

THE LEGAL PROFESSION IN KAZAKHSTAN

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1. The Organization and Structure of the Legal Profession

This study focuses primarily upon the organization and structure of the legal profession, that is, the function of providing legal aid to citizens and legal entities, and upon the status of the defence lawyer in the Republic of Kazakhstan. Furthermore, this study addresses the types of provision of legal services as a kind of free enterprise, as well as the legal status of practising lawyers¹.

The fundamental difference of legal aid from legal services lies in the fact that such aid is not profit-g geared and due to its nature has a compensatory character (that is aimed at restoring violated rights); it is part of the mechanism to socially resolve legal conflicts involving the state and the citizen². On the other hand, enterprise is defined as “the initiative activities of citizens and legal entities which, irrespective of the form of property, aim at gaining net profit by way of satisfying the demand for goods (works, services), based either on private property (private business activities) or on the right to economically manage a state venture (state business activities). Business activities are carried out on behalf, at the risk and material responsibility of the businessman”³. Based on these differences, legal practice in the Republic of Kazakhstan in the non-governmental sector can be carried out in several legal modes.

1. Lawyers can be in-house personnel of enterprises, agencies and organizations and according to their job description, work for their employer within the powers given to them by law. In this case the legal status of lawyers does not differ from the status of the hired workforce, is regulated by labour legislation and does not need to be specially addressed within the framework of this study.
2. Lawyers have the right to be engaged in private practice and provide legal services to physical and legal entities both individually and through creating legal companies and firms. Representation offices of international law corporations also work in Kazakhstan. Civil and tax legislation treat these activities as a kind of business activity.
3. Where lawyers comply with qualification requirements they can work as defence lawyers. Article 1 of the RK Law, “On advocacy” (hereinafter – “the Law”), defines it as “the work of the defence lawyer in the areas of criminal defence, representation in civil, administrative, criminal and other cases, and providing other types of legal aid in order to protect and promote the rights, freedoms and legitimate interests of citizens as well as the rights and legitimate interests of legal

¹ The organization of academic and pedagogical activities in the area of juridical branches of knowledge is not dealt with in this study because these activities are regulated by the statutory acts in the sphere of education and science and do not directly constitute law practice. Practising the legal profession in law enforcement, judicial and other public service bodies is not addressed within this study either.

² “The purpose of the Bar – to promote the administration of justice, to defend the legitimate rights and freedoms of citizens and legal entities, to represent their legitimate interests in courts and in their relationship with third parties... The assistance rendered by the defence lawyer is a kind of humanitarian (public) activity; it realizes an important social mission and by no means can be associated with commercial and business activities” // Open letter by defence lawyers to the RK Prime Minister. Available at: <http://www.zakon.kz/our/news/news.asp?id=30200047>

³ See Article 10 (1) of the Civil Code of the Republic of Kazakhstan (General Part) with changes and amendments as of 05.07.2006 // Available at: http://base.zakon.kz/doc/lawyer/?uid=A5BFB30C-122C-4E4F-949D-04233C9F8C46&doc_id=1006061

entities”⁴. At the same time the Law expressly states that legal aid rendered by defence lawyers within the framework of advocacy does not constitute free enterprise⁵.

The differences between the organization of business activities in the area of legal services and the working principles of the Bar are fundamental.

Legal services are rendered in accordance with provisions of the current civil, tax and other legislation, which determine legal relations in the business sphere. Lawyers in private practice can choose between a few modes in which they can carry out their activities: to register as a sole trader or to set up a legal entity (a firm, a company, etc.). Legal regulation of these activities and the forms of their taxation do not significantly differ from the general ones established for entrepreneurship in the services sector.

Advocacy is specified in more detail in the regulatory legal acts. In particular, Article 4 of the Law names the following types of legal aid provided by defence lawyers:

1) providing consultations, explanation, advice and written opinions on the issues requiring professional legal knowledge;

2) drawing up petitions to sue, complaints and other documents of a legal nature;

3) representation and defence of physical persons and legal entities in the bodies of inquiry, preliminary investigation, courts, public service and other bodies and organizations as well as in their relations with citizens, and other legal aid permitted by law. The afore-mentioned Article of the Law expressly states that “professional defence in criminal cases shall be carried out by defence lawyers only”⁶.

Therefore, it is possible to conclude that according to its content, legal aid provided by defence lawyers is wider in scope because in addition to legal services and representation in civil and administrative cases it also includes defence in criminal proceedings. However, the special legal status of the Bar is determined by the specific social function it pursues. In conformity with Article 13 of the Constitution of the Republic of Kazakhstan, “everyone has the right to qualified legal aid. In cases provided by law, legal aid is free”⁷. It is the Bar that performs the state-entrusted duty to render this aid to citizens. Unlike entrepreneurs in the area of legal business the defence lawyers cannot evade this duty. In addition in a number of cases this aid shall be free for citizens. The way free legal aid is provided will be addressed at length below.

Since advocacy plays a special role in the entire mechanism of legal regulation the law details the forms of organization of professional defence lawyers and their legal status. The major element of advocacy in Kazakhstan are the Bars. In conformity with Article 20 of the Law, the Bar “is a non-commercial, independent, professional, self-managing and self-financed organization of defence lawyers created in order to provide qualified legal aid

⁴ See The Law of the Republic of Kazakhstan of 5 December 1997 No. 195-I “On advocacy” with changes and amendments as of 22.05.2007 // “The Jurist” law reference system; also available for purchase at: <http://base.zakon.kz/result.asp?uid=4AFD5595-4390-483F-9754-CC1760659BEA&fromclass=1&class=2325&language=rus>.

⁵ Ibid.

⁶ Ibid.

⁷ See: the Constitution of the Republic of Kazakhstan (adopted by national referendum on 30 August 1995) with changes and amendments as of 21.05.2007 // Available at: http://base.zakon.kz/doc/lawyer/?uid=CB8D6DF4-60E4-43DE-A24F-DAE02F9BAD4B&doc_id=1005029

to physical persons and legal entities, to express and defend the rights and legitimate interests of defence lawyers and fulfil other functions established by this Law”. The public association of defence lawyers – the Union of Kazakhstan’s Defence Lawyers – functions in Kazakhstan at a national level. However, it does not have any executive authority with regard to the Bars and only fulfils a representational function. In principle, the Bars are autonomous as to their functioning and there is not any other organization, which would have the right to run Bars in Kazakhstan.

Only one Bar can be set up and can function within an oblast, a city of national importance or the capital city in Kazakhstan. Such a Bar does not have the right to set up its structural units (subsidiaries and representations) within another oblast, a city of national importance or the capital city. The name of the Bar should include the name of the administrative territorial subdivision within which it was created (Article 20 of the Law).

Membership of the Bar is mandatory. If a defence lawyer has a licence and acknowledges the Bar’s Charter, he/she cannot be refused membership of the Bar. Refusal of membership of the Bar can be appealed in court (Article 27 of the Law).

According to the Law (Article 20) the Bar shall be created by persons who have the right to engage in advocacy. There is no need to have special permission from state bodies to set up a Bar. However, in reality, at the moment when the Law was adopted in 1997 the majority of Kazakhstan regions had working Bars which had been set up in Soviet times and their status had virtually remained unchanged. Therefore, the legislator separated the spheres of jurisdiction of the Bars but at the same time did not limit a defence lawyer’s right to defend his/her clients throughout the entire territory of the Republic of Kazakhstan. A defence lawyer has the right to work in any administrative territorial subdivision of Kazakhstan provided he/she properly fulfils his/her obligations towards the Bar he/she belongs to and complies with the requirements of tax legislation.

Major functions of the Bar are as follows:

- 1) to help, to render professional assistance to and to defend the members of the Bar whilst performing their duties as defence lawyers;
- 2) to provide for logistics and reference/information materials necessary for the activities of the members of the Bar;
- 3) to organize professional supervision of defence lawyers engaged in advocacy;
- 4) to organize provision of free legal aid and defence as directed by preliminary investigation bodies and the court (Article 20 of the Law).

The activities of the Bar are regulated by its Charter, which, according to the Law should set out the following:

- 1) the name, subject and goals of the Bar’s activities;
- 2) the rights and obligations of the Bar members;
- 3) the rules of admission to membership of the Bar, suspension and termination of membership;
- 4) the structure of the Bar, rules of establishing its bodies and their competence;
- 5) the rules of creating and functioning of legal advice bureaux;
- 6) sources of generating its property and procedures for its managing;
- 7) the rules for paying membership fees;
- 8) the procedure for providing free legal aid by defence lawyers and the system of distribution of legal aid jobs as directed by the court, bodies of inquiry and preliminary investigation;
- 9) the rules of conducting defence lawyers’ performance reviews;

- 10) disciplinary responsibility of the Bar members and defence lawyers' trainees and rules for taking disciplinary action;
- 11) the rules for applying for revocation of a defence lawyer's licence;
- 12) the rules for restructuring and winding up of the Bar;
- 13) deciding the fate of the property on winding up the Bar (Article 21 of the Law).

The supreme body of the Bar is the General Assembly (conference) of its members; its executive body is the Presidium and its inspection body is the Auditing Commission. In cases provided for by the Charter, other bodies can be created within the Bar, whose functioning would be based on regulations adopted by the General Assembly (conference) of the Bar members (Article 22 of the Law).

The General Assembly has the right to deal with any issues concerning the activities of the Bar. It has the exclusive right:

- 1) to adopt the Charter of the Bar and to take decisions on introducing changes into the Charter;
- 2) to elect the Presidium, its Chairperson, members of the Auditing Commission and its Chairperson;
- 3) to elect other bodies provided for by the Charter and their heads; to approve the regulations of these bodies;
- 4) to listen to and approve the reports on performance of the bodies of the Bar, heads and staff of the Bar;
- 5) to establish the procedure of managing the property of the Bar;
- 6) to establish the level of membership fees;
- 7) to consider the defence lawyers' complaints about decisions taken by the bodies of the Bar, and heads and staff of the Bar;
- 8) the pre-term recalling of heads and staff of the Bar.

The General Assembly is called at least once a year by the Presidium of the Bar and is authorized to take decisions with two thirds representation from the total Bar membership or, respectively, elected delegates of the conference. Where the Auditing Commission or no less than one quarter of the total Bar membership request it, the Chairperson of the Bar must convene the General Assembly within thirty days (Article 23 of the Law).

The main executive body of the Bar in the periods between General Assemblies is the Presidium of the Bar. The Presidium of the Bar and the Chairperson of the Presidium are to be elected by secret ballot for a term of four years.

The Presidium of the Bar shall:

- 1) organize the work of the Bar to provide legal aid to individuals and legal entities including legal aid rendered by defence lawyers at the expense of the state budget in cases provided for by the legislation of the Republic of Kazakhstan;
- 2) organize the execution of the decisions taken by the General Assembly (conference); convene the General Assembly (conference);
- 3) defend professional and other rights of defence lawyers;
- 4) admit to the Bar; expel from the Bar; organize the training of defence lawyers' trainees;
- 5) organize work on investigating the complaints (submissions) about defence lawyers' actions filed by individuals and legal entities;
- 6) examine the materials on disciplinary violations by defence lawyers and impose disciplinary punishment on offenders;

7) organize defence lawyers' performance reviews and work on upgrading their professional qualifications;

8) apply for revocation of a defence lawyer's licence to the Ministry of Justice of the Republic of Kazakhstan in cases provided for by the Law;

9) conduct events aimed at upgrading the professional level of defence lawyers, analyse, generalise and disseminate the best practices;

10) organize codification and reference work; independently or together with the Ministry of Justice of the Republic of Kazakhstan develop and publish methodology aids and recommendations on the issues of defence lawyers' work;

11) set up legal advice bureaux, appoint and dismiss their heads and deal with other issues of Bar activities except those falling under the exclusive authority of the General Assembly (conference) of the Bar (Article 24 of the Law).

Disciplinary action can be taken against defence lawyers for breaches of the Law, other statutory acts and the Charter of the Bar. Discipline proceedings fall under the authority of the Presidium of the Bar. The measures of disciplinary punishment, the manner of their application, lifting and appeal shall be determined by the Charter of the Bar (Article 30 of the Law).

The inspection and audit body of the Bar is the Auditing Commission which is elected by the General Assembly (conference) of the Bar for a term of four years, runs audits of the financial and business performance of the Bar, legal advice bureaux, defence lawyer firms and financial performance of self-employed defence lawyers (Article 26 of the Law).

A defence lawyer has the right to choose the form he/she practises advocacy. According to the Law (Article 19) a defence lawyer has the right to work via a legal advice bureau or to set up a defence lawyer firm independently or together with other defence lawyers as well as be self-employed without registering a legal entity.

Legal advice bureaux are created by the Presidium of the Bar to render legal aid. They are structural subdivisions (branch affiliates) of the Bar. A legal advice bureau has a seal and a letterhead stamp, which displays its name and affiliation to a certain Bar; it also has other trappings necessary for organizing the provision of legal aid. A legal advice bureau is directed by its head appointed by the Presidium of the Bar (Article 32 of the Law).

A defence lawyers' firm is a non-commercial organization in the form of an agency and is created by members (a member) of the Bar in order to provide for material, organizational/legal and other conditions necessary for rendering legal aid by defence lawyers. A defence lawyers' firm, set up by one defence lawyer, works on the basis of the Charter. When a defence lawyers' firm is created by several defence lawyers, its founding document can also be a Deed of Incorporation. Within a period of 10 days after its state registration a founder (founders) of a defence lawyers' firm must notify in writing a corresponding Bar of this and place at its disposal the founding documents of the defence lawyers' firm. There is no need for a special permit to be issued by state bodies for setting up a defence lawyers' firm (Article 33 of the Law).

A defence lawyer who has decided to work as a sole trader, without creating a legal entity, should notify the Bar of this. The notification should include his/her name, surname, patronymic and permanent address. He/she has the right to have a business account and other bank accounts, a personal seal, stamps and letterheads (Article 33-1 of the Law).

Consequently, the Bar is the most organized part of the legal community. Apparently such a situation developed not only because of and not only due to the conscientious qualities of defence lawyers themselves but also because the state is interested in retaining efficient control over the process of providing legal aid, especially regarding that rendered at the expense of the state budget. Nevertheless, it is possible to say at present that the Bar in the Republic of Kazakhstan, on the one hand, has maintained a certain institutional independence from the state, and, on the other hand, is situated in the legal field which is fairly thoroughly regulated and which clearly determines its social function and place in the system of legal relations.

2. Permission to practise in the legal profession

In order to work as a sole trader a defence lawyer by law does not have to satisfy any other requirements apart from having a diploma certifying his/her appropriate education. Lawyers who work as such do not enjoy any special legal status. The right to witness immunity, the right to inviolability of documentation, criminal relief and so on do not extend to them. Before 2005 in order to render remunerated legal services not related to a defence lawyer's activity, a licence was required. However, the Decree of the RK Government of 25 July 2005 No. 773 abrogated this rule⁸.

It is much more complicated to acquire the status of a defence lawyer. According to Article 7 of the Law a defence lawyer is a citizen of the Republic of Kazakhstan who has a higher juridical education and a licence enabling him/her to carry out advocacy; he/she must be a member of the Bar and render qualified legal aid within the framework of advocacy. A person cannot be a defence lawyer if he/she has a previous conviction for a intentional crime; he/she has proved to be, according to established procedure, legally incapable or insufficiently capable; he/she has been expelled from the law enforcement bodies for a disciplinary offence – within one year of the day of dismissal; and when his/her licence has been terminated.

The licence of the defence lawyer is issued by the Ministry of Justice of the Republic of Kazakhstan based on the decision of the Qualification Licensing Commission of Justice and represents a permit to engage in advocacy. The licence is general, permanent and extends to the entire territory of the Republic of Kazakhstan (Article 9 of the Law)⁹. The licence is to be issued to the citizens of the Republic of Kazakhstan who have a higher juridical education, have passed a qualifying exam with the Qualification Licensing Commission of the Ministry of Justice and have undergone a training period from three months to one year at the Bar with one of the defence lawyers who has had experience of

⁸ See the Decree of the RK Government of 25 July 2005 No. 773 "Introduction of changes and recognizing certain decisions of the Government of the Republic of Kazakhstan as having ceased to have legal force" // "The Jurist" law reference system».

⁹ In conformity with para 3 of Article 9 of the Law, persons who passed qualification examinations with the Qualification Panel of Justice of the Republic of Kazakhstan (an examination for suitability for the position of a judge – D. K.), permanent judges and persons who worked as permanent judges, with the exception of judges dismissed from the position of a judge for discrediting acts and violations of law while performing their duty, can obtain a licence to engage in advocacy without the qualifying exam. Prosecutors, investigators and inquiry officers who have worked within the bodies of prosecution, investigation and inquiry for not less than ten years, with the exception of those dismissed for negative reasons, shall be exempt from the examinations upon having had training with the Bar.

working as a defence lawyer for not less than five years, according to the procedure and on conditions determined by the Bar¹⁰.

The Rules of taking a qualifying exam by persons claiming the right to engage in advocacy were approved by Decree of the Government of the Republic of Kazakhstan No. 1235 of 25 September 2001¹¹. According to paragraphs 2 and 3 of the said Decree persons claiming the right to engage either in practice as a defence lawyer or as a notary shall take a qualifying exam with the Qualification Licensing Commission of Justice (hereinafter – Commission) created by the Ministry of Justice and made up of representatives of the bodies of the National Notary Chamber and academic jurists. The composition of the Qualification Licensing Commission of Justice and the Procedural Rules of its work are approved by the Ministry of Justice of the Republic of Kazakhstan. The qualifying examination is conducted by the Commission on an “as needed basis” but not less than once a quarter. An applicant permitted to take the qualifying examination test is tested on his/her knowledge of the current legislation. The Commission shall guarantee an unbiased approach and standardised conditions, time, calculation of the results and the content of the testing. The qualifying examination consists of two stages:

- 1) computer test on knowledge of legislation;
- 2) testing of an applicant’s knowledge using paper questions.

Tests for knowledge of the current legislation of the Republic of Kazakhstan used in the qualifying examination differ in content and volume; they are also different for applicants claiming the right to practise as a defence lawyer or notary. The list of questions to be included in the tests is put together and approved by the Commission. The questions to evaluate the knowledge of the applicants should correspond to the topics of the branches and subjects of the law, the knowledge of which is important for practising the corresponding professions. The tests should contain no fewer than three answers with only one of them being correct. Applicants bidding for the right to be engaged in practice as a defence lawyer and as a notary are tested separately. The applicant has the right to choose whether he/she will have the test in the state language or Russian. In making his/her choice of language the applicant should confirm this in writing. Applicants should be acquainted with the procedure of the examination, its duration and content in advance.

Testing is conducted with the use of computers. Before the beginning of the test an applicant is given detailed instructions on its procedure. During the test applicants are forbidden to use any reference, specialist and other literature or any notes. If an applicant violates these requirements he/she will not be allowed to proceed with the test.

Correct answers of the tests are calculated automatically with the help of the computer programme. The results of the testing are printed in duplicate and are given to the applicant to peruse and sign. One copy of the test result sheet is given to the applicant, the other one is passed to the Commission. The applicant shall pass the test if the number of correct answers constitute 70 or more percent from the general number of questions asked; in that case he/she is permitted to proceed to the second stage. The applicant does not pass the test if the number of correct answers amounts to less than 70 percent from the general number of questions asked.

¹⁰ See Article 9 of the Law and the Qualification requirements to comply with when licensing advocacy. Approved by the Decree of the Government of the Republic of Kazakhstan No. 454 of 2 June 2007 // “The Jurist” law reference system.

¹¹ See the Decree of the Government of the Republic of Kazakhstan of 25 September 2001 No 1235 “The approval of the Procedure of Qualification Licensing Examination to be sat by persons claiming the right to engage in the practice of advocacy or notary work (with changes and amendments as of 02.06.2006) // “The Jurist” law reference system.

When checking the applicants' knowledge with the help of question papers, those who claim their right to engage in practice as a defence lawyer or notary are given different content papers. The papers are put together and approved by the Commission. Questions to evaluate the applicants' knowledge should correspond to the topics of the branches and subjects of the law, the knowledge of which is important for practising specific professions. Papers should have three questions each. Qualifying examination papers are to be sealed in envelopes to which the Ministry of Justice seal is affixed. The envelopes with the qualifying exam papers are to be opened during the qualifying examination by the Chairperson of the Qualification Licensing Commission of Justice in the presence of the applicants and members of the Qualification Licensing Commission of Justice. To prepare their answers to the questions of the examination question papers the applicants are given not more than 10 minutes. Applicants answer the questions orally and the correctness of their answers is evaluated on a five-point grading system. Each member of the Commission makes his/her evaluation of an applicant's answers independently of the others. The Chairperson shall add up the grade points given by members of the Commission, which then are divided by the number of all Commission members present. The grades given by the Commission members and the grade point average earned by applicants on the questions from the question paper are recorded in the minutes of the Commission. A candidate is deemed to have passed the qualifying examination if the grade average is at least four. A candidate with less than four is deemed to have failed. Based on the results of the test and/or answers to the examination paper questions the Commission reaches a reasoned decision as to whether a candidate is awarded a qualification licence or not ... not later than on the next day after the qualification licensing examination. The decision of the Commission is recorded in duplicate, with one copy kept in the qualification exam file, and the other given to the candidate at his/her request on the day the decision is taken. When the Commission sits minutes are kept recording the following: the date, time and venue of the sitting, the surname, name and patronymic of the candidate, the results of the test, the number and the content of the examination paper, the candidate's answers, the grades given by the members of the Commission and the average grade for the paper questions as well as the decision of the Commission. The decision by the Commission can be appealed against according to the procedure established by the law¹².

The Ministry of Justice of the Republic of Kazakhstan maintains the National Register of Licences giving the right to be engaged in advocacy in conformity with the Regulations on this approved by the Ministry of Justice. It publishes information about the issuing of new licences, suspension, revocation and termination of defence lawyer licences (Article 9 of the Law).

Despite the fact that the current statutory acts provide detailed explanation of the qualification licensing exam procedure, some issues are still not sufficiently outlined, which creates certain difficulties and lack of clarity in conducting the examination. Thus, for example, the procedure of creating the Qualification Licensing Commission and the procedural rules of its work have not been published in open sources. In this connection questions arise within the legal community as to the proportion of public service

¹² See section 3 of the Decree of the Government of the Republic of Kazakhstan of 25 September 2001 No 1235 "The approval of the Procedure of Qualification Licensing Examination to be sat by persons claiming the right to engage in the practice of advocacy or notary work (with changes and amendments as of 02.06.2006) // Ibid.

employees, representatives of civil society and professional organizations in its composition, what the procedure is of recommending these people to the Commission, on what grounds they participate in its work and, consequently, to what extent the said persons are independent in their actions, and whether the final decision depends on their opinion. The author of this study, a Deputy Head of Centre for Training and Improving Qualifications of the Almaty City Bar, is aware of the fact that trainees who have sat the qualification licensing examination, have expressed their discontent with the shortcomings of this procedure and the possibility that its results could be manipulated. Thus, for example, after answering the questions of the tests, a candidate is given only the print-out of the number of correct and incorrect answers but he/she is not provided with the information matching questions and answers and helping him/her to understand where he/she went wrong. Therefore he/she does not have the opportunity to check the credibility of the computer evaluation of his/her answers. In such a situation some applicants started to have doubts regarding the correctness of the evaluation or the absence of external influence upon the work of the machine. In addition, there were grievances regarding the procedure of testing the applicants' knowledge on the basis of examination question papers. According to the formal procedure an applicant can find out the assessment of his/her answers by the Commission on the next day. He/she is given a telephone number to call. However, in reality sometimes problems arise with regard to obtaining the appropriate information.

In this connection it would be advisable to provide for such a procedure of informing the applicants with the results of computer testing where each applicant would receive a print-out of his/her answers indicating the ones that were correct. With the purpose of securing confidentiality of test questions the print-out could be taken back after an applicant has seen it and it would be replaced by an information sheet similar to the one provided to applicants at present. It is advisable that the results of the paper question examination be given to an applicant on the day of the exam.

The insufficient transparency of the procedure of the qualification licensing examination and rigorous control over its implementation on the part of the Ministry of Justice give rise to criticism from the defence lawyer community and to suggestions to pass the right to select the staff for the Bar to the Bar itself¹³. An opinion is being voiced in society and among specialists about the insufficient number of defence lawyers in Kazakhstan¹⁴. However, the process of replenishing the body of defence lawyers is moving

¹³ See A.K. Tugel. "Promoting the Bar within the system of providing qualified legal aid including free aid. // Advancing the system of free legal aid guaranteed by the state. The materials of the Round Table. Astana, 2007, pp. 37-38.

¹⁴ Thus, in an interview to the newspaper "Liter" Deputy Minister of Justice of the Republic of Kazakhstan D. KUSDAVLETOV said the following:

" - In Kazakhstan there are five thousand clients per defence lawyer, while in Russia – 2000 and the USA – 300 people. Why is it so?

- Is it few or too many? And how many do we need? In total we have issued 6730 licences for the right to engage in advocacy. 51 of them were revoked. Since the beginning of this year another 516 people have obtained a permission document. 54 grievances were received about the actions of defence lawyers, with allegations being confirmed in 23 cases out of this number. Two defence lawyers were charged with intentional crime. It turns out that only 3200 defence lawyers are working! Again an out-dated provision is to blame which makes it possible for current judges, prosecutors and investigators to obtain a defence lawyer licence which is valid indefinitely. The majority of lawyers acquire it just in case, hoping to use it, perhaps, when they retire. However, there are 11 rural areas of Kazakhstan that do not have defence lawyer services on a regular basis. Earlier defence lawyers provided defence for criminal cases only. As for civil and administrative cases, trust plays an important role with them. In other words, a client has the freedom to

very slowly. According to T.Z. Kozhamzharov, the Chairperson of the Committee of the Ministry of Justice of the Republic of Kazakhstan on Organizing Legal Aid and Providing Legal Services to the Public, there were 3325 defence lawyers in Kazakhstan as of 22 May 2007¹⁵. In the course of his study the expert failed to discover more recent information about the number of working defence lawyers. There are several reasons for a poor increase in the number of defence lawyers. Despite the fact that from time to time the Qualification Licensing Commission has sessions outside its headquarters, many applicants from the regions have to go to Astana in order to sit for their qualification licensing examinations, which requires certain material expenses and time. In case of a failure an applicant may have to encounter such hardships more than once. Those in possession of a licence who wish to join the Bar have to pay their first membership fee, the amount of which in some Bars is in excess of a thousand US dollars. For some lawyers it is quite a large amount of money. Under such circumstances many of those who would like to join the defence lawyers' community have to abandon the idea because of its costliness.

3.The cost of legal services and legal aid

In conformity with Article 5 of the Law the level of payment for legal aid provided by the defence lawyers and reimbursement of expenses related to defence and representation is established in a written agreement between the defence lawyer and the person who has applied for aid. This means that a defence lawyer and his client have the freedom to decide themselves on the amount and procedure of paying for legal aid in cases which are paid for privately. Defence lawyers call such cases "cases on agreement" separating them from cases "on assignment", where the work is financed from the state budget. The defence lawyers' fee practice in cases "on agreement" has a rather varied character as it depends on the level of the qualification and reputation of a defence lawyer and his/her degree of "being in demand", as well as on the financial position of those persons who have applied for legal aid. The statutory acts do not stipulate a minimum or maximum amount of fee in cases in this category. In other words, the price is determined by the market demand. Financial relations between lawyers and their clients in the area of providing legal services are structured in a similar way. In principle, advice, defence and representation are affordable for the majority of the population because there is always an opportunity to obtain a lawyer's services within a price range acceptable to any citizen. For the poor and other socially vulnerable sections of the population such services are provided free of charge.

In cases provided for by the law, payments for legal aid rendered by a defence lawyer, travel expenses, subsistence allowance and other expenses are made on the decisions of bodies of inquiry, preliminary investigation and on court rulings from the state budget. (Article 5 of the Law).

Article 6 of the Law lays down cases when defence lawyers should render legal aid free to their clients on their request:

decide himself/herself whether to use the defence lawyer services or not. I do not know the reason for this: is it law negativism or do our people have knowledge of the law at their finger tips? I think society has only started moving towards a situation when, in the course of time, every family will need a defence lawyer."

Defence lawyers and public notaries are like "a cobbler that has no shoes" // Available at:

<http://www.liter.kz/print.php?lan=russian&id=151&pub=2428>

¹⁵ See, Advancing the system of free legal aid guaranteed by the state. The materials of the Round Table. Astana, 2007, p.64.

1) to plaintiffs in the court of the first instance when handling cases on recovery of alimony, on reimbursement of damage caused by the death of the breadwinner, mutilation or other health damage related to work;

2) service personnel of the Second World War and those of equal status to them, those in compulsory military service, groups I and II disabled, those receiving old age pension when advice is not related to the issues of entrepreneurship;

3) to citizens when drawing up applications claiming pensions and benefits;

4) to citizens when giving them advice on the issues of rehabilitation.

The Law states that citizens, based on their material situation, can be exempted from paying for their legal aid by the Presidium of the Bar, the Head of a legal advice bureau, the owner of a defence lawyer firm and a defence lawyer who works as a sole trader without registering a legal entity (Article 6).

It should be acknowledged that the realization of this legal norm in practice has, by and large, formal character because the same Article of the Law lays the duty to pay for such legal aid upon the Bars and defence lawyer firms. Since the budget of the Bars (and defence lawyer firms) comes from the membership fees of defence lawyers themselves and, as a rule, is rather limited, it is not possible to organize any serious provision of legal aid to citizens in need at the expense of the Bars. The Bars do not show any special zeal with regard to this issue either since they quite reasonably believe that legal aid should be provided to socially vulnerable sectors of the population on behalf and at the expense of the state and not by exploiting the resources of professional associations. The procedure of organizing legal aid proposed by Article 6 does not comply with basic principles of social justice because it obliges defence lawyers to provide legal aid out of the fees paid to the Bars by themselves or their colleagues.

Contrary to cases listed in Article 6 of the Law the procedure of paying for the services of a defence lawyer “by assignment” in criminal and administrative cases is regulated in sufficient detail in current legislation and by-laws.

In conformity with Article 72 of the Criminal Procedure Code of the Republic of Kazakhstan (hereinafter – RK CPC) a defence lawyer’s involvement can be secured by the body in charge of criminal proceedings where:

1) the suspect or the accused requests that;

2) the suspect or the accused is a minor;

3) the suspect or the accused cannot exercise his/her right to defence due to his/her physical or mental deficiency;

4) the suspect or the accused does not speak the language of judicial proceedings;

5) a person is charged with committing a crime, the sentence for which could be deprivation of liberty for a term in excess of ten years, life imprisonment or the death penalty;

6) the accused was arrested, with arrest being used as a measure of restriction, or he/she was compulsorily referred to an in-patient facility for forensic psychiatric examination;

7) there is a conflict of interests between the suspects or accused, one of whom is represented by a defence lawyer;

8) a representative of the complainant (a private prosecutor) or civil plaintiff is involved in criminal case proceedings;

9) a state prosecutor is involved in the court hearing of the case;

10) the accused is beyond the territory of the Republic of Kazakhstan and has failed to surrender to the bodies of preliminary investigation¹⁶.

In administrative proceedings a state body must provide for mandatory involvement of a defence lawyer where:

- 1) a person held administratively liable, requests that;
- 2) a person held administratively liable cannot exercise his/her right to defence due to physical or mental deficiencies;
- 3) a person held administratively liable does not speak the language of proceedings;
- 4) there is evidence in the materials of the case which make it possible to believe that a person held administratively liable may be ordered compulsory measures of a medical nature;
- 5) a person held administratively liable is a minor (Article 589 of the Code of the Republic of Kazakhstan on Administrative Offences)¹⁷.

In conformity with Article 114 of the Civil Procedure Code of the Republic of Kazakhstan (hereinafter – RK CivPC) a judge while preparing the case for court hearing or the court, in the course of the court hearing, has the right, based on the financial situation of a citizen, to exempt him/her fully or partially from paying for his/her legal aid and to charge the expenses of paying for the defence lawyer’s services to the state¹⁸.

According to Article 304 of the RK CivPC the judge, upon accepting the statement recognizing a citizen as incapacitated, shall assign an official representative-defence lawyer to represent and defend that person’s interests in the proceedings on the case. The official representative-defence lawyer shall have the authority of a legitimate representative. In conformity with the legislation regulating the activities of the Bar, legal aid rendered by such a defence lawyer shall be free¹⁹.

Therefore, in order to obtain the assistance of the defence lawyer at the expense of the state budget in criminal and administrative proceedings a citizen has only to file the appropriate request. In civil proceedings the decision on providing a defence lawyer (apart from cases where a citizen is recognized as incapacitated) is taken at the discretion of the court.

Where legal aid is rendered by a defence lawyer, the amount and procedure of payment for this and reimbursement of the expenses related to the defence and representation out of the state budget are established by the Government of the Republic of Kazakhstan²⁰. Not delving into the particulars of this sufficiently complicated procedure, it can be generally described as follows.

The body in charge of the proceedings having established the necessity to use a defence lawyer shall take an appropriate resolution about it which is mandatory for the Bar to carry out. Based on this resolution the management of the Bar or a legal advice bureau

¹⁶ Available at: http://base.zakon.kz/doc/lawyer/?uid=8B9D4023-733B-46E6-A008-EC00D71A62D6&doc_id=1008442

¹⁷ Available at: http://base.zakon.kz/doc/lawyer/?uid=8B9D4023-733B-46E6-A008-EC00D71A62D6&doc_id=1021682

¹⁸ Available at: http://base.zakon.kz/doc/lawyer/?uid=8B9D4023-733B-46E6-A008-EC00D71A62D6&doc_id=1006061

¹⁹ Ibid.

²⁰ See, The Decree of the Government of the Republic of Kazakhstan of 26 August 1999 No. 1247 “The Rules of paying for legal aid provided by defence lawyers and reimbursing expenses related to the defence and representation out of the funds of the state budget” (with changes and amendments as of 30.09.2005) // “The Jurist” law reference system.

shall second a defence lawyer to be involved in the case proceedings. Either at the end of his/her work or at the end of each month if the proceedings roll over, a defence lawyer shall submit an application for legal aid payment to the body which was in charge of the proceedings in the case. Based on this application a decision (ruling) on payment is issued which contains information about the official who made this decision, the number and name of the case, the venue, date and time of its hearing; the surname, name and patronymic of the person exempted from paying for his/her legal aid; the surname, name and patronymic of the defence lawyer who carried out the assignment, the number and date of the issue of the order certifying the defence lawyer's authority; types of legal aid provided by the defence lawyer with indication of the date and time on an hourly basis and the amount of money due; other relevant information.

A copy of the decision or ruling shall be appended to the materials of the criminal or civil case or the case on administrative offence, the second copy shall be handed on to the defence lawyer who was involved in the case for him/her to submit it to the Bar. Upon submission by defence lawyers of the second copy of the decision or the ruling, the Bar shall put together a written request with the number of hours and the amount of money subject to funding at the expense of the state budget, and then shall forward it to the territorial body of the administrator of the corresponding state budget programme. When the territorial body receives the request it shall forward the information on the amount of money subject to be paid to defence lawyers to the administrator of the corresponding state budget not later than the 10th day of the month following the reporting month; for December – not later than the 20th day of the reporting month²¹. On average, the amount of pay for defence lawyers' services in "on assignment" cases equals 1/21 of the minimum monthly salary which at present comes to approximately US \$4.

The problem of improving the system of legal aid rendered at the expense of the state budget is a subject of discussions in present-day Kazakhstan at the highest level. It is being debated not only in the professional environment but is receiving wide coverage in the mass media and is of keen interest to the public at large. Major grievances expressed about legal aid provided at the expense of the state budget are its low quality, delays and insufficient accessibility for persons in need of it. The current state of events is, as a rule, explained by the low defence lawyer fees, citizens' lack of clear-cut information about the procedure and forms of the provision of such help, the obscure character of the procedure of engaging the defence lawyers on criminal and administrative cases, strong corruption links between some defence lawyers and law enforcement officers, gaps and unclear provisions in the statutory mechanisms granting free legal aid on civil cases and law enforcement bodies' unwillingness to fully secure the right to defence for persons held liable. The work of the defence lawyer providing legal aid at the expense of the state budget is remunerated at a low rate. Moreover, the procedure is such that during the preliminary investigation the time record and final agreement of the amount due to the defence lawyer, who worked on the assignment, is carried out by the criminal prosecution body itself, namely the adversary of the defence lawyer in the proceedings of that case. In some cases the principled position of the defence lawyer defending his/her client, his/her involvement in the professional conflict with the investigator in connection with the latter's violation of the defendant's rights, filing complaints and petitions may serve as informal

²¹ In more detail see, "The Rules of paying for legal aid provided by defence lawyers and reimbursing expenses related to the defence and representation out of the funds of the state budget", approved by the Decree of the Government of the Republic of Kazakhstan No. 1247 of 26 August 1999 // "The Jurist" law reference system.

grounds for not acknowledging the full amount of the defence lawyer's working time spent in reality and, consequently, reduced amounts of money paid. At the judicial stages of the proceedings the decision on the payment due to the defence lawyer is made by the court which is by far not always interested in zealous work on behalf of such a defence lawyer either. The outcome is a procedure, rather strange from the point of view of normal logic and humiliating for a defence lawyer, when, having provided legal aid for a citizen at quite a low payment rate, he/she, on top of that, has afterwards to solicit an agreement for payment for his/her own work from his/her procedural counterparts. Undoubtedly, particulars of this type do not promote the provision of quality legal aid in cases paid for at the expense of the state budget, and the said procedure needs to be reformed.

It should be recognized at the same time that the Bars manage to cope sufficiently well with providing legal aid to the public. In principle, thanks to the efforts of the Presidiums of the Bars almost every citizen in need of legal aid has access to a defence lawyer. Problems in the area of providing legal aid need complex solutions and require a special review within the framework of targeted research. Since the issue of improving legal aid provided at the expense of the state budget is directly linked to the course of reforming the entire Bar system, separate aspects of this polemic will be addressed by us in the next chapter.

4. The reform of the Bar

The issue of reforming the Bar is from time to time raised in the legal community and discussed as part of a general discussion of judicial/legal reform in Kazakhstan. The necessity to upgrade the status of the Bar was spoken about by the President of Kazakhstan²². Over the last three years Parliament has considered several bills on introducing changes and amendments in the legislation on advocacy. The most acute aspect of this discussion is an issue of improving the system of providing legal aid at the expense of the state budget. It should be acknowledged that the participants of the discussion, despite expressing occasional criticism of advocacy, did not offer concrete suggestions as to how this sphere of legal relations should be improved. Some officials, although avoiding details and not describing the general vision of the concept, mentioned the idea of creating the municipal Bar, which in reality meant state Bar, somewhat similar to state legal bureaux which existed in Russia²³. It was suggested that the function of providing legal aid paid for out of the state budget be passed on to these very "municipal" defence lawyers. The Bar from the outset perceived this idea as rather dubious. First of all, it is quite odd to discover "municipal" defence lawyers in a country where municipalities do not exist and local government has to some extent an ornamental character, especially taking into account the fact that legal aid is to be paid for out of the national budget and not from regional ones. Secondly, it should be acknowledged that the very idea of a state Bar contradicts the legal nature of this institution. Defence lawyers should not have any functional relation to the state apparatus since their mission is to defend private interests and to safeguard human rights and freedoms. Therefore the Bar is

²² See, Address by President N.A. Nazarbaev, Republic of Kazakhstan, to the people of Kazakhstan. February 2005. // Available at:

http://www.akorda.kz/www/www_akorda_kz.nsf/sections?OpenForm&id_doc=643BC94235F0D2DF462572340019E606&lang=ru&L1=L2&L2=L2-22

²³ See, "Aty-baty, defence lawyers are at war" // "Oko" national socio-political newspaper. 24.02.2006 Available at: <http://www.oko.kz/index.php?cont=long&id=64&year=2006&today=24&month=02>

defined as an institution of civil society and is clearly separated from the state in specialist literature²⁴. The idea of creating a “state” Bar contradicts the main principles of rendering legal aid, especially in criminal cases. According to the theory of separation of powers underpinning the basis of democratic state structure, power is divided into three independent branches: legislative, executive and judicial. State bodies constituting the two latter branches respectively carry out criminal prosecution and judicial consideration of criminal cases. Consequently, the defence against criminal prosecution should be carried out by another entity – an independent party, which is not part of the system of state bodies and which represents an institution of civil society. In our situation such an institution can only be the Bar as a free, self-sustaining and self-governing organization of qualified defence lawyers.

Amongst other ideas on how to improve the Bar it was proposed that “at the legislative level tariffs be established for each category of cases depending on their complexity and a statutory mechanism be developed forbidding fees in excess of the established tariffs”²⁵. According to the Union of Defence Lawyers, “this will contradict major principles of market economy in conformity with which the amount of financial remuneration for a job carried out is determined by private persons themselves based on the demand for such type of services in certain segments of the economy, the quality of legal aid provided, time input and other factors. Introducing any sort of fixed rates here is virtually unrealistic, because it is simply impossible to determine in advance the amount of work to be carried out by a defence lawyer in each specific case since the diversity and invariance of legal situations does not allow formulation of any general universal rules of measuring and paying for the defence lawyer’s work. Introducing such rules will be a flagrant intervention by the state into the area of private business relations, will unjustifiably limit lawyers’ initiative and will result in excessive formalization of the defence lawyers’ work, which in the long run will downgrade the quality of rendered legal aid and result in a reduction in the number of defence lawyers. Freedom to determine the level of fees has always boosted the advance of defence lawyer skills, served as an incentive for a defence lawyer to maintain his/her reputation and to rigorously observe the rules of professional ethics. Limitation of this freedom will knock the bottom out of the financial basis of the profession and will force out of the Bar its most efficient and active representatives, which will be another push in the direction of degradation of the defence lawyers’ community”²⁶.

Apparently, the power of the state to fix the amount of pay for defence lawyers’ work should extend only to cases, in which the defence and representation to be paid for out of state funds. It should be noted that at present the procedure and levels of remuneration established by the state for legal aid provided in “on assignment” cases, are not market-driven, with the state making it the bar’s duty to work in this area on conditions agreeable for the budget. Such common forms of interacting between the state and business as public procurement where contracting parties are able to find mutually

²⁴ “The Bar, not on paper, but in reality should not be included in the system of state bodies and local government. Defence lawyers must not be turned into public servants, they are people of “free profession”. It is this very status that creates the opportunity for efficient polemic with representatives of state bodies, and not only in criminal proceedings but in civil proceedings as well”. Y.E. Stetsovsky/ The Bar and the state. – M.: “Jurist”, 2007, p.83.

²⁵ A. Zhoukenov. Prosecution and defence: how to achieve parity? // “Kazakhstanskaya pravda” of 5.04.2006.

²⁶ From the analytical brief prepared by members of the Presidium of the Union of Defence Lawyers of Kazakhstan for corresponding with state bodies (not published in open sources).

beneficial variants of cooperation, are not applicable here. The state “buys” legal aid from the Bar at dumping prices, not especially bothering as to what extent such exchange is advantageous for the defence lawyers. Furthermore, the defence lawyers do not have the right to refuse this “labour duty”. Apparently, such a situation can be perceived as part of the social agreement between the state and the Bar, where the professional community, sometimes to the detriment of its well-being, affords the right to qualified aid, guaranteed by the state, but in exchange for that enjoys a special legal (and tax) status. However, the state intervention into the area of such strictly private and market relations as fee payment in “on assignment” cases, is inappropriate and counter-productive.

One of the draft laws considered by Parliament suggested amalgamation of the Bars, autonomous at present, into the Union of Defence Lawyers, membership of which would be mandatory for qualified defence lawyers. At the same time it was proposed that setting up similar defence lawyer associations should be banned. However, this idea proved to be not feasible. The Constitutional Council acknowledged that “since the functions and the powers of the Union of Defence Lawyers are not defined by the Law and the declared goals for its creation are of general character and cannot be recognized as exclusive ... banning other, apart from Union of Defence Lawyers, organizations and bodies with similar functions and powers unjustifiably limits the constitutional right of defence lawyers as citizens of the Republic of Kazakhstan to freedom of association”. As a result, the draft law was acknowledged as not compliant with the Constitution, and at present the Bars are the main structures of the defence lawyers’ community. Perhaps the concentration of management at the regional level is the optimum form of self-organization because only in this way is it possible to achieve efficiency for major democratic principles underpinning the existence of the defence lawyers’ community: electivity and turnover of managing bodies, their accountability to the working collective, non-interference in advocacy, collegiality and timeliness of decision-making, and to guarantee proper protection of rights and legitimate interests of defence lawyers, provision of legal aid to citizens and resolution of other important issues.

It should be acknowledged that at present there is some tension in the relations between the commercial lawyers and the Bar because one of the versions of a particular draft law suggested that lawyers who are not defence lawyers, should be banned from being involved in civil case trials²⁷. Self-employed lawyers interpreted this as an attempt by the Bar to monopolize the market and to force them to join their association and by doing so, improve the material and cadre situation in the Bars. At the moment the said norms have not been included in the final language of the draft law submitted to Parliament, and the discussion of this issue has been suspended. In reality the merger of the Bar and the elite of the legal business would promote improvement of quality of the defence lawyers’ corps, upgrade the professional level and competition between qualified defence lawyers. However, it is obvious that amalgamation of these two segments of the legal profession should take place voluntarily, on the basis of mutual respect and cooperation, avoiding needless administrative pressure from outside.

A strong independent Bar – is a reliable assistant for every individual in the defence of his/her rights and interests, and the integral element of a normal legal system of a contemporary civilized country. The Bar should not be a pseudo-democratic setting suppressed by bureaucratic arbitrariness. The Bar is a vitally important part of civil society

²⁷ See, M. Koushkarin. “About the ban for self-employed lawyers to be involved in court cases and proposals to improve the system of justice” // Available at: <http://www.zakon.kz/our/news/news.asp?id=30074789>

guarding lawfulness and liberal values. Any cardinal transformations in this area should be implemented on the basis of cooperation between the state, society and professional association of the defence lawyers, taking into consideration the opinions of all parties of this complex legal relationship.