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Friday, 4 March 2016

Taras Rudnitsky

President

Ukrainian American Bar Association

taras@carsafetylawyer.com

Re: Contacts between UABA and the UNBA

Dear Mr. Rudnitsky,

Thank you for welcoming our delegation at the 38th Annual UABA Convention in New York City in October 2015. Mr. Gvozdiy's presentation at the Convention was an important step for us in reaching out to international community.

The Bar of Ukraine is indeed relatively new, finally gaining its independence and self-governance after decades of being controlled by the state. A strong and independent bar is extremely important for successful judicial reform in Ukraine in light of the European integration course adopted by our society. International support is thus essential, as unfortunately there are still many external factors and influences that do not wish the UNBA to succeed as an organization.

As you may already know, Ukrainian National Bar Association has been actively developing its international agenda. Despite being a relatively new organization, in 2015 alone UNBA has established partner relations with foreign law societies and national bar associations (UK, USA, Germany, Italy, Georgia, Belarus, Kazakhstan), international institutions (Council of Europe, EU Projects, USAID, Human Rights First etc.) and has been admitted as a full member of the International Bar Association.

Moreover, after the visit to NYC for the Convention in October 2015, the delegation met with members of US Congress, representatives of Department of Justice, Department of State and US Institute for Peace in Washington, DC. Throughout the visit, the delegation promoted the rule of law in Ukraine and outlined that Ukraine is finally succeeding in reforms, however, there still remain some dangerous issues with the Ukrainian legal aid system. Please find enclosed a report adopted by the Bar Council of Ukraine that

deals with the threats that current legal aid system poses to the rule of law in Ukraine and the legal profession in particular.

We urged our international partners to further support the reform process in Ukraine and thanked them for the continued support they have provided to the Ukrainian society thus far.

UNBA welcomes your interest in learning more about our organization. For this purpose, please find enclosed to this letter [the 2015 UNBA Annual Report](#). At the moment, it only contains financial information for Q1-3 2015. The report examines in detail the activities of our organization as well as key initiatives. So far, it is only available in Ukrainian. However, once the report has been updated with financials for the whole year, it will be translated into English as well. We will also make sure that you receive a translated copy.

I would like to note, that since UNBA is the biggest self-governed professional organization comprising legal professionals (in fact, membership is mandatory in accordance with the Law), it is important to realize the principles upon which it is built.

Every attorney in Ukraine directly participates in the election of the regional attorneys' self-government bodies (Bar Council of the Region, Qualification and Disciplinary Commissions of the Bar, Audit Commission of the Bar); regional representatives in the Bar Council of Ukraine and High Qualification and Disciplinary Commission of the Bar; and finally, delegates for the Congress of Attorneys of Ukraine.

Therefore, the system of the attorneys' self-government in Ukraine is very transparent, as all of the bar officials are elected, not appointed. I am attaching an English version of the Law of Ukraine 'On the Bar and Practice of Law' to this letter for your consideration.

I would also like to point out that the [news article](#) from our website that you are referring to does not include a statement that UABA lacks objective facts regarding the status of the Ukrainian legal system and its role in modern Ukraine. We believe this may have been a translation error.

On the contrary, the original article in Ukrainian underlined the importance of cooperation between UNBA and UABA because of your organization's proactive position in the development and promotion of the rule of law in Ukraine. The line which you are referring to in your letter actually states that UABA was not aware of all the facts in regard to the state of affairs of the Ukrainian bar, not Ukrainian legal system.

We received further proof of this at the Convention, where it became evident that some of those present at the venue only had the information from one source, and it was necessary for us to step in and clear any confusion. This is where a Q&A session with UNBA Vice-President Valentyn Gvozdiy proved helpful. We are glad that he addressed many of the questions raised by your members.

In addition, further in the same article, it says that UNBA will continue its effort in the development of the strategic partnership with the UABA and will share information in order to jointly promote the rule of law in Ukraine.

Furthermore, I am happy to address the following issues that you have raised in your letter:

1. Viktor Smalyy

It is my understanding that Ivan Grechkivsky, Chair of the UNBA International Relations Committee, has already communicated with Mr. Myroslaw Smorodsky, UABA's Communications Director, on this matter back in August 2015, prior to the Convention.

In any case, please find enclosed a 9-page report that has been adopted by the Bar Council of Ukraine. The report contains a chronology of all the actions undertaken by the Ukrainian National Bar Association for the protection of the professional rights of Attorney Viktor Smalyy.

As you can see, on this matter alone, UNBA has addressed Minister of Internal Affairs of Ukraine, Prosecutor General of Ukraine, Head of the High Qualification Commission of Judges of Ukraine, Head of the High Council of Justice of Ukraine and other officials on numerous occasions.

On December 26, 2013, UNBA held a roundtable on the violations of attorneys' rights and professional guarantees. The roundtable was attended by representatives of the attorneys' self-government in Ukraine where we jointly searched for ways of protecting the rights of Attorney Viktor Smalyy.

On February 5, 2014, UNBA held another conference with the representatives of regional bar councils, higher bodies of attorneys' self-government, the UNBA Committee on the Protection of Attorneys' Rights and Professional Guarantees, prominent attorneys involved in criminal cases, human rights activists and the defendants of the arrested attorneys Nos, Nosikovsky and Smalyy. The purpose of such conference was to provide legal assistance to the attorneys involved in the legal defense of Viktor Smalyy.

Furthermore, on February 6, 2014, as the President of the UNBA, I have petitioned the Dniprovsky District Court of Kyiv City asking to change the pre-trial restriction in the form of arrest.

Ukrainian National Bar Association has alerted, on numerous occasions, that the rights and professional guarantees of the attorneys in Ukraine are violated frequently. In 2015, there were 95 documented cases of the violations. In January 2016 alone, there were more than 10.

More recently, on February 4, 2016, UNBA addressed with an [open letter](#) the President of Ukraine, International Bar Association (IBA) and Council of Bars and Law Societies of Europe (CCBE) in connection with the frequent violations.

UNBA also addressed the Prosecutor General of Ukraine [on February 18](#) with more examples of the violations, calling on the Prosecutor General to respect the rights and professional guarantees of the attorneys, provided for by the Law of Ukraine 'On the Bar and Practice of Law'.

On February 22, UNBA held a [press-conference](#) during which UNBA Vice-President Valentyn Gvozdiy called on the President of Ukraine to intervene and put an end to blatant violations of the attorneys rights by the Prosecutor General's office. No reaction followed.

On February 26, the Bar Council of Ukraine adopted a special report on the violations of the attorneys' rights and professional guarantees. The report is currently being translated and I will make sure it is shared with you as soon as it is available in English.

IBA's Bar Issues Commission (BIC) and Human Rights Institute (IBAHRI), as well as CCBE are all currently in the process of reviewing all of the recent violations on a case-by-case basis.

Given that UNBA's and UABA's shared goal is promotion of the rule of law in Ukraine, we invite you to be a part of this process. For this purpose, please find enclosed a table with all of the recent violations of the attorneys' rights and professional guarantees. We welcome any support from your side and believe that since Ukrainian officials are widely disregarding Ukrainian institutions on this matter, support of well-known international organizations such as IBA, CCBE and UABA will at least draw their attention to these issues.

2. Andriy Vyshnevsky

Your letter refers to the decision of the Qualification and Disciplinary Commission of the Bar in Kyiv region concerning Andriy Vyshnevsky, who is also Head of the Coordinating Center for Legal Aid Providing at the Ministry of Justice of Ukraine.

We consider it necessary to explain that the Qualifications and Disciplinary Commission of the Bar (hereinafter - QDCB) acts as a competent independent collegial body of the legal profession, to whom the State delegated authority to initiate disciplinary procedures and impose disciplinary penalties on attorneys.

The QDCB acts in accordance with the Law of Ukraine 'On the Bar and Practice of Law' and other laws of Ukraine, the Regulations on the Qualification and Disciplinary Commission of the Bar. It is established in order to determine the level of professional training of individuals who intend to qualify to practice law and to resolve issues concerning the disciplinary liability of attorneys.

Thus, the Law has Section VI 'Disciplinary liability of attorney', which prescribes the procedure and organization settling the issues of disciplinary liability of attorneys, including general disciplinary liability terms, grounds for bringing a lawyer to disciplinary action, types of disciplinary sanctions, stages of the disciplinary proceedings etc.

It is on the basis of Law that Disciplinary Chamber of QDCB Kyiv region on September 10, 2015 issued a decision to disbar attorney Andriy Vyshnevsky with excluding him from the Unified Register of Attorneys of Ukraine for violation of article 21 of the Law and articles 51, 52, 54 of the Rules of Professional Conduct.

I draw your attention that as President of the UNBA, I am not authorized by law to provide assessment of QDCB decisions neither in general nor in respect of Mr. Vyshnevsky in particular. Decision of QDCB is independent and based on legislative requirements. No one can pressure the members of the commission at the time of making their decisions.

Under the law, any decision regarding disciplinary proceedings can be reviewed at the request of an interested party either by the Higher Qualification and Disciplinary Commission of Bar of Ukraine by the courts. UNBA neither adopted any decisions that would have deprived Mr. Vyshnevsky of the right to practice law, nor in any way influenced QDCB the Kyiv region in the final collegiate decision making.

It should also be noted that according to the Law, Qualification-Disciplinary Commission of the Bar of the region is formed by attorneys at a conference of attorneys of the region, so none of the bodies of attorney self-government in the legal profession can interfere with the other.

UNBA adheres to the principle of non-interference with other bodies of attorneys' self-government acting within the system, enabling them to make decisions independently and without any pressure, within their competence, to act strictly in accordance with the requirements of the Law, the Statute and binding decisions of the supreme body of the attorney self-government - Congress of Attorneys of Ukraine.

What is important to understand in this situation is that the colleagues of Mr. Vyshnevsky (members of the Disciplinary Chamber of the QDCB of Kyiv region) on the eve of the complaint review invited him for mediation and attempted to resolve this issue in a peaceful manner, but Mr. Vyshnevsky did not appear.

In accordance with the provisions of the Law of Ukraine 'On the Bar and Practice of Law', a disciplinary procedure is indeed initiated by the QDCB on the grounds of a complaint. Following a public outrage within the bar of Ukraine after Mr. Vyshnevsky's remarks, it was my duty as the President of the UNBA to communicate such information to the QDCB of Kyiv region, although not in form of an official complaint but a letter.

QDCB approved the decision on the basis of disciplinary proceedings initiated on the grounds of an official complaint by People's Deputy of Ukraine Serhiy Rybalka. This was preceded by a resonant reaction of attorneys' community and the decision of the supreme body of attorneys' self-government - Third Congress of Attorneys of Ukraine. In July 2015, Congress even demanded that the Ministry of Justice 'considered whether Andriy Vyshnevsky is suitable for director's position.'

Please find enclosed for your consideration the Resolution of the Third Congress of Attorney of Ukraine and the letter addressed to the Minister of Justice of Ukraine in this regard. In addition to that, more complaints were filed by Ukrainian attorneys in regard to this matter.

Following the QDCB decision, Mr. Vyshnevsky appealed it to the Kyiv city Administrative Court. The case is still being examined by the court.

Moreover, it should also be noted that Mr. Mykola Pavlov, who is a member of the Disciplinary Chamber of the QDCB of Kyiv region and was directly involved in the procedure that led to disbarment, is also a member of UABA, and happened to be present at the NYC Convention. When asked by Mr. Vitvitsky to comment on the matter, he cleared up the situation by explaining the whole process in detail.

To specifically answer your question, UNBA is a strong supporter of freedom of speech. We believe that anyone should be able to criticize any institution and we consider criticism to be an important driver of change in our society. Even more so in recent years, look at all the progress that Ukraine has made in our strive for European integration. Without critics, we believe this would've been impossible.

However, the situations with groundless accusations of committing criminal activities is different. Attorneys and judges were publicly accused of committing crimes. This was done without substantiation and proper ground, and the practice of the European Court of Human Rights (ECHR) shows that groundless (unproven) and extremely serious accusations, which have basically sufficient factual basis, even if they are value judgments are not protected by guarantees of freedom of

expression envisioned in Article 10 of the European Convention on Human Rights (see, e.g., «*Prager and Oberschlick v. Austria*», № 15974/90, §§ 36-39, judgment dated 26 April 1995; and «*Morice v. France*» [GC], № 29369/10, § 126, judgment dated 23 April 2015).

According to the ECHR, although lawyers have the right to publicly comment on the issues of justice (which in the same way applies to the Bar), such comments should not overstep certain boundaries, which are the usual restrictions on the conduct of lawyers, i.e. the 10 basic principles which are reflected in the CCBE Charter for European Advocacy («*Morice v. France*», § 134).

3. Role of Government in Protecting Human Rights

The [video that you referred to](#) in your contains my comment on the threats of government-controlled legal aid system in Ukraine. The particular part of the comment (starting at 1:58) that you are referring to, has to be considered in context of the entire comment in order to be properly understood.

As described in the ‘Legal Aid System in Ukraine: Current Issues and Recommendations for Reform’ report, adopted by the Bar Council of Ukraine, legal aid system in Ukraine is fundamentally flawed. Mr. Gvozdiy examined these issues during his presentation at the NYC Convention but I would like to go into further detail. The following circumstances give rise to the above conclusions.

Under current legislation, the Legal Aid system in Ukraine is administered by the Ministry of Justice. Attorneys, who provide Legal Aid, are selected by the state appointed officials. Thus, the Ministry of Justice currently indirectly controls thousands of the attorneys in Ukraine, their case assignments, payments and access to market.

In accordance with the provisions of the Law of Ukraine ‘On the Bar and Practice of Law’, the Congress of Attorneys of Ukraine is a supreme body of attorneys’ self-government. Every attorney has a right to participate in attorneys’ self-government and be elected as its member.

Congress of Attorneys of Ukraine, apart from electing the leadership of the Ukrainian National Bar Association, also appoints three members to the High Council of Justice of Ukraine, two members to the High Qualification Commission of Judges of Ukraine and one member to the Qualification and Disciplinary Commission of Prosecutor’s Office. All of these government bodies are in charge of administration of justice in Ukraine and are the pillars of judicial system.

As you can see, the state has established an effective mechanism by which not only they are trying to subdue the bar of Ukraine, but also gain control over independent judicial bodies of utmost importance.

Also, under current legislation, ‘an attorney is an individual who has obtained complete higher legal education, has a command of the official language and at least two-year experience in the field of law, has passed the qualification exam, has successfully completed traineeship, has taken the oath of attorney of Ukraine, and has obtained the certificate of right to practice law’.

However, in order to become a part of the Legal Aid system, the state introduced additional examinations for attorneys. It is thus unclear what purpose exactly does an additional exam serve if all persons, who are admitted to the bar, automatically receive a right to practice law. It is Ukrainian

National Bar Association's understanding that every attorney has equal rights. Moreover, even though the state has introduced additional examination for the attorneys, who wish to provide Legal Aid, it lacks necessary mechanisms to resolve issues associated with disciplinary proceedings against attorneys, as this falls exclusively under the jurisdiction of the attorneys' self-government.

Another blatant violation of human rights by the Ministry of Justice of Ukraine is the fact that directors of the Legal Aid centers, who are responsible for review and approval of the work carried out by attorneys, are in some cases not attorneys themselves. Thus, while reviewing case files, they are exposed to unauthorized attorney-client privileged information.

Moreover, Ukrainian National Bar Association is concerned that in some cases, Legal Aid centers appoint up to 439 mandates for representation of clients to a single attorney. Taking into account that the minimum duration of the mandate is 72 hours, or which an absolute minimum of 4-5 hours of work is required, in this particular case the attorney had to work non-stop for a year. This also raises the question of the quality that an attorney is able to provide spending an absolute minimum amount of time in each case.

The procedure under which these mandates are appointed by the Legal Aid centers is also unclear. How come some attorneys get just a few (the average number of mandates per attorney in 2015 is 10) whereas some get hundreds?

Comments by the Ministry of Justice officials, including Deputy Minister Gia Getsadze, who is directly in charge of Committee on Reforms within the Ministry, are nothing more but an attempt to hijack the independence of the Bar of Ukraine. In his comment on national TV on 19 August 2015, Mr. Getsadze stated, *inter alia*, that there should be no single independent professional organization of attorneys in Ukraine and Ukrainian National Bar Association should be disbanded.

This contradicts universally recognized position in regards to the independence of the bar. For example, Leandro Despouy, United Nations Special Rapporteur on the independence of judges and lawyers has stated in his report to the UN General Assembly, that 'since the creation of the mandate, the importance of an organized legal profession has been constantly emphasized. For the Special Rapporteur, the foundation of an independent and self-regulated association is one of the most significant steps in a period of political transition. This is why, in such contexts, he has always recommended the establishment of an independent professional organization as a priority'.

In Soviet times, the Bar fell victim of totalitarian state control. For instance, Soviet Ministry of Justice used to dispatch special 'commissions' to review attorney's legal stance in court and punish those demonstrating deviation from 'socialistic fairness'.

Recalling this not-so-distant past I would like to reiterate that the State therefore must not possess instruments allowing it to interfere with independent legal profession and thus violate the core principles of the rule of law and separation of powers. The State already has all the power it needs to protect rights and freedoms of the citizens. In the current Ukrainian legal system, the State controls judges and prosecutors. Adding attorneys to this list is therefore unacceptable.

To answer your question, UNBA believes that the State is and must be guarantor of human rights. As you can see from our 2015 Annual Report, UNBA's Human Rights Committee in 2015 alone has held 15 roundtables and 27 trainings. The Committee meets regularly and has a lot of great initiatives.

4. Lustration

UNBA has expressed its stance on the issue during a joint Roundtable on 19 February 2015, held by UNBA, Protection of Human Rights Civil Initiative, Council of Lawyers of Ukraine, Legal Protection for Landowners, International Charitable Fund 'Patriots of Ukraine'.

The main objective of the roundtable was to discuss the Opinion of European Commission for Democracy through Law (Venice Commission) regarding the Law of Ukraine 'On Government Cleansing'.

At the said venue I've stated that lustration is the expression of the political will of the State, reflected in legislative act. The primary concern for the attorneys is the fact that by virtue of this law a principle of collective liability was introduced, without any possibility for protecting individual rights in the court of law. It is my belief that the provisions of the lustration law must be applied individually, subject to relevant checks performed by a dedicated independent body, as opposed to a body of executive branch of power.

Those falling under lustration must have an option to refer the matter to court in order to secure their constitutional rights and freedoms. Presently, those rights and freedoms are grossly neglected while courts are under pressure from those not interested in such court hearings.

The lustration law does not provide for a possibility to refer the matter to court. Attorneys are therefore deprived of ability to provide legal aid to the citizens, which is contrary to article 59 of the Constitution of Ukraine.

Therefore, the Law of Ukraine 'On Government Cleansing' has to be amended for it to be in compliance with the Constitution and International Covenant on Civil and Political Rights so any obstacles to referring the matter of lustration to court are eliminated.

Another important point worth mentioning is that lustration is applicable only to those occupying government offices, while it is not at all applicable to non-governmental sector, including the independent, self-governed Bar of Ukraine, which is based upon democratic principles, meaning that bodies of attorney self-government and their heads are elected either by Conference of Attorneys of the Region or the Congress of Attorneys of Ukraine.

Moreover, the Law of Ukraine 'On the Bar and Practice of Law' provides for the possibility of recalling any elected official of the bodies of attorneys' self-government throughout Ukraine (articles 47-48, 50-55).

I hope this answers all of your questions. Taking this opportunity, I would once again like to thank you for welcoming our delegation at the 38th Annual UABA Convention in NYC in October 2015. Do not

hesitate to contact me directly in case you require any additional information. I do look forward to cooperation between our organizations.

Please accept the assurances of my highest consideration.

Sincerely yours,



Lidiya Izovitova
President
Ukrainian National Bar Association

Enclosed: 2015 UNBA Annual Report
Legal Aid System in Ukraine: Current Issues and Recommendations for Reform, a report adopted by the Bar Council of Ukraine
Law of Ukraine ‘On the Bar and Practice of Law’
Report on the actions that UNBA undertook in connection with the Viktor Smalyy case
Table containing recent violations of the attorneys’ rights and professional guarantees
Resolution of the Third Congress of Attorneys of Ukraine
Letter from the President of the UNBA addressed to the Minister of Justice of Ukraine

CC: **Valentyn Gvozdiy**, Vice-President of the UNBA
Ivan Grechkivsky, Chair of International Relations Committee of the UNBA
UABA Board of Directors