

# LEGAL AID AS SEEN IN THE LIGHT OF THE LAW NO. 270/2010 REGARDING THE AMENDMENT AND THE COMPLETION OF THE LAW NO. 51/1995 FOR THE ORGANIZATION AND THE PRACTICE OF THE LAWYER'S PROFESSION

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## Abstract

*According to the explanatory memorandum of the Government as well as to the favorable opinion of the Legislative Council, the Law no. 270/2010 relate mainly to the correlation the OUG no. 51/2008 on legal aid in civil matters, by covering in detail the circumstances and the conditions for granting legal aid as well as the organization of the activity of granting such assistance. From the perspective of European law, the Legislative Council appreciated that the new law is placed within the sphere of the legislation as regulated at the European Union level, that are circumscribed to the European Area of freedom, security and justice, within the European legislation reserved to the judicial cooperation in civil matters.*

*In this material we will analyze the following issues: granting legal aid in criminal matters, in which defense is mandatory according to the dispositions in the Criminal Procedural Code; granting legal aid in any other causes except criminal ones, as modality to grant public legal aid, according to the law; legal aid throughout a lawyer, granted at the request of the organs of the local public administration; appointing the lawyer for legal aid; extra-judiciary legal aid; competences of the bars regarding legal aid; the department for the coordination of legal aid; services of legal aid; legal aid registry; payment for the activity of legal aid and extra-judiciary legal aid.*

**Key words:** *the Law no. 270/2010; the lawyer's profession; legal aid in civil matters.*

## I. Introduction

The adoption of the Law no. 270/2010<sup>1</sup> constitutes the delayed<sup>2</sup> materialization of an initiative of the Romanian Government meant to enhance the normative failure recorded by the Emergency Government's Ordinance (E.G.O.) no. 159/2008<sup>3</sup>, ordinance that has been declared unconstitutional<sup>4</sup> and, subsequently, was rejected by law<sup>5</sup>.

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<sup>1</sup> The Law no. 270/2010 for the amendment and the completion of the Law no. 51/1995 for the organization and the practice of the lawyer's profession was published in the Official Gazette no. 872 from December 28, 2010. The present study has in consideration the form of the Law no. 51/1995, right before republishing in the Official Gazette no. 98 from February 7, 2011.

<sup>2</sup> Although on May 19, 2010 the Government submitted to the Senate the project of the law in order for it to be adopted by an *emergency procedure* (according to the article 76 3<sup>rd</sup> paragraph from the Romania Constitution), the Senate adopted it in its séance from August 24, 2010 and the Chamber of Deputies – decisional chamber – adopted it in its séance from December 7, 2010.

<sup>3</sup> The E.G.O. no. 159/2008 regarding the amendment and the completion of the Law no. 51 /1995 for the organization and the practice of the lawyer's profession was published in the Official Gazette no. 792 from November 26, 2008 and then rectified by the Editorship "Official Gazette, Part I" in the Official Gazette no. 824 from December 8, 2008.

<sup>4</sup> By the Decision of the Constitutional Court no. 109 from February 9, 2010, published in the Official Gazette no. 175 from March, 18 2010.

<sup>5</sup> The Law no. 81/2010 for the dismissal of the E.G.O. no. 159/2008 regarding the amendment and the completion of the Law no. 51/1995 for the organization and the practice of the lawyer's profession, published in the Official Gazette no. 300 from May 10, 2010.

As shown in the explanatory memorandum regarding the issuance of the new piece of legislation, given the fact that the constitutional court criticized the promotion modality regarding the regulations on the organization and the practice of the lawyer's profession – throughout an emergency ordinance<sup>6</sup> -, and not their substance, as well as the fact that the reasons having determined their adoption maintain their relevance, the disposition of the Law no. 270/2010 are mainly assuming the solutions foreseen in the E.G.O. no. 159/2008.

## II. Legal aid

### 1. Circumstances and conditions for granting legal aid

#### A. Circumstances (forms) of legal aid

According to article 68, 1<sup>st</sup> paragraph from the Law no. 51/1995, as amended by the Law no. 270/2010, the bars ensure the legal aid, in the following forms:

a). *In the criminal cases, in which defense is mandatory according to the dispositions in the Criminal procedural code*<sup>7</sup>

We remind that, in accordance with the article 171, 2<sup>nd</sup> paragraph from the Criminal procedural code, legal aid is mandatory when:

- the accused or the defendant is a minor, admitted to a rehabilitation center or a medical education institute;
- the accused or the defendant is detained or even arrested within another case;
- towards the accused or the defendant a safety measure was ordered for his/her admittance to a medical facility or for the obligation to assume medical treatment even within another case;
- the prosecution or the court considers that the accused or the defendant could not accomplish his/her defense by himself/herself;
- in any other circumstances as stipulated by the law<sup>8</sup>.

b). *In any other cases except the criminal cases, as means of granting the public legal aid, according to the law*

Of course, in this situation, consideration must be given to the dispositions of the E.G.O no. 51/2008 regarding the public legal aid in civil matter<sup>9</sup>, normative act in which, in the article 3, it is

<sup>6</sup> As grounds for the admission decision regarding the exception of unconstitutionality, the Constitutional Court invoked the failure of article 115 4th paragraph of the Romanian Constitution.

<sup>7</sup> According to the article 90 from the New Criminal procedural code (published in the Official Gazette no. 486 from July 15, 2010), the legal aid (terminology taken from the current Code) is mandatory:

a) when the accused or the defendant is a minor, admitted to a rehabilitation center or a medical education institute, when the accused or the defendant is detained or even arrested within another case, or when towards the accused or the defendant a safety measure was ordered for his/her admittance to a medical facility even within another case, as well as in any other cases as stipulated by the law;

b) when the prosecution or the court considers that the accused or the defendant could not accomplish his/her defense by himself/herself;

c) during the trial, in the circumstances in which the law stipulates, for the offense committed, the punishment of life imprisonment or the punishment of prison for a period longer than 5 years.

<sup>8</sup> In the 3<sup>rd</sup> paragraph of the same article in the Criminal procedural code it is stipulated that, during trial, legal aid is mandatory also in the circumstances in which the law stipulates, for the offense committed, the punishment of life imprisonment or the punishment of prison for 5 years or more.

<sup>9</sup> Published in the Official Gazette no. 327 from April 25, 2008, approved with modifications and amendments through the Law no. 193/2008 (published in the Official Gazette no. 723 from October 24, 2008). For the analysis of the legal regime regarding the public legal aid established through this ordinance, see also: I. Deleanu "Public legal aid". *European and Romanian legislation on this matter* in Dreptul no. 8/2008 pages 17-47; A. Tabacu, *Public legal aid*, in Romanian Magazine of Private Law no. 4/2008, pages 212-227; M. Tăbărcă, *Issues regarding the public legal aid in civil matters (The Government's Emergency Ordinance no. 51 from April 51, 2008)*, Publishing House Universul Juridic, Bucharest, 2010.

foreseen that the public legal aid is granted in civil, commercial, administrative, labor and social insurances cases, as well as in other cases, except for the criminal cases.

*c). Legal assistance through the lawyer, granted at the request of the bodies of the local public administration*

This hypothesis preexisted as well in the former wording<sup>10</sup>, where the organs of the local public administration – as well as the courts or the prosecution’s offices – were able to request the bar to ensure the legal assistance in the cases in which they appreciated that individuals were *facing the obvious inability to pay the retainer*.

Even if the current text no longer refers to the situation in which a body of the local public administration may request the legal assistance through a lawyer, we consider that the reason for the former regulation, namely *the obvious inability to pay the retainer*, continues to exist.

According to the article 68, 2<sup>nd</sup> paragraph from the Law no. 51/1995, such as it was modified through the Law no. 270/2010, in exceptional cases, if the rights of the person lacking material means would suffer prejudice from a delay, the dean (president) of the bar may approve the grant of legal assistance, for free. Comparing with the former wording<sup>11</sup>, a sole intervention is noticeable, through which the term of “free legal assistance” is reformulated, the rest of the text as well as the substance of the regulation being maintained.

It is the place here to remind the fact that, regarding the protection of the crime victims *the free legal assistance*<sup>12</sup> was instituted and is granted, upon request – if the crime was committed on Romanian soil or, if the crime was committed outside Romanian soil, if the victim is a Romanian citizen or a foreign citizen that is legally residing in Romania, and the criminal trial takes place in Romania – to the following categories of victims (article 14, 1<sup>st</sup> and 2<sup>nd</sup> paragraph from the Law no. 211/2004):

- the individuals against whom was committed an attempt to murder, manslaughter and aggravated murder, a crime of serious body injury, an intentional crime which resulted in serious body injury for the victim, an offense of rape, sexual intercourse with a minor and sexual perversion;
- the spouse, the children and the dependants of the deceased, following the crimes of murder, manslaughter and aggravated murder, as well as the intentional crimes that resulted in the death of the person<sup>13</sup>.

#### *B. The conditions for granting legal aid*

*a). Appointing the lawyer to provide public legal aid [article 68/1, article 68/2, article 68/3 paragraphs (5) and (6) and article 68/7 letter c) newly introduced in the Law no. 51/1995 throughout the Law no. 270/2010]*

<sup>10</sup> In the previous regulation the E.G.O. no. 159/2008, paragraph (1) of article 68 of Law no. 51/1995 had the following content: “The Bar association provides legal assistance in all cases where protection is required by law, as well as at the request of the courts, the prosecution or *the public local administration* in the cases in which the latter appreciate that the individuals are *facing the obvious inability to pay the retainer*. (our emphasis)”.

<sup>11</sup> In its previous wording the E.G.O. no. 159/2008, paragraph (2) of article 68 of the Law no. 51/1995 had the following content “In exceptional cases, if the rights of the individual lacking financial means would be prejudiced by the delay, the dean (president) of the bar association may approve *free legal aid*. (our emphasis)”.

<sup>12</sup> Through Chapter IV (“Free legal aid of victims of crimes”) from the Law no. 211/2004 regarding some measures to ensure the protection of victims of crimes, published in the Official Gazette no. 505 from June 4, 2004. For a presentation of this regulation, see also M. Catea, *Free legal aid granted to victims of crimes*, in the Bulletin of the National Institute for the Training and the Improvement of Lawyers, nr. 2/2006, pages 118-121.

<sup>13</sup> According to article 15 from the Law no. 211/2004, free legal aid is granted, upon request, to the victims of other crimes than the ones mentioned in article 14, paragraph (1), with the observance of the conditions established in the article 14 paragraph (2), if the monthly income per family member of a victim shall not exceed the minimum gross wage in the country, as established for the year in which the victim submitted the application for free legal aid.

If there application for public legal aid was approved under the form of assistance through a lawyer<sup>14</sup>, then, the application together with the approval minutes are immediately sent to the dean (president) of the bar association of the respective district court. Upon receipt of the two documents, the dean (president) or the lawyer he delegates appoints within 3 days a lawyers registered in the legal aid Registry<sup>15</sup>, to whom he/she transmits, together with the notification regarding the appointment, the approval minutes. The dean (president) has also the obligation to communicate the name of the appointed lawyer to the person benefiting from public legal aid, this one having the possibility to request the appointment of another lawyer, of course with the consent of the latter.

The appointment is made considering the lawyer's professional experience and qualification, as well as the nature and the complexity of the case, the lawyer's other appointments and commitment degree. The criteria regarding *the professional experience* must be though related to the stipulation in the By-laws of the lawyer's profession<sup>16</sup> [article 217 paragraph (1) second thesis) according to which the cases on legal aid<sup>17</sup> mandatory and/or free are distributed *predominantly to trainee lawyers and young (definitive) lawyers*, of course, with the compliance of the professional competency stipulated by the law. The distribution of these cases towards *young lawyers (trainees or definitive)* results also from the dispositions of the article 55, article 73 and article 98 from the current General Regulations for the organization of the bar associations' legal aid offices<sup>18</sup>, adopted by the Decision no. 419/2008 issued by the UNBR Council, in the context of the entry into force of the E.G.O. no. 51/2008. According to the article 112 from the same General regulation, the repartition of cases pending in *courts of first instance* is made predominantly towards *trainee lawyers*, disposition that correlates with article 22 paragraph (1) from the Law no. 51/1995, in accordance to which the trainee lawyer can draw conclusions only in front of courts of first instance. We also observe the following relevant dispositions existent in the above mentioned General Regulation:

- the lawyer having provided legal aid ex officio during the criminal pursuit phase will ensure as well the assistance in front of courts competent with the solution of the case, when he/she obtained and certified the special agreement of the beneficiary (article 40);

- the ex officio lawyer appointed for one phase of the judicial inquiry will be appointed to assist the party as well during appeal against conclusions that might be appealed separately, if he/she obtained and certified the special agreement of the party (article 45);

- the cases having as object the challenge on enforcement or changes in the enforcement of certain decision will be distributed with priority to the ex officio lawyer that provided legal assistance in the last phase of the judicial inquiry, if he/she obtained and certified the special agreement of the party (article 49);

- mandatory legal aid (ex officio) will be ensured only following the prior appointment by the Office of legal aid, according to the criteria regarding the compatibility, specialization, and with the application of the of the principle of co-fraternity (article 105);

- in the situation in which the ex officio designated lawyer chooses not to provide legal assistance under the principle of continuity, the cases will be redistributed to lawyers appointed according to the criteria adopted throughout methodological norms (article 108).

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<sup>14</sup> In the conditions stipulated in Chapter III ("Competencies and procedures for granting public legal aid"), Section 1 ("Common provisions"), articles 11-19, from the E.G.O no. 51/2008.

<sup>15</sup> See *infra*, point II.2, letter D.

<sup>16</sup> Published in the Official Gazette no. 45 from January 13, 2005, with subsequent amendments and supplements.

<sup>17</sup> In the mentioned text the phrase "legal aid" is used.

<sup>18</sup> Published on [www.unbr.ro](http://www.unbr.ro) website and entered into force at October 15, 2008, therefore previous to the publishing in the Official Gazette of the E.G.O. no. 159/2008. According to the final dispositions of the Law no. 270/2010 (article II 2<sup>nd</sup> paragraph), within 60 days from the entering into force of this law, the Council of the National Association of the Romanian Bars (U.N.B.R.) has to adopt – in fact, to revise – The general Regulation for the organization of the services of legal aid.

In terms of *extra-judiciary* assistance<sup>19</sup>, based on the decision for granting such type of assistance, the dean (president) of the competent bar association appoints a lawyer from the legal aid Registry of the bar association. Depending on the actual possibilities, the dean (president) may approve the granting of extra-judiciary assistant by a lawyer chosen by the beneficiary<sup>20</sup>.

The lawyer being appointed to provide public legal aid cannot refuse this professional task unless a conflict of interest appears or for other justified reasons. If the appointed lawyer refuses, inexcusably, to take over the case or to continue the work is committing a disciplinary misbehavior.<sup>21</sup>

On the other side, if the beneficiary of the public legal aid refuses, in an unjustified manner, or renounces unilaterally and unjustified the assistance provided by the appointed lawyer, the public legal aid under the form of assistance through a lawyer ceases.

*b). The extra-judiciary assistance (article 68/3 newly introduced in the Law no. 51/1995 throughout the Law no. 270/2010)*

According to article 35 paragraph (1) of E.G.O. no. 51/2008, the assistance through a lawyer may be as well extra-judiciary, consisting in: providing advice; making applications, petitions, complaints, initiation of other legal proceedings; representation in front of public authorities or institutions, other than judiciary or with jurisdiction ones, in pursuit of rights or legitimate interests.

The purpose of extra-judiciary assistance envisaged by the legislator lies in providing clear and accessible information to the applicant, in accordance with legal provisions in force regarding the competent institutions, and, if possible, the conditions, the limits and the procedures prescribed by law for the recognition, the grant or the accomplishment of the right or interest claimed by the applicant.

The extra-judiciary assistance is granted by the legal aid Office<sup>22</sup> constituted at the level of each bar association, upon request<sup>23</sup>, by attaching documents proving the income of the applicant and his family's, as well as evidence regarding the obligation for maintenance (care) or payment.<sup>24</sup> The application shall be accompanied by an applicant's affidavit, in the sense of making specifications if

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<sup>19</sup> See forthwith *infra*, letter b).

<sup>20</sup> Wrongly, in the article 68/3 paragraph (6) from the Law no. 51/1995 reference is made to "the individual to whom legal aid is granted", although the text regulates the extra-judiciary assistance. A similar mistake taken, as this one, from the E.G.O no. 159/2008, has slipped in the text of the paragraph (4) of the article 68/3 from the same law (see *infra*, fn. no. 28).

<sup>21</sup> These provisions are correlated with the current provisions of the By-laws of the lawyer's profession, according to which the unjustified refuse to provide free legal aid constitutes disciplinary misbehavior [article 217 paragraph (1) third thesis, introduced by the Decision of the lawyers' Congress no. 6/2008].

<sup>22</sup> See *infra*, point II.2, letter C.

<sup>23</sup> The standard form of the application is approved by the Department for the coordination of the legal aid (see also *infra*, point II, letter B). The application will include references regarding the purpose and nature of the request for assistance, the identity, the social security number, the address and the financial condition of the applicant and his/her family.

<sup>24</sup> The proof of the applicant's financial situation is made mainly with the following documents: certificate issued by the competent authorities or by the employer, as appropriate, showing the applicant's professional income and the income of the other family members, subjected, according to the law, to income tax, revenue that is made within the period stipulated by the legislation on public legal aid or the amounts received as pension, unemployment benefit or social security and others, also received for the same period; the family book and, where appropriate, the children's birth certificates; the certificate attesting a disability of the applicant or of his/her child, where appropriate; affidavit showing that the applicant and other family members have no other income; affidavit on the patrimonial situation of the applicant and his family; affidavit showing that the applicant and / or the other natural or adoptive parent or, where appropriate, any other person entrusted with the child for adoption or having the child in placement or in emergency placement or has been appointed as trustee is handling the child's care and growth and that child is not entrusted to or in placement of any authorized private body or authorized public service or any legal person; evidence issued by the competent authorities regarding taxable goods of the applicant or, where appropriate, of other family members; other documents required to establish the right to legal aid, according to the law.

during the last 12 months he/she did benefit from public legal aid, under what form, for what case, as well as the amount for this aid.

The application for having granted the extra-judiciary assistance is settled no later than 15 working days from the date of registration, throughout an approval decision<sup>25</sup> or a rejection decision, where appropriate.

The decision regarding the grant of extra-judiciary assistance is communicated to the applicant within 5 working days from its issuance date. If the application for granting extra-judiciary assistance was rejected, then the applicant can challenge the decision at bar association's council, within 5 days from its communication, the challenge will be dealt with urgency, in the first session of the bar association's council. We observe that, unlike the term established for the communication of the decision, in the case of the *challenging* term for the decision of rejection it is not stipulated that the 5 days are working days, therefore they will be considered as *calendar* days.

We notice that according to article 65 from the current General Regulation for the organization of the bar association's legal aid offices, adopted by the Decision no. 419/2008 of the Council of UNBR, the lawyer having ensured the extra-judiciary assistance becomes *incompatible* with providing legal aid.

## 2. Organization of the activity of legal aid

*A. Attributions of the bar association (article 68/7 newly introduced in the Law no. 51/1995 through the Law no. 270/2010)*

The organization of legal aid was widely reformed in comparison to the former legislation, namely the E.G.O. no. 159/2008, when the Law no. 51/1995 consecrated to this aspect one sole paragraph<sup>26</sup>.

Throughout the Law no. 270/2010, the attributions of the bar associations, taking into consideration the organization of legal aid, were substantially increased, as follows: they organize the offices (services) for legal aid<sup>27</sup> both at the premises of each bar association as at the premises of each court; they organize and update the legal aid Registry of each bar association, based on the requests of the lawyers, approved by the bar association's council; they appoint the lawyers registered with the legal aid Registry to provide legal aid;<sup>28</sup> they operate control on how legal aid is provided by lawyers registered with the bar associations; they organize and execute programs to promote the legal aid system; they accomplish any other attribution as stipulated by the law or by the General Regulation for the organization of the legal aid offices (services).

*B. The Department for the coordination of the legal aid (article 68/5 and article 68/6 newly introduced in the Law no. 51/1995 by the Law no. 270/2010)*

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<sup>25</sup> Should the application for extra-judiciary assistance be approved, the decision on the extra-judiciary assistance (not legal, as wrongly appears in the wording of paragraph 4 of article 68/3 from the Law no. 51/1995, the mistake being taken from the E.G.O no. 159/2008) will include the following: the name of the document; the name of the issuer; the legal and factual basis for issuing the decision; the person to whom extra-judiciary assistance is provided; the type or the form of the extra-judiciary assistance granted; the date of issuance; the title and the signature of the person that issued that respective document.

<sup>26</sup> We are taking into consideration the paragraph (3) of the article 68 from the Law no. 51/1995, text that had the following wording: "The bar association organizes, at the premises of all county courts, the offices for legal aid, making legal aid also available at local prosecution's offices, offices that are managed by a definitive lawyer, appointed by the bar association's council and coordinated by a member of the council".

<sup>27</sup> See *infra*, point II.2, letter C.

<sup>28</sup> See *supra*, point II.1, letter B.

This department was regulated as novelty regarding the organization of the lawyer's profession throughout the E.G.O. no. 159/2008, within the National Association of the Romanian Bars, as organ with permanent activity, coordinated by one of the UNBR vice-presidents.<sup>29</sup>

The main attributions of the department are as follows: it runs the methodological management of the activity of granting legal aid; it elaborates the project of the General Regulation for the organization of the legal aid offices (services); it proposes, or, where appropriate, it endorses the project of memorandums that are to be concluded with competent public authorities in order to obtain financial means to organize the services of legal aid; it organizes the national Registry of legal aid, based on the registries prepared by the bar associations; it organizes and coordinates the payment methodology of the retainers for the provided legal aid; it runs the control on the legal aid provided; it prepares projects of legislation in the area of legal aid, that it submits to the Ministry of Justice, in order for them to be promoted; it establishes, in conjunction with the Ministry of Justice, the statistical indexes, it keeps the statistical evidence of the legal aid system and it analyses the information required by the planning and the proper coordination of the legal aid system; it cooperates with the Ministry of Justice for the good functioning and planning, including from the budgetary point of view, of the legal aid system; it promotes the legal aid system; it establishes the forms that are to be used by the bar associations for the organization of the activity of legal aid and of the extra-judiciary assistance, according to the law; it represents UNBR in the field of legal aid, within international cooperation in the area, according to the law or the By-laws of the lawyer's profession.

*C. The legal aid offices (services) (article 36 modified, article 68/8 and article 68/13 newly introduced in the Law no. 51/1995 through the Law no. 270/2010)*

The statutory regarding the legal aid offices (services) has undergone the fewest changes, being maintained, in essence, on the coordinates of the former article 68 paragraph (3) from the Law no. 51/1995<sup>30</sup>. Thus, as we showed during the presentation of the bar associations' attributions<sup>31</sup>, in the area of the organization of the legal aid offices (services), the bar association organizes<sup>32</sup> the legal aid offices (service) under the management of a definitive lawyer appointed by the council of the bar association and are being coordinated by a member of this council.

The activity of the legal aid offices (services) is deployed at the premises of all county courts, in spaces exclusively destined to this purpose, that are made available by the Ministry of Justice, or, where appropriate, by the authorities of the local public administration, freely, and – supplementary stipulation contained by the Law no. 270/2010 in comparison with the provisions in the E.G.O. no. 159/2008 – *mandatory*. Besides, according to the article 36 from the Law no. 51/1995, such as it was modified through the Law no. 270/2010 – modification that was not operated through the E.G.O. no. 159/2008 –, the Ministry of Justice *is obligated to ensure* the proper spaces for the activities of the lawyers within the premises of the courts, disposition that strengthens the preexistent<sup>33</sup> necessity held to the Government. These dispositions are to be correlated with the provisions of the article 68/13 from the Law no. 51/1995, according to which UNBR and the bar association are working together with the Ministry of Justice, the Superior Council of Magistracy, the courts, as well as the prosecutors' offices near the courts, in order to perform in proper conditions the activity of providing legal aid.

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<sup>29</sup> The organizational structure of this department is established through a decision of the Standing Committee of the UNBR.

<sup>30</sup> See *supra*, fn. no. 29.

<sup>31</sup> See *supra*, point II.2, letter A.

<sup>32</sup> The organization, the functioning and the attributions of the offices for legal aid are accomplished according to the regulations approved by the bar association's council, based on the general regulations for the organizations of the offices of legal aid, as approved by the UNBR Council.

<sup>33</sup> In the previous wording of the article 36 from the Law no. 51/1995 it was stipulated that the "Ministry of Justice *ensures* the spaces (...) (our emphasis)".

*D. The legal aid Registry (article 68/9 newly introduced in the Law no. 51/1995 through the Law no. 270/2010)*

*a). The legal aid Registry of the bar association*

It is organized at the level of each bar association and it includes the lawyers that are able to be appointed to provide public legal aid under the form of legal aid and extra-judiciary assistance.

This Registry is updated, for the next calendar year, until the end of September of the previous calendar year, with the possibility, in exceptional cases, to operate modifications during the year.

The Registry has a public characteristic<sup>34</sup> and is kept both on paper as on electronic support.

*b). The legal aid national Registry*

It is organized at the level of the National Association of the Romanian Bars, being constituted from the legal aid registries of all bar associations from the country.

This registry has as well a public characteristic<sup>35</sup> and is updated, automatically, together with the update of the bar associations' legal aid registries.

*c). Registration with the legal aid Registry and radiation*

It is operated throughout a decision of the council of the bar association of which the solicitant lawyer is member, based on an application completed according to the form approved by the Department for the coordination of legal aid.

The lawyer's registration with the Registry may be denied by the council of the bar association, grounded, in the following cases: if the solicitant lawyer suffered a disciplinary sanction; if the solicitant lawyer is accused of having committed a crime; if an ascertainment was made towards the solicitant lawyer regarding his/her repeated of the Law no. 51/1995 or regarding the inferior quality of his legal aid being provided.

The decision through which the council of the bar association refuses the registration with the Registry can be challenged according to the procedure stipulated for the disciplinary liability<sup>36</sup>. This being said, we remember here the competency of:

- The Central Commission for Discipline that judges, in appeal, with a panel of 5 members, the appeals formulated by the interested lawyer, the dean of the bar association and the President of UNBR against the decisions pronounced by the Discipline Commissions of the bar associations and the conclusions throughout which against the lawyer was taken the measure of suspension of the practice of the profession, until the final settlement of the case, in case of obvious and serious misbehavior. Against the decisions of the Central Commission for Discipline, in appeal, the interested party can declare appeal at the contentious section of the Court of Appeal of Bucharest, its decision being definitive and irrevocable.

- the Council of UNBR, constituted as disciplinary court, in its plenary, except for the person involved, that judges the appeals formulated against the sentences pronounced by the Central Commission for Discipline, as court of first instance, and also that judges the appeals formulated against the conclusion throughout which against the lawyer was taken the measure of suspension of the practice of the profession until the final settlement of the case, in case of obvious and serious misbehavior. The rulings pronounced by the Council of UNBR, in the appeal stage formulated against the disciplinary decision of the Central Commission for Discipline (as court of first instance), can be challenged by the interested party with appeal at the contentious section of the Court of Appeal of Bucharest, its decision being definitive and irrevocable.

The situation due to which the refusal to register the lawyer the registry occurs may lead to the lawyer's radiation from the same Registry, for a period of one year, and if an assessment is made

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<sup>34</sup> To be published on each bar association's webpage.

<sup>35</sup> To be published on UNBR's webpage.

<sup>36</sup> See article 72 and article 74 from the Law no. 51/1995 corroborated with article 260 and article 262 from the By-laws of the lawyer's profession.

regarding the consecutive committing of three or more misconducts in relation to the obligations stipulated in the Law no. 51/1995, the radiation may be ordered for a period up to three years. The decision of radiation is made public on the internet website of the bar association and of UNBR and may be challenged, according to the procedure that is applicable to the challenge of the bar associations' refusal to have the lawyer registered with the Registry.

With regard to the radiation measure, we consider it being improperly regulated, by reference to the effects it produces and being specific to the *suspension* institution. This is because the effects of the "radiation" for a period from one year up to three years are *temporary*; or, it is widely known the fact that the radiation has a *definitive*<sup>37</sup> characteristic.

*E. Remuneration of the activities of legal aid and extra-judiciary assistance (article 68/4, article 68/11, article 68/12 newly introduced in the Law no. 51/1995 and article 69 modified through the Law no. 270/2010)*

Although the assistance through the lawyer is a form of the public legal aid, this does not mean that the lawyer providing assistance does it *pro bono*. According to the article 30 paragraph (1) from the Law no. 51/1995 corroborated with the article 132 paragraph (1) from the By-laws of the lawyer's profession, for his/her professional activity the lawyer has the right to a retainer and to coverage of all expenses made in the procedural interest of the client.

Therefore, as same as the E.G.O. no. 159/2008, the Law no. 270/2010 stipulated that, for the legal aid provided, the appointed lawyer has the right to a retainer established by the judiciary organ, based on the nature and the volume of the activity deployed, but within the limits of the amounts agreed through the memorandum concluded between UNBR and the Ministry of Justice. The funds necessary for the payment of those retainers are ensured according to the provision of the article 26 paragraph (1), letter a) from the Law no. 146/1997 regarding the court fees.<sup>38</sup> As element of difference compared to the E.G.O. no. 159/2008<sup>39</sup>, according to the Law no. 270/2010 the expenditures required by the functioning of the legal aid offices (services) within the bar associations are ensured from the approved and actually transferred amounts<sup>40</sup> allocated to the retainers due for the legal aid, out of which each bar holds 1% at the actual moment of payment of the retainer to the entitled lawyer<sup>41</sup>.

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<sup>37</sup> For exemplification, we remind that, from the date of cancellation, the legal personality of the commercial company *ceases*, with all consequences arising from this fact (see also St.D. Cârpenaru, *Romanian trade law*, 6<sup>th</sup> edition, revised and enlarged, Publishing House Universul Juridic, Bucharest, 2007, page 294).

<sup>38</sup> According to the article 26 paragraph (1) letter a) from the Law no. 146/1997 (published in the Official gazette no. 173 from July 29, 1997, with subsequent amendment and supplements), a quota of 75% from the amounts from the taxes collected from the retainers of lawyers, public notaries and of judicial executor, constitutes incomes to the state budget and is included distinctly in the income and expenditure budgets of the Ministry of Justice and Civil Liberties, of the Superior Council of Magistracy, of the High Court of Cassation and Justice, respectively of the Prosecutor of the High Court of Cassation and Justice, as follows: a 70% quota will be included in the income and expenditure budgets of the Ministry of Justice and Civil Liberties, out of which 50% shall be used to finance the public legal aid system and the legal aid system, and 20% will have as destination expenditure with investments and current expenditures.

<sup>39</sup> According to the article 69 paragraph (3) from the Law no. 51/1995, in the form modified by the E.G.O. no. 159/2008, it was stipulated that the funds necessary to the organization and the functioning of the offices of legal aid within the bar associations are covered from the amounts allocated for the financing of the public legal aid system and of the legal aid system, according to article 26 paragraph (1) from the Law 146/1997, with subsequent amendments and supplements, based on the proposals transmitted on a yearly basis by UNBR to the Ministry of Justice, at the drawing time of the project of the state budget, and the release of the amount approved would be accomplished according to the procedure established throughout a order (decision) of the Minister of Justice.

<sup>40</sup> The amount necessary to pay the retainers or, where appropriate, the remunerations for legal aid, are transferred, monthly, according to the law, in a separate account, opened by each bar association. The compliance by the bars of the destination for the funds thus transferred is making the object of the UNBR control.

<sup>41</sup> The payment of the retainer for the legal aid provided is made on a monthly basis, based on reimbursement documents.

With regard to the legal aid provided at the request of the organs of the local public authorities, the retainers are paid from the funds of those respective organs, within the limits of the amounts established throughout the memorandum concluded with them by each bar association, and in the lack of such a memorandum, within the limits of the amounts established by the memorandum concluded between UN BR and the Ministry of Justice. Otherwise, the article 69 paragraph (1) in the Law no. 51/1995, such it was modified, stipulates, *as general*, that the retainers for the legal aid granted in *any of its forms*<sup>42</sup> are established throughout this memorandum.

In fact, the payment of the retainer due to the lawyer appointed to provide legal aid is preceded by the following phases:

- a). through the approving act of granting legal aid, the judiciary organ establishes a *provisional* retainer;
- b). after the legal aid is provided, the lawyer prepares a *written report (memoir)*<sup>43</sup> regarding the effective performance;
- c). the report (memoir) is subjected to the *confirmation of the judiciary organ*, which, based on the volume and the complexity of the activity deployed by the lawyer, as well as based on the length, the type and the particularities of the case, may order *the maintenance or the increase* of the initial established retainer;
- d). the report (memoir) being confirmed by the judiciary organ is forwarded to the bar association in order for it to carry on *the payment formalities* of the retainer.

According to the article 42 in the current General Regulations for the organization of the bar associations' legal aid offices (services), adopted by the Decision no. 419/2008 issued by the UNBR Council, in the hypothesis in which the mandate of the *ex officio* lawyer being appointed is ceasing throughout the assurance of legal aid by a chosen lawyer, the lawyer shall make mentions in his/her report about the activities deployed, he/she shall submit the report to the file of the case and in copy to the file compiled by the legal aid office (service), and the competent organ shall decide over the amount of the retainer due to the *ex officio* lawyer for the assistance being already provided.

Although the E.G.O no. 159/2008 established in article 68/13 the issue regarding the remuneration of the *extra-judiciary* assistance, the Chamber of Deputies decided, inexplicably from our point of view, to eliminate those dispositions<sup>44</sup>. Or, the legal regime ruled for the remuneration of legal aid *cannot be applied by analogy* in relation to the extra-judiciary assistance. This is because, by hypothesis, the judiciary organ which, as shown, plays an important role in establishing the retainer for the legal aid, does not have the competence with regard to the remuneration of the extra-judiciary assistance.

Thus being said, there is an error in the provision in the current General Regulations for the organization of the bar associations' legal aid offices (services), adopted by the Decision no. 419/2008 issued by the UNBR Council, according to which, in the article 69, the payment of the retainers due to lawyers providing extra-judiciary assistance in accordance with the approval of the dean (president) is ordered by *the competent court throughout the conclusions that admit the legal*

<sup>42</sup> See *supra*, point II.1, letter A.

<sup>43</sup> According to the form approved by the Department for the coordination of legal aid (see *supra*, point II.2, letter B).

<sup>44</sup> The article 68/13 from the E.G.O no. 159/2008 had the following wording: "(1) For the extra-judiciary assistance provided, the designated (appointed) lawyer has the right to a retainer established according to the nature, the complexity and the volume of activity deployed, as certified throughout a written memoir of the lawyer, according to the reimbursement form, as approved by the Department for the coordination of legal aid within UNBR.

(2) For the appointed lawyers, the coordinator of the Office for legal assistance (*legal aid* – our emphasis) of the bar association verifies and approves the report (*the memoir* – our emphasis) of the lawyer that provided extra-judiciary assistance and proposes to the bar association's council the amount of the remuneration, based on the particularities of the case, its type, work volume deployed and the quality of the assistance provided, within the limits established by the Memorandum concluded between UNBR and the Ministry of Justice".

*aid*, since the judiciary authorities or with judicial attributions<sup>45</sup> are excluded from the area of application of the extra-judiciary assistance.

Quite the contrary, we appreciate that the legal regime applicable to the remuneration of the extra-judiciary assistance, that is to be regulated in the By-laws of the lawyer profession<sup>46</sup>, as well as in the new General Regulation for the organization of the bar associations' legal aid offices (services) must take into account the stipulations of the former article 68/13 from the E.G.O no. 159/2008.

Specifically, the payment of the retainer due to the lawyer that has been appointed to provide extra-judiciary assistance would be preceded by the following steps:

a). after having provided the extra-judiciary assistance, the lawyer prepares a *written report (memoir)*<sup>47</sup> regarding the services being effectively provided;

b). the report is subject to *verification and approval of the coordinator of the bar association's legal aid office (service)*, who, depending on the particularities of the case, the volume of work being deployed and the quality of the assistance provided, *proposes* to the council of the bar association the amount of the remuneration.

c). based on the proposal of the coordinator of the legal aid office (service), *the council of the bar association establishes the final amount* of the remuneration and proceeds with the retainer's *payment formalities*.

If against the lawyer a disciplinary sanction was taken, he/she will not be entitled to receive the retainer for the legal aid provided in the case for which he/she was appointed.<sup>48</sup> Although the legal stipulation is not explicit, obviously, the disciplinary misconduct must have a *relation* with the activity of providing legal aid in that respective case, in order to have the lawyer being denied his/her due retainer. Thus, according to the current General Regulations for the organization of the bar associations' legal aid offices (services), adopted by the Decision no. 419/2008 issued by the UNBR Council, the disciplinary misconducts may concern:

- the delayed accomplishment of the obligation to ensure the ex officio legal aid, the extra-judiciary assistance or the legal aid *stricto sensu* committed in bad faith or gross negligence (specific offense; if the delay caused serious consequences for the proper conduct of the case or the court hearing, it constitutes serious disciplinary misconduct);

- the failure in bad faith or negligence of the obligation to notify the legal aid office (service) and the competent court regarding the impossibility to attend or to secure replacement where the regulation allows it (specific serious misconduct);

- the failure of the obligation to provide the ex officio legal aid or the extra-judiciary assistance or the legal aid *stricto sensu*, without priorly requiring the legal aid office (service) for his/her substitution and without communicating that fact to the competent body (specific serious misconduct in ideal concurrence with serious disciplinary misconduct);

- to provide the extra-judiciary assistance, the legal aid *stricto sensu* or the ex officio assistance without appointment through the prior issuance of the delegation by the legal aid office (service) (specific serious misconduct ideal concurrence with serious disciplinary misconduct);

- the unmotivated refusal to provide the ex officio legal aid or the extra-judiciary assistance or legal aid *stricto sensu* within the activity area for which an option was made (specific serious misconduct);

<sup>45</sup> See *supra*, point II.1, letter B.

<sup>46</sup> According to article II paragraph (1) from the Law no. 270/2010, within a 60 days period starting with the entry into force of this law, the By-laws of the lawyer's profession must be modified accordingly.

<sup>47</sup> In accordance with the reimbursement form approved by the Department for the coordination of legal aid (see *supra*, point II.2, letter B).

<sup>48</sup> In comparison with the E.G.O. no. 159/2008, in which reference was made to "the retainer for the particular case or for the activity deployed", in the Law no. 270/2010 the following phrase remains: „the retainer for ensuring the legal aid for which he/she was appointed, for that case”.

- the omission to justify in writing the refusal to provide free or ex officio legal aid (specific offense);
- the omission to notify the legal aid office (service) regarding the change of the contact details or their malfunctioning (specific offense)
- the repeated refusal during a calendar month to provide assistance as a result of the appointment, even motivated (specific offense);
- the omission of the appointed lawyer to notify the legal aid office (service) within five days, regarding the change of the grounds that led to the admission or approval of the application for extra-judiciary assistance or for legal aid (specific serious misconduct);
- the failure to comply with the deadline for the submission of the report (specific offense; failure to comply with the deadline for the submission of the report resulting in influencing the repartition of the cases constitutes specific serious misconduct);
- the belated formulation, in bad faith, of a complaint, with less than 10 days before the deadline given in the case concerned with the complaint, when the deadline given in the case allows this (specific offense);
- the failure in bad faith of the obligation to prepare the written report requested, stated 10 days after the expiry of the deadline (specific serious misconduct).

According to the article 159 – correlated with the articles 80 and 92 – from the General Regulations for the organization of the bar associations’ legal aid offices (services), adopted by the Decision no. 419/2008 issued by the UNBR Council, the lawyers have the obligation to return portions of the retainer, proportionally with the activity being deployed, to fellow lawyers substituting them or whom they substitute, the litigations in this respect being submitted to the arbitration of the dean (president) of the bar association.

Finally, we mention that, according to the article 68/4 from the Law no. 51/1995, the lawyer providing legal aid does not have the right to receive from the client or from the person he defends *any whatsoever remuneration or any other means of reward*, not even as expenses’ coverage. As far as the reference to costs, of course that consideration was made towards the expenses advanced by the lawyer in the procedural interest of his/her client.<sup>49</sup> Although the legislator instituted this interdiction by referring only to the legal aid, we consider that it also applies – for the same reasons – to the extra-judiciary<sup>50</sup> assistance. Indeed, in agreement with the terminology used in the E.G.O. no. 51/2008 – “assistance through a lawyer”, that may be legal aid or extra-judiciary assistance –, the legislator should have made reference either to “assistance”, or to “legal aid or extra-judiciary assistance” and not exclusively to “legal aid”.

### III. Conclusions

The Law no. 270/2010 targets mainly to correlate with the E.G.O. no. 51/2008 on public legal aid in civil matters, by regulating in detail the circumstances and the conditions for granting legal aid, as well as the organization of the activity of providing such assistance. From the perspective of the EC law, the new legislative act is to be placed within the sphere of regulations

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<sup>49</sup> See article 28 paragraph (2) second thesis and article 30 from the Law no. 51/1995.

<sup>50</sup> Besides, according to article 157 of the General Regulation for the organization of the bar association’s offices for legal aid adopted by the Decision no. 419/2008 of the UNBR Council, the lawyer providing legal aid, *extra-judiciary* assistance, special or ex officio, is not entitled to receive from the person being assisted or represented a remuneration or any other means to cover the costs, *except* the situation when a contract for *legal assistance* was agreed, with the notification of the Office for legal aid.

ruled at the European Union level, subsumed to the European Space for Freedom, Security and Justice, within the European legislation section reserved to the judiciary cooperation in civil matters.

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