**DECISION**

of

Qualifications and Disciplinary Commission of

Kyiv Regional Bar

Disciplinary Chamber

September 10, 2015 Kyiv

The Disciplinary Chamber of the Qualification and Disciplinary Commission of Kyiv Regional Bar composed of its Chairperson Elizaveta Lisnychenko and the members: Tamila Olkova, Lyubov Gryaznova, Oleg Malinevskiy, Mykola Ochkolda, Angelica Sytsko, Olena Foia, Alina Biryukova, Volodymyr Kachan, Mykola Pavlov, involving Chairperson of the Qualifications and Disciplinary Commission of Kyiv Regional Bar Kovbasinska G.V., having considered at public meeting in the premises of the Commission in Kyiv, Artema street, 10 the materials of the appeal of the Ukrainian National Bar Association of June 24, 2015 under № 419/2-15 and the appeal of the Ukrainian Parliament Member of July 22, 2015 under № 417-2207/1 on the conduct of the **attorney Andriy Vyshnevskiy** (certificate of admission to legal practice № 4930/10 of 18.07.2012 issued by the Qualifications and Disciplinary Commission of Kyiv Regional Bar)

**RENDERED:**

The Qualifications and Disciplinary Commission of Kyiv Regional Bar received two appeals:

from the Ukrainian National Bar Association of June 24, 2015 under number 419/2-15;

from the Ukrainian Parliament Member Rybalka S.V. of June 22, 2015 under number 417-2207/1, the applicant requests to consider it as a complaint.

The appeals state that June 15, 2015 at the conference in the premises of the Supreme Court of Ukraine, the attorney Andriy Vyshnevskiy made a report “The Bar and Free Legal Aid System: approaches to reforming” which, in particular, contained the following statements of the speaker – “…text of presentation… Well, the main risk for the free legal aid system, the main risk for the realization of citizens' constitutional right to free legal aid and the capacity of the state to ensure this right, we see, is the dire state of the Ukrainian Bar, which has already been mentioned today by our colleagues – this is low ethical standards and professional level of the bar; this is that it is the attorney, who is the main corruption element as of now, that is that the phenomenon of police lawyers is not counteracted by the National Bar Association and even not commented in any way, and a lot more could be told here, but I will not stop on it. Reforming of the bar is necessary now. As in the state it is today, it can be a hindrance to the implementation of the judicial reform ... end of the speech" (extract from the transcripts of the attorney A.V. Vyshnevskiy report).

The applicants believe that the actions of the attorney A.V. Vyshnevskiy have elements of disciplinary offense as the abovementioned speech of the attorney A.V. Vyshnevskiy humiliates the bar, every attorney, destroys respect of the society to the bar in the state, contradicts to European standards. In addition, the applicants emphasize that the attorney A.V. Vyshnevskiy, who is the Director of the Coordination Centre of Legal Aid of the Ministry of Justice of Ukraine, posted on the official website of the subordinated to the Ministry of Justice of Ukraine institution the information on the above-mentioned conference and his speech, in which he stressed that the main risk among the outlined in the speech for the further development of the system of free aid is “… dire state of the national bar…”, and “… if the bar is not reformed as soon as possible in accordance with the principles and standards of the Council of Europe, it can become a hindrance to the implementation of the judicial reform”.[[1]](#footnote-1)

In this way A.V. Vyshnevskiy as the Director of the Coordination Centre of Legal Aid of the Ministry of Justice of Ukraine, during his speech of June 15, 2015, displayed a low professional level that caused the humiliation of Ukrainian bar role in the overall system of protection of rights and freedoms of citizens of Ukraine.

Apparently attorney A.V. Vyshnevskiy did not understand that the system of free legal aid is a part of the Ukrainian professional bar community, and differs only in the way of involving an attorney and exercising of their responsibilities and the procedure of payment for the services. Professional quality of a person who provides legal aid are checked at the acquisition of the right to practice law, and cases of non-compliance to ethical standards are addressed in the manner and following the procedure provided by the Law of Ukraine "On the Bar and Advocacy". Provided that, the Ministry of Justice of Ukraine charged with only the check of the professional level of attorneys with whom contracts are concluded, which approves quality standards for providing legal aid in the system of FLA.

Taking into consideration the statistics of employment to local coordination centres, none of the cases of not passing the competition by the attorney for providing FLA on the ground of low professional level is known. That is to say, that the Head of the FLA structure, charged with the verification of professional level of attorneys, allows attorneys with low “disappointing level of” professional skills to work, not referring to specific cases and names. Thus, in his public speech the attorney A.V. Vyshnevskiy expresses obviously not true information on the whole institution of the national legal system.

At the same time, the author of the public speech informs public about the corruption component in the activities of attorneys, which, according to the author, “is a hindrance to the implementation of judicial reforms”. Taking into consideration the abstracts posted on the official website of the Centre of FLA, the author and the Head of this institution did not understand the content of his position, which is actually of populist nature and terms that are used to describe the system of independent professional activity in Ukraine. Thus, the author is far from understanding the role of the bar in the justice system, and mistakenly identifies independent professional activity with the mechanism of bar self-governance bodies’ organization.

The bar in Ukraine is a type of independent professional activity, a type of function delegated by the state vested in persons who confirmed their professional level in accordance with the law. In other words, using the term "Bar" the director of the coordination centre should have decided what he had in mind, especially when it concerns the conclusion on the activities of the whole representative institution in the rule of law state. If the author had in mind the organization of the attorney’s self-governance body, it is clear that regulatory standardization of the system in this specific professional field is performed in view of the recommendations of the Council of Europe.

This is confirmed by the adopted Law “On the Bar and Advocacy”, which is in force up to now. The author of the abstracts did not provide arguments for improper operation of the law, but only referred to reasons without proofs for the need to bring the "Bar" in compliance with the Council of Europe standards. In such way, the author believes that the bar in the context of the use of this term known only to the author contradicts to such recommendations. The attorney, particularly the Head of the Centre of FLA subordinated to the Ministry of Justice of Ukraine should understand the difference between the system of organization of the work of attorney’s self-governance bodies which vested mainly with functions of access to the profession and organization of provision of professional rights of attorneys and the legal practice as such.

Activities of the attorney cannot be reformed, only the organization of self-governance bodies can be subjected to reforming. The level of the professional activities of the attorney depends entirely on the level of his perception by the judiciary. This is to say, no matter how an attorney presents his position, the court may not necessarily weigh on it. In view of the above, not the bar is a hindrance for the implementation of judicial reform, but the absence of judicial reform is a hindrance to the improvement of the professional level of the bar.

The representative of the applicant the Member of the Parliament Rybalka V.S. – the attorney Kolesnikov I.V. – explained that his principal – the Member of the Parliament of Ukraine Rybalka V.S. and he personally believe that the statements of the attorney A.V. Vyshnevskiy are of subversive nature, he used in his report those expressions and the that sense that he wanted to convey, there is neither mistakes nor contingency there.

This is shown by the conclusion of the expert research of 07.09.2015, executed by the Ukrainian Linguistic Expertise Bureau of the National Academy of Sciences of Ukraine, confirming the negative general nature of the statements, therefore, the representative applied to the Disciplinary Chamber with the request to give assessment of the specified document and to include it into a disciplinary case materials. A.V. Vyshnevskiy did not provide any arguments, did not stated specific facts of inactivity of the Ukrainian National Bar Association or the specific facts of non-ethic conduct of an attorney. In addition, the representatives of the applicant – the Member of the Parliament V.S. Rybalka drew attention of the Disciplinary Chamber to the fact that the statements of the attorney A.V. Vyshnevskiy were made consciously and publicly.

He is the Heads of the structure which needs the allocation of funds from the state budget of Ukraine. A.V. Vyshnevskiy used the bar for certain purposes. But according to the law the Bar has other goals. This is primarily the protection of the interests of persons who applied for legal assistance.

In justification of the position the applicants submitted the following documents:

* Copy of the letter of the National Bar Association of Ukraine of 07.13.2015 № 449/0/2-15;
* Letter of the National Bar Association of Ukraine of 04/08/2015 №527/0/2-15;
* Copy of the letter of Bar Council of Transcarpathian Region of 02.07.2015 № 30/15;
* Copy of the letter of Bar Council of Chernihiv Region of 01.07.2015 № 155;
* Copy of the letter of Bar Council of Odessa Region of 02.07.2015, № 114/0 / 9-15;
* Letter of the National Bar Association of Ukraine of 07.29.2015 № 502/0 / 2-15
* Resolution of III Bar Congress of Ukraine of 03.07.2015;
* Copy the Extract from the minutes of III Bar Congress of Ukraine of 3.07.2015r;
* Power of attorney of 02.09. 2015 notarised under registration number 1834;
* Copy of the letter of the Bar Office "Kolesnikov I.V. and partners" of 02.09.2015 № 02-09-15 by;
* Copy of the expert research conclusion of 07.09.2015 executed by the Ukrainian linguistic expertise Bureau of the National Academy of Science of Ukraine.

Taking into consideration the fact that both appeals refer to the same attorney, their consideration is consolidated into one disciplinary proceeding.

The attorney A.V. Vyshnevskiy read and understood the content of the appeal of the National Bar Association of Ukraine and provided written explanations, in which said that the Coordination Centre for Legal Aid received the invitation for participation of its representative in the conference “Judicial Reform; strategic planning and further steps”, which took place on June 15 in the premises of the Supreme Court of Ukraine. So, exactly as an official of the Ministry of Justice of Ukraine – the Director of the Coordination Centre of legal aid and on behalf of the Coordination Centre of legal aid and not as an attorney, he made a report on “Free legal aid: vision, impact on the environment, risks and opportunities” (and not “The Bar and free legal aid: the approaches to reforming” as it is stated in the appeal of the National Bar Association of Ukraine).

The attorney A.V. Vyshnevskiy insists that during his speech he did not express contempt to the Bar of Ukraine, the legal profession of Ukraine, its nature and public role, he did not discredit the Bar of Ukraine and the National Bar Association of Ukraine at the national level, did not spread the opinion on the failure of the modern Bar of Ukraine to provide activities on free legal aid. But in his report he outlined the recognized in professional circles and official documents problems of the bar addressing of which the Coordination Centre for the provision of legal aid and its territorial offices systematically involved in during the last three years.

In particular, in his report, he drew attention of the attendants to the risks that exist today in the way of implementation of the judicial reform and the development of free legal aid system as a part of the reform in accordance with the Strategy of reforming the judicial system, the judiciary and related legal institutions in 2015-2020 years, approved by the Decree of the President of Ukraine of May 20, 2015 № 276/2015. In it he also drew attention of the attendants on the fact that the way in which these risks are overcome in the system of legal aid and what steps are done by the Coordination Centre for provision of legal aid for the improvement of the professional level of attorneys and the quality of legal aid provided by them if such aid is provided on the account of state budget.

As to the merits of his report at the conference: first, the report took place after several speakers who expressed their views on the stated theme of the conference, including the state of the bar in Ukraine and the necessary steps of its reforming. As seen from the transcript of the speech extract cited by the complainant, his words about the dire state of the Ukrainian bar, the low ethical standards and low professional level of the bar he used with the reference to what had already been voiced by other speakers.

The attorney A.V. Vyshnevskiy really is not aware of the counteraction of attorney’s self-governance bodies against the phenomenon in which the lawyer is a basic element of corruption, or against so-called “police attorneys”, as such information is not publicly available. There is no information posted on the site of the National Bar Association of Ukraine on this subject. As for the participation of individual attorneys in offenses related to corruption mediation schemes, such information regularly is publicly available. As the proof of such facts the attorney A.V. Vyshnevskiy cited extracts from opinion polls conducted in 2009 that do not contain specific information on the activities of attorneys in particular.

The attorney A.V. Vyshnevskiy in his explanations also stated that he understands that the state of the Bar only reflects the state of society in general and the same problems that exist in society inherent to it, but as a citizen, an officer and an attorney, he wants to change for the better and put to this significant personal efforts. He is convinced that only a frank and honest recognition of internal problems will allow the bar community to change for the better. Making oath of attorney, A.V. Vyshnevskiy swore that he would in his legal practice adhere to the rule of law, legality, independence and confidentiality rules of attorney’s ethics, honestly and in good faith ensure the right to defence and provide legal assistance in accordance with the Constitution and laws of Ukraine, with high responsibility fulfil duties assigned to him, be faithful to the oath.

**Based on the results of the investigation, the Disciplinary Chamber concluded that there are grounds for initiating disciplinary case concerning the attorney with a view to the following:**

Article 34 of the Law of Ukraine “On the Bar and Advocacy” determines that grounds for bringing an attorney to disciplinary action are committing a disciplinary offense. Attorney disciplinary offense is: the violation of incompatibility requirements; the violation of oath of the attorney of Ukraine; the violation of attorney’s ethics; the disclosure of attorney-client confidential information or actions, that led to its disclosure; failure or improper performance of professional duties; non-implementation of the decisions of attorney’s self-governance; violation of other attorney’s obligations provided by law.

According to members of the Disciplinary Chamber, public report set out in the application (complaint) and not refuted by the attorney is a disciplinary offense as it does not meet the requirements established by Article 7 § 3, Article 12 §§ 1, 2, 4 of Rules of Attorney’s Ethics, committed by the attorney A.V. Vyshnevskiy. Regulations of Article 12 §§  1 and 2 of Rules of Attorney’s Ethics impose an obligation on the attorney with all his activities to display respect for the bar, which he represents, its essence and public role, to promote retention and increase of respect for it in the society and not to commit acts aimed at damage the prestige of the bar and advocacy (part 4 of Art. 12 of the Rules of attorney’s ethics). According to Article 7 § 3 of the Rules of Attorney’s Ethics, the attorney has no right in his professional activities to use means and methods that contravene applicable laws or regulations of attorney’s ethics.

In this case, the circumstances set out in applications contain data on non-adherence by the attorney A.V. Vyshnevskiy of fundamental provisions on the activities of the attorney, his failure to comply with the requirements of Article 21 § 1(1) of the Law of Ukraine “On Bar and Advocacy” and the provisions of Articles 51, 52, 54 of the Rules of Attorney’s Ethics, according to which the attorney has no right in his legal practice to use means and methods that contravene applicable laws or regulations of attorney’s ethics and by all his activities (in all areas of attorney, professional, social, publicity and others), the attorney should display respect for the bar, which he represents, its essence and public role, to promote retention and increase of respect for it in the society and must not commit actions aimed at damage the prestige of the bar and advocacy (Article 7 § 3, Article 12 §§ 1, 2, 4 of the Rules of Attorney’s Ethics), which is confirmed by Article 10 of the Convention, which applies to attorneys, but with the consideration of the appropriate features, in particular, such statements of the attorney should be based on certain facts (ECtHR judgment on the case “Maurice v. France”).

Based on the results of the disciplinary inquiry, examining the arguments of the complainants obtained during the audit and revision of the disciplinary case evidences on the basis of the abovementioned, based on the material in the disciplinary case-file, following Articles 33-39 of the Law of Ukraine “On the Bar and Advocacy”, Articles 51, 52, 54 of Rules of Attorney’s Ethics, the Disciplinary Chamber

**DECIDED:**

For the violation of Article 21 of the Law of Ukraine “On the Bar and Advocacy” and Articles 51, 52, 54 of the Rules of Attorney’s Ethics to bring the attorney Andriy Vyshnevskiy to disciplinary punishment, applying to him disciplinary punishment in the form of withdrawal of the right to practice law with followed exclusion from the Unified Register of Attorneys of Ukraine.

The decision may be appealed within thirty days of its making to the High Qualifications and Disciplinary Bar Commission of Ukraine or to the court.

**Chairperson of the disciplinary chamber**

**QDC of Kyiv Regional Bar E.S. Lisnychenko**

**Secretary of the disciplinary chamber**

**QDC of Kyiv Regional Bar О.V. Foia**

1. http: legalaid.gov.ua/ua/holovna/cherven-2015/holovnym-ryzykom-relizatsii-hromadianamy-konstytutsiinjho-prava-na-bezoplatnu-planovy-dopomohu-ie-plachevnyi-stan-ukrainskoi-advokatury-vyshevskyi [↑](#footnote-ref-1)