

THE LEGAL PROFESSION IN BELARUS

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The Legal Profession in Belarus¹

The structure of the legal profession in Belarus

Provision of legal assistance in Belarus is a regulated professional activity subject to mandatory licensing by the Ministry of Justice². The law provides for two types of licenses in the field of legal assistance: a license of advocates' activities and a license for the provision of legal services³. Based on this dual licensing requirement, the legal profession in Belarus is divided into two distinct groups of practising lawyers: advocates and commercial lawyers*.

The main distinction between advocates and commercial lawyers is in the scope of representational rights that each group enjoys. While advocates are entitled to provide any kind of legal assistance, including representation in any court, to any physical or legal person on any legal matter⁴, the legal assistance rendered by commercial lawyers is strictly limited to:

“provision of paid services of legal nature on issues related to the establishment, operation and closure of corporations and on issues related to business activities of physical persons, including the provision of advice and preparation and examination of documents and representation of clients in commercial courts”⁵.

This means that advocates exercise monopoly over criminal defense and pleadings before civil courts, including employment and intellectual property law litigations. Additionally advocates are entitled to represent clients in commercial courts. The commercial lawyers on the other hand may only appear before commercial courts in commercial disputes and in administrative proceedings against legal entities. This arrangement frequently leads to situations, when commercial lawyers advise a client on issues of employment or intellectual property law, but are later forced to hire an advocate to represent their client in a civil court.

Additionally, advocates and commercial lawyers enjoy a different level of guarantees of their independence and client protection. On the one hand, the law explicitly outlaws

¹ This report was prepared for OSCE ODIHR by Vasili Kukharchyk, LL.M., Minsk, Belarus.

² Decree of the President of the Republic of Belarus “On licensing of certain types of activities” No.17 of July 14, 2003.

³ Ibid.

* While the law uses the term “lawyers” or “persons with a license to provide legal services” in respect to this group of practitioners, for the purposes of avoiding confusion the author of this report will use the term “commercial lawyers”, which better reflects the distinction between the two groups.

⁴ The Law “On Advocates” of June 15, 1993 No. 2406-XII (the Law on Advocates), Articles 4, 5, 17; Civil Procedure Code of the Republic of Belarus, Article 72; Criminal Procedure Code of the Republic of Belarus, Article 44; The Code of Administrative Procedure and Enforcement, Article 4.5; Commercial Procedure Code, Article 22.

⁵ Regulation “On licensing of the provision of legal services”, adopted by the Resolution of the Council of Ministers No. 1363 of October 20, 2003 “On the Licensing of activities for the performance of which the Ministry of Justice issues special permits (licenses)”, Article 4.

any interference in the attorney-client privilege in relation to advocates⁶ and prohibits advocates from disclosing privileged information in witness testimonies⁷. On the other hand, the Rules of Professional Ethics in force for commercial lawyers mandate that:

*“Pursuant to the request from a court, a prosecutor or an investigation agency in relation to an ongoing criminal or civil case, and pursuant to the request from a commercial court in relation to ongoing commercial disputes, a commercial lawyer has the right to disclose, without her client’s consent, the information that the client communicated to the commercial lawyer”.*⁸

Additionally, advocates and commercial lawyers have different institutional frameworks, and are subject to contrasting qualifications and licensing requirements, requirements related to the forms of organizing practice and provision of legal aid. All of these differences will be illustrated in the sections below.

There are currently 1,601* advocates-members of the National Bar Association of whom 66% are women⁹. 3% of advocates have less than 1 year of experience, 55% have from 1 to 10 years of experience and 16% of advocates are in the retirement age. The number of advocates in Bar Associations as of January 1, 2008, and the ratio of population per advocate are described in the table below.

Table: Number of advocates in Bar Associations and ratio of population per advocate

Bar Association	Advocates	Population	Population per advocate ¹⁰
Brest Oblast Bar Association	171	1 439 504	8 418
Vitebsk Oblast Bar Association	182	1 283 192	7 051
Gomel Oblast Bar Association	198	1 475 869	7 454
Grodno Oblast Bar Association	145	1 114 114	7 684
Minsk Oblast Bar Association	265	1 466 763	5 535
Mogilev Oblast Bar Association	126	1 137 521	9 028
Minsk Municipal Bar Association	508	1 797 498	3 538
Belarusian Specialized Bar Association	6	n/a	n/a
Belarus	1 601	9 714 461	6 068

The number of commercial lawyers in Belarus is 520 of whom 371 practice in Minsk, the capital of Belarus.¹¹ There are 124 commercial law firms licensed in Belarus and

⁶ The Law on Advocates, Article 16.

⁷ Rules of Advocate’s Professional Ethics, adopted by the Resolution of the Ministry of Justice No.15 of June 27, 2001, Rule 18.

⁸ Resolution of the Ministry of Justice No.37 of June 8, 2007 “On Rules of Professional Ethics for Persons Providing Legal Services”, Rule 36.

⁹ Analysis of statistical data on the work of Bar Associations in Belarus in 2007, prepared by the National Bar Association.

* This number is slightly different according to the data kept by the Ministry of Justice and constitutes 1619 advocates.

¹⁰ Statistics of the Ministry of Justice as of April 1, 2008

¹¹ Registry of persons with lawyer’s qualification certificates. Available on the website of the Ministry of Justice www.minjust.by Information as of January 15, 2008

94% of them operate in Minsk. Out 254 licensed solo commercial law practitioners 80 practice outside of the capitol. Thus, the legal profession in Belarus includes 2 121 practising lawyers allowing for nearly 22 lawyers per 100 000 inhabitants.

Regulation and organization of the legal profession in Belarus

The constitutional basis for the functioning of the legal profession in Belarus stems from article 62 of the Constitution which enshrines the right of every person to legal assistance in protecting her rights and liberties, including the right to use, at any time, the assistance of an advocate or other representative in court or other governmental agency.

Both legal professions are heavily regulated by a number of Presidential Decrees and Resolutions of the Ministry of Justice. In addition, the exercise of the profession of an advocate is subject to the Law on Advocates and several binding regulations of the National Bar Association.

The central self-governing body of advocates in Belarus is the National Bar Association¹². The National Bar Association unites Minsk municipal Bar Association, six oblast-level Bar Associations, and Belarusian Specialized Bar Association¹³. Following the 1997 Presidential Decree every advocate in Belarus must be a member of one of these seven Bar Associations¹⁴.

The highest decision-making organ of the National Bar Association is the Presidium composed of 33 members. Seven members of the Presidium are chairpersons of the seven Bar Associations, 18 members are elected from among advocates of Oblast-level Bar Associations, 5 are elected from Minsk Municipal Bar Association, and the Chairperson and Deputy Chairperson of the National Bar Association are correspondingly Chairperson and Deputy Chairperson of the Presidium. The Presidium meets at least four times a year and its decisions are adopted by simple majority vote.

The daily management of the National Bar Association is carried out by the Chairperson, Deputy Chairperson and four Permanent Commissions: commission on appeals; commission on guidelines; commission on legislation; and commission on international relations¹⁵. Auditing functions are performed by the Audit Commission. The Chairperson, Deputy Chairperson and members of the Permanent and Audit Commissions are elected by the Presidium of the National Bar Association for a renewable term of five years.

¹² The Law on Advocates, Article 13

¹³ The oblast-level Bar Associations are organized according to the administrative division of Belarus. Belarus is divided into six oblasts (regions) and Minsk enjoys a special administrative status. The Belarusian Specialized Bar Association enjoys the status of oblast-level Bar Association.

¹⁴ Decree of the President of the Republic of Belarus No. 12 of May 3, 1997 "On measures to improve the exercise of the professions of advocates and notaries", Article 1.4; The Law on Advocates, Article 13.

¹⁵ Ibid., Article 8.

The four goals of the National Bar Association include: a) ensuring organizational and legal guarantees for the provision of qualified legal assistance; b) promotion of the role of advocates in the society and in the state; c) uniting advocates' efforts in the establishment and promotion of rule of law; and d) protection of professional and social rights of advocates¹⁶.

In addition to coordinating and lobbying functions, the National Bar Association is vested with powers to:

- adopt the Rules of Advocates' Professional Ethics;
- adopt Model Charters for Oblast-level Bar Associations, Minsk Municipal Bar Association and the Specialized Bar Association;
- adopt Model Internal Rules and Procedures for advocates' Legal consultation offices and other documents regulating advocates' activities;
- conduct inspections of activities of Bar Associations, including inspections of their financial activities;
- regulate the number of advocates in the country.

Daily professional activities of advocates are regulated by oblast-level and Minsk Municipal Bar Associations. The highest decision-making body of a regional Bar Association is the General Assembly, and every-day management of the Bar is the responsibility of the Presidium. Presidiums are composed of five members who are elected by General Assembly of the respective Bar Association for the term of three years. Presidiums of regional Bar Associations are empowered to:¹⁷

- Annually determine the cap on the number of new advocates to be admitted to practice;
- Increase, for up to six months, the amount of mandatory monthly deductions from advocates' salaries towards the Bar Association from 30% to 40%;¹⁸
- Decide on granting legal aid;
- Approve or deny applications for apprenticeship and the position of assistant advocate;
- Administers apprenticeships;
- Allocate and reallocate advocates among LCOs of the Bar Association;
- Discipline and reward advocates. One of the disciplinary sanctions which Presidiums may impose on bar members is expulsion from the Bar Association, which automatically leads to the revocation of license;¹⁹

¹⁶ Charter of the National Bar Association, Article 5.

¹⁷ Charter of the Minsk Municipal Bar Association, Article 12. It should be noted that the Charters of all 7 regional Bar Associations in Belarus are virtually identical.

¹⁸ Advocates are required to transfer to the Bar Association 30% of their monthly income. *See* Law on Advocates, Article 13-2. In fact, as clients pay for their services to the "cash desk" of the Legal consultation office and not directly to the advocate, LCOs retain the 30% and pay advocates the remainder of her monthly income. Additionally, advocates must allocate a certain amount of their income to the National Bar Association and pay taxes. The total amount of deductions from advocates income is over 55%. *See* Gennadiy Kosarev, *Advocates will either raise prices or move into the shadow*, available at <http://www.belaruspartisan.org/bp-forte/?page=100&backPage=22&news=23989&newsPage=0>

- Organize professional development of advocates;
- Control the quality of advocate's work;
- Certify professional competence of advocates for the purposes of renewing the license.

Moreover, as advocates are only allowed to practice through Legal consultation offices, they are subject to daily supervision by the LCO Chairperson who *inter alia* has the power to:²⁰

- Distribute the workload among advocates and assign legal aid cases;
- Control the quality of advocates' work and their compliance with the Rules of Professional Ethics;
- Propose to the Presidium of the Bar Association to reward or discipline an advocate;
- Decide, based on clients' requests, on granting legal aid.

While the National, oblast-level and Minsk Municipal Bar Associations retain the power to set ethical standards, discipline advocates, propose and influence the adoption of relevant legislation and regulate the number of bar members, the primary regulatory authority over the profession lies with the Ministry of Justice. The Ministry has the power to design the content of qualifications examination,²¹ decide on the number and the nature of questions for each bar examination,²² introduce additional qualification requirements for members of the Specialized Bar Association,²³ issue,²⁴ extend and revoke²⁵ advocates' licenses, initiate disciplinary proceedings against advocates²⁶ and suspend decisions of Bar Associations.²⁷

¹⁹ Interestingly enough, by law Chairpersons of Bar Associations are immune from disbarment Bar. As a disciplinary sanction, disbarment exists only in relation to regular advocates.

²⁰ Regulation on a Chairperson of Legal consultation office, Article 3, adopted by the Resolution of the Ministry of Justice No.55 of October 26, 2005 "On a Chairperson of oblast-level, Minsk Municipal and Specialized Bar Associations and a Chairperson of Legal Consultation Center".

²¹ Resolution of the Ministry of Justice No.27 of October 29, 2003 "On the Advocate's Qualifications Commission of the Republic of Belarus", Article 23, paragraph 2; *also see* Order of the Minister of Justice of May 2, 2007 "Program for preparation to the advocate's qualifications examination".

²² *Ibid.*, Article 23, paragraph 3.

²³ Resolution of the Council of Ministers No.1605 of October 31, 2001 "On the Ministry of Justice of the Republic of Belarus", Article 5.14. paragraph 4.

²⁴ *Ibid.*, Article 5.12; Resolution of the Council of Ministers No. 1363 of October 20, 2003 "On the Licensing of activities for the performance of which the Ministry of Justice issues special permits (licenses)".

²⁵ Decree of the President No. 17 of July 14, 2003 "On licensing of certain types of activities", Articles 30 and 34.

²⁶ Regulation on licensing of advocates' activity, adopted by the Resolution of the Council of Ministers No. 1363 of October 20, 2003 "On the Licensing of activities for the performance of which the Ministry of Justice issues special permits (licenses)", Article 16 paragraph 3.

²⁷ Resolution of the Council of Ministers No.1605 of October 31, 2001 "On the Ministry of Justice of the Republic of Belarus", Article 5.14. paragraph 7.

Unlike advocates, commercial lawyers in Belarus are not required to join a professional association. Nevertheless, in 1992 a group of lawyers registered under the law on public associations a Belarusian Association of Commercial Lawyers (BACL), a non-for-profit organization. BACL does require its members to have a license to practice law and currently has 171 members, and not all of them are licensed commercial lawyers. Most of commercial lawyers in Belarus remain unorganized.

BACL does not have any powers to regulate the profession of commercial lawyers, but serves as a forum for commercial lawyers to discuss pertinent problems of the legal services market in Belarus and provides professional development and access to legal information for its members. The Ministry of Justice exercises control over the design and administration of qualifications examination for commercial lawyers²⁸, establishment²⁹ and enforcement³⁰ of ethical standards, as well as over issuance, extension and revocation of licenses³¹.

The powers of admission to and oversight over the legal profession are vested in commissions created by the Ministry of Justice. Thus, advocates' entry to the profession is administered by the Advocates' Qualifications Commission (AQC),³² responsible for the evaluation of applicants' character, educational and professional preparedness for the exercise of the profession. The Commission is appointed by the Ministry of Justice for the term of three years. The Minister of Justice appoints to the Commission no less than 9 members, including representatives of governmental agencies, advocates with at least five years of professional experience and other specialists in the field of law. The Commission is chaired by Deputy Minister of Justice. Presently, the commission is composed of 15 members, of whom only 4 are advocates. Other members include judges, representatives of the Ministry of Justice, members of law enforcement agencies and legal scholars.

The qualifications commission for commercial lawyers is appointed by the Minister of Justice, who determines the size and personal composition of the commission. The number of commission members, however, may not be less than five. The commission usually includes representatives of the Ministry of Justice and legal academia, and is

²⁸ Instruction "Concerning the procedure of issuance of lawyer's qualification certificates" adopted by the Resolution of the Ministry of Justice No.26 of October 29, 2003 "On the adoption of the Instruction concerning the procedure of issuance of lawyer's qualification certificates and the Instruction concerning the procedure of issuance of a certificate of forensic expert and the schedule of forensic examinations for the conduct of which the commission of the Ministry of Justice issues certificates" (The Instruction concerning the procedure of issuance of lawyer's qualification certificates).

²⁹ Resolution of the Ministry of Justice No.37 of June 8, 2007 "On Rules of Professional Ethics for Persons Providing Legal Services".

³⁰ The Instruction concerning the procedure of issuance of lawyer's qualification certificates, Article 49

³¹ Decree of the President of the Republic of Belarus "On licensing of certain types of activities" No.17 of July 14, 2003, Articles 10, 24, 26, 30, 31.1, 31.2, 34; Instruction "Concerning the procedure of issuance of a special permit (license) for the provision of legal services", Articles 19-21, as adopted by the Resolution of the Ministry of Justice No.67 of December 23, 2005.

³² Resolution of the Ministry of Justice No.27 of October 29, 2003 "On the Advocates' Qualifications Commission"

responsible for reviewing applications to sit for the qualifications examinations, administration of qualifications examination and review of misconduct by licensed commercial lawyers.

Entry to the legal profession

Entry to the profession of advocates and commercial lawyers is equally subject to licensing by the Ministry of Justice. The license is issued for five years and may be renewed upon the application of a license holder subject to the good history of compliance of the license holder with relevant legislation, payment of a fee and proof of maintenance of professional competence.³³ The Ministry of Justice designs the content of both qualifications examinations for both advocates and commercial lawyers. At the same time there are different admission requirements and procedures established for advocates and commercial lawyers.

A person may become an advocate if she is a citizens of the Republic of Belarus, and has a university degree in law, and completed at least three years of professional legal experience or six-to-twelve months of apprenticeship in a Legal consultation office, and has successfully passed qualifications examination and received a license.³⁴ Persons with criminal convictions and persons who have been fired from law enforcement or other agencies for misconduct may not be admitted to the profession. Advocates whose license has been revoked may reapply for it in one year.

A graduation from a law faculty does not by itself satisfy the requirement of university degree in law. Only persons who graduated with following specializations will meet this requirement: “Jurisprudence”, “International law”, “State security”, “Customs service”, “Economic law” and “State management and law”.³⁵ Some law schools in Belarus offer other specializations, i.e. “Political science” etc.

For the purposes of obtaining advocate’s or commercial lawyer’s license, professional legal experience means employment in any organization which was directly related to the protection of physical or legal persons or the establishment of public order including:³⁶

- Judges, court secretary, assistant judge, judicial apprentice;
- Bailiffs;
- Public notary, assistant public notary, apprentice notary;
- Staff employment arbitrator;
- Prosecutor;

³³ Resolution of the Council of Ministers No. 1363 of October 20, 2003 “On the Licensing of activities for the performance of which the Ministry of Justice issues special permits (licenses)”.

³⁴ Law on Advocates, Article 7.

³⁵ Resolution of the Ministry of Justice No.4 of February 23, 2004 “On certain requirements for persons who wish to become public notaries, and persons applying for an advocates’ license or license to provide legal services”, Article 1, paragraphs 1 and 2.

³⁶ Ibid., Article 2.

- Other specialist working in governmental organization on positions, the terms of reference for which require university degree in law;
- Advocate, assistant advocate or apprentice;
- Lawyer, in-house counsel;
- Lecturer of law;
- Researcher in research institutions;
- Military officers occupying positions which require a university degree in law;
- Employees of enforcement agencies, state security agencies, financial crimes investigation agencies and customs.

A person may start accumulating professional legal experience after receiving the degree in law, or upon the completion of the second year of university degree or after the completion of specialized secondary legal education. Under these circumstances, a graduate who started working after the second year of law school will meet the professional experience requirement and may sit for the bar exam immediately after graduation.

Instead of obtaining three years of professional legal experience a person wishing to sit for the bar exam may opt for an apprenticeship in an LCO. While the law provides for a six-to-twelve month apprenticeship, in practice it rarely lasts more than half a year. Apprentices are enrolled only once a year from among law school graduates.³⁷ Chairpersons of the Presidiums of Bar Associations must approve individual apprenticeship plans for each apprentice, and an apprenticeship curator is appointed from among practicing advocates. At the end of the apprenticeship, apprenticeship curators submit to the Presidium of the Bar Association a recommendation concerning the apprentice and evaluation of the trainee's performance of the individual apprenticeship plan. The apprentice herself must prepare a written report on the progress of her training, where she must describe completed assignments and provide drafts of procedural documents, texts of defense speeches and case files. Based on this information, the Presidium decides whether to recommend the apprentice for the bar examination. Unless a positive recommendation is issued, an apprentice will not be allowed to sit for the exam.

If the apprentice subsequently fails the qualifications examination, she should be expelled from the Bar Association. In exceptional circumstances,³⁸ however, an apprentice may be given up one year, but no less than four months, of additional training after which she will be given a chance to retake the examination. In practice, failed apprentices are almost never expelled and are usually given the opportunity to retake the examination after four months of additional training. If the apprentice fails the exam for the second time, she will be expelled from the Bar for professional inaptitude.

³⁷ Order of the Minister of Justice of June 30, 1999 "On apprenticeship of advocates", Paragraph 1.1.

³⁸ Exceptional circumstances include circumstances which impeded the normal flow of the apprenticeship such as difficult family situation etc. See Order of the Minister of Justice of June 30, 1999 "On apprenticeship of advocates", Paragraph 1.1.

While the law does not place a priority on either of the two options for meeting the professional experience requirement, it does grant persons who complete the apprenticeship an automatic “pass” on the professional experience, whereas applicants claiming three years of professional legal experience are subject to preliminary determination of their eligibility by the Advocates’ Qualifications Commission³⁹.

Having received a university degree in law and having completed the professional experience requirement, a person may file an application with the Advocates’ Qualifications Commission. The Commission reviews the application and determines whether the applicant meets the educational and professional experience criteria and has good moral character.⁴⁰ If the Commission determines that the applicant meets these requirements, the applicant is invited to take the qualifications examination.

The qualifications examination includes a written and an oral test. A written test has 20 multiple-choice questions, arranged by the Deputy Minister of Justice into individual test cards, based on the general examination program approved by the Minister of Justice.⁴¹ The applicant is allocated 30 minutes to answer these questions. In order to pass the written exam, applicants must answer 80% of the questions correctly.⁴² The written exam is evaluated by the Commission immediately and, in case of a positive result, the applicant is invited to take the oral examination.

The procedure of administering the oral examination is not regulated by law and usually involves a set of practical questions from the Commission members. The number and the scope of questions are different from applicant to applicant, and it is unclear from the law whether any written record of the questions asked and answers provided is kept. While the law states that in evaluating the applicant’s written test and oral examination the Commission makes a collective decision, no voting procedures exist. Additionally, it is unclear whether the applicants may challenge decisions of the Commission on denial of the right to sit for the bar exam and decisions on the passing of the examination.

As a rule, advocates’ qualifications examination takes place twice a year. The first exam is administered approximately six months after the end of academic year in law schools (February-March) so that law school graduates have enough time to complete their

³⁹ Resolution of Ministry of Justice No.20 of June 21, 2004, Article 4.

⁴⁰ Traditionally, the examination of the character of the applicants was limited to the investigation of her criminal record, but since 2002 the approach to evaluating the applicants’ character has been increasingly stringent. Between 2002 to 2004, there was a special Advocates’ Ethics Commission set up by the Ministry of Justice, which carefully examined the character of applicants. In 2004 these functions were transferred to the Advocates’ Qualification Commission. According to anecdotal information, the Advocates’ Qualifications Commission, on the grounds of bad character, denied access to the qualifications examination to persons whose previous employment included bartending, and persons who were actively involved in religious groups.

⁴¹ The Order of the Minister of Justice of May 2, 2007 “Program for preparation to the advocate’s qualifications examination”.

⁴² Resolution of the Ministry of Justice No.27 of October 29, 2003 “On the Advocates’ Qualifications Commission”, Article 24, paragraph 2.

apprenticeships. The second examination is usually organized four months after the first one (August-September) so to allow the applicants who initially failed to complete the additional four-month training. Average passing rate of the advocates' qualification examination varies from 80% to 85%.⁴³

The commercial lawyers are subject to the same educational and professional experience requirements as advocates with one exception – commercial lawyers do not enjoy the option of completing a six-month apprenticeship. Therefore, all applicants for commercial lawyer's license must complete at least three years of professional experience. Another difference in the procedure of entering the profession between advocates and commercial lawyers is the relationship between the passing of qualifications examination and obtaining a license to practice law, or the number of stages in the admission procedure.

While advocates are subject to a two-stage entrance procedure (first, they have to prove eligibility to sit for the bar, and second – prove eligibility for the exercise of the profession by way of passing the bar examination), the commercial lawyers must face a three-stage process. First, just like advocates, commercial lawyers have to meet the educational and eligibility requirements to be admitted to the qualifications examination. Then they have to prove their professional aptitude in the field of law by taking the qualifications examination (certification procedure). Finally, commercial lawyers must prove that they have a necessary capacity and resources to engage in the business of provision of legal services (licensing procedure).

The qualifications examination for commercial lawyers is designed by the Ministry of Justice⁴⁴ and administered by a special qualifications commission appointed by the Minister of Justice.⁴⁵

The examination consists of a written test and oral interview and is administered much like the examination for advocates. Within 30 minutes, applicants must answer correctly at least 80% of the questions from the written test to be eligible for the oral interview. If the applicant successfully passes both tests, the commission issues a decision on the issuance of the certificate which is valid for five years. If the applicant fails either of the examination components, she may retake the exam in four months. If the applicant fails it for the second time, she must wait for one year before she could be considered for the

⁴³ Interview with Ms. Tatiana Matusevich, Deputy Chairperson of the National Bar Association; Interview with Ms. Valentine Boreisha, Deputy Head of Advocate's Licensing Department of the Ministry of Justice.

⁴⁴ Order of the Deputy Minister of Justice of June 15, 2007 "Program for the preparation to commercial lawyer qualifications examination".

⁴⁵ Instruction "Concerning the procedure of issuance of lawyer's qualification certificates" adopted by the Resolution of the Ministry of Justice No.26 of October 29, 2003 "On the adoption of the Instruction concerning the procedure of issuance of lawyer's qualification certificates and the Instruction concerning the procedure of issuance of a certificate of forensic expert and the schedule of forensic examinations for the conduct of which the commission of the Ministry of Justice issues certificates" (The Instruction concerning the procedure of issuance of lawyer's qualification certificates), Article 7.

examination. According to different sources, average passing rate on the commercial lawyers' examination varies between 20%-50%⁴⁶ and 50%-60%⁴⁷

Once the applicant received a certificate of a commercial lawyer, she may apply for the license to practice law. If the applicant wishes to practice individually, she must be a national of Belarus and must have a certificate of a commercial lawyer. If the applicant wishes to operate through an office/corporation, she must be a resident company of Belarus, in which all staff, including the director and deputy directors (excluding technical and support staff) possess university degrees in law, and at least two of them are certified to practice commercial law.

To obtain a license, an individually practicing commercial lawyer must provide to the Ministry of justice the following documents: a) application for a license; b) commercial lawyer's certificate; c) a copy of employment record book; d) a receipt confirming the payment of the state fee; e) passport information. In addition to that, a law firm must also provide its statutory documents and a list of employees, all of whom, except for the support and technical staff must have a university degree in law and at least two of the lawyers must be certified.

The entrance qualifications requirements and the examination itself are not viewed as fair and objective by either of the legal professions. Thus, the advocates are concerned about the nature of the questions on the written examination. Reportedly, an advocate with 10 years of professional experience would be unable to pass the examination without having a look at sample examination questions. During the examination, future advocates are often required to cite legal provisions virtually by heart.

The commercial lawyers are dissatisfied with inconsistent approach to the qualifications requirements. Firstly, they believe it is unfair that advocates may opt for a six-month internship, while commercial lawyers must obtain three years of professional experience. Finally, while commercial lawyers are only allowed to plead before commercial courts in commercial disputes between business entities, examination questions include virtually every area of law, including criminal and family.

The law establishes the same license fee for advocates and commercial lawyers in the amount of 8 times the basic measure,⁴⁸ which today constitutes 280,000 Belorussian rubles or (130 USD). The same fee is collected every time the license is renewed (every five years), and an additional fee of 75 USD must be paid in order to register changes in the license.

⁴⁶ Tatiana Ignatovskaya, Main tendencies in the development of legal services market in Belarus, presentation at the VI Legal Forum of NIS and Baltic states, October 1-4, 2007, Yalta, Ukraine

⁴⁷ Interview with Ms. Valentine Boreisha, Deputy Head of Advocate's Licensing Department of the Ministry of Justice.

⁴⁸ The Law "On the State Fee" No. 1394-XII of January 10, 1992, Appendix 9, Article 45. The "basic measure" is a fixed and periodically reviewed monetary value used to calculate state fees, taxes, fines, benefits etc. When the amount of the basic measure changes, so do the amounts of state fees. Since 2002 the amount of the basic measure has gone up 3.5 times (See Resolution of the Council of Ministers No.243 of February 22, 2002 and Resolution of the Council of Ministers No. 1446 of November 2, 2007).

Forms of organizing legal practice in Belarus

The law establishes mandatory membership of advocates in Minsk Municipal Bar Association, Oblast-level Bar Associations or in the Specialized Bar Association. Advocates may exercise their profession collectively through Legal Consultation Offices (LCOs) established by a respective Bar Association or through “other organizational forms”, based on the specific decision of the Bar Association⁴⁹. While the law seems to allow for private practice of law as “another organizational form”, in practice the only other organizational forms of advocates’ professional activities are the so-called Specialized Legal Consultation Offices (SLCOs).

Consequently, advocates’ solo practice⁵⁰ or practice outside LCOs and SLCOs is not allowed,⁵¹ and all advocates in Belarus practice law as members of 162 LCOs and 11 SLCOs⁵². The number of advocates working in LCOs and SLCOs varies from 1 in the Chernobyl area to 35 in Minsk. Based on the considerations that it is impossible to organize control over the assignment of cases, quality of work and advocates’ compliance with the Rules of Professional Ethics and office rules and regulations, there are currently no LCOs with more than 35 advocates in Belarus⁵³. The biggest LCOs are located in Minsk and oblast capitols, and most common office have 5 -15 advocates. Due to their narrow area of work, SLCOs are usually small in size.

Unlike advocates, commercial lawyers are free to practice individually or in law firms.⁵⁴ Presently, out of 124 active law firms only three have 15 or more lawyers. The rest of the law firms are small in size. Over the last years Belarusian legal market saw a consistent tendency for enlargement of law firms and specialization of lawyers. The mentality of regulatory agencies and most commercial lawyers, however, remains to be – “one lawyer can do it all”.⁵⁵

In order to obtain a license a law firm must have at least two certified commercial lawyers, and its director and deputy directors must have a law degree. All of the

⁴⁹ Law on Advocates, Article 13.

⁵⁰ It should be noted that there are several one-person LCOs in the Chernobyl area (Mogilev and Gomel oblasts), but they fall under the general regulatory regime and are not considered solo practice.

⁵¹ Law On Advocates, Article 24.

⁵² Of these 7 SLCOs specialize in commercial law, 1 SLCO – on international commercial transactions, 1 SLCO – on intellectual property law, 1 SLCO – on real estate law, and 1 LSCO – on martial law.

⁵³ Guidelines on organization of work of Legal Consultation Office of Bar Associations approved by the Order of the First Deputy Minister of Justice on March 29, 2000; Resolution of the Ministry of Justice No.20 of June 21, 2004 “On additional measures to improve the discipline and responsibility of lawyers”.

⁵⁴ Regulation on licensing of the provision of legal services, adopted by the Resolution of the Council of Ministers No. 1363 of October 20, 2003 “On the Licensing of activities for the performance of which the Ministry of Justice issues special permits (licenses)”, Article 5.

⁵⁵ Interview with Alexander Stepanovskiy, Managing Partner and Director, “Stepanovskiy, Papakul & Partners”, and Tatiana Ignatovskaya, Partner, Head of the commercial practice, “Stepanovskiy, Papakul & Partners”.

employees of a law firm, except for technical and support staff, must have a law degree.⁵⁶ Commercial lawyers who are practicing individually, may hire no more than three staff members all of whom must be close relatives.⁵⁷

The cost of legal services in Belarus

When it comes to setting the costs of legal services in Belarus, different rules apply to advocates and commercial lawyers. According to the Law on Advocates, the price of advocate's services is a matter of contract between the client and the counsel.⁵⁸ Advocates are free, at least on the books, to negotiate the costs of their services in each particular case, depending on the complexity of the case, type of legal assistance required, amount of time required to provide the services and amount of time available, advocate's experience, implications on advocate's ability to simultaneously handle other cases, regional practice of fee setting etc.⁵⁹

At the same time there are several restrictions on advocates' discretion to negotiate fees for legal services. Firstly, advocates who handle high-paying cases or set unjustifiably high prices for their services are subject to 40% deductions from their monthly income towards Bar Associations instead of a regular 30% bar tax.⁶⁰ Secondly, advocates who were found guilty of systematically (3 times within one calendar year) setting unjustifiably high prices for their services may be disbarred and have their license revoked.⁶¹

Reportedly, the National Bar Association requires all LCOs to submit periodic reviews of the costs of legal services provided by their advocates, but this information is not accessible. It should be noted, that advocates in Belarus are reluctant to discuss their fees even in private conversations, which made it difficult to gather any generalized information on the cost of legal services in the country. The following information became available based on a series of informal interviews with Minsk-based advocates:

- The price of an oral consultation on a case of medium complexity would range from 35,000 to 100,000 Belarusian rubles (17 USD - 50USD);
- Drafting of a lawsuit on a case of medium complexity would cost between 70,000 and 200,000 rubles (35 USD - 100USD) and rarely goes over 350,000 rubles (170USD);

⁵⁶ Regulation on licensing of the provision of legal services, adopted by the Resolution of the Council of Ministers No. 1363 of October 20, 2003 "On the Licensing of activities for the performance of which the Ministry of Justice issues special permits (licenses)", Article 5, paragraph 1.

⁵⁷ Decree of the President No.760 of June 18, 2005 "On certain measures concerning the regulation of entrepreneurial activities", Article 1.1.

⁵⁸ Law on Advocates, Article 27, paragraph 2.

⁵⁹ Rules of Advocates' Professional Ethics, Article 52.

⁶⁰ Law on Advocates, Article 13-2, paragraph 3.

⁶¹ Regulation on licensing of advocates' activity, adopted by the Resolution of the Council of Ministers No. 1363 of October 20, 2003 "On the Licensing of activities for the performance of which the Ministry of Justice issues special permits (licenses)", Article 17.

- A day in court in simple civil cases ranges from 150,000 to 200,000 rubles (75 USD - 100USD), but more complex cases start at 350,000 rubles (170USD).

Belarusian advocates use daily rates and rates for specific legal actions, and the use of contingency fee is considered a violation of professional ethics.⁶² It should be noted that these prices are applicable to physical person, and companies tend to get charged much more. Additionally, experiences Minsk-based advocates' are free to set higher prices, which can go up to 100USD per oral consultation, 500USD per hearing court-room hearing. Reportedly, there are advocates who charge up to 300USD per hour of work. On the other hand, advocates' fees outside of Minsk are considerably smaller.

In assessing how affordable these prices are for the citizens, it is important to understand the scope of legal aid services available to the clients. This will be further illustrated in the section below, but for the purposes of this analysis it is sufficient to state that all employment and alimony cases are handled by advocates free of charge. Noting that nearly 40% of all legal assistance rendered by advocates in Belarus is free of charge, representatives of this legal profession do not seem to be concerned about the costs of their services. On the other hand, the House of Representatives of the National Assembly reported that in 2006 nearly 1,000 citizens complained to the lower house of the parliament about high costs of advocates' services.

As regards commercial lawyers, the costs of their services are approved by the government. Individually practicing commercial lawyers and law firms must periodically register the prices of for their services at the Ministry of Finance. Registration involves detailed economic justification of lawyers' rates, including the analysis of prices used by competing companies.⁶³ Unlike advocates, commercial lawyers calculate legal fees based on hourly rates and may not use lawyer's professional experience or prestige to justify higher fees.⁶⁴

An average hourly rate of Minsk-based law firms⁶⁵ is between 100,000 and 120,000 Belarusian rubles (50USD - 60USD), but there is a tendency of increasing this price to 50Euro – 60Euro.

Reportedly, foreign companies like “Artzinger & Partners” charge up to 200 Euro per hour, but this currently has no impact on the legal services market due to small number of foreign law firms (3) and concentration of foreign law firms on foreign clients.

⁶² Rules of Advocates' Professional Ethics, Article 53.

⁶³ See the Law “On the Formation of Prices”; Decree of the President No.285 of May 19, 1999 “On further stabilization of tariffs and prices”; Resolution of the Council of Ministers No.209 of February 10, 1999.

⁶⁴ Igor Verhovodko, *The Procedure of Setting Prices for Legal Services*, presentation at the roundtable “Prospects of development of the legal practice in Belarus”, Minsk, May 24, 2002.

⁶⁵ The rates of Minsk-based law firms are generally higher than those of their regional counterparts, but this has little impact on the general picture as nearly 95% of all law firms in Belarus are located in Minsk.

Minsk-based individually practicing commercial lawyers tend to set fixed rates for specific types of legal actions. For example, registration of a local limited liability company would cost the client on average 200USD-250USD, and drafting a contract usually costs between 30USD and 75USD. One of courtroom representation is rarely valued at less than 100USD.

Overall, according to the World Bank, average attorney's fees required to enforce a contract in commercial disputed amount to 12% of the claim, or roughly 811USD, which is comparable to most Eastern European and NIS countries.⁶⁶

Legal aid

The Constitution of Belarus guarantees the right of everyone to receive legal assistance free of charge in cases provided for by law.⁶⁷ There is no single law on legal aid in Belarus, and it is afforded in different scope to different categories of persons under a variety of laws. Legal aid is available in both criminal and civil cases. It should be noted from the outset, that only advocates bear the burden of delivering legal aid services,⁶⁸ and they amount to nearly 40% of advocates' workload.

The law declares that legal aid may be rendered in criminal cases in two scenarios: a) when advocates are appointed *ex officio*;⁶⁹ and b) when competent authorities exempted the defendant, fully or partially, from paying for advocate's services.⁷⁰ While the latter option is not used in practice at all,⁷¹ only limited amount of legal aid is available under the first scenario. Thus, *ex officio* advocate is appointed by the investigating agency when: 1) the suspect/the defendant requests so; 2) advocate's participation in the case is mandatory, but the suspect/defendant does not have a counsel;⁷² 3) the suspect/accused have been detained – in order to provide legal advice before the first interrogation; 4) when the counsel chosen by the suspect/the defendant failed to appear within 24 hours after being admitted to the case, or failed to appear in procedural actions, and if the accused/the defendant insists on advocate's participation in the case.

Under any of these circumstances, an investigating officer, a prosecutor or a judge contact the Chairperson of the closest LCOs or the Presidium of the respective Bar Association. In practice, pursuant to recommendations from the National Bar

⁶⁶ Enforcing contracts in Belarus, the 2008 Doing Business Report available at <http://www.doingbusiness.org/ExploreTopics/EnforcingContracts/Details.aspx?economyid=19>

⁶⁷ The Constitution of the Republic of Belarus, Article 62.

⁶⁸ Law on Advocates, Article 6.

⁶⁹ Criminal Procedure Code of the Republic of Belarus, Article 46, paragraph 2.

⁷⁰ *Ibid.*, Article 46, paragraph 8.

⁷¹ Olga Savich, *The Right to Legal Assistance in the Criminal Process*, dissertation for the degree of candidate to doctor of legal sciences, УДК 343.13, Minsk, 2006, p.89

⁷² According to Article 45 of the Criminal Procedure Code, advocate's participation in the case is mandatory is the suspect/the defendant is a minor, or does not speak the language, or is unable to defend herself due to physical or psychiatric disabilities, or when a person is accused of a grave crime, or when contradictions exist in a group of defendants and at least one them has a lawyer.

Association, all LCOs in the country have advocates-on-duty. The schedule of on-duty advocates is approved by LCO Chairpersons and those advocates are responsible for any and all legal aid assignments during their time slot. According to anecdotal information, most of legal aid assignments are performed by recently admitted inexperienced advocates.

It is clear that the law does not establish any financial criteria for defendant to be eligible for legal aid, and a simple request for an appointed lawyer is sufficient. However, out of all of these circumstances, the law directly provides for the right to legal aid only in the form of legal advice to the suspect/the accused before the first interrogation. In particular, in relation to the first two options (when the suspect/the defendant requests an appointed counsel and when advocate's participation is mandatory), the law obliges the court to subsequently recover attorney's fees from such persons or their legal representative should they be found guilty.⁷³ The courts follow this rule in all cases. Finally, advocates appointed under the fourth option are mandated to explain to the client that their services are not for free.⁷⁴

Therefore, legal aid in criminal cases, except for the free advice before the first interrogation, is never free of charge for legal aid recipients who are later found guilty. *Ex officio* advocates are nevertheless compensated from local (oblast-level) budgets to the tune of roughly 52, 000 Belarusian rubles (25USD) per one day of legal aid work in the Supreme and oblast-level courts, and 35, 000 rubles (17USD) per day in lower courts and during the pre-trial stage. For the purposes of compensation only the number of days actually worked counts, regardless of the number or the complexity of assignments completed.⁷⁵ In order to receive pay, an advocate must prepare three copies of a billing record, in which she must indicate the dates during which she provided legal aid services and the amount to be paid for such services from the local budget. Each copy of the billing record must be approved by the person appointing the advocate (investigator, prosecutor or a judge). The compensation is transferred from the local budget to the advocate's LCO's account within two weeks following the signed receipt of the billing record.

Other categories of cases and persons eligible for legal aid include:⁷⁶

- Legal assistance to plaintiffs in employment cases;
- Legal assistance to plaintiffs in alimony cases;
- Legal assistance to plaintiffs in cases concerning the recovery of compensation for physical injuries caused at work;

⁷³ Criminal Procedure Code of the Republic of Belarus, Article 46, paragraph 9 and Article 163, paragraph 2.

⁷⁴ Resolution of the Presidium of the National Bar Association No.22 of July 1, 2003 "On the practice of setting advocate's fees in legal consultation offices".

⁷⁵ Resolution of the Council of Ministers No.1003 of August 8, 2007; Joint Resolution of the Ministry of Justice and Ministry of Finance No.57/129 of August 30, 2007 "On the procedure of paying compensations to advocates from local budgets", paragraph 4.

⁷⁶ Resolution of the Ministry of Justice No.86 of December 11, 2007 "On certain issues of legal aid delivery", Article 1.

- Legal assistance to plaintiffs in cases concerning the recovery of damages for death of a bread-winner;
- Consultations and drafting of documents for persons under the age of 18;
- Simple consultations on issues not related to commercial activities to World War II participants, persons with disabilities of I and II degrees and persons serving in the army;
- Legal assistance to persons in disagreement with decisions of local election commissions on their inclusion in voter lists;
- Assistance in drafting law suits for deprivation of parental rights to persons empowered by law to file such lawsuits on behalf of children.

In all of these cases legal aid is rendered at the expense of advocates, i.e. advocates' work is compensated from pools of money created with monthly deductions towards Bar Associations. Finally, every year the National Bar Association announces four days, during which all advocates are required to provide legal aid services to indigent clients on any legal matter.⁷⁷ In 2008, these dates include March 14th – the Constitution Day, June 26th - the Day of the National Bar Association, October 1st – the Day of the Elderly, and December 5th – the Lawyers' Day. While the regulation requires advocates to provide pro bono services to any and all indigent clients on these dates, it fails to establish any indigence criteria. In practice, legal aid is rendered virtually to all walk-in clients.

Overall, Belarusian advocates handled 134,366 legal aid cases in 2007, or 37% of the total number of cases handled during the year. For comparison, in 2006, 39% of all cases were legal aid matters, and 45% - in 2004.

Reform agenda

The official reform agenda in Belarus is limited in scope and may not be, as a whole, characterized as progressive.

On April 9, 2008, the House of Representatives of the National Assembly (lower house of the parliament) approved in the first reading amendments to several laws concerning advocates' activities.⁷⁸

Firstly, it has been proposed to grant advocates access to information held by notaries and to data contained in real estate registries. Presently, unlike investigators and prosecutors, advocates have no access to information on her client's real estate transactions which is viewed as a violation of equality of arms principle. The amendments establish the right of advocates to access such information if it is necessary for the drafting of procedural documents in preparation for trial. Secondly, the amendments increase the amount of mandatory monthly deduction from advocates'

⁷⁷ Resolution of the Presidium of the National Bar Association No.11/01 of February 5, 2008 "On setting the dates for year 2008 during which legal aid is to be rendered to indigent clients".

⁷⁸ <http://house.gov.by/index.php/4831,16554,...0,0,0.html>

income towards Bar Associations from 30% to 39%. This is hardly a progressive reform effort. It is already feared that, due to increased monthly deductions, advocates will increase their fees which would further restrict citizens' access to qualified legal assistance.⁷⁹

In December 2007, the Ministry of Justice recommended to the National Bar Association to develop eligibility criteria for persons seeking legal aid who are not already eligible to legal aid.⁸⁰ Currently, the law guarantees World War II participants and persons with disabilities of I and II degree free consultations on issues not related to commercial disputes and not requiring familiarization with case files.

In a draft Resolution, the National Bar Association proposed that in order to be eligible for legal aid services in criminal and civil matters other than free consultations, World War II participants and persons with disabilities of I and II degrees must prove that an average monthly income in their family is below the minimum subsistence level (220,000 Belarusian rubles or \$100).⁸¹ To prove this, the applicant will have to present to the Chairperson of the LCO or to the Presidium of a Bar Association a record of the number of family members, a statement of each family member's monthly income for three preceding months, and a statement on the absence of property or investments.⁸² In extraordinary circumstances, these persons may be relieved, fully or partially, from paying for legal aid services without the need to prove their financial eligibility upon the submission of a written request. It is proposed that the decision on the financial eligibility of applicants for legal aid must be made by the Chairperson of the LCO or the Presidium of a Bar Association within 10 days from the receipt of the application. While the establishment of financial eligibility criteria may be characterized as a step forward, it remains to be seen whether the proposed mechanisms will be effective.

It seems as though the official reform agenda in Belarus is limited not because of the lack of reform issues, but of the lack of clear political will. In 2007 the Council of Ministers approved a 2-year project implemented by UNDP Belarus office and the Ministry of Justice, under which national and international experts will draft recommendations for the improvement of the status of advocates and the legal aid system.⁸³ As a result of two conferences held under the project in 2007 and 2008 the following issues relevant to the report have been identified as problematic and requiring reforms:⁸⁴

- The licensing of advocates by the executive branch of government;

⁷⁹ Gennadiy Kosarev, *Advocates will either raise prices or move into the shadow*, available at <http://www.belaruspartisan.org/bp-forte/?page=100&backPage=22&news=23989&newsPage=0>

⁸⁰ Resolution of the Ministry of Justice No.86 of December 11, 2007 "On certain issues of legal aid delivery", Article 5.

⁸¹ <http://news.tut.by/102546.html>

⁸² Draft Resolution of the Presidium of the National Bar Association No.01/04 of December 21, 2007, "On criteria of determining citizens' eligibility for legal aid", Paragraph 2.

⁸³ Project "Promotion of a wider application of international human rights standards in the administration of justice in Belarus" No. 2/07/000312 funded by the European Commission, UNDP and UNICEF.

⁸⁴ Seminar "Judiciary and the status of lawyers", held on October 15, 2007; Seminar "Legal aid: current state and prospects", held on March 20, 2008.

- Low representation of advocates in the Advocates' Qualifications Commission, which administers the bar examination;
- The limited validity of advocate's license and the need to renew it every five years;
- Inadequate compensation of advocates for provision of legal aid;
- Absence of the right to legal aid in administrative proceedings when the penalty involves deprivation of liberty (administrative arrest);
- Excessive amount of civil cases in which legal aid is rendered;
- Lack of indigence requirement for receiving legal aid;
- Mandatory recovery from the convicted person of the legal aid costs;
- The funding of legal aid services in civil cases by advocates themselves without any compensation by the government.

In informal discussions many advocates express strong dissatisfaction with the existing mandatory form of collective practice in LCOs, the system of mandatory monthly deductions from their incomes towards Bar Associations, the restrictions on the freedom of speech of advocates and excessive powers of the Ministry of Justice.

The UNDP Project envisions that by the end of 2008 national and international experts will prepare and present to the government specific recommendations based on international standards and best foreign practices. However, the project does not envision any mechanisms for subsequent promotion of the recommendations, and their due examination and adoption by the government will depend on the existence of political will, especially on the part of the leadership of the Ministry of Justice and National Bar Association.