

## INFORMATION SECURITY IN LAWYERS' PROFESSIONAL ACTIVITIES

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### Summary

The purpose of this paper is to study the issues of ensuring information security in lawyers' activities, primarily in the context of revealing the theoretical and applied aspects of maintaining the legal professional privilege policy when an advocate uses information technologies.

In the process of studying the subject matter of this paper the authors applied a set of general scientific and specific methods being characteristic of legal science, both to achieve the aim of the work as well as to ensure the scientific objectivity, thoroughness, reliability and credibility of the obtained results. In particular, with the help of the system-structural method the general structure of the scientific research was formed, which enabled the authors to elaborate the issue in question and solve the set tasks profoundly. The dialectical method of cognizing legal reality has made it possible to analyze different types (classes) of threats to the information security of advocacy. The general scientific methods of analysis and synthesis have been extensively employed in this scientific paper.

This article reveals the theoretical approaches of scholars to determining the nature and types (classes) of threats to the information security of advocacy activity, as well as clarifies the provisions of the domestic legislator which are aimed at ensuring the protection of advocate secrecy (also known as attorney-client privilege). The major part of the work is devoted to the analysis of practical aspects related to the implementation of advocacy guarantees that aim to ensure information security, in particular, such as bans on interfering with communication between a lawyer and a client, the advocate's testimonial immunity, and guarantees in case of searching or inspecting the dwelling, the advocate's other possessions, premises where he conducts advocacy practices). Attention is drawn to the main shortcomings in the regulatory framework for the aforementioned guarantees and there have also been put forth the appropriate proposals to remedy them, taking into account, first of all, the experience of foreign countries and the case law of the European Court of Human Rights.

On the basis of the conducted research, it is concluded that ensuring the proper level of information security in a lawyer's activity depends not only on the quality of legal regulation, in particular, the guarantees of a lawyer's activity and their observance in practice, but also on the fact whether a lawyer himself takes into account the possible security threats to his information activity. (of all its classes).

The use of information technologies by a lawyer in his professional activity is aimed not only at improving the ability to obtain, process, store and transmit information of any kind, but also requires that an advocate should take more active steps to ensure its confidentiality (the adequate level of information security of advocacy).

**Key words:** advocacy; guarantees of lawyers' activities; legal assistance; legal professional privilege; information confidentiality.

## 1. Introduction

In their professional activities lawyers deal with a large amount of information, and this is connected with receiving, processing, storing and transmitting information of legal and non-legal nature. The topicality of the study is manifested through the fact that, on the one hand, the exchange of such information primarily between lawyers and their clients in many cases occurs by means of applying information technologies, and on the other hand, there is a need to ensure the confidentiality of such information, taking into consideration that legal professional privilege policy extends to it. This necessitates the coverage of the problematic issues related to ensuring information security in the professional activity of a lawyer, primarily in the context of enforcing guarantees of a lawyer's activity, as well as the practical aspects of maintaining legal professional privilege policy, in particular, when a lawyer makes use of information technologies.

The review of scientific publications. Theoretical and applied issues associated with ensuring information security in the professional activities of a lawyer have been the subject of research carried out by a number of scholars. Among those who investigated separate aspects of this issue there can be singled out the following ones: V. V. Borychevska, M. Yu. Barshchevskiy, S. K. Buraieva, E. Butovchenko, P. P. Gusyatinikov, P. P. Gusyatinikova, V. V. Naumova, V. Yu. Panchenko, M. A. Pohoretskiy, M. M. Pohoretskiy, H. I. Reznikova, Z. Romovska, K. M. Severyn, O. N. Skriabin, V. M. Trofymenko and others. Despite this today there still remain a number of discussion points in this area.

The article aims to investigate information security issues in lawyers' activities, primarily in the framework of revealing the theoretical and applied aspects of maintaining legal professional privilege policy as long as a lawyer uses information technologies. The main tasks set by the author are: to reveal scholars' theoretical approaches to determining the nature and types (classes) of threats to information security of lawyer's activities; to clarify the provisions of the domestic legislator aimed at ensuring the preservation of the lawyer's secrecy, as well as to identify the practical issues related to their implementation, including the security aspect

of information infrastructure which is used by the lawyer.

## 2. Information security in lawyers' activity: the notion and essence

The multifaceted professional activity of a lawyer, which, on the one hand, is directly related to receiving, processing, storing and transmitting information, and on the other hand, is associated with the use of various types of information technologies, requires the ensurance of information security. Ensuring information security is primarily associated with maintaining the confidentiality of information received by a lawyer in the process of carrying out his activities.

The need to maintain confidentiality of information is directly linked to the existence of trusting relationship between a lawyer and his client. The presence of trust, in turn, is the foundation for relationship between a lawyer and his client, as the latter is «forced to inform a de facto stranger (a lawyer) about circumstances of his private life that are not always positive» (Severyn, 2014), and therefore he must be sure that the provided data «will remain confidential and cannot be used against him» (Panchenko, Mihaleva, 2014).

In Part 1, Article 10 of the Rules of Professional Conduct (2017) the preservation of the confidentiality of any information designated as a subject matter of a lawyer's secrecy is also regarded as a lawyer's right in dealing with all legal entities that may require the disclosure of such information, and as a duty in relation to the client and those who are concerned with this information. This norm is consistent, in particular, with the provisions of paragraph 2.3.1 of the Code of Conduct for Lawyers of the European Union (1988), according to which confidentiality is the paramount and fundamental right and duty of a lawyer, and trust to a lawyer can only arise under the condition that a lawyer strictly adheres to the confidentiality principle. In addition, trusting the lawyer with certain information, the client must be sure that «the lawyer will be responsible for any misuse of the received information» (Buraeva, 2014). In Ukrainian law, such liability is foreseen, particularly, in paragraph 2 of Part 2, Art. 32 of the Law of Ukraine «On the Bar and Advocacy» (2012) (if a lawyer

discloses the information that is viewed as confidential according to legal professional privilege and takes advantage of it or third parties take advantage of it due to him, this entails the imposition of a disciplinary measure in the form of deprivation of the right to practise law).

While revealing the essence of information security in the context of a lawyer's activities, V. V. Borychevska's definition is worth exemplifying. She views information security in a lawyer's activities as the protection of confidential information in its undistorted form, as well as secret information which is necessary for implementing activities by a lawyer (Borichevskaya, 2016). P. P. Gusyatnikov and P. P. Gusyatnikova conceive information security of a lawyer's activities in a broad way (the kind of protection of the rights and legitimate interests of a lawyer in the course of conducting his professional activity, as well as the rights and legitimate interests of his trustors, guaranteed by the Law on the Bar in the Informational Sphere) and in a narrow sense (confidentiality, integrity and accessibility, that is, the security of information owned by the lawyer – the security of the lawyer's personal information and information that is subject to lawyer-client confidentiality) (Gusyatnikov, Gusyatnikova 2016).

### **3. The maintaining of legal professional privilege policy as the basis of information security**

Undoubtedly, the basis of information security is the confidential information obtained by the lawyer, and this fact necessitates the disclosure of information security issues in the lawyer's activity through the lens of exploring the theoretical and practical aspects of ensuring the preservation of such secrecy in the context of using information technologies by a lawyer.

Legal professional privilege should be virtually understood as any information possessed by a lawyer in connection with providing his client with professional legal assistance, the obligation of the preservation of which is not limited in time. In concurrence with this, the possibility of disclosing this information is, on the one hand, due to the client's interests (according to his written statement, the legal guarantee of keeping such secrecy is lost) and cannot be associated with the lawyer's obligation to report the crime

of his client that has already been committed (but not known to law enforcement authorities), as well as the crime that he is only preparing to commit; on the other hand, the probability of revealing the kind of information mentioned is attributable to the lawyer's interests, because it is not allowed to misuse the client's rights (if he pursues claims against the lawyer in connection with his professional activity) (Zaborovskyy, By`saga, Bulecza, 2019).

Securing the lawyer's duty of professional secrecy, taking into account the aspect of using information technologies, is possible in case of having the proper complex of rights and guarantees of a lawyer's activity (in particular, such guarantees as the ban on interfering with the lawyer's private communication with a client (Zaborovskyy, 2017), a lawyer's testimonial immunity (Zaborovskyy, 2017), as well as guarantees in case of conducting searches or inspection of the lawyer's dwelling, his other possessions, premises where he carries out his professional activity (Zaborovskyy, 2018)).

There is no doubt that one of the most important stages of a lawyer's professional activity is the exchange of information between the lawyer and his client, which in many cases occurs with the help of information technologies. The sharing of this information requires the creation of conditions to safeguard its confidentiality.

The fundamental condition for maintaining a lawyer's secrecy is the prohibition to interfere with the private communication of a lawyer and a client (paragraph 9, Part 1, Article 23 of the Law of Ukraine «On the Bar and Advocacy»), which is viewed as one of the main standards of independence of the legal profession (in paragraph 13 of the UIA (the International Association of Lawyers) Standards for Independence of the Legal Profession (1990) it is stated that lawyers should be provided with such equipment and facilities as are necessary for the effective performance of their professional duties, in particular to ensure the confidentiality of relations between the lawyer and the client, including the protection of the ordinary and electronic systems of the lawyer's all correspondence and documents from seizure and inspections, as well as protection against the interference with the electronic means of communications and information systems which are used by the law-

yer). The content of such a ban is reflected in Part 5 of Principle I (The General Principles on the Freedom of Exercising the Legal Profession) of Recommendation No. 21 of the Committee of Ministers of the Council of Europe (2000) (lawyers should have access to their clients, including especially persons, deprived of liberty, to be able to consult them behind the closed doors and represent their clients' interests in accordance with the established professional standards). The similar position is reflected in paragraph 8 of the General Provisions on the Role of Lawyers (1990) (The Basic Principles on the Role of Lawyers (1990))

With regard to Ukrainian law, this guarantee is disclosed, in particular, in the aspect of prohibition and interference with the private communication of the defender with the suspect, the accused one, the convicted one, the acquitted one (part 5 of Article 258 of the Criminal Procedural Code of Ukraine ) and the person taken into custody (part 5 of Article 12 of the Law of Ukraine «On Pre-trial Detention» (1993)), and access to things and documents that are correspondence or another form of exchanging information between a defense lawyer and his client (Article 161 of the Criminal Procedural Code of Ukraine), and the inspection of correspondence between the lawyer and the person, who is in custody – Part 9 of Art. 13 of the above-mentioned Law, and the convicted – Part 5 of Art. 113 of the Criminal Executive Code of Ukraine, which are generally in line with the international principles in this field and aimed at creating proper conditions for ensuring the maintenance of legal professional privilege policy.

To the means of ensuring the information security of a lawyer's activity belong the guarantees which indicate the presence of a lawyer's testimonial immunity. Thus, paragraph 2 of Part 1 of Art. 23 of the Law of Ukraine «On the Bar and Advocacy» states that it is forbidden to demand from a lawyer, his assistant, apprentice, a person who is in an employment relationship with a lawyer, a law firm, a law association, as well as from the person in respect of whom the right to practise law has been terminated or suspended, to provide information that is a lawyer's secret. These individuals may not be interrogated on these matters unless the person who has entrusted the data has relieved them

from the obligation to maintain secrecy under the procedure specified by law. The lawyer's testimonial immunity is also enshrined in the provisions of other procedural codes: the Civil Procedure Code of Ukraine (paragraph 3, Part 1, Article 70); the Economic Procedural Code of Ukraine (paragraph 3, Part 1, Art. 67), The Code of Administrative Legal Proceedings of Ukraine (paragraph 2, Part 1, Art. 66); the Criminal Procedural Code of Ukraine (paragraphs 1, 2, Part 1, Art. 65). A lawyer's testimonial immunity comes into effect from the moment the client set foot in the legal office, the law firm, bureau» (Barshvskij, 2000) and is not limited in time (Part 2, Article 10 of The Rules of Professional Conduct). Despite the enshrined provision on a lawyer's testimonial immunity and the establishment of criminal liability, in particular, and for breaching the guarantees of professional secrecy (Article 397 of the Criminal Code of Ukraine), unfortunately, in practice there are cases of unlawful interrogations of lawyers as witnesses.

Paragraph 4, Part 1, Art. 23 of the Law of Ukraine «On the Bar and Advocacy» refers to the prohibition of inspecting, disclosing, demanding or seizing documents related to carrying out a lawyer's activities. The existence of such a guarantee does not indicate that it actually denies the possibility of performing searches of a lawyer's dwelling, of his other possessions, of premises where he conducts his professional activity, since, on the one hand, there may be the materials in these premises that are not related to pursuing a lawyer's professional activity (but are important for the case) and, on the other hand, imposing the absolute ban on the search of such premises has the chance to transform their objects», where there could be hidden «any information, including the information featuring the evidence of criminally punishable acts» that certain people do not wish to disclose (Romovs`ka, 2000). Without a doubt, this investigative action should be carried out in an exceptional case. The peculiarity of this action has been repeatedly the focus of attention on the part of the European Court of Human Rights, pointing out that the encroachment on a lawyer's professional secrecy could have consequences while administering justice and thus may violate the right to a fair trial (paragraph 37 of the judgement in the «Niemetz v. Germany» case (1992)); the search

of lawyers' premises should be scrutinized thoroughly (paragraph 62 of the *Golovan v. Ukraine* judgment (2012)); such measures can be recognized as «necessary in a democratic society» only if there are effective safeguards against abuse and arbitrariness in national law, subject to compliance with them in a particular case (paragraph 31 of the *Kolesnichenko v. Russia* judgment (2009)), and, where there are no other ways to find evidence of this or that fact other than to search a lawyer (paragraph 56 of the judgement in the case of *Roemen and Schmidt v. Luxembourg* judgment (2003)).

The specifics of conducting a search in relation to a lawyer, determined in Part 2 Art. 23 of the Law of Ukraine «On the Bar and Advocacy», whose provisions contain the requirement that the investigating judge, court necessarily in his / its decision points to the fact of conducting such investigative actions, the list of things, documents to be found, identified or seized, is one of the guarantees of securing the maintenance of a lawyer's secrecy. One of the main guarantees of maintaining legal professional privilege while carrying out the indicated investigative actions in relation to the lawyer is the enshrining of the norm on the need for the presence of a representative of the council of advocates of the region, except in cases of his / her absence if the council of advocates of the region has not been notified in advance. In order to ensure the participation of such a representative, the official who is to carry out the appropriate investigative action, shall notify in advance the Council of Lawyers of the region at the place of its carrying out.

Disturbingly, the current legislation does not specify either the term or the procedure of such notification, as a result, the indicated official is exposed to «the practical opportunity to circumvent these guarantees of practicing law» (Skryabin, 2015). Unfortunately, there is a shortcoming in determining the powers of the mentioned representative of the Council of Advocates of the region, since most of them are not defined in the Law of Ukraine «On the Bar and Advocacy», but in the Procedure for ensuring guarantees of advocacy, protecting professional and social rights of lawyers (2013). As a result, there are frequent cases when investigators or other officials, as noted by scholars (Pogorec-

z`ky`j, 2015) do not always adequately respond to such a representative's remarks as to the lawfulness of the appropriate procedural action (in particular, the exercise of the power to seal the premises, things, including electronic media and / or computer equipment (portable computers), mobile phones, etc., access to which is prohibited in accordance with Article 161 of the Criminal Procedural Code of Ukraine). Therefore, there is an urgent need to include all the key powers of such a representative in the provisions of both the mentioned Law and the Criminal Procedural Code of Ukraine of Ukraine (Zaborovskij, 2017).

Unfortunately, the indicated guarantees are not always respected when conducting such an investigative action as search. There are cases in which a lawyer's mobile phone numbers are seized, yet they are listed as work phone numbers in the lawyer's profile (the phone book, in addition to the personal contacts, also contains the phone numbers of clients, which is a lawyer's secret in itself); and there are cases when in the investigating judge's decision on the seizure of things and documents during the search at the lawyer's office the presence of phrases like «other documents and drafts», «personal notebooks», «system units of personal computers, laptops, electronic tablets, magnetic hard disk drives placed in the system units of personal computers or external (removable), flash drives, mobile terminals and other electronic media ... SIM cards and mobile starter packages, money, values and other property...» contrary to the enumerated guarantees, groundlessly grants virtually to an unspecified circle of law enforcement officials the unlimited rights to seize from the lawyer's office any objects, things and documents, especially those that have nothing to do with the subject of investigation (On the State of Attorney's Safeguards in Ukraine, 2017).

Exploring the state of information security H. I. Reznikova emphasizes that there are three classes of threats to information security of a lawyer's activities, namely: internal (illegal activities of insiders – lawyers, their assistants, apprentices, individuals who are in labor relations with a lawyer, a law firm, a law association, as well as persons in relation to which the right to practise law has been terminated or suspended); external (viruses, network worms; fitting, vishing, hacking attacks, etc.); mixed (the combina-

tion of efforts of external and internal violators of information security) (Reznikova, 2017).

The researcher aptly notes that the shortcomings in ensuring the security of «information resources» of advocates' activities include miscalculations in the organization of confidential records management, human resources, information-analytical and logistical support for the security of information resources, among which the organizational measures ensuring information security are the most vulnerable (Reznikova, 2017). The absence of records management or its improper organization both in law firms and associations, and in self-employed lawyers' offices contribute to the disclosure of information that is confidential. In order to maintain a lawyer's secrecy, as V. M. Trofymenko admits, a lawyer must carry out the clerical work separately from the objects and documents belonging to his principal» (Trofymenko, 2011). K. Butovchenko adheres to the same position. She underlines that among a number of useful recommendations for maintaining professional secrecy there is the formation of a lawyer's dossier, since usually the marking on the folder and the signed agreement on the provision of advocacy services on the first pages of the files is enough for law enforcement authorities to refrain from the further familiarization with it (Butovchenko, 2016).

The issue of keeping a lawyer's dossier is regulated primarily by the Decision of the Bar Council of Ukraine No. 169 (2017), which states that a lawyer's dossier is a collection of documents and information which are received, collected, created, stored, used by a lawyer (another person on his behalf) and / or are at his disposal (he possesses them, is in charge of managing them, etc.) and is covered by the notion of legal professional privilege, as well as separate (single) documents and any media that are covered by this notion, objects and the like. This Decision states that a lawyer's dossier can be kept fully or partially in an electronic form, especially when the case materials are large, which makes it impossible or problematic to keep all documents in a paper form; and it is also stressed that to a lawyer's dossier can belong different documents, as well as things that may or may not have the features of a document (for example, any magnetic or electronic media (including telephones,

tablets, computer equipment, etc.) that play an important role in providing legal aid to a client.

Taking into consideration the fact that lawyers make use of a significant number of the latest information technologies in the course of conducting their activities the security of the information infrastructure is of great importance in ensuring the confidentiality of information which is referred to as legal professional privilege. Admittedly, the failures of ensuring the security of the information infrastructure are: the absence or unsatisfactory state of technical means of ensuring the security of the infrastructure; the fragmentation or malfunction of the protective equipment, technical and software environment; the lack of cryptographic protection of information during its processing in computer networks; the lack of the differential access to information for individuals; the lack of identification of a user and operations with the help of computers and their networks, telecommunication networks using special passwords, keys, magnetic cards, digital signatures in the process of accessing to information and telecommunication systems; the inappropriate level of registering actions with information (the date and time, the nature of actions), illegal access attempts, etc. (Reznikova, 2015).

#### **4. Lawyers' information security on the Internet**

Taking into account the modern lawyers' vigorous activity on the Internet, when using social networks, online forums and other forms of online communication, lawyers should not only observe the norms of legal ethics, but also think about the restrictions established for advocacy in terms of completeness and perception of information, ensuring its confidentiality and preservation. In addition, the lawyer must take into account the parameters of their confidentiality in order to responsibly use, monitor and regularly analyze their own social networks, online forums, other forms of communication on the Internet and the content posted on social networks, and in case any errors or confidentiality discrepancies are detected they are subject to immediate correction and / or deletion (Article 58 in the Rules of Legal Ethics).

A lawyer uses the Internet for storing the information he receives. According to V. V. Nau-

mov, while using virtual («cloud») servers, the lawyer should consider the following features of storing information on these servers: 1) the lawyer must determine the jurisdiction of the owner of such servers. In other words, the lawyer must make sure that the laws of the country of the actual location of the server sets high standards of confidentiality; 2) the liquidation of the enterprise owner of the servers will inevitably lead to the loss of information which is privileged legal information; 3) the provider (the technology intermediary for providing access to the Internet network), and therefore the subject that has got into the security system of the provider has the immediate access to the information at the moment of its transmission from the lawyer's device to the virtual server (Naumov, 2017).

In their activities advocates also use various programs for instant messaging through the Internet (Viber, WhatsApp, Telegram, Skype and others). Each of these programs, as H. I. Reznikova states, has its own information security features and confidentiality provisions, but all of these have been repeatedly subjected to hacking attacks, resulting in information leakage, and one should not forget about the possibility of the controlled extraction of information from communication channels (Reznikova, 2017).

Hence, in all cases of exercising the protection, representation and providing other types of legal assistance to a client, advocates' activities are, in this way or another, related to receiving, processing, storing and transmitting information, both legal and illegal, a significant part of which is confidential and constitutes subject to advocate secrecy. Therefore, lawyers' (advocatory) professional activity is impossible without ensuring the appropriate level of information security of their activities.

## 5. Conclusions

Ensuring an adequate level of information security in lawyers' activity depends not only on the quality of legal regulation, in particular, the guarantees of lawyers' activity and their observance in practice, but also directly on the very lawyer's account of the possible security threats to his / her information activity (all its classes). The use of information technologies by lawyers in their professional activity is aimed not only at improving the ability to obtain, process, store

and transmit information of any kind, but also requires from them more active steps to ensure its confidentiality (the appropriate level of information security of lawyers' activity).

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## ІНФОРМАЦІЙНА БЕЗПЕКА В ПРОФЕСІЙНІЙ ДІЯЛЬНОСТІ АДВОКАТА

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### **Анотація**

Метою даної статті є дослідження питань щодо забезпечення інформаційної безпеки в адвокатській діяльності насамперед в контексті розкриття теоретико-прикладних аспектів збереження режиму адвокатської таємниці за умов використання адвокатом інформаційних технологій.

У процесі розкриття предмета дослідження як для досягнення мети роботи, так і забезпечення наукової об'єктивності, повноти, достовірності та переконливості отриманих результатів авторами було застосовано комплекс загальнонаукових і спеціальних методів, що є характерними для правової науки. Зокрема, за допомогою системно-структурного методу було сформовано загальну структуру наукового дослідження, що забезпечило найповніше розкриття та вирішення поставлених перед авторами завдань. Діалектичний метод пізнання правової дійсності надав можливість проаналізувати різні види (класи) загроз інформаційній безпеці адвокатської діяльності. Загальнонаукові методи аналізу та синтезу були широко використані в науковій статті.

В даній статті розкриваються теоретичні підходи науковців щодо визначення сутності та видів (класів) загроз інформаційної безпеки адвокатської діяльності, а також з'ясується положення вітчизняного законодавця, що спрямовані на забезпечення збереження адвокатської таємниці. Значна частина роботи присвячена аналізу практичних аспектів, що пов'язані із реалізацією гарантій адвокатської діяльності, які спрямовані на забезпечення інформаційної безпеки, зокрема, таких гарантій як заборони втручатися у приватне спілкування адвоката з клієнтом, свідоцький імунітет адвоката, а також гарантій у разі проведення обшуку чи огляду житла, іншого володіння адвоката, приміщень, де він здійснює адвокатську діяльність). Звертається увага на основні недоліки нормативного регулювання вищевказаних гарантій, а також запропоновані відповідні пропозиції щодо їх усунення, враховуючи насамперед досвід зарубіжних країн та практику Європейського суду з прав людини.

На основі проведеного дослідження робиться висновок, згідно з яким забезпечення належного рівня інформаційної безпеки в діяльності адвоката залежить не тільки від якості правового регулювання, зокрема, гарантій адвокатської діяльності та їх дотримання на практиці, але безпосереднього й від врахування самим адвокатом можливих загроз безпеки його інформаційної діяльності (всіх її класів).

Застосування адвокатом інформаційних технологій в своїй професійній діяльності спрямоване не тільки на покращення можливостей отримання, обробки, зберігання та передачі інформації різного роду, але й вимагає від адвоката більше активних дій щодо забезпечення її конфіденційності (належного рівня інформаційної безпеки адвокатської діяльності).

**Ключові слова:** адвокатура; гарантії адвокатської діяльності; правнича допомога; адвокатська таємниця; конфіденційність інформації.