

## COMPLIANCE OF GUARANTEES OF PROFESSIONAL ACTIVITY OF UKRAINIAN ADVOCATE WITH INTERNATIONAL STANDARDS OF PROFESSION OF ADVOCATE

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**Abstract:** *The article reveals the multifaceted functional purposes of guarantees of activity of a Ukrainian advocate first of all through the prism of finding out of their compliance with international standards of profession of advocate. Considerable attention is devoted to revealing, firstly, the essence of the prohibition to require information which is lawyer's secret and its boundaries, and secondly, means which help to ensure the secrecy. Thus, normative regulation is explored, as well as the problems of implementation, in particular, of such guarantees as witness immunity of the lawyer and the prohibition to interfere with his private communication with the client, as well as guarantees in the case of a search or inspection of housing, other possession of a lawyer, premises where he carries out his advocacy. The pages of the article reveal the legal nature and shortcomings in the construction of norms providing for the existence of guarantees directly related to the prosecution of an advocate, guarantees of his security, as well as guarantees indicating the availability of Ukrainian lawyer's indemnity.*

**Keywords:** *advocate, guarantees of advocacy, international standards of the profession of advocate, lawyer's secret, indemnity of an advocate*

### I. THE CONCEPT AND THE ESSENCE OF THE GUARANTEES OF ADVOCACY AS AN ELEMENT OF THE LEGAL STATUS OF AN ADVOCATE

One of the basic, necessary elements of the legal status of an advocate is the guarantees of his professional activity. In legal literature, they are considered as a means of effectively exercising the powers of the lawyer,<sup>1</sup> since «whatever amount of rights, even the largest, would be possessed by a particular participant in the process, without the corresponding guarantees, it will be just a declaration».<sup>2</sup>

While exploring the essence of the guarantees of advocacy, it is necessary to proceed from the fact that they «are not personal privileges of the lawyer, but serve as a means of protecting the public interest in obtaining qualified legal aid»,<sup>3</sup> full assistance of which is possible only under conditions of guarantee of advocacy. Such guarantees should prima-

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<sup>1</sup> SINIELNIK, R. V. *Defender in proceedings on administrative offenses: the author's abstract dissertation for obtaining a scientific degree Doctor of law: spec. 12.00.07. Kh., 2008. p. 15.*

<sup>2</sup> SOLTANOVICH, A. V., KHIREVICH, M. L. Guarantees of the implementation of the powers of a defense lawyer in criminal proceedings. *Problems of strengthening of law and order: science, practice, trends: a collection of scientific papers.* 7<sup>th</sup> ed. Minsk: BGUFK, 2009. p. 128.

<sup>3</sup> RAGULIN, A. V. Guarantees of independence of a lawyer under Russian law: the concept and content. *New legal thought.* 2011, No. 5, p. 56.

rily aim at protecting «the lawyer from arbitrary interference and interference from the government, any governmental and non-governmental bodies and/or third parties»,<sup>4</sup> taking into account the specifics of advocacy, especially in such areas of activities as protection in criminal proceedings, where the «conflicts» between the legal position of the lawyer and other participants in the competitive process is actually inevitable.

The guarantees of advocacy should not only protect a lawyer, in particular, from self-will of the government, but it is necessary to take into account the fact that it is the duty of the state to ensure the compliance with the guarantees of advocacy (Part 2 Article 5 of the Law of Ukraine «On Advocacy and Advocacy Issues»<sup>5</sup>). The state is not called to control and supervise the activity of the lawyer, as it was in Soviet times, but to provide guarantees of its independence, because it is the state itself, according to O.G. Yanovska, that is the main subject of the implementation of such guarantees.<sup>6</sup>

All this points to the multifaceted functional assignment of advocacy guarantees, which are aimed at protecting the lawyer from possible manifestations of arbitrariness by the state, the bodies of lawyer's self-government and other entities, and ensuring the right of a person for a professional legal assistance, the implementation of which is closely connected to the existing system of such guarantees. Generally, under the guarantees of advocacy, one should perceive one of the elements of the structure of the legal status of a lawyer, which is a set of conditions, methods and means provided by the law on the advocacy, aimed at ensuring the proper implementation of all other elements of such status for the purpose of creating the appropriate conditions for the provision of professional legal assistance.

## II. TYPES OF GUARANTEES OF PROFESSIONAL ACTIVITIES OF AN ADVOCATE

An important thing in the aspect of this study is to reveal the essence of the system of such guarantees in Ukrainian legislation, primarily through the prism of clarifying their compliance with the international standards of the profession of a lawyer, as well as the experience of foreign countries. In the legal literature, there is no single approach to the classification of advocacy guarantees. Thus, Y.S. Pylypenko distinguishes between the guarantees of lawyer's secrecy and guarantees of the independence of the lawyer,<sup>7</sup> which in turn are divided into three types, namely: professional, procedural and personal security guarantees.<sup>8</sup>

<sup>4</sup> SAVCHENKO, A. V. Regulation of disciplinary liability of a lawyer in Ukraine in the framework of integration with the EU. *Journal of the Academy of Advocacy of Ukraine*. 2013, No. 4, [2019-02-19]. Available at: <[http://nbuv.gov.ua/UJRN/Chaau\\_2013\\_4\\_19](http://nbuv.gov.ua/UJRN/Chaau_2013_4_19)>.

<sup>5</sup> On Advocacy and Advocacy Issues: Law of Ukraine dated July 5, 2012 No. 5076-VI. *Official Bulletin of Ukraine*. 2012, No. 62, p. 17.

<sup>6</sup> YANOVSKA, O. H. *Legal guarantees of the activity of a lawyer-defense counsel in the criminal process of Ukraine*: the author's abstract dissertation for obtaining a scientific degree Doctor of law: spec. 12.00.09. K., 1997. p. 15.

<sup>7</sup> PILIPENKO, Y. S. The main directions of the study of lawyer's secret. *The journal of advocacy of Ukraine*. 2009, No. 9, p. 25, [2019-02-19]. Available at: <<http://e-pub.aau.edu.ua/index.php/chasopys/article/view/619/639>>.

<sup>8</sup> PITULKO, K. V., KORYAKOVTSSEV, V. V. Article-by-article commentary to the Federal Law «On Advocacy and Advocacy Issues in the Russian Federation». SPB.: Piter, 2003. p. 70.

V.G. Bessarabov and M.O. Kosarev, apart from security guarantees, distinguish between guarantees of independence and lawyer's immunity.<sup>9</sup>

Art. 23 of the Law of Ukraine «On Advocacy and Advocacy Issues» does not provide for any criteria for the classification of such guarantees, and no groups are allocated, but an analysis of its content gives us an opportunity to agree that «a large group of guarantees of lawyer's activity is connected with the peculiarities of criminal proceedings concerning the lawyer».<sup>10</sup> This is due to the fact that it is precisely in such proceedings that «defense lawyer directly encounters the activities of law-enforcement bodies, opposes them»<sup>11</sup> and his active and solid position can actually «collapse, the case».<sup>12</sup>

## II. 1. Concept and boundaries of lawyer's secrecy as one of the main guarantees of the activity of an advocate

One of the main guarantees of advocacy is the prohibition to require from a lawyer information that is lawyer's secret (Part 1 Art. 23 of the Law). Without a lawyer's secret, according to A.S. Mamikin, it is hard to talk about the trust-worthy relationships with the client, and hence the provision of professional assistance.<sup>13</sup> Trust is fundamental in the relationships between a lawyer and his client, since the latter «has to inform the actual stranger (lawyer) about circumstances of his private life, which are not always positive»,<sup>14</sup> and therefore he must be sure that the information will remain confidential and can not be used against him.

Part 1 of Art. 10 of Rules of law ethics<sup>15</sup> on maintaining the confidentiality of any information that is defined as a matter of lawyer's secrecy is considered both, the lawyer's right concerning all the subjects of law that may require disclosure of such information, and the commitment to the client and the persons this information relates to. This norm corresponds, in particular, to the provisions of section 2.3.1 of the General Code of Practice for lawyers in the European Community,<sup>16</sup> according to which confidentiality is a primary and fundamental

<sup>9</sup> BESSARABOV, V.G., KOSAREV, M.A. The concept of the legal status of a lawyer. *Law and politics*. 2005, No. 11, p. 102.

<sup>10</sup> VOINAROVICH, A. B. Features of inquiry of a lawyer as a witness in a criminal proceeding. *Scientific Herald of the International Humanitarian University. Ser.: Jurisprudence*. 2015, Vol. 2, No. 8, p. 137.

<sup>11</sup> KUDRIAVTSEV, V. L. *The implementation of the constitutional-legal institution of qualified legal assistance in the activities of a lawyer (defender) in Russian criminal proceedings: theoretical foundations and problems of ensuring*: the author's abstract dissertation for obtaining a scientific degree Doctor of law: spec. 12.00.09. K., 2008. p. 42.

<sup>12</sup> ZALOGINA, O. G. *Problems of strengthening the guarantees of the independence of lawyers. Law and order in modern society: a collection of materials of the III International Scientific and Practical Conference*. Novosibirsk: Publishing House NGTU, 2011. p. 12.

<sup>13</sup> MAMYKIN, A. S. Securing the lawyer's secrecy in criminal proceedings. In: *Criminal procedural legislation in modern conditions: problems of theory and practice. a collection of articles*. M.: Walters Cloover, 2010. p. 83.

<sup>14</sup> SEVERYN, K. M. Problems of normative regulation and implementation of the principle of confidentiality of advocacy. *Scientific Herald of the International Humanitarian University*. 2014. Issue 9-2 (2). p. 121.

<sup>15</sup> Rules of law ethics, approved by the Reporting and Election Congress of Lawyers of Ukraine dated June 9, 2017. In: *Liga 360* [online]. [2020-04-07]. Available at: <<https://ips.ligazakon.net/document/view/mus28627?an=1>>.

<sup>16</sup> The General Code of Conduct for Lawyers of the European Communities, adopted by the delegation of the twelve participating countries at the plenary meeting in Strasbourg in October 1988. In: *Verkhovna Rada of Ukraine* [online]. [2019-02-19]. Available at: <[http://zakon2.rada.gov.ua/laws/show/994\\_343](http://zakon2.rada.gov.ua/laws/show/994_343)>.

right and duty of a lawyer, and the credibility of a lawyer can only arise in the case of his mandatory adherence to the principle of confidentiality. Consequently, a guarantee of prohibition to require from the lawyer the information that constitutes a lawyer's secret is in line with both, his right, and his obligation to preserve the confidentiality of such information, as well as with the responsibility of a lawyer, in particular, if it has been disclosed.

Definition of the concept of «lawyer's secret» is disclosed in Part 1 of Art. 22 of the Law of Ukraine «On Advocacy and Advocacy Issues», the content of which indicates that the legislator uses a broad understanding of such a concept, considering it, in fact, as any kind of information that a lawyer possesses due to his professional legal assistance to a client. We share the position of the Ukrainian legislator, since M. Mollo also came to the conclusion that «any face to face communication of a client and a lawyer is confidential and therefore should remain secret».<sup>17</sup> For instance, the Basic Principles relating to the role of lawyers (Paragraph 22)<sup>18</sup> come from a broad understanding of the essence of such a concept.

One of the most controversial moments in the study of the legal nature of the mentioned- above guarantee of the professional activity of a lawyer is the issue of the possibility of disclosing a lawyer's secret. On the basis of two points of view, V.L. Kudryavtsev points out that according to the first one, lawyer's secret can not be disclosed under any circumstances, but according to the other – it can be disclosed in exceptional cases (in particular, if the trustee informs the lawyer about a crime that is being prepared, which could be prevented).<sup>19</sup>

In such an exceptional case, a number of scholars consider it possible for a lawyer to disclose a professional secrecy in order to prevent the commitment of a serious or particularly serious crime.<sup>20</sup> V.A. Myslyvyi and N.S. Besaraba point out the legitimacy of disclosure of such information in the case when it is the only opportunity to prevent a crime.<sup>21</sup> The possibility of disclosing a lawyer's secrecy in such cases is also inherent in law practice of other countries. The lawyer's right to disclose information concerning the client's representation, in particular in order to prevent actions that could lead to death or serious bodily harm, is referred to in section 1.6 of the Model Rules of Professional Conduct, created by the American Bar Association.<sup>22</sup> In fact, the same positions are reproduced in Sec-

<sup>17</sup> MOLLO, M. *Rules of the legal profession in France: transl. from French*. M.: Publishing House of N.P. Shubinsky, 1894. p. 67.

<sup>18</sup> Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. In: *UN HR Office of the High Commissioner* [online]. [2019-02-19]. Available at: <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx>>.

<sup>19</sup> KUDRYAVTSEV, V. L. The procedural position of a lawyer in the Russian criminal justice system. *Modern law*. 2005, No. 4, p. 65.

<sup>20</sup> DAZHYBA, T.G. The problem of excluding from the privilege of lawyer secrets: foreign experience. *Law practice*. 2013, No. 1, p. 22; ZHIRONKINA, Y.E. On the issue of lawyer secrets. *Law practice*. 2012, No. 5, p. 41; SAVYTSKA, S. Some criminal procedural guarantees of the lawyer's activity. *Law and life*. 2013, No. 3, p. 58.

<sup>21</sup> MYISLYVYI, V. A., BESARABA, N. S. Lawyer's Secret: Theory and Practice. *Scientific herald of Uzhgorod National University*. Series: *Law*. 2014, Vol. 4, No. 24, p. 157.

<sup>22</sup> Model Rules of Professional Conduct, created by the American Bar Association in 1983. In: *ABA* [online]. [2020-04-07]. Available at: <[https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/)>.

tion 3.3-3 of the Rules of Professional Conduct, adopted by Convocation The Law Society of Upper Canada<sup>23</sup> (the attorney believes that there is an imminent risk of death or serious harm to health). The possibility of withdrawal from securing the confidentiality of the relationship between a lawyer and his client is set forth in Part 6 of Principle I of Recommendation – 21 of the Committee of Ministers of the Council of Europe,<sup>24</sup> in case they are compatible with the rule of law.

A completely different point of view is observed by N.Y. Litvintseva, who proceeds from the fact that «the lawyer, by virtue of his professional duties, must keep a secret entrusted to him by a client and under no circumstances shall disclose it».<sup>25</sup> This issue needs to be analyzed in the light of the possibility of disclosure by the lawyer of an offense that has already happened, not known to law enforcement authorities, and of a crime that a lawyer's client is only intending to commit. Taking into account the first option, the position of S.L. Aria is appropriate, where he states that «the lawyer must silence the crime committed by his client»,<sup>26</sup> since in this case the latter acts as an assistant to the punitive bodies of the state, that is, acts in clear contradiction with the principles and nature of the Institute of Advocacy. The complexity of the answer to the second option (regarding a crime that a lawyer's client is only intending to commit) is in «a conflict between the duty of each lawyer to perform his duties to preserve the lawyer's secrecy and the moral duty of each person».<sup>27</sup> In our opinion, the position of S.V. Lukoshkina is worthy of attention in this regard. Pointing out the collision of two interests (the client who entrusted the secret, and the life of people, when it comes to the crime being prepared), she proceeds from the fact that it is impossible to know precisely whether the crime will be committed, but after revealing the secret of the client, the lawyer already violates his right for professional protection.<sup>28</sup> We share this approach, since M.S. Strogovich pointed to the impossibility of being both a defender and a witness, and giving the possibility of interrogating defenders as witnesses would greatly undermine their trust in them.<sup>29</sup>

In our opinion, in such a situation (the client informs the lawyer of his intentions to commit a crime in the future) the only advice that the lawyer has the right to give is to «strongly recommend to abandon the implementation of the plan and point out destruc-

<sup>23</sup> Rules of Professional Conduct, adopted by Convocation The Law Society of Upper Canada on June 22, 2000. In: LSO [online]. [2020-04-07]. Available at: <<https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct>>.

<sup>24</sup> Recommendation No. R(2000)21 of the Committee of Ministers to member States on the freedom of exercise of the profession of lawyer, adopted by the Committee of Ministers on 25 October 2000 at the 727<sup>th</sup> meeting of the Ministers Deputies. In: *Council of Europe* [online]. [2019-02-19]. Available at: <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=533749&SecMode=1&DocId=370286&Usage=2>>.

<sup>25</sup> LITVINTSEVA, N. Y. Witness immunity of a lawyer. *Law practice*. 2014, No. 1, p. 58.

<sup>26</sup> ARIA, S.L. *Life of a Lawyer*. 3<sup>rd</sup> edition, updated and corrected. M.: American Association of Lawyers, 2010. p. 45.

<sup>27</sup> PSHUKOVA, A. M. Professional lawyer's secret as one of the main requirements of lawyer ethics. *Investigator*. 2008, No. 6, p. 301.

<sup>28</sup> LUKOSHYNINA, S. V. On the procedural immunity of a lawyer in the Russian criminal proceedings. *Siberian criminal procedure and forensic readings*. 2014, Vol. 2, No. 6, p. 100.

<sup>29</sup> STROGOVICH, M. S. *The course of the Soviet criminal process: in 2 vol.* M.: Science, 1968. Vol. 1. p. 398.

tive consequences».<sup>30</sup> Similar views belong to an American legislator (Part 1.2 of above-mentioned Model Rules of Professional Conduct<sup>31</sup>). What concerns Ukrainian legislation, the lawyer can not give advice deliberately aimed at facilitating the client to cause the offense or deliberately contribute to cause the offense in any other way (Clause 7 Part 2 of the Rules of Advocate's Ethics), since in other case such actions of a lawyer may be qualified not only as a disciplinary offense but he also risks being recognized as an accomplice to a crime (abettor).

The issue of the possibility of disclosure of information constituting a lawyer's secret, in accordance with the provisions of Art. 8 of the Law of Ukraine «On Prevention and Counteraction to Legalization (money laundering) of the Income from Crime, Terrorist Financing and Financing of the Proliferation of Weapons of Mass Destruction»<sup>32</sup> is also worthy of attention. Based on the research conducted, we arrive at the conclusion that the Ukrainian legislation in this area, in general, corresponds to the European tendencies.<sup>33</sup> This is due to the fact that the provisions of the specified Article 8 of the Law, in essence, correspond to the conclusions reached by A. Lalardri on the basis of her study of various court decisions taken on complaints about the laws of bringing EU directives in line with domestic law. Thus, she points out that when it comes to «traditional» types of lawyers, the professional secrecy of a lawyer is indeed recognized as a fundamental right, but in those cases where lawyers render their services as professional intermediaries in concluding sales contracts, financial agreements, or real estate issues, they should fight against money laundering during the process.<sup>34</sup> Unfortunately, Ukrainian legislation is not deprived of shortcomings, which primarily consist in the fact that the state regulation and supervision in the area concerning lawyers, law offices and associations is carried out by the Ministry of Justice of Ukraine (Paragraph 5 of Part 1 of Article 14 of this Law), which, in our opinion, contradicts the principles of absolute independence of the lawyer. According to our conviction, it is appropriate to refer to Paragraph 9 of the ECtHR judgment (in case C-305/05),<sup>35</sup> according to which, in cases provided for by the law, information on facts related to money laundering or terrorist financing, should immediately be given by the lawyers to the President of the board of lawyers they belong to (Paragraph 9).

Covering the issue of so-called «boundaries of lawyer's secrets», it is necessary to take into account the norm of Part 2 of Art. 22 of the Law of Ukraine «On Advocacy and Advo-

<sup>30</sup> ARIA, S. Do not ring the keys of secrets. *Lawyer's newspaper*. 2009, No. 22, [2020-04-07]. Available at: <<http://old.advgazeta.ru/rubrics/8/366>>.

<sup>31</sup> *Model Rules of Professional Conduct, created by the American Bar Association in 1983*.

<sup>32</sup> On Prevention and Counteraction to Legalization (Laundering) of the Income from Crime, Terrorist Financing and Financing of the Proliferation of Weapons of Mass Destruction: Law of Ukraine dated October 14, 2014 No 1702-VII. *Information from the Verkhovna Rada of Ukraine*. 2014, No. 50–51, p. 2057.

<sup>33</sup> ZABOROVSKY, V. V. Legal nature and boundaries of the lawyer's secrecy under the legislation of Ukraine. *Teise*. 2017, No. 105, pp. 180–182.

<sup>34</sup> LALARDRI, A. EU lawyers are fighting for their rights. *New lawyer's newspaper*. 2009, No. 10, [2020-04-07]. Available at: <<http://old.advgazeta.ru/rubrics/11/290>>.

<sup>35</sup> Judgment of the European Court of Human Rights in the case «Ordre des barreaux francophones et germanophone and Others v Conseil des ministres» on June 26, 2007 (Case C-305/05). In: *InfoCuria* [online]. 26. 6. 2017 [2020-04-07]. Available at: <<http://curia.europa.eu/juris/document/document.jsf?docid=61675&doclang=en>>.

cacy Issues», according to which information or documents may lose the status of a lawyer's secret by a written application of the client. By questioning the position of the scientists<sup>36</sup> who disagree with such legal regulation (considering the lawyer's secret as absolute), we consider it necessary to proceed from the fact that the interests of the lawyer's client should occupy a central place, be the core of professional activity of the lawyer, and therefore such activity of the lawyer, including the preservation of lawyer's secrecy, should be carried out, taking into account, above all, his interests. It should be taken into account that compliance with the principle of confidentiality is not only the duty of a lawyer, but it is the fundamental right of the client,<sup>37</sup> and therefore, by the written application of the client the legal guarantee of its preservation is lost and, therefore, the lawyer must provide such evidence. A similar view is observed, in particular, by the German legislator (Part 2 § 53 of the CPC of Germany).<sup>38</sup> So we do not share the provisions of Part 5 of Art. 10 of the current version of the Rules of the Advocate, according to which, in order to protect his professional rights and guarantees of advocacy, the lawyer has the right to continue to keep information and documents in the status of lawyer's secret.

Unfortunately, while advocating the interests of the client, a situation when he may illegally abuse his rights, in particular by submitting unreasonable claims to the lawyer, is not excluded. Therefore, Part 4 of Art.22 of the Law is positive, according to which the lawyer is released from the obligation to preserve the lawyer's secrecy within the limits necessary for the protection of his rights and interests, in case of presentation of claims by the client in connection with his activity. We share the position of the Ukrainian legislator, since it enables an advocate to equally defend his or her own rights and interests in case of the presentation of claims by the latter to a lawyer (in particular when considering a civil dispute between them). A similar view is supported by the Czech legislator (Part 4 of Article 21 of the Law «On Advocacy»<sup>39</sup>).

The above-mentioned brings to the conclusion that lawyer's secret is understood as basically any information that is in the possession of a lawyer due to the fact of professional legal assistance given by him to a client, and the obligation of its keeping is not limited in time. At the same time, the possibility of disclosure of such information is predetermined, on one hand, by the interests of the client (according to his written statement, the legal guarantee of the keeping of such a secret is lost), but cannot be associated with the assignment of the duty of the lawyer to report about a crime of his client, which has already taken place (but not known to law enforcement authorities) as well as about the crime that he is only intending to commit, and, on the other hand, by the interests of the lawyer, since the unlawful abuse of his rights by the client is not permit-

<sup>36</sup> PILIPENKO, Y. S. Lawyer's secret as a guarantee of the right to defense. *Lawyer*. 2008, No. 4, p. 9.; SAVITSKA, S. Some criminal procedural guarantees of the activity of a lawyer. *Law and life*. 2013, No. 3, p. 5.; KHABIBULLIN, V. Interviews with a lawyer as a witness. *Law of Ukraine*. 2006, No. 5, p. 95.

<sup>37</sup> GOLDSMITH, J. *Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers*. Brussels: CCBE, 2013. p. 11.

<sup>38</sup> Strafprozesordnung (StPO), ausfertigungsdatum 12.09.1950. In: *Gesetzeim-internet.de* [online]. [2019-02-19]. Available at: <<http://www.gesetzeim-internet.de/bundesrecht/stpo/gesamt.pdf>>.

<sup>39</sup> Zákon o advokácii: Zákon od 22 duben 1996 No. 85/1996. In: *UNBA* [online]. [2020-04-07]. Available at: <[https://unba.org.ua/assets/uploads/e698546cb94f12eaff62\\_file.pdf](https://unba.org.ua/assets/uploads/e698546cb94f12eaff62_file.pdf)>.

ted (in the case when he presents his claims to a lawyer in connection with his professional activities).

## II. 2. Witness immunity of an advocate: problems of its providing

After analyzing the legal nature as well as the boundaries of the lawyer's secret, it is necessary to cover the essence of the means by which it is ensured. The preservation of such secrecy is primarily guaranteed by the witness immunity of the lawyer (prohibition of interrogation of a lawyer as a witness).

Witness immunity of a lawyer is ensured both, by the norms of the Law of Ukraine «On Advocacy and Advocacy Issues» (Clause 2 Part 1 Article 23), and by the provisions of other procedural codes: CPC (Clause 3 Part 1 Article 70); EPC (Clause 3 Part 1 Article 67), CAC (Clause 2 Part 1 Article 66); the CPC of Ukraine (Clause 1, 2 Part 1 Article 65). Such immunity of a lawyer begins to operate «from the moment when the client has crossed the threshold of legal counseling office, law firm, bureau»<sup>40</sup> and is not limited in time (Part 2 of Article 10 of the Rules of Advocate's Ethics, Section 2.3.3 of the General Code of Rules for Lawyers of the European Community).

Taking into account the above-mentioned boundaries of lawyer's secret, we consider that the lawyer is entitled to so-called relative witness immunity. Therefore, the norm of Art.78 of the CPC of Ukraine is positive, which, in contrast to the previous CPC,<sup>41</sup> in order to withdraw a defense counsel, representative, does not provide his interrogation as a witness. Unfortunately, other codes (Part 1 of Article 61 of the CPC, Part 1 of Article 59 of the CCP, Part 1 of Article 58 of the CAC of Ukraine) cannot boast of such a norm. It is also necessary to take into account the fact that witness immunity applies only to information obtained by a lawyer in connection with his professional activities, and therefore, in all other cases, the lawyer is «regarded as a private individual» and may be summoned to testify.<sup>42</sup>

Despite the consolidation of the provisions on the witness immunity of the lawyer and the establishment of criminal liability, in particular, and for the violation of professional secrecy (Article 397 of the Criminal Code of Ukraine), in practice there are cases of unlawful interrogations of the lawyer as witnesses, which, in particular, is indicated in the Report on Violations of the rights of lawyers and guarantees of advocacy in Ukraine (2013–2016),<sup>43</sup> where they are considered as «one «reliable» way of disclosing the lawyer's secret» and a significant increase in the number of such cases is pointed out. At the same time, as stated in the analytical report «About the state of observance of guarantees of advocacy in Ukraine»,<sup>44</sup> repeated appeals of the National Association

<sup>40</sup> BARSHCHEVSKY, M. Y. *Lawyer's Ethics*. M.: Profeducation, 2000. p. 136.

<sup>41</sup> The Code of Criminal Procedure of Ukraine dated December 28, 1960 (expired). *Data from the Verkhovna Rada of the USSR*. 1961, No. 2, p. 15.

<sup>42</sup> STETSOVSKY, Y. I. The Principle of the Professional Secret of a Lawyer. *Lawyer*. 2008, No. 3, p. 10.

<sup>43</sup> Report on violation of the rights of lawyers and guarantees of advocacy in Ukraine (2013–2016), approved by the decision of the Council of Advocates of Ukraine of February 26, 2016, No. 2. In: *UNBA* [online]. [2019-02-19]. Available at: <<http://unba.org.ua/assets/uploads/news/publikacii/buklet-zvit-porushennya.pdf>>.

<sup>44</sup> About the state of observance of the guarantees of advocacy in Ukraine: an analytical report prepared by the Committee for the Protection of Advocates' Rights and Advocacy Guarantees of the National Association of Advocates of Ukraine 2017. In: *UNBA* [online]. [2019-02-19]. Available at: <[https://unba.org.ua/assets/uploads/e698546cb94f12eaff62\\_file.pdf](https://unba.org.ua/assets/uploads/e698546cb94f12eaff62_file.pdf)>. See p. 12.



of Advocates of Ukraine and the Committee of the Protection of Advocates' Rights and Advocacy Guarantees with a statement that such actions were inadmissible, and the requirement to bring investigators to justice resulted in written answers of about the same content that the investigator assuredly intended to interrogate a lawyer about information that is not related to lawyer's secret.

### II. 3. Prohibition of any interference and obstacles in the exercise of lawyers' activities as a guarantee of professional activity of a lawyer

One of the guarantees of advocacy is the prohibition of any interference and obstacles to its implementation (Paragraph 1 Part 1 Article 23 of the Law). Taking into account the mentality of Ukrainian operatives, investigators and judges, D.P. Fiolevskii points out the need to clarify what should be regarded as such an obstacle, including the facts of humiliation of the honor and dignity of the lawyer during the investigation and in the court hearing by officials and recalls the consequences of such violations.<sup>45</sup> Such a guarantee has been also consolidated in international acts in the field of advocacy, in particular, in Part 1 of Principle I of Recommendation No 21 of the Committee of Ministers of the Council of Europe<sup>46</sup> and Paragraph 16 of the Basic Principles on the Role of Lawyers<sup>47</sup> (Basic Provisions on the Role of Lawyers<sup>48</sup>).

First of all, the disclosure of the essence of the mentioned above guarantee of advocacy is carried out through another guarantee, namely the prohibition on interfering with private communication between a lawyer and a client (Paragraph 9 Part 1 Article 23 of the Law). Such a prohibition is a prerequisite for preserving the lawyer's secrecy and is regarded as one of the main standards of the independence of the legal profession (paragraph 13 of the Standards of Independence of the Law Profession of IAU). Also, its content is reproduced in Part 5 of the mentioned-above Principle I of Recommendation No 21 (Advocates should have access to their clients, especially including those deprived of their liberty, in order to be able to give counseling behind closed doors and to represent their clients in accordance with established professional standards). A similar view is reproduced in Paragraph 8 of the Basic Provisions on the Role of Lawyers (Basic Principles Regarding the Role of Lawyers). Such a guarantee was also

<sup>45</sup> FIOLEVSKY D. P. *Advocacy: textbook, 3<sup>rd</sup> edition, edited and supplemented*. K.: Alerta, 2014. p. 151.

<sup>46</sup> Recommendation No R(2000)21 of the Committee of Ministers to member States on the freedom of exercise of the profession of lawyer, adopted by the Committee of Ministers on 25 October 2000 at the 727<sup>th</sup> meeting of the Ministers Deputies. In: *Council of Europe* [online]. [2019-02-19]. Available at: <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=533749&SecMode=1&DocId=370286&Usage=2>>.

<sup>47</sup> Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. In: *UN HR Office of the High Commissioner* [online]. [2019-02-19]. Available at: <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx>>.

<sup>48</sup> Basic Provisions on the role of lawyers, adopted by the VIII United Nations Congress on the Prevention of Crime of August 1, 1990. In: *Verkhovna Rada of Ukraine* [online]. [2019-02-19]. Available at: <[http://zakon4.rada.gov.ua/laws/show/995\\_835](http://zakon4.rada.gov.ua/laws/show/995_835)>.

consolidated in the provisions of Paragraph 93 of the Minimum Standards for the Treatment of Prisoners from 1955.<sup>49</sup>

What concerns Ukrainian legislation, this guarantee is disclosed, in particular, in the aspect of the prohibition of interference with the private communication of a lawyer with a suspect, accused, convicted, acquitted (Part 5 of Article 258 of the CPC of Ukraine) and a person who was been taken into custody (Part 5 Article 12 of the Law of Ukraine «On pre-trial imprisonment»<sup>50</sup>), and access to things and documents that are correspondence or other form of information exchange between a lawyer and his client (Article 161 of the CPC) (review of correspondence between a lawyer and a person in custody – Part 9 of Article 13 of the above-mentioned Law, and the convicted person – Part 5 of Article 113 of the Criminal-Executive Code of Ukraine<sup>51</sup>). In spite of a certain drawback (concerning the limited scope of action of Part 5 of Article 258 of the CPC of Ukraine<sup>52</sup>), in our opinion, Ukrainian legislation pays considerable attention to the mechanism of the implementation of such a guarantee as a prohibition to interfere with the private communication of a lawyer with a client, which is generally in line with international principles in this area and aims at creating the appropriate conditions for securing the lawyer's secrecy. And this is absolutely necessary because the absence of such conditions will basically lead to the elimination of lawyer's secrecy, which will mean the elimination of the profession of advocacy.

#### II. 4. Problematic aspects of the implementation of advocacy guarantees in the context of conducting a search in relation to a lawyer

The greatest connection between the guarantees of the professional activity of the lawyer, which establish the specifications for carrying out operative search or investigative actions and prohibit the conduct of the search, disclosure, reclamation or withdrawal of documents related to the lawyer's activity (respectively, Paragraphs 3 and 4 of Part 1 of Article 23 of the Law), is traced during such an investigative action as the search of a lawyer's home, his other possessions, the premises where he carries out his advocacy. The presence of such guarantees does not indicate that they actually deny the possibility of conducting a search, since, on one hand, the above-mentioned premises may include materials that are not related to lawyer's professional activities (but relevant to the case), on the other hand, the establishment of an absolute ban on conducting a search of such premises has the chance to turn them into «criminal objects», where

<sup>49</sup> Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955. In: *UN* [online]. [2020-04-07]. Available at: <[https://www.unodc.org/pdf/criminal\\_justice/UN\\_Standard\\_Minimum\\_Rules\\_for\\_the\\_Treatment\\_of\\_Prisoners.pdf](https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf)>.

<sup>50</sup> On preliminary imprisonment: Law of Ukraine dated 30 June 1993 No 3352-XII. *Data from the Verkhovna Rada of Ukraine*. 1993, No. 35, Art. 360.

<sup>51</sup> Criminal-executive code of Ukraine of July 11, 2003. *Data from the Verkhovna Rada of Ukraine*. 2004, No. 3–4, Art. 21.

<sup>52</sup> POHORETSKY, M. M. Guarantees of securing the lawyer's secrecy in criminal proceedings. *Scientific herald of Dnipropetrovsk State University of Internal Affairs*. 2014, No. 3, p. 284.; SAVITSKA, S. *Some criminal procedural guarantees of the activity of a lawyer*. p. 57.

«any information, including criminal acts»<sup>53</sup> could be hidden from being possibly disclosed.

We proceed from the possibility of conducting such a search, but this investigative action should be carried out in an exceptional case. This peculiarity repeatedly draws the attention of the ECtHR, pointing out that the encroachment on the professional secrecy of a lawyer can have implications for the administration of justice and thereby violate the right to a fair trial (§ 37 of the decision of the case of «Nimitz v. Germany»<sup>54</sup>); the search of the lawyer's premises should be subject to a particularly thorough examination (Paragraph 62 of the decision on the case «Golovan v. Ukraine»<sup>55</sup>); such measures can be recognized as «necessary in a democratic society» only if there are effective guarantees against abuse and arbitrariness in national law, and subject to compliance with a specific case (Paragraph 31 of the decision on the case of «Kolesnichenko v. Russia»<sup>56</sup>), as well as in case when there is no other way to find evidence of a fact other than conducting a search of a lawyer (Paragraph 56 of the decision on the case of «Romain and Schmit v. Luxemburg»<sup>57</sup>).

When researching the essence of such an investigative action, the question remains as to the particularities of conducting a search in urgent cases (Part 3 of Article 233 of the CPC of Ukraine), as well as when its object is the information that has no relation to the professional activity of the lawyer. Concerning the first case, which is perceived as the «most typical»<sup>58</sup> violation of the guarantees of advocacy, we consider it necessary to proceed from the fact that Paragraph 3 of Part 1 of Art. 23 of the Law in an imperative form indicates the necessity of court's decision as the basis for a search, without any indication of the existence of any exceptions. Regarding the second case, judicial practice is based on the fact that «neither the CPC nor the Law of Ukraine» On Advocacy and Advocacy Issues «do not define the connection between a lawyer's search and his activity as a prerequisite for filing an application».<sup>59</sup>

The specificity of conduction a search of a lawyer is determined, in particular, by Part 2 of Art. 23 of the Law, which consolidates the requirement for an investigating to be indicated by the judge, the court in its decision on conducting such an investigative action, a list of things, documents to be found, discovered or withdrawn is one of the guarantees

<sup>53</sup> ROMOVSKA, Z. Law of Ukraine «On Adovacy» – repair or complete reconstruction? *The law of Ukraine*. 2000, No. 11, pp. 58–59.

<sup>54</sup> Judgment of the European Court of Human Rights in the case «Niemietz v. Germany» on December 16, 1992 (Application No. 13710/88). In: *ECHR* [online]. [2019-02-19]. Available at: <<http://hudoc.echr.coe.int/eng?i=001-57887>>.

<sup>55</sup> Judgment of the European Court of Human Rights in the case «Golovan v. Ukraine» on July 05, 2012 (Application No. 41716/06). In: *ECHR* [online]. [2019-02-19]. Available at: <<http://hudoc.echr.coe.int/eng?i=001-112021>>.

<sup>56</sup> Judgment of the European Court of Human Rights in the case «Kolesnichenko v. Russia» on April 09, 2009 (Application No. 19856/04). In: *ECHR* [online]. [2020-04-07]. Available at: <<http://hudoc.echr.coe.int/eng?i=001-112021>>.

<sup>57</sup> Judgment of the European Court of Human Rights in the case «Roemen and Schmit v. Luxembourg» on February 25, 2003 (Application No. 51772/99). In: *ECHR* [online]. [2019-02-19]. Available at: <<http://hudoc.echr.coe.int/eng?i=001-60958>>.

<sup>58</sup> IVANOV, A. V. Guarantees of independence of lawyers and ways of their improvement. *Eurasian Advocacy*. 2014, No. 6, p. 60.

<sup>59</sup> Generalization of judicial practice regarding examination by an investigating judge of petitions for granting a permit for a search of a home or other property of a person (extract). *Civil and criminal justice magazine*. 2015, No. 1, pp. 81–104. [2019-02-19]. Available at: <[http://nbuv.gov.ua/UJRN/Chcks\\_2015\\_1\\_6](http://nbuv.gov.ua/UJRN/Chcks_2015_1_6)>.

of ensuring the observance of the lawyer's secrecy. The absence of such a list, as stated in the ECtHR judgment in the case of «Kolesnichenko v. Russia» (Paragraph 33),<sup>60</sup> indicates that the investigator has unlimited authority in determining which documents are „of interest“ for investigation in a criminal case. A similar view is reproduced in other judgments of this Court, in particular in the case of «Smirnov v. Russia» (Paragraph 48),<sup>61</sup> «Romain and Schmit v. Luxembourg» (Paragraph 70),<sup>62</sup> «Manchevski v. Moldova» (Paragraph 47-48)<sup>63</sup> «Andre and the other against France» (Paragraph 45).<sup>64</sup>

The experience of foreign countries is also worthy of attention, taking into account the focus on the additional guarantee of preserving the lawyer's secrecy during a search of a lawyer. Thus, documents withdrawn from Austrian lawyers are transferred to a court where three judges examine them for confidentiality,<sup>65</sup> whereas a search in the premises of a French or Albanian lawyer is conducted by a judge in person (Article 56-1 of the CPC of France<sup>66</sup> and Part 3 of Article 52 of the CPC Republic of Albania<sup>67</sup>). Unfortunately, the provision of this guarantee of professional activity of a lawyer is not always adhered to in the practice of the investigating judge when decreeing the relevant decision.<sup>68</sup>

One of the main guarantees of preserving the lawyer's secrecy during the conduct of such investigative action is consolidation of the norm about the necessity for the presence of a representative of the advocates of the region, except for cases of non-appearance, provided that the advisory council of the region is informed in advance (Article 23 Part 2 of the Law). Such a norm of the Ukrainian legislation corresponds to the legislation of a number of European countries (Article 20 of the Code of Ethics of Lawyers of Poland,<sup>69</sup> Article

<sup>60</sup> Judgment of the European Court of Human Rights in the case «Kolesnichenko v. Russia» on April 09, 2009 (Application No. 19856/04). In: *ECHR* [online]. [2020-04-07]. Available at: <<http://hudoc.echr.coe.int/eng?i=001-92147>>.

<sup>61</sup> Judgment of the European Court of Human Rights in the case «Smirnov v. Russia» on June 7, 2007 (Application No. 71362/01). In: *ECHR* [online]. [2020-04-07]. [2019-02-19]. Available at: <<http://hudoc.echr.coe.int/eng?i=001-80953>>.

<sup>62</sup> Judgment of the European Court of Human Rights in the case «Roemen and Schmit v. Luxembourg» on February 25, 2003 (Application No. 51772/99). In: *ECHR* [online]. [2019-02-19]. Available at: <<http://hudoc.echr.coe.int/eng?i=001-57887>>.

<sup>63</sup> Judgment of the European Court of Human Rights in the case «Mancevski v. Moldova» on October 7, 2008 (Application No. 33066/04). In: *ECHR* [online]. [2019-02-19]. Available at: <<http://hudoc.echr.coe.int/eng?i=001-88719>>.

<sup>64</sup> Judgment of the European Court of Human Rights in the case «Andre and another v. France» on July 24, 2008 (Application No. 18603/03). In: *ECHR* [online]. [2019-02-19]. Available at: <<http://hudoc.echr.coe.int/eng?i=001-87938>>.

<sup>65</sup> ANDROSHCHUK, A. Profession of a lawyer in the countries of European Union. *Law magazine*. 2011, No. 2, p. 121.

<sup>66</sup> Code de procedure penale: Le decret du 6 aout 1959. In: *Legifrance* [online]. [2019-02-19]. Available at: <<https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006071154>>.

<sup>67</sup> Kodi i Procedures Penale te Republikes se Shqiperise nga 21.03.1995 No 7905. In: *Republic of Albania General Prosecutor Office* [online]. [2020-04-07]. Available at: <[http://www.pp.gov.al/web/kodi\\_i\\_procedures\\_penale\\_date\\_30\\_gusht\\_2017\\_1201.pdf](http://www.pp.gov.al/web/kodi_i_procedures_penale_date_30_gusht_2017_1201.pdf)>.

<sup>68</sup> About the state of observance of the guarantees of advocacy in Ukraine: An analytical report prepared by the Committee of the Protection of Advocates Rights and Advocacy guarantees of the National Association of Advocates of Ukraine. 2017. p. 4–8. In: *UNBA* [online]. [2020-04-07]. Available at: <[https://unba.org.ua/assets/uploads/e698546cb94f12eaff62\\_file.pdf](https://unba.org.ua/assets/uploads/e698546cb94f12eaff62_file.pdf)>.

<sup>69</sup> Zbioru Zasad Etyki Adwokackiej i Godności Zawodu (Kodeksu Etyki Adwokackiej): uchwałam Naczelnej Rady Adwokackiej z 19 listopada 2011 r. No. 52/2011. In: *Naczelna Rada Adwokacka* [online]. [2019-02-19]. Available at: <[http://www.nra.pl/dokumenty/Kodeks\\_Etyki\\_Adwokackiej\\_tekst\\_jednolity.pdf](http://www.nra.pl/dokumenty/Kodeks_Etyki_Adwokackiej_tekst_jednolity.pdf)>.

56-1 of the CPC of France,<sup>70</sup> Part 3 of Article 103 of the CPC of Italy<sup>71</sup> etc.). In order to ensure the participation of such a representative, the official who conducts the relevant investigative action, in advance informs the council of advocates of the region where it is held. Unfortunately, the current legislation does not define either the term or the order of such notice, which results in the fact that indicated official, receives «a practical opportunity to bypass these guarantees of advocacy».<sup>72</sup> There is also a drawback in the definition of the powers of the mentioned representative of the advocates of the region, as most of them are reproduced not in the provisions of the Law of Ukraine «On Advocacy and Advocacy Issues», but in the Procedure on issues of provision of guarantees of advocacy, protection of professional and social rights of lawyers.<sup>73</sup> As a result, there are not uncommon cases when investigators or other officials, as noted by scholars,<sup>74</sup> do not always respond adequately to the comments of such a representative on the legality of the appropriate procedural action (in particular, regarding the implementation of the authority to seal access to premises, things etc.).

## II. 5. The legal nature of the guarantees connected with the criminal prosecution of an advocate

The Law of Ukraine «On Advocacy and Advocacy Issues» also provides guarantees that are directly related to the criminal prosecution of a lawyer (in particular, Paragraphs 3, 12 and 13 of Part 1 of Article 23 of the Law), indicating the existence of a special procedure for criminal proceedings concerning a lawyer, his ownership of certain criminal-procedural immunity. We do not share the point o view of O.V. Dobrovljanina, who opposes such a special order<sup>75</sup> because we consider that its existence does not prevent the advocate from being held accountable but, on the contrary, seeks to provide additional guarantees for the defense of a lawyer whose professional activity often resists the interests of court employees and law enforcement agencies. Unfortunately, such a special order is not devoid of deficiencies, which, in particular, consist of both terminological inconsistencies and the inconsistency of the Ukrainian legislature concerning the reproduction of additional guarantees of a lawyer provided for by the mentioned-above Law in the provisions of the CPC of Ukraine.

<sup>70</sup> Code de procédure pénale: Le décret du 6 août 1959.

<sup>71</sup> Comparative table proposals on amending the constitution, prepared by the working group on justice of the constitutional commission of Ukraine European commission for democracy through law (Venice commission) from 24 July 2015 No. 803/2015. In: *Council of Europe* [online]. [2020-04-07]. Available at: <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2015\)024-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2015)024-e)>.

<sup>72</sup> SKRIABIN, A. N. Features of conducting investigative actions and measures to ensure criminal proceedings against a lawyer under the legislation of Ukraine. *Eurasian Advocacy*. 2015. Edit. 1 (14). p. 44.

<sup>73</sup> Procedure on issues for providing guarantees of advocacy, protecting professional and social rights of lawyers, approved by the decision of the Council of Advocates of Ukraine dated July 27, 2013, No 183. In: *Kyiv Bar Council* [online]. [2019-02-19]. Available at: <[https://kmdka.com/sites/default/files/files/poryadok\\_reaguvannya\\_10.04.2013-1.pdf](https://kmdka.com/sites/default/files/files/poryadok_reaguvannya_10.04.2013-1.pdf)>.

<sup>74</sup> POHORETSKY, M. A., POHORETSKY, M. M. Criminal procedural guarantees of lawyer's secret during conducting the search: problem issues. In: *Advocacy: Past and Present: Materials of the V-th International Scientific Conference (Odessa, November 14, 2015)*.

<sup>75</sup> DOBROVLYANINA, O. V. *Features of the criminal proceedings against certain categories of persons: the author's abstract dissertation for obtaining a scientific degree Doctor of law: spec 12.00.09*. Ekaterinburg, 2010. p. 21.

One of the guarantees of the professional activity of a lawyer is a special procedure of reporting him of suspicion (Paragraph 13 Part 1 Article 23 of the Law), which must be observed «regardless of whether the crime is related to his advocacy».<sup>76</sup> Such a guarantee was also present in the previous Law of Ukraine «On Advocacy»<sup>77</sup> (Part 5 Article 10), which concerned the procedure of instituting criminal proceedings against a lawyer. Taking into account that CPC of Ukraine from 1960 (Clause 4 Part 1 Article 61)<sup>78</sup> related this circumstance to those which excluded the participation of a lawyer in the case, this provision of the Code was criticized by Paragraph 13.12 of Resolution 1466 (2005) of the Parliamentary Assembly of the Council of Europe<sup>79</sup> (perceived as incompatible with the Council of Europe standards). Therefore, the provisions of the current CPC of Ukraine (Article 78) and the Law of Ukraine «On Advocacy and Advocacy Issues» (Articles 31 and 32) are positive, according to which withdrawal of a lawyer defense is now connected not with reporting him of suspicion of committing a crime, but with entry into force of a court conviction.

## II. 6. Security guarantees as one of the most important for ensuring the professional activity of a lawyer

The guarantees of advocacy are also the provisions of Paragraph 6 (life, health, honor and dignity of a lawyer and members of his family, their property is protected by the state, and the assault on them imposes the responsibility provided for by law) and 7 (the lawyer is guaranteed the right for security during participation in criminal proceedings in the manner prescribed by law) Part 1 of Art. 23 of the Law, which D.P. Fiolewski considers, on one hand, as a serious guarantee for a lawyer whose activity is not always safe, and on the other hand, as a demand to be responsible, bold and determined to claim the legitimate rights and interests of the client.<sup>80</sup> The necessity of such guarantees is due to the fact that the state, by imposing on a lawyer the duty to provide professional legal aid, must also guarantee him safe implementation of such commitments. These positions include, in particular, the Basic Provisions on the Role of Lawyers<sup>81</sup> (Basic Principles Regarding the Role of Lawyers), obliging the Governments to first of all provide advocates (and, accordingly, lawyers<sup>82</sup>) with adequate protection when their security is in danger (Paragraph 17).

<sup>76</sup> SAVITSKA, S. L. Violation of a criminal case concerning a lawyer. *Court appeal*. 2011, No. 4, p. 54.

<sup>77</sup> About the Advocacy: Law of Ukraine dated December 19, 1992, No 2887-XII (expired). *Data from the Verkhovna Rada of Ukraine*. 1993, No. 9, Art. 62.

<sup>78</sup> The Code of Criminal Procedure of Ukraine dated December 28, 1960 (expired). *Data from the Verkhovna Rada of the USSR*. 1961, No. 2, Art. 15.

<sup>79</sup> On the fulfillment of Ukraine's obligations and commitments: Resolution 1466 (2005) of the Parliamentary Assembly of the Council of Europe from October 5, 2005. In: *Verkhovna Rada of Ukraine* [online]. [2019-02-19]. Available at: <[http://zakon3.rada.gov.ua/laws/show/994\\_611](http://zakon3.rada.gov.ua/laws/show/994_611)>.

<sup>80</sup> FIOLEVSKY D. P. *Advocacy: tutorial. 3<sup>rd</sup> edition., edited and amplified*. K.: Alerta, 2014. p. 159.

<sup>81</sup> Basic Provisions on the role of lawyers, adopted by the VIII UN Congress on the Prevention of Crime of August 1, 1990. In: *Verkhovna Rada of Ukraine* [online]. [2019-02-19]. Available at: <[http://zakon4.rada.gov.ua/laws/show/995\\_835](http://zakon4.rada.gov.ua/laws/show/995_835)>.

<sup>82</sup> Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. In: *UN HR Office of High Commissioner* [online]. [2019-02-19]. Available at: <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx>>.

Unfortunately, Ukrainian legislation in this area is not perfect. In particular, the lawyer is guaranteed the right for security precisely when he or she participates in criminal proceedings (Paragraph 7 of Part 1 of Article 23 of the Law). It is unclear why the law, which applies to all professional activities of a lawyer, does not take into account the fact that often a lawyer who takes a principled stand on any category of cases, as noted by T.G. Dabizha, is under «a pressure that entails a real or potential threat to his personal security or the safety of his loved ones».<sup>83</sup> The provisions of the draft Law prepared by the working group of the Judicial Reform Council<sup>84</sup> are more successful, according to which the lawyer is already guaranteed the right for security during the conduct of advocacy activities in accordance with the procedure established by law.

At present, the implementation of such a lawyer's guarantee is ensured by the provisions of the Law of Ukraine «On ensuring the safety of persons involved in criminal proceedings»,<sup>85</sup> the analysis of which shows that it groundlessly does not foresee, firstly, all possible forms of lawyer's activity in such a legal proceeding (according to S.L. Savitskaya, such a right should also be given to a lawyer of the witness<sup>86</sup>), and secondly, the same increased measures of state protection, which are given to judges, employees of the prosecutor's office and other law-enforcement bodies in accordance with the provisions of the Law of Ukraine «On State Protection court officials and law enforcement agencies».<sup>87</sup> Taking into account the existing cases of murder and assault on the life of a lawyer, physical harassment with lawyers, and the destruction of his property in connection with the professional activities referred to in the above-mentioned Report,<sup>88</sup> the analytical note «On the Status of Compliance of the guarantees of Advocacy in Ukraine»<sup>89</sup> we consider it necessary to substantially increase the level of guaranteeing the right of a lawyer to ensure his safety, in particular by establishing equality between such a right and the right of court employees and law enforcement agencies, as well as by also extending its validity for the time of conducting of any kind of professional activities by the lawyer.

<sup>83</sup> DABYZHA, T. G. Guarantees of Personal security of an attorney. *Lawyer*. 2013, No. 10, p. 16.

<sup>84</sup> Comparative chart for the draft Law of Ukraine On Amendments to the Law of Ukraine «On Advocacy and Advocacy Issues», prepared by the Working Group on the reform of legislation on advocacy and free legal assistance at the Council on Judicial Reform. In: *UNBA* [online]. [2020-04-07]. Available at: <<https://unba.org.ua/assets/uploads/legislations/inshidokumenty/proekt-zakonu-pro-advokaturu.pdf>>.

<sup>85</sup> On ensuring the safety of persons involved in criminal proceedings: Law of Ukraine dated December 23, 1993, No. 3782-XII. *Data from the Verkhovna Rada of Ukraine*. 1994, No. 11, Art. 51.

<sup>86</sup> SAVYTSKA, S. L. *Criminal procedural guarantees of the activity of a lawyer*: the author's abstract dissertation for obtaining a scientific degree Doctor of law: 12.00.09. K., 2013. p. 158.

<sup>87</sup> On State Protection of Employees of the Court and Law Enforcement Agencies: Law of Ukraine dated December 23, 1993 No 3781-XII. *Data from the Verkhovna Rada of Ukraine*. 1994, No. 11, Art. 50.

<sup>88</sup> Report on violation of the rights of lawyers and guarantees of advocacy in Ukraine (2013–2016), approved by the decision of the Council of Advocates of Ukraine from February 26, 2016, No 2. In: *UNBA* [online]. [2019-02-19]. Available at: <<http://unba.org.ua/assets/uploads/news/publikacii/buklet-zvit-porushennya.pdf>>.

<sup>89</sup> About the state of observance of the guarantees of advocacy in Ukraine: an analytical report made by the Committee for the Protection of Advocates Rights and Advocacy guarantees of the National Association of Advocates of Ukraine. 2017. In: *UNBA* [online]. [2020-04-07]. Available at: <[https://unba.org.ua/assets/uploads/e698546cb94f12eaff62\\_file.pdf](https://unba.org.ua/assets/uploads/e698546cb94f12eaff62_file.pdf)>.

## II. 7. The indemnity of an advocate as a guarantee of his activity

The guarantee of advocacy is also the provision of Paragraph 14 Part 1 of Art. 23 of the Law (it is forbidden to bring a lawyer to criminal or any other accountability (a person whose right to carry on advocacy has been stopped or suspended) or to threaten him with application of liability in connection with his or her lawyer's activity in accordance with the law;) indicating the existence of a kind immunity to bringing him to justice in connection with his professional activities, which has gained the name of «indemnity» in literature (from the Latin *indemnities* – not condemned).<sup>90</sup>

The disclosure of the content of this guarantee to a certain extent occurs in the following, namely Paragraph 15 Part 1 of Art. 23 of the Law (can not be the basis for bringing a lawyer to the responsibility of his statement in the case, including those that reflect the position of the client, statements in the media if this does not violate professional duties of a lawyer). The positive effect of this rule is that its action is not limited only to the judicial process, which complies with the practice of the ECtHR (Paragraph 138 of the case «*Moriss v. France*» (*Morice v. France*))<sup>91</sup> concerns the issue of the right to a client's protection also with the help of the press, in order to inform the public about shortcomings which may harm legal proceedings, but the lawyer is not exempted from the duty to play safe concerning the secrecy of the conduct of a judicial investigation). The presence of such a guarantee, which is considered as the immunity of a lawyer's statement,<sup>92</sup> undoubtedly plays an important role in the process of professional activity, since the opinion of a lawyer, which helps to make procedural decisions, as noted by Y.I. Stetsovsky and G.B. Mirzoev has «a value when expressed freely, without regard to a separate decree or other document that may serve as a reason for initiating the issue of the liability of a lawyer».<sup>93</sup>

The law on the indemnity of a lawyer is also contained in international legal acts (Part 4 of Principle I of Recommendation No 21 of the Committee of Ministers of the Council of Europe<sup>94</sup> and Paragraphs 16 and 20 of the Basic Provisions on the role of lawyers<sup>95</sup> (and, accordingly, the Main Principles relating to the role of lawyers<sup>96</sup>)), the analysis of which

<sup>90</sup> PETRUCHENKO, O. *Latin-Russian Dictionary*. 9<sup>th</sup> ed., edited. M.: Publishing house «V.V. Dulenov, Br. Salaevy's Heirs», 1914. p. 210.

<sup>91</sup> Judgment of the European Court of Human Rights in the case «*Morice v. France*» on April 23, 2015 (Application No. 29369/10). In: *ECHR* [online]. [2020-04-07]. Available at: <<http://hudoc.echr.coe.int/eng?i=001-154265>>.

<sup>92</sup> DABIZHA, T. H. Immunity of a lawyer's statement. *Law practice*. 2012, No. 5, p. 25.

<sup>93</sup> STETSOVSKY, Y. I., MIRZOEVA, G. B. *Professional duty of a lawyer and his status: monograph*. M.: UNITY-DANA, 2003. p. 66.

<sup>94</sup> Recommendation No. R(2000)21 of the Committee of Ministers to member States on the freedom of exercise of the profession of lawyer, adopted by the Committee of Ministers on 25 October 2000 at the 727<sup>th</sup> meeting of the Ministers Deputies. In: *Council of Europe* [online]. [2019-02-19]. Available at: <<https://wcd.coe.int/com.instranet.InstrServlet?command=com.instranet.CmdBlobGet&InstranetImage=533749&SecMode=1&DocId=370286&Usage=2>>.

<sup>95</sup> Basic Provisions on the role of lawyers, adopted by the VIII United Nations Congress on the Prevention of Crime of August 1, 1990. In: *Verkhovna Rada of Ukraine* [online]. [2019-02-19]. Available at: <[http://zakon4.rada.gov.ua/laws/show/995\\_835](http://zakon4.rada.gov.ua/laws/show/995_835)>.

<sup>96</sup> Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. In: *UN HR Office of High Commissioner* [online]. [2019-02-19]. Available at: <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx>>.



indicates that there are certain limitations concerning the possibility of its implementation. Such an opportunity exists only when lawyers act in accordance with their «professional standards», «recognized professional duties, standards and ethical norms». In Ukrainian legislation, the use of the lawyer's indemnity is associated with the exercise of his lawyer's activity in accordance with the law (Paragraph 14 of Part 1 of Article 23 of the Law), and with the non-violation of his professional duties (Paragraph 15 of Part 1 of Article 23 of the Law). The presence of such general phrases, as well as the lack of a clear mechanism for establishing these restrictions, somehow offset the possibility of proper implementation of the provisions regarding the lawyer's indemnity, since it is unclear, firstly, what exactly will constitute the «offense» of the lawyer, and secondly – which authority (court, qualification-disciplinary commission of advocacy, etc.) will be responsible for considering the issue of the presence or absence of such an offense.

In our opinion, only the lawyer's self-government bodies have the right to decide on the non-fulfillment or inappropriate performance of the lawyer's professional duties, violation of the rules of lawyer's ethics, and the disclosure of the lawyer's secrecy. Therefore, if the lawyer is brought to disciplinary responsibility or another offense beyond his professional activity, the lawyer's indemnity does not apply to such acts, and therefore he may be brought to justice in the general order.

The implementation of the lawyer's indemnity is conditioned by the availability of other guarantees, in particular those provided for in § 10 (the submission of an application by the investigator, the prosecutor, as well as the issuance of a separate decision of the court regarding the legal position of the lawyer in the case is prohibited), 11 (interference with the legal position of the lawyer is prohibited) and 16 (the identification of a lawyer with a client is prohibited) Part 1 of Art. 23 of the Law. Taking into account the proximity of the nature of the guarantees as defined in Paragraphs 11 and 16, the provisions of the draft law,<sup>97</sup> according to which they are considered as one guarantee, «it is prohibited to interfere with the legal position of an attorney and to identify a lawyer with a client». The prohibition to identify a lawyer with a client is provided in Paragraph 7 of the Standards of Independence by the IBA,<sup>98</sup> which states that the lawyer should not be identified with the client or the client's business, no matter what positive or negative thoughts it stirs. The same norm is consolidated in the mentioned above Basic Provisions on the role of lawyers and the Basic Principles on the role of lawyers (Paragraph 18). We share this position because the lawyer does not have the duty to verify the evidence provided by his client, he was only forbidden, in particular, to refer in the court to the evidence presented by the client which he knew were false.

Taking into account the reported above, one can conclude that the provisions of the Law of Ukraine «On Advocacy and Advocacy Issues» set sufficiently positive norms that

<sup>97</sup> Draft Law on amendments to the Law of Ukraine «On Advocacy and Advocacy Issues» and some other legislative acts of Ukraine (regarding the status and guarantees of advocacy and the formation and operation of lawyer's self-government bodies) from February 4, 2015, No. 1794-1. In: *Verkhovna Rada of Ukraine* [online]. [2020-04-07]. Available at: <[http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=53817](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53817)>.

<sup>98</sup> Standards for the independence of the legal profession, adopted by the IBA on 7 September 1990 in New York. In: *International Bar Association* [online]. [2019-02-19]. Available at: <[http://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx)>.

presuppose the existence of a lawyer's indemnity as a guarantee of his professional activity. Unfortunately, the shortcomings in the construction of norms that provide for the existence of a lawyer's indemnity, in particular concerning the use of common phrases and the lack of appropriate procedures for its implementation, somehow offset the possibility of a reliable mechanism to guarantee the activities of a lawyer.

### III. CONCLUSIONS

Guarantees as an element of the legal status of an advocate represent a combination of conditions, methods and means provided by the law on advocacy, aimed at ensuring the proper implementation of all other elements of such status (rights, duties and responsibilities), in order to create appropriate conditions for the provision of professional legal assistance. The guarantees of the advocacy are aimed at protecting the lawyer from possible manifestations of arbitrariness by the state, the organs of the lawyer's self-government and other entities, as well as ensuring the right of a person to a professional legal assistance, the implementation of which is in close connection with the existing system of such guarantees.

The system of guarantees of advocacy in Ukraine generally complies with both the international standards of the profession of the advocate and the experience of foreign countries, but the existence of significant inaccuracies and gaps, the lack of clear mechanisms for ensuring their implementation, inconsistency in a number of cases between the provisions of the Law of Ukraine «On Advocacy and Advocacy Issues» and other normative acts (in particular, the CPC of Ukraine), indicates the need for a significant increase in the level of guaranteeing the professional activity of a lawyer, in order to create, first of all, such fundamental principles as independence and confidentiality.