

THE LEGAL PROFESSION IN POLAND

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January 2009

Poland is currently undergoing important legal transformations concerning access to legal assistance and framework for operations of legal professions. This report is based on the legal status as for the date of its writing. However, it takes into account possible changes that are now contemplated.

The main legal changes currently discussed in Poland are:

- fusion of two main legal professions (attorneys and legal advisors),
- reform of the examination and professional traineeships enabling an access to legal professions,
- opening of legal professions through introduction of a licensing system for lawyers not being members of professionals' corporations,
- access to legal aid.

Each of these reforms will have a significant impact on the situation of legal professions in Poland. There is no certainty regarding direction of these reforms as well as whether they will be implemented. They depend on many political and financial variables.

1. Organization and structure of legal professions in Poland

There are two legal professions in Poland dealing with legal assistance, representation of individuals, private and public bodies and legal advice – attorneys (*adwokat*) and legal advisors (*radca prawny*)¹. All members of these professions are associated within two separate professional self-government bodies.

The Bar (*Adwokatura*) reunites the attorneys and attorney trainees (*aplikant adwokacki*)². The Bar is composed of the 24 Regional Bar Chambers (*okręgowe izby adwokackie*)³, and is headed by the National Bar Council (*Naczelna Rada Adwokacka*).

The self-government of legal advisors (*samorząd radców prawnych*)⁴ is composed of 19 Regional Chambers of Legal Advisors (*Okręgowe Izby Radców Prawnych*), and is headed by the National Council of Legal Advisors (*Krajowa Rada Radców Prawnych*).

Both the Bar and Legal Advisors' corporations make decisions on admitting new members, adopt rules of professional ethics, consider complaints against practicing lawyers, organize disciplinary courts and conduct disciplinary proceedings in cases of their members.

Over the course of the years division of competences between two legal professions blurred. The Bar has now over 90 years of tradition and attorneys were always equipped with a full right of representation in the court. The profession of legal advisor has been regulated in 1982 and originally legal advisors advised public enterprises in their legal matters and represented them before courts. However, over the course of years, legal advisors got new competences. Currently the main division consists of the ability of legal representation in

¹ Art. 4 par. 1 of the Law on Attorneys of 26 May 1982, *Prawo o Adwokaturze* (Dz. U. z 2002 r., Nr 123, poz. 1058) and art. 6 of the Law on Legal advisors of 6 July 1982, *Ustawa o Radcach Prawnych* (Dz. U. 2002, Nr 123, poz. 1058).

² Art. 2 of the Law on Attorneys.

³ Art. 8b of the Law on Attorneys.

⁴ Art. 5.1 of the Law on Legal advisors.

criminal cases. Legal advisors are allowed to represent in criminal cases only persons which are conducting an economic activity and only in respect of their pecuniary claims, they may also represent auxiliary prosecutors if they are business persons⁵. However, they cannot represent individuals as defense lawyers in typical criminal cases, while it is the most basic privilege of attorneys.

The above legal limitation results in a *de facto* specialization of legal advisors in commercial and civil law, rather than criminal law (although there are many attorneys who do not deal at all with criminal law).

Another crucial difference concerns methods of performing the profession. Attorneys are prohibited to perform their profession while staying in an employment relationship. In contrast, legal advisors may be employed. Consequently, legal advisors are often employees of state authorities or private companies.

A debate on the potential unification of two professions has started a couple of years ago. In January 2007 three experts associated with the Helsinki Foundation for Human Rights have prepared a new model for organization of two legal professions in Poland, by unification of existing corporations (*Nowa Adwokatura*)⁶. The new model proposed unification of the attorneys and legal advisors profession into one profession, creation of one self-government with eleven regional councils, reform of the disciplinary proceedings, as well as new rules on access to the profession and on traineeship. This project started a significant discussion in Poland on unification of those two legal professions.

In November 2007 the National Council of Legal Advisors adopted a resolution in which legal advisors highlighted their support to the idea of unification of legal professions. However, the National Bar Chamber has been against this idea and passed different resolutions on this issue. It is significant that one regional bar chamber (in Warsaw) did not agree with the position of the National Bar Chamber and in April 2008 passed a resolution supporting the idea of unification.

The discussion on unification is continued within the works of the Ministry of Justice. In February 2008, the Minister of Justice has created a special panel of experts to discuss the potential unification as well as to prepare general assumptions of such unification. It seems that final result of works of this panel will be ready in the first quarter of 2009. However, it is not certain whether it will be then supported by the Government.

2. Admission to the legal professions

2.1 *General introduction*

There are different ways in Poland to become attorney and legal advisor. The most popular way is to complete professional traineeship and then pass a final exam. Accordingly, the graduate of five years law studies has to complete following steps:

⁵ Art. 88 par. 3 of the Code of Criminal Procedure of 6 June 1997, *Ustawa Kodeks Postępowania Karnego* (Dz. U. 1997, Nr 89, poz. 555).

⁶ Experts were Adam Bodnar, Filip Wejman and Łukasz Bojarski. The text of the Project is available on web page: <http://www.nowaadwokatura.org/?p=1>

- pass the entry exam to professional traineeship (*aplikacja*)
- complete the professional traineeship
- pass the attorneys' exam or legal advisors' exam.
- make an oath and register himself/herself as an attorney / legal advisor.

From the point of view of access to legal profession, the most problematic issue for young graduates was the entry exam for professional traineeship.

2.2 Professional traineeship entry exam

For many years the entry exam, enabling law studies' graduates to start attorneys' or legal advisors' traineeship was organized by respective professional self-governments. Preparation of questions, organization of examination, supervision and the qualification process has been managed by self-governments. The examination was divided in oral and written part.

The reform of June 2005 introduced a state organized examination. Furthermore, reform enabled a larger group of lawyers without a professional traineeship (but with other qualifications) to register themselves as attorneys or legal advisors on the lists managed by respective professional corporations⁷.

Currently, lawyers have to pass an entry exam in order to accede to the attorney/legal advisors traineeship. It lasts 3 years and 6 months for both professions. The candidate has to register in one of the attorney/legal advisors' regional councils. Only lawyers who have graduated in law in Poland may register for the entry test, they cannot have criminal records. The exam is organized once a year⁸. The one-choice test is composed of 250 questions, for each question only one answer (from three) is correct. For each correct answer the candidate receives one point. The required threshold of points in order to pass the exam is 190. The cost of participation to the examination is 563 PLN, approx. 130 EUR.

The examination for the attorneys/legal advisors is prepared by the Examination Committee (*Zespół konkursowy*) composed of 5 members, 3 appointed by the Justice Ministry and 2 delegated by the National Bar Council and respectively, National Council of Legal Advisors⁹. Another Committee composed of 7 members (3 delegated by the Ministry of Justice, 2 persons delegated by the National Legal Advisors Council, 1 by universities and 1 by prosecutor's authority) is responsible for maintaining an order during the examination¹⁰. At least 3 members of the Committee have to participate in the examination. The same Committee is checking examination tests¹¹.

In 2008 (examination took place on 20 September 2008) there were 3,542 participants in the entry exam for attorneys' traineeship (2,988 in 2007) and 8.060 participants in the entry exam for legal advisors' traineeship (5,402 in 2007)¹². In 2008, only 413 candidates succeeded and were accepted for attorneys' traineeship, which constituted only 11,66 % of

⁷ The details of the reform are presented in point 3 of the Report.

⁸ Art. 33 par. 4 of the Law on Legal advisors.

⁹ Art. 33(1) par. 2 of the Law on Legal advisors.

¹⁰ Art. 33(5) par. 2 of the Law on Legal advisors.

¹¹ Art. 75 h of the Law on Attorneys.

¹² Data available on the Ministry of Justice web page: <http://www.ms.gov.pl/aktualnosci.php#akt080925>.

all candidates. Similar number was as regards admission to legal advisors' traineeship - 930 candidates succeeded, which constituted 11,53 % (50,6 % in 2007) ¹³. In addition, statistics of the passing rate varied in different regions. In some regions none of the candidates obtained the required 190 points (e.g. attorney examination candidates in Opole region)¹⁴.

Please note that in 2007 the passing rate was completely different and it was relatively easy to be admitted. In 2007, 47.8% candidates passed a test and were admitted to attorneys' traineeship and 50,6% - to legal advisors' traineeship.

Table 1. Examination results comparison 2007 – 2008

	Number of candidates		Successful candidates		Success ratio	
	2007	2008	2007	2008	2007	2008
Attorneys examination	2988	3542	1,428	413	47,8 %	11,66 %
Legal Advisors examination	5402	8060	3164	930	50,6 %	11,53 %

Source: author, data from Polish Ministry of Justice

The 2008 examination has been criticized by media for being too complicated and specific. Candidates perceived the exam as difficult. Questions were very detailed and demanded memorization of a large number of specialized legal regulations. There were no methodological preparation of the examination and no clear idea of competences that should be subjected to examination.

The President of the National Bar Council, Joanna Agacka-Indecka in an official statement criticized the 2008 examination. She underlined that the low rate of successful candidates was the effect of the inability of the State to organize a proper examination and that the introduced reforms (passage from corporation examination to examination organized by the State) have been premature and badly managed. She also referred to the 2007 examination, where many questions were annulled because of substantive mistakes. In reply the Ministry of Justice stated that the 2007 test was too easy and the successful candidates' ratio was so high that the corporations had problems to organize the professional traineeship.

The 2008 examination – and especially its comparison to 2007 examination - revealed the need of a methodological preparation of professional traineeship entry examinations by the members of the Examination Committee, as well as the lack of a clear idea on the scope of the reformed examination system.

2.3. Professional traineeship requirements

The attorney or legal advisor trainee is required to undergo a traineeship during the professional traineeship in an attorney's/legal advisor's office and in a period of at least one year in a court, notary office or with the prosecution authority. During such traineeship, trainee performs certain tasks and helps in daily work of courts, notaries etc.

¹³ ibidem.

¹⁴ Marek Domagalski, *Tegoroczne aplikacje tylko dla nielicznych*, Rzeczpospolita, 23.09.2008 and Marek Domagalski, *Dostał się co siódmy, winnych nie ma*, Rzeczpospolita, 25.09.2008.

Every trainee should have a tutor (*patron*), a practicing attorney/legal advisor. The trainees have to search a tutor on their own. Because of insufficient number of attorneys/legal advisors, it was a problem for some trainees to find a tutor. This problem exists following 2005, when significantly more trainees were accepted for professional traineeship than in previous years. From the practical point of view, it happens often that tutors are only nominal tutors – in fact they do not supervise their trainees on a daily basis and are not leading persons in their professional life

The professional traineeship is payable. The annual fee is established by the Minister of Justice after consultation with the National Bar Council and the National Council of Legal Advisers. By virtue of law, the annual fee may not exceed the amount of six minimal monthly salaries. In 2007 the tuition fees of the professional traineeship were 4,504 PLN, approx. 1,020 EUR. Taking into consideration that the average monthly salary was 2,900 PLN approx. 660 EUR the professional traineeship tuition fees seem to be affordable, especially in bigger cities.

Trainees follow courses and pass regular examinations during the professional traineeship. Usually apart from participating in the professional traineeship, trainees work in law firms or practice law in other ways. Please note that after six months of traineeship they may act as substitute attorney (substitute legal advisor, respectively) before district courts (*sądy rejonowe*) and prosecution authorities during pre-trial proceedings. After one year and six month of professional traineeship trainees may act as substitute attorney (substitute legal advisor, respectively) before other courts (regional courts, courts of appeal), except the highest court instances, i.e. the Supreme Court (*Sąd Najwyższy*), the Supreme Administrative Court (*Naczelny Sąd Administracyjny*), the Constitutional Tribunal (*Trybunał Konstytucyjny*) and the Tribunal of State (*Trybunał Stanu*)¹⁵.

2.4. Final examination, inscription on attorneys/legal advisors lists

Trainees, after the required period of professional traineeship have to pass a final exam.

The final examination fee for 2008 was established for 844,50 PLN, approx. 192 EUR. The exam is composed of two parts. The first one is written. Trainees may choose between four questions that cover all fields of law. Trainees may be asked to prepare a judicial writ (e.g. appeal in a tax case, administrative complaint or commercial agreement) or a judicial analysis. During the examination trainees may use texts of legal regulations, commentaries and jurisprudence. In order to succeed the examination and to be allowed to pass the second part of the examination it is required to obtain 80 points on 120. In the second, oral part trainees have to answer 19 questions in front of an examination committee composed of attorneys/legal advisors. Questions correspond to all fields of law. Every question is marked from 0 to 4 points. It is required to obtain 130 points from the oral and written examination in order to succeed the overall of the examination.

Passing a final exam enables to be inscribed on the list of attorneys / legal advisors and to start independent practice. In case of failure during the examination the attorney trainees may retake the examination in the period of time indicated by the examination commission¹⁶.

¹⁵ Art. 77 of the Law on Attorneys and art. 35(1) of the Law on Legal advisors.

¹⁶ Art. 78 of the Law on Attorneys.

2.5 Other possibilities to join attorneys / legal advisors profession

It is possible to join legal advisors profession, without passing the final examination for: professors and persons with post doctoral degree in law (*doktor habilitowany*), for persons who passed the final examination for judges, prosecutors, attorneys and notaries and persons which worked for the Prosecutor General of the State Treasury at least for three years (*Prokuratoria Generalna Skarbu Państwa*)¹⁷. Possessing a PhD in law or having worked for at least five and no more than eight years in a post of judicial division official or judge assistant may subscribed to the final examination without accomplishing the professional traineeship¹⁸.

2.6. Legal practice

There are different ways to perform profession of attorney or legal advisor in Poland. There are also some differences between two professions in this regard.

An attorney may practice in a legal office, an attorney joint office (*zespół adwokacki*), a company established under civil law, a general partnership, partner company and limited partnership. An attorney may not practice while being under an employment contract¹⁹.

Legal advisors may practice while being in an employment contract or a civil law agreement with a legal office, a company established under civil law, a general partnership, partner company and limited partnership²⁰.

From the above described rules result a different manner of practicing. In general, once admitted to the profession, attorneys usually open solo or small offices in order to share administrative costs. Legal advisors open small offices, become employees of companies (so called in house lawyers), employees of state authorities or join bigger law firms. It seems that there are currently more and more law firms in Poland, having from 10 to even 100 lawyers. Most of them cooperate both with attorneys and legal advisors on the basis of long-term civil law contracts.

In 2008²¹ the number of practicing attorneys was 7,056 (1,928 were registered, but did not practice), which constituted one attorney for approx. 5,527 citizens. At the end of 2007²² the number of practicing legal advisors was 18,953 which constituted one legal advisor for approx. 2,507 citizens. 10,656 of the legal advisors were employed in law firms or other companies.

Table 2. Legal Professionals in society

	Practicing professionals	Professional lawyers per 1000 citizens	Citizens per 1 professional
Attorneys	7,056	0.180	5,527

¹⁷ Art. 66 par. 1 and 2 of the Law on Attorneys, art. 25 par. 1 of the Law on Legal advisors.

¹⁸ Art. 25 par. 2 of the Law on Legal advisors.

¹⁹ Art. 4a and 4b of the Law on Attorneys.

²⁰ Art. 8 par. 1 of the Law on Legal advisors.

²¹ Data for 30 June 2008.

²² Data for 30 December 2007, data for June 2008 were not available as for the time of writing the report.

(data for June 2008)			
Legal advisors (data for December 2007)	18,953	0.486	2,507

Source: author, data available through professionals' corporations

Poland is one of the European countries with the lowest rate of professionals providing legal services. According to the Ministry of Justice data, on 100,000 citizens of Poland only 68 are entitled to provide legal services²³.

3. Background of current legal framework

The current legal framework concerning access to legal professions is a result of reform introduced by the law of 30 June 2005²⁴ and Constitutional Tribunal judgments²⁵ which resulted in further legal changes. Please note, however, that these changes did not end yet and the legal profession still awaits final result of different works in the Parliament.

In the mid 1990s, when the legal market started to be extremely profitable and prestigious, law studies became in Poland very popular. It resulted in a significant number of graduates. At the same time many of them did not have a real chance to become attorneys or legal advisors, due to restricted access to professional traineeship and low number of available places. At that time professional corporations were responsible for organization of exams and in fact regulated access to traineeships.

This restricted access caused a mass frustration among law graduates. Professional corporations started steadily to change the rules of access and admitted more and more graduates. However, the major reform was made by law of 30 June 2005, promoted by the Law and Justice Party and parliamentary deputy – Przemysław Gosiewski (co called “lex Gosiewski”).

Its aim was to increase the access to legal professions for young people. Although the draft law has been consulted for three years (and in fact stuck in the parliamentary committee for that time) the proximity of parliamentary elections and the political need to obtain votes from lawyers made the Polish Parliament to accelerate works and to pass the law.

The reform of 2005 introduced a possibility to pass the final examination without professional traineeship for persons possessing a Ph.D. in law and persons which worked in legal offices for at least five years or were providing legal services as self-employed persons, persons working for the same period as legislators and persons working for at least five years as judicial assistants or court clerks. The organization of the entry examination to the professional traineeship was transferred from the Attorney Council and Legal Advisors Council to the State, particularly the Ministry of Justice.

²³ Data available in the justification to the draft Law on State examination, web page: <http://grafik.rp.pl/grafika2/198742>

²⁴ Ustawa o zmianie ustawy – Prawo o adwokaturze oraz o zmianie niektórych innych ustaw z dnia 30 czerwca 2005 (Dz. U. Nr 163, poz. 1361).

²⁵ Judgments of the Constitutional Tribunal available on web page: <http://www.trybunal.gov.pl/index2.htm>.

The 2005 law enabled also persons who passed judges or prosecutors' exam (but never in fact worked in that profession) also to register on attorney/legal advisors lists without passing additional examinations or having their competences additionally checked.

The National Bar Council protested against the 2005 law and following its adoption filed a motion for constitutional review (case no. SK 6/06) to the Constitutional Tribunal. It challenged in particular the possibility of providing legal services (except representation in courts) by lawyers who are not members of professional corporations. The National Bar Council referred to the fact that providing legal services is a task of public trust and should be effectuated only by professionals. The National Bar Council questioned also the organization of the final attorney's exams by the State. The National Bar Council also contested the possibility of registering on the list of attorneys by persons being members of other legal professions (e.g. prosecutors) and possibility of passing the final professional examination without having accomplished a professional traineeship by persons with at least 5-years legal practical experience.

The Constitutional Tribunal in a judgment of 19 April 2006 found that provision of legal services by lawyers, who are not members of corporations is unconstitutional, because of the public trust character of providing legal aid services. Public trust services should be provided by professionals reunited in professional corporations and by professionals which followed the corporation traineeship. Second, the Constitutional Tribunal found unconstitutional the total lack of influence of the corporation on the final professional examination. However, it did not claim that organization of exams by the state is per se wrong and violates the Constitution. The Tribunal also questioned a possibility of transfer to attorney/legal advisor's profession by prosecutors, which passed their professional exams under the old political regime. The Tribunal expressed doubts regarding their competences to provide legal aid as they were not checked since they acquired professional titles. The Tribunal also found unconstitutional the possibility of passing the final examination by people without professional traineeship but with 5-years experience in legal field.

The Constitutional Tribunal has reached similar conclusions as to the profession of legal advisors in its judgment of 8 November 2006 (case no. SK 30/06). The motion for constitutional review was introduced by the National Council of Legal Advisors.

Currently a new law introducing amendments to the Law on Attorneys, Law on Legal Advisors and Law on Notaries is under discussion in the Parliament. The new regulation in fact is enforcement of the above-mentioned judgments of the Constitutional Court. In this judgment, the Tribunal expressed some views about conditions that should be fulfilled by certain lawyers' groups in order to register as attorney or legal advisor. The new law in fact creates those conditions.

Under the new law, in addition to existing possibilities to be registered as attorney/ legal advisor, it introduces such a possibility for following persons:

1. Who have passed the judges or prosecutor final examination after the 1 of January 1991 and in the period of 5 years before submission of a motion to be registered as attorney / legal advisor had at least 3 years experience in courts or prosecutor authorities (e.g. as judge's assistants) or in private legal practice (e.g. working in a law firm);

2. Who possess a PhD in law and in the period of 5 years before submission of a motion to be registered as attorney / legal advisor had at least 3 years experience in courts or prosecutor authorities (e.g. as judge's assistants) or in private legal practice (e.g. working in a law firm)²⁶.

Furthermore, according to draft law persons possessing the Ph.D. title in law, and persons with a significantly long period of practice in courts (e.g. judges' assistants) or in legal practice (e.g. in law firm) have a right to take the final attorney/legal advisors examination, without necessity to complete the professional traineeship before.²⁷

The draft law introduces also some changes regarding the professional exams. The major point of controversy in the Parliament was the issue of oral exams. While the Government proposed the law which provided only written attorney's exams, the Senate, as well as the National Bar Council, wanted also to have oral exams. It seems, however, that ultimately there will be only written exam.

4. Legal services : costs and affordability

4.1 Costs

Legal services may include different activities undertaken by attorney or legal advisor: legal advice, trial representation, writing legal briefs, hearing experts and witnesses and travel costs.

In general, the cost of legal services depends upon the agreement with the client²⁸. There are no special rules in this regard. Currently most of the law firms is remunerated in accordance with number of hours worked for a given client. Alternatively, law firms may agree on a fixed price for services for a given period of time (e.g. fixed rate for general legal services for one month to a given company). The client may also agree with a lawyer for a remuneration for a given task (e.g. preparation of the legal opinion).

There is one general exception to the above rule – remuneration for court representation. In general, the principle of freedom of contract is also binding here. The client may hire the best lawyer for significant amount of money. However, a significant number of lawyers is remunerated (or calculates their remuneration) in accordance with the Ordinance of the Minister of Justice on minimal fees for legal representation before courts.²⁹

Please note that the above Ordinance is by law applicable to all those situations when attorney / legal advisor is representing a party *ex officio*, i.e. his / her remuneration is covered by the State Treasury. It is an instrument for courts to adjudicate the remuneration of such attorney / legal advisor at the end of proceedings. The Ordinance sets only minimum rates – they may be higher, if a court decides it. When calculating the remuneration a court takes into

²⁶ Amended art. 66 of the Law on Attorneys, art. 25 of the Law on Legal advisors

²⁷ The draft law is very detailed in terms of time requirements and categories of persons entitled to take the final exam without the necessity to complete professional traineeship. There is no need to provide these details in this study.

²⁸ Art. 16 of the Law in Attorneys and art. 22(5) of the Law on Legal advisors.

²⁹ Rozporządzenie Ministra Sprawiedliwości z dnia 28 września 2002 r. o opłatach za czynności adwokackie oraz ponoszenie przez Skarb Państwa kosztów nieopłaconej pomocy prawnej (Dz.U.Nr 163, poz.1348, z poz. zm.).

account the complexity of the case and the amount of work performed by attorney. Under the same Ordinance the court decides about the costs of attorney/legal advisor representation that a losing party in a case has to cover.

In practice rates for legal representation that are expressed in this Ordinance are often used also in other cases, when attorney / legal advisor has been hired by private person to represent it before the court.

According to the said Ordinance the minimal legal aid fees vary from 60 PLN (approx. 17 EUR) and 7,200 PLN (approx. 2,000 EUR) and depend of the value of the object of litigation and the nature of the case (civil, family, inheritance law)³⁰.

Of course not all rates expressed in the Ordinance are used in private relations. For example, the minimum fee for a representation in a divorce proceeding, according to the regulation is 360 PLN (approx. 100 EUR), the actual fees demanded by attorneys vary from 1,000 PLN to 3,000 PLN (approx. 360 EUR to 950 EUR). In legal offices in Warsaw or bigger cities a single legal advice may cost more than 300 PLN (approx. 80 EUR), whereas in small cities the advice may be provided for even 30 PLN (approx. 8 EUR).

From the point of view of legal services, Warsaw is a special market, because of presence of big commercial law firms. In fact, the Warsaw legal market resembles to great extent a typical market in big European cities. Most of the big international law firms have presence in Warsaw. There are also important domestic law firms. In Warsaw you can find at least 50 law firms with more than 20 lawyers working in it. Those law firms in general provide legal services to business entities, and rarely to individuals. They employ both attorneys and legal advisors, sometimes also foreign lawyers practicing in Poland. The remuneration for their services is calculated on the basis of hours of services for a given client. The rate for one hour of services may even reach 600 EUR for best lawyers in the city. The average for attorney / legal advisor (not a partner) may vary between 100 – 300 EUR, while for younger lawyers it may be between 50 EUR – 200 EUR. The rate depends upon the position of the firm on the market, experience, quality of services, field of specialization, portfolio of clients, competition in the given sector of legal market, whether the firm is international or domestic one, provision of services in foreign languages, etc.

4.2 Eligibility and costs of ex officio legal aid

In order to discuss the system of legal aid in Poland, one should distinguish two possibilities:

- legal aid before the start of proceedings in a case and general legal advice in daily matters (so called “pre-trial legal aid”),
- legal aid provided in the course of court proceedings (representation before courts).

Poland does not have a system of legal aid which is provided before the start of court proceedings. Accordingly, poor persons do not have a possibility to seek for a legal advice – sponsored by the state – in their daily matters. The Ministry of Justice is currently working on establishment of the new system of legal aid.

³⁰ Par. 6 of the Minister of Justice regulation, 28 September 2002.

On the other hand, Poland has a complex system of legal aid in the course of court proceedings. Legal aid in this extent is provided by both attorneys and legal advisors through the system of *ex officio* representation. It means that every attorney or legal advisor may be asked by the respective court to take a case of poor person and has to represent such person before the court. In criminal cases, attorneys are appointed by the president of the respective court from the alphabetical lists of attorneys. In other cases, judges send their decision granting legal aid to respective Regional Bar Council or Regional Council of Legal Advisors. It is the obligation of those Councils to appoint then attorney or legal advisor to represent a person (awarded with *ex officio* legal aid) in proceedings. Costs of legal aid are covered by the state, through the budget of the Ministry of Justice.

4.3 Regulations concerning *ex officio* legal aid

There is no specific act in which legal aid is regulated in complex. There are more than seventy nine legal acts referring to different forms of legal aid³¹.

4.3.1. Criminal Proceedings

Every accused has the right to defense. The defense in the criminal trial may be provided by an attorney of his own choice or by attorney appointed *ex officio* according to principles specified by law. Only an attorney may appear as a defendant in criminal cases (legal advisors may represent the State, local-Government or social institutions and may represent parties being legal or non-legal entities only when the offence relates to economic activity, to a pecuniary claim)³². In criminal cases legal aid is mandatory when the accused is a juvenile, is blind, deaf and mute or there are reasonable doubts about the accused mental condition when he committed the crime³³.

Furthermore, accused has to be represented by an attorney when he/she has been charged of an offense involving the statutory penalty of imprisonment for at least three years and the case is pending before a Regional Court (*Sąd Okręgowy*). If it is the case legal representation is mandatory before the first instance court. During the appellate proceedings legal representation requirement is left to the court discretion³⁴. Accused charged with less serious criminal offences (where the minimum statutory penalty is lower than three years) do not have a right to mandatory defense. However, in Polish criminal law for numerous, less serious offences maximum statutory penalties of imprisonment is set for five, ten or twelve years. Therefore, it might occur that a person can be sentenced to a prison term without being assisted by an attorney³⁵.

Furthermore, mandatory representation by an attorney is required in case of a private indictment, appeal to the Court of Appeal (*Sąd Apelacyjny*) of a judgment passed by the Regional Court (*Sąd Okręgowy*) acting as a court of first instance (i.e. in more serious crimes), cassation filed to the Supreme Court and motion for reinstatement of proceedings³⁶.

³¹ Łukasz Bojarski, *Access...* op.cit.

³² Article 88 par. 2 and 3 of Code of Criminal Procedure.

³³ Art. 79 of Code of Criminal Procedure.

³⁴ Art. 80 of Code of Criminal Procedure.

³⁵ Łukasz Bojarski, *Access...* op.cit

³⁶ Art. 55, 446, 526, 545 of the Code of Criminal Procedure respectively.

An *ex officio* legal aid may be granted to an individual in following situations:

- when there is a requirement of mandatory representation in court proceedings (it means that if accused does not have a lawyer, the president of the court will assign one);
- on the motion of accused; in such a case assignment of attorney is made by the judge and there is no possibility to appeal against such a decision;
- where the court decides *ex officio* that the accused needs an attorney³⁷.

If the accused does not possess sufficient means to hire an attorney/legal advisor of his own choice he / she may apply to the court for appointment of an *ex officio* defendant. The accused is obliged to demonstrate his inability to cover attorney's/legal advisor's fees. In theory, as soon as the accused demonstrates this fact, the president of the court shall appoint an *ex officio* attorney/legal advisor³⁸. Please note that the decision on appointment of *ex officio* lawyer is arbitrary and it is up to the court to assess whether accused really does not have means to cover representation out of own funds.

Both in criminal and in civil cases, representation by attorney / legal advisor is mandatory in order to lodge a cassation appeal³⁹. Accordingly, poor persons have to seek for legal aid at this stage proceedings, even if they were not represented by an attorney/ legal advisor at earlier stages of proceedings. In practice there are certain problems in getting legal aid meeting all professional standards at this stage of proceedings. For example it may happen that it takes attorneys / legal advisors too much time to review case file and prepare cassation appeal. IF they make a negative decision on it, parties may not have enough time to find another lawyer to prepare such cassation. This problem has been considered by the European Court of Human Rights, which stated that lack of precise rules on preparation of cassation appeals may cause violation of Article 6 of the European Convention on Human Rights⁴⁰.

Costs of *ex officio* aid are covered by the State Treasury. However, if the accused is found guilty, he may be charged with legal aid costs. In practice, it happens quite rarely.

Rules governing legal aid in criminal proceedings are applicable not only to accused, but also to persons acting as private prosecutors or auxiliary prosecutors (e.g. victims of a crime). Therefore, persons acting in this capacity may also apply for legal aid⁴¹.

4.3.2. Civil Proceedings

The civil procedure does not require in any case a mandatory legal representation. As mentioned above, the mandatory representation by an attorney / legal advisor is required only with respect to filing a cassation appeal.

Please note that the judge presiding the trial may draw the participants' attention to the necessity of hiring a legal representative⁴². However, the civil procedure does not include an

³⁷ „if the court finds it necessary due to circumstances hampering the defense”.

³⁸ Art. 78 § 1 of the Code of Criminal Procedure.

³⁹ Art. 526 of the Code of Criminal Procedure and art. 393(2) § 1 of the Code of Civil Procedure from 17 November 1964, *Ustawa Kodeks Postępowania Cywilnego* (Dz. U. Nr 43, poz. 296, ze zm.).

⁴⁰ Case of Staroszczyk v. Poland (application No 59519/00) judgment of 22 March 2007; case of Siałkowska v. Poland (application No 8932/05) judgment of 22 March 2007.

⁴¹ Art. 87, 88, 77 and 78 of the Code Criminal Procedure.

explicit duty of the court to inform the participants about the possibility of applying for an *ex officio* attorney/legal advisors.

The *ex officio* legal aid may be granted only to participants that have been exempted from court costs in whole or in part. The exemption from court fees may be granted *ex officio* or upon motion of participant in the proceedings. Participants applying for exemption from court fees are obliged to adequately document their financial situation, and thus provide not only a statement on their financial situation, but also evidence in support. In such a situation the expenses are temporarily borne by the State Treasury. The participant losing the case may be required to cover costs of proceedings and costs of legal representation (*ex officio* or not)⁴³. *Ex officio* attorney/legal advisor may obtain his fees after the trial. If the participant represented by an *ex officio* representative loses the case, the attorney or legal advisor remuneration is paid directly from the State Treasury.

In numerous cases the lack of exemption from court fees that have to be heard while introducing the claim to civil courts prevents the participants of continuing the proceedings. This issue constituted subject of numerous complaints to the European Court of Human Rights. The Court found that when the court fees are so high, that the applicant is forced to desist from pursuing his claim before civil court, this constitutes a breach of the right of art. 6 par. 1 of the Convention, access to court. The Court referred to the fact that restrictions which are of a purely financial nature and which, as in the present case, are completely unrelated to the merits of an appeal or its prospects of success, should be subject to a particularly rigorous scrutiny from the point of view of the interests of justice⁴⁴. The Court also observes that under Polish law an exemption from payment of court fees can at any time be revoked by the courts if the basis thereof has ceased to exist. Allowing the applicant to proceed with his claim at the initial phase of the proceedings would not therefore have prevented the Polish courts from collecting court fees if at some further stage his financial situation had improved⁴⁵

The participant who has been exempted from court costs may apply to have an *ex officio* lawyer. The application should be made in writing or declared for the record in the court where the case is pending or will be instituted⁴⁶. A claim under labor and social insurance law can be filed by the person concerned or, on that person's motion, by non-governmental organization or by a labor inspector⁴⁷. An employee lodging a complaint under labor or social insurance law does not pay court fees.

The presiding judge may grant the legal aid motion if he/she finds that participation of an attorney/legal advisor is necessary in the case. However, the law does not clarify what criteria should be applied to evaluate the "need" of professional representation. According to the jurisprudence and doctrine, those criteria include legal and factual complexity of the case, helplessness of the participants and the principle of adversarial trial (when one participant is assisted by an attorney/legal advisor and others are not). The Supreme Court stated that a court may consider the difficulties of a participant in communication with the court as a

⁴² Art. 212 of the Code of Civil Procedure.

⁴³ Art. 98 § 1-3 of the Code of Civil Procedure.

⁴⁴ Please refer to Podbielski and PPU Polpure v. Poland (application No 39199/08), par. 65-67; Palewski v. Poland (application No 32971/03), par. 65.

⁴⁵ Please refer to judgment in the case of Kreuz v. Poland (application No 28249/95), par. 63-65.

⁴⁶ Art. 117 of the Code of Civil Procedure.

⁴⁷ Art. 61 of the Code of Civil Procedure.

motion for appointment of an *ex officio* attorney/legal advisor⁴⁸. However, the decision about granting legal aid is entirely left to discretion of a judge.

If the court finds that legal aid should be provided to a particular person, the court issues an order of appointment of the *ex officio* attorney/legal advisor. The issue of such an order has also the value of granting the power of attorney in the proceedings⁴⁹. The court sends the order to the respective Regional Bar Council or Regional Council of Legal Advisors for appointment of a particular attorney / legal advisor to conduct the case *ex officio*. The respective Council appoints then a particular attorney / legal advisor as representative and informs him / her about this fact.

Ex officio legal aid in civil cases includes all stages of court proceedings, from the first to the last instance. A legal representation granted at the stage of court proceedings is also valid for enforcement proceedings. Please note that participants in the proceedings, who are not represented by an attorney / legal advisor, may expect to receive from the court necessary advice and information about procedural actions and consequent legal effects⁵⁰. Judges also have a duty to instruct participants about possibilities for appealing from the judgment, terms and in case of participants deprived of liberty, to officially deliver to them a copy of judgment together with appropriate instructions⁵¹.

4.3.3. Other Proceedings.

There are no rules in administrative cases about the circumstances where legal aid is required. Participants of the proceedings may be represented by everyone that possesses legal competency, not necessarily by attorneys or legal advisors⁵².

The procedure before administrative courts does not require in any case a mandatory legal representation. The representation may be effectuated by an attorney / legal advisor but also by broadly understood members of family (siblings)⁵³.

The procedure before administrative courts provide for the possibility to obtain so called right to aid (*prawo pomocy*). The right to aid may be granted upon the participant motion. The motion is lodged on an official form. The right to aid consist of an exemption (total or partial) from court fees and the appointment of an attorney / legal advisor, patent agent or tax advisor. The total right to aid (exemption from court fees and appointment of legal representative) is granted when the participant is unable to bear any costs of the proceedings. The partly right to aid (exemption from part of the court fees or appointment of legal representative) is granted to participants which have demonstrated that proceedings would influence his/her material situation. The same rules are applicable to participants being legal entities.

⁴⁸ Judgment II PZ 46/64.

⁴⁹ Art. 118 of the Code of Civil Procedure.

⁵⁰ Art. 5 of the Code of Civil Procedure.

⁵¹ Art. 327 of the Code of Civil Procedure.

⁵² Art. 33 of the Code of Administrative Procedure from 14 June 1960, *Ustawa Kodeks Postępowania Administracyjnego* (Dz.U. 2000 Nr 49, poz. 509).

⁵³ Art. 35 of the Act on Procedure before Administrative Court from 30 August 2002, *Ustawa o postępowaniu przed sądami administracyjnymi* (Dz.U. 2002 Nr 153, poz. 1270, z poz. zm.).

The right to aid should not be granted when the claim is manifestly ill-founded. The right to aid may be withdrawn partly or totally when the circumstances of granting legal aid have changed or disappeared or in the event of the participant death. The representative is paid according to the generally established fees for attorneys / legal advisors, patent agents and tax advisors.

The decision to grant or refuse a right to aid is made by the court (judge) or court registrars sitting in camera. There is a possibility to lodge an appeal to the Regional Administrative Court (*Wojewódzki Sąd Administracyjny*) and to question the administrative decision.

After the order of the court granting right to aid has been issued, the participant representative is appointed by the Regional Attorney Council or Regional Council of Legal Advisors or in tax cases by the National Council of Tax Advisors (*Krajowa Izba Doradców Podatkowych*) or in intellectual property cases by the National Council of Patent Agents (*Polska Izba Rzeczników Patentowych*)⁵⁴.

Under Polish law, the mandatory representation is also required to submit a constitutional complaint to the Constitutional Tribunal. In such a case, a procedure is similar to submission of the cassation appeal. An individual has to request a district court (in the place of its residence) to appoint ex officio attorney / legal advisor.

4.3.4 *Managing the system of legal aid*

There is no separate institution managing the system of legal aid. All decisions on granting legal aid are made by participants' courts. In criminal cases, attorneys/legal advisors are appointed by courts, in civil cases attorney/legal advisors are appointed by Regional Bar Councils or Regional Councils of Legal Advisors.

The Minister of Justice has supervisory powers over attorneys and legal advisors' corporations (e.g. the Minister of Justice may challenge before the Supreme Court an unlawful resolution of the professional body, or initiate disciplinary procedures against attorney/legal advisor). Furthermore, the Minister of Justice issues ordinances on disciplinary procedures against attorney/legal advisors and sets fees for activities of attorneys / legal advisors, which are the basis for decisions on professionals' fees and costs in *ex officio* legal aid cases.

4.4. Other professions providing legal services

Since 2003 numerous lawyers – without being attorneys or legal advisors - opened offices providing legal aid without being attorneys/legal advisors. Their activity is conducted under the general rules on economic freedom and they are only subject of registration in the register of business entities⁵⁵. There is a popular name for this type of activity and for people providing economic activity in this way – legal consultants (*doradcy prawni*).

⁵⁴ Chapter 3, division 2, Art. 243 - 263 of the Act on Procedure before Administrative Court.

⁵⁵ Ustawa o swobodzie działalności gospodarczej z 2 lipca 2004 r. (Dz. U. Nr 155, poz. 1095).

However, legal services provided by non-attorneys/legal advisors raise serious doubts as regards quality, professionalism, and lack of verification of their competences (through exam or potential disciplinary proceedings). Opponents raise that access to provision of legal services by legal consultants is not verified during the registration of the economic activity. Furthermore, legal consultants may advertise themselves, whereas advertising is forbidden for attorneys / legal advisors. Such differentiation in treatment infringes the competition rules and may be also dangerous to clients.

Costs of legal services provided by legal consultants are much lower than fees demanded by attorneys/legal advisors. Because of that legal consultants became an alternative source of legal services for poorest member of the society.

In order to protect their rights and support further legal changes, legal consultants have created an association (*Stowarzyszenie Doradców Prawnych*)⁵⁶, being part of the association Fair Play⁵⁷. Their major objective is to increase access to legal professions as well as to provide clear legal rules for activities of legal consultants.

4.5 Other institutions providing legal aid

As it was mentioned, there is no system of legal aid in Poland helping citizens in their daily legal matters. In 1990s, because of this important lacuna in legal regulations and activities of the state, non-governmental organizations started to provide such services.

Most importantly, free legal aid is provided in Poland by students of law faculties working in “legal clinics” organized within universities. Law students are providing basic legal information and assistance in cases for poor persons, under the supervision of academic teachers. Legal clinics' operation and establishment of new ones is supported by the Foundation of Legal Clinics in Poland⁵⁸. This organization proved to be one of the most important organizations in the world promoting the “legal clinics” teaching method, because it managed to promote the idea around the Poland, which resulted in establishment of legal clinics in almost all law schools. In the period from October 2007 to June 2008, legal clinics acting in 18 different Polish cities dealt with 10,598 cases.⁵⁹

Another institution providing free legal aid is the Union of Citizens Advice Bureaux (*Związek Biur Porad Prawnych*), created in 1998⁶⁰. The Bureaux are providing information about rights of citizens and providing free legal aid. The Union was constituted under the patronage of the Polish Ombudsman.

In addition to those two big networks providing general free legal aid, there are different local organizations providing free legal aid to members of the community, or non-governmental organization specialized in particular types of cases or matters. For example, in

⁵⁶ Information about the association available on web page:
<http://www.doradcyprawni.org/index.php?id=57>

⁵⁷ For further information about Fair Play please refer to web page: <http://www.fairplay.org.pl/index-3.html>

⁵⁸ For further information please refer to web page: http://www.fupp.org.pl/index_eng.php

⁵⁹ Summary report of the Foundation of Legal Clinics in Poland for the period 2007/2008, available on web page: <http://www.fupp.org.pl/index.php?id=news2008>

⁶⁰ Information available on the network web page: <http://www.zbpo.org.pl/page/en/>

Warsaw there are NGOs advising on women's rights and reproductive rights, family violence, rights of disabled persons, rights of LGBT persons or litigation before the European Court of Human Rights.

Some organizations provide even more complex legal aid than only advice or instruction. If the case of a given person is especially interesting or presents an important problem, NGOs cooperate with *pro bono* attorneys or legal advisors. In such a case, attorneys / legal advisors act *pro bono*, because a given case is important for them, they want to contribute to the activities of NGOs, help the victim. Accordingly, their motivation is not financial one.

It should be noted that existence of different NGOs providing free legal aid does not resolve the general problem of lack of legal aid at pre-trial stage of proceedings. The new law in this respect is very much needed.

5. Reform proposals

5.1 Access to legal professions

The current system of examination, the passage of the entry examination to the professional traineeship from attorneys/legal advisors' corporations' examination to the state, is a result of the 2005 reform.

A reform of the system of examination required to become attorney or legal advisor (both entry exam and final exam) has been proposed by the Ministry of Justice. A draft of new Law on State legal examination⁶¹ was presented in September 2008. The planned reform introduces a 1st degree and 2nd degree examination, both organized at a national level. The 1st degree would be available for all law graduates. There would be one and the same examination in order to access all legal professional traineeships (including prosecutor's, judge's or notary's traineeship). The examination would be in a form of a test with 250 questions. The examination committee would be composed of delegates from the Ministry of Justice, judges appointed by appeal courts, prosecutors, attorneys and legal advisors. A positive mark will enable the entry to the professional traineeship. The period of the professional traineeship would be shortened to 2 years.

The 2nd degree examination would be available to attorney/legal advisors' trainees which have accomplished the entire period of traineeship. The examination will be divided in specializations according to the existing legal professions. The examination would be composed of two parts: a general knowledge test and a specific written question.

Moreover, the draft law would enable an easier transfer from one legal profession to another. The draft would also provide the possibility to subscribe to list of attorneys-legal advisors (without passing the 2nd degree examination) to:

- professors of law;
- prosecutors, judges, legal advisors and notaries;

⁶¹ *Projekt ustawy o państwowych egzaminach prawniczych*, available on web page: <http://grafik.rp.pl/grafika2/198742>

- persons who worked for three years as advisors in the State Treasury Representation Office (*Prokuratoria Generalna*);
- persons that passed the 2nd degree examination in the notary specialization and that provided legal aid services for four years;
- persons that passed the prosecutor or judge examination after 1 January 1991 and that provided legal aid services at least three years.

The draft law in addition to regulate state legal examination system, created a new category of legal professionals - legal consultants (*doradcy prawni*). Legal consultants would be able to represent clients before district courts (except for criminal and family law cases) and would be competent to prepare judicial writs. A person that succeeded in the 1st degree examination would be able to become a legal consultant by subscribing to a list and upon receiving a certification of subscription. The only requirement for legal consultant would be necessity to have insurance policy. After four years of practice as legal consultants it would become possible to pass the 2nd degree examination (without accomplishing the professional traineeship) and to become an attorney/legal advisor.

The idea to regulate legal consultants in the above way has been criticized in media. It seems that this proposal is not consequent with other policies of the government. Establishment of the profession of legal consultants would mean in fact creation of the third legal profession providing legal services. It is strange in a situation when the Ministry of Justice at the same time works on unification of the profession of attorney and legal advisor.

Another proposal of regulating the status of legal consultants is the draft law on legal licenses, proposed by former Minister of Justice, Zbigniew Ziobro⁶² and still – in a slightly modified form – supported in the current Parliament by Law and Justice party. The draft law enables lawyers to register in a licensing office in order to effectuate legal aid tasks in the pre-trial proceedings (license of 1st degree) under the supervision of a person possessing the license of 2nd degree (attorney or legal advisor). After two years of such a professional activity lawyers would be able to obtain the 2nd degree license and will be able to represent clients in courts, except criminal and family cases. In those cases only lawyers possessing the 3rd degree license will be competent. In order to obtain the 3rd degree license lawyers will have to pass a State examination in the field of criminal and family law. Only after three years of legal practice lawyers will be able to pass the 3rd degree examination. The supervision of lawyers will be effectuated by the Licensing Committee. The draft law is supported by Association Fair Play⁶³. The draft law has also been criticized by numerous practicing professionals.

5.2. Access to legal aid

Discussion on creation of a system of legal aid at pre-trial stage and in all daily matters is discussed for many years in Poland. Different drafts have been prepared over the years and in the scope of activity of different Ministers of Justice.

⁶² *Projekt ustawy o licencjach prawniczych*, available on web page: <http://64.233.183.104/search?q=cache:KRTKBHOJJuAJ:kprm.gov.pl/bip/071008u4.pdf+projekt+ustawy+o+licencjach+prawniczych&hl=pl&ct=clnk&cd=3&gl=pl>

⁶³ Information about Fair Play available on web page: <http://www.fairplay.org.pl/index-3.html>

Currently, a special group of experts in the Ministry of Justice is working on the new draft law on free legal aid. The basic idea of the law is to create possibility to obtain legal aid in every district (*powiat*) in Poland and to transfer the decision-making process as regards eligibility for legal aid from courts to local social assistance units, so called district centers for families' aid (*powiatowe centrum pomocy rodzinie*). Those centers would decide who is eligible for legal aid, including who is authorized to receive legal representation before the court. Poor persons authorized to receive legal aid could then contact freely attorney / legal advisor participating in the system of legal aid (not all attorneys / legal advisors may be interested in rendering such services) and to receive relevant services, including representation before courts. There is also an idea that beneficiaries would pay a small symbolic amount of money for services (thus to avoid abusing the system of legal aid by some persons). A possibility to render legal aid services would be also created for non-governmental organizations.⁶⁴

Poland is currently undergoing important legal reforms in the field of access to justice and the availability of legal professions to law graduates. Numerous draft laws proposed by the Government, Parliament or independent experts are currently discussed at different levels of the legislative procedure. The final scope of the regulations is still unknown. However, the corporations attitude towards the increase of legal aid availability is evolving constantly and the need of changes is becoming more accepted by professionals.

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⁶⁴ Interview with Łukasz Bojarski, *Państwo nie radzi sobie z pomocą prawną*, Rzeczpospolita of 26 January 2009.