



UKRAINIAN NATIONAL
BAR ASSOCIATION

REPORT

*of UNBA Free Legal Aid Committee on current issues
of the functioning of the free
legal aid system in Ukraine*

2022



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LIST OF CONVENTIONAL ABBREVIATIONS:

FLA – free legal assistance;

FSLA – free secondary legal aid;

CC – Coordination Center for Legal Aid Provision;

the **Committee** – Free Legal Aid Committee of Ukrainian National Bar Association;

UNBA – Ukrainian National Bar Association;

MoJ - Ministry of Justice of Ukraine;

CMU - Cabinet of Ministers of Ukraine;

the **Law** – the Law of Ukraine “On the Bar and Practice of Law;”

Quality Commission – the Commission for Assessing the Quality, Completeness and Timeliness of the Provision of Free Legal Aid;

QDCB – Qualification and Disciplinary Commission of the Bar;

RC – Regional Center for Providing Free Secondary Legal Aid; **LC** - a Local Center for Providing Free Secondary Legal Aid.

INTRODUCTION

The systematic monitoring of the legislation of Ukraine, which regulates legal relations in the field of rendering FLA, and the current state of operation of the FLA system in Ukraine were the basis for the UNBA FLA Committee's hypothesis regarding the existence of significant and conceptual problems in the operation of free secondary legal aid system in Ukraine.

To test this hypothesis, the Committee carried out a series of measures, which included an in-depth study of certain aspects of the functioning of the FLA system, discussion thereof at Committee meetings, during working meetings with the Deputy Minister of Justice Valeria Kolomyets, representatives of the Coordination Center, etc. Other UNBA committees participated in providing an assessment of particular issues of FLA system operation in Ukraine.

Based on the results of professional studies, discussions and other substantive work, the Committee created this Report, reflection them.

Free legal aid is a type of state guarantee, aimed at ensuring that certain categories of citizens defined by law are guaranteed the to be covered by Art. 24 of the Constitution of Ukraine - the principle of equality of rights and freedoms before the law. ¹

Such aid must meet the international standards stated in the Universal Declaration of Human Rights, adopted in 1948 by the UN General Assembly, the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, and in numerous other international instruments. ²

According to art. 59 of the Constitution of Ukraine, everyone has the right to professional legal assistance, regardless of whether it is provided free of charge or under a contract with the client on a paid basis.

According to art. 131-2 of the Constitution of Ukraine, the Bar of Ukraine exclusively operates for the provision of professional legal assistance in Ukraine, the independence of which is guaranteed by the state.

The principles of legal practice are set by the Law "On the Bar and Practice of Law". ³

In many provisions of the specified Law, attention is focused on the principle of independence of the Bar as a whole and in relation to each advocate individually. These are s. 2.2 of art. 1 of the Law, which define that the legal practice as independent professional activity of an advocate, Art. 4 the Law (legal practice is carried out on the principles of the rule-of-law, legality, independence, confidentiality and avoidance of conflict of interest), Art. 5 of the Law (the Bar is independent of state authorities, local governments, their officials and employees), etc.

The State creates proper conditions for the activities of the Bar and ensures compliance with the guarantees of legal practice.

In order to ensure the independence of advocates providing FLA, in Art. 25 of the Law, it is determined that the assessment of the quality, completeness and timeliness of the provision of legal aid by advocates is carried out exclusively by Commissions formed for this purpose by the regional Bar Councils.

Advocate's qualification is ensured by the current procedure for obtaining access to the legal profession and taking the advocate's oath. Therefore, any evaluation or monitoring of the quality of the FLA provided advocates by any other body, except for the specific Commissions, is prohibited by the Law.

From the analysis of the above provisions of the legislation, it is apparent that two independent entities (centers and advocates) should interact within the FLA system, each having different rights and obligations.

¹ Constitution of Ukraine. URL: <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80>

² Universal Declaration of Human Rights: Adopted and proclaimed by resolution 217 A (III) of the UN General Assembly of December 10, 1948. URL: https://zakon.rada.gov.ua/laws/show/995_015#Text

³ On the Bar and Practice of Law: Law of Ukraine dated 05/07/2012 URL: <https://zakon.rada.gov.ua/go/5076-17>

The former - should ensure an exceptionally transparent and fair general organization of the FLA system (consideration of requests for FLA, in case of their satisfaction - issuing orders to advocates, ensuring payment of legal fees under the terms of the contract and within the limits of current legislation). The latter - advocates - must ensure the provision of high-quality professional legal assistance, which should not be worse than the quality of such assistance, which is provided under the terms of the contract under which the services are paid by the client.

Taking into account the principle of equality of parties in relations and the various range of issues that must be resolved by each of these independent entities, it is obvious that UNBA must be involved in the development of all draft laws and by-laws in the field of FLA, joint implementation adopted provisions, analysis of the state of functioning of the system and adoption of measures to improve it, which will meet Ukraine's obligations under international law.

In the preamble of the Basic Principles on the Role of Lawyers, adopted by the VIII United Nations Congress on Crime Prevention in August 1990, it is emphasized that professional associations of lawyers play an important role in maintaining professional and ethical standards, protect their members from harassment and unjustified restrictions and encroachments, cooperate with government and other institutions to achieve the goals of justice and public interest.⁴

In s. 4 of the main provisions, it states that special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers.

According to ss. 16, 25 of the Basic Principles, governments must ensure that advocates are able to perform their duties without hindrance, nuisance or undue interference.

Professional associations of lawyers shall cooperate with Governments to ensure that everyone has effective and equal access to legal services and that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognized professional standards and ethics.

Such requirements of international legislation regarding the cooperation of joint actions within the FLA system between UNBA and state bodies, due to the fault of the latter, remain unfulfilled. Such violations are directly causally related to the emergence of all functional and conceptual problems that exist in the modern FLA system.

In addition, the objective crisis in cooperation, despite the memorandum signed in 2018 between UNBA and the Coordination Center, has deepened in recent years.

There is an obvious increase in disdain towards advocates, whom the Ministry of Justice and the Coordination Center are systematically trying to bring under complete control and dependence. Advocates who do not want to give up their independence lose the opportunity to work within this system.

Unfortunately, the adoption of the Law of Ukraine "On Free Legal Aid" (June 2, 2011)⁵ preceded the adoption of the Law "On the Bar and Practice of Law" (07/05/2012), as a result of which the former law did not normatively ensure the participation of the Bar self-government in resolving issues related to the provision of FLA.

At the same time, until 2018, there was still a certain interaction between UNBA, the MoJ and the CC on the development of some normative acts, working groups were created, at the meetings of the Committee with the participation of representatives of these bodies, complaints received by UNBA were considered, decisions were made aimed at to eliminate deficiencies, etc.

⁴ Basic provisions on the role of lawyers, adopted by the VIII UN Congress on Crime Prevention in August 1990. URL: https://zakon.rada.gov.ua/laws/show/995_835#Text

⁵ On Free Legal Aid: Law of Ukraine dated June 2, 2011 URL: <https://zakon.rada.gov.ua/laws/show/3460-17#Text>

After 2018, such interaction completely ceased to exist, the Bar and UNBA and its entities are systematically ignored by the MoJ and the CC for the purpose of eliminating its participation in any segments of rule-making, managerial, organizational, etc. activities and for the purpose of illegally usurping part of the functions of Bar self-government (administration of FLA advocates' register, conduct of assessment of the quality of the FLA provided by advocates, steer the professional activities of advocates, etc.). Unfortunately, standalone provisions corresponding to the outlined goals have already been adopted and received regulatory approval without prior discussion and taking into account the position of UNBA.

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It is a positive fact that most of the negative changes to the Law "On Free Legal Aid" were not adopted due to the principled position of UNBA. The Ministry of Justice failed to ensure the introduction of the desired changes to the mentioned law, in particular, regarding granting the RCs and LCs the right to monitor the quality of services provided by advocates in the FLA system.

Repeated appeals to the Ministry of Justice regarding the involvement of UNBA in the development of draft laws and by-laws in the field of FLA have not been dignified with a response.

At the same time, rule-making activity without the involvement of a constitutional subject representing the legal profession and uniting the interests of all advocates of Ukraine significantly violates the principles set forth in Arts. 24, 59, 92, 131-2 of the Constitution of Ukraine.

Having no success in Verkhovna Rada of Ukraine, the Ministry of Justice continued its activities aimed at ignoring the principle of independence of the Bar and attempting to establish control over their activities through the Cabinet of Ministers of Ukraine and by-laws adopted thereby.

On September 2, 2022, the Cabinet of Ministers of Ukraine adopted Resolution #990 "On Amendments to Certain Resolutions of the Cabinet of Ministers of Ukraine Regarding Certain Issues of Ensuring the Provision of Mediation Services by the Free Legal Aid System" without examining and taking into account the position of UNBA. ⁶

By this resolution, the Ministry of Justice was tasked with approving the Procedure for maintaining another Register of mediators from among advocates, establishing a mechanism for their selection (within the implementation of the project "Rehabilitation program for minors suspected of committing a criminal offense"), the Coordination Center was tasked with approving the Rules for conducting mediation and ensure monitoring of the quality of mediation services provided by mediators (from among advocates), which is contrary to the Law.

As a result of the by-laws adopted by the specified authorities, without the consulting with UNBA, a competition for advocates is held to decide who may undertake the provision of services in the FLA system; the Heads of the RCs and LCs at their own discretion distribute assignments thus violating the rights of advocates with an independent principled position, by removing them from work in the FLA system on trumped-up grounds. Such facts were repeatedly confirmed as a result of inspections pursuant to advocates' complaints received by the Committee and relevant court decisions. But due to the currently existing procedure, even after establishing such facts, the Heads of FLA centers have the opportunity not to enter into contracts with advocates.

⁶On making changes to some resolutions of the Cabinet of Ministers of Ukraine regarding some issues of ensuring the provision of mediation services by the system of free legal aid: Resolution of the CMU dated September 2, 2022. #990. URL: <https://zakon.rada.gov.ua/laws/show/990-2022-%D0%BF#Text>

It must be stated that currently UNBA does not have any effective levers to protect such advocates or eliminate the indicated shortcomings and prevent them.

The FLA system must be transparent, objective and fair, which is impossible without fruitful cooperation between state bodies and UNBA, which represents the Bar in relations with state authorities in the legislative sphere and in the process of activity of the system's stakeholders.

Currently, the draft law #7473-1 of July 2, 2022, which provides for amendments to the Law "On Free Legal Aid", pursues such illegal goals of removing UNBA from participating in decision-making in the FLA system.⁷

UNBA has already made comments on this draft law and proposed changes to the Law of Ukraine "On Free Legal Aid", which will contribute to positive changes in the system and meet applicable international standards.

The comments emphasize the need to legislate a provision on the cooperation of the Cabinet of Ministers of Ukraine, the Ministry of Justice and the UNBA in matters of developing and amending the legislation, which will contribute to the elimination of the corruption component in the work of the system in the future. It is also emphasized that it is mandatory to leave the provisions of the current law, according to which, during the appointment of an advocate, his specialization, work experience, workload, and complexity of the cases in which he participates are taken into account. The exclusion of this clause, as proposed by the authors of the draft law, will contribute to the strengthening of the existing corruption risks in the distribution of cases and deterioration of the quality of the legal aid, since any criteria for the distribution of cases in the FLA system to be abolished.

The amendments to the draft law proposed by UNBA found support in the relevant Committee of Verkhovna Rada of Ukraine. But there is predicted opposition to these changes from the Ministry of Justice, and the approaches proposed by the latter will be implemented through the Cabinet of Ministers of Ukraine and departmental acts, as is already the case.

The specified selective facts are given illustratively, but they are part of the systemic phenomena in the functioning and development of the FLA system in Ukraine, which allow us to assert about existence of well-shaped and strengthened tendencies of the elimination of the legal profession from all aspects of regulation and administration of the FLA system, the expansion and strengthening of the mechanisms of influence on the legal profession and advocates, destructive impact on the institutional capacities of the Bar and UNBA in particular.

In connection with the above, this report was created, which is a generalized result of the analysis of issues of various types and scale in the functioning of the FLA system, as well as the Committee's work on ways to overcome them.

⁷Draft Law on Amendments to Certain Legislative Acts on Simplifying Access to Free Legal Aid #7473-d dated August 9, 2022. URL: <https://itd.rada.gov.ua/billInfo/Bills/Card/40197>

I. General information about the current operation of the FLA system in Ukraine

The current state of the FLA system can be described by the following.

1.1. Subjects of FLA provision

The stakeholders of the FLA system are at least the following three parties: advocate - the State - recipient of FLA.

The number of advocates involved, including the number of advocates who passed the competition and the number of advocates who signed contracts. From the report of the CC for 2021, it stems that 8,156 advocates were included in the register, advocates with signed contracts - 3,989.⁸

This number of advocates in absolute numbers is not significant.

At the same time, the qualitative characteristics of the advocates involved in the provision of FLA testify to the following. Advocates who have entered into contracts for the provision of FLA are actually practicing advocates who belong to the active part of the legal community, who perceive legal practice as the main type of socially useful work and their main source of income.

For example, out of 15 members of the QDCB of Khmelnytskyi region, 8 advocates concluded contracts for the provision of FLA, out of 7 members of the Bar Council of Khmelnytskyi region – 2 are involved in providing FLA.

Therefore, the share of influence of advocates involved in the provision of FLA is greater than can be measured mathematically.

Attention should also be paid to certain areas of legal services. Thus, in the field of criminal law, which remains the basis of the constitutional advocate's monopoly,

the share of defense by FLA advocates is more significant.

Using the example of the Khmelnytskyi region, we can say that at least half of the advocates actively practicing in criminal law are involved in the provision of FLA. The share increases when the sample size decreases: in some districts of Khmelnytskyi region, almost all advocates practicing in criminal law are involved in providing FLA. As opposed to this, the figure for Khmelnytskyi City is lower. This fact determines that in small cities it is quite typical for a situation where 100% of advocates providing assistance in criminal proceedings are involved in the provision of FLA, and therefore are in the sphere of influence of this system.

The state is represented by relevant bodies. First of all, this is the CC, in the structure of which there are RCs and LCs. However, the rules for rendering FLA are established by laws, resolutions of the CMU, acts of the Ministry of Justice, etc. The most significant provisions were formed at the level of Verkhovna Rada of Ukraine (Basic Rules for Granting FLA); CMU (Resolution on payment of services); CC (advocate selection rules, standard provisions).

The role of Bar self-government in the formation of the rules for providing FLA is extremely insignificant. As a positive example, the Quality Standards for the Provision of Free Secondary Legal Aid, created with the active participation of the Bar, should be noted.⁹ However, at present this positive experience has been leveled by way of making changes to the Standards without the approval of UNBA.¹⁰

⁸ Report on the activity of the FLA system in 2021. URL: <https://legalaid.gov.ua/wp-content/uploads/2022/08/zvitbpd-2021.pdf>

⁹ On the approval of Quality Standards for the provision of free secondary legal aid in civil and administrative proceedings and representation in criminal proceedings: Order of the Ministry of Justice of Ukraine dated December 21, 2017 #4125/5. URL: <https://zakon.rada.gov.ua/go/z1554-17>, On the approval of quality standards for the provision of free secondary legal aid in criminal proceedings: Order of the Ministry of Justice of Ukraine dated February 25, 2014 #386/5. URL: <https://zakon.rada.gov.ua/laws/show/z0337-14#Text>

¹⁰ On amendments to the Quality Standards for the provision of free secondary legal aid in criminal proceedings: Order of the Ministry of Justice of Ukraine dated 03.11.2022 #4903/5. URL: <https://zakon.rada.gov.ua/laws/show/z1372-22#n2>

Among the main powers of central state bodies is the payment for services, which is conducted according to the rules determined unilaterally.

Through the formation of payment rules and the actual allocation of funding, overall influence is exerted. In particular, by regulating the coefficients and indicators of payment, the most encouraged model of providing legal aid is created.

At the level of RC and LC, there are influence mechanisms related to payment - due to the terms and sequence of submission of acts to the treasury. The most significant powers of the RC and CC are the rights to conclude contracts with advocates at their own discretion and the power to distribute assignments. It is these mechanisms that are used to leverage advocates.

The third party is the recipient of the FLA.

The number of FLA recipients is excessive and objectively needs to be reduced.

In the said relationship, the recipient has the least influence. An important feature of the FLA system is that the recipient cannot influence the choice of an advocate. In contrast, in many countries the recipient receives funding that can be transferred to any advocate.¹¹

However, the FLA recipient has no obligations and bears no liability. He is not obligated to reimburse the FLA costs to the state in the future. He is not bound by the obligation to pay for all his whims as when collaborating with contractual advocate. Accordingly, legal aid is not properly appreciated by the recipient. He considers the advocate to be a hired employee, by engaging on weekends, non-working hours, unexpectedly arriving to the office without scheduling a visit, making irrelevant requests, etc. That is, the FLA system forms in the recipient of the legal aid a consumer attitude towards an advocate, which predictably affects the authority of the latter and the legal profession as a whole.

At the same time, it should be noted that there is a difference between the behavior of FLA recipients in criminal and civil cases. In the vast majority of criminal cases, the recipients of FLA behave quite adequately, they have normal cooperative relations with advocates. Exceptions are only problematic "professional complainants".

However, the situation is somewhat different in the field of civil (non-criminal) relations. Individuals apply to the FLA system at their own will and initiative, in contrast to issues of criminal jurisdiction, where a person is prosecuted against its will. People asking for help believe that the state "owes" them. They are well aware that the services of an advocate do not cost them anything, and therefore they often act without even focusing on the final result (satisfying with the process itself). Clients allow themselves daily visits, calls during non-working hours, conversations for hours about the same thing, insist on suing without a reason, appeal, file groundless complaints. There is often abuse on the part of clients, the premise of which is the improper organization of the advocate's work in these cases.

The main power of the FLA recipient is the possibility of challenging the advocate's actions. It is important that in fact the FLA advocate finds himself in a crossfire: between the QDCB and, - as a member of the FLA system - to the bodies of the CC. The situation with complaints is complicated. At the same time, the minimum number of recipients of FLA apply to the QDCB, while the share of complaint filed to CC is much larger.

There is an urgent need to protect advocates from such 'professional complainants' and it is becoming a norm in the FLA system for the CC, RCs and LCs execute the functions of an arbitrator, controller, and disciplinary body under a single roof.

Therefore, the general conclusion from the analysis of the subject composition of relations regarding the provision of FLA is that the importance of advocates as unique subjects is not sufficiently reflected in the system's regulation.

¹¹ Ukrainian-German online advocates' forum: there is much to learn. URL: <https://jur-gazeta.com/publications/events/ukrayinskonimeckiy-forum-advokativ-e-chomu-povchitisya.html>

Advocates are artificially placed in a vulnerable position relative to other subjects in the FLA system.

1.1. The objective of FLA

To assess the role of the FLA in the legal system, it is worth trying to determine the share of the FLA in the overall structure of legal practice. Any evaluations will be very conditional, but at least an approximate clarification will provide an idea of the role of this field, its importance the legal profession etc.

A comparison of the FLA and the types of legal practice defined by the Law of Ukraine "On the Bar and Practice of Law" indicates that there are areas not covered by the FLA. First of all, these are legal services provided to legal entities, state authorities, local self-government bodies, and the State. In addition, it represents the interests of individuals and legal entities, the State, state authorities, and local self-government before foreign, international judicial bodies.

All other types of legal practice are in one way or another included in the scope of FLA.

The Law of Ukraine "On Free Legal Aid" makes a distinction between primary and secondary legal aid.

Free primary legal aid includes the following types of legal services:

- 1) provision of legal information;
- 2) provision of consultations and clarifications on legal issues;
- 3) drawing up statements, complaints and other legal documents (except procedural documents);
- 3-1) provision of consultations, explanations and preparation of draft land use contracts (lease, sublease, land easement, fee-farm, superficies) for the rural population - owners of land plots;
- 4) providing assistance in ensuring a person's access to secondary legal aid and mediation.

Free secondary legal assistance includes the following types of legal services:

- 1) defense;
- 2) representation of the interests of persons entitled to free secondary legal aid in courts, before other state bodies, local self-government, other persons;
- 3) drawing up procedural documents.¹²

The significance of this division lies in the fact that primary FLA includes simple types of legal aid. These are non-unique types of legal practice, they can be provided by any person with a law degree, therefore are less formalized. The status of an advocate is not required to provide primary legal assistance. This division drew a distinction between unique and non-unique types of legal practice, in fact between activity-in-law and legal practice.

The provision of primary legal aid has been transferred to the employees of the LC.

For its part, the free secondary legal aid rendered by RCs and LCs ensures drafting of procedural documents at the request of those entitled to free secondary legal aid; ensures representation of the interests of the subjects of the right to free secondary legal aid in courts, other state authorities, local self-government, before other persons.

In the 2021 CC's Report, it is indicated about 806,272 instances of granting FLA.

Of these, 627,281 were primary legal aid and 178,991 were secondary legal aid.

According to the structure of primary aid:

- 403,835 cases (64%)- providing legal information;
- 207,397 cases (33%) - consultations and clarifications of legal issues;
- 31,725 cases (5%) - assistance in drawing up statements/complaints and other legal documents (except procedural ones);
- 952 cases (0.2%) - assistance in providing access to mediation.¹³

¹² On Free Legal Aid: Law of Ukraine dated June 2, 2011, URL: <https://zakon.rada.gov.ua/laws/show/3460-17#Text>

¹³ Report on the activity of the FLA system in 2021. URL: <https://legalaid.gov.ua/wp-content/uploads/2022/08/zvitbpd-2021.pdf>

So, the primary legal assistance is predominantly consulting work.

The structure of secondary legal aid - 178,991 total cases of provision of secondary legal aid, of which:

- 133,046 (74%) – cases of provision of secondary legal aid by advocates;
- 45,984 (26%) – cases of provision of secondary legal aid by employees of the LCs. ¹⁴

The results of comparing the statistics of the courts and the statistics of the CC from the issued assignments are also informative.

Thus, in 93,070 cases of providing FLA by regional centers, in 100% of cases it was provided by advocates. Of those, 18,352 assignments for the protection of persons detained on suspicion of committing a criminal offense and 49,175 assignments for defense by appointment, 3,935 - assignments for defense during the application of coercive measures of medical nature, in total - 71,462 assignments. It is clear that sometimes two assignments may be issued for one case. ¹⁵ However, sometimes the assignment is issued, but the case has not been brought to court.

According to the report of the judiciary, 116,043 criminal cases were brought to the court in 2021

• ¹⁶

By way of a rather approximate comparison, one can imagine that in 61% of cases of criminal proceedings, an advocate from the FLA system was involved.

These figures show that the share of FLA in the structure of legal practice is significant and indicates a contrast between the percentage of advocates involved in FLA and the volume of cases in which a FLA advocate is involved. A small number of advocates have a large practice volume, which means that these advocates are guaranteed increased access to clients.

The second indicator of determining the quantitative indicators of FLA in the structure of general legal practice is the share of participation of advocates.

One of the MoJ's points is the statement that only 20% of FLA is provided by advocates. However, the assessment can be given according to different criteria: by the number of cases; by the number of subjects; payment of working hours.

First of all, it should be noted that primary legal aid and secondary legal aid cannot be equated. The quantitative indicator of the Ministry of Justice was artificially increased through the primary FLA.

However, substantial, professional and significant work is carried out precisely at the level of secondary legal aid, and at this level advocates provide 74% of legal aid.

Therefore, the statement of the Ministry of Justice about the insignificant participation of advocates in the provision of FLA is incorrect both in terms of quantitative indicators and in terms of the essence of the activity.

Thus, almost all types of legal practice are included in the scope of FLA provision. The Law of Ukraine "On Free Legal Aid" distinguishes between activity-in-law and legal practice. Primary free legal aid has been removed from the sphere of activities of advocates and entrusted to employees of the LCs. Given the primitive nature of such work, it is hardly worth consideration. Involvement in the provision of secondary legal aid by the LCs' employees is a natural consequence of the general attack on the advocate's monopoly - exclusive audience rights. For its part, the legal profession should be critical of such an approach and demand the elimination of the very possibility of providing a secondary FLA by an employee of a state body.

It is the secondary FLA that is significant, professional, and meaningful, and here advocates provide 74% of legal assistance, and in the field of criminal justice - they provide 100% of FLA. At the same time, advocates from the FLA were involved in about half of the cases of criminal proceedings, which testifies to the extremely high level of influence of the FLA system on the field of criminal proceedings.

¹⁴ Report on the activity of the FLA system in 2021. URL: <https://legalaid.gov.ua/wp-content/uploads/2022/08/zvitbpd-2021.pdf>

¹⁵ Report on the activity of the FLA system in 2021. URL: <https://legalaid.gov.ua/wp-content/uploads/2022/08/zvitbpd-2021.pdf>

¹⁶ Report of local general courts on consideration of court cases. URL: https://court.gov.ua/inshe/sudova_statystyka/IV_kvartal_21

The substance of the FLA provision

The FLA system has had a significant impact on the understanding of the concept of a legal service.

First of all, it is about standardization of the quality of FLA provision. Quality standards were developed and approved, which became an inevitable natural consequence of the separation of the recipient of the service and the person who pays for it. The standards lay down a great positive because they create a sphere of responsibility of the advocate and do not allow any sidestepping. However, it is possible that there is a need for their updating and clarification, in particular in criminal proceedings - in connection with the spread of special pre-trial investigation, work under conditions of quarantine and air alarms, etc. In civil cases, given the fact that the advocate is unprotected from the excessive demands of the recipients of assistance, it is worth discussing the prospect of introducing at least a partial hourly payment (currently, the payment of commissions is based on an hourly principle, but the client's request for advocates' time outside of these hours paid by the state should be limited).

It is also necessary to regulate the prohibition to call at any time, to come to the office at an unscheduled time - to establish the duties of the recipient of legal aid.

When forming the Standards and the Rules, it should be assumed that only basic, most necessary assistance can be obtained at state expense. The quality should be adequate, but not the best; and comfort, attention, convenience - are not requisite. It is only available for money.

The issue of involving an advocate in a separate procedural action in criminal proceedings deserves special attention. This is a systemic, conceptual problem. It should be decided in the context of the general paradigm of the development of the principles of the advocate's participation in the criminal process.

For advocates both from the FLA and outside, one-time involvement of an advocate for particular procedural actions 80% of the time is harmful to the achievement of the objectives of criminal proceedings and causes an imbalance in favor of the prosecution. Therefore, it is in the interests of the Bar to take all measures to reduce the grade of involvement of one-time advocates for particular procedural actions.

It is impossible to bypass the problem of the cost of advocates' services for the state. The costs of FLA are obviously excessive. The volumes of FLA should be significantly reduced. Secondary FLA should be provided exclusively by advocates. Costs for maintaining the system of CC, RCs and LCs should be reduced. The cost of services should be tied to the remuneration of lawyers, namely judges and prosecutors. Even within the limits of available funding, expenditures should be allocated more efficiently.

For objectivity sake, it should be noted [that the FLA system has a number of positive influences, which may include:](#)

- carrying out the social mission of ensuring access to legal aid for vulnerable population;
- State paying for the legal services rendered by advocates that were previously provided free of charge;
- fulfilling the function of a source of stable, albeit small, income for individual advocates.

However, [there are a number of systemic problems.](#)

The objective problem is [excessively broad provision of FLA.](#)

In any modern democratic state, the provision of FLA is an exception, a social service that is provided only if there is a justified need for it.

States are clearly aware that FLA is free only for its recipient. In fact, FLA services are paid for by taxpayers. And not only actual legal aid, but also the entire volume of organizational and administrative work related to its provision. FLA is financed with the common money of Ukrainian taxpayers, and therefore it is extremely important that the volume of such FLA be as small as possible.

Developed European countries approach the determination of the scope of FLA provision much more carefully, although economically they have greater opportunities than Ukraine. Moreover, in the conditions of war, the spending of funds for the provision of FLA should become even more careful.

In addition to direct damage to the budget, the excessive growth of FLA volumes distorts the structure of the provision of legal services and affects normal relations in the legal sphere.

Payment for services not by their recipient, but by the state, adds a third party to the relationship, which should be confidential and trusting, purely bilateral by definition. Accordingly, the state, as a person that finances FLA, establishes the rules for its provision, controls the quality of services, and evaluates the result. Such a situation is inevitable, but it should not turn into a general rule. In Ukraine, the scope of FLA provision is constantly expanding.

Excessive expansion of the scope of application of the FLA leads to the formation of an extensive system of its administration bodies. At the same time, the necessary functions of administration, acceptance of reports, payment of services are supplemented by derivative, secondary and generally not very necessary functions - public relations, monitoring, analysis, professional development, etc. Gradually, the system of FLA bodies developed into an extensive network of state institutions that require significant funding. The costs of paying advocates are lower than the costs of maintaining the FLA system.

Another systemic problem is that [the system of FLA bodies constantly tries to interfere in the sphere of independence of the legal profession](#).

As already mentioned, unfortunately, no adequate model of cooperation between the CC and the Ministry of Justice with the legal profession as equal partners has been developed. At the level of involvement of advocates, it is also not possible to talk about parity contractual relations with the centers. The FLA system puts up with the involvement of advocates in the provision of FSLA as unavoidable, since currently any other subjects cannot provide it as part of the advocates' monopoly. However, the desire of the Ministry of Justice and the CC to replace FLA advocates with full-time employees is obvious. But as long as advocates are involved in the provision of FLA, the CC is steadily trying to introduce a subordination model of relations with advocates. Its elements include attempts to interfere with advocate's confidentiality obligation under the guise of FLA quality control, influence on the advocate's position in cases by manipulating payment for services, consideration of complaints against advocates, etc.

The latest relevant examples of such interference are unilateral changes to the Standards for the provision of FLA without the involvement of the legal profession in the discussion of this issue and systematic interference by FLA bodies with the position of advocates in criminal proceedings in which there is no suspect.

The lack of real equality in the relations between the Bar and the CC and the Ministry of Justice in the field of providing FLA is an attack on the independence of the Bar. Each such step encroaches on the guarantee of legal practice; makes an advocate involved in providing FLA dependent on the State; deepens the difference between FLA and contractual legal advice.

The sheer number and systemic nature of such steps slowly but steadily do its job.

Society feels the difference between FLA and legal aid based on a contract. It is not for nothing that the saying goes

"A free advocate is worse than a prosecutor." The advocate, the client, and the entire legal system suffer.

The Bar is committed to constructive cooperation and is ready to participate in discussing controversial issues, agreeing positions, and developing optimal algorithms. At the same time, only UNBA and the central bodies of the Bar self-government can fully act on behalf of the Bar, which can comprehensively and representatively represent the interests of all advocates, have full information and sufficient power to implement joint decisions in the field of corporate regulation of advocates' activities.

FLA centers feel the looming corruption risks, which manifested in the provision of unjustified benefits and advantages in the distribution of assignments in criminal cases. And worst of all, the centers form models of cooperation with law enforcement agencies in the context of pushing away from FLA system

"inconvenient" advocates and involving "convenient" ones instead. The centers exercise their corrupt discretion by deliberately choosing advocates with whom to conclude contract, announcing endless competitions for the selection of advocates for FLA, in absence of need to replenish the register. In this way, there is a threat of formation of a body of advocates who, for one reason or another, will be completely under the control of the system.

The excessive powers of the FLA bodies, their interference with the independence of the Bar represent a threat to the full implementation of the main function of the Bar - protection of people's rights and interests, primarily in relations with the state. And this may adversely influence both criminal and administrative cases and not only that. A advocate dependent on the state and controlled by it cannot be expected to take a principled position in a legal conflict with the same state. Trust in such an advocate on the part of society is rapidly deteriorating. The FLA turns into a fiction, and the formal provision of the FLA to almost everyone willing turns into the fact that instead of a defender, a person risks getting an agent of the opposing party. Therefore, all attacks on the independence of the Bar by the FLA system have the consequence of being contrary to the purpose for which this system was created.

Ensuring high-quality and full-fledged FLA in Ukraine is possible only if such assistance is provided in conditions as close as possible to the normal rules and algorithms of an advocate's work under the agreement.

Minimal interference in the mechanisms of the advocate's work by state authorities is a guarantee that such FLA will not differ from the legal aid paid by the client.

There is a separate fundamental problem - [artificial blocking of the functioning of the FLA system according to the following model](#): with the management of the CC by an independent director and with control over the system exercised by the Supervisory Board of the CC.

According to s. 16 of Regulation on the Coordination Center for Legal Aid Provision, approved by the Cabinet of Ministers of Ukraine Resolution dated 06.06.2012

#504, the Coordination Center is headed by a director appointed and dismissed by the Minister of Justice. In order to select persons capable of professionally performing the director's duties, a competition for the vacant director's position is held in accordance with the procedure determined by the Ministry of Justice.

The Minister of Justice appoints the director based on the recommendations of the

Supervisory Board regarding the candidates who received the three highest competitive points according to the results of the competition and the information about which was submitted thereto by the Candidate Selection Commission for the position of director of the Coordination Center for Legal Aid Provision. Such recommendations must contain a rationale for the feasibility of appointing each of the candidates who successfully passed the competition to the position of Director of the Coordination Center. ¹⁷

That is, the CC should be headed by a director appointed in accordance with a legally prescribed, transparent, open procedure. This procedure for appointing a director

of the FLA system meant to guarantee, firstly, the management of the system led by a highly qualified specialist, and secondly, by an independent person who, having passed the competition, is not dependent on the changing will of the subject of his appointment.

Instead, after the deliberate recognition of the competition for the position of Director of the Center as null and void, the system has been since presided by the Acting Director for two years, that is, a person who did not pass the necessary selection and is directly dependent on the will to the appointing authority.

In this way, the state-created guarantees of the necessary degree of independence of the FLA system from the state - Ministry of Justice were actually leveled.

In addition, the activity of the Supervisory Board of the CC as a body that was supposed, among other things, to ensure this independence, has actually been blocked.

Thus, in accordance with the Regulation on the Supervisory Board of the Coordination Center for the Provision of Legal Aid, approved by the order of the Ministry of Justice dated 14.08.2018 #2551/5, the Supervisory Board of the CC was established by the Ministry of Justice in order to ensure the effective implementation of state policy in the field of providing free legal aid, independence and transparency of management of the FLA provision system. ¹⁸

¹⁷On the formation of the Coordination Center for the legal aid provision and the liquidation of the Center for Legal Reform and Legislative Works under the Ministry of Justice: Resolution of the Cabinet of Ministers of Ukraine dated 06.06.2012 #504. URL: <https://zakon.rada.gov.ua/laws/show/504-2012-%D0%BF#Text>

¹⁸On the approval of the Regulation on the Supervisory Board of the Coordination Center for the Provision of Legal Aid: Order of the Ministry of Justice dated August 14, 2019, #2551/5. URL: <https://zakon.rada.gov.ua/laws/show/z0932-19#Text>

The main tasks of the Supervisory Board are: 1) supervision of the activity of the FLA system; 2) assistance to the Coordination Center and its territorial branches in relation to: implementation of perspective development tasks of the Coordination Center and its territorial branches; ensuring the independence of management of the FLA system; increasing public confidence in the FLA system.

The Supervisory Board of the CC performs the following functions:

- approval at the request of the director of the CC of: proposals regarding strategic and priority areas of development of the FLA system and improving its structure; annual activity plans and reports of the Coordination Center;
- provision of advisory assistance to the CC Director regarding strategic issues of the Coordination Center and its territorial branches;
- identification and assessment of risks (political, financial and other), providing recommendations to the CC Director on ways to prevent the occurrence of risks or eliminate them and proposals to minimize possible negative consequences;
- evaluating the activities of the CC Director by listening to the annual, in particular financial, reported on the functioning of the FLA system, and recognizing the work of the CC Director as satisfactory or unsatisfactory based on the results of such evaluation;
- supervision of the activity of the FLA system.

That is, the CC Supervisory Board is a specially created body in the FLA system, which was supposed to ensure the independence and efficiency of this system.

According to the results of the competition for the election of the members of the CC Supervisory Board by the order of the Ministry of Justice of Ukraine dated March 17, 2020, #662/7 approved the composition of the CC Supervisory Board for the provision of legal assistance.¹⁹

It is known that the specified body was never involved in the procedure of the selection for the position of the CC Director, and its work itself is actually blocked (the composition of the Supervisory Board is not updated, meetings are not held, etc.).

In this way, the FLA system is actually deprived of all the protection mechanisms provided for it against the toxic influence of the state, as well as deprived of any democratic elements of interaction with society and control by the latter.

This largely sustains the dependence of the FLA system on the Ministry of Justice, which for its part determines the appropriate conditions for the destructive development of the system in an undemocratic way and contrary to the standards of the rule of law.

The biggest systemic problem is strengthening the development strategy of the FLA system as an alternative to the elements of the Institution of the Bar and UNBA.

Briefly, this problem has the following practical reflection:

- making decisions about advocates, regarding advocates and for advocates without a Bar and UNBA;
- creation of a system of hierarchical and subordinate management of advocates by a state institution represented by Directors of CC, RCs, LCs;
- expanding the powers of the CC and giving it management powers in relation to advocates-mediators;
- administration of resources for advocates at the expense of state funds and without access to them by UNBA, etc.

The listed systemic problems of the functioning of the FLA system are illustrative, not exhaustive.

²⁰On the approval of the composition of the Supervisory Board of the Coordinating Center for the provision of legal assistance for the provision of legal assistance: Order of the Ministry of Justice of Ukraine dated March 17, 2020 #662/7. URL: <https://minjust.gov.ua/files/general/2020/03/18/20200318120654-28.pdf>

There are also direct risks for the legal profession from the activity of the FLA system:

- creating a threat to the commercial interests of the Bar, dumping of the cost of legal services;
- distortion of the mechanism for establishing the market value of services, forming an bespoke rating of advocates on the basis of inflated practice volumes of advocates who would not have received it on a competitive basis;
- creation of a material and organizational basis for ensuring a procedural mechanism for facilitating the implementation of the function of prosecution against the obstruction of the function of defense, which is carried out by advocates under the contract (particular procedural action);
- formation of a strong interest in advocates, aimed at obtaining a state order, that is, interest in the state as a source of work and income;
- creation of harmful connections between advocates and state officials and, through them - with law enforcement agencies;
- formation of hidden mechanisms of influence on advocates by state structures, which can potentially be used;
- division of the legal profession, creating tension between advocates.

Therefore, the priority of UNBA activity is to protect the interests of the legal profession from the risks created by the FLA system, and to develop the FLA system in the direction of increasing the independence, professionalism, and commercial success of advocates.

The outlined goal involves certain [tasks](#), which in the most generalized form can be defined as a reduction in the volume of FLA provision; strengthening of the role of the legal profession in the FLA system; prevention of excessive state influence on the Bar through FLA institutions.

Similar tasks can be implemented in the following directions:

1. limitation of categories and narrowing of the circle of FLA recipients;
2. support of the monopoly position of the Bar in the legal services market; FLA should be divided by tiers: primitive (primary) - can be provided by employees of the LCs, complex (secondary) - only by advocates.
3. gradual reformatting of the understanding of FLA provision standards: only the minimum amount of legal aid should be provided free of charge; the legal profession is interested in the comprehensive implementation in society of the idea that high-quality legal assistance is possible only if it is adequately paid for;
4. formation of practical minimum standards of FLA - through assessment of the quality of free legal aid provided by advocates, in the activities of Commissions and disciplinary bodies of the Bar;
5. the concentration of control over the quality of FLA by the Bar and its institutional strengthening to achieve the outlined goals;
6. adjustment of rhetoric - instead of "FLA" there should be "aid at the expense of taxpayers";
7. highlighting the negative practice of spending taxpayers' money on legal aid, which should not be provided with state funds (convicts, distribution of property, disputes over insignificant matters, etc.);
8. introduction of a negative attitude to competition, formation at the regulatory level and in practice of an effective system of protection of advocates against "professional complainants", etc.

In the perspective of development, one should strive to achieve:

- approval of acts relating to FLA only with input from UNBA; for this, to find out which institutions of the CC are used to bypass the participation of the UNBA and to ban them from participating in official projects with which the CC substitutes the consent of UNBA;
- ensuring the participation of UNBA and/or the Bar self-government in competitions for the selection of FLA advocates with the right to a casting vote;
- strict observance of the provision that the responsibility of advocates providing FLA is possible only through professional disciplinary liability track.

It is worth noting that a significant part of the problems can be solved by conducting internal work with advocates: explanations, continuing legal education, drafting recommendations, etc. After all, the success of attempts to have a negative impact on the legal profession largely depends on the behavior of advocates. The efforts of UNBA should be aimed at cultivating zero tolerance for attempts by the state to influence the legal profession in general and advocates in particular.

SECTION II. Aspects of interaction of FLA Committee at UNBA with the Coordination Center and the Ministry of Justice.

Issues of FLA system operation, assigned by the Coordination Center to the list of issues to be discussed with UNBA

The only form of communication of the UNBA represented by the Committee with the Ministry of Justice and the CC in recent years (at least the preceding 3 years) was a working meeting of the Committee Chair with Deputy Minister of Justice V. Kolomiyets, which took place on October 5, 2022 (initiated by the Committee) and a working meeting of Committee Members with representatives of the CC, which took place on November 21, 2022 (initiated by CC Acting Director - O. Baranov).

Despite the fact that representatives of the Ministry of Justice and the CC demonstrated adequate openness and transparency in the process of organizing and holding these meetings, this did not significantly affect the essence of legal relations between the Bar and the FLA system.

At the same time, such meetings and the exchanges give grounds for asserting that at least this format of communication allows the parties to present positions to each other, which, as the practice of such interaction has shown, are significantly different from those perceived through official documents, statements, etc.

In addition, as a result of the specified exchange of information, it was possible to find out the limits of possible constructive communication, which are quite clearly defined by the CC and can be evaluated through the prism of the issues that were proposed to the Committee for discussion.

In particular, [subject-wise, the limits of communication with the Committee were reduced by the CC to the following issues.](#)

1. Provision of free secondary care during martial law. Challenges, problematic issues, and their solutions:

- provision of FSLA to detained persons: curfew, lack of transport connections, air alerts, restrictions on visits to places of detention, prisons, temporary detention centers; the role of the Bar self-government in solving the issues of the movement of advocates during the curfew in the case of the execution of the instructions of the RCs and/or LCs;
- absence of communication or moving abroad of clients and/or advocates;
- mobilization of advocates, procedure of informing; request to the opposing party for replacement; the grounds for terminating the authorization from FLA centers;
- new categories of cases/new subjects of the right to FSLA, lack of experience and practical cases, court practice, new legislative acts;
- introduction of the standard regarding advocates informing their clients about actions/inaction by the client under the influence of physical or psychological coercion (order of the Ministry of Justice dated 03.11.2022 #4903/5).

2. Increasing the organizational capacity of the FLA system:

- changing the procedure for appointing advocates to defend the rights of detainees, suspects, accused persons in the framework of the implementation of the Project in successive parts;
- further development of the FLA system.

3. Consideration of appeals from FLA centers to Commissions for Assessing the Quality, Completeness and Timeliness of the Provision of Free Legal Aid by advocates.

4. Payment for services and reimbursement of legal fees and expenses for providing free secondary legal aid:

- financing of the program #3603030 "Payment of services and reimbursement of expenses of advocates for providing free secondary legal aid";
- amendments to the Resolution of the Cabinet of Ministers of Ukraine "On approval of the Procedure for the exercise of powers by the State Treasury Service in a special regime under martial law" dated 06/09/2021

#590 ²⁰

The specified list of issues was revealed by the CC in the following theses.

1. The problem of moving advocates during the curfew does not have a systematic solution, advocates to be dispatched to the self-government to solve this issue. ²¹

2. The successful practice in this regard is delivery of an advocate to a client during curfew by the police.

3. Regional centers do not and will not take measures to resolve the issue of the movement of advocates during the curfew at the regional level (except for certain standalone cases),

since this should be done by UNBA by way of initiating the adoption of a normative act that would grant the right to freedom of movement to advocates during martial law.

4. The CC will initiate regulatory changes to determine the time of arrival of advocate to a client (including a detainee) - after the end of the curfew, air alert.

5. The CC reacts to cases of advocates not being allowed into the places of detention of clients by way of consideration of advocates' written complaints.

6. The problem of identification of advocates with clients - war criminals - is predicted to occur.

7. Advocates must refuse to represent clients with whom they cannot have a confidential meeting.

8. The draft amendment to the FLA Quality Standards was developed by the CC, which is sure that the Ministry of Justice involved the legal profession in the process of amending the relevant instrument. ²²

9. In the conditions of war, cases of complete loss of contact with the client and/or advocate in connection with their departure abroad, mobilization, etc. are not rare. There is no approved algorithm of actions for advocates in such cases, which complicates the provision of FLA.

10. The list of subjects entitled to FLA was supplemented by victims of sexual violence and torture. Advocates do not have experience of working with this category of cases and need additional training. ²³

²⁰ For reference: the video of the Work Meeting can be viewed at <https://legaid.gov.ua>; zoom.us/rec/play/Ch1TV8QbCK9RSKJVNZvtIBN63J-cKfMUIBAcd33FeiVaXZzZhc7zH2onjqRgFJMN2P99vYPR9m0CO6U.TaDsoLYLvwWiKnTk Passcode: KDO@&6IF:

²¹ For reference: curfew (forbidden time) - prohibition by the military commandant at a certain time of day and for a certain time to be on the streets and/or public places for residents of a certain settlement, where the President of Ukraine has established a state of martial law or state of emergency. The order and procedure for imposing curfew has been settled by resolution of the Cabinet of Ministers of Ukraine dated July 8, 2020 #573

"The procedure for implementing measures during the curfew and the establishment of a special light masking regime in individual areas where martial law has been imposed." In the territory where the curfew is introduced, it is necessary to have passes and certificates issued by the military authorities for staying in the streets and other public places during a certain period of the day. Passes are valid only within the limits of territories where a curfew has been imposed and their accounting is also carried out by the commandant's office in the curfew territory

²² For reference: Quality standards for the provision of FSLA for an advocate are an algorithm of his actions during defense or representation of clients. This is the unification of actions of an advocate cooperating with FLA system. Adherence to these Standards is mandatory for advocates when they provide free secondary legal aid.

Order of the Ministry of Justice #4903/5 was issued on November 3, 2022, registered with the Ministry of Justice of Ukraine on November 7, 2022, #1372/387/08 "On Amendments to the Quality Standards for Providing Free Secondary Legal Aid in Criminal Proceedings."

By this order, section 1 "General standards for providing free secondary legal aid in criminal proceedings" was supplemented after item 6 with item 7 of the following content: "If the defense advocate becomes aware of the client's actions/inaction under the influence of physical or psychological coercion, he (with the client's consent) reports this to the pre-trial investigation body or the procedural prosecutor."

11. In the FLA system, the processes of unification of RCs are taking place (there should be 6 RCs in the end), only one center will administer the assignments, advocates must submit reports in electronic form. The Ministry of Justice turned to partners to develop algorithms for automating the distribution of assignments and electronic reporting of advocates. These processes exclude the Bar, and these issues are not discussed with the advocates.

12. The system is financed by means of monthly appropriations (1/12 of the budget), but there were problems with financing (including the lack of the possibility of opening a budget allocation), which is why the debt before advocates occurred.

13. An increase in advocates' fees is feasible only with an additional source of funding. Advocates working in the FLA system should not have financial motivation to cooperate with the system (motivation should be determined by other factors).

14. A significant problem is the improper functioning of the system of Commission for Assessing the Quality, Completeness and Timeliness of the Provision of Free Legal Aid. Such commissions function only in Chernivtsi, Lviv, Ternopil, Kirovohrad, Rivne, Sumy, Zakarpattia, Chernihiv, Mykolaiv, Khmelnytskyi and Odesa regions. In other regions, Quality Commissions do not work (formally, the Chair or secretary accept submissions from RCs and LCs for consideration, but meetings are not held, the results of the consideration are not reported).

15. Advocates themselves want to write reports and explanations to the RCs and LCs. This problem is related to insufficient qualifications of some advocates and the latter's misunderstanding of the requirements of the law, the Rules of Professional Conduct and concluded contracts.

CC, RCs, and LCs review complaints against advocates and provide assessment in the interests of the advocates themselves, in order to protect them.

16. The right of the centers to receive from advocates information about the status of execution of the assignment includes the right to receive any information about it.

The following should be attributed to the positions of the Ministry of Justice and the CC, assessed by the Committee as a result of the described interaction, as conceptually threatening and destructive.

1. There is no policy of interaction with UNBA. There is no official or consolidated explanation for the lack of communication with UNBA on FLA issues. The only interaction is the one initiated by UNBA and the response thereto from the representatives of the system. That is, no one wants to involve UNBA.

2. The FLA system actively communicates with advocates, provides them with the amount of information deemed necessary by the system, and administers the necessary Internet resources for this. In addition to the relevant own registers, which are different from the Unified Register of Advocates, Telegram channels "Free Legal Aid" and "Free Legal Aid and Advocacy" have been created, to channel communication with advocates. Meetings are held with individual advocates for information exchange. Such communication with advocates of the FLA system is positioned as communication with the legal profession as a whole. That is, FLA institutions are building a model of their own management of the Bar, which includes an extensive system of forms and methods, isolated from the UNBA and the self-government bodies of the Bar.

» For reference: in accordance with the Law of Ukraine "On Amendments to Part One of Article 14 of the Law of Ukraine "On Free Legal Aid" Regarding Expanding the List of Persons Entitled to Free Legal Aid", Article 14 was supplemented by the following category of persons: "8-2) persons who do not have documents certifying their identity and confirming their citizenship of Ukraine - for legal services provided for in clauses 2 and 3 of the second part of Article 13 of this Law, on matters of establishing facts of legal significance in court, related to the registration and issuance of such documents"; "13-1) victims of criminal offenses against sexual freedom and sexual integrity, torture or ill-treatment during hostilities or armed conflict, - for legal services provided for in clauses 2 and 3 of the second part of Article 13 of this Law, in criminal proceedings initiated by the fact of committing such criminal offenses".

On November 19, 2022, the Law of Ukraine "On Social and Legal Protection of Persons Deprived of Personal Freedom as a Result of Armed Aggression Against Ukraine and Their Family Members" entered into force. The right to free secondary legal aid is available to citizens of states with which Ukraine has concluded relevant international agreements on legal assistance, the binding consent of which has been granted by Verkhovna Rada of Ukraine, as well as foreigners and stateless persons in accordance with international agreements to which Ukraine is a party, if such treaties oblige member states to provide free legal aid to certain categories of persons.

3. Changes to the FLA system (reorganization of centers, introduction of new procedures, etc.) are not shared with the Bar and would not be discussed with the Bar. That is, the conditions, forms, and rules for the provision of FLA by advocates are positioned as those that belong to the absolute competence of the state, are in the realm of the implementation of relevant state functions, and therefore do not require cooperation with the Bar.

4. Conviction of advocates participating in criminal proceedings in the absence of a suspect (accused) for violating the Rules of Professional conduct.²⁴ That is, toxic economic and moral conditions are created for FLA advocates in such cases, they are actually motivated to refuse to provide legal aid.

5. FLA Centers have the right to consider complaints against advocates, select explanations from the latter, demand from advocates (offer them) to state their explanations regarding the execution of the assignment in the form of reports addressed to the Director of the RC/LC. That is, the FLA system took over the functions of management, control, disciplinary supervision, etc. making advocates its subordinates.

6. The contractual right of the FLA centers to receive information about the state of execution of the assignment by the advocate includes virtually unlimited access of the CC, RC, LC to the privileged information. That is, the right to receive information about whether the assignment is being executed and its progress, is interpreted as the right to unlimited access to information about the content of this assignment.

7. Monitoring the quality of FLA is a mandatory element of the FLA system and the system's prerogative. That is, the existence of problem of taking over the functions, which according to the Law belong to the exclusive competence of the bodies of the Bar, is denied.

8. The FLA system does not set itself the goal of providing advocates with work, decent pay, etc. Mechanisms for the distribution of assignments, the order and terms of payment for advocates' work, the mechanism of interaction with advocates and UNBA are evaluated positively. No problems are recognized and will not be addressed accordingly. That is, the FLA system does not demonstrate any readiness for dialogue and changes based on joint efforts.

Expectations of the CC from UNBA

1. UNBA to initiate procedure for adding advocates to the category of persons who are not subject to curfew restrictions.

2. Development of methodological recommendations regarding the advocate's actions in cases of mobilization, travel abroad, the existence of other circumstances that make it impossible to practice law in general or in relation to a specific client.

3. Improving the qualifications of advocates in working with new categories of crimes (aid to war criminals, assistance to victims of war crimes, etc.).

4. Taking measures to ensure the functioning of commissions for evaluating the quality, completeness, and timeliness of the provision of free legal aid by advocates in all regions of Ukraine.

Taking into account the above, it should be noted that certain local and technical issues, which are considered as possible for a partnership solution, can really be solved in this way (for example, regarding the provision of methodological recommendations to advocates, improving their qualifications, ensuring the work of quality commissions, etc.).

But the main part of the problematic issues lies in the realm of conceptual contradictions between the principles of the functioning of the FLA system and the institutional principles of the Bar operation in Ukraine (for example, in the part of the FLA centers taking over the functions of the disciplinary bodies of the Bar and Quality Commissions, interfering with the activities of advocates, violating the confidentiality of advocates, strengthening the model subordination of advocates to FLA centers, etc.)

The FLA system is developing in the direction of usurping influence over the Bar and advocates, while the Bar and UNBA are developing in the direction of strengthening institutional and professional independence.

Therefore, it is expedient to implement the justified expectations of the Central Committee regarding the reaction of the UNBA to the identified problems, at the same time as taking large-scale measures to respond to real threats to the functioning of the Bar, which are intensified by the corresponding development of the FLA system.

²⁴ Rules of Professional Conduct: approved by the Reporting and Election Congress of Advocates of Ukraine in 2017 on June 9, 2017. URL: <https://zakon.rada.gov.ua/rada/show/n0001891-17#Text>

CHAPTER III. SUMMARY OF ISSUES OF THE FLA SYSTEM OPERATION IN UKRAINE

SUGGESTIONS OF UNBA FLA COMMITTEE ON RESOLVING THEM

The Committee observes that the problems of the functioning of the FLA system have such a large-scale qualitative and quantitative manifestation that their solution is possible only by taking numerous measures of various nature.

In connection with the above, we present a list of such problems in a table together with the proposed solutions.

# Table of issues	Significan for the Bar	Propos solution	Obstacles to resolving
1 The name of the CC does not correspond to its purpose	The name "Coordination Center for Legal Aid Provision" defines the name of an institution that provides all types of legal assistance, not only free ones. The above has already led to the granting of powers to the CC to oversee mediation profession and advocates-mediators, and also creates prerequisites for managing all processes of providing legal aid, instead of the Bar (Bar self-government bodies and UNBA) by a state institution.	Amendments to the resolution of the CMU dated 06.06.2012 #504	Opposition to the Ministry of Justice
2 CC led by a person dependent on the Ministry of Justice.	The FLA system, which cooperates with a significant part of the advocates of Ukraine and takes over management functions in relation to them, is under the control of a person who is potentially forced to be guided not by the interests of the system and advocates, but by the needs and instructions of the Ministry of Justice, which are systemically opposed to the interests of the legal profession	Voluntary competition for the position of CC Director or challenging the inaction of the Ministry of Justice in court	Opposition to the Ministry of Justice

3	Blocking the functioning of the CC Supervisory Board	The functioning of the system on a democratic basis and in compliance with the interests of the institutional strength of the Bar was supposed to be ensured by a body that does not actually function	Voluntary re-election of the CC Supervisory Board and ensuring its participation in the competition for the position of CC Director or challenging the inaction of the Ministry of Justice in court	Opposition to the Ministry of Justice
4	<p>Implementation of the policy of removing the Bar and UNBA from participating in any aspect of FLA system management:</p> <ul style="list-style-type: none"> • adoption of regulatory and other normative acts regulating the activities of advocates without the participation of UNBA; • making changes to the Standards for FLA Provision without the participation of the Bar; • holding contests for contracting advocates for FLA provision without the participation of UNBA (Bar self-government bodies); • reorganization of the FLA system, involvement of all kinds of partners and isolation of UNBA from this process 	<p>The implementation of the intention to isolate UNBA from participation in the formation and implementation of state policy regarding advocates has systemic negative consequences:</p> <ul style="list-style-type: none"> • a significant decrease in the quality of regulation and management of the said social relations; • Institutional weakening of the Bar and, accordingly, the state of human rights protection in Ukraine; • discrediting Ukraine as a rule-of-law-based state before foreign and international partners, etc. 	<p>Normative determination of specific spheres of activity of the Ministry of Justice and CC, in which UNBA should be involved;</p> <ul style="list-style-type: none"> • appeal of normative acts adopted without the approval or participation of UNBA; • a report on the state of interaction between the Ministry of Justice, the CC and Ukrainian National Bar Association, the CMU, the Parliament, the President of Ukraine, international organizations, etc. • appeal of normative acts adopted without the approval or participation of UNBA; • a report on the state of interaction between the Ministry of Justice, the CC and Ukrainian National Bar Association, the CMU, the Parliament, the President of Ukraine, international organizations, etc. 	Opposition to the Ministry of Justice

5	Systematic and systemic attempts of the FLA system to encroach into the matters of competence of the independent Bar (taking over the function of assessing the quality of legal aid; disciplinary bodies; administration of services for advocates, etc.)	The analysis of the functioning of the FLA system indicates a systemic development to the parallel performance of a significant part of the functions of the UNBA, at the same time, based largely on principles, opposite to generally adopted ones. This puts at risk the very existence of the Bar as an institution independent of the state	Report on the state of cooperation between the Ministry of Justice, the CC and UNBA before the CMU, the Parliament, the President of Ukraine, international organizations, etc. Taking measures to identify persons guilty of actions against the independence of the Bar	Opposition to the Ministry of Justice
6	Excessive expansion of the FLA system	The work of an advocate is devalued, there is an economically unjustified imbalance in the functioning of the legal profession, advocates work in competitively unhealthy conditions, the unjustified influence of the state on the legal profession is increasing	Significant legislative narrowing of the range of subjects entitled to FLA, as well as a reduction in the categories of cases in which it is granted	Opposition to the Ministry of Justice
7	The presence of a considerable number of real and potential corruption risks and their implementation in the system in the absence of an anti-corruption program within the CC	Advocates are artificially placed in conditions of dependence and feel insecure before the FLA system	Adoption of the anti-corruption program at the CC. Introduction of automated assignment distribution. Creation of a mechanism allowing the Bar to exercise control of FLA system	Opposition to the Ministry of Justice
8	Powers of the CC over advocates-mediators	Strengthening the influence of the state on another group of advocates	Appeal to the CMU regarding the revision of the adopted decision and the introduction of appropriate legislative changes	Opposition to the Ministry of Justice

<p>9 Implementation of the system for the state to rule over advocates:</p> <ul style="list-style-type: none"> • preparation of explanatory and reporting notes by advocates; • the duty of advocates to report, explain, prove their position when conducting an assignment; • hierarchical subordination of advocates without the right of the latter to know the criteria for getting or not getting a contract with CC, real rules for the distribution of assignments, etc. 	<p>Leveling of all the principles of legal practice and the institutional principles of operation of the Bar; application of the model that changes the essence of legal practice as state-independent institution</p>	<p>Normative ban on the use of this model of management over advocates.</p> <p>Providing clarifications to advocates regarding measures to respond to state approaches to cooperation with advocates</p>	<p>Opposition to the Ministry of Justice</p>
<p>10 The lack of real equality of the parties to the FLA contract</p>	<p>The binding conditions of FLA contracts reduce the necessary level of independence of advocates, demotivate them when providing FLA, create toxic dependence on the CC, RC, LC</p>	<p>Approval of a new form of a standard FLA contract for advocates, approved by the UNBA</p>	<p>Opposition of the Ministry of Justice</p>
<p>11 Low remuneration of FLA advocates</p>	<p>Violation of the advocates' constitutional right to fair remuneration.</p> <p>Erosion of the legal profession's authority due to devaluation of legal services.</p> <p>Demotivation of advocates from providing quality legal aid.</p> <p>Adoption of practice of regulating the cost of legal in administrative manner, completely disregarding economic principles, without approval of the Bar</p>	<p>Making additions to the resolution of the Cabinet of Ministers of Ukraine "Issues of payment for services and reimbursement of expenses of advocates providing free secondary legal aid" dated September 17, 2014, #465 according to the Committee's Conclusion</p>	<p>Opposition of the Ministry of Justice</p>

- | # Table of issues | Significan for the Bar | Propos solution | Obstacles to resolving | |
|-------------------|--|--|---|---------------------------------------|
| 12 | Using the FLA system to create a procedural imbalance in criminal proceedings favoring the prosecution | By weeding out "inconvenient" advocates and the eliminating contractual advocates, the defense party is sometimes irrecoverable weakened to the point, desired by the prosecution. This harms the justice system and the legal profession, which play an important constitutional role; fulfillment of this role is next to impossible under such conditions | Normative improvement of the institution of involving an advocate for a particular procedural action.

Strengthening the disciplinary responsibility of FLA advocates tipping procedural scales in favor of the prosecution | Opposition of the Ministry of Justice |
| 13 | Interference with professional legal privilege (when LC, RC consider complaints against advocates; during quality monitoring, when accepting reports, etc.) | Leveling of the advocate's basic professional guarantee, toxic changes in the human rights defense system as a whole | Cancellation of any forms of FLA quality monitoring by the FLA system.

Strengthening the responsibility of advocates for the disclosure of privileged information | Opposition of the Ministry of Justice |
| 14 | Direct or indirect influence on the advocate's position in case (through direct advice and instructions, quality monitoring, payment system, handling of complaints, etc.) | Leveling of the principles of legal practice, toxic changes in the human rights defense system as a whole | Providing clarifications to advocates regarding the algorithm for responding to attempts to influence their legal position in a case.

Prosecution of persons guilty of influencing the advocate's legal position in a case | Opposition of the Ministry of Justice |

In addition to the above, The Committee considers the following to be appropriate.

1. Take measures to ensure the proper functioning of the Commissions for Assessing Quality, Completeness and Timeliness of the FLA in all regions of Ukraine.
2. To include in the structure of advocates' Continuing Legal Education for those in the FLA system, an additional 2 points on issues of the Rules of Professional Conduct (a special course from the Higher School of Advocacy for FLA advocates).
3. Instruct the Higher School of Advocacy to develop free and paid CLE options for FLA advocates in the new category of "military" cases.
4. Develop methodological recommendations for advocates deprived of the opportunity to provide legal aid in accordance with the concluded contract or the received assignment, regarding interaction with the client, the court (other bodies), LC, Bar self-government, other advocates, etc. (devise an algorithm for notices of impossibility to render FLA to those entitled thereto, transfer of case (by advocate) by advocate etc.).

This report is proposed for consideration by the Bar Council of Ukraine in order to adopt decisions, named herein.

The report is accompanied by the Committee's conclusions on certain problematic issues highlighted in the report.

It is recommended to involve:

- UNBA Committee for the Protection of Advocates' Professional Rights and Guarantees - regarding the formulation of proposals for the protection of FLA advocates from systematic violations of their rights;
- UNBA Committee on Professional Conduct - regarding the development of methodological recommendations for compliance with the Rules of Professional Conduct for FLA advocates, as well as in providing aid to a suspect, accused, with whom it is impossible to agree on a legal position and conduct a confidential meeting;
- UNBA Anti-corruption policy and Compliance Committee - regarding the assessment of corruption risks in the FLA system and the effective measures to prevent them;
- UNBA Committee on Legislative Initiatives on Advocacy - regarding drafting legal acts to solve the problems of the functioning of the FLA system;
- UNBA Committee on Criminal Law and Procedure - regarding the formation of a position on the possible algorithm of actions of an advocate in the case of accepting an assignment in a special pre-trial investigation and a special trial;
- UNBA Committee for CLE - regarding the development of topics for professional qualification improvement for FLA advocates, as well as provide legal assistance in new categories of cases.

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CONCLUSION #1-z

of UNBA FLA Committee regarding the participation of advocates in criminal proceedings in the absence of the client

CC FLA publicly accusing advocates who participate in criminal proceedings in the absence of a suspect (accused) of violating the Rules of Professional Conduct

Position of the Committee

The said accusations are baseless. In this way, the CC is allowed to interfere in the legal position of advocates and exert pressure thereon; obviously unfair and unfounded accusations of advocates are expressed; the legality of procedural actions and court decisions decision are put into question; the very possibility of functioning of a number of institutions of criminal procedural law is denied.

Criminal procedural legislation regulates the procedure for conducting proceedings *in absentia*, that is, in the absence of the accused.

Proceedings in the absence of the accused under the current Code of Criminal Procedure of Ukraine are provided for in several cases, namely when it comes to:

- 1) removal of the accused temporarily or for the entire duration of the trial (part. 1 Article 330 of the CPC of Ukraine);
- 2) fast track court proceedings: regarding criminal infractions: (arts. 381– 382 of the Constitution);
- 3) special pre-trial investigation and special trial *in absentia* (arts. 297-1 – 297-5, p. 3 Article 323 CPC of Ukraine);
- 4) the procedure for consideration of a request for the selection of a preventive measure in the form of detention in the absence of the suspect, accused (p. 6 Article 193 of the CPC of Ukraine).

Therefore, the current criminal procedural legislation provides for procedures, including judicial ones, which are carried out in the absence of the accused.

In all these cases (except for fast track proceedings regarding criminal infractions), the legislation directly establishes the mandatory participation of the defense counsel of the suspect (accused). Continuing Legal Education - regarding development of event topics for FLA advocates that also render assistance in new types of cases.

Similar *in absentia* proceedings exist in a number of European countries. The practice of the ECtHR confirms the compliance of consideration of cases *in absentia* with the requirements of the Convention

where certain guarantees and conditions are met to ensure the general fairness of the proceedings (decision of the Grand Chamber from March 1, 2006, in the case *Sejdovic v. Italy*); The ECtHR decision of February 12, 2015 in the case *Sanader v. Croatia*). One of these conditions is the representation by defenders of the interests of persons whose cases are considered *in absentia*.

Thus, proceedings *in absentia* are a legally regulated procedure that meets international standards of justice, provided that the defense attorney of the absent suspect (accused) participates in it. The current legislation positively resolves the relevant issue, defining the participation of a defense attorney as a mandatory condition for proceedings in the absence of the accused (special pre-trial investigation, special court proceedings, selection of a preventive measure according to the rules of Part 6 Article 193 of the CPC of Ukraine).

Therefore, the participation of the defender in the criminal proceedings, which is carried out in the absence of the suspect (accused), corresponds not only to the prescriptions of the criminal procedural legislation, but also to international standards for ensuring the fairness of the trial.

By its actions and public statements, the FLA CC evaluates the form of legal aid provided by advocate at a court hearing (independently or simultaneously with the client) as acceptable or unacceptable. By threatening to refuse payment for the work done, the FLA Center is trying to create an interest in advocates to ensure the presence of their clients in all investigative and procedural actions. Such an interest is consonant with the interest of law enforcement agencies, which traditionally try to relay to the advocate their duty to properly notify the suspect, hand him procedural documents, etc.

In the positions expressed by the CC FLA, there is a potential threat of exerting pressure on the advocate's right to choose such a procedural position in the case, where advocate participates in the hearing without the client present, making a statement to the investigating judge that the client does not know about the motion submitted, about a violation of the method of proper notification of the suspect, etc.

This position turns out to be flawed, since the payment of advocate's time spent in court is at risk. The FLA client is limited in its rights compared to a client of advocate under contract. Also, the CC FLA concludes whether advocate received approval of the client solely on the fact of a meeting between the advocate and the client taking place. In this way, FLA clients are deprived of the opportunity to communicate with an advocate by phone or any other means of communication. The advocate is thus forced to initiate a mandatory personal meeting with the client. The very possibility of providing legal assistance to a person with whom there was no personal meeting is denied. And in general, the assessment by the CC FLA of the whether advocate and client agreed upon certain aspects of a case is groundless at best and amounts to violation of professional privilege.

The position of the CC FLA contradicts the current legislation on the following grounds.

1. The general principles of advocate's participation in criminal proceedings are determined by the Code of Criminal Procedure, the Law of Ukraine "On the Bar and Practice of Law", and the Rules of Professional Conduct.

The rules of engagement for FSLA advocate do not differ from the rules of participation of an advocate operating on the contractual basis. The Law of Ukraine "On the Bar and Practice of Law" and the Rules of Professional Conduct also apply to FLA advocates.

In carrying out the defense, the FLA advocate must also proceed from the priority of the client's interests, which is directly enshrined in Art. 8 of the Rules of Professional Conduct.

According to this norm, an advocate must remain independent of his client. Within the limits of compliance with the principle of legality, an advocate is obliged to proceed from the primacy of the client's interests in his/her professional activity. ... An advocate working under a contract for rendering free secondary legal assistance is obliged to proceed from the priority of the client's interests before his own and the interests of other persons.

Depending on the circumstances of the case, the interests of the client may be diverse. It is possible that it is in the client's interest not to be present at the hearing, while presence of an advocate in the hearing is very much within the client's interest. This is decided exclusively by the client and advocate, but not by the FLA RC. Deciding whether or not to participate in the hearing is an integral part of the legal position in the case.

3. Against this background, the institution of choosing a preventive measure is of particular importance, its special purpose being to properly regulate the procedure for applying security measures to the suspect if there are sufficient grounds to believe that he/she has left the country and/or is in the temporarily occupied territories of Ukraine, in the territory of a state recognized by Verkhovna Rada of Ukraine as aggressor, and/or declared internationally wanted.

According to s. 1, 6 of art. 193 of the CCP of Ukraine, *consideration of the motion for the application of a preventive measure is carried out with the participation of prosecutor, suspect, accused, and their defense counsel, except for the cases provided for in part six of this Article.*

The investigating judge, the court considers the motion for the selection of a preventive measure in the form of detention and may choose such a preventive measure in the absence of the suspect, the accused only if the prosecutor proves the existence of the grounds provided for in Article 177 of this Code, as well as the presence of sufficient grounds to believe that the suspect, the accused has left and/or is in the temporarily occupied territory of Ukraine, the territory of a state recognized by the Verkhovna Rada of Ukraine as an aggressor state, and/or declared an international wanted person.

According to its purpose, this institution is directly and exclusively aimed at cases when the suspect is absent in Ukraine. The legislator, regulating the procedure for choosing a preventive measure, determined that the investigator's motion is considered in the mandatory presence of advocate of defense party (ss. 1, 6 art. 193). The advocate represents the interests of the suspect who is absent in the court session. In this way, the legislator compensates for the personal absence of the suspect and his inability to participate in the court session. The defender receives information, expresses the defense party's position, receives a court decision and has the right to appeal it.

The introduction of the institution of choosing a preventive measure with mandatory participation of the defense party is a compromise option between the needs of the pre-trial investigation and ensuring adversariality and the right to defense.

Thus, the selection of a preventive measure for the suspect in accordance with Part 6 Article 193 of the Criminal Procedure Code of Ukraine always takes place without the presence of the suspect, but with the participation of an advocate and legal assistance in this case is provided precisely in the form of representation of the absent person.

With regard to special pre-trial investigation and special court proceedings, the procedure is similar.

Therefore, taking into account the legislation and the prevalence of the client's interests, the advocate, acting as the defender of the absent person, independently determines his legal position in the case. This legal position includes the form of participation in the hearing, filing of certain motions, the provision or non-provision of evidence to the court, the position on the merits of the case or motion, the position regarding the appeal of court decisions, etc.

With its decisions, the CC FSLA not only interferes with the advocate's legal position in the case, but also exerts pressure on the advocate, prompting him to choose a position that is comfortable for other bodies, and not for his client.

According to s. 11 art. 23 of the Law of Ukraine "On the Bar and Practice of Law", entitled "Professional Guarantees", it is forbidden to interfere with the legal position of an advocate.

Bottomline

The position of the CC regarding the presence of violations in the actions of the advocate who defends the absent suspect (accused) during the consideration of the motion for the selection of a preventive measure in the order of p. 6 Article 193 of the Criminal Procedure Code of Ukraine, when conducting a special pre-trial investigation and special court proceedings, is not based on the norms of the current criminal procedural legislation and international standards for ensuring the fairness of criminal proceedings.

The choice of specific forms and methods of participation in investigative and procedural actions, court hearings in criminal proceedings within the limits established by the current legislation, belongs to the scope of the concept of "advocate's position in the case", interference with which is prohibited in accordance with clause 11 part 1 Article 23 of the Law of Ukraine "On the Bar and Practice of Law".

Direct or indirect interference of FLA authorities with the advocate's position in the case, including public negative evaluations of advocate's behavior and also in the form of unjustified benefits in payment depending on personal participation in investigative and procedural actions of his client, are prohibited.

The fact of communication between an advocate and a client, as well as the content, method, form, means and other properties of such communication are included in the concept of "privileged information". The advocate is free to choose the forms, methods, means of communication with the client.

Offers

1. To recommend that CC FLA to publicly refute the expressed position.
2. To contact the Office of the Prosecutor General regarding the need to remove obstacles made by CC FLA to the legal practice of advocates when considering a motion to choose a preventive measure in accordance with p. 6 Article 193 of the Criminal Procedure Code of Ukraine, during special pre-trial investigation and special court proceedings.

CONCLUSION #2-z of UNBA FLA Committee regarding certain issues of reorganization of the FLA system

From the fall of 2021, the receipt of arrest notices and other procedural decisions on the assignment of advocates in criminal proceedings will be centralized.

Positive consequences: in war-torn areas where FLA centers cannot operate, the system was able to receive all detention reports and assign an advocate. Final stage: all reports are processed in 2 duty units (currently, such duty centers are located in Ternopil and Chernivtsi) and other procedural decisions on the assignment of advocates in criminal proceedings.

A different practice came to be in various regions, courts and law enforcement make different decisions. As a result of communication with the CC, best practices are being spread, courts and law enforcement incline to unification of adopted decisions in form.

Submission of reports in electronic form is gains traction.

CC does not see any negative aspects.

Position of the Committee

The role of Regional Centers now and of those "united regional centers" after the reorganization is reduced to drawing up duty schedules for advocates and handing them over to the other duty units (hereinafter referred to as "DUs").

Now, in times of occupation of part of the country's territory and the outflow of a significant part of population abroad, the number of prospective clients has decreased, and every paying client is of immense importance to an advocate. Therefore, in case an advocate has clients outside FLA system, the importance of the possibility to adjust schedule increases.

In the conditions of "monopoly" of the DUs, this possibility is greatly reduced. The flexibility of the advocate assignment system may be reduced. As a result, the system of drawing up duty shift schedules and working hours can lead to overbooking of advocates and advocates staying on duty without receiving offers from the centers for a long time, which will not contribute to advocates' will to cooperate with the FLA system and further demotivate their work.

[Procedures for drawing up, agreeing and correcting duty shift schedules should be developed with the participation of UNBA representatives.](#)

And now there is inconsistency in the issues of professional privilege, receipt, verification, storage, destruction of advocate's reports by FLA centers, which contain procedural documents relating to clients. In times of martial law, the issue of preserving state secrets becomes especially important in the course of checking the reports submitted by advocates (I personally had the opportunity to partially familiarize myself with the court decision, which in accordance with the Law of Ukraine "On Access to Court Decisions" is made public with the exception of information considered in closed court and subject to protection from disclosure; despite that requirement, the classified information laid open at the table of the regional center).

This also applies to the processing of court decisions in proceedings regarding crimes against the sexual freedom and integrity of minors, in particular. The full texts of court decisions are accepted, checked, stored, and destroyed without observing professional legal privilege.

Professional legal privilege and confidentiality of personal data are different legal institutions. The advocate bears personal responsibility for maintaining privilege in accordance with Art. 10 of the Rules of Professional Conduct. The last paragraph of Art. 10 obliges the advocate to obtain the client's written consent for disclosure of privileged information. "An advocate who provides (has provided) free secondary legal aid, without the written consent of the FLA receiver - subject of the decision to grant free secondary legal aid, has no right to transfer any information, items and/or documents containing privileged information to any persons, with the exception of persons conducting disciplinary proceedings. The advocate has the right, but is not obliged, to provide such information, items and/or documents to the persons who have the right to assess the quality, completeness and timeliness of the provision of free legal aid, and to the advocate who is subsequently engaged on the basis of a contract or assignment to provide legal aid".

This issue requires additional regulation in cooperation with the CC.

With the spread of the practice of submitting reports in electronic form, these issues will require clear regulation by the CC. Therefore, it is necessary to create a joint CC- UNBA working group.

Prospects of the situation

In the future, there will be a need to create a comprehensive software product for drawing up, adjusting duty shift schedules, issuing and acceptance of assignments, accounting, and reporting cases of FLA clients, and keep records of advocates' reporting. Most likely, grant funds will be involved. Since this is international grant aid, there is a risk that the international donor partner will impose conditions **NOT** involve UNBA. Which can lead to the violation of the rights of advocates. Such a situation must be prevented. Participation of UNBA in the development of the TECHNICAL TASK for the creation of a software product with appropriate functions **IS MANDATORY**.

Viable solutions:

1. attain the creation of a joint UNBA working group with CC and/or the Ministry of Justice;
2. attract grant assistance for the creation of a project blueprint (this is a lesser work, and it is easier to fund it).

CONCLUSION #3-2 OF UNBA FLA COMMITTEE regarding the remuneration of FSLA advocates

There is a problem of payment for the services of advocates providing FLA. In particular, there are systematic delays in payment of services; the cost of services depreciates due to inflation; the amount of payment for services is low; the rules for determining the amount of payment for advocates' services are not always justified.

CC position

At this time, there are delays in pay settlements with FSLA. This is due to the fact that the Cabinet of Ministers of Ukraine Resolution #590 dated 06/09/2021 "On approval of the Procedure for the exercise of powers by the State Treasury Service in a special regime under martial law" is in effect during the martial law, which did not provide for settlements with advocates at all. At the same time, the advocates carried out their duties and provided services, despite the lack of payment. The CC initiated changes to the specified resolution of the Cabinet of Ministers of Ukraine, and after some time settlement finally began.

The CC did not initiate or insist on the indexation of payment for the services rendered by FSLA advocates, since in such a case it would be necessary to indicate the source of the funds, at the expense of which the indexation of payment is possible.

Taking into account the martial law and the suspension of the activity of some courts, advocates did not work btw. February - June 2022 and accordingly submitted fewer work reports. The CC also notes that it will not be able to raise the issue of an increase in advocates' hourly work fees work, because next year, when the number of advocates' reports will increase, there will be no funds in the budget to pay for their services. At the same time, the advocate should not have a single motivation in the form of payment for services from the state budget.

Position of the Committee

Ensuring the effective provision of professional qualified assistance by advocates, the payment and reimbursement of costs associated therewith is provided from the state budget, and objectively related to the application of functional administrative and legal guarantees, the impact of which is not only protection from external negative influence on the FLA system, but also in the positive assessment of the results of advocates' proper performance of their duties.

Paragraphs 1 and 3 of the "UN Basic Principles on the Role of Lawyers", adopted in August 1990, in particular emphasize that all persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings; it manifests compliance of governments with the obligation to provide the necessary funding and other resources for legal aid to the poor and other disadvantaged people, and professional associations of advocates at the same time play a leading role in cooperation in the organization and creation of conditions for providing such assistance.

Therefore, the encouraging functional administrative legal guarantees of free legal aid, which exist both economically (calculations of the amount of remuneration and reimbursement of advocate's services) and social-professional (a system of measures to improve professional qualifications), are a set of methods and measures that are equally necessary for the effectiveness of the system of providing free legal aid.

Regarding the mandatory indexation of the incomes of FSLA advocates

The Committee draws attention to the fact that after the start of the active phase of hostilities in Ukraine, a sharp increase in inflation was recorded - by more than 30%, which is connected with the occupation of part of the territory of Ukraine, active hostilities, significant destruction, termination of production, trade, etc.

Starting from February 2022, the advocates of the FSLA system worked properly and continually provided legal assistance, ensured the right to defense, complying with the Law of Ukraine "On the Bar and Practice of Law", contributed to Ukraine's fulfillment of its international obligations in ensuring the right to a fair investigation and a fair trial. The work of advocates was stopped only temporarily and only when the activity of law enforcement and courts was stopped during the active phase of hostilities in particular regions, i.e. for reasons beyond the control of the advocates.

At the same time, due to the erroneous disregard of the FSLA advocates' interests, the resolution of the Cabinet of Ministers of Ukraine dated 09.06.2021 #590, halted the financing of legal aid for a considerable time, which deprived FSLA advocates of the right to proper and timely remuneration.

Further, the payment of funds and the repayment of debts after a long period of time significantly devalued the income of advocates due to inflation, which at this time remains outside the attention of the CC and the Ministry of Justice of Ukraine.

The Committee believes that the indexation of advocates' fees as a mandatory tool will not only meet the requirements of the Law of Ukraine "On indexation of monetary incomes of the population", but also relevant legislation - Arts. 25, 30 of the Law of Ukraine "On the Bar and Practice of Law", p. 8 part 1 Art. 25 of the Law of Ukraine "On Free Legal Aid".

The Committee took into account the numerous decisions of the higher bodies of the Bar self-government, aimed at observing the rights of advocates to a dignified,

proper and timely remuneration of advocates, in particular the decision of the Bar Council of Ukraine #74 of June 26, 2019 "On Ensuring the Observance of the Rights of FSLA Advocates", which recognized the systemic nature of violations of the FSLA advocates' rights, in particular, through incomplete and untimely payment of the FSLA advocates' remuneration.

In addition, in accordance with Art. 5 of the Law of Ukraine "On the Law of Ukraine "On the Bar and Practice of Law", the state creates appropriate conditions for the activity of the Bar and ensures compliance with the professional guarantees of legal practice, including the prohibition of any interference and hindrances to exercise of the legal profession.

According to s. 2 Art. 29 of the Law of Ukraine "On Free Legal Aid", financing of free secondary legal aid is carried out at the expense of the State Budget of Ukraine.

Under such circumstances, a mandatory condition for the proper remuneration of FSLA advocates is the permanent indexation of the fees at the expense of the State Budget, which will not only promote the independence of the Bar, but also guarantee the proper level of remuneration, comply with the Rules of Professional Conduct and the Code of Conduct of European Lawyers.

In this regard, the Committee considers it necessary to turn to the Bar Council of Ukraine with a proposal to amend the legislation on free legal aid in order to introduce mandatory indexation of the FSLA advocates' fees at the expense of the State Budget of Ukraine.

Regarding the restoration of the principle of fairness of the contractual terms offered to FSLA advocates

The form of the Model Contract with an Advocate Continually Rendering FSLA approved by the Resolution of the Cabinet of Ministers of Ukraine dated January 11, 2012 #8 "The Procedure and Conditions for Concluding Contracts with Advocates Providing Free Secondary Legal Aid on an ongoing basis, and Contracts with Advocates Providing Free Secondary Legal Aid on a Temporary Basis".

According to s. 13 of the Model Contract, payment for services and reimbursement of advocate's expenses are carried out in accordance with the Procedure of Payment for Services and Reimbursement of Expenses of Advocates Providing Free Secondary Legal Aid, and Methodology for Calculating the Amount of Remuneration of FSLA Advocates, approved by the resolution of the Cabinet of Ministers of Ukraine dated September 17, 2014, #465.

The CC is not responsible for the payment of taxes, fees and other mandatory payments by advocate (law firm, law office).

In the case of an advocate's violation of the deadlines for submission of deeds with relevant attachments, the payment for advocates' services is reduced in accordance with the specified Procedure and Methodology.

The Committee notes that the Model Contract contains conditions under which the advocate's fee may be reduced depending on the time of his submission of the Deed of Services Rendered. So, in case of delay in submitting the deed for more than 120 calendar days, the advocate's fee is not accrued at all.

At the same time, the Model Contract does not contain a provision for increasing the advocate's fee in the event that the State Budget transfers the remuneration with a delay, which occurs systematically.

Therefore, there are clear and obviously unfair terms of contract with the FSLA advocates, under which the amount of the advocate's fee can be reduced, which is considered by the State as a motivating condition for the timely submission of reports on the services provided by the advocates. At the same time, there are no compensatory mechanisms for advocates who receive payments for their services from the State budget with significant delays (up to 4 months).

This circumstance indicates a discriminatory approach to advocacy on the part of the state, which negatively affects the motivation of advocates.

Also, the new practices of organizing the payment against deeds are not entirely convenient. Cases of demands for creating consolidated deeds, their registers, etc., are not rare, which is an additional burdensome duty for advocates.

In the absence of a procedure for verifying deeds, with the specified terms, stages, procedure for processing documents, the work of advocates looks to be unpaid. In addition, there are errors in the consolidated deeds, which are difficult to correct due to the lack of electricity.

Taking into account the above, the Committee considers it necessary to address the Bar Council of Ukraine with a proposal to amend the Model Contract by including conditions for increasing the advocate's fees in case of violation of the terms of payment for the services provided by introducing compensation mechanisms, in particular, a forfeit.

[Regarding the need to improve the rules for calculating the cost of advocates' services](#)

The mechanism for calculating the remuneration of FSLA advocates is defined normatively in the resolution of the Cabinet of Ministers of Ukraine "Issues of payment for services and reimbursement of expenses of advocates providing free secondary legal aid" dated September 17, 2014. #465.

The principle of normative definition of an advocate's remuneration means that such a remuneration will correspond to the amount and quality of work done, and the state's obligation to pay an advocate's remuneration for providing free legal aid corresponds to the advocate's obligation to provide such free legal aid at least at the minimum level of quality determined in FLA Quality Standards.

The calculation of the fee is based on the application of various coefficients to the amount of hourly rate for advocate's provision of legal aid, which is five percent of the amount of the subsistence minimum established for able-bodied persons at the time of the submission of the deed by advocate.

Taking into account the specificity and quality of the free legal aid rendered by advocates, the coefficients can both positively and negatively affect the amount of payment.

Among the factors that have a positive effect on the size of the remuneration, in our opinion, such a factor as the number and types of documents drawn up by an advocate when providing free legal assistance gained our particular attention.

In criminal proceedings, as one may know, when providing free legal aid, an advocate, exercising his rights, contributes to the objectivity of the criminal process, and also protects both its rights and the rights of the client (suspect, accused, witness, victim) from possible and perpetrated violations. At the same time, the advocate's reaction to violations of his rights and the rights of the client may take the form of petitions, statements, demands, answers, objections, complaints etc. In civil and administrative procedure, in particular, submission of statements on procedural issues in the form of statements and motions is available. To date, when determining the remuneration for representation in civil and administrative proceedings, the drafting the specified documents by an advocate is not taken into account.

It is well known that the drafting of motions requires development of a rationale, evaluation of the evidential material available in the case, further collection of evidence, which obviously requires that advocates spend significant time when providing free legal aid.

Therefore, in our opinion, it is expedient to provide for an increase of the amount of the advocate's fee, taking into account the number of relevant motions filed (motions related to the collection of evidence, motions to declare evidence inadmissible, motions to conduct procedural actions, motions to cancel the seizure of property in whole or in part, motion for discovery of items or documents, motion for changing or canceling measures to ensure criminal proceedings, motion for changing a preventive measure, a motion for closing proceedings, a motion for reduction of charges).

In fulfilling his duties, advocate must use all opportunities to clarify the circumstances that can confirm the legal position chosen in criminal, civil and administrative proceedings, at the pre-trial stage, which is related to drafting advocate's requests, which usually, as we know, also consume a significant amount of the advocate's working time. Therefore, in our opinion, it is advisable to take into account the number of advocate's requests when establishing the appropriate coefficient, which positively affects the amount of remuneration of FSLA advocates in criminal, civil, and administrative proceedings.

Procedural statements in civil and administrative processes (statements, motions), such as statement to secure a claim and evidence, a motion to replace one provisional measure with another, a motion to cancel a provisional securing a claim, a statement of settlement, a request to appoint a forensic examination require development of justification, evaluation of the evidential material available in the case, and therefore, in our opinion, should also be classified as documents, the drafting of which is taken into account when determining the coefficient that positively affects the amount of remuneration of FSLA advocates.

Objections can be stated not only orally, but also in writing, therefore, objections to appeals and cassation appeals in accordance with Arts. 402, 431 of the Criminal Procedure Code of Ukraine, also for the reasons mentioned above, should be taken into account when establishing a coefficient that positively affects the amount of remuneration of FSLA advocates in criminal proceedings.

We believe that the appellate and cassation appeals filed in accordance with Arts. 396 and 427 of the Criminal Procedure Code of Ukraine, an application for review of a court decision based on newly discovered or exceptional circumstances in accordance with Art. 462 of the CPC of Ukraine

should also be classified as documents, drafting of which additionally taken into account when determining the coefficient, which positively affects the amount of remuneration of FSLA advocates in criminal proceedings.

In view of the above, we consider it expedient to propose additions to the resolution of the Cabinet of Ministers of Ukraine

"Issues of payment for services and reimbursement of expenses of advocates providing free secondary legal aid" dated September 17, 2014. #465 (to the Methodology for Calculating the Amount of Remuneration of FSLA Advocates, approved by the resolution of the Cabinet of Ministers of Ukraine dated September 17, 2014, #465), to expand the list of documents, the drafting of which causes a positive impact on the amount of remuneration of FSLA advocates; as for the determination of the remuneration of advocates in criminal proceedings, we propose to provide for the drafting of the above-mentioned documents to be additionally taken into account. We believe that the proposed changes to the mechanism of the FSLA advocates' remuneration calculation will contribute to increasing the effectiveness, efficiency, reliability, and fairness of free legal aid in Ukraine as a type of professional legal practice, the guaranteed procedure for providing which is detailed in the legislation.

It is because of the application of the reduction factor that the institution of expedited processing of criminal cases does not work.

Current compensation rules create a potential conflict between the interests of the defender and the interests of the suspect.

For example, the Resolution does count the decisions made by the prosecution as a result of the work of the defense counsel: modification of charges, refusal of charges, motion for house arrest instead of detention.

Accordingly, it is financially more profitable for the defender not to carry out any work aimed at proving the expediency of applying for a less severe preventive measure (which is favorable for the client and provides him with a reliable guarantee of a less severe preventive measure). If the client ends up in detention, which may be appealed, the amount of the advocate's fee will be higher than in the case where investigator, with the agreement of the prosecutor, makes a request for house arrest. The person will remain in custody, at the next stages, the coefficients of the application of the preventive measure will be applied.

Also, the CC believes that the prosecutor reduces charges in court due on its own, and not because of the work of an advocate. In order for such a change to be taken into account, the advocate has to resort to tricks - to write to the prosecutor a request to reduce/change charges, which is not strictly legal and sometimes goes against the interest of defense.

High Complexity Case Coefficient

(4) takes into account complaints against actions of investigator, prosecutor, etc. and filing of a criminal offense notice. In addition, such types of work as addressing investigating judge with motion to grant temporary access, for the appointment of an forensic examination, lodging appeals against decisions of investigating judge (court) on the extension of preventive measure, appealing against the notice of suspicion, etc., are indicative of high complexity of the proceedings, and sometimes require even more time and effort. In this way, the FLA system orients the advocate to the predominant use of conflict methods of interaction (appeal and submission of notices to the URPI - Unified Register of Pre-Trial Investigations) and devalues the constructive approach (i.e. gathering evidence).

Viable solutions:

attain the creation of a joint UNBA working group with CC and/or the Ministry of Justice, and discuss the need of improving the payment of advocates' services.

in our opinion, the list documents, the drafting of which is taken into account when determining the coefficient, which positively affects the amount of remuneration of FSLA advocates should be expanded.

Objections can be stated not only orally, but also in writing, therefore, objections to appeals and cassation appeals in accordance with Arts. 402, 431 of the Criminal Procedure Code of Ukraine, also for the reasons mentioned above, should be taken into account when establishing a coefficient that positively affects the amount of remuneration of FSLA advocates in criminal proceedings.

We believe that the appellate and cassation appeals filed in accordance with Arts. 396 and 427 of the Criminal Procedure Code of Ukraine, an application for review of a court decision based on newly discovered or exceptional circumstances in accordance with Art. 462 of the Criminal Procedure Code of Ukraine should be included into the documents, the drafting of which is additionally taken into account when determining the coefficient, which positively affects the amount of remuneration of FSLA advocates in criminal proceedings.

In view of the above, we consider it expedient to propose additions to the Resolution of the Cabinet of Ministers of Ukraine

"Issues of payment for services and reimbursement of expenses of advocates providing free secondary legal aid" dated September 17, 2014. #465 (to the Methodology for Calculating the Amount of Remuneration of FSLA Advocates, approved by the resolution of the Cabinet of Ministers of Ukraine dated September 17, 2014, #465), having expanded the list of documents, the drafting of which causes a positive impact on the amount of remuneration of FSLA advocates, and as for the determination of the remuneration of advocates in criminal proceedings, we suggest that the drafting of the above documents be additionally taken into account.

We believe that the proposed changes to the mechanism for calculating the remuneration of FSLA advocates will contribute to increasing the effectiveness, efficiency, reliability, and fairness of free legal aid in Ukraine as a type of professional legal assistance, the guaranteed by the law.

It is because of the application of the reduction factor that the institution of fast track consideration of criminal proceedings does not work.

Current compensation rules create a potential conflict between the interests of the defender and the interests of the suspect.

For example, the Resolution does count the decisions made by the prosecution as a result of the work of the defense counsel: modification of charges, refusal of charges, motion for house arrest instead of detention.

Accordingly, it is financially more profitable for a defender not to carry out any work aimed at proving the expediency of moving for a less severe preventive measure (which is favorable for the client and provides a reliable guarantee of application of a less severe preventive measure). If the client ends up in detention, which may be appealed, the amount of the advocate's fee will be higher than in the case where investigator, with the agreement of the prosecutor, makes a request for house arrest. The person will remain in custody, at the next stages, the coefficients of the application of the preventive measure will be applied.

Also, the CC believes that the prosecutor reduces charges in court due on its own, and not because of the work of an advocate. In order for such a change to be taken into account, the advocate has to resort to tricks - to write to the prosecutor a request to reduce/change charges, which is not strictly legal and sometimes goes against the interest of defense.

CONCLUSION #4-z OF THE UNBA FLA COMMITTEE regarding the model of state influence on advocates at the FLA system

The activities of the FLA system demonstrate a tendency towards the gradual but steady introduction of elements of the administrative model of collaborating with advocates.

CC position

There are no elements of subordinate relationship in the system. Complaints are considered in accordance with current legislation. FLA bodies do not select explanations and reports and advocates themselves want to execute such documents on their own volition. According to the contract, the FLA body has the right to request information about the progress of the assignment.

Position of the Committee

Currently, the FLA authorities developed a practice of preliminary consideration of client complaints against advocates. Within the framework of this procedure, the practice of obtaining extended information from advocates about the execution of the assignment, demand of explanatory notes and reports from advocates, as well as the preliminary consideration of customer complaints against advocates in order to resolve the issue of forwarding these complaints to the Commission for Assessing the Quality, Completeness and Timeliness of FLA by advocates.

Arguments

The established practice is inconsistent with the observance of professional privilege, may be used as means of exerting pressure on advocates and interfering with their legal position. In addition, in this way, the FLA bodies take over the powers of the Bar self-government. In fact, the FLA bodies created special mechanism for bringing advocates to liability.

A special procedure for consideration of complaints against the actions of advocates is an important guarantee of legal practice.

Under s. 14 Art. 92 of the Constitution of Ukraine, *exclusively the laws of Ukraine determine ... the principles of the organization and activity of the Bar;*

According to s. 17 part 1 Art. 23 of the Law "On the Bar and Practice of Law", *disciplinary proceedings against an advocate follow the specified procedure.*

According to s. 2 of Art. 25 of the Law "On the Law of Ukraine "On the Bar and Practice of Law", *evaluation of the quality, completeness and timeliness of the provision of free primary legal assistance by advocates is carried out at the request of local self-government bodies, and free secondary legal assistance - at the request of a body (institution) authorized by law to provide free legal assistance, by commissions formed for this purpose by the regional Bar Councils.*

Thus, complaints against an advocate can be considered exclusively by the disciplinary body of the Bar self-government, and the evaluation of the quality, completeness and timeliness of the services provided by advocates can be carried out exclusively by commissions formed for this very purpose by the Bar Councils of the regions.

Accordingly, upon receiving a complaint against an advocate, FLA bodies have the right only to forward it to the disciplinary body of the Bar self-government to the said Commission. Any consideration of complaints against an advocate by the FLA bodies does not comply with the law.

Instead, departmental regulation provides for the right of FLA centers to consider complaints against advocates.

For example, according to s. 12 of the Standard Provision on [Department of Quality Assurance of Legal Aid and Professional Development of its Providers of the Regional Center for the Provision of Free Secondary Legal Aid](#), approved by order of the Ministry of Justice from 26.03.2019

#36, the department *ensures consideration by the regional center of complaints about the quality of provision of free secondary legal aid by advocates,*

prepares draft responses to complaints, draft appeals of the Regional Center to the relevant Commission for Evaluating the Quality, Completeness and Timeliness of free secondary legal aid.

It is obvious that substantive consideration of complaints against advocates should not be carried out by Centers that are in contractual relations with advocates and are not endowed with relevant powers. Such consideration may consist exclusively of formal forwarding of the relevant complaint.

Such powers of Centers to demand from advocates information on the provision of legal aid is not provided for in the Law on Free Legal Aid.

For the justification of such a right, the FLA authorities refer to s. 6.1 of the Model Contract, approved by the resolution of the Cabinet of Ministers of Ukraine dated March 11, 2015.

#110, according to which The Center has the right to demand from the advocate, in order to monitor the quality, completeness and timeliness of the provision of free secondary legal aid, to submit information on the provision of such aid.

At the same time, FLA bodies obviously interpret the concept of "information on the provision of legal aid" too broadly.

In this regard, it should be taken into account that the information on the provision of legal aid, for the most part, covered by professional privilege, and the FLA body has no right to demand its disclosure.

Taking into account the existence of contractual obligations between the FLA body and advocate, it is clear that the FLA body may have an objective reasonable need to receive information about the progress of advocate's execution of the assignment. However, the FLA body can demand the provision of such information only to the extent that it does not reveal the privileged information. This may include solely information about: completion of the assignment; stage of the proceedings; whether the reports have been submitted by under assignment.

The requirement to provide information about the legal position in the case, the execution of certain actions, the content of confidential communication with client; content of court decisions; the motives of the advocate's actions or decisions clearly contradict the confidential nature of privileged information.

However, according to s. 4 of Art. 22 of the Law "On the Bar and Practice of Law" *in the event that the client sues an advocate in connection with the professional activity, the advocate is released from the obligation to maintain privilege within the limits necessary to protect his rights and interests.* Therefore, when FLA bodies receive complaints from clients, the advocate has the right to provide the FLA body with the amount of information deemed sufficient. However, the provision of privileged information is exclusively the right, and not an obligation of the advocate.

It is appropriate to note that FLA bodies practice obtaining information from advocates by demanding explanatory notes and reports. However, the proposal to submit such documents is incompatible with the contractual nature of the relationship between FLA bodies and advocates.

At the same time, public denial of such facts by the CC management are refuted by the presence of numerous examples of such documents in the materials submitted to the Quality Commissions, as well as by the content of s. 9 of the Model Contract, according to which *the advocate is responsible for reliability of the information submitted to the Center, including the deeds, calculations and annexes thereto, as well as reports, certificates, statistical data and other documents of the said reporting, which is the basis for payment of the advocate's services.*

FLA centers, after receiving complaints from FLA recipients on the actions/inaction of advocates, conduct an inspection of advocate's work, take written explanations therefrom, without having any authority to do so. Advocates, realizing that they may not sign a contract for the next year, provide the said written explanations addressed to the Head of the FLA Center.

Not all complaints are sent by the FLA centers to the Quality Commissions; submission is rather selective, occurs typically in the presence of gross, obvious violations committed by an advocate. This is a violation, since the FLA center does not have the authority to check/evaluate the quality of the advocate's work.

Thus, the declared high quality rating of the work of advocates in the FLA system, is impossible to verify independently.

It is not regulated which copies of documents concerning the advocate the FLA center provides to the Quality Commission for inspection. In practice, the following documents are submitted: submission for the verification, a copy of a citizen's complaint and FLA assignment. Other documents provided at the request of the Commission to the FLA center, although the documents related to the execution of the assignment, available at the FLA center, should be provided to the Commission immediately, so as not to generate unnecessary correspondence and additional work.

By selectively sending complaints to the Quality Commission, the FLA centers hold a leverage over advocate, by way of discretion - whether to forward the complaint against advocate to the Quality Commission for consideration upon receipt of advocate's written explanation, or not.

Decisions of the Quality Commission are advisory in nature. Accordingly, if the Commission recognized advocate's work as not meeting quality standards and recommended not to conclude a contract with him, then it is only a recommendation as well.

Bottomline

Consideration of complaints against advocates by FLA bodies is unacceptable. The legitimate behavior of FLA bodies upon receiving a complaint is to send this complaint to appropriate authorities (to the disciplinary body of the Bar self-government or to the Quality Commission). FLA Center's demands for advocates to provide information on the provision of legal aid are valid only with regard to the following information: completion of the assignment; current stage of the proceedings; whether the advocate submitted the report pertaining to the assignment.

The practice of FLA centers obtaining reports, explanations, explanations, and other similar documents from advocates is not based on current legislation.

The specified shortcomings can be corrected through the deliberate advocates' opposition to the clearly illegal activity of FLA bodies; one important way for elimination of this shortcoming is to provide clarifications for advocates.

Suggestions to advocates

It should be clarified that the advocate is not obliged to participate in any procedures for consideration of complaints against advocates by the FLA bodies, given that the FLA bodies do not have the right to consider such complaints.

It should be clarified that at the request of the FLA bodies, the advocate is obliged to provide information exclusively the following information: completion of the assignment; current stage of the proceedings; whether the advocate submitted the report pertaining to the assignment. Provision of other information to the FLA authorities in the event of client's claims against the advocate lies within exclusive discretion of an advocate.

To clarify, that the contractual nature of the relationship between advocates and FLA bodies makes it impossible for advocates to submit to FLA bodies such documents as reports, explanations, explanatory notes and other similar documents, which belong to the relations of authority and subordination.

Suggestions to CC

Immediately refrain from the practice of considering complaints against advocates by the FLA authorities, given its inconsistency with current legislation; in the future use the mechanisms of advocate's disciplinary responsibility set by law, and the track of assessing the quality, completeness and timeliness of advocates' free legal aid by relevant Commissions.

Terminate the practice of demanding privileged information from advocates.

Stop the practice of inducing advocates to submit such documents as reports, explanations, explanatory notes, and other similar documents to FLA bodies.

CONCLUSION #5-z OF THE UNBA FLA COMMITTEE

regarding certain aspects of maintaining professional privilege in the FLA system

The general principles of participation of an advocate in criminal proceedings are determined by the Code of Criminal Procedure, the Law of Ukraine "On the Bar and Practice of Law", and the Rules of Professional Conduct.

Audience rights of FSLA advocate are the same as the rights of an advocate under contract. The Law of Ukraine "On the Bar and Practice of Law" and the Rules of Professional Conduct equally apply to FSLA advocates.

During the defense, the advocate must proceed exclusively from the priority of his client's interests, which is directly enshrined in Art. 8 of the Rules of Professional Conduct.

The question of the inadmissibility of the FLA centers and the Ministry of Justice violating professional privilege, accessing advocate's dossier etc., has been raised repeatedly.

In particular, the Bar Council of Ukraine discussed the issue the online meeting on August 5, 2020 and came to the conclusion that *peer review* can be applied exclusively to FSLA advocates in simplified proceedings, and advocates work exclusively under the control and procedures set by the Bar Council of Ukraine. The latter ensures the independence of the Bar, and reserved the right of Quality Commissions established by RBCs to carry out relevant reviews.

However, until now, FSLA advocates assigned by Centers are forced to attach originals or self-certified copies of procedural documents to the deeds to confirm their participation in the case, and in certain cases - protocols reflecting client's approval of the legal strategy, which is unacceptable under the Rules of Professional Conduct.

In addition, in accordance with part 4 of the Quality Standards for the Provision of Free Legal Aid in Civil and Administrative proceedings and defense in criminal proceedings, approved by the order of the Ministry of Justice dated 21.12.2017 #4125/5, the monitoring of the quality of the free secondary legal aid is carried out by the CC and RCs. At the same time, access is provided to the entirety of advocate's dossier, as well as to individual procedural documents covered by professional privilege. At the same time, the specified standards do not define the circle of CC and RC employees that can conduct the monitoring.

In fact, an FSLA advocate is placed in the framework of a choice between receiving payment for the legal aid provided and preserving the professional privilege.

At the same time, according to part 2 art. 22 of the relevant Law, information or documents may lose coverage of privilege upon written consent of the client (a person who was refused to conclude a legal aid agreement on the grounds provided for by this Law). The same article stipulates that the advocate is released from liability entailing disclosure of professional privilege only if the client lodges claims against the advocate. In connection with the practice of law, the advocate is released from the obligation to maintain legal privilege within the limits necessary for the protection of his rights and interests, and for submission to the central body of the executive power, which implements the state policy in the field of prevention and countermeasures against the legalization (laundering) of income, obtained through crime, financing of terrorism

and financing the distribution of weapons of mass destruction, information about financial transactions, even if such actions caused damage to legal entities or individuals, and for other actions, if he acted within the framework of the implementation of the Law of Ukraine "On Prevention and Counteraction of Legalization (Laundering) of Criminal Proceeds, the financing of terrorism and the financing of the proliferation of weapons of mass destruction".

According to art. 23 of the relevant Law, it is forbidden to demand from the advocate the provision of information covered by professional privilege, and to review documents related to the legal practice.

Thus, it is necessary to immediately stop the practice of violating professional privilege at the request of FLA centers, as well as make the necessary changes to the Quality Standards for the provision of free legal aid in civil and administrative proceedings and representation in criminal proceedings, approved by the order of the Ministry of Justice dated 21.12.2017 #4125/5.



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