LEGAL RESPONSIBILITY OF THE LAWYER. GENERAL ASPECTS REGARDING THE RESPONSIBILITY FOR LEGAL REPRESENTATION AND ASSISTANCE

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Abstract

In this article, we aim to present essential aspects regarding the legal responsibility of the lawyer, with a particular focus on the activity of legal representation and assistance, without claiming to comprehensively address the chosen topic. According to art. 3 para. (1) of Law no. 51/1995 on the organization and exercise of the lawyer profession, the lawyer's activity is carried out through: a) legal consultations and requests; b) legal assistance and representation before the courts of law, the bodies of criminal investigation, authorities with jurisdictional attributions, public notaries, bailiffs, public administration bodies, institutions, as well as other legal entities, in accordance with the law; c) drafting legal documents, certifying the identity of the parties, the content, and the date of the documents submitted for authentication; d) assisting and representing natural or legal persons before other public authorities with the possibility of certifying the identity of the parties, the content, and the date of the concluded acts; e) defending and representing, with specific legal means, the legitimate rights and interests of natural and legal persons in their relations with public authorities, institutions, and any Romanian or foreign person; f) mediation activities; g) fiduciary activities carried out under the conditions of the Civil Code; h) temporary establishment of the registered office for companies at the lawyer's professional office and registering them, on behalf and for the account of the client, the interested parties, the shareholders, or the company shares thus registered; i) fiduciary activities and activities of temporary establishment of the registered office for companies at the lawyer's professional office and registering them, on behalf and for the account of the client, the interested parties, the shareholders, or the company shares thus registered can be carried out under a new legal assistance contract; j) special guardianship activities according to the law and the Statute of the lawyer profession; k) any means and methods for exercising the right of defense, in accordance with the law.

Regarding the activity of legal representation and assistance, the lawyer shall not be held criminally liable for oral or written statements made, in proper form, before the courts of law, bodies of criminal investigation, or other administrative bodies of jurisdiction, nor for consultations provided to litigants or for formulating the defense in that case, or for statements made during verbal consultations or written consultations provided to clients, provided that they are made in compliance with the rules of professional ethics. However, during their activity, the lawyer may be held criminally, civilly, disciplinarily, or administratively liable, depending on the nature of the unlawful act committed, which we will assess to what extent by referring to the legal provisions mentioned above. Therefore, through this article, we aim to provide, in a general manner, information regarding the legal responsibility of the lawyer that may arise in the exercise of legal representation and assistance activity.

Keywords: *lawyer, law, legal responsibility of the lawyer, criminal liability, civil liability, disciplinary liability.*

1. Introduction

Art. 1 of the Romanian Constitution[1] provides that the Romanian state is a state of law, democratic and social, organised according to the principle of separation and balance of powers - legislative, executive, and judicial - within the framework of constitutional democracy. The judicial power is composed of the High Court of Cassation and Justice and all other courts established by law. In the administration of justice, judges, prosecutors, lawyers, bailiffs, public notaries, experts, witnesses, as well as litigating parties play important roles.

The lawyer is an essential partner of justice in Romania, contributing to ensuring a legal system that is fair, equitable, and transparent, where the fundamental rights and freedoms of citizens are protected and respected. Law no. 51/1995 regarding the organisation and exercise of the lawyer profession in Romania regulates the activities of lawyers in Romania, as well as the conditions under which they can carry out their activity.

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[1] From a historical standpoint, states have been concerned with incorporating the issue of human action responsibility into both Constitutions and common acts using various terminologies. (See E.E. Ştefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ,* Pro Universitaria Publishing House, Bucharest, 2013, p. 12).

Thus, Law no. 51/1995 establishes the ethical principles and professional rules that lawyers must respect in the exercise of their profession, including admission procedures into the profession, the regime of incompatibilities and prohibitions in the exercise of the lawyer profession, the rights and obligations of lawyers, the organisation and functioning of the Bar Associations in Romania, the role and attributions of the UNBR, the rules regarding advertising in the exercise of the lawyer profession, disciplinary sanctions for violations, and so on.

The principles of the legal profession represent the values upon which the lawyer bases and defends both in the exercise of the profession and in social life, and in relation to which any ethical norm and behavior in or outside of the profession are interpreted.

In doctrine, it has been established that professional ethics entail „standards and rules that guide professional behavior and entail moral rights and obligations of individuals involved in certain professions”.[2]

Regarding the legal profession, the principles governing the exercise of the profession are the principle of legality, the principle of freedom, the principle of independence, the principle of autonomy and decentralisation, and the principle of professional secrecy. [3]

Additionally, art. 8 para. (2) of the Romanian Lawyer's Code of Ethics outlines principles governing the exercise of the profession: the principle of freedom and independence of the lawyer, the principle of legality and respect for the rule of law, the principle of professional secrecy, the principle of avoiding conflicts of interest, the principle of dignity, honor, and probity, the principle of professionalism and loyalty to the client, the principle of professional competence, the principle of respect for colleagues and all individuals with whom the lawyer enters into professional relationships, the principle of autonomy and self-regulation of the legal profession, and the principle of loyalty to the legal profession.

In relation to the topic we aim to address in this article, namely the legal responsibility of the lawyer with particular regard to the activity of legal representation and assistance, we note several principles with a direct influence on what constitutes the activity of legal assistance and representation of natural or legal persons of public or private law before the courts, bodies of criminal investigation, authorities with jurisdictional attributions, public notaries, bailiffs, public administration bodies and institutions, as well as other legal entities, in accordance with the law.

Thus, in the activity of legal assistance and representation, with regard to the analysis of the legal responsibility that could be attributed to the lawyer, the principles that become particularly relevant are: the principle of freedom and independence of the lawyer, the principle of legality and respect for the rule of law, the principle of avoiding conflicts of interest, the principle of dignity, honor, and integrity, the principle of professionalism and loyalty to the client, the principle of professional competence, and the principle of respecting colleagues and all individuals with whom the lawyer enters into professional relationships.

2. Content

Freedom and independence in the legal profession are principles under which the lawyer advocates and defends the rights, freedoms, and legitimate interests of clients in accordance with Law no. 51/1995 regarding the organisation and exercise of the lawyer profession and the Statute of the Lawyer Profession. These principles define the professional status of the lawyer and ensure their professional activity.

Moreover, „the freedom and independence of the lawyer allow them to interpret and request the application of the law in a specific case according to their own professional belief, without seeking or fearing to please or displease the judicial, executive, legislative, political, hierarchical, economic, media, or public opinion”.[4]

By exercising the rights conferred upon them by Law no. 51/1995 regarding the organisation and exercise of the lawyer profession and the Statute of the Lawyer Profession, the lawyer fulfils their duties and obligations towards the client in relation to the authorities and institutions with which they assist or represent the client, towards their profession in general and towards each colleague in particular, as well as towards the public.

[2] I. Muraru, E.S. Tănăsescu, *Drept constituțional și instituții politice*, 16th ed., vol. I, C.H. Beck Publishing House, Bucharest, 2023, p. 12.

[3] See art. 1 of the Lawyer Profession Statute.

[4] Gh. Florea, *Libertatea și independența avocatului în exercitarea profesiei. Între aparență și realitate*, article published on 25.10.2021, *https://www.juridice.ro/essentials/5014/libertatea-si-independenta-avocatului-in-exercitarea-profesiei-intre-aparenta-si-realitate*, last consulted on 25.03.2024.

The lawyer has a duty to fulfil conscientiously, with honor and professional integrity, their obligations towards the client, in relations with individuals, public or private authorities and institutions, other legal entities, other lawyers, as well as in their relationship with the public.

The lawyer has the right to assist and represent individuals and legal entities before the courts of law and other judicial bodies, law enforcement authorities, public authorities, and institutions, as well as before other individuals or legal entities, who have the obligation to allow and ensure the lawyer's unhindered conduct of their activities, in accordance with the law.

For the purpose of providing legal assistance and representation to the client, under the legal assistance contract concluded, the lawyer may provide legal advice, draft legal documents, represent the client, based on the granted mandate, before judicial or non-judicial bodies, law enforcement agencies, public institutions and authorities, as well as before legal or natural persons, while respecting all participants in a civilised manner.

The lawyer's tools of the trade include not only speaking but also writing. More precisely, they first write, drafting requests, actions, responses, counterclaims, third-party notices, requests for evidence, etc., and only then speak. They must write well so that the judge can easily understand the matter at hand.[5]

Advising and representing a client obliges the lawyer to view the respective case from their own perspective and to provide disinterested advice to the client.

Advising the client involves not only the exposition of legal provisions but also considers the moral, economic, social, and political consequences that may be relevant in the given situation.

Assisting and representing the client encompass all acts, means, and operations permitted by law and necessary for the protection and defense of the client's interests.

In the event they engage to assist and/or represent a client in a legal procedure, the lawyer assumes obligations of diligence. The lawyer must assist and represent the client with professional competence, utilising appropriate legal knowledge, specific practical skills, and reasonable preparation necessary for the concrete assistance or representation of the client.

Assisting and representing the client require appropriate professional diligence, thorough preparation of cases, files, and projects, with promptness according to the nature of the case, experience, and professional belief.

Thus, „to write well, the lawyer must research, study, and then make connections, establish the factual situation, identify applicable legal provisions, determine what evidence is necessary to support the claim they are making, the arguments that can be invoked, their strength, and the order in which they should be presented. Then they must deal with drafting, the words used, legal terminology, style. Legal writing is ultimately an art. It must be fluent, expressive, and engaging."[6]

Moreover, „the system of selection operations is superior to that of establishing arguments, as the latter has a strong note of spontaneous improvisation, through a supposition characterised by impression, imbued with the subjectivity of basic affective temptation and passionate preferences. Establishing aims to form a primary mass of possible arguments, while selection aims to distinguish and retain only what is the actual argument and, at the same time, admissible from a legal perspective and necessary from a logical-formal point of view for the alternative chosen by the subject”.[7]

Furthermore, we point out that "the lawyer must not forget that he is an auxiliary of justice, and for this purpose, he must make himself clearly understood, express himself in appropriate terms, avoid vague or equivocal formulas, eliminate from the expression the incidents that burden the sentence, rephrase in a different form what he thought was not well understood."[8]

However, the lawyer does not incur criminal liability for the oral or written statements made, properly, before the courts, the prosecutorial bodies, or other administrative jurisdictional bodies, nor if they are related to the consultations provided to litigants or with the formulation of the defense in that case or for the statements made during verbal or written consultations provided to clients, if they are made in compliance with the rules of professional ethics.

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[5] A. Ţiclea, *Oratorie și procese celebre*, 2nd ed., revised and expanded, Universul Juridic Publishing House, Bucharest, 2023, p. 439.

[6] *Idem*, p. 439.

[7] Gh. Mihai, *Elemente constructive de argumentare juridică*, Academy Publishing House of the Socialist Republic of Romania, Bucharest, 1982, p. 116.

[8] Y. Eminescu, *Pledoarii celebre (Antologie de oratorie judiciară),* Academy Publishing House of the Socialist Republic of Romania, Bucharest, 1973, p. 18.

The lawyer has the obligation to ensure professional liability, pursuant to art. 42 of Law no. 51/1995 regarding the organisation and exercise of the lawyer's profession.

Professional liability covers the actual damages suffered by the client resulting from the exercise of the profession without respecting the provisions of Law no. 51/1995, the Statute of the lawyer's profession, and the deontological rules.

According to art. 38 para. (4) of the Statute of the lawyer's profession, the parties may establish the limits of the lawyer's liability by contract. Clauses totally exempting professional liability are considered unwritten.

The lawyer may be civilly liable for the damages caused to his client in the exercise of the lawyer's profession for acts such as negligence or professional error in the exercise of the profession, non-performance or defective performance of contractual obligations assumed towards the client, failure to respect the confidentiality of information received from the client, conflict of interest, etc. The lawyer has the obligation to ensure professional liability.

Professional liability covers the actual damages suffered by the client resulting from the exercise of the profession without respecting the provisions of Law no. 51/1995 regarding the organisation and exercise of the lawyer's profession, the Statute of the lawyer's profession, and the deontological rules.

In practice, the civil liability of the lawyer is contractual, occurring in the execution of a legal assistance contract, for acts such as: missing the procedural deadline for filing an action or exercising a remedy, failure to respect the conflict of interest, failure to respect the confidentiality clause, ignorance of the legal provision or insufficient legal research, providing a consultation that contravenes the provisions of the law, etc., without excluding the lawyer's tort civil liability for unlawful acts committed outside the sphere of exercising the profession of lawyer.

As an example, we mention the retention in a lawsuit of the considerations according to which the lawyer showed negligence in the execution of the legal assistance contract, negligence resulting from the erroneous substantiation of the lawsuit on the principle of undue payment and on tort liability when contractual civil liability was applicable in the case file.[9]

The lawyer may be held disciplinarily liable for acts provided and incriminated as disciplinary offenses or serious disciplinary offenses, according to the applicable normative acts governing the organisation and exercise of the legal profession. Thus, the lawyer is disciplinarily liable for failure to comply with the provisions of Law no. 51/1995 regarding the organisation and exercise of the legal profession or the Statute of the legal profession, for failure to comply with mandatory decisions adopted by the governing bodies of the bar association or the UNBR, as well as for any acts committed in connection with the profession or outside it, which are likely to prejudice the honor and prestige of the profession, the body of lawyers, or the institution, according to art. 85 of Law no. 51/1995.

By way of example, we note that the lawyer is obligated to thoroughly study the cases entrusted to them, whether retained or appointed ex officio, to appear at each hearing before the courts of law or the prosecution authorities or other institutions, according to the mandate entrusted to them, to demonstrate conscientiousness and professional integrity, to plead with dignity before the judges and the parties to the proceedings, to submit written conclusions or session notes whenever the nature or difficulty of the case requires it or the court orders it, the attributable failure to perform these professional duties constitutes a disciplinary offense, respectively, the unjustified absence of the lawyer who is a member of the governing bodies of the profession and has the obligation to participate in meetings constitutes a serious disciplinary offense.[10]

Expressions of legal opinions, exercise of rights, fulfilment of obligations provided by law, and the use of legal means for the preparation and effective implementation of the defense of the freedoms, rights, and legitimate interests of their clients do not constitute disciplinary offenses and do not give rise to other forms of legal liability for the lawyer.

The lawyer is not disciplinarily liable for oral or written submissions made before the courts of law, other judicial bodies, prosecution authorities, or other authorities if they are made in accordance with the rules of professional ethics.[11]

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[9] See also *https://www.legal-land.ro/raspunderea-avocatului-pentru-invocarea-unui-temei-juridic-eronat/*, last consulted on 25.03.2024.

[10] See art. 30, art. 41^1, art. 43, art. 53, art. 54 of the Statute of the Legal Profession.

[11] See art. 7 of the Statute of the Legal Profession.

Administratively, the lawyer may be held responsible for non-attendance if they have not ensured their substitution by another lawyer, representative, or assisting party, or for failure to comply with the duties established by law or by the court if such conduct causes adjournment of the trial, punishable by judicial fine ranging from 50 lei to 700 lei, according to art. 187 para. (1) point 2 letter c) CPC.

The lawyer may be criminally liable for committing acts provided and incriminated by criminal law in the exercise of the legal profession, as a qualified active subject of the committed offense.

However, it is noted that the lawyer may commit unlawful acts provided and incriminated by criminal law outside the exercise of the legal profession, in which case they shall be liable for them like any other person.

The criminal liability of the lawyer involves certain particularities that are noticeable from the stage of criminal prosecution, namely, criminal prosecution is carried out, obligatorily, by the prosecutor in the case of offenses for which the jurisdiction in the first instance belongs to the High Court of Cassation and Justice or the court of appeal.[12]

Moreover, offenses committed by lawyers, notaries public, judicial executors, financial controllers of the Court of Auditors, as well as external public authors are settled in the first instance by the court of appeal.[13]

Furthermore, in the exercise of the profession, the lawyer is an indispensable partner of justice, protected by law, without being assimilated to a public official, except in situations where they certify the identity of the parties, the content, or the date of a document.

According to art. 175 para. (2) CP, a public official, for the purposes of criminal law, is considered to be a person who performs a public service for which they have been invested by public authorities or who is subject to their control or supervision regarding the performance of that public service.

Therefore, from the combination of the above, it follows that the lawyer is not a public official, but as an exception, they are assimilated to a public official in situations where they certify the identity of the parties, the content, or the date of a document.

In doctrine, it has been established that, „if in the period prior to 1989 the lawyer was assimilated by case law decisions with the category of officials, at present there is no doubt that the lawyer is a freelance professional”.[14]

Art. 284 CP provides that the act of a lawyer or representative of a person who, in fraudulent collusion with a person having conflicting interests in the same case, within a judicial or notarial procedure, harms the interests of the client or the represented person is punished with imprisonment from three months to one year or a fine. Moreover, the same penalty is imposed for the fraudulent agreement between a lawyer or representative of a person and a third party interested in the decision to be rendered in the case, with the aim of harming the interests of the client or the represented person.

3. Conclusions

In a society[15] founded on the values of democracy and the rule of law, the lawyer plays an essential role. The lawyer is indispensable to both justice and the litigants and is tasked with defending their rights and interests. The lawyer is both the advisor and advocate for their client.

In legal doctrine, *the legal profession is considered the archetype of liberal professions*[16], thus, in the activity of legal representation and assistance, the lawyer must benefit from all rights and guarantees recognized by the current normative acts.

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- The Constitution of Romania;

[12] See art. 56 CPP.

[13] See art. 38 CPP.

[14] L. Dănilă, *Organizarea și exercitarea profesiei de avocat,* 2nd ed., C.H. Beck Publishing House, Bucharest, 2008, p. 13.

[15] Human society is based on a diversity of individuals, grouped according to various criteria into various forms and social structures. Rarely is the social body fully homogeneous; most often it is composite, characterised by pluralism and sometimes even fragmentation. (See I. Muraru, E.S. Tănăsescu, *op. cit*., p. 2.

[16] Al. Țiclea, *op. cit.,* p. 430.

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