ECtHR case-law under Article 6 which outlines the duties of the state in this respect, which would circumscribe the word 'legitimate' in the sentence – see paragraphs 159-163 of the ECtHR guide to Article 6 (criminal limb).

In essence, the prosecution authorities must disclose to the defence all material evidence in their possession for or against the accused. The relevant evidence is not only evidence directly

relevant to the facts of the case, but also other evidence that might relate to the admissibility, reliability, and completeness of the former.

Disciplinary procedures.

Section XI of the Conduct Rules ("Liability for the Breach of the Rules of Professional Conduct", Articles 66-70) deals with the procedures to be followed if a disciplinary offence is alleged. The grounds for disciplinary proceedings against lawyers are provided for in Article 34 of the Law.

Any person who has become aware of an advocate's misconduct which may serve as grounds for disciplinary liability of the advocate shall have the right to submit an application (complaint) regarding the misconduct to the Qualification and Disciplinary Commission of the Bar "the Commission").

The procedure is specified in Articles 31 – 42 of the Law on the Bar. An application shall be registered by the Commission. The investigation is conducted by the staff members of the disciplinary chamber of the Commission duly authorised by the chairman. Based on the results, the disciplinary chamber adopts a decision by a majority vote to institute disciplinary proceedings or to refuse it. The decision to initiate or refuse disciplinary proceedings can be appealed within thirty days to the High Qualification Commission of the Bar or to the court.

The disciplinary action is then considered by the disciplinary chamber of the Commission, based on the adversarial principle. The advocate subjected to the disciplinary action and the person who initiated the disciplinary action against the advocate shall have the right to provide explanations, to put questions to other participants in the proceedings, to raise objections, to present evidence in support of their arguments, to file motions and requests for withdrawals, and to use the legal services of an advocate.

The decision of the disciplinary chamber shall be reasoned. The member of the disciplinary chamber who conducted the investigation shall not participate in voting. It can be appealed to the High Qualification Commission of the Bar or to the court.

There are three types of disciplinary sanctions:

- warning;
- suspension of the right to practice law for a period from one month to one year;
- (for Ukrainian advocates) disbarment with further exclusion from the Unified Register of Advocates of Ukraine; (for advocates of foreign states) exclusion from the Unified Register of Advocates of Ukraine.

Commentary: Recommendation 2000 says:

Principle VI – Disciplinary proceedings:

2.Bar associations or other lawyers' professional associations should be responsible for or, where appropriate, be entitled to participate in the conduct of disciplinary proceedings concerning lawyers.

3.Disciplinary proceedings should be conducted with full respect for principles and rules laid down in the European Convention on Human Rights, including the right of the lawyer concerned to participate in the proceedings and to apply for judicial review of the decision.

4.The principle of proportionality should be respected in determining sanctions for disciplinary offences committed by lawyers.

There are CCBE recommendations on disciplinary process for the legal profession as follows[51]:

(a) although the State may set the framework within which disciplinary proceedings should take place, the proceedings should be independent of state authorities (excluding the ordinary court system);

(b) the primary responsibility of the conduct of disciplinary proceedings at first instance concerning lawyers preferably lies with the Bar or Law Society;

(c) disciplinary proceedings should be carried out in accordance with the principles of due process, as laid down in the European Convention on Human Rights, including the right to defend himself/herself through legal assistance;

(d) disciplinary proceedings should be separate from criminal trials of the same alleged misconduct;

(e) attorney-client privileged confidential information should be protected throughout the disciplinary proceedings, without prejudice to the lawyer's right to self defence;

The explanatory note to Principle 1 (independence) of the IBA Principles says:

Independence of a lawyer requires also that the process for the lawyer's admission to the bar, professional discipline, and professional supervision in general, are organised and carried out in a manner that guarantees that administration of the legal profession is free from undue or improper influence, whether governmental, by the courts or otherwise.

The Bar has introduced a fee of 2,000 UAH (around 60 EUR) for complaints to be submitted to the Commission, which can be waived for certain categories. This has not unnaturally brought down the number of complaints, and it has to be questioned whether it is good practice for a bar to charge for complaints.

On the other hand, there is evidence that complaints were being used as a means of pressuring lawyers, either by the authorities or by other lawyers. In that case, a fee might serve as a disincentive to such abuse – and there was evidence that this practice is now not so widespread, although it is unknown whether it is tied to the introduction of the fee. The UNBA was not interviewed, and therefore there was no opportunity to question its leaders about this, nor about evidence that the Commission unduly protects lawyers.

Sensitive cases (for instance, cases of political importance or delicacy)

Commentary: There were repeated reports about lawyers suffering harassment and violence for acting in sensitive cases. For example, there were instances where three lawyers in separate cases who suffered a loss of property because of fire at their home or on their cars. However, the evidence was also that such violence is now much diminished under the new government. But there is no evidence that it will not return under a different regime since there are insufficient safeguards or changes in culture.

Gender issues.

Commentary: There was widespread agreement that gender difference played no part in the abuse of lawyers' procedural safeguards by the authorities. However, it was indicated that sexual stereotypes still play a part in Ukrainian society, with men being seen as more competent, for instance by a client or a judge, or a prosecutor.

[51] https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DISCIPLINE/EN_DISC_20070917_CCBE_Recommendations_disciplinary_proceedings.pdf

The evidence showed that about a third of the lawyers' profession is female. Leadership in law firms is heavily male, there being about 20-25% of law firms where women are partners or owners. Lawyers in private firms are paid more or less the same whether men or women, but fewer women make it to a more lucrative partnership.

Although there is a separate women's committee within the UNBA, according to interlocutors the UNBA does not hold any meaningful programmes on gender issues.

4.5.2 Lawyer-client confidential relationship.

Scope and meaning.

Although Article 10 of the Conduct Rules deals with "Confidentiality", the principal provisions regarding the legal framework for lawyer-client privilege are to be found in Articles 21-23 of the Law On the Bar and Article 47.3 of the Criminal Procedure Code (and the Conduct Rules mainly confirm that position in an ethical code).

Article 21, which outlines the professional duties of an advocate, says:

Article 21. Professional duties of advocate

2. The advocate may not:

2) disclose advocate-client privilege and use it in his/her own interests or in the interests of the third parties without the client's consent.

Article 22 is the principal provision, dedicated just to lawyer-client privilege, which it defines as follows:

Article 22. Advocate-client privilege.

1. Advocate-client privilege includes any information about a client that an advocate, an assistant advocate, advocate's trainee or a person in employment relationship with an advocate became aware of, as well as the matters on which a client (a person who was denied conclusion of an agreement on the provision of legal services on the grounds established by this Law) applied to an advocate, law office or law firm, as well as the contents of the recommendations, advice, or explanations provided by an advocate, documents drafted by an advocate, information stored on electronic media, and any other documents or information received by an advocate while practicing law.

There follow detailed provisions regarding the scope and application of the privilege.

Additionally, Article 23. 1. 2, cited above under general guarantees for the independence of the profession, states:

2) It is prohibited to demand disclosure of advocate-client privilege from an advocate or those working in the advocate's law firm, as well as from a person whose right to practise is suspended or terminated. These individuals cannot be questioned regarding these issues, either save on waiver from the obligation by the person who entrusted the information to the advocate.

Commentary: Regarding European and international standards, the following apply:

Recommendation 2000:

I.6 All necessary measures should be taken to ensure the respect of the confidentiality of the lawyer-client relationship. Exceptions to this principle should be allowed only if compatible with the Rule of Law'.

UNBP:

22. Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

The CCBE Code of Conduct:

2.3.4. A lawyer shall require his or her associates and staff and anyone engaged by him or her in the course of providing professional services to observe the same obligation of confidentiality.

There are problems with the provisions in Ukraine, as follows.

Greater definition - it is reported that the authorities (meaning investigatory and prosecuting authorities, hereafter called 'the authorities') regularly flout the rule.

Some felt that it would be better to define the documents which were protected under the rules, so that it would be easier to take action on a breach. At present, the definition is so broad and unspecific that it is not clear what falls inside or outside it. However, it is difficult to see that a comprehensive list of documents could be drawn up which would cover all eventualities, and this problem is even more difficult with electronic data.

Therefore, a better solution to the current broad definition may be to give a more exact definition of confidentiality than the existing one. For instance, instead of applying to 'any information', the definition could be spelled out, as happens in other countries, to 'communications between a lawyer and client made in connection with the giving or receiving of legal advice, including communications which aim to keep a lawyer and client informed so that legal advice may be given as required. In relation to court proceedings, the definition could be supplemented with 'communications between lawyers or their clients and any third party for the purpose of obtaining advice or information in connection with existing or reasonably contemplated litigation.'

If the definition were to be made more exact in this way, it should become easier to police if there are infractions by the authorities, as opposed to with the current overly broad catch-all.

In addition, the category of people who can have access to confidential information should be made clearer. For instance, on the granting of free legal aid, it is reported that the clerk checks every document, which is in breach of the principle of confidentiality. This needs to stop, and confidentiality also on the granting of legal aid should be expressly mentioned in any amendment aimed at improvement of the current position.

Waiver - the last phrase of Article 23.1.2, which contains an exception for client waiver, causes a problem in Ukraine : ' … save on waiver from the obligation by the person who entrusted the information to the advocate.'

There is nothing wrong on the face of this exception. Other European countries permit a client to waive confidentiality, and client waiver in such circumstances is well within Council of Europe standards.

But the difference in Ukraine – which is not the case in other countries which permit such a waiver - is that it is reported that the authorities use the waiver to put pressure on the client to waive confidentiality so that the authorities can access the evidence, for instance when granting free legal aid to the client (or via other routes). The waiver should not be seen as an invitation to the authorities to pressure a client to exercise it. The legal aid authority itself stated that it was not aware of this practice.

There are two possible solutions to this problem. One is that the exception allowing the client to waive confidentiality should be removed, so that it can never be waived. Some felt that this would remove the ability of the authorities to pressure clients.

Others felt, though, that removal of the client waiver would only put even more pressure on lawyers from the authorities, since they would now be the only route to the information that the authorities illicitly seek. The solution sought by this group was to ensure that client waiver could only be granted if it were undertaken in the presence of the lawyer concerned and with the written signatures of both the client and the lawyer. If evidence was obtained in breach of this procedure, it should be inadmissible in court as evidence.

Finally, Article 47.3 of the Criminal Procedure Code says:

‘3. Without consent of the suspect, accused, the defence counsel may not disclose information of which he took knowledge in connection with participation in criminal proceedings and which constitutes privileged information, or any other secret protected by law.’

Consequences of breach of confidentiality.

Commentary: The European and international standards on confidentiality have been cited above. In addition, in relation to search and seizure, there is considerable jurisprudence from the ECtHR on the parameters of lawful searches of lawyers’ offices – see paragraphs 450-457 of the ‘Guide on Article 8 of the European Convention on Human Rights’.

There are two sides who may suffer consequences of any breach of lawyer-client confidentiality: the lawyer and the state authorities (which may seize documents or otherwise illicitly acquire information which should remain confidential between lawyer and client).

The lawyer will be subject to disciplinary, and possibly other consequences, but that is not the real problem in Ukraine. The real problem is the lack of substantive consequences for the state authorities which acquire confidential information regarding clients with impunity. The rest of this section deals with this aspect.

Documents seized in breach of confidentiality – there is no mechanism at present for resolving disputes over whether something is in breach of a lawyer’s duty of confidentiality. Lawyers report that in many cases all documents are seized, or all electronic data, including of other clients unconnected with the subject of the search. It is proposed, therefore, that the role of the UNBA be considerably strengthened in respect of confidentiality as it arises during searches.

First, the UNBA should be informed in advance of all measures being taken against lawyers, including searches of their premises (home or office), with a right to be present at the making of the original court order (see below for further detail on searches), and during the search and at subsequent relevant court hearings to make representations regarding whether a document is confidential or subject to lawyer-client privilege or not. Apparently, the UNBA is not always informed at present because the authorities do not as a matter of routine check the electronic register of lawyers to confirm whether the potential subject of a search order is a lawyer or not. In the future, the law should make it clear that it is a legal obligation on the authorities to check whether the potential subject of the search order is a lawyer, and if so, to inform the UNBA straight away to allow it to play its proper role as described above.

Second, the UNBA should have a role both in the original court order for a search, and then during the search itself, to decide, before the documents (whether in paper or electronic form) are seized and read by the authorities, which documents are subject to confidentiality, and which not. In other words, the UNBA is the only body which has the power to open the file, and then to say which documents are subject to the search and able to be removed. This decision should be respected by the authorities, and documents taken or filmed in breach of confidentiality should not only be inadmissible as evidence in court but should also give rise to sanctions against the authorities concerned.

The topic of confidentiality in search-and-seize operations is closely related to other aspects of search, which are dealt with below.

Lawyers as witnesses.

Article 23 2) of the Law on the Bar states:

> *It is prohibited to demand disclosure of advocate-client privilege from an advocate or those working in the advocate’s law firm, as well as from a person whose right to*

practise is suspended or terminated. These individuals cannot be questioned regarding these issues, either save on waiver from the obligation by the person who entrusted the information to the advocate.

This is backed up by Article 10 of the Conduct Rules (“Confidentiality”):

The disclosure of information containing professional secrecy is prohibited in all circumstances, including the unlawful attempts by the inquiry and investigation authorities, and the court to question the advocate about the circumstances containing professional secrecy.

Article 46.6 of the Criminal Procedure Code also states:

6. Documents related to the defence counsel’s performing his duties may not be inspected, seized, or disclosed by the investigator, public prosecutor, investigating judge, court without defence counsel’s consent.’

Commentary: This is in line with Council of Europe standards. Regarding European and international standards, the following apply:

Recommendation 2000:

I.6 All necessary measures should be taken to ensure the respect of the confidentiality of the lawyer-client relationship. Exceptions to this principle should be allowed only if compatible with the Rule of Law’.

UNBP:

22. Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.’

The CCBE Code of Conduct:

2.3.4. A lawyer shall require his or her associates and staff and anyone engaged by him or her in the course of providing professional services to observe the same obligation of confidentiality.

Interviews of lawyers.

This section is added to the topic of confidentiality, although it covers a wider field. There is widespread concern among the legal profession that lawyers are too often interviewed by the authorities, for a variety of reasons. Part of this is to obtain information relating to the client’s matter, even though lawyers are under a duty, in a country under the rule of law, not to disclose confidential client information. Therefore, this practice should stop.

Because a lawyer cannot be both a witness against a client and a lawyer for that client at the same time, an interview of a lawyer can also lead to that lawyer being eliminated as the client’s freely chosen lawyer, thus interfering with the client’s free choice of lawyer. There is concern that the authorities sometimes use interviews of lawyers to remove lawyers from a case, and this is unacceptable under the European Convention of Human Rights.

Searches of lawyers’ premises.

Article 23.1.4. of the Law on the Bar, cited above, states:

4) Disclosure, request or seizure of documents related to the practice of law is prohibited.

Commentary: The European and international standards applicable here have already been cited under the general provisions on lawyer-client confidentiality above.

Regarding this particular provision, first of all, it is not clear whether Article 23 1.4 means any kind of document, or only those documents or other data protected by lawyer-client confidentiality? For instance, there might be documents or data not related to specific clients, such as the law firm's policy in relation to merging with another law firm.

The ECtHR has extensive commentary about searches of law firms in relation to Article 8 (see paragraphs 440-445 of its case-law guide to that article), which implies that the protection is only for documents protected by lawyer-client confidentiality, and therefore the text above would go further than the ECHR.

Second, the question of searches of lawyers' premises (whether their offices or homes) is closely tied to the above two topics of confidentiality and equality of arms. If there were proper protections regarding confidentiality and equality of arms, then many of the problems related to searches would disappear.

As a result, the solutions are the same as for the other two: clarification as to which documents can be taken in a search, a role for the UNBA in questions of the confidentiality of documents seized and in searches, and protections for lawyers regarding the instigation of searches to put them on the same level as prosecuting and investigation authorities (rather than treated in the same way as suspects and defendants).

But there should also be clearer criteria for the undertaking of searches of lawyers' premises by the authorities, since Ukrainian lawyers complain that they are undertaken as a matter of regularity without proper motivation.

Nevertheless, there are specific additional problems related to searches, as follows.

First, orders for search are currently made usually only after hearing from the prosecution and the authorities. To balance this, and to ensure that the current disregard for procedural rights in searches is stopped, and as mentioned before in relation to confidentiality, the UNBA should be notified in advance of all potential search orders of lawyers' premises (office or home), in order for it to appear in court before the orders are issued to argue: whether there should be a search at all, and if so at which premises (since currently the premises are often not specified); and which documents should be subject to the search. The previous section on confidentiality proposed new powers for the UNBA during the search itself.

Second, current orders for search are apparently very vague, which is an incentive to abuse by the authorities. Apparently, many of them are just copy-and-paste of previous orders. That is why the role for early intervention mentioned above for the UNBA is so important, because its presence during the court hearing when the search order is drawn up will ensure that the order is focused on the necessities of the case itself, including the avoidance of seizure or filming of confidential documents.

Third, the two concepts of search and seizure should be separated procedurally. Seizure of all documents should not automatically follow from search, for the reasons given above that documents may be subject to confidentiality. At present, allegedly, searches lead to the broad and indiscriminate seizure of documents. This especially applies to electronic documents, where computers or phones may be seized, with confidential information related to other clients unconnected to the search order, where these clients' right to confidentiality is afterwards unprotected. That is why it is so important that the UNBA's powers in relation to search and seizure need to be strengthened, to prevent indiscriminate search and, in particular in this respect, seizure in the future.

4.5.3 Issues related to the proposed European Convention on Lawyers.

Commentary: There was a general agreement among all interviewees that a European Convention on Lawyers, signed by Ukraine, would be good for the further protection of lawyers' procedural safeguards. The Council of Europe's standards are generally held in high esteem in Ukraine.

Given the level of impunity among state officials, it was felt that a Convention might help to set standards in this field. It was also thought to be useful in the field of gender issues. Other issues which could be covered by the Convention were also suggested: access to the profession and disciplinary standards; independence; strengthening of a right of lawyers to gather evidence, at a level equal to that of law enforcement authorities; and more transparency in the rules of lawyers' governing bodies.

4.5.4 Recommendations.

1. The list of protected documents under the umbrella of confidentiality or lawyer-client privilege should be better defined, including the circumstances in which they have come into the possession of the lawyer. This list should be extended to a description of the electronic information that falls under the confidentiality rule and should also expressly be extended to the granting of free legal aid.
2. The exception allowing waiver of confidentiality by the client should be removed, for the greater protection of the client's right to a fair trial.
3. The UNBA should be given a formal role to be notified in advance of all measures being taken against lawyers, including searches of their premises (home or office), with a right to be present during the search and at subsequent relevant court hearings to make representations regarding whether a document is confidential or subject to lawyer-client privilege or not.
4. The criteria for searching lawyers' premises, the procedures for obtaining a search, and the list of documents which can be seized in a search should all be explicitly laid out in the Law on the Bar and the Code of Criminal Procedure in new articles.
5. The two concepts of search and seizure should be separated procedurally, and seizure of all documents should not automatically follow from search, given that documents may be subject to confidentiality.
6. Given that there appears to be no disincentive for the state authorities to disrespect lawyers' procedural guarantees, this should clearly be remedied through appropriately severe sanctions, to act as a disincentive, and by consideration of making state authorities pay fines or other financial compensation out of their own pockets rather than state coffers.
7. Given that a lawyer cannot be both a witness against a client and a lawyer for that client at the same time, lawyers should not be interviewed about their clients' cases without clear evidence of the lawyer's involvement in illegal activity, to allay concerns that lawyers are being eliminated as the client's freely chosen lawyer in contravention of the client's free choice of lawyer.