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# Identifying Barriers to Effective Legal Representation

A Survey of Advocates and Lawyers in The Kyrgyz Republic

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<sup>1</sup> For the purposes of this report and its scope, it is important to mention that there is a significant difference between advocates and lawyers in Kyrgyzstan and other countries in the region. Please see the full discussion on this topic below on page 5.

# I. EXECUTIVE SUMMARY

The focus of this survey was to determine the most pressing issues faced by advocates and lawyers as a result of their professional activities. The survey was organized into seven categories: access to the legal profession; right to independent practice; professional immunity; disciplinary proceedings; access to clients; confidential communications with clients; and right to information.

While the results are more anecdotal than data-driven, several trends clearly emerged from this survey. First, on each of the seven factors examined, most respondents replied that although rights of lawyers are protected by law, in practice, the majority of time, those rights were violated and norms are not implemented. For example, although an overwhelming majority, 93%, said that there were existing protections for the independence of advocates in Kyrgyz law, 69% of those said that those safeguards were insufficient or ineffective and that their rights were violated.

Second, it appears that in general, the rule of law is respected in broad outlines and lawyers are largely allowed to defend their client's interests. Sixty-two percent of respondents, for example, said that they are generally able to have private consultations with clients. Similarly, 59% of respondents said that the licensing exam is fair and only 30% of respondents had knowledge about the use of disciplinary procedures as means of intimidation. That said, on each of the factors, there are numerous failings in the details and implementation of how lawyers are treated. Further, advocates and lawyers have a low status in society, and as a result, people engage in physical assaults, intimidations and threats without fear of ramifications for their actions. For example, 24% of respondents reported being personally physically attacked and intimidated by non-state actors, private parties including opposing clients, their family members and private citizens.

Our survey found, however, that these issues are overcome-able. The lawyers indicated that they believed many of the systemic failings were in the implementation at the local level and not larger political attempts to undermine the work of advocates. There are several

straightforward steps that can be taken to improve the situation. It is incumbent on the Kyrgyz Bar Association (hereinafter Advokatura), and Government agencies including prosecutors' offices, Ministry of Internal Affairs, local courts and the Ministry of Justice to work together and ensure that all law enforcement and judicial bodies understand the rights and responsibilities of lawyers and respond appropriately to lawyers' requests. The government should publicly condemn, at all levels, any attack and other acts of harassment against lawyers, and actively seek to prevent such acts by adequate measures including: conducting public information campaigns about the role of lawyers to increase understanding, respect and status of lawyers; providing adequate protection of lawyers in court; investigating any attacks against lawyers to identify and prosecute perpetrators; and combating impunity. The government must take an interest in how the rule of law is followed and how the rights of participants in the legal system are respected.

The Advokatura, as an advocacy body, must ensure that advocates follow established rules and procedures and support adoption of the new Code of Professional Ethics of Advocates. They should also play the role of highlighting and documenting the instances of violations of advocates professional rights when other actors in the legal system do not play their own role. Courts must continue to ensure the equality of arms and should take note of instances where access to a client or relevant information is denied.

National and non-profit organizations should continue to monitor the situation on the ground and make the public aware when attorneys and lawyers' rights are violated. International organizations as well as diplomatic missions should continue to highlight the importance of the rule of law and the benefits a strong legal system brings to Kyrgyzstan and make detailed and specific recommendations to the national government.

## II. INTRODUCTION

In the last several years, respect for human rights and the overall situation for civil society in the area of the former Soviet Union is in decline<sup>2</sup>. In this time of uncertainty, the role of human rights defenders and human rights advocates has become even more important. As these brave individuals stand up to protect their families and communities, they are finding themselves at the hands of corrupt justice and legal systems, arbitrary bureaucratic practices, and old cultural traditions. When the cameras turn off and public attention turns elsewhere, one of the last defenses these human rights defenders have are the advocates and lawyers willing to go in to court and demand that governments follow the rule of law and international standards.

In these worsening human rights conditions and as a result of their difficult work, the advocates and lawyers encounter increased amount of threats, pressure and prosecution.<sup>3</sup> In many instances, the advocates and lawyers are having to address these issues without the necessary resources or support. Legal systems in many of these countries are still relatively new and are going through transition phases, adopting new legal concepts and traditions.<sup>4</sup> Geographic isolation for some countries, as well as determined efforts by local governments to hobble judicial branches have ensured that these systems continue to be weak and dysfunctional. Structural issues also affect the work of lawyers in this region, as well as an important factor of whether the professional rights of lawyers are being respected, both by the state and more broadly in society.

Due to the historical origins of these legal systems and other existing factors, some of these lawyers work in small firms or alone and are not always part of the bar associations, collegiums or professional organizations. Further, those professional structures that are commonly seen in the West as support structures for advocates and lawyers actually function quite differently in the countries that were part of the former Soviet Union. The structure of professional advocates and lawyers' associations in this region are largely dependent on the Executive branch of government, primarily the Ministry of Justice (MOJ). The MOJ, in many cases, monitors the activities of these organizations, is responsible for licensing procedures and has an input on its disciplinary procedures for advocates. Such a set-up makes the advocates vulnerable to the wishes of the executive branch and in some countries is used as a tool to influence and control the outcomes in sensitive political cases. Thus, many professional bar associations and collegiums are finding themselves in a precarious situation where on one hand, they are forced to follow the guidance from the MOJ to punish or pressure an attorney when her work in sensitive cases is undesirable, and on the other hand, to provide support to the advocates working in these difficult conditions.<sup>5</sup>

2 For a discussion of freedoms in Post-Soviet countries see Eliza B Young & Tyler Roylance, *Promise and Reversal: The Post-Soviet Landscape Twenty Years On*, Freedom House (2013), available at <https://freedomhouse.org/report/special-reports/promise-and-reversal-post-soviet-landscape-twenty-years> (last visited Aug 13, 2018).

3 Report of the Special Rapporteur on the Independence of Judges and Lawyers, Monica Pinto (2016), U.N. Doc. A/HRC/32/34, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/068/03/PDF/G1606803.pdf?OpenElement> (last visited August 13, 2018); Report of the Council of Europe's Committee on Legal Affairs and Human Rights Rapporteur Sabien Layaye-Battheu, *The case for drafting a European Convention on the profession of lawyer* (2017), available at <http://website-pace.net/documents/19838/3254453/201712112-convention-avocats-EN.pdf> (last visited August 15, 2018); Parliamentary Assembly, PACE - Recommendation 2133 (2018) - Protecting human rights defenders in Council of Europe member States (2018), available at <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?lang=EN&FileId=24802> (last visited Aug 13, 2018); Human Rights Lawyers: Making the Case for Protection of Legal Professionals in Azerbaijan, Belarus, Moldova, Russia, and Ukraine, Human Rights House (2015), available at <https://humanrightshouse.org/noop-media/documents/21177.pdf> (last visited August 15, 2018), Andriy Osavoliyk & Katerina Savchenko, *Defence for the defenders: Lawyers and attorneys under attack for participation in politically motivated cases*, The Open Dialog Foundation (2018), available at <https://en.odfoundation.eu/a/8707/defence-for-the-defenders-lawyers-and-attorneys-under-attack-for-participation-in-politically-motivated-case> (last visited Aug 15, 2018).

4 The process of developing new constitutions and institutions began in the early 1990s after the end of the Soviet Union. Further reforms to various justice systems have continued through to the present. See for example, Rett R Ludwikowski, *Constitution Making in the Countries of Former Soviet Dominance: Current Development*, 23 *GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW* 155–267 (1993), available at <https://scholarship.law.edu/cgi/viewcontent.cgi?article=1479&context=scholar> (last visited Aug 15, 2018) (discussing the initial constitutional development); Paul Babie, *Ukraine's Transition from Soviet to Post-Soviet Law: Property as a Lesson in Failed Regulation*, *East/West: Journal of Ukrainian Studies* 3–37 (2016) <https://www.ewjus.com/index.php/ewjus/article/viewFile/167/61> (last visited August 15, 2018) (discussing continued reform and struggles of a new justice system in Ukraine).

5 Report of the Special Rapporteur on the Independence of Judges and Lawyers, Monica Pinto (2016), U.N. Doc. A/HRC/32/34, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/068/03/PDF/G1606803.pdf?OpenElement> (last visited August 13, 2018); Parliamentary Assembly, PACE - Recommendation 2133 (2018) - Protecting human rights defenders in Council of Europe member States (2018), available at <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?lang=EN&FileId=24802> (last visited Aug 13, 2018).

This gap has not gone unnoticed by authoritarian governments in the region. These executives are becoming more sophisticated in suppressing opposing voices by removing the means of effective legal representations in cases pending against them. The most common tactics used are creating random re-qualification exams, holding arbitrary disciplinary procedures, withdrawing licenses from experienced lawyers and replacing them with ‘pocket’ state lawyers who often lack professional experience and commitment to the rule of law.<sup>6</sup> This approach gives the impression that the defendant has legal representation, but in fact leaves the outcome of the case totally up to the government. This tactic also allows governments to shield themselves from international pressure and criticism, as the perception creates a picture of the governments complying with international fair trial norms and respecting the rule of law.

For the last several years in Kyrgyzstan, advocates and lawyers have reported that they faced pressure, intimidation and physical attacks<sup>7</sup> as they performed their professional duties, despite existing regulations, provisions and laws that should exist to protect them. These same lawyers have also reported some positives overall developments in the improved functioning of the legal profession in general. Many of the reports and literature reviewed indicated that the origins and reasons of such pressures were varied in delivery and methods. However, given that compared to other Central Asian countries, the rule of law and role of civil society in Kyrgyzstan is better established, a more in depth examination of the problems facing lawyers there could give an insight into how the situation could develop in other countries.

This project seeks to identify the general trends of the reasons for violations of advocates’ and lawyers’ professional immunities and rights, as established by international standards and local laws, document specific cases and develop a set of recommendations creating a road map for the best practices to address the issue of infringements upon these rights. The roadmap will be useful for stakeholders including the Advokatura, professional lawyers’ organizations, individual advocates, non-governmental rights organizations, local law authorities, international organizations and other entities that are working towards improving the rights of advocates and legal professionals overall. Because the infringement of lawyers’ rights is unfortunately common throughout Central Asia, it is possible that the model of this study could be useful in other Central Asian countries.

6 Bruce Pannier, *The Breaking Of A Tajik Defense Lawyer*, RadioFreeEurope/RadioLiberty(2016), available at <https://www.rferl.org/a/tajikistan-qishloq-ovozi-tabarov-death-saidov/27799302.html> (last visited Aug 15, 2018).

(Introduction of a new mandatory test for all lawyers includes non-legal questions and can lead to disbarment in Tajikistan); Ismail Djalilov and Tamara Grigoryeva, *Injustice for all: how Azerbaijan’s bar association was reduced to tatters*, openDemocracy(2018), available at <https://www.opendemocracy.net/od-russia/ismail-djalilov-and-tamara-grigoryeva/injustice-for-all> (last visited Aug 15, 2018) (discussing the challenges lawyers in Azerbaijan face in obtaining and maintaining a law license) also see *Breaking Point in Azerbaijan*, at <https://humanrightshouse.org/noop-media/documents/20949.pdf>, p. 30 (discussing the pressure on lawyers); re-Human Rights Center, *Human rights activists alarmed over new wave of harassment against lawyers*, [spring96.org](http://spring96.org) (2017), available at <http://spring96.org/en/news/87716> (last visited Aug 15, 2018)(discussing harassment of lawyers in Belarus where a random re-qualification exam were instituted).

7 For documentation of recent cases see *World Report 2018: Rights Trends in Kyrgyzstan*, Human Rights Watch, Access to Justice (2018), <https://www.hrw.org/world-report/2018/country-chapters/kyrgyzstan> (last visited Aug 13, 2018); United States Department of State, *Kyrgyz Republic 2017 Human Rights Report* at 7 (2018) <https://www.state.gov/documents/organization/277529.pdf> (last visited August 13, 2018); *Legal Professional Reform Index for the Kyrgyz Republic*, American Bar Association (2014), at 12-13, available at <https://www.americanbar.org/content/dam/aba/directories/roli/kyrgyzstan/roli-kyrgyz-republic-legal-profession-reform-index-2014.authcheckdam.pdf> (last visited Jul 9, 2018); see also “Security of Advocates is questionable” available in Russian at <http://birduino.kg/ru/pressa/720-bezopasnost-advokatov-pod-voprosom> (last visited August 13, 2018).

### III. BACKGROUND

Kyrgyzstan obtained independence from the Soviet Union in 1991 and has since undergone many constitutional and structural reforms.<sup>8</sup> Beginning with the adoption of the current Constitution in 2010, there have also been several reforms to the justice system.<sup>9</sup> Former President Atambayev signed the Decree of the President No. 147 'On Measures for Justice Improvement in the Kyrgyz Republic' in 2012 and the 'Law on the Bar of the Kyrgyz Republic and on Advocate Activity' (Law No. 135) (hereinafter "The New Law") was passed in 2014, replacing the 1999 'Law on Advocacy of the Kyrgyz Republic'.<sup>10</sup> The New Law was drafted through consultation between the Ministry of Justice (MOJ), Parliament, and the Advokatura.<sup>11</sup> ABA ROLI's Kyrgyz office and other international organizations also assisted and worked on this project during the whole process.<sup>12</sup> Although the law was drafted in 2004, it was not adopted until 2014.<sup>13</sup> The New Law reformed the legal profession in a number of ways, including requiring the formation of an independent, unified national bar.<sup>14</sup>

The new Unified Bar Association, or Advokatura, was formed on December 26, 2014, in accordance with the New Law, that defines itself as a "self-governed professional association of advocates"<sup>15</sup> and is tasked with representing and protecting the advocates whose membership is mandatory. The article 2 of the New Law also identifies the Advokatura as a civil society organization and does not constitute a part of the state system. As a new entity, the Advokatura is still going through a transition phase and is navigating many obstacles, includ-

ing establishing financial viability, as it's not supported by the state budget; continuing work on implementing legal ethics provisions;<sup>16</sup> establishing support for the advocates' professional rights; improving the system of continuing legal education and other issues.<sup>17</sup>

It is worthwhile to explain the difference between advocates and lawyers because the scope of this assessment expands to all advocates and lawyers who sustained violations against their rights. Though a material difference exists between the advocate and lawyer in this region, both play an important role in the society and the legal system as a whole and both need protection in accordance with international laws and standards. For the purposes of this assessment, we follow the standards and definitions as established in the UN Basic Principles on the Role of Lawyers.<sup>18</sup>

In Kyrgyzstan, like many other countries in the former Soviet Union, advocates and lawyers are two different categories in the legal profession classification.<sup>19</sup> Generally, advocates are lawyers who have law degrees and have obtained a law license to be able to represent clients primarily in criminal cases.<sup>20</sup> In Kyrgyzstan, there were 3,394 licensed advocates in 2014, although the majority of law graduates do not become advocates.<sup>21</sup> While our assessment is mostly focused on advocates,<sup>22</sup>

8 Legal Professional Reform Index for the Kyrgyz Republic, AMERICAN BAR ASSOCIATION (2014), at 3-4 <https://www.americanbar.org/content/dam/aba/directories/roli/kyrgyzstan/roli-kyrgyz-republic-legal-profession-reform-index-2014.authcheckdam.pdf>. Hereinafter ROLI index. (last visited Jul 9, 2018)

9 Bruce Pannier, What's In Kyrgyzstan's Constitutional Referendum? RadioFreeEurope/RadioLiberty (2016), <https://www.rferl.org/a/kyrgyzstan-constitutional-referendum-whats-at-stake/28164053.html> (last visited Aug 15, 2018); Kyrgyzstan profile - Timeline, BBC News (2018), <https://www.bbc.com/news/world-asia-16185772> (last visited Aug 15, 2018)(Provides an overview of structural changes throughout the history of the Kyrgyz Republic).

10 LAW ON THE BAR OF THE KYRGYZ REPUBLIC AND ON ADVOCATE ACTIVITY (Law No. 135, adopted June 19, 2014, entered into force July 14, 2014) <http://www.advokatura.kg/documents> (last visited August 15, 2018); ROLI Index, supra note 8, at 4.

11 ROLI Index, supra note 8, at 4.

12 Id.

13 Id.

14 ROLI Index, supra note 8.

15 Supra note 10, article 2, para 1.

16 The work on the new Code of Professional Ethics of Advocates has been ongoing for several years and the process is not a quick or easy one. Please see more details on pages 31-32.

17 At many of our meetings, attorneys were expressing high hopes that the Advokatura should be more responsive and involved in protecting advocates when they experience pressure and attacks.

18 The definition of "lawyer" varies somewhat across different legal cultures and countries, however, the importance of protecting the rights of all who provide the function of a lawyer is recognized in the international sphere. The Principles on the Role of Lawyers apply "to persons who exercise the functions of lawyers without having the formal status of lawyer." OHCHR, Basic Principles on the Role of Lawyers, available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx> (last visited Jul 9, 2018).

19 ROLI Index, supra note 8, at 5-6 (Discussion of the different categories of lawyers).

20 Please see definition of advocate, as stated in the New Law, below in FTs 44-47 or pages 10-11.

21 ROLI Index, supra note 8, at 23.

22 Forty-two advocates participated in the surveys, and twelve of them viewed themselves as human rights defenders. Please see more details in the section below on Methodology, on page 7.



lawyers and human rights defenders<sup>23</sup> also took part in the discussions and interviews in order to provide a cross sectional reference and obtain additional perspectives from different point of views. For the purposes of this assessment, we will be using the terms of 'advocates,' 'attorneys,' and 'lawyers' interchangeably.<sup>24</sup>

To contrast, in the United States, for example, traditionally most<sup>25</sup> law school graduates take the bar exam in a certain jurisdiction to obtain a law license to practice law and become attorneys. Around 90% of graduates obtain the law license within two years of graduation and around 1% of law school graduates do not take exam<sup>26</sup>, so lawyer is a general term that includes both attorneys and lawyers who do not have a license and generally the two terms are used interchangeably. In some European countries, lawyers make up a larger number compared to the number of attorneys or advocates, for example, in Poland in 2002, there were 22,048 lawyers practicing law and of that number only 5,315 of them were advocates.<sup>27</sup> Similarly in the Russian Federation, in 2008, there were an estimated 61,422 advocates compared to 430,000 lawyers.<sup>28</sup>

Either way, in the region as a whole, and in Kyrgyzstan in particular, there are more lawyers than advocates and the work of both categories is equally important, as they both play a key role in a functioning justice system.<sup>29</sup> The international community widely recognized the importance of lawyers and advocates for operating of an effective legal system.<sup>30</sup> Where the lawyers' rights have been breached, the rights of their clients are also in jeopardy and the justice system cannot function in an effective way. A functioning justice system is vital for the protection of human rights and freedoms, as it provides both protections and remedies for those who face human rights violations.<sup>31</sup>

It is important to understand what the term "lawyers' rights" mean. The "lawyers' rights" are the rights, immunities and privileges which are necessary in order for a lawyer to carry out his professional functions and duties toward his client in an effective way. These rights are recognized by the international community and include the right to have access to the profession, the right to independent practice, professional immunity, a fair system of disciplinary proceedings, a right to have access to clients, a respect for lawyer-client confidentiality, and the right to information pertaining to clients and cases and equality at arms.

23 We follow the broad definition of human rights defenders as used by the Office of the High Commissioner for Human Rights. "Human rights defender" is a term used to describe people who, individually or with others, act to promote or protect human rights. Human rights defenders are identified above all by what they do and it is through a description of their actions [...] and of some of the contexts in which they work [...] that the term can best be explained. The examples given of the activities of human rights defenders are not an exhaustive list.

Who is a defender? Office of the High Commissioner, available at <https://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Defender.aspx#ftn1> (last visited August 17, 2018). The UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (hereinafter Declaration on Human Rights Defenders), is available at <https://www.ohchr.org/en/professionalinterest/Pages/RightandResponsibility.aspx> (last visited August 17, 2018).

24 Except for situations where legal regulations or de facto situations differ for the licensed lawyers, advocates, and other groups of lawyers.

25 Two years after graduation nearly ninety percent of applicants have obtained a law license. Less than one percent of law school graduates do not take the bar exam. "New data on bar passage show wide variation in law schools' rates", available at <https://www.insidehighered.com/news/2018/03/23/new-data-bar-passage-show-wide-variation-law-schools-rates> (last visited Aug 13, 2018)

26 Id.

27 The Council of Bars and Law Societies of Europe (CCBE), Number of Lawyers in European Countries (2002), [https://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/Statistics/EN\\_STAT\\_2002\\_Number\\_of\\_lawyers\\_in\\_European\\_countries.pdf](https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/Statistics/EN_STAT_2002_Number_of_lawyers_in_European_countries.pdf) (last visited August 14, 2018); see also ROLI Index, supra note 8, at ii.

28 Dmitry Shabelnikov, The Legal Profession in the Russian Federation (2008) at 5, <https://www.osce.org/odihr/36312?download=true> (last visited August 14, 2018).

29 In Tajikistan for example, there are only approximately 800 advocates who are licensed to provide defense work, however the number of lawyers in general practice exceeds that figure, although the exact number is unknown. See OSCE, ODIHR Background paper by Mahira Usmanova, The Legal Profession in Tajikistan, at 8, available at <https://www.osce.org/odihr/36313?download=true> (last visited Aug 14, 2018); In 2012, the estimated number of advocates in Kazakhstan was 4,235, in Kyrgyzstan the estimated number was 3,000 as of 2013; for Turkmenistan the estimated number was 200-300 in 2013, and for Uzbekistan the number was 5,407 as of 2011. These numbers do not include people who are not formally licensed. see THE INTERNATIONAL COMMISSION OF JURISTS, INDEPENDENCE OF THE LEGAL PROFESSION IN CENTRAL ASIA, pgs 13-18.

30 UN HRC Resolution on Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, available at Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers. Also, see JOSE ZEITUNE, INTERNATIONAL PRINCIPLES ON THE INDEPENDENCE AND ACCOUNTABILITY OF JUDGES, LAWYERS AND PROSECUTORS (2007), <http://www.refworld.org/pdfid/4a7837af2.pdf> (last visited Jul 9, 2018), pg. 5.

31 Ibid.

## IV. METHODOLOGY

Our main goal was to better understand the state of Kyrgyz advocates' rights and professional guarantees and how they are stipulated in the national law and implemented in practice, also to shed some light on specific instances of violations of these rights and identify common trends of such practices based on respondents' perceptions. Another goal was to attempt to make a determination of the potential causes for such shortcomings and finally to prepare recommendations for the involved stakeholders to improve the legal protections for advocates and lawyers in the future.

To accomplish these goals, we attempted to determine two data points: lawyers' perceptions of the situation and actual documented instances of violations. We accomplished this by collecting surveys, public reports, information from interviews and meetings with practitioners about their own perceived levels of violations of their rights as well as using public sources to document actual cases of threats, intimidations and pressures against the advocates and lawyers. Thus, each summaries section was based in part on this information.

Our methodology for determining these data points was designed around the seven main areas that provide principal protections, immunities and guarantees for the functioning of lawyers and were based on existing international standards and norms starting from the United Nations Basic Principles on the Role of Lawyers, Council of Bars and Law Societies of Europe's (CCBE) Charter of Core Principles of the European Legal Tradition, and using resources from the International Commission of Jurists (ICJ) and the American Bar Association's Rule of Law Initiative (ABA ROLI). These areas include: access to the legal profession, a right to independent practice, professional immunity, a fair system of disciplinary proceedings, a right to have access to clients, a right for lawyer-client confidentiality, and the right to information and equality of arms. Thus, we designed 34 questions that covered these main areas and we included ample space for the specific anecdotal cases of violations of such rights. The assessment team and local partners collected surveys from 42 advocates, thirteen of whom also identified themselves as human rights defenders.<sup>32</sup> There were 19 women and 23 men, and the respondents represented all major geographic regions/oblasts of Kyrgyzstan<sup>33</sup> including

Chui, Osh, Djalal-Abad, Batken, Issyk-Kul, Talass, Naryn and capital Bishkek city.

The in-depth interviews were conducted with selected advocates from various regions and the capital city of Kyrgyzstan and in addition to the above questions, the interviews covered many other relevant topics and issues in order to capture the innate cultural specificities and local/regional peculiarities to provide a backdrop to better comprehend the environment and the origins of some behaviors.<sup>34</sup> As noted earlier, the assessment was conducted in response to numerous calls, reports and requests by local advocates, lawyers, human rights defenders and local organizations about continuous instances of violations of advocates, lawyers and defenders' rights. The team received those concerns during the last several years while working directly with these stakeholders on supporting the human rights and the rule of law in Kyrgyzstan and Central Asia as a whole. While doing preliminary research on whether to conduct this assessment, we have determined the lack of specific information related to how lawyers perceived their rights to be protected called for a more in-depth study, and to our knowledge, no other similar study was done recently.

The assessment team included Jasmine Cameron, Esq., Director of 'Justice International' (USA), Liudmila Ulyashyna, an expert of 'Human rights Houses Foundation', adviser of "International Law in Advocacy"(Norway), Judith Lichtenberg, Executive Director of 'Lawyers for Lawyers' (Netherlands), Anna Knych, a legal expert of 'Justice International', and Lela Metreveli, a legal expert and the Executive Director of 'Human Rights Embassy'(Moldova). The team is grateful to all the assistance from our local partners, advocates and lawyers, who participated in the survey, traveled to our workshops, took part in the interviews, and attended the meetings and presentations. Specifically, we wanted to thank the Advocates' Training Center (ATC), and especially its former Director, Venera Sydykova, as well as the Bishkek ABA/ROLI office and its Senior staff attorney Asel Djamankulova. We are also grateful to Advokatura's council and staff members for meeting with us and holding candid discussions. The assessment mission was possible with financial support from ABA Human Rights Center's Justice Defenders Program.

32 As some of the respondents identified themselves as human rights defenders, it was interesting to observe that these attorneys cooperate with local human rights organizations, strengthening the legal component of civil society organizations and coordinating the work of "human rights lawyers", when jointly studying cases, discussing legal strategy or working as advocates and lawyers at human rights organizations. They also attend and participate trainings and advanced courses on human rights. In their responses to the survey questions, these attorneys had a higher level of knowledge of international standards, shortcomings of national legislation or practice, better understanding of the concepts of lawyers' independence, identification of risks and / or causes of violations and limitations of the rights of advocates.

33 Kyrgyzstan has seven administrative divisions/regions - the so-called oblasts, the assessment included representatives from the following oblasts: Chui, Osh, Djalal-Abad, Batken, Issyk-Kul, Naryn, and Talas. CIA Fact book, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/kg.html>

34 Lawyers from different regions in Kyrgyzstan had different regional nuances. For example, the southern part of the country is normally considered more conservative and has stronger religious traditions. The northern part of the country is considered to be more liberal and slightly more secular. Thus, some of the responses could be viewed through this lens.



Before, during and after the assessment mission, the team has met and/or talked to many local advocates, human rights defenders, lawyers, journalists, representatives from the Kyrgyz Advokatura<sup>35</sup>, including its council, the representatives of ethics commission, and the committee on protection of advocates' professional rights, Advocates' Training Center (ATC),<sup>36</sup> the staff of the ABA's ROLI office in Bishkek, local human rights organizations, the Human Rights office of the European Union Delegation in Kyrgyzstan, USAID's Democracy and Governance office, and U.S. Embassy representatives. The team also conducted three separate workshops and one large-scale academic presentation with the aim of raising awareness to the importance of the protections of the rights of the advocates, focusing on international standards and describing the best practices in these matters, as well as answering the questions from a young generation of future lawyers and advocates.<sup>37</sup>

One of the challenges was to conduct the assessment in as independent manner as possible. Due to the sensitive nature of the cases local advocates were working on, the local cultural settings, and internal working relationships, many local attorneys expressed concerns about openly providing information and their views on the topics asked<sup>38</sup>. Therefore, while conducting preliminary preparatory work, it was decided to rely on independent experts outside of Kyrgyzstan to process, compile and analyze the data to ensure objective outcomes and preserve the confidentiality and security of the participants. However, the team, of course, received assistance from local partners and experts in gathering the confidential responses of the surveys and other data.

Another challenge was the limited budget for this mission. Therefore, the scope and the magnitude of the assessment is limited and is aiming at identifying major trends based on anecdotal data and personal perceptions of the respondents. For these reasons, the project did not employ social scientists to design the questions, nor professional polling organizations to conduct the surveys, rather the team based the assessment on the main concepts of protections and guarantees for the lawyers as established by international and local standards. The findings of the assessment will be a valuable contribution to the beginning of the conversation on how to better protect local advocates and lawyers, as we continue our work supporting them in the region.

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35 The meeting took place in the office of the Advokatura's secretariat, see <http://www.advokatura.kg/news/vstrecha-s-eksper-tami>.

36 The meetings, discussions and workshop took place at the ATC office and was covered by the ATC <http://centradvokatov.kg/news/seminar-i-gostevaya-lektsiya-5-iyunya-2018-goda/>

37 The first workshop was a small gathering of advocates who traveled from different regions/oblasts of Kyrgyzstan including Osh, Djalal-Abad, Issyk-Kul, Naryn, Talas, Chui. The regional advocates highlighted the situation in various oblasts, the second workshop was aimed at gathering perspectives on the matters at hand from a cross sectional points of view provided by local human rights defenders, activists, journalists, and lawyers. The third workshop was aimed to gather advocates from Chui oblast and the capital of Bishkek at the ATC. During this event, the team made an interactive presentation and engaged into in-depth discussions on the topic. The team also conducted a large-scale academic lecture at a local leading law school where over 160 students and practitioners attended and expressed interest in the topic.

38 All surveys are confidential and information is being used for the strict purposes of this report. The specific instances that indicate the names of the advocates were used only with their consent and/or if their names were already made public in the local media.

## V. MAIN AREAS OF LEGAL PROTECTIONS FOR ADVOCATES AND LAWYERS

1. Access to the Legal Profession
  - a. Definition and International Standards

While it is very important to have a non-discriminatory system to access legal profession and adequate professional training, it is also vital to have an independent body that oversees the qualification process. International principles recognize that there should be no discriminatory barriers to entry into the profession based on, for example, race, sex, ethnicity, religion, or national origin.<sup>39</sup> However, the states are free to require non-discriminatory conditions for authorization to practice as lawyers, such as education and working experience. The states also allowed to make distinctions between different categories of lawyers in terms of qualifications to appear for certain courts, for examples, in many countries only certain categories of lawyers are allowed to appear before appeal courts and Supreme courts. In addition to a non-discriminatory entry process, countries should allow and encourage proper training of their lawyers because professional qualifications of lawyers are of the utmost importance in the justice system. The UN Human Rights Council has stated that lawyers should: "possess the professional qualifications required for the performance of their functions through improved methods of recruitment and legal and professional training, and through the provision of all necessary means for the proper performance of their role in ensuring the rule of law."<sup>40</sup>

Further, the training of lawyers and the qualification process should be the responsibility of an independent body which is subject to review.<sup>41</sup> The UN Special Rapporteur on the independence of judges and lawyers has often expressed concerns about situations where the entry into or continued practice within the legal profession is conditioned or controlled by the executive branch.<sup>42</sup> The Council of Europe also stated that "decisions concerning the authorization to practice as a lawyers or to accede to this profession, should be taken by an independent body. Such decisions, whether or not they are taken by an independent body, should be subject to a review by an independent and impartial judicial authority."<sup>43</sup>

39 Basic Principles, *supra* note 18, Principle 10.

40 Resolution adopted by the Human Rights Council, 23/6, Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, 19 June 2013, A/HRC/RES/23/6, Preamble.

41 Council of Europe, Recommendation No. R(2000)21 of the Council of Europe Committee of Ministers

42 The UN Special Rapporteur on the independence of judges and lawyers Report on Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/264/93/PDF/N1626493.pdf?OpenElement>

43 Council of Europe, Recommendation No. R(2000)21, Principle I(2), available at [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016804d0fc8](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804d0fc8) (last visited, September 15, 2018).

## b. Treatment in Kyrgyz Law

In Kyrgyzstan, anyone who has graduated from law school (a four to five year undergraduate degree) can work as a lawyer. Further, there are two classes of lawyers : licensed lawyers ("advocates," "attorneys"), and unlicensed lawyers ("lawyers").<sup>44</sup> Advocates have the right to practice law in all types of cases, including in criminal cases, while unlicensed lawyers may provide representation only in civil, administrative and economic cases.<sup>45</sup> Advocates and unlicensed lawyers vary in a number of other important ways as well. For example, advocates are required to follow ethical guidelines while unlicensed lawyers have no formalized rules of ethics, advocates are nationally registered and must be members of the Advokatura while unlicensed lawyers are not registered and are not required to be members of a lawyers' association, and finally, under the national law, advocates are guaranteed independence in their professional activities while unlicensed lawyers are not. The New Law regulates the licensure of advocates. An advocate is a citizen of the Kyrgyz Republic who has been duly licensed to engage in advocate activity and is a member of the Bar (Advokatura) of the Kyrgyz Republic.<sup>46</sup> A license is generally granted to a citizen of the Kyrgyz Republic with higher legal education, with one year of experience, who has passed the qualification exam.<sup>47</sup> Individuals with experience in certain fields may be granted a license without passing the qualification exam.<sup>48</sup> The qualification exam is given by and the license is granted by the Ministry of Justice.<sup>49</sup> According to local law, the make-up of the qualification commission is determined by the Advokatura, and a majority (four out of seven members) must be members of the Advokatura.<sup>50</sup> The law specifies the process of the exam, the passing scores,<sup>51</sup> and a right to appeal the decision in a local court.<sup>52</sup>

The New Law does not regulate the practice of unlicensed lawyers, and there are no laws which specifically protect the freedom to practice law of unlicensed lawyers.<sup>53</sup> That said, a lawyer does have some general procedural guarantees as defined by the Civil Procedure Code which is granted to all representatives not specifically lawyers. For example, a representative has the right to conduct any procedural actions on behalf of his or her client.<sup>54</sup>

44 ROLI Index, *supra* note 8, at 5.

45 *Ibid* at 11.

46 The New Law, art. 15.

47 The New Law, art. 19, para 1

48 The New Law, art. 19, para 4. A license may be granted without passing the exam if the applicant has five years of experience in the following fields: 1) investigative services of law-enforcement bodies; 2) as a judge; 3) as a member of the staff of the President, Parliament or Government of the Kyrgyz Republic, in a position that requires higher legal education; 4) as a member of the Parliament, who has completed higher legal education.

49 The New Law, art. 21.

50 The number of members of qualification commission is seven and is comprised from three MOJ representatives and four Advokatura representatives. See the New Law, article 21, para 2.

51 The passing of the exam is considered if applicant answered 70% of the questions correctly. See article 21, para 4.

52 The decision may be challenged in a local court within 30 days from the date the decision was made. See article 21, para 5

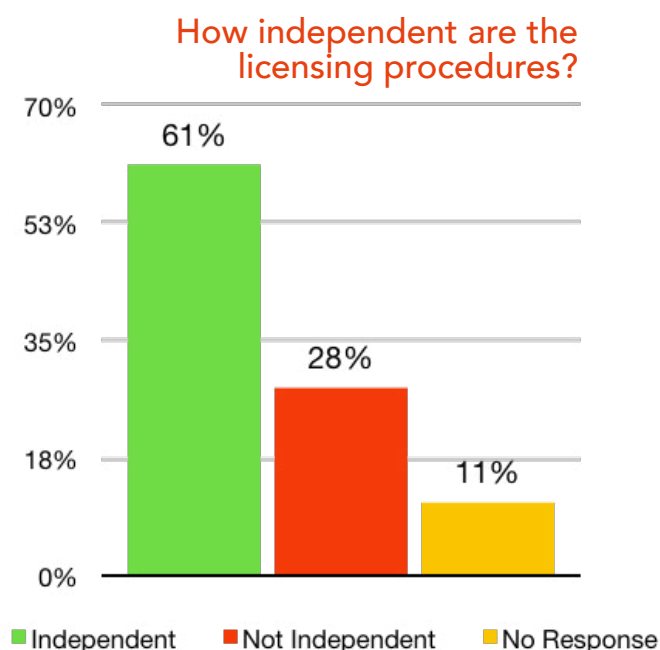
53 ROLI Index, *supra* note 8, at 5

54 Civil Procedure Code of the Kyrgyz Republic No. 146 of December 29, 1999, art. 58, para 1, available at [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=447197](http://www.wipo.int/wipolex/en/text.jsp?file_id=447197) (last visited August 16, 2018).

### c. Survey results

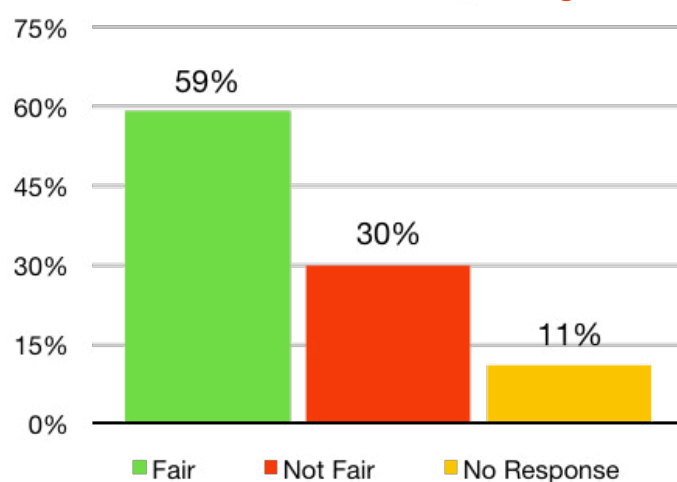
Specific cases that attorneys shared with us were the following: one lawyer was not able to pass the exam and when he asked the qualification commission to see the results, he was refused, stating that it is not allowed under the law. The lawyer used the protocol established under the law and appealed this decision to a local court, however, the court did not hear the case, and the lawyer was not able to challenge the decision. Later, the lawyer took the exam again and passed. Another lawyer took the exam three times and was not successful. He theorized he was discriminated against because he was working as a human rights defender and that his professional activities supporting human rights were the true reason he did not receive a license and was unable to see the results of his tests.

The majority of the respondents, 61%, felt that the procedures for licensing and admission to the profession of advocate was independent of various factors including political or other types of pressure, make-up of the qualification commission, decisions making process and others. That said, 28% of the respondents replied negatively stating that the process is not independent, with majority of those explaining that licensing process is controlled by the Ministry of Justice which may open an avenue to exert pressure on what should be an independent process. One respondent reported that there is a presence of corruption in the process, and others indicated the lack of transparency. One gave a specific example of an applicant, who worked as a human rights defender, being denied access to the legal profession three times as a result of his activities supporting human rights. When the applicant appealed and requested to see the results, he was not allowed to access that information, making it difficult for an unsuccessful applicant to determine the reasons for not passing the exam.



Further, while the majority, 59% of the respondents, say that the exam itself is fair, 30% noted that the exam is not transparent, defined nor predictable. One respondent noted that this lack of transparency raises the potential of applicants using corrupt means to have their scores on the exam changed to passing. Two respondents raised the issue that the topics covered in the exam were not necessarily the most important topics required to become a successful advocate. Legal rhetoric and critical reasoning, in particular, were areas mentioned that were needed in practice, but not covered by the exam. Again, the majority of respondents reported not having to take advantage of the existing appeals mechanisms in case of not passing the exam. A minority of respondents reported that the process is weighted against the applicant, and that appeals generally cover the ability of applicants to sit for the test and not the actual results of the test itself. Others reported that it was possible to also appeal the results of the test to the qualification commission itself in addition to the courts. Others noted that the various regulations regarding appeals procedures are contradictory.

### How fair is the licensing exam?



## d. Summary and Recommendations

Overall results indicated that the process of access to the legal profession was largely independent with little interference or pressure. While the MOJ's qualification commission, an organ conducting the licensing procedures, still remains under the executive branch, the majority of the respondents perceived the commission as independent. The procedures of the exams were procedures should be improved and that applicants who failed the exam should be able to have better access to their results.

However, it is imperative for the bar association to be viewed as independent from any form of influence, especially from any political pressure by the executive branch. The fact that the licensing process is still under the MOJ creates a public perception of the executive branch having possible influence on a lawyer's independence in accessing the legal profession.

It is our recommendation that the Advocatura will take the licensing functions upon itself to avoid even the perception of dependence upon the Executive. However, taking on this additional responsibility could raise capacity and funding issues for the Advokatura, so any transitions must be done with planning and transparency.

Other recommendations include making the procedures of the appeal process more transparent, allowing applicants access to their test results and raising awareness among the applicants about the licensing procedures in advance of the exam, with highlighting to applicants their rights to appeal the decision if the exam is unsuccessful.

## 2. Right to Independent Practice

### a. Definition and International Standards

The right to independent practice means that a lawyer is afforded the protections necessary to allow him to perform the appropriate functions required for the effective representation of his client without intimidation, hindrance, harassment, or other improper interference by the state, those representing the state, or non-state actors. Where the lawyer does face threats or intimidation in the fulfillment of his duties, the state offers safeguards and protections.

International standards require that states establish conditions which allow lawyers to discharge their professional duties and functions freely and independently and ensure that their role is protected. Where the government has properly established these conditions, lawyers are able to defend their clients in accordance with the law, and free from external pressures and interference<sup>55</sup>.

Specifically, under international standards, governments must guarantee that lawyers:

- a. Are able to perform their professional functions without intimidation, hindrance, harassment or improper interference;
- b. Are able to travel and to consult with their clients freely both within their own country and abroad; and
- c. Shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.<sup>56</sup>

The Basic Principles on the Role of Lawyers further require that if a lawyer does face threats or intimidation as a result of their work, the government must safeguard the lawyer.<sup>57</sup> While states are under the duty to protect lawyers from undue interference from authorities, they should also remove third party's obstacles to the independence of lawyers.<sup>58</sup> In this section, we are focusing on instances of violations of advocates professional rights perpetrated by non-state actors, in the following section, we will be describing the cases where the state actors are the perpetrators.

55 THE INTERNATIONAL COMMISSION OF JURISTS, INDEPENDENCE OF THE LEGAL PROFESSION IN CENTRAL ASIA, pg. 55.

56 Basic Principles, supra note 18., Principle 16

57 Basic Principles, supra note 18., Principle 17.

58 "Lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognized professional ethics without restrictions, influence, pressure or undue interference from any quarter." Human Rights Committee, General Comment No. 31 – CCPR/GC/32, par 34.



## b. Treatment in Kyrgyz Law

The independence of advocates' is guaranteed by the New Law.<sup>59</sup> Specifically, the law prohibits interference or obstruction of lawful advocate activities<sup>60</sup> and the same article of the law states that an advocate should not be restricted in any way and should be allowed to freely choose the means and method for carrying out his legal work.<sup>61</sup> Interference with such work is punishable under local legislation. The article further establishes that an advocate cannot be punished for expressing his opinion while fulfilling his professional duties and a criminal case, stemming from attorney's professional activities, against the attorney can only be opened by the Prosecutor General or his deputy.<sup>62</sup> Documents related to the lawyer's professional activities may only be seized if the lawyer becomes a criminal defendant, similarly a court order is needed to search, seize, arrest, withhold, possess his property, communications and person at his dwelling or office when it results from his advocate's activities unless he is apprehended during commission of a criminal act, or in other cases as determined by law.<sup>63</sup> Lawyer-client confidentiality is established by the law<sup>64</sup> and a lawyer cannot be called as a witness in a case, or deposed, where the statements are protected by the privilege.<sup>65</sup> As we mentioned earlier, unlicensed lawyers have no codified guarantee of independence under the Kyrgyz law.

The committee on protection of professional rights of advocates is established under the Advokatura.<sup>66</sup> The committee has its provision that regulates its activities and it was adopted by the Advokatura in 2015. The committee consist of seven members who are proposed by the committee itself and confirmed by the Advokatura's council. The committee is tasked with providing legal assistance to the advocates in need representing them and conducting measures to prevent violations against advocates.<sup>67</sup> For example, the committee was active in assisting the attorney Khusanbay Saliev, when local authorities conducted an illegal search and seizure at his residence and office.

However, it was reported to us that the committee does not have its own budget, thus, it is challenging to implement the provisions in practice. Though advocates who experience challenging situations are able to request assistance from the committee, it is not always easy to respond quickly.

59 The New Law, art. 17.

60 The New Law, art. 29, para 1.

61 Id.

62 The New Law, art. 29, para 3.

63 The New Law, art. 29, para 4 and 5.

64 The New Law, art. 30.

65 The New Law, art. 29, para 6.

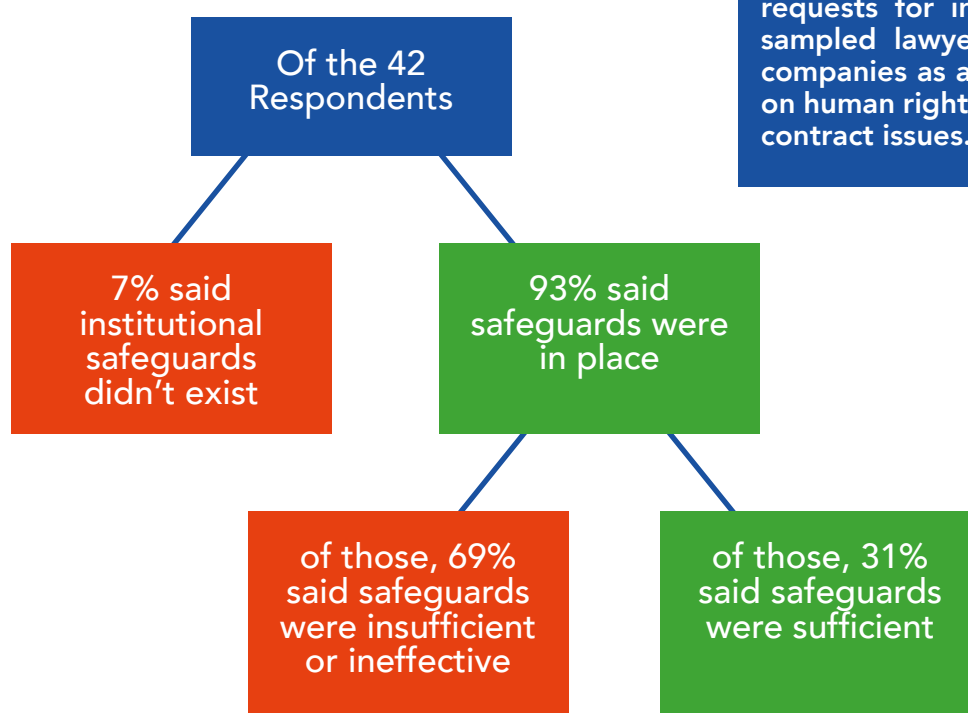
66 The committee was established by the Advokatura on May 29th, 2015, see more at <http://www.advokatura.kg/komitet-po-zashchite-professionalnyh-prav-advokatov>

67 Id.

### c. Survey results

The right to independent practice in this section focuses on threats and intimidation advocates and lawyers face from any non-state actor including societal and private actors. Threats, harassment and undue interferences from government actors will be addressed in the next chapter.

As to organized private obstruction to lawyers' work, one lawyer reported a private company organizing pickets at his place of work as an attempt to hinder his work. Three other lawyers reported difficulty in companies and opposing parties complying with requests for information. It is possible the sampled lawyers faced fewer threats from companies as a result of their focus primarily on human rights issues and not commercial or contract issues.



Thirty-nine, or 93%, of the respondents overwhelmingly agreed that there were existing protections in Kyrgyz legislation protecting the independence of advocates. A number of respondents pointed to the Articles 318-1, 319, and 320 of the Criminal Code of the Kyrgyz Republic as the primary safeguards for lawyers. Of the thirty-nine lawyers or 93 % who believed that there were existing safeguards in Kyrgyz law, 69 % explicitly stated that these safeguards were not sufficient. Of the remaining 31 % several stated that while the safeguards are in theory sufficient, they are not implemented in practice, either because lawyers themselves do not take advantage of the existing procedures or because of a reluctance by either the Prosecutor's Office or the State National Security Committee (also called GKNB) to initiate cases. Those who said that the safeguards are not sufficient, suggested strengthening the sanctions against those impeding the work of lawyers in criminal, civil and administrative legislations; making the

safeguards closer to those afforded to judges; and encouraging State structures to provide any available information related to such cases. Another respondent suggested increasing the number of judges available to hear cases related to the independence of lawyers.

The first issue identified by respondents was related to a cultural misunderstanding of the role of lawyers, the overall low status of the advocates in society and a tendency to confuse the interests of the lawyer with the interests of the client. The majority, twenty-nine, or 69%, of the respondents, indicated that they believed lawyers' rights were limited or violated in the last five years. 24% of all attorneys reported being threatened, physically attacked, and intimidated by non-state actors, private parties including opposing clients, their family members and private citizens. Some lawyers also reported being attacked by their own clients when cases were not decided in their favor.

Respondents provided examples and instances of such harassment and pressure that they experienced themselves or know of other lawyers who did, perpetrated by non-state actors and private parties, some of these instances were publicly covered by the media or rights organizations, while other cases were not. Here are a few examples based on the responses and other available reports: in the aftermath of the ethnic conflicts of 2010<sup>68</sup> in the south of Kyrgyzstan, there were many instances reported of the attacks on attorneys who were working on the cases stemming from these events.<sup>69</sup> For example, on August 20th, 2013, two attorneys Dinara Medetova and Kuban Joroev, were attacked by a crowd of “aggressive women” in the building of the Osh oblast court.<sup>70</sup> Attorney Kalybai Pratov who had been working on the same case had been attacked previously.<sup>71</sup> Such attacks even took place in the building of the Supreme Court of Kyrgyzstan. On April 2, 2013, attorneys Tatyana Tomina<sup>72</sup> and Ulugbek Usmanov and the relatives of their clients were attacked by the relatives of the opposing side before and during the hearing.<sup>73</sup>

On January 12, 2017, an attorney, Aisalkyn Karabaeva, was physically attacked in the building of the local Nookat regional court.<sup>74</sup> The advocate was representing a minor, a victim, in a criminal case. The opposing side’s relatives attacked the attorney and her client. The overall atmosphere in this case was very difficult, as the client’s family and relatives were consistently pressured and attacked by the accused’s family. Eventually the client’s family had to move and separated to escape the pressure - the mother and the children left to the North of the country and the husband left to another country. The attorney was identi-

fied with her client and was intimidated and attacked as a result of her work.

On April 28, 2017, two female advocates from Osh<sup>75</sup>, Aisalkyn Karabaeva, who already was attacked before, and Myhayo Abduraupova<sup>76</sup>, who also was intimidated before in other cases, were assaulted and physically attacked by a crowd of people at the Osh city court building, as a result of attorneys’ activities representing their client. According to the attorneys, they represented a client in a different, unrelated matter and the client had alleged personal connections to a deceased local policeman. The policeman’s family wanted to retaliate against the client and her attorneys, so they appeared at the client’s court hearing and physically attacked the attorneys. The attorneys highlighted the fact that the crowd was informed about dates and times of the hearings and other legal proceedings of the client’s case, a matter unrelated to the deceased policeman case. The scheduling information was privileged and known only to the investigators and court employees. The attorneys pressed charges and requested that law enforcement bodies investigate the attacks, however, the investigators failed to do so. When the attorneys appealed to the court, the court found for the attorneys and held that there was a failure to investigate. However, the prosecutors made a decision not to pursue the case, arguing that they could not identify those who attacked the attorneys.

68 Following the 2010 elections ethnic violence broke out in southern Kyrgyzstan between Kyrgyz and Uzbek peoples. The Red Cross estimated that 700 people died and more than 80,000 were displaced. The law enforcement reaction disproportionately affected ethnic Uzbeks with ethnic Uzbeks accounting for both 70 percent of casualties and 80 percent of those charged. Those charged were not provided with a fair trial. The United States Department of State reported that the trials of those charged in the 2010 clashes experienced “pervasive violations of the right to a fair trial, including coerced confessions, use of torture, denial of access to counsel, threats and acts of violence against defendants and defense attorneys within and outside of the courtroom, intimidation of trial judges by victims’ relatives and friends, and convictions in the absence of condemning evidence or despite exculpatory evidence.” United States Department of State, Kyrgyz Republic 2011 Human Rights Report (2012) <https://www.state.gov/documents/organization/186678.pdf> (last visited August 15, 2018); see also Michael Schwirt & Ellen Barry, Russia Weighs Pleas to Step In as Uzbeks Flee Kyrgyzstan The New York Times (2010), <https://www.nytimes.com/2010/06/15/world/asia/15kyrgyz.html?src=mv> (last visited Aug 15, 2018).

69 There are many sources and materials exists that covered this problem after the 2010 events. See International Commission of Jurists’s statements at <https://www.icj.org/kyrgyzstan-measures-to-end-attacks-on-lawyers-and-defendants-urgently-needed/> See news report on this practice at <https://www.ktk.kz/ru/news/video/2010/11/09/10461>

70 These events were covered broadly by rights organizations as well, see <http://golos.kg/?p=13295>

71 Id.

72 Tatyana Tomina, is a well-known advocate working in Osh, was attacked many times during her professional career. See more at <http://www.fergananews.com/articles/7284>

73 This case was public as well, see <http://www.fergananews.com/articles/7284> , and <https://www.icj.org/kyrgyzstan-icj-condemns-assaults-on-lawyers-in-supreme-court/>

74 This case also was highlighted by the local media and human rights organizations, see <http://golos.kg/?p=35990>

75 This case was also publicized by the local media and human rights organizations, see at <http://golos.kg/?p=35779>

76 Muhayo Abduraupova is a well-known attorney from the South of Kyrgyzstan, she works on sensitive cases and as a result is often under pressure. She is also involved in the work for a local non-profit organization “Positive Dialog” that supports the rights of women and girls. For more information about Muhayo, please see <https://www.justiceinternational.net/single-post/2017/11/25/Justice-by-women-for-women>

In May 2018, in Osh oblast court, attorney Ramazzan Kojomkulov was physically attacked by the relatives of the opposing side in a case of the murder of policeman Taiyr Ularov.<sup>77</sup> The attorney was representing defendants in this case and had already been attacked previously. The attorney had asked the court to provide security in the court building in order to conduct the hearing, however, the physical violence repeated.

Another attorney indicated multiple instances of threats and intimidations perpetrated by private parties during the last five years of her practice. The first instance was when the attorney was representing a client in a divorce case, the client's husband contacted the attorney and threatened the attorney to stop the representation of his wife's interests. The second instance took place in 2014 when she was pressured by the opposing side to drop the case representing a client in a case involving financial compensation to the client. The client died in 2017 and the compensation is still not paid. Another two examples were given about two separate cases where opposing sides were intimidating and threatening the attorneys during the hearings in a courtroom in front of the presiding judge. The courts ignored the threats against the attorneys made during the hearing and did not act to stop them.

One other attorney described instances of pressure and intimidation by private parties when he was fulfilling his obligation as an advocate. In the first case, the opposing side in a large theft case was threatened by the other side to drop his representation of the defendant. Another case of attorney intimidation was when the client himself threatened the attorney because the decision of the court didn't satisfy him.

One more attorney was the subject of the threats and physical attacks by the family of the opposing side in a case of a traffic accident. Similarly, another attorney and his family were threatened by the opposing side in two separate cases to drop the case representing the client.

<sup>77</sup> This case was also highlighted in the local press, available in Russian at [https://24.kg/proisshestvija/84178\\_vgorodeosh\\_iz-bili\\_advokata/](https://24.kg/proisshestvija/84178_vgorodeosh_iz-bili_advokata/) and <http://paruskg.info/novosti/153864-v-gorode-osh-izbili-advokata.html>, also at <http://www.centrasia.ru/news2.php?st=1527137820>.

## d. Summary and Recommendations

While the overwhelming majority, 93%, of the respondents indicated that there are safeguards in place in laws, the trend shows that in practice, the majority of respondents, 69 % of all respondents stated that those safeguards are not sufficient. 24% of the respondents experienced pressure, threats and intimidation themselves as a result of their professional activities as lawyers and indicated that attacks they had experienced were perpetrated by private parties, mostly families and relatives of the opposing side, and non-government actors. However, since such attacks in many cases were not investigated, prosecuted and heard in court, the perpetrators are not punished, and such negative experiences continue, contributing to the overall low culture of the respect of the rule of law and disrespect of the legal profession.

First, it is our recommendation that the government shall publicly condemn at all levels any attack and other acts of harassments against lawyers, and actively seek to prevent such acts by adequate measures, including public information campaigns about the role of lawyers to increase understanding, respect and status of lawyers, adequate protection of lawyers in court where appropriate and properly investigate any attacks against lawyers to identify and prosecute perpetrators and combat impunity. The Government should take all necessary measures to enable lawyers to do their work without threats, harassment and intimidations and to ensure that safeguards are put in place to guarantee the independence of the legal profession as well as the liberty and security of lawyers. Where state authorities refrain from attacking lawyers themselves, they still may contribute to an environment that is hostile to lawyers, by failing to publicly condemn such attacks and to begin proper investigations to arrest and prosecute the perpetrators of attacks against lawyers. However, having been working on the rule of law issues in the region for many years, we can attest that the implementation of the laws remains one of the most difficult and important factors in the process of legal reform.<sup>78</sup>

Secondly, it is our recommendation that the attorneys should follow the local legal procedures and file reports

and create a record with local law enforcement and Advokatura at every instance of such abuse, threat or intimidation.

As it was indicated above, the committee for protection of professional rights of advocates exists at the Advokatura, however, the budget and resources to support the functions of this committee are still lacking.<sup>79</sup> While the legal mandate of the functions of this committee was adopted in 2015 and amended in 2016, it is still challenging to implement the provisions in practice.<sup>80</sup> It was reported that the procedures of filing the advocate's request for assistance were not flexible enough to provide for rapid interference and assistance, and sometimes the responses were delayed.<sup>81</sup> Overall expectations for this committee from local advocates are very high, however. We recommend the Advokatura to continue supporting its committee on protection of professional rights of advocates with additional funding in order to have regional representatives, allowing them to be able to respond rapidly when advocates' requests are time-sensitive and are geographically remote.

It is also our recommendation that other stakeholders working locally on supporting the advocates and legal defense community assist with increasing public awareness among the local population on the role of advocates and the importance of a functioning legal system. Transparency is also essential, so we recommend those stakeholders also highlight instances of violations and specific violation cases, either through social media campaigns, public service announcements, or educational events.

78 The Implementation and Protection of the Principles of the Rule of Law in Georgia, The Republic of Lithuania, The Republic of Moldova, and Ukraine (Prof. Dr. Dainius Žalimas & Dr. Ieva Saudargaitė ed., 2016) available at [http://www.lrkt.lt/data/public/uploads/2016/12/31449\\_konstitucinis\\_teisines\\_valstybes.pdf](http://www.lrkt.lt/data/public/uploads/2016/12/31449_konstitucinis_teisines_valstybes.pdf) (last visited August 16, 2018) (A compendium of reports from the International Conference of the Justices of the Constitutional Courts of Georgia, the Republic of Lithuania, the Republic of Moldova, and Ukraine which discuss the issues associated with the introduction and implementation of the Rule of Law).

79 We were told that it's a still new concept for some attorneys to pay the Bar membership fees, the poor economic state and wide spread corruption contribute to this challenge. There is a low understanding of the functions of the Advokatura and the committee on advocates' protection where its members have to act promptly and independently to respond to its member's requests for help.

80 Meeting with the members of the Advokatura

81 Meetings with local advocates where it was reported that sometimes committee's responses were delayed or missing at all.

### 3. Professional Immunity

#### a. Definition and International Standards

“Professional immunity” means that the lawyer is not personally identified with the client or the client’s causes. This means that both officially and unofficially the lawyer does not suffer repercussions based on his representation of the client. The lawyer is not criminally or civilly liable for the actions of the client. The lawyer is not subject to nor threatened with prosecution, administrative sanctions or other punitive measure due to actions taken or statements made in good faith in the lawyer’s professional capacity. Further, the lawyer is not subject to threats, harassment or other harm by third parties due to his work as a lawyer.

Principle 18 of the Basic Principles on the Role of Lawyers states that “Lawyers shall not be identified with their clients or their clients’ causes as a result of discharging their functions”.<sup>82</sup> This principle is widely recognized in international law. For example, the former Special Rapporteur on the independence of judges and lawyers has stated that “identifying lawyers with their clients’ causes [...] could be construed as intimidating and harassing the lawyers.”<sup>83</sup> He went on to emphasize that governments have an obligation to protect the lawyers from intimidation and harassment, including intimidation based on the lawyer being identified with the clients’ cause.

#### b. Treatment in Kyrgyz Law

According to the Article 29, Paragraph 3, of the New Law, an advocate cannot be held liable for opinions expressed in the course of providing legal assistance. Criminal prosecution for professional activities is not absolutely excluded, but can only be initiated against an advocate by the Prosecutor General of the Kyrgyz Republic or his or her deputy.<sup>84</sup> A warrant is required before any search or seizure of advocate’s home, office, or vehicle,<sup>85</sup> and the warrant can be issued by the prosecutor. The Advokatura and the MOJ must be notified immediately of initiation of criminal proceedings against an advocate, as well as an advocate’s indictment, arrest, or detention.<sup>86</sup> The law specifically states that advocates are not identified with their clients or with their clients’ interests.<sup>87</sup>

As in other areas, lawyers who are not licensed advocates do not have the guarantees of immunity of the New Law, and the Civil Procedure Code also does not include any professional immunity guarantees for lawyers representing clients in civil, administrative, and economic cases

82 Basic Principles *supra* note 18. This could also be the case when any action taken not in accordance with or in violation with recognized professional duties, standards and ethics.

83 Report of the Special Rapporteur on the Independence of Judges and Lawyers, UN document E/CN 4/1998/39, at 179.

84 The New Law, art. 29, para 3.

85 *Id.*, para 4.

86 The New Law, art. 29, para 7.

87 The New Law, art. 17, para 2



### c. Survey results

The legal protections discussed in the previous chapter are also relevant as protections from interference from governmental actors. As we have seen from the previous numbers, 69% of respondents stated that the rights and immunities of lawyers have been violated and 67% stated that these infringements have a negative impact on them or their clients. When asked about specific examples of violations of rights of lawyers, 59% of the respondents stated that they know of such violations and 54% stated that they experienced general pressure, threats and intimidation themselves. Their examples followed closely to those described in the previous section.

Further, when asked about the actors who caused the violations, 38% of the respondents reported that they either personally were harassed or knew someone who had been harassed by the law enforcement. 9.5% of the respondents reported to have had criminal cases opened against them as a result of their professional activities, while 40% stated that they know of other lawyers being criminally investigated due to their work.

The specific details that respondents gave pointed to intimidation, procedural obstacles, criminal investigations, and searches of homes and offices as the primary issues. Another lawyer said that in addition to law enforcement agencies, lawyers could be intimidated through the tax laws of Kyrgyzstan.

The one area where there were fairly low numbers of reports was on the question of the pressure and harassment put on the friends and family of lawyers. About 19% reported instances of such nature where the families and/or relatives were directly or indirectly affected by the attorneys' work. Overall, however, a number of respondents stated that they did not feel intimidated by this harassment and did not allow it to influence their work.

There are following instances and examples based on responses and public reports:



On July 4, 2013, an attorney from Osh, Nazgul Suyunbaeva,<sup>88</sup> was accompanying her client to his parole check-in, when they were apprehended by law enforcement agents. The agents wanted to detain her client, when the attorney inquired about the legal basis for the arrest she was physically attacked. After the agents injured the attorney's hand and took away car keys, the agents took the client away.

On May 1, 2014, an attorney in the city of Osh, Dinara Turdumatova<sup>89</sup>, was attacked<sup>90</sup> by an investigator when she complained that the records of statements by her clients were not accurate and wanted to record the discrepancy. The investigator "turned off the lights in the room", grabbed her by the hair and "several times hit her on the head." The attorney was in shock and she complained to the investigator's superiors and the prosecutor's office. In return, the law enforcement officer stated that the incident never happened and threatened to complain to the MOJ to withdraw her license.<sup>91</sup>

In 2015, Khusanbay Saliev<sup>92</sup>, a prominent attorney from Osh, and his partner were working on a case representing a client. As a result of this work, Saliev's residence and office were searched and many materials, documents, and files were seized. Based on the materials seized, the investigators asked prosecutors to open a criminal case against Saliev, stating that some of the seized materials were 'prohibited' anti-terrorism propaganda. However, the fact that these materials were given to the advocate by the investigator himself was ignored.

In 2017, Khusanbay Saliev again experienced pressure when investigators opened a criminal case against him on the pretext that he had resisted the implementation of investigative actions, using a press release that had been distributed as evidence. The investigators claimed that during the search of a client, the lawyer allegedly obstructed those collecting evidence. The lawyer claimed not to be in the area during the search, but rather the investigators found a brochure written by the lawyer entitled "Learn to defend your rights."

88 This was a public case as well, and the local media covered it [https://www.gezitter.org/society/21862\\_vyiyasnyayutsya\\_obstoyatelstva\\_izbieniya\\_advokata\\_suyunbaevoy/](https://www.gezitter.org/society/21862_vyiyasnyayutsya_obstoyatelstva_izbieniya_advokata_suyunbaevoy/). Nazgul Suyunbaeva was also threatened in a different case <http://kabarlar.org/news/16532-advokaty-iz-goroda-osh-poluchili-sms-soobscheniya-s-ugrozami.html>

89 This attorney previously received threats as a result of her professional activities in a different unrelated case, see <http://kabarlar.org/news/16532-advokaty-iz-goroda-osh-poluchili-sms-soobscheniya-s-ugrozami.html>

90 This case was also covered by the local media and local rights organizations, see [https://www.vb.kg/doc/271673\\_advokat\\_turdumatova:\\_sotrydniki\\_yvd\\_osh\\_obvinili\\_menia\\_v\\_sviaziah\\_s\\_opg.html](https://www.vb.kg/doc/271673_advokat_turdumatova:_sotrydniki_yvd_osh_obvinili_menia_v_sviaziah_s_opg.html)

91 See Id.

92 Khusanbay Saliev is a well-known lawyer from Osh, who works on sensitive cases and is often a target of threats and intimidation by both the state actors and private parties. He and his partner took the case against the Government based on the illegal search of their offices all the way to the Supreme Court and won the case. It was the first case of such nature.

## d. Summary and Recommendations

Based on the findings of this factor, advocates' professional immunities and protections need to be improved. Though only 9,5% of respondents have open criminal cases against them as a result of their work, the majority of the respondents were regularly harassed by low level investigators, prosecutors, court clerks, trial judges and others via lesser means of threats and intimidation such as derailment of investigations, complicating and/or omitting the procedural steps in the investigations, other bureaucratic obstacles. The trend appeared that the harassment and intimidation against attorneys conducted by the Government official did not carry political undertones, but rather was caused by overall lack of respect for the rule of law, low status of advocates and other legal professional, and lack of understanding and awareness of advocates' rights and immunities.

We recommend that government law enforcement bodies continue to educate their employees on the rights and immunities of lawyers and to fully investigate, prosecute and publicly condemn cases of intimidation and harassment of lawyers. The government should also ensure that the Basic Principles on the Role of Lawyers be brought to the attention of lawyers as well as other persons, such as judges, prosecutors, members of the executive and the legislature and the public in general.<sup>93</sup> Both the government and the Advokatura should promote programs to inform the public about the important role of lawyers in protecting their fundamental freedoms.<sup>94</sup>

As discussed previously, we recommend for the Advokatura to support its committee on the protection of lawyers with financial resources and established procedures for investigating reported incidents of harassment. We also recommend for the Advocates Training Center (ATC) to develop and teach specific courses on 'how to' challenge the most common bad practices of investigators and prosecutors during the investigative stages of the cases.

For the attorneys and the legal community at large, we recommend to make use of existing local procedures to lodge formal complaints and record instances of harassment. We also especially encourage the advocates to utilize UN HR legal mechanisms and special procedures, as well as the Universal Periodic Review procedures.<sup>95</sup> There are many tools exist to explain and assist the local attorneys in using these instruments.<sup>96</sup> Though at times it is challenging for local advocates to use international mechanisms as it is applied in local practice, it has tremendous long-term benefits.<sup>97</sup> Transparency is the best barrier to continued harassment, and this is best achieved through a comprehensive record of violations of lawyers' rights.

We recommend for the international community continue to engage with the government of Kyrgyzstan to ensure that the government complies with the requirements of the international agreements to which it is a signatory. The international community should also continue to publicly promote the importance of lawyers and respect for rule of law and associated benefits to Kyrgyz society, as well as participate and utilize the same international and regional mechanisms

<sup>93</sup> Basic Principles, *supra* note 18, Preamble par 10.

<sup>94</sup> *Id.*, Principle 4

<sup>95</sup> Please see <https://www.ohchr.org/en/hrbodies/sp/pages/welcomepage.aspx> and <https://www.ohchr.org/EN/Issues/SRHR-Defenders/Pages/Defender.aspx#ftn1>

<sup>96</sup> There are many sources that are designed to assist the public in using the UPR and other mechanism to better protect human rights. See <https://www.upr-info.org/en/upr-process/what-is-it>, <https://www.ohchr.org/en/hrbodies/upr/pages/UPRMain.aspx>, also <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=742C8431-9C25-4D0B-BB05-F7950B22B5C4>

<sup>97</sup> Among other benefits, a study of Belarus by Human Rights House found that using International Human Rights Mechanisms also assisted human rights defenders in a number of ways including though the fact of communication of an international body/procedure with the State concerning the resort, media support of a case, additional political lobbying, and the qualitative reasoning of submissions. It was also noted that cooperation between human rights organizations increased the level of competence of human rights defenders through their participation in educational programs and acquiring skills. Efficiency of the Use of International Human Rights Mechanisms in Respect of Belarus, Human Rights House Network.(2015) available at <http://humanrightshouse.org/noop-media/documents/20842.pdf> (last visited August 17, 2018).

## 4. Disciplinary Proceedings

### a. Definition and International Standards

The importance of clear ethical guidelines and an open and fair system of discipline for lawyers is clearly established in international law. The Principles on the Role of Lawyers state that there should be a code of professional conduct for lawyers; that lawyers have the right to a fair hearing; that disciplinary proceedings should be brought in an independent process; and that disciplinary proceedings should proceed in accordance with the code of professional conduct.<sup>98</sup>

### b. Treatment in Kyrgyz Law

Advocates in Kyrgyzstan have a formalized ethics and disciplinary system while unlicensed lawyers do not. Currently, there is a Professional Ethics Code<sup>99</sup> for the attorneys that was adopted by the Congress of Advocates on November 11, 2014, as required by the New Law.<sup>100</sup> The provisions of the Draft Code of Professional Ethics of Advocates (Draft Ethics Code) were set to be discussed and possibly adopted in July, 2018 at the Congress of Advocates, however, the Congress was rescheduled until “further legislative reforms”.<sup>101</sup>

Article 8 of the New Law provided for the creation of an ethics commission of the Advokatura and established its main provisions. The Advokatura adopted the internal regulation outlining the commission’s mandate on May 29, 2015.<sup>102</sup> The ethics commission has nine advocate members who are elected by the Congress of Advocates for a term of three years.<sup>103</sup> The commission reviews complaints and makes decisions by a simple majority vote of the members present (a quorum is established by the presence of 2/3 of the members).<sup>104</sup> As opposed to the international standards, the ethics commission is not completely independent as it works in partnership with

the Advokatura and the Ministry of Justice. The ethics commission sends its decisions to the council of the Advokatura who in turn makes recommendations to the MOJ on the suspension or termination of licenses.<sup>105</sup> The Ministry of Justice, according to article 22, may suspend, revoke, and terminate advocates’ licenses.<sup>106</sup>

The law provides for several reasons for the suspension of a license. For example, a license can be suspended if the advocate violates the Professional Ethics Code for the first time or if the advocate fails to pay his or her Advokatura membership dues.<sup>107</sup> An advocate’s license may be also revoked if the advocate is convicted of a crime or if the advocate commits a repeat violation of the Professional Ethics Code.<sup>108</sup> Other reasons for the termination of license include: at the advocate’s own request, on the loss of Kyrgyz citizenship, a situation when advocate is declared dead, missing, legally incompetent, or partially incompetent, on failure to obtain a license within a one-month period without valid reasons or failure to become a member of the Advokatura within one month of obtaining a license.<sup>109</sup> The MOJ’s decision is subject to appeal and must be filed within one month of the decision.<sup>110</sup>

98 Principles on the Role of Lawyers, Principles 26, 27, 28, and 29.

99 There is also a Draft Code of Professional Ethics of Advocates, available at [http://www.advokatura.kg/sites/default/files/documents/kodeks\\_professionalnoy\\_etiki\\_proekt.pdf](http://www.advokatura.kg/sites/default/files/documents/kodeks_professionalnoy_etiki_proekt.pdf). The discussions of the provisions of the Draft Ethics Code are ongoing, some attorneys are not supporting the new provisions arguing that the new norms will be putting constraints of attorney’s activities instead of supporting them.

100 The New Law, article 6, para 3-4.

101 Please see <http://www.advokatura.kg/news/ii-vneocherednyy-cezd-advokatov-kyrgyzskoy-respubliki-otlozhili>

102 Please see <http://www.advokatura.kg/komissiya-po-etike/polozhenie-o-komissii-po-etike>

103 The New Law, article 8, para 1, and article 6, para 3(5). Also, see Advokatura’s internal provision on the commission, available at <http://www.advokatura.kg/komissiya-po-etike/polozhenie-o-komissii-po-etike> (Hereinafter commission’s provision).

104 Id., see article 8, para 3-5.

105 Id., article 7, para 3 (9).

106 The New Law, article 22, para 1.

107 Id., article 22, para 2 (5 & 6), and para 3.

108 Id., article 22, para 4.

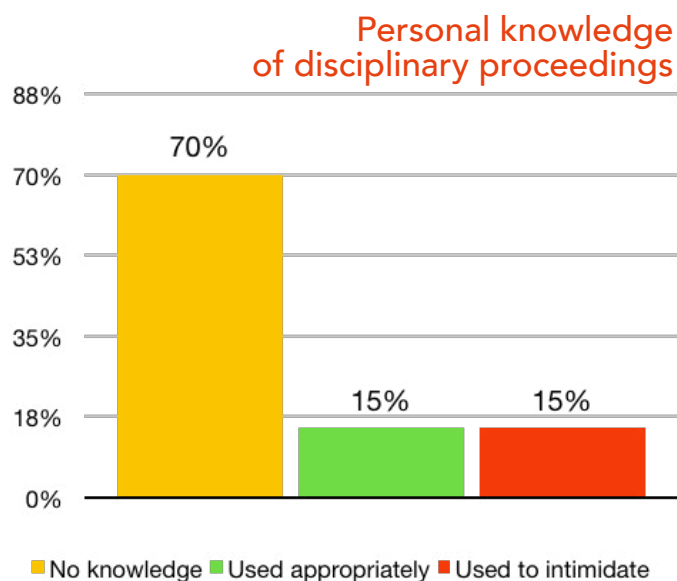
109 Id., article 22, para 5.

110 Id., para 6.

The New Law also establishes advocates' duties and responsibilities which include <sup>111</sup>:

- Mandatory membership in the Advokatura,
- A duty of care to their clients,
- A duty of confidentiality to their clients,
- The responsibility to improve their professional knowledge and qualifications at least once every three years,
- A prohibition on representing a client if this representation would be knowingly illegal in some way,
- A prohibition on assuming a position in a case contrary to the client's will,
- A prohibition from representation where there would be a conflict of interest.

### c. Survey Results



### d. Summary and Recommendations

Based on the findings, the trend appeared that it is not common for revocation and suspension of licenses to be used to harass advocates. That said, when it is used, it can be used in an arbitrary manner that can have profound effects on participants in court cases. A functional and independent ethics commission is an important part of improving the professionalism of the legal profession. As the standards of the legal profession are developing in Kyrgyzstan, the public should be able to be confident that all sides of court cases are impartially held to the highest standard.

When asked about whether disciplinary/licensing proceedings being used against advocates for misconduct or as a means of intimidation, only about 30% of the respondents reported knowledge of such proceedings taking place. And of those reporting such knowledge, majority gave additional details: half of the instances were related to lawyers failing to carry out their responsibilities to their clients and the other half of the respondents stated that disciplinary procedures were used to intimidate them in their professional context. Therefore, it appears that overall the licensing bodies and self-regulatory organizations are not often used to intimidate lawyers. Also, the respondents expressed hopes for the Advokatura and the ethics commission to provide better support for attorneys facing intimidation, such as conducting timely investigations and being more responsive to the attorney's requests.

One specific instance was described to us, when one attorney represented a client in a case against the GKNB. In an effort to intimidate the attorney, the GKNB requested the MOJ withdraw his license when he was actively representing his client in this case against the GKNB. The license was withdrawn without involving the disciplinary commission. However, once the attorney appeal the decision to the Advokatura, the license was restored.

We recommend the Advokatura to continue supporting its ethics commission with additional funding in order to support regional representatives, allowing them to be present when disciplinary hearings take place in areas outside the capital.

We recommend attorneys and the wider legal community expedite the review of the Draft Ethics Code and to adopt it as soon as possible in order to be complying with existing international standards in providing a basis for a strong professional legal community. By incorporating these ethical norms in everyday practice, the attorneys will be raising the bar for the whole legal system in terms of raising the status of advocates in the society as a whole. We recommend the international community to support programs on raising public awareness on the importance of these ethics norms of the legal profession for the advocates themselves and the public as a whole.

## 5. Access to Clients

### a. Definition and International Standards

In order to adequately represent clients, a lawyer's access to his or her client must be unimpeded by either state or societal forces. "Access to clients" is defined by several factors. First, the lawyer must have the right and ability to visit his clients freely and confidentially, including when the client is in detention. The ability to meet with his client confidentially means that the meeting cannot be overheard by anyone. Possible roadblocks to meeting with clients can come not only from state security forces, but also from societal forces or outside groups who threaten or intimidate lawyers, thereby preventing them from visiting their clients. Analysis of the role of societal forces is especially relevant in civil cases and other cases where the client is not in state detention.

Second, the lawyer has freedom of movement and is not prevented from domestic and/or international travel in order to consult with clients, gather information, or otherwise pursue work on behalf of his clients. As above, we must analyze both state and societal forces. Even if state forces do not prevent movement, if a lawyer is prevented from travel due to societal forces, he or she may not be able to truly provide effective representation.

Third, the lawyer has the right and ability to be present when his client is questioned by members of the executive or judicial branch including judges, prosecutors, investigators, and law enforcement officers. A lawyer is not able to provide effective representation if he or she is not allowed to be present at times when the client may make incriminating statements.

Finally, "access to clients" means "equality of arms." A lawyer has the right to be present before the court and to represent his client at all hearings, trials or other proceedings where his client's rights are or may be affected. Further, a lawyer must be given the same opportunities as

those given to the prosecutor to present evidence.

In international law, the right to consult with an attorney (access to an attorney) is strongly protected. Upon detention, a lawyer should be allowed to visit the detainee without delay, and at the very latest, not more than 48 hours from the time of the detention.<sup>112</sup> The prosecutors and/or investigators should not control when and for how long a lawyer may meet with their client.<sup>113</sup> The right to consult with an attorney includes the right to confidential communication.<sup>114</sup> Confidential communication means that no one, law enforcement or prosecutors included, should be able to overhear a meeting, although they may visually observe it.<sup>115</sup>

International law also recognizes that an essential part of a fair trial is "equality of arms". Lawyers for any party should receive the same procedural opportunities and be given the same rights in court.<sup>116</sup> In both law and in practice, equality between the defense and the prosecution should be observed both during the investigation and at trial.<sup>117</sup> This means that prior to trial defense lawyers must be allowed the time and resources necessary to gather evidence and to conduct their own investigation.<sup>118</sup> At trial, defense lawyers must be allowed to call witnesses under the same privileges afforded the prosecution.<sup>119</sup>

112 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 17 and 18; Basic Principles, *supra* note 18, Principle 7.

113 THE INTERNATIONAL COMMISSION OF JURISTS, INDEPENDENCE OF THE LEGAL PROFESSION IN CENTRAL ASIA, pg. 88.

114 THE INTERNATIONAL COMMISSION OF JURISTS, INDEPENDENCE OF THE LEGAL PROFESSION IN CENTRAL ASIA, pg. 51.

115 Basic Principles, *supra* note 18., Principle 16, principle 8; THE INTERNATIONAL COMMISSION OF JURISTS, INDEPENDENCE OF THE LEGAL PROFESSION IN CENTRAL ASIA, pg. 91.

116 UN HRC General Comment 32, CCPR/C/GC/32, 23 August 2007, section II; THE INTERNATIONAL COMMISSION OF JURISTS, INDEPENDENCE OF THE LEGAL PROFESSION IN CENTRAL ASIA, pg. 52

117 THE INTERNATIONAL COMMISSION OF JURISTS, INDEPENDENCE OF THE LEGAL PROFESSION IN CENTRAL ASIA, pg. 88.

118 THE INTERNATIONAL COMMISSION OF JURISTS, INDEPENDENCE OF THE LEGAL PROFESSION IN CENTRAL ASIA, pg. 89.

119 THE INTERNATIONAL COMMISSION OF JURISTS, INDEPENDENCE OF THE LEGAL PROFESSION IN CENTRAL ASIA, pg. 89.



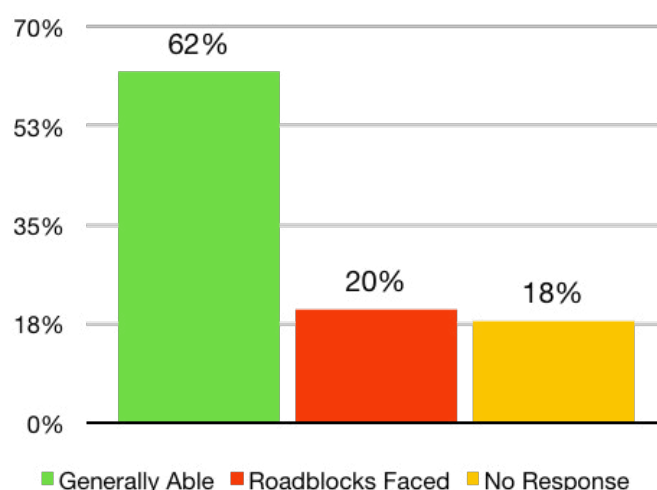
## b. Treatment in Kyrgyz Law

The rights of a detained individual to meet with an advocate are formally protected in the Kyrgyz Republic Criminal Procedure Code (CPC).<sup>120</sup> As in other areas, the rights pertaining to unlicensed lawyers are not strongly protected. From the moment of detention or interrogation, a person has the right to legal assistance from an advocate.<sup>121</sup> This right is not subject to any limits regarding the number or length of the meetings, and meetings also may occur on weekends.<sup>122</sup> Even persons who are charged with administrative misdemeanors have the right to meet with an advocate from the moment a report of a violation is drawn up.<sup>123</sup> If a detained person requests a meeting, the advocate must be notified as quickly as possible.<sup>124</sup> Advocates may meet with their detained clients simply by presenting confirmation of his or her representation of the detained person. Permission of an investigator, prosecutor, or judge is no longer required.<sup>125</sup> The law also protects the advocate's role in the judicial process in criminal matters. From the moment the client is arrested or is first questioned, the lawyer has the right to take part in the proceedings.<sup>126</sup> The law specifically provides that a lawyer in a criminal case may use any means of defense which is not contrary to the law.<sup>127</sup>

## c. Survey Results

When asked about access to clients either in or out of custody, 62% of advocates reported that generally they are able to consult with their clients. 20% of the respondents reported being hindered in meeting with clients or having heard of others being denied access. Those who provided details about their experiences, the majority reported that obstruction came in the form of bureaucratic roadblocks. Some reported that that officials needed to give permission to visit clients were suddenly unavailable; the clients were not found in the places of detention; officials hid the location clients were being held from the advocates; and investigators and police simply refused to provide information. Only one of the respondents reported personal threats intimidating them from meeting with clients.

### Are lawyers able to have private consultations with clients?



120 The Kyrgyz Republic Criminal Procedure Code, 40(1)(4), 42(1)(9), 44(3) <https://www.oecd.org/site/adboecdanti-corruptioninitiative/46816576.pdf> (last visited August 16, 2018).

121 Constitution of the Kyrgyz Republic, article 24(5), [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=458383](http://www.wipo.int/wipolex/en/text.jsp?file_id=458383) (last visited August 16, 2018).

122 ROLI Index, supra note 8, at 15.

123 ROLI Index, supra note 8, at 16.

124 Id.

125 ROLI Index, supra note 8, at 16.

126 THE INTERNATIONAL COMMISSION OF JURISTS, INDEPENDENCE OF THE LEGAL PROFESSION IN CENTRAL ASIA, pg. 66.

127 THE INTERNATIONAL COMMISSION OF JURISTS, INDEPENDENCE OF THE LEGAL PROFESSION IN CENTRAL ASIA, pg. 65.

## d. Summary and Recommendations

Based on the responses of the selected group, it appears that overall the advocates are able to consult their clients, though access to clients remains to be a problem for minority of the respondents. Advocates are denied the ability to consult with clients and do not have the confidence that they will be present at all hearings affecting their clients. While it appears that most violations of this kind are taking place at the local level, there was no evidence from the respondents that there was a coordinated effort by the Ministry of Justice or other law enforcement bodies to ensure that both lawyers' and clients' rights were respected.

The similar trend appears here as well - the lack of awareness of the attorneys' professional rights and immunities, low level of understanding of criminal procedures and international norms, and overall lack of respect for the rule of law.

We recommend that the Advokatura in coordination with the Ministry of Justice and Prosecutor's General office ensure that all places of detention have a written copy of the rules and regulations regarding lawyers' ability to consult with their clients. When these rights are violated, we recommend that lawyers make a formal report to the prosecutors office, Advokatura and that they raise the issue with the appropriate judicial authority as access to a client plays a direct role in the ability of a lawyer to carry out effective representation.

We recommend that international organizations include respect for lawyers' access to clients, as well as other lawyers guarantees and immunities, during their training sessions for law enforcement and judicial personnel.

## 6. Confidential Communications with Clients

### a. Definition and International Standards

Effective representation requires open communication between lawyer and client. To that end, the lawyer has a right to confidential communication with his client, both orally and in written communication, including when the client is in state custody. The lawyer/client confidentiality privilege is protected at all times including before, during, and after trial, and applies to all active and former clients. International law fully recognizes the importance of confidential communications between lawyers and clients. It is the duty of the government to recognize the right to confidential communication between lawyers and clients in all matters, both criminal and civil. The Basic Principles on the Role of Lawyers states, “Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.”<sup>128</sup> In criminal justice matters the right to confidential communication remains protected and is subject to special safeguards. A detained person has the right to be visited by and consult with a lawyer without delay. Such communication must be out of the hearing of law enforcement, although law enforcement may retain visual supervision.<sup>129</sup>

### b. Treatment in Kyrgyz Law

Under the New Law, confidential information is defined as information relating to legal assistance being provided to a client.<sup>130</sup> Advocates have special duties regarding confidential information. Unless the client consents, an advocate must keep all such information, confidential.<sup>131</sup> Advocates may not use confidential information for their own interests or the interests of third parties.<sup>132</sup> Kyrgyz law also provides some safeguards pertaining to the use of confidential information in court. With very few exceptions, information related to legal assistance (i.e. confidential information) is not admissible.<sup>133</sup> Furthermore, an advocate may not be questioned as a witness or testify in court regarding things which became known to him or her in the course of his duties in rendering legal assistance.<sup>134</sup>

Where the client is being detained, Kyrgyz law requires that the detaining authorities respect the confidentiality of meetings between advocate and client. The meetings are to be held in private, under conditions which ensure that they cannot be overheard (although visual surveillance is allowed).<sup>135</sup> However, although persons in detention have the right to correspond with their counsel, all correspondence is subject to mandatory censorship

128 Basic Principles, supra note 18, Principle 16, Principle 22.

129 Basic Principles, supra note 18., Principle 16, Principle 8.

130 The New Law, article 30, para 1.

131 The New Law, articles 25, para 2 (5), and 26, para 1(5).

132 The New Law, article 30, para 2.

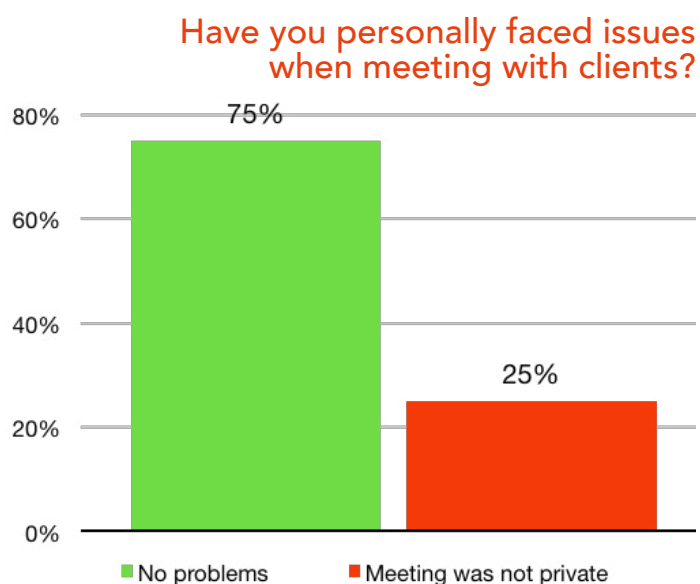
133 The New Law, article 29, para 5.

134 The New Law, article 29, para 6.

135 The Criminal Procedure Code of Kyrgyz Republic, art. 42, para 1 (9).

### c. Survey Results

Twenty five percent of respondents reported issues in communicating in private with their clients. The main issue reported was obvious video recording devices present in interview rooms. Clients also believe that interview rooms are being audio recorded as well, limiting their willingness to be candid with lawyers. Advocates also reported that police officers remain in the room during some interviews. One lawyer also commented that other lawyers are present in the interview rooms having discussions with their own clients. One lawyer further added that confidential information from interviews appeared in the press, published in a way to discredit the lawyer.



### d. Summary and Recommendations

Given that 75% of respondents said that they were generally able to communicate with clients confidentially, it appears that there is at least a basic understanding of the principle among law enforcement and detention centers in Kyrgyzstan. That said, given that one in four of respondents reported a personal issue with confidentiality of communications, much work remains to be done on this issue. As this is a fundamental element of a lawyer's ability to effectively represent a client, we would like to see the Ministry of Justice and Ministry of Internal Affairs take a more active role in ensuring this right is respected and the courts actively sanctioning those who do not allow lawyers to exercise this right.

We recommend for the Advokatura in conjunction with the Ministry of Justice and Ministry of Internal Affairs to ensure that detention centers and police stations have written guidelines covering the rights of lawyers with respect to their clients and the procedures to be followed. Advocates should continue to file formal reports with the appropriate bodies when this right is violated and should make note of such violations with the appropriate judicial body.

International organizations should include this right, along with the others covered in this report, in their training sessions as one important to the effective functioning of any legal system. Allowing lawyers access to clients and the ability to confidentially consult does not weaken the legal system, quite the opposite leads to better outcomes for both sides.

## 7. Right to Information and Equality of Arms

### a. Definition and International Standards

A lawyer has the right to gather and receive information about the case from the state or the adversary. This information includes the charges, or the counts being brought against the client, the basis for the charges or counts, and any other materials or evidence which may be used against the client. The sharing of this information is highly important because without equal information a lawyer is prevented from providing truly effective representation.

International law recognizes that equality of information is necessary for effective representation. The Principles for the Role of Lawyers places a positive duty on “competent authorities” to safeguard lawyers’ access to information.<sup>136</sup>

The lawyers should be provided access to all appropriate information, files and documents at the earliest appropriate time.<sup>137</sup>

### b. Treatment in Kyrgyz Law

Kyrgyz law protects the right of an Advocate to gather and receive information regarding his clients and their interests. Specifically, an advocate has the right to collect factual information which may be used as evidence, collect written statements from witnesses, draft private scene inspection reports, demand and obtain documents or copies from any agencies or organizations, as well as from individuals with their consent.<sup>138</sup> Further, the advocate may demand “information references, letters of reference or any other document” and may “take the necessary notes from the case-file or make a copy thereof”.<sup>139</sup> Under Article 14 of the law “On state-guaranteed legal aid” an advocate also has the right to obtain information about decisions made by competent bodies.<sup>140</sup>

136 Basic Principles, supra note 18., Principle 16, Principle 21.

137 Basic Principles, supra note 18., Principle 16, Principle 21.

138 THE INTERNATIONAL COMMISSION OF JURISTS, INDEPENDENCE OF THE LEGAL PROFESSION IN CENTRAL ASIA, pg. 66.

139 THE INTERNATIONAL COMMISSION OF JURISTS, INDEPENDENCE OF THE LEGAL PROFESSION IN CENTRAL ASIA, pg. 66.

140 Law of the Kyrgyz Republic “On State-guaranteed legal aid”, No. 201 (December 16, 2016) as quoted in Legal Ethics and the Provision of Free Legal Services In the Kyrgyz Republic, pg. 3.

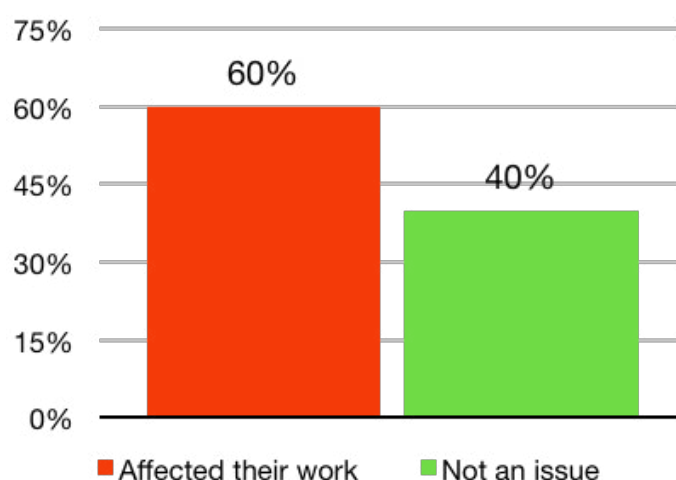
### c. Survey Results

Sixty percent of the respondents cited a failure of authorities to provide information as an issue that affected their work as advocates. One cited this issue as the most important obstacle to lawyers' work in Kyrgyzstan. Lawyers reported a large number of state agencies refusing to provide information, not only law enforcement bodies. Lawyers commonly cited the State Registry and the address registry of the Ministry of Interior as particularly egregious violators of the principle of equal access to information. One lawyer shared an example of when an expert witness refused to share his findings, neither the police nor the court supported the lawyer's demand for the information. There was another example given of a court citing a member of a village council for being non-responsive, but the lawyer was not allowed to be part of the proceedings, and the court refused to provide further information.

When asked to describe how state agencies respond to requests for information, the majority of respondents said that agencies simply ignored the request. When agencies did respond, lawyers described agencies either giving blanket refusals to provide information or demanding lawyers pay for information that should either be free or is provided free to prosecutors. Three of the respondents did say that they had appropriate access to information in state registries.

When asked to describe how defense attorneys are treated in court as compared to prosecutors, 31% of the respondents claimed to experience obstacles in their work within the courtroom procedures. Some respondents reported that judges ignored the threats made in court against the attorneys, or active issued judicial orders to put pressure on the advocates. Some also stated that judges ignored the legal validity of defense arguments or did not force prosecutors to give a legal defense for their petition

#### Has gaining access to information been difficulty in representing clients?



### d. Summary and Recommendations

Based on the findings, access to information remains a serious obstacle for advocates in the effective representation of their clients. These particular survey responses point to the weakness of the legal culture in Kyrgyzstan with regards to lawyers overall. It is telling that ministries did not feel the need to even respond to lawyers' requests for information. This attitude implies that there is no effective sanction against unresponsive organizations or individuals and that institutional culture does not promote or reinforce the importance that both sides play in a court case.

We recommend, that the Advokatura in coordination with the Ministry of Internal Affairs and Ministry of Justice provide to law enforcement bodies and detention centers written guidelines outlining the rights and responsibilities of lawyers with respect to their clients. The Ministry of Justice or the Prime Minister's office should remind ministries and agencies of the government the procedures that should be followed to ensure that lawyers are given access to the information they have a right to access. We encourage the advocates and lawyers to continue to file formal complaints when denied access to information or when requests are ignored citing the existing norms of obstruction of the professional activities of advocates. Working with its membership, the Advokatura should alert the appropriate government bodies of particular offices that violate this right and demand actions to remedy the situation.

International organizations should continue to encourage Kyrgyzstan to comply with international standards and take those necessary actions needed to ensure that the rule of law is respected by all levels of government and society.



## VI. CONCLUSIONS

This survey was not intended to be a comprehensive survey of the issues facing advocates practicing in Kyrgyzstan. Rather it was an attempt to survey those lawyers practicing in some of the most sensitive types of cases and see what they feel are the most pressing issues they face. The results of the survey are more anecdotal than data driven. True to Kyrgyzstan's reputation as the most progressive country in Central Asia, it appears that while overall the rule of law is respected in broad outlines and lawyers are largely allowed to defend their client's interests, lawyers and advocates continue to experience obstacles, pressure, intimidation in their daily work. On each of the examined factors, it is clear that there are numerous failings in the details and implementation of how lawyers are treated and allowed to practice. And, it is clear that these failings can have tangible effects on clients' outcomes and ultimately can weaken the overall rule of law and implementation of fair trial standards. Another failing was clear as well, advocates and lawyers have a low status in the society, and as a result, public and individuals engaged in physical assaults, intimidations and threats without fear of ramifications for their actions.

There are a number of straightforward steps that can be taken to improve the situation. Many of those steps have been outlined in our report. To reiterate, the government must take the main responsibility to ensure that advocates and lawyers are able to work in conditions free from pressure, harassment, and intimidations and to ensure that safeguards are put in place to guarantee the independence of the legal profession as well as the liberty and security of lawyers. The government must take an interest in how the rule of law is followed and how the rights of participants in the legal system are respected.

Further, the newly established Advokatura has accomplished many positive goals already and should continue to support Kyrgyz advocates. Not only should it ensure that advocates follow established rules and procedures, they should also take on the role of highlighting those instances when other players in the legal system do not play their own role. The more the Advokatura can show that it is indeed independent from the executive and holds all lawyers, both private and government, to the highest standard, the more the Kyrgyz public will respect the status of lawyers and the importance of rule of law.

All other stakeholders involved should continue to support individual advocates in their challenging work, as well as continue to monitor the situation on the ground and make the public aware about cases when lawyers' rights are violated in order to continue highlighting the importance of the rule of law and the benefits a strong legal system brings to Kyrgyzstan as a whole.