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# Improving the legal services in Ukraine



In collaboration with:



UKRAINIAN NATIONAL  
BAR ASSOCIATION



The Ukrainian National Bar Association (UNBA), a member of the International Bar Association (IBA), asked for assistance in relation to certain problems that it was facing, in particular regarding:

- whether advocates should have a monopoly of representation rights in the courts
- how it should develop its continuing legal education for advocates, and
- how it should establish compulsory professional indemnity insurance for advocates.

The IBA, through the Bar Issues Commission provided the necessary financing through the Public and Professional Interest Division's Activity Fund, so that – in cooperation with the Council of Bars and Law Societies of Europe (CCBE) and the European Lawyers Foundation (ELF) – it could arrange an exploratory visit to Kiev, and then organise a conference for Ukrainian advocates to deal with the issues raised.

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# Improving the quality of legal services in Ukraine

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# Introduction

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This report can be a source of pride to the International Bar Association (IBA) which financed it. The Ukrainian National Bar Association (UNBA), a member of the IBA, asked for assistance in relation to certain problems it was facing, in particular regarding:

- whether advocates should have a monopoly of representation rights in the courts
- how it should develop its continuing legal education for advocates, and
- how it should establish compulsory professional indemnity insurance for advocates.

The IBA, through the Bar Issues Commission (BIC), rightly thought that this fell within its core responsibilities, and provided the necessary financing through the Public and Professional Interest Division's Activity Fund, so that – in cooperation with the Council of Bars and Law Societies of Europe (CCBE) and the European Lawyers Foundation (ELF) – it could arrange an exploratory visit to Kiev, and then organise a conference for Ukrainian advocates to deal with the issues raised.

The detailed list of recommendations in the next few pages speaks for itself. This long list is useful not only for the UNBA, but also for other developing bars which face similar problems. Following that, in the conference report, there are very full explanations of the background leading to the recommendations. Of particular use – to both developing and developed bars - are the descriptions of independent research into why regulation of the legal profession is necessary to guarantee access to justice, economic growth, and the rule of law.

Several people should be thanked for their contributions to the success of this project: Péter Köves (Vice Chair of the BIC) for drafting the report, Alonso Hernandez-Pinzon (Managing Director of the ELF) and Sieglinde Gamsjäger (Senior Legal Advisor of the CCBE) for organising the visit and the conference, and Andriy Kostin (Member of the Odessa Regional Bar Council and Chair of the International Relations Committee of the UNBA) for reviewing the report and being responsible for the Ukrainian side of the arrangements.

*Jonathan Goldsmith*

*(BIC Officer when the application for funding for this project was submitted in 2014)*

*January 2016*

## Recommendations

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### *Exclusive right to represent physical or legal persons in civil and administrative cases*

- It is recommended that advocates regulated by the Regional Bar Associations and/or the Ukrainian National Bar Association are exclusively authorised by law to represent physical or legal persons in any civil, business or administrative procedures before any Ukrainian ordinary or arbitration Courts.
- This exclusive authorisation is extended to both contentious (judicial) and non-contentious (extra-judicial) procedures.
- Legal advisors employed by legal persons including the public administration are excluded from the exclusive rights of advocates.
- The Law On Advocacy and Advocates' Activity as well as all procedural laws regulating judicial (civil, administrative, commercial, arbitral, etc.) or extra judicial procedure before any type or level of the Courts in Ukraine should be amended accordingly.
- The Ukrainian National Bar Association should prepare and issue recommendations for advocates regarding the conditions enabling advocates to practise properly under these new conditions.

### *Selecting the procedures in which legal representation is mandatory*

- It is recommended that every and all judicial and extra-judicial process is reviewed in order to select those in which legal representation for both physical and legal persons should be made mandatory.
- The Ministry of Justice, together with the judiciary and advocates, should review all such procedures to make them more efficient by introducing mandatory representation.
- The procedural law should be amended accordingly after such a review.

### *Preparation for unification of the legal profession in Ukraine*

- It is recommended that a roadmap is prepared for the unification of the legal profession in Ukraine.
- This roadmap should contain a provision that after a specific adaptation period of a rational length of time any lawyers not currently members of the Regional Bar Associations and the Ukrainian National Bar Association can freely join the Bar Associations under the same conditions as any other advocate.
- During the adaptation period, the newly joining lawyer's right to represent can be limited by the requirement to take courses set by the Ukrainian National Bar Association.
- After the unification of the legal profession is concluded, only regulated advocates should be entitled to provide legal services, including providing legal advice and drafting contracts as a professional activity.
- The Law On Advocacy and Advocates' Activity should be amended to enable the implementation of the roadmap for unification of the legal profession, and to introduce new forms to practise advocacy.

### *Adaptation of the Code of Ethics of the Ukrainian Bar Association*

- It is recommended that the Code of Ethics of the Ukrainian National Bar Association should be reviewed, and where necessary amended, to cater for the changes contained in these Recommendations.
- It is also recommended that the disciplinary procedures conducted by the local Bars and the Ukrainian National Bar Association should be streamlined in accordance with the guidelines of the CCBE and the IBA.

### *Introduction of professional indemnity insurance for advocates*

- It is recommended that professional indemnity insurance should be introduced for advocates alongside with the exclusive right to represent clients before the Ukrainian Courts, in line with the guidelines of the CCBE and the IBA.
- It is also recommended that a working group should be established jointly between the representatives of the insurance industry and the Ukrainian National Bar Association to work out a professional indemnity insurance system which provides affordable professional indemnity insurance for each advocate.
- The Ukrainian National Bar Association should thoroughly review the option that the Ukrainian National Bar Association itself conclude professional indemnity insurance for all of its advocate members, to allocate the risk for the initial period.
- If an affordable professional indemnity insurance scheme is worked out, it should be mandatory for all advocates.

### *Enhancing Continuing Legal Education for advocates*

- It is recommended that the Ukrainian National Bar Association should develop further its continuing professional education programme in line with the guidelines of the CCBE and the IBA.

### *Restructuring the Ukrainian Legal Aid System*

- It is recommended that a working group be established in which the Ministry of Justice together with the Ukrainian National Bar Association can review the legal aid system in Ukraine.
- The legal aid system should be made more available and more affordable to all citizens
- The working group should work out a proposal which ensures the active participation of the Ukrainian National Bar Association in the administration of the Ukrainian legal aid system.

### *Use of foreign experience*

- It is recommended to use the experiences of the CCBE and IBA when dealing with the various topics set out in these Recommendations.

# Context

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## Background

Following a request for assistance from the Ukrainian National Bar Association (UNBA) in June 2014, which was addressed to both the CCBE and the IBA, the IBA and the CCBE (in cooperation with the European Lawyers Foundation - ELF) agreed to join forces in providing support to the UNBA. A joint project proposal was developed - in coordination with the UNBA - with the object of organising a conference with the UNBA in May / June 2015 on topics of particular interest to the legal profession in Ukraine. The project proposal was approved by the CCBE and IBA at their meetings in October 2014.

## Visit to Kiev on 18-19 February 2015

An IBA CCBE delegation went to Kiev on 18<sup>th</sup> and 19<sup>th</sup> February 2015, in order to meet with representatives of the Ministry of Justice, Council of Europe, EU Super-Twinning programme, American Bar Association Rule of Law Initiative (ABA ROLI) and the UNBA. (The IBA/CCBE delegation was composed of Péter Köves, vice-chair of the Bar Issues Commission, IBA; Rytis Jokubauskas, outgoing vice-chair of the CCBE PECO committee; and Sieglinde Gamsjäger, CCBE secretariat.) The aim of the visit was to see what support would be most beneficial to the Bar and also to make sure that there was no overlap of the planned conference with activities of other organisations on the ground. The delegation received invaluable assistance from Andriy Kostin, the Chair of the International Relations Committee of UNBA.

The delegation observed that Ukraine was carrying out a judicial reform under the umbrella of the President. The National Council of Reforms was working on the details of the reform (and various working groups had been set up to look into specific areas). Five advocates were on the Council, however, no official representative of the UNBA. The President of the UNBA raised her concerns about the composition and the lack of an official representative of the UNBA. Oleksiy Filatov was heading this work (Deputy Head of the Presidential Administration and member of the Kyiv Regional Bar Association).

## Meetings of the Delegation

### *Meeting with the Ministry of Justice*

The delegation visited the Ministry of Justice where it was welcome by Natalia Sevostyanova, the First Deputy Minister. The First Deputy Minister thanked the delegation for the interest and active involvement of the IBA, CCBE and ELF in issues concerning the advocate's profession.

The Minister and deputies are all former advocates. They know the situation of the Bar Association well. The Ministry is willing to provide assistance to the Bar Association where needed.

As part of the 'activity programme 2014', the Ministry proposed amendments to the Law on the Bar last year. A working group was set up in March 2014. At the end of April, the First Deputy Minister submitted draft amendments to the Bar Association and asked to have internal discussions / provide feedback on these amendments. The UNBA prepared an alternative draft law. They were able to merge both drafts into a single draft. The draft was sent to the Council of Europe for comments. On 2 December 2014, a group of MPs put forward amendments to the Law on the Bar. The Ministry of Justice considered the proposals of the Council of Europe and introduced changes in their draft. The draft was sent to the Bar Association on 30 January 2015.

The delegation invited the Ministry to attend their conference. An official, written invitation will be circulated in due course. The First Deputy Minister thanked the delegation for the invitation. She noted that the main topic to be discussed was reflected in the amendments to the Law on the Bar. The Ministry will not take a stance on how advocates should do their work. It is the Bar Association which should come up with proposals. They hope that the judicial reforms will also help the profession. They are open to dialogue.

The Ministry issued a press release on the visit of the delegation.

### ***Meeting with the Ukrainian National Bar Association (UNBA)***

The Delegation met with the President of UNBA, Lydia Izovitova, who explained that it took 17 years to agree on the Law for a unified, national Bar Association (Law). After the Maidan events the previous year, there was a feeling that the Law needed to be amended, although it was only adopted in July 2012.

The Congress of the UNBA which took place in April 2014 adopted some proposals re amendments to the Law. These were sent to the Ministry of Justice and the Presidential office. The UNBA proposals suggested (inter alia) that only lawyers can represent citizens in court proceedings (civil and administrative). The Bar Association had the impression that the Ministry and Presidential office were happy with the draft amendments of the UNBA. However, now three different texts of draft legislation were pending before Parliament. One of the drafts proposes to go back to the Law of 1992. This proposal was brought by one of the former Heads of the Supreme Qualifying Commission.

It is important to have the support of European and international representatives of the legal profession as far as rights of audience of lawyers are concerned. The UNBA would appreciate to receive a letter of support from the IBA and CCBE as far as rights of audience are concerned.

The Law says that an advocate can have insurance. The problem is, however, that no company provides insurance contracts. It would be important to give recommendations to insurance companies.

The UNBA is very active as far as continuous legal education is concerned. They organise seminars and issue on a regular basis information letters. They have a very well developed website which provides links to documents and videos of training sessions. They had roundtables, in particular on the new criminal procedural code. Regional councils benefit from the seminars and roundtables that are organised at national level. Trainers are sent to the regions.

The UNBA issued a press release on the visit of the delegation.

### ***Meeting with EU “Super-Twinning Project “Support to Justice Sector Reforms in Ukraine”***

The delegation learned that the EU supports Ukraine’s efforts to build a justice system based on the principles of the rule of law through this Project. It is a three-year initiative to share experiences and best practices between Ukrainian authorities and experts from the Member States. The Project brings together all the justice sector stakeholders and assists with the development and implementation of a comprehensive reform strategy.

It was explained that their main current activity regarding the legal profession is the proposed ‘Advocate’s declaration on criminal justice’. The declaration will set out what advocates see as requirements in the criminal justice area (as far as the functioning of courts, court proceedings etc. is concerned) The declaration will have five sections (independence of the judiciary, legal reform/implementation, legal aid, protection of the work of advocates and access to justice). (The declaration does not deal with insurance.) The declaration should strengthen the voice of lawyers which is not sufficiently heard at this stage. The intention was that the declaration will be presented to the public in April or May 2015.

There was no overlap between the Project and the proposed conference topics. There were no large events planned for May or June 2015. It was thought useful to involve insurance companies in the conference.

### ***Meeting with the American Bar Association Rule of Law Initiative (ABA ROLI)***



The delegation learned that ABA ROLI works mostly on criminal (procedural) law related issues. They also work closely with the Ministry on legal aid issues and training of legal aid lawyers. Currently, they provide training to trainers from the regions – 3-4 trainers from each region for 5 days. The training is targeted at legal aid lawyers working in legal aid coordination centres, but they are open to work with all advocates. Ukraine provides free legal aid in criminal cases. This is to be extended to civil and administrative cases. It might be difficult given the economic crisis. It was explained that the Canadian government also runs a project which aims to increase equitable access to justice for Ukrainian citizens, particularly individuals from marginalised groups.

Last year, ABA ROLI had a big conference on ‘Quality standards within the profession’. It was specifically for legal aid advocates. The conference’s aim was to trigger some discussion. They also carried out training on trial skills (after the entry into force of the new criminal procedural code).

There was no overlap of their work with the proposed Conference themes. The structure and administration of continuous legal education is not part of their ‘implementation programme’. They did not plan any major event in May or June 2015.

### ***Meeting with the Council of Europe***

The delegation learned that the Council of Europe runs a joint project with the European Union. It has a judicial component but is also relates to the Bar Association and advocate’s profession. The project is in the inception phase (6 months). It covers discipline/ethics and training (improving qualifications and CLE). It also provides for a workshop with the Bar Association on quality control and management. Part will relate to the register of the Bar Association. The project will also cover amendments to the Law. The first activities will start in 3-4 months.

There was also discussion on the draft law. There were currently three competing drafts concerning amendments to the law on the Bar. The Ministry had prepared a draft. The Council of Europe had provided its comments. Then the Presidential Office had also prepared a draft. Some MPs had also drafted amendments. The Council of Europe had encouraged the authorities and MPs to work on a consolidated version. The Council of Europe will give its opinion on the consolidated version (if asked). They had provided the authorities with a list of standards which they should have in mind when working on the consolidated version (and reforms overall).

The First Deputy Minister of Justice had been very supportive of the work of the Council of Europe. The Presidential Office was an important body. Representatives (in particular Mr Filatov) should be invited to the conference. Whatever law or amendments to the law were planned, they will need to ‘pass’ the Presidential Office.

### **Outcome of meetings**

The proposed dates for the 2 days conference were, therefore, 5<sup>th</sup> and 6<sup>th</sup> June 2015.

The UNBA confirmed that the themes proposed last year (rights of audience; continuous legal education; and civil liability insurance) were still topical issues. It was agreed to add ethics / discipline to the list of topics.

Rights of audience would be the central theme. The aim was to highlight the importance of lawyers representing citizens in court proceedings. Currently, anyone can represent citizens in civil court proceedings in Ukraine. Having lawyers representing citizens in court proceedings is in the interest of a well-functioning administration of justice and it means lower costs overall. (It is important to note that the Bar Association had been pushing for lawyers’ representation in civil court proceedings and suggested amendments to the relevant laws in that respect. It might be that these amendments would pass Parliament before the

conference, but even if so, it would be good to have a discussion about this topic. Three draft laws - providing for amendments to the Law - were currently pending before Parliament, and a fourth one was expected.

Day 1 of the Conference would be dedicated to 'rights of audience'. It was agreed that economists should be invited to this first day (morning session) to give their views from an economic point of view. (Copenhagen Economics and Professor Yarrow - who were well-known to the CCBE through previous work - dealt with these issues and might be best suited to intervene.) The afternoon of the first day should focus on a comparative analysis of rights of audience in European countries. It might be necessary to do some fact-finding in advance of the conference. The CCBE had gathered data in 2013 about lawyers' representation in court proceedings, but it would need to be updated / extended to more countries.

It was important to have representatives of public authorities participate in this Day 1.

Day 2 of the conference would focus on topics 'related' to rights of audience (Continuous Legal Education, ethics / discipline and civil liability insurance). The themes went hand in hand with the central theme 'Rights of audience'. The aim of the second day was to emphasise the importance of having well-trained lawyers, who adhere to a code of ethics, are subject to a disciplinary regime, and who possess civil liability insurance.

The UNBA felt that it would be good if there were continuous activities with the IBA and CCBE. The conference in June should not be the last event. Both organisations would consider how they could provide continuous assistance to the UNBA. Legal aid was mentioned as one of the topics of high interest to the UNBA (and an area where they wished for support to bring about changes to the current regime). Currently, the provision of legal aid was supervised by the Ministry of Justice. Legal aid was provided through legal aid coordination centres by lawyers who have to undergo a special competition (organised by the Ministry of Justice) and are paid a monthly salary. The Bar Association would like to have more involvement in this process. They see the current system as being in contradiction with an independent profession.

## Conference

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### Conference “Handyman or Professional? – Representation by Advocates in Court” in Kiev on 5-6 June 2015

The conference, “Handyman or Professional? – Representation by Advocates in Court”, was held in the President Hotel in Kiev on 5<sup>th</sup> and 6<sup>th</sup> June 2015. The Conference was attended by the Presidential Office and government officials, judges and over 70 Ukrainian advocates. Unfortunately, the Ukrainian Parliament, the Rada, set 5<sup>th</sup> June for “direct questions day”, which prevented more officials and MPs from attending.

#### *Opening speech by Lidiya Izovitova, President of the UNBA, Ukraine*

The conference was opened by Lidiya Izovitova, the President of the UNBA. She expressed the view that the quality of legal representation of citizens in Ukraine before the Courts should be improved. The 35,000 advocates who are members of the UNBA member Regional Bar Associations are not enough to cover all aspects of legal representation, therefore the UNBA is only asking that legal representatives before the Courts – apart from lawyers who are employed by companies or the administration – should be only advocates who are members of the UNBA Regional Bar Associations. A self-governing Bar Association, which can maintain the quality of legal work ultimately through its disciplinary procedures, is the only actor which could as an organisation improve the quality of legal representation before the Courts.

After initial discussion, it was made clear to the UNBA that the Courts are supportive of this idea and that it would also be beneficial for the State. The State had also taken the first step, because as of 1st July 2015 a legal aid service could only be provided by an advocate, but it is a question of how representation should be structured in the future.

She also raised the question of professional insurance and mentioned the current debates as to whether it should be voluntary or mandatory.

The President of the UNBA did not avoid talking about the question of the unification of the legal profession. Her opinion was that lawyer entrepreneurs do not know what it means to be an advocate, and the UNBA member Regional Bar Associations had very bad experiences with lawyer entrepreneurs joining the Bar Associations. Therefore, she believed that it is too early to talk about full unity of the profession. The first step would be to reserve court work for lawyers. It was also true that under the current economic and political situation in Ukraine there was not enough work even for advocates.

However, she expressed the view that the UNBA is very open to suggestion and would like to follow European best practices.

#### *Opening speech by Martin Šolc, Former President of the Czech Bar Association, Vice-President of the IBA, Czech Republic*

The second opening speech was made by Martin Šolc, the Vice President of the IBA. First he introduced the IBA, and mentioned that it was probably the most influential worldwide organisation of the legal profession. He also mentioned that the IBA has broad experience in helping bar associations, even to create them in jurisdictions where there was no bar association before.

He emphasised that the UNBA and the Ukrainian legal profession has a unique opportunity to decide the best way to structure their own profession, and their own future. He admitted that the current political-economical situation is not helpful for the Ukrainian legal profession, but he was sure that the situation will

get better and will provide new challenges. The UNBA and Ukrainian legal profession should not only reflect the present but should be prepared for the future, when new regulations for the legal profession will be prepared.

He pointed out that the political-economic changes will significantly change the profile of the legal profession in the future. Taking the Czech example, over 20 years the number of lawyers increased by 10 times and the revenue of lawyers by 500 times. Traditionally, Czech lawyers spent 80% of their time at the Courts, and only 20% with contract work. Now it is just the opposite. 20% is spent in court work, and 80% in contract work. This is the future for which the Ukrainian legal profession has to be prepared, and the Ukrainian legal profession now has the opportunity to avoid the mistakes which the Czech legal profession made over the last 20 years.

***Keynote speech by Viktor Korolenko, Head of Judiciary Department of the President's Office, Ukraine***

The speaker was Victor Korolenko who works in the Ukrainian President's Administration responsible for judicial reform. He said that out of the three working groups preparing the reforms, two are dealing with the Courts. The exclusive legal representation by advocates before the Courts is an issue to be discussed, because it could increase efficiency and lead to quicker procedures. Ukrainian traditions teach that one has to be careful with the unification of the legal profession, because it needs to provide an acceptable level of income for all members. Therefore an action plan is recommended. He emphasised that proposals by the UNBA regarding the judiciary are welcome. The Presidential Administration is open to discuss them with the judiciary. He also said that disciplinary procedures within the Bar Association have to be strengthened, and it is necessary to study experiences from other countries in this regard.

***Introductory speech by Martin Šolc to the Theme of Day 1 "The representation by advocates in courts: an economic and comparative view"***

Martin Šolc, the Chair of Day 1 of the Conference, introduced the theme of the day: "The representation by advocates in courts: an economic and comparative view".

He started his introduction by saying that at the beginning of each reform process in any country there is a lot of talk about the economy and improvement of the economy, but if something goes wrong then immediately the legal system becomes responsible. Even in his own country, there was a lot of talk about the failures made by the legal system, and whether strong enough legal measures were introduced to avoid corruption and to maintain the rule of law.

It is the task of the Bar Association and the legal profession to explain what the rule of law means. It not only means the law in books but also their proper enforcement. He quoted some figures from the Rule of Law Index supported by the American Bar Association in which Ukraine achieved bad results in terms of efficiency of the judicial system, especially in fighting government corruption. It is therefore very important that mandatory representation by advocates before the Court should be discussed, and whether the introduction of mandatory representation would result in improving results in the Rule of Law Index. He also said that mandatory representation in all legal services would have a bigger impact on the Rule of Law Index. However, he understands that today's discussion is only about court representation.

Court representation is a proper place to start because judicial activity is always in the public eye. Advocacy before the Court is not only a service to the client, but at the same time a service to justice itself, because it is a part of the judicial system. If this is taken into consideration, there is no alternative to mandatory representation by advocates.

He explained that the first reason for the lack of real alternatives is professionalism. Only advocates are properly trained and regulated to ensure proper access to justice. If someone with a different qualification represents someone else before the Courts and there is a failure, not only that person is criticised but the whole judicial system is blamed. As far as the question of whether someone with a law degree who is not an advocate could represent another person before the Courts, the question could be asked what could be the reason that two lawyers who want to represent a client before the Courts should be subject to different rules. The answer is simply 'No reason', because a level playing field is absolutely necessary. This means the same professionalism, the same ethical rules, the same disciplinary rules. To protect the client with professional indemnity insurance if the aim is to improve the situation in the judicial system. If someone is listing the reasons why not to give this right to the advocates, the monopoly is often mentioned. However, this is not a real monopoly because the legal profession is a liberal profession. It is open for every lawyer – and if not, that should be reviewed. There is no issue of cost of representation, because then there will be competition within the profession. If you take the example of the Czech Republic, where every lawyer who would like to provide a service to the public has to be a member of the Bar Association, you cannot find any negative impact of this monopoly; on the contrary, regulated lawyers provide better service to the public.

#### *Presentation of Henrik Ballebye Okholm, partner and director of Copenhagen Economics, Denmark*

Before his current portfolio, Henrik Ballebye Okholm used to work as an economic analyst for regulated professions in Copenhagen Economics. He said that interestingly the situation in Denmark is somewhat the opposite than in Ukraine because traditionally only advocates, who are members of the Bar Association, can represent clients before the Courts and now the government is considering to liberalise these rules. However, he and his colleagues at Copenhagen Economics prepared a report about the pros and cons of more liberalisation, and he will introduce the results in his presentation. He touches three topics as result of their findings.

The first is that allowing non advocates to represent clients before the Courts has a big impact not only on the advocate-client relationship, but also on society and the economy. The second is the legal market, where there is a high risk of quality issues as a result of market characteristics because the market itself is not capable of ensuring high quality in legal services. He will finish with giving some examples from other countries.

With regard to the first topic, he emphasised that a properly-functioning legal system is very important for the economy and its development. Society and the economy must trust in the legal system; otherwise they will malfunction. This also requires good support from the legal profession. He underlined that a well prepared, well-regulated advocacy has a major impact on the judicial system. First of all, it increases the efficiency of the judicial system because a good preparation of cases by advocates help judges to judge the case more quickly, and of course it increases the chance that the Court will give the right ruling. This helps the whole society to understand what can they expect in a similar legal situation. Therefore the spillover effects of quality legal services ensured by advocates cannot be underestimated.

He said that it is very important to understand that the market itself is not capable of providing the above effect. The legal service is a very special good, because the quality cannot be assessed before it is provided. It is especially difficult for individuals or small companies to assess whether an advocate would be able to provide the right quality service. Therefore, external assurance of the right quality has to be established. This situation is called by economists 'asymmetrical information', because usually the client is not capable of assessing the quality of service the lawyer provided. The result of asymmetrical information is what is called 'moral hazard' - that the client is not capable of measuring whether the lawyer has spent enough time on the case or is not sufficiently prepared. If no external support is provided for clients regarding quality, then it leads to declining quality because good quality advice is not properly paid for. As a consequence, the risk

of receiving a product of low quality tends to reduce consumers' willingness to pay, rendering the market unprofitable for those sellers who actually provide a product of high quality – this phenomenon is often called adverse selection, as it leads to a lower average quality in the entire market.

The risk associated with allowing non-lawyers to represent in Court is that of reduced quality in the entire legal profession. Because non-lawyers are subjected to fewer regulatory requirements than lawyers, they will dilute the average quality in the profession, according to the logic of moral hazard and adverse selection.

The most obvious mechanism to reduce the risk is regulation. In most countries, only lawyers are allowed to represent their clients in Court. Since lawyers are subjected to various regulatory requirements, such as high educational standards, ethical guidelines and external supervision, clients can expect a reasonable quality of service even when the market is characterised by asymmetric information.

Usually reputation is also mentioned as reducing the risk. However, it can be used in the legal market with great difficulties. First of all, private individuals do not use legal services very often and the second problem with reputation results from the asymmetrical information problem. Other methods do not work, either, and therefore from an economist's point of view regulation is the best way to ensure high quality, which also means that only regulated professionals such as advocates can represent clients before the Courts.

He said that the usual argument against such regulation is the competition argument i.e. regulation reduces competition because the regulation that only advocates can represent clients before the Court reduces the number of service providers, thus reducing competition. To counterbalance this argument, the number of advocates has to be reviewed, because if there is sufficient number, there will be a natural competition within the advocates' profession.

The other issue which should be taken into consideration is how accessible the advocacy profession might be to other lawyers. It has to be ensured that the profession is accessible and that not too many restrictions are applied. The UNBA should go for a regulation which ensures quality but at the same time does not reduce competition. If it is done properly, then the monopoly of advocates representing clients before the Court will be just such a regulation, providing high quality without restricting competition.

He also outlined the empirical evidences that supports the above theory. A survey in Denmark showed that for individual clients quality is the most important factor when using legal services, and quality can only be provided by regulation. Price and reputation were low on the importance list for selection. Lawyers, being highly skilled professionals, will face competition from non-lawyers only in simple cases, with low value to the client.

The presence of presumably cheaper non-lawyers will instead lead to a higher number of cases in Court. This is because individuals weigh the costs of pursuing a civil case against the potential value, before deciding to proceed to Court. More cases will lead to higher procedural costs, that are partly borne by taxpayers.

*Presentation of Dr Christopher Decker, Research Fellow, Law and Economics, Centre for Socio-Legal Studies, Oxford University and a Senior Research Associate, Regulatory Policy Institute, Oxford, United Kingdom*

The next speaker was Christopher Decker from Oxford University, who is also an advisor to the Legal Services Board of England and Wales.

He started his presentation with the old economic question "Why do some countries perform better in economic terms than others?" In this context, he posed three questions. The first: "Does economic analysis and evidence suggest the existence of a link between the quality of a legal system and economic welfare?" The second: "What is the relationship between lawyers and economic performance?" The third: "What distinguishes regulated professionals from other professionals?"

He emphasised that a substantial body of economic analysis and evidence suggests that well-functioning legal systems contribute to and facilitate economic development and performance. A large amount of empirical work suggests that law as an institution has a significant impact on economic performance, and better institutions - such as a legal system - results in better economic performance (because for commercial transactions a well-functioning legal system is necessary). In a market economy, where most of the market actors do not know each other personally, the well-functioning legal system provides the necessary confidence for economic transactions. Enforcement is also important, because if it is very difficult and costly to enforce your rights under a commercial transaction, that would impede development.

This implies the role of high quality lawyers in enforcing economic development. It is obvious that politicians play an important role in shaping the rule of law in a country, and the role of the judiciary is also obvious. However, he suggested that the legal profession also shapes the rule of law. Evidence suggests that the quality of lawyers is an important determinant of how a legal system functions.

The World Bank investigated the disappointing results in countries in which laws were introduced to establish and strengthen the rule of law. One of the factors described as a cause of the failure is the lack of quality in the legal profession, which does not have proper integrity and the necessary skills. It is obvious from the studies that is not enough to have high quality judges but a high quality legal profession also. Advocates should have integrity not only as individual lawyers, but also as a profession. A legal profession with integrity, a culture of professionalism and independence are important factors for good economic performance. It is also suggested by these studies that a high quality legal profession with integrity can only be achieved by regulation.

He emphasised that it is important to mention that not every regulation in proper anti-competitive regulation will lead to lower costs for economic transactions, because if each economic actor knows its rights and also knows that they are enforceable, it increases economic performance and does not require monopolisation. This is the spill-over effect of a regulated profession having certain rights such as mandatory representation before the Courts. This is why advocates are different from other professionals, because the legal profession has an impact on the social economic and moral landscape.

There is a connection between the independence of the legal profession, the implementation of law and the development of the rule of law. Historical examples show that where advocates are not sufficiently independent, this can affect which legal matters are challenged (i.e. which rights are enforced) and the manner in which they are challenged

There are different aspects of independence. First, advocates must be independent from the policy consequences of acting against the State. Second, advocates should also plead a case independently of their own personal views, which means that they cannot bring their own morality into a case, saying that a bad guy does not need to be properly represented. Third, advocates must be independent from public opinion e.g. even when defending criminals is not popular.

In summary, he said it is very important to mention that regulation and rights provided to advocates through regulation would have a positive effect on economic welfare.

### *Questions and comments*

Answering a question, Henrik Ballebye Okholm said that even in Denmark where legal advice is liberalised, representation before the Courts is reserved for advocates. He also emphasised that the first quality clients are seeking is competence, which means the education of advocates; the second is trust; and the third criterion for selection is specialised knowledge in law which is required by the client; and price comes only as fourth; and only the fifth is reputation, because reputation is very difficult to assess.

Of course, there are also social benefits for society. For example, in Denmark the majority of the cost of the Courts is paid by the national budget. So, if there are too many cases, the whole society should pay more. However, when an advocate is looking at a case professionally, and the case has no chance of success, it is not taken to Court and this would result in some savings for the national budget. It is also found that cases which are not taken to Court as a result of the work of advocates should not be taken to Court at all. It is also very important that those people who do not have the money to pay for the services of advocates should get free legal aid. He took an example from Sweden, where there is no obligation to use an advocate to represent somebody before the Court, anybody can do that. However, it is a very interesting empirical finding that Swedish people almost always use an advocate as their representative. When further research was done, it was found that one of the reasons for using almost exclusively advocates is that the Swedish Bar Association is very strong, which ensures high quality legal work. The second reason is that one needs court experience in order to represent a client, and obviously advocates have a big advantage there. Although it is possible to have low cost and low quality legal advice by others than advocates, they are not used.

In answering another question, Péter Köves said that in most EU countries there is a *de jure* mandatory representation by advocates before the Courts, and in the very few countries where there is no *de jure* monopoly, there is a *de facto* monopoly of regulated professionals, and it is quite clear there is no European EU country where unregulated legal professionals can represent clients before the Courts.

Martin Šolc also added that it is a very dangerous to look into countries where there is only a *de facto* monopoly of advocates, because each country has its own traditions, and unfortunately many of the previous socialist countries have a tendency to avoid regulations.

Regarding another question on legal aid, Martin Šolc emphasised that the State has to set up the legal aid system, and provide the financing for it, but it should not run the system; it should be run by advocates who are responsible to the Bar Association as their regulator and not to the State, because anything else would be a serious breach of independence. If it is run by the State, then advocates who are more friendly to the State would get more cases and only the Bar Association can make sure that the legal aid work is distributed on a fair basis.

*Presentation of Prof. Dr. Matthias Kilian, Hans-Soldan-Professor for Private Law, Business Law, Procedural Law and Law of the Legal Profession, Cologne University; Director, Soldan Institute For Law Practice Management, Cologne; member, Documentation Centre of The Law of The Legal Profession In Europe, Germany*

Prof. Dr. Matthias Kilian began with a general look at the meaning of mandatory professional legal representation in court procedures. Legal representation describes that a party to court proceedings is accompanied, guided and, of course, represented by a licensed legal professional, like a lawyer, solicitor, barrister or advocate in civil, criminal or administrative court proceedings. If legal representation in a court proceeding is mandatory, representation is usually linked to the right to be heard by the Court and the ability to invoke certain procedural rights pursuant to the applicable code of procedure. The opposite of litigation with mandatory representation by a professional is a procedural system in which private individuals are able to participate in court proceedings without professional guidance by lawyers. The most common legal terminology for such a scenario is "*per se* litigant" or "litigant in person". Taking such an approach is typical for the Common Law world and for the Nordic countries. It is based on the simple thought of personal freedom and self-responsibility in any circumstance of life. In contrast, Germany and the other jurisdictions built on the Roman Law system, consider an obligatory legal representation in Court as a prerequisite for effective court proceedings, the individual's success in litigation and thus, ultimately, for justice.

Representation by someone else than the party him- or herself does not necessarily mean representation by a member of the Bar Association. Being a member of a Bar Association and being a professional lawyer is not



necessarily the same thing – unless the provision of legal services in a jurisdiction and/or the representation of a party in court proceedings against payment is only lawful for a member of the Bar Association. While in some jurisdictions this is the case, in others it is sufficient to hold a law degree or to be deemed “competent” by the Court. Things get even more complicated when you take into consideration that a legal system can further distinguish between different instances within a court system or between different court systems as such. It may, for example, be necessary to employ the services of a lawyer before a regional court or a Court of Appeals, but not so before a local court which has jurisdiction for low-value claims. Or the approach is different for civil courts and, say, administrative or tax courts – maybe because they follow different procedural rules, with one court system being inquisitorial in nature and the other more contradictory, maybe because one system, for historical reasons, is a court in the traditional sense whereas the other is more akin to a tribunal. He made all these distinctions right at the beginning of his presentation to make the audience aware of the fact that it is very difficult to generalise when discussing the issue of representation in Courts, and that one must avoid thinking in black and white.

To get to the bottom of the advantages and disadvantages of mandatory legal representation in civil Courts, he gave an insight into some details of the approaches taken across Europe. In the first part of his analysis, details would be provided regarding the existing rules of representation by legal professionals in civil court proceedings in Germany and other selected European countries. In the second part, focus would be on what insight empirical research can provide into the matter by looking at research on the effects of legal representation on the outcomes of court proceedings. Finally, some conclusions would be drawn about the importance of professional legal advice and representation when a layperson decides to go to Court.

He began his comparative analysis by explaining the representation in civil Courts in Germany.

The German code of civil procedure stipulates that in some cases a party to a proceeding before a civil Court must be represented by an advocate who is a member of the Bar Association, while in other cases a party is free to act on his or her own. Whether a claimant needs to be represented in a Court action or not depends on the court of jurisdiction and the amount in dispute. The representation of an advocate is mandatory for civil and commercial cases heard before the Regional Courts (Landgericht). They have jurisdiction in cases in which the amount in dispute is more than 5.000 Euros. Representation can only be by a member of the Bar Association, meaning that German advocates enjoy monopoly rights in this type of proceedings, since the representative who pleads the case must be a bar member. Consequently, if a litigant appears at a court proceeding without a member of the Bar Association representing her in cases of mandatory representation, the litigant is not allowed to take any action herself and is regarded as being absent. Only in a Local Court (Amtsgericht) may a litigant bring a court action without being represented (except in family cases). The Local Court has, roughly speaking, jurisdiction for cases with a value of less than 5.000 Euros. Such proceedings are usually rather straightforward, a limited amount is at stake and the presiding judge is provided with sufficient procedural authority to guide ‘*per se* litigants’ through the court procedure without legal representation. If a party wants to be represented, not anybody can be a representative. The law stipulates that representation by a member of the Bar Association is the norm. Other than that, the law only allows representation by an employee, family members of legal age and consumer advice bureaux. Law graduates who are not a member of the Bar Association and who do not fall in one of the above categories can only represent a party *pro bono*.

This does not mean that before the local courts most litigants are litigants in person. It is an interesting piece of statistical information that only roughly a fifth of all litigants in Germany are unrepresented in proceedings where they have the options to instruct a lawyer or represent themselves. Unrepresented litigants are more likely individuals with a higher income and educational level, and are more likely to be male. It has been suggested that the reason for this may be that litigants with a better educational background are more likely to trust themselves to be able to deal with a legal matter without assistance, or to have acquired some sort of legal knowledge.

The rules on representation in Court are inextricably linked to rules on unauthorised practice of law. Such rules, by and large, prevent someone with whatever source and extent of legal knowledge to provide legal advice and representation against payment if he is not a member of the Bar Association. These rules on unauthorised practice of law have three purposes that are indirectly reflected in the rules for mandatory representation as well. They guarantee:

- 1) consumer protection because in the interest of clients, the lawmaker regards it as necessary that a state-controlled standard of professional legal services is maintained, and that rules are obeyed when those services are provided;
- 2) an effective administration of justice because court proceedings can be slowed down and stalled by parties who are not familiar with procedural rules and the practical aspects of court proceedings to the detriment not only of the party itself, but also the opponent. It can also negatively affect the quality of court services in general;
- 3) a functioning legal system as a whole, because this aspect relates to, e.g., the furthering of the case law which requires input from legal professionals rather than lay persons.

More specifically, the additional rationale for mandatory representation in German Courts is that it is seen as a guarantee for social justice and the effectiveness of the democratic welfare state. The concept of legal representation in court proceedings is based on the principle of “equilibrium” or “equality of opportunity” for every litigant. Germans use a somewhat more martial terminology “*Waffengleichheit*”, which means equality of arms. Every individual involved in a court proceeding must be guaranteed the chance to plead her case before a Court based on the legal merits of the case. As civil proceedings are contradictory by nature and not based on the inquisitorial powers of the Court, the assumption is that litigants in all but small claims disputes, therefore, should be represented by a person with adequate legal training. To allow litigants without sufficient means to employ a lawyer, they are, based on the merits of a case, entitled to legal aid and a so called “*Notanwalt*”, which can be loosely translated as “emergency counsel”.

Next he described the representation in civil Courts in Scandinavia, the Roman law System and the Common Law System.

The Roman Law System, which sets the basis of many European legal systems, such as the French, German, Italian or Spanish one, considers mandatory legal representation in civil proceedings as an important factor of an orderly court procedure and fair process for the individuals involved.

In France, there are a number of cases which require the representation of an advocate in civil court proceedings. In actions brought in a Regional Court, the parties must generally be represented by an advocate, except in cases concerning commercial leases, injunctions or actions for withdrawal of parental authority. However, in a District Court as a court of lower instance, representation by an advocate is not mandatory in the majority of cases, as well as in the Commercial Courts, the Family and Social Courts and the Juvenile Court. Legal aid entitles the recipient to free assistance from an advocate or other legal practitioner (bailiff, *avoué*, notary, auctioneer, etc.) and to a waiver of court costs.

In Spain, it is the general rule to use a *Procurador* (procurator) or an *Abogado* (advocate) to conduct actions in the Court. However, an individual can act without these professionals when the dispute involves an amount of less than 900 Euros. It is also possible to submit an initial claim as a litigant in person through a fast-track procedure called “*proceso monitorio*” which can be used for claims of no more than 30.000 Euros if there is documentary evidence as proof. However, if the debtor does not pay, it is not possible to bring further action as a litigant in person. Those granted legal aid in Spain also receive free pre-trial legal advice and financial aid for lawyers’ fees.

In Italy, as a general rule, all litigants need to be represented by an advocate. Only for claims concerning very small amounts of less than 1.100 Euros, or if the plaintiff is a qualified Italian lawyer herself, the litigant can initiate procedural actions in person.

As a summary, he said that the idea of mandatory representation by an advocate in Court finds its basis in the Roman Legal System, which in its modern form is inspired by the concept of a “social state”. However, for small and straightforward court actions, even in jurisdictions following the Roman Legal System, the requirement of representation by an advocate is to some extent dispensed with.

In England and Wales, Northern Ireland or Scotland, jurisdictions which follow Common Law traditions, there is no statutory requirement for a person to seek the advice of, or be represented by, a lawyer in civil court proceedings.

However, in England and Wales, it is common practice to seek the advice of a solicitor when the claim is for a sum over £10,000, and particularly if it includes a claim for compensation ('damages'). Litigants are allowed to take anyone to a court hearing to speak on his or her behalf. Such a person is called a 'lay representative' and may be a spouse, relative, friend or an advice worker. A legal background is not required to be allowed to speak for a litigant. To ensure an orderly administration of justice and well-organised court proceedings in the absence of an advocate representing a claimant or defendant, courts follow a 'pre-action protocol' for certain claims, which sets out the steps the Court will expect the plaintiff to have taken before he or she issues the claim. It involves things such as writing to the person who the plaintiff is claiming from, to set out the details of the dispute or to exchange evidence, etc. Copies of all those protocols are available from the responsible court or on the website of the Ministry of Justice. Self-representation is relatively common in England and Wales: 85% of individual litigants in County Court cases and 52% of High Court litigants are unrepresented at some stage of their case. Also almost two thirds of family cases involve unrepresented litigants in person.

In Scotland, the "small claims" procedure in the Sheriff Court – which is the local court of first instance - was even designed to give special support to litigants in person who do not enjoy the benefit of professional legal representation. Court users in several Scottish sheriff courts have access to “in-court advice” projects. These provide court users with legal and other advice including court procedure and self-representation in small claims matters, summary cause debt and eviction work as well as ordinary debt collection matters.

In Northern Ireland, there is no obligation to be legally represented in civil court procedures either. However, in the High Court, the so-called “next friend” or a “guardian *ad litem*” of a person under a disability (e.g. under eighteen) must act through a solicitor. A corporate body must also act through a solicitor, unless the Court allows a director to represent the company himself. Furthermore, Northern Irish Courts may impose conditions or restrictions on the legal representation to ensure that the case proceeds in an orderly manner. People who do not want to instruct a lawyer can also seek advice or assistance from the voluntary sector or a statutory body such as the Consumer Council for Northern Ireland.

Despite relatively relaxed rules on mandatory representation, it is worth noting that most litigants in common law countries choose to be represented by advocates at least in the higher courts and in major legal matters in general, even without a legal requirement to do so.

Finally, he gave a very quick look at the Nordic countries. In Sweden, Finland and Norway individuals are permitted to bring a case to court as litigants in person. Thus, there is no requirement to be represented by an advocate in civil court hearings. Furthermore there is also no lawyers’ monopoly in the Swedish legal system in the sense that a legal representative or counsel must be a lawyer and/or a member of the Bar Association. In Denmark there is also no requirement to be represented by a legal professional. However, the regional and higher court may set the obligation of legal representation to secure an effective court proceeding. Anecdotal evidence suggests that more recently the courts’ have begun to use these powers more often than in the past. As a result, nowadays almost all civil proceedings before Danish Courts are pursued through a legal professional representing the party. The same is true for Sweden as well.

Next he explained the research on the impact of representation in civil court processes, the effects of legal representation. He introduced research from the United Kingdom, the United States and Germany that has analysed the impact of representation in Court.

There are two interesting studies that can help to better understand the relevance of legal representation, which have come out of Germany. One goes back as far as the 1980s, while the other has just been published.

In the 1980s, a comprehensive research project tried to identify barriers to success in court proceedings for claimants and defendants. For that purpose, almost 8.000 court cases were assessed by a thorough analysis of court files of selected local courts from one federal state in southern Germany.

According to the study, representation by an advocate leads to significantly more activities of the judge hearing the case. A legal professional acting on behalf of a party, one could argue, therefore serves as a catalyst for more commitment by the judge, and therefore for a better quality of adjudication. One explanation is obvious: representation by a legal professional bridges the problem of asymmetrical knowledge of the parties on the one side and the Court on the other side, and allows, to some extent, control of the Court.

The study also showed that parties from lower classes are more often unrepresented in Court. This means that those who are the most vulnerable cannot effectively control the judge and/or influence the court proceedings because their legal knowledge and intellectual capabilities do not allow such a control.

The most striking finding is that chances of a successful outcome of litigation depends to an extreme extent on representation by a member of the Bar Association as far as defendants are concerned: 31 per cent of the defendants were entirely successful in defending the claim when represented by an advocate, but only 12 per cent of those representing themselves. 79 per cent of unrepresented parties lost the case to a full extent, but only 35 per cent of those defending the claim with the help of a member of the Bar Association.

More recently, another research project analysed a couple of hundred court cases that were decided at one German High Court. The approach was slightly different as it involved a court where only members of the Bar Association have a right of audience and litigants cannot represent themselves. The aim of that research was to find out if the cost of representation has an impact on the quality of representation. In the context of this conference, this research has relevance with a view to the question if a distinction should be made between representation by a member of a Bar Association and some other legal professional who is not a member of a Bar Association, but holds a law degree, assuming that he or she offers cheaper legal services than a member of the Bar Association. A common notion is that a lack of competition between different types of legal professionals as a result of monopoly rights of members of the Bar Association leads to higher costs for the consumer without any additional gain in quality and outcomes. This research project has shown that on the basis of an identical legal qualification, lower remuneration for a legal professional results in a lower service quality and poorer outcomes for the party represented. To come to that conclusion, the research project used a couple of indicators that were applied to the court files. The research found out that lower remuneration served as a disincentive for a professional to invest additional time in a court case that potentially could have bettered the chances of a more positive outcome for the client. Unless a legal professional who is not a member of the Bar Association has much lower costs than a Bar Association member, he thus can only compete on price with a Bar Association member at a disadvantage for the client. At least this is what this recent research tentatively suggests.

Much more research than in Germany has been carried out in England and Wales. The amount of research led the Ministry of Justice to publish a literature review on the impact of litigants in person in civil and family court proceedings in the United Kingdom a while ago. The aim of this review was to examine the demographics of litigants in person, their motivations and the impact of self-representation on outcomes by condensing the findings of various studies into a single research report. In short, most research analysed

suggested that non-represented litigants may experience a number of problems, which not only create problems for the litigant and the prospects of the case, but in turn also impact on the Court.

A number of studies found that many litigants in person may have difficulties understanding the nature of court proceedings, were often overwhelmed by the procedural and oral demands of the courtroom, and had difficulties explaining the details of their case. Some studies also found that many unrepresented appellants and applicants felt unequipped to present their case effectively at their hearing. They felt intimidated, confused by the language and often surprised by the formality of proceedings. Problems with understanding principles of evidence and identifying facts relevant to the case, but also difficulties with forms, were common occurrences in many studies.

Research was also able to identify that as a result of such problems, unrepresented litigants tend to be an extra burden for court staff, judges, and also opponents. Studies found that court staff need to spend additional time on litigants in person. Judges highlighted the role of good representation in producing properly investigated cases, provision of the correct type of evidence and relevant facts, researching the law and presenting relevant cases. It was found that some representatives had to do extra work to compensate for the lack of representation on the other side, such as preparing documents that would normally be prepared by the other party's representative.

Where studies looked at the duration of court proceedings with active litigants in person, the evidence suggested that those cases may take longer. There was also evidence that representatives in some situations speed up court proceedings.

Various studies indicated that case outcomes were adversely affected by lack of representation. Researchers found that lawyers obtain significantly better results in tried cases than unrepresented litigants, after controlling for the amount at stake, complexity and party characteristics. In addition, it was found that representation significantly and independently increased the probability that a case would succeed in tribunal cases.

Research also shows that the quality of outcomes is affected by legal representation. One research project found that cases involving fully unrepresented litigants were likely to be resolved by withdrawal, abandonment, default judgment or dismissal, rather than agreement between the parties or by judgment following a trial or appeal hearing. In the area of family law, another research project presented evidence that representation alters custody outcomes, for example shared decision-making and visitation arrangements were more likely to be achieved when both parties were represented.

Rebecca Sandefur, a renowned scholar in the field of socio-legal research in the United States, is about to publish a study that is a meta-analysis of 45 research studies of the relationship between representation and adjudicated civil case outcomes in the United States. The study will bring together the findings of research on lawyer and non-lawyer representation in the United States over the past 50 years. The meta-analytical approach allows one to look at the effects of representation by lawyers, representation by non-lawyers and self-representation. The findings of the meta-analysis are striking in three respects.

First, they reveal a potentially very large impact of representation by an advocate on case outcomes. Available evidence reveals that expanding representation by a legal professional could radically change the outcomes of adjudicated civil cases. This potential impact is notable when advocates' work is compared to that of non-lawyer representatives, and, as Sandefur puts it, "spectacular" when compared to lay people's attempts at self-representation.

Second, and maybe even more importantly: in fields of law studied to date, the element of lawyers' expertise that is associated with greater potential impact is the ability to manage more complex procedures. By contrast, a need to use and understand more complex substantive law appears to explain little of lawyers' superior performance relative to unrepresented lay people in these kinds of cases. Surprisingly, it is in fields of law that involve less complex substantive law where one observes a larger potential of representation by

an advocate. Conventional wisdom that big law requires lawyering whereas run of the mill cases can do without, therefore, appears to be an urban legend.

Third, the research hints at the significant impact of relational expertise on the outcomes of professional work. Relational expertise reflects skill at negotiating the interpersonal environments in which professional work takes place.

Sandefur argues, for example, that representation by an advocate may act as an endorsement of lower status parties that affects how judges and other court staff treat them and evaluate their claims, perhaps because court staff believe represented cases are more meritorious. The presence of an advocate signals something important about a case to the people involved in processing it. The presence of an advocate also may encourage court staff to obey rules and so enhance people's chances of winning their cases. This interpretation is in line with the German study I mentioned earlier in my presentation. The findings also suggest that there is a difference between a litigant being represented by a member of a Bar Association or by someone who just happens to hold a "law degree", as usually only additional postgraduate training and experience provides the knowledge to work the ropes of the court system and interact with a judge on a level playing field.

As a conclusion, he said that in contrast to common law jurisdictions or Nordic countries, legal systems in continental Europe tend to focus more on the importance of representation in court proceedings. Representation is usually mandated in civil proceedings, and exemptions are only made for low value claims heard before local courts of first instance. The threshold beyond which representation is required differs quite significantly between those jurisdictions; setting it is often based on political and fiscal considerations and also subject to change. Whether or not representation is required reflects not only the origins of a legal system, but also the self-concept of the political system we are looking at: it can stress the responsibility of the individual for personal well-being and accept that financial or intellectual inequalities also impact the individual's abilities to navigate the legal system and to resolve legal problems. A political system can, however, also be based on the understanding that self-responsibility in the context of legal issues can be detrimental not only for the individual, but also for the legal system and the common good. With such an understanding, regulation will be based on the principle of "equality of opportunity" for every individual involved in most court procedures. The decision for or against representation in court proceedings therefore is always a trade-off that needs to take into consideration the conceptual disadvantage of restricting one's self-determination on the one hand and the various positive effects of representation by lawyers that have been proven by empirical research. Empirical research from across the globe shows that representation in court has a positive impact on outcomes, guarantees a better quality of education, and lets the Court operate more effectively by speeding up case disposal, reducing the need for assisting litigants and minimising the intimidation of individuals involved in a court case.

### *Questions and comments*

Answering a question, Prof. Dr. Matthias Kilian explained that the findings suggest that, of course, somebody who was represented by a lawyer who is not an advocate would be generally better off than somebody who is representing themselves, but the research also shows that somebody who is represented by an advocate and not by a lawyer with a law degree will also do better. He is in favour of the system that works quite well in the Roman law countries for representation by advocates that also requires of course, official funds by government to assist those clients who cannot afford to pay for an advocate.

Answering the next question, Martin Šolc emphasised that representation in criminal matters should not be done by someone other than an advocate. Mandatory representation in civil administrative cases is a complex issue. There are many approaches around the world but the goal is the same: the proper

administration of justice. When he was at Court and another party was represented by a civil engineer, the judge spent the whole day explaining the basics to that party.

It is important when discussing legal aid with the government to make the government understand that legal aid is not just costs, but legal aid buys something, because court proceedings speed up and this is what governments should take into account. It should compare the comparable – so, not only the cost of doing, not only the cost of paying the bill, but also the cost of not paying it.

It is also important to ensure true independence of the legal aid system. It should be institutionally independent from governments. He suggested that in the current situation of development, if UNBA succeeds in remaining fully independent, it would be a waste of energy to create another independent regulator, and it would not be a regulator of legal aid in a true sense - it will be an administrator, because the regulator in the sense of discipline would be a Bar Association anyway.

Prof. Dr. Matthias Kilian commented after it was explained that in Ukraine legal aid lawyers are selected and contracted by a non-governmental body which is financed by the government, but the decisions are not directly made by government officials. It is a board that makes the decisions, which is independent from the government. The problem is the experience from England and Wales that the number of people who were allowed to provide legal aid services was cut back a couple of times. So law firms tried to meet the criteria set for the selected providers. If they specialised, for example, in immigration work, they would invest a lot in infrastructure to meet the criteria - and then they did not get a new contract after five years, and they simply had no work left to do, because all they have done in the five years before was legal aid work. If only certain providers are selected, there would be lawyers who are fully dependent on legal work, which is a problem.

***Opening speech and introduction to Theme of Day 2 “High Quality Advocates for High Quality Services: Requirements” by Maria Ślęzak, President of the CCBE, Poland***

Maria Ślęzak explained that the CCBE, the Council of European Bars and Law Societies of Europe, is the other organisation which, together with the IBA, is organising this conference. The CCBE is the organisation which gathers 45 European Bars from all over Europe. Through all those Bar Associations one million lawyers are represented. The CCBE represents the interest of the public through taking care of the protection of the core values of the profession.

The CCBE is really a very well recognised representation of the profession within the EU institutions. It also works in ensuring the rule of law and fundamental values defended by the profession, including with CCBE observer members like Ukraine.

She spoke about the work of the CCBE’s PECO Committee. This is a committee which concentrates on the issues and problems of the CCBE’s observer members. The CCBE sent a letter on 26 March 2015 to the President of Ukraine on the issue of the mandatory representation by advocates. In this letter, it was pointed out that the legal services market is not regulated at all, and that the right of the Ukrainian people to receive professional and qualified legal assistance is not guaranteed. The CCBE believes that advocates who are qualified to appear in Court best serve the interest of the administration of justice. Representation by non-lawyers could bring errors, unsatisfactory legal representation, and so the CCBE fully supports UNBA in its request for qualified advocate representation at the Courts.

During the presentations and discussions yesterday, the main argument for introducing mandatory representation was quality. The topics today are to ensure quality. First, continuing legal education is going to be discussed. Second, deontology and disciplinary liability, and third, professional insurance.

## Continuing legal education

*Presentation of Dr. Péter Köves, Former President of the CCBE, Vice-President of the Bar Issues Commission of the IBA, Hungary*

He started by saying that both the IBA and the CCBE have very recent recommendations on continuing legal education, from 2013 and 2014 respectively. This gives the opportunity to any country, including Ukraine, to compare its system with these best practices, and also to take ideas on how something could be done differently.

The IBA work on continuing legal educations produced the second guideline on education of the legal profession, because the first guideline was on training for future lawyers who are just entering the profession.

First an on-line questionnaire was sent to the member organisations of the IBA. The replies for the online questionnaire were interesting. 27 countries or jurisdictions replied that they have a continuing legal education system, and only 11 answered not yet. However, 7 out of the 11 were already planning to introduce one, and so that means that the vast majority of the countries now have or will have a continuing legal education system. So Ukraine is in good company, because it has already introduced its continuing legal education system.

It is also interesting to see what is taught in continuing legal education. The same amount of time is spent on substantive law issues and ethical and deontological issues; then comes practical training, law firm management and compliance. He thinks that proportionality has to be changed in countries which put a big emphasis on substantive law, civil law, criminal law, administrative law and other substantive law matters in favour of other capabilities and knowledge which are necessary to be a versatile advocate. Ethics is very important. The President of the UNBA has already alluded to the fact that sometimes there is a problem with ethical practice in Ukraine. So an emphasis has to be put on ethics, and practical training for advocates on topics from using computers to how to handle client money. It seems that young advocates are entering the profession, and they do not know how to run a law firm, how to do the accounting, how to make a good public relation campaign, what to do when you appear in television. Compliance such as for money laundering purposes is also important because there are more and more compliance requirements.

He has been told that controlling the compliance of an advocate is an issue in Ukraine. The vast majority of countries somehow measure performance, such as how many credits an advocate has obtained and how. In some countries, if an advocate does not fulfil his or her continuing legal education obligations, the advocate will be automatically disbarred. In some countries there is also a yearly renewal of practicing certificate, and if an advocate cannot prove that he or she has satisfied continuing legal education requirements, it is not renewed. In other countries, there is a disciplinary process which is started against such an advocate, which could have various consequences. Most countries do not tolerate it if continuing legal education requirements are not fulfilled.

The IBA questionnaire formed the basis of the IBA Guidelines for Continuing Legal Education. The first clause in essence means that lifelong learning is a must for the legal profession. So, as the Roman said, you have to learn as long as you live, and this is more than true for the legal profession. The second clause says that the primarily responsibility for continuing legal education lies with the Bar Associations – so, in case of Ukraine, on the UNBA. It is not the state but Bar Associations that are responsible, because it is in the interest of Bar Associations and their members to create the best possible legal profession to serve the rule of law. The third clause is about a strategy for continuing legal education. In many countries, there are systems or they are introducing systems - but not as part of an agreed strategy, and they have no objectives for how to teach, who is going to teach, how is the outcome going to be measured, in other words how to deal with all the situations that may arise.



The next clause is about the forms of training and there are various ways of teaching, not just class room teaching. Then there is the training of soft skills, which are equally important, such as negotiation techniques, how to speak before the Court, how to speak to the client. Computer skills are usually taught in workshops. In Scotland, the Bar Association has a TV studio, and young advocates are recorded while pleading. The recording is then analysed with an experienced advocate to see what was wrong, whether the emphasis was made on the right point or the wrong point, and so on. Academic work is also very important, because the legal profession in each country is proud of those lawyers who have contributed to legal literature or the teaching of law.

The training of risk-based ethics is also important, because the application of ethical rules have to be explained to advocates in a real situation, for instance when a client comes and tells something, and the advocate has to think whether what the client is asking is in line with ethical obligations

In a good continuing legal education system, the performance of advocates has to be measured at regular intervals. In some countries, it is also a required portion of ethical training or soft skill training. Non-compliance should be disciplined or punished. The Bar Association has to accredit the institutions delivering the training, in order to maintain quality. Another point is that the Bars should acknowledge each other's training.

He explained that the CCBE's work on continuing legal education is equally interesting and important. In 2000, there was the first resolution on training for lawyers, which included some thoughts with regard to continuing training. In 2003, there was a recommendation on continuing training; in 2011 there was a survey on continuing training regimes in CCBE full members; and in 2013 there was a specific CCBE Resolution on Continuing Legal Education.

The CCBE and the IBA guides have a lot in common. In the earlier CCBE recommendations, the first point makes specific reference to European Community Law, which is a very important part for EU lawyers to learn. Then there is a very elaborate list of ways of participating in continuing legal education - from attending seminars, meetings, conferences, congresses to e-learning. Distance learning could also be a part, and there are techniques for how can e-learning be measured. Writing legal articles, legal essays, legal books, and teaching can also be part of fulfilling training obligations.

He said that the second CCBE Resolution focuses on recognition of training in various countries, because advocates can go and practise law in another EU member state and therefore, the mutual recognition of each other's training is very important. Equally there are joint courses for advocates from different countries, for example Italy and France have an agreement that they will organise joint courses as part of their continuing legal education. Cross border training is very important in the EU and it is also becoming more and more important for Ukraine as it becomes closer to the EU.

Migrant lawyers who are going to other countries or permanently practising in other countries have to be taught, too. If lawyers will come to Ukraine from another state, it is the responsibility of the UNBA to provide continuing training on Ukrainian issues for them.

He explained that the CCBE is working on an information exchange platform through which the member Bar Associations provide information on their own training courses, which is a way how foreign advocates could participate in their continuing legal education system. It is recommended for the UNBA to participate in this information exchange.

***Presentation of Dr. Ulrich Wessels, President of the Regional Bar of Hamm, Germany***

Ulrich Wessels started by saying that in order to have mandatory representation by advocates in Court, the high quality of the profession has to be guaranteed. In Germany, the Federal Lawyers Act says that the advocate (called *Rechtsanwalt*) is the appointed independent consultant and representative of the client in

all legal matters - but due to the flow of laws, the individual lawyer is no longer in a position to give legal advice in all areas of law. Therefore, individual advocates have to specialise. Clients should be convinced that advocates provide expert knowledge on a legal question, and also solve problems acceptably on the basis of such expert knowledge. The key phrase is high quality legal consultancy.

In Germany, there is the possibility of specialising, and of documenting such specialisation by obtaining the title of specialist advocate called *Fachanwalt*. The regulation on specialist advocates is an act of self-governance of the legal profession in the so-called Lawyers' Parliament.

The specialist lawyer is an advocate whose specific knowledge is confirmed in formal procedures conducted by the regional Bars. The number of specialist advocates is rising continuously. At the beginning of 2014, there were about 50,000 specialist advocates out of 164,000 German advocates. It is also important that specialist advocates' incomes are about 20-30% higher than that of normal advocates.

He explained that in 2004 there were only 8 specialisations: industrial law, family law, insolvency law, social law, tax law, criminal law, insurance law and administrative law. In 2014, there are 22 specialisations. The following has been added: banking and capital market law, construction and architectural law, inheritance law, commercial legal protection, international commercial law, agricultural law, commercial and corporation law, IT law, medical law, rental and residence ownership law, transport and shipping companies' law, copyright and media law, transport law and procurement law.

There are three conditions to become a specialist advocate: three years of activity as an advocate from registration, proof of specific theoretical knowledge, and proof of specific practical experience. The proof of specific theoretical knowledge is normally satisfied by presentation of certificates of successful participation in a course for specialist advocates. The specific practical experience should be evidenced by a certain number of cases handled personally and without instruction within the three years before application in the specialist field. For example, in order to obtain a title of specialist advocate in criminal law, an applicant has to present evidence that he/she has dealt with 60 cases in criminal law and spent 40 trial days in a criminal court.

He then explained the procedure to obtain the title. The written application to the regional Bar Association, including the proof that the three preconditions are met, is examined by the preliminary examining board, and this board has the following possibilities of decisions. First, it can give the board of the regional Bar Association a positive recommendation without inviting the applicant for an interview. Second, it can invite the applicant to an interview. Third, it can ask the applicant for supplementary substantiation of the application, by giving him or her the opportunity of reporting on further cases. Fourth, it can give a negative report to the board of the regional Bar Association because the prerequisites of being a specialised advocate were not fulfilled.

Quality assurance is provided by the duty on the advocate to conduct continuing legal education according to the Federal Lawyers Act. It benefits the client on the one hand, as the client can rely on qualified legal consultancy, and it benefits the advocate on the other hand because satisfied clients will give another mandate. And in addition it reduces the risk of liability.

Specialist advocates have a specific duty for continuing legal education. They have to prove each year to the regional Bar Association that they have attended continuing legal education. Up to 5 hours of this training time can be satisfied by self-study, as long as a written performance test is passed. Any advocate is entitled to obtain three different titles as a specialist advocate, which means that if somebody has three titles, 45 hours of continuing legal education shall be performed for each. If there is no proof of such continuing legal education, the title of a specialist advocate can be withdrawn by the regional Bar Association.

The German Federal Bar, the BRAK, established a reward system for all advocates to encourage performance of the duty of continuing education by issuing a certificate. The continuing legal education certificate is an incentive to attend training events regularly, and also can be used with the public as a marketing tool.

In order to obtain this certificate, an advocate has to obtain 360 continuing legal education credits within 3 years in 4 modules: substantive law, professional law including costs law and professional third-party liability, procedural or process law, and business, personnel or negotiation management. The 360 points in three years are distributed as follows: at least 240 points for substantive law, at least 60 points for professional law, a total of at least 60 points for procedural law and the management module. Various forms of training are credited: seminars and specialist events 10 points, own studies 10 points a year, activity as an examiner 30 points a year, quality circle AND discussion groups 10 points, and specialist publications 20 to 50 points.

### *Question and comments*

Answering a question, Ulrich Wessels said that the regional Bar Associations keep the lists of specialist advocates, and clients often ask for a specialist lawyer.

Answering another question, Ulrich Wessels explained that the Lawyers' Parliament is elected for 4 years, and it is the supreme regulatory body of the legal profession in Germany.

Answering a question, Péter Köves said that in some European countries there is a central electronic register to keep track of attendance at the various courses as part of continuing legal education. However, in most countries a paper certificate is given, which should be submitted as proof of fulfilling the training obligation.

Maria Ślązak added that in Poland all such proof should be submitted to the local Bar Association every 3 years.

## **Professional Conduct and Discipline**

*Introduction by Andriy Kostin, Member of the Odessa Regional Bar Council, Chair of International Relations Committee of the UNBA, Ukraine*

Andriy Kostin started by saying that advocates are responsible to society. Independence of advocates and of the Bar Association is one of the core values of the legal profession - but independence does not mean that advocates can be independent from society.

Public control over the enforcement of the professional ethics is exercised by disciplinary boards consisting of advocates. There is judicial control over the operation of the disciplinary boards. However, the case law demonstrates that the Courts have disproportionate influence. Sometimes, even more than one court believes that they have jurisdiction in disciplinary cases.

Disciplinary actions, which represent the responsibility of the legal profession to society, are based on professional ethics. Ethical behaviour is a very important attribute of an advocate, because one unethical act of an advocate harms the whole legal profession. It is also a problem in Ukraine that many lawyers believe that their private life is not subject to professional ethics. It is obvious for these advocates that an advocate should respect the rule of law, should respect the Courts and colleagues, but they do not understand that their behaviour in their private life could also adversely impact the whole profession.

It should also be understood by advocates that being an advocate is a profession, and they cannot trade their licence to their clients by participating in their illegal or unethical activities. The advocate is not a servant of the client, because the advocate always remains subject to professional ethics, as oppose to those who are not subject to professional ethics. If an advocate accepts unethical instructions from a client, he or she becomes simply a service provider.

He said that, unfortunately, unethical behaviour very often has no consequences; however, he is of the opinion that such advocates should leave the profession.

He was also of the opinion that the current disciplinary sanctions are obstacles to enforcing professional ethics. The range of the sanctions is very limited, consisting of a very mild warning and then severe sanctions like suspension of licence and disbarment, with no sanctions in between. In this respect, new sanctions have to be introduced in order to achieve more proportionality when judging the offences. Preventative sanctions, such as a public warning, fine or compulsory training, are completely missing.

The reform of the disciplinary system in the UNBA is necessary. Currently, society does not trust the disciplinary procedures, and the Courts do not respect the disciplinary decisions. The current criticism from society can only be reduced if improper ethical behaviour by an advocate is properly and consistently sanctioned.

***Presentation of Lucy Dupong, Former President of the Luxembourg Bar, Former Chair of the CCBE Deontology Committee, Luxembourg***

Lucy Dupong said that mandatory representation requires very strong arguments showing that advocates are more efficient in guaranteeing a better administration of justice in the public interest. The central role of advocates in the administration of justice is acknowledged by the European Court of Human Rights and by the Court of Justice of the European Union. The European Court of Human Rights on 27 January 2015 in the case *Kincses versus Hungary* (Application no. 66232/10) states that advocates have a central position in the administration of justice. The decision further states that this central position is supported by the rules of professional conduct by which advocates must be bound.

The key role of advocates in the administration of justice is recognised in various European and international legal instruments. Article 47 of the Charter of Fundamental Rights of the European Union gives the right to citizens to be advised and represented in legal cases.

She said that she will focus on European and international aspects of professional conduct and discipline in the context of client representation in Court by an advocate or lawyer. Representing clients in Court is the right of an advocate to appear and conduct proceedings in Court on behalf of his client. This right of audience can be viewed from two different angles. On the one side, it is the right of an advocate, and only of an advocate, to appear in Court, and this right is denied to non-lawyers. On the other side, the right of an advocate to appear and conduct proceedings in Court - and this is of outmost importance - is based on a view of the advocate's role as an actor in the administration of justice, and as being required to provide, in full independence and in the overriding interest of the cause entered before the Court, such legal assistance as needed by the client.

The central role of advocates in the administration of justice is acknowledged by the European Court of Human Rights and by the Court of Justice of the European Union in numerous cases. The most recent is from the European Court of Human Rights on 27 January 2015 (*Kincses v. Hungary* – application no. 66232/10) in which the Court held that “*the special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the Court. Such position explains the usual restrictions on the conduct of members of the Bar.*” (see also *Casado Coca v Spain*, 24 February 1994 Par. 54, series A no. 285-A) As ruled by numerous court decisions, the special status of the lawyer on the one side entails the right of individuals and legal persons to be advised, defended and represented by an advocate in non-criminal as well as criminal proceedings, and hence enables these persons to have a fair trial and their rights enforced. And on the other side, this puts on the advocate an obligation to act within the boundaries of the rules of professional conduct issued by the Bar Association or the laws of the home country.

The international and European legal instruments acknowledge the key role of lawyers as actors in the administration of justice, and as acting as a safeguard for a fair trial. Article 47 of the Charter of Fundamental Rights of the European Union under the heading “*Right to an effective remedy and to a fair trial*” rules that “*everyone shall have the possibility of being advised, defended and represented*”. Article 6 of the European

Convention on Human Rights rules that *“in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”*.

The European Court of Human Rights has interpreted Article 6 as a right of access to a court, and in order to ensure that this right is effective, State Parties may have to provide access to legal assistance. The United Nations (UN) adopted the Basic Principles on the Role of Lawyers of 7 September 1990 on access to lawyers and legal services. The Council of Europe Recommendation No.R (2000) 21 of 25 October 2000 on the freedom of exercise of the profession of lawyer stipulates, as a matter of general principle, that *“[l]awyers should not be refused access to a court before which they are qualified to appear and should have access to all relevant files when defending the rights and interests of their clients in accordance with their professional standards”*. The European Parliament resolution on the legal profession and the general interest in the functioning of legal systems of 23 March 2006 *“recognises fully the crucial role played by the legal professions in a democratic society to guarantee respect for fundamental rights, the rule of law and security in the application of law, both when lawyers represent and defend clients in Court and when they are giving their clients legal advice.”*

She explained that the rules of conduct and discipline by which advocates are bound when appearing in court proceedings are a requirements for lawyers deriving from the right of audience. This is a consequence of the advocates’ special status, which gives advocates a central position in the administration of justice as intermediaries between the public and the Court. The European Court of Human Rights has on several occasions outlined the duties of lawyers that are essential to ensure that members of the public have confidence in the administration of justice. However, it is an undisputed fact that individuals and legal persons who are engaged in court proceedings will only have confidence in the administration of justice if *“they have confidence in the ability of the legal profession to provide effective representation”* and the *“special role of lawyers, as independent professionals, entails a number of duties, particularly with regard to their conduct.”*(see *Morice v. France*, 23 April 2015 – application no. 29369/10) Among all those core values which advocates abide by on a universal scale, the core principle of independence is fundamental for public confidence in the administration of justice, and takes an outstanding place in the conduct of court proceedings.

The Code of Conduct of the CCBE outlines the importance of the independence of advocates by using the following words:

*“The lawyer must be independent of the State or other powerful interest and must not allow his or her independence to be compromised by improper pressure from business associates. The lawyer must also remain independent of his or he own client if the lawyer is to enjoy the trust of third parties and the Courts. Indeed without this independence from the client there can be no guarantee of the quality of the lawyer’s work. The lawyer’s membership of a liberal profession and the authority deriving from that membership helps to maintain independence, and Bar Associations must play an important role in helping to guarantee lawyer’s independence. Self-regulation of the profession is seen as vital in buttressing the independence of the individual lawyer.”*

An independent advocate also needs to be qualified in the sense of professional competence, and advocates have to be engaged in continuing professional education in order to achieve a high quality of legal services and be worthy of the trust of clients, third parties and the Courts. It is the lawyer’s duty to comply with the rules of conduct of the Court before which he/she appears, to have due regard to the fair conduct of proceedings, due respect and courtesy towards the Court and to defend the interests of the client honourably and fearlessly without regard to his or her own interests. The advocate should never knowingly give false or misleading information to the Court, and in the relationship with other advocates should be mindful of the corporate spirit of the profession, which requires a relationship of trust and cooperation

between advocates for the benefit of their respective clients, and in order to avoid behaviour that could be harmful to the advocate's reputation and the reputation of the profession.

The freedom of expression guaranteed by the European Convention on Human Rights is applicable also to all advocates. In its decision handed down in the case *Morice v. France* (above) the European Court of Human Rights said the following with respect to freedom of expression:

*"It encompasses not only the substance of the ideas and information expressed but also the form in which they are conveyed. Lawyers are thus entitled, in particular, to comment in public on the administration of justice, provided that their criticism does not overstep certain bounds. Those bounds lie in the usual restrictions on the conduct of members of the Bar Association, as reflected in the ten basic principles enumerated by the CCBE for European lawyers, with their particular reference to "dignity", "honour" and "integrity" and to "respect for ... the fair administration of justice". Such rules contribute to the protection of the judiciary from gratuitous and unfounded attacks, which may be driven solely by a wish or strategy to ensure that the judicial debate is pursued in the media or to settle a score with the judges handling the case. The question of freedom of expression is related to the independence of the legal profession, which is crucial for the effective functioning of the fair administration of justice. It is only in exceptional cases that restriction – even by way of lenient criminal penalty – of defence counsel's freedom of expression can be accepted as necessary in a democratic society."*

***Presentation of Merete Smith, Chief Executive of the Norwegian Bar Association, Chair of Chief Executives of the European Bar Associations, Co-Chair of the Bar Executives Committee of the IBA BIC, Norway***

Merete Smith explained that a disciplinary regime is a consequence of the rule that advocates must follow the code of ethics in their practice. The purpose behind a disciplinary regime is to enforce the rules of conduct. It is essential for confidence in advocates that the practice of law follows regulations and standards for professional conduct, and the disciplinary regime helps to secure that advocates will act in accordance with a code of ethics (because if they do not, they risk having disciplinary sanctions imposed). It is also the experience that advocates who are subject to a disciplinary regime will increasingly seek to live by the code of ethics.

She said if the disciplinary regime does not follow basic procedural principles in the handling of complaints, it will not achieve credibility and confidence among the public or other members of the judicial system. A well-functioning disciplinary regime will also contribute to better protection for advocates. A disciplinary regime with proper procedural rules gives the advocate an opportunity to submit a defence on his or her own behalf, and obtain a correct decision. The disciplinary regime reinforces public confidence in the legal profession, which helps to contribute to a good reputation for advocates

A well-functioning disciplinary regime should be independent, credible, transparent, with proper sanctions and proper procedures.

She emphasised that independent advocates must have independent institutions. Therefore, the disciplinary panels or disciplinary boards must also be independent. They have to be independent from the government, and independent from the Bar Association, independent from the client of course, and independent from other advocates. In many countries, especially non-democratic countries, when sometimes an advocate challenges the state, or challenges state officials, the state uses the disciplinary system to get rid of that advocate.

The connection between independence and self-regulation is very important because some Bar Associations around the world do not give enough attention to the disciplinary regime. The government grants the Bar Association the right to regulate the provision of legal services, and in return the Bar Association must ensure that its members provide high quality legal services. If Bar Associations do not regulate advocates in a

credible, efficient way, external regulators may decide to fill the vacuum, and the legal profession certainly does not want this.

Therefore, the disciplinary system has to be credible, and it has to be effective and efficient. The credible handling of complaints is essential for public confidence in the legal profession. If the disciplinary regime has credibility, advocates more often abide by and follow the decisions of the disciplinary panels.

She said that another important issue for the credibility of the disciplinary system is transparency. The publicity of disciplinary decisions is central to achieving credibility. In Norway, it was decided to publish disciplinary decisions in 2004. Before 2004, when the media asked for information about a disciplinary decision, the only thing that could be said was that the decision could not be seen even though of course, the decision is very well-reasoned and correct. This is of course created frustration and irritation among journalists. Moreover it created a lot of speculation. The journalists doubted the credibility of the disciplinary regime, and created an impression that the disciplinary panels did not sanction unethical lawyers but protected them. The experience is that publicity of disciplinary decisions has contributed to more confidence in, and less criticism of, the disciplinary regime.

Disciplinary sanctions have to be effective. For less serious cases, a warning is enough, but fines are important. In many countries, fines can be quite high, and advocates understand that language because it raises the question of whether it is worthwhile. Of course, in the most serious cases, disbarment or loss of practising certificate is necessary

The disciplinary system should have proper procedures, just like every procedure before the Court. The complainant should know what is happening, and the advocate should have a chance to defend himself or herself. The goal is that the discipline regime should be consistent, efficient, fair and transparent in order to protect the public and foster public confidence in the regulation of the practice of law. Bar Associations should pay attention to the length of the procedure, because it is in the common interest of both complainant and advocate to put the case behind them. In Norway, the standard is six months from the complaint having come in until the procedure is finished. Most of the time, the standard is met.

Many advocates find clients' complaints and the subsequent process time-consuming and difficult. A client complaint or a disciplinary case is uncomfortable, and it generates a lot of work for the advocate, but no billable time. The complaint should be reviewed, replied to, and the advocate must spend time defending that his or her action was in a line with the code of ethics. However, an effective, efficient and credible disciplinary system is of the utmost importance for advocates themselves, to gain public confidence in advocates and the Bar Association.

### *Questions and comments*

Answering a question, Merete Smith explained that the decision of the disciplinary board could be challenged before the Court. However, in Norway the Court has annulled the decision of the disciplinary board in only one or two cases. Lucy Dupong added that the European Court of Human Rights had already ruled that a decision of a disciplinary panel composed only of advocates must be able to be challenged before a court composed of only professional judges.

Merete Smith and Lucy Dupong, answering another question, explained that the disciplinary process, and the challenge of the disciplinary decision before the Court, are linked, and if the fine imposed by the disciplinary board is upheld by the Court, it should not be paid again.

Péter Köves added that a fine in disciplinary procedure is not for the compensation of the client. The fine is a sanction, like in a criminal procedure. However, the client could also ask for compensation of its losses from the advocate. Usually, this is paid by the insurance company, because in EU countries professional indemnity insurance is mandatory. If the loss is not simply the result of the negligence of the advocate, but rather the advocate committed the action wilfully, and so the insurance does not cover the event, many Bar Associations maintains a mutual client compensation fund to give some compensation to the client.

Answering another question, Merete Smith explained that in Norway the disciplinary decisions are published in full for 5 years. It is not against the human rights of the advocate concerned. However, they are not published on the internet because they cannot be fully removed after 5 years (they would remain there forever). There is information on the internet that the Bar Association can be called or sent a letter or e-mail by anyone to obtain information on any lawyer. The request could be for a specific lawyer, or for lawyers in a specific area, or for decisions from a specific time. However, the information regarding the client in the case is deleted, because it is personal information.

Merete Smith also explained that any advocate can consult the Bar Association concerning an ethical question. The advice is not binding because it is just advice. The advocate is the one who remains responsible for making the right decision. This is the reason that training in ethics must be an important part of training advocates.

## Professional Liability Insurance

*Presentation of Rytis Jokubauskas, Former Secretary General of the Lithuanian Bar Association, Vice-Chair of the CCBE PECO Committee, Expert of the Council of Europe, Lithuania*

Rytis Jokubauskas started by explaining that civil liability insurance is professional insurance that is a form of insurance applicable to professional advice and services provided to individuals and companies. When a client suffers damages as a result of a professional mistake committed by an advocate, such insurance is very helpful. Just like legal education, professional ethics or the professional secret, civil liability insurance is a feature of the profession of an advocate. It is necessary for advocates, but even more so for their clients. Because of the specific status of advocates in the legal system, uncertainty of compensation or – even worse – failure to compensate a client in case of malpractice creates mistrust of the whole profession and even of the legal system. Professional indemnity insurance is a feature of the legal profession.

He said that in the vast majority of European countries it is mandatory. In those very few cases when professional liability insurance is voluntary e.g. in Latvia, amendments to the law are already considered and professional indemnity insurance would then become mandatory. In Spain, where professional indemnity insurance is voluntary by law, it was made obligatory by the ethical rules of the Bar Association.

When talking about professional indemnity insurance, what is interesting is the minimum coverage and the premiums. Of course, the minimum coverage can be set only in countries where professional indemnity insurance is mandatory. The experience in Europe differs largely. In Lithuania, the minimum coverage is still less than 30,000 euros, and in e.g. in Ireland and Luxembourg, the minimum coverage is over 1 million euros.

The premium very much depends on the coverage. Therefore, in countries with a very small minimum coverage, the premium is usually also very small. Of course, there are countries where professional indemnity insurance costs much more.

He explained that schemes of professional indemnity insurance can be grouped into three variations. One is the individual scheme where each advocate is responsible for his/her own professional indemnity insurance. This is the most popular. There is another scheme of collective professional indemnity insurance where the Bar Association - whether the National Bar Association or sometimes the Regional or Local Bar Association - purchases professional indemnity insurance for all of their members. Then the premium would be part of



the advocate's annual fee to the Bar Association. There is also a mixed model, when either an advocate can purchase professional liability insurance via the Bar Association or individually i.e. there is no obligation to go through the Bar Association, but it is usually cheaper.

With small exceptions, civil liability insurance policy is triggered by the date of the claim rather than the date of the cause of the loss. There are countries where civil liability insurance may be initiated either on a claims-made or act-committed basis, depending on the civil liability insurance contract.

It is important to understand that both advocates and clients benefit from professional indemnity insurance. On the one hand, advocates need to have some protection, because if something happens they should not lose their house. Clients need to know in advance that when someone's professional title contains the word 'advocate' they have certainty that in case something goes wrong at least their minimum loss will be covered. It is also important to the whole legal profession and to the legal system in general, because it contributes to public trust in the legal profession.

In 2004, the CCBE adopted Minimum Standards for European Lawyers' Professional Indemnity Insurance. The CCBE recommended to its member bars, and to all lawyers registered with these bars, that they should adopt these minimum standards. The most important feature is that the CCBE advocates for mandatory requirements for all advocates to be insured against civil (or public) legal liability arising out of their legal practice, with a minimum amount of cover of €100,000 for any one claim, with an aggregate level of €200,000 in total in any one year. It also recommends that cover should be extended, where appropriate, to all partners, principals, former partners, trainees and employees, or any other such eligible person, and in case of a claims-made system, the insurance policy should provide run-off cover for a period as near as possible to the statutory limitation in that State.

In most countries, there are no specific rules for professional indemnity insurance other than general civil liability insurance rules. There are only additional requirements, like the requirement for minimum coverage.

The EU project to support legal reforms in Ukraine also deals with the question of how to create a model to ensure that professional liability insurance would become a reality for the legal profession, so that advocates are able to go to insurance companies and obtain professional liability insurance. It might be easier to start with a voluntary system, and it is suggested that the UNBA adopts recommendations, encourages advocates to purchase professional liability insurance, and puts an obligation on advocates that they should inform the client if they have no insurance or the insurance is not compliant with the recommendations of the UNBA.

### *Questions and comments*

Answering a question, Rytis Jokubauskas said that usually no regress claim is applicable to professional indemnity insurance, because it would be applicable if the lawyer wilfully caused damage to the client, which is a criminal offence and so not covered by professional indemnity insurance. He added that usually the terms of the insurance are the same for all advocates; only the cover and the premium are different.

Maria Ślęzak explained that in Poland the Bar Association signs an insurance contract with an insurance company, which makes every advocate insured. Advocates have to pay an additional 1€ per month to the Bar Association for the premium, which is paid by the Bar Association to the insurance company.

Péter Köves advised that the suggestion of going for voluntary insurance is questionable. Insurance as a product is based on a risk community, which means that if the risk is the same and there are only 3 people taking out such insurance, the premium would be higher than if 10 people took out the same insurance. In Ukraine, where is no professional indemnity insurance available, if there will be only 1000 advocates who on a voluntary basis would like to have such an insurance, then it would be extremely expensive, and the other advocates would think it is not affordable. However, if a mandatory regime is introduced, which means all

37,000 advocates have to have such insurance, it would be a large deal on the insurance market, and the premium would be much smaller.

Rytis Jokubauskas said that one of the main problems in introducing mandatory insurance right away would be the cost - and the overall economic situation cannot be ignored. The other aspect is that insurance companies, due to the lack of any statistics, would charge very high premiums in the beginning, even if there were a lot of advocates joining the scheme.

Maria Ślęzak closed this session by saying that the principle is relatively simple. The main issue is how to obtain relatively cheap professional indemnity insurance for a large number of advocates, and the recommendation would be to do it through the Bar Association.

## GENERAL INFORMATION

### ABBREVIATIONS

#### IBA

The International Bar Association (IBA), established in 1947, is the world's leading organisation of international legal practitioners, bar associations and law societies. The IBA influences the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 55,000 individual lawyers and more than 190 bar associations and law societies, spanning all continents. For more information, see <http://www.ibanet.org/>

#### UNBA

The Ukrainian National Bar Association was established in 2012 according to a new Law of Ukraine "On Advocacy and Advocates' Activity". It is a non-governmental, independent, professional association of advocates of Ukraine with mandatory membership. The UNBA is responsible for admission to the profession, discipline and regulation of advocates' activities. For more information, see <http://unba.org.ua/>

#### CCBE

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 32 member countries and 13 further associate and observer countries, and through them more than 1 million European lawyers. The CCBE - founded in 1960 - is recognised as the voice of the European legal profession by the national bars and law societies on the one hand, and by the EU institutions on the other. For more information, see <http://www.ccbe.eu/>

#### ELF

The main aim of the European Lawyers' Foundation (ELF) - established in 2014 by the CCBE - is to implement added-value projects that create services for European lawyers and on issues related of Justice's policies in Europe. Furthermore, the Foundation may also implement projects related to other objectives as Human rights and Rule of Law. For more information, see <http://europeanlawyersfoundation.eu/>



## HANDYMAN OR PROFESSIONAL? REPRESENTATION BY ADVOCATES IN COURTS

**5-6 JUNE 2015**

**PRESIDENT HOTEL**

**12 HOSPITALNA STR, KYIV**

5 June 2015

**Representation by Advocates in Courts:  
An Economic and Comparative View**

Chair: Martin Šolc, Vice-President of the IBA

- 09.00**      **Registration**
- 10.00**      **Welcome**
- Maria Šlqzak, President of the CCBE  
Martin Šolc, Vice-President of the IBA  
Lidiya Izovitova, President of the UNBA
- 10.30**      **Representation by Advocates in Courts:  
An Introduction**
- Martin Šolc, Vice-President of the IBA
- 10.45**      **An Economic View on Representation in Courts**
- Henrik Ballebye Okholm, Copenhagen Economics  
Christopher Decker, University of Oxford, Center for Socio-  
Legal Studies
- 11.45**      **Discussion**
- 12.30**      **Lunch**
- 14.00**      **Representation in Courts: Comparative and Empirical  
Findings**
- Matthias Kilian, Professor for Law of the Legal Profession,  
Faculty of Law, University of Cologne / Director, Soldan  
Institute for Law Practice Management, Cologne
- 14.30**      **Discussion**
- 15.30**      **Closing Remarks**

6 June 2015

**High Quality Advocates for High Quality Services: Requirements**

Chair: Maria Šlqzak, President of the CCBE

- 09.00**      **Continuous Legal Education**
- Péter Köves, Vice-Chair of the Bar Issues Commission of the  
IBA  
Ulrich Wessels, President of the Hamm Regional Bar,  
Germany
- 09.30**      **Discussion**
- 10.30**      **Coffee break**
- 11.00**      **Professional Conduct and Discipline**
- Andriy Kostin, Chair of the International Relations  
Committee of the UNBA  
Lucy Dupong, Former Chair of the CCBE Deontology  
Committee  
Merete Smith, Secretary General of the Norwegian Bar  
Association
- 12.00**      **Discussion**
- 13.00**      **Lunch**
- 14.30**      **Civil Liability Insurance**
- Rytis Jokubauskas, Member of the CCBE PECO committee
- 15.00**      **Discussion**
- 15.30**      **Closing Remarks and Conclusions**
- Maria Šlqzak, President of the CCBE  
Lidiya Izovitova, President of the UNBA