

Introduction

1. In recent years, the Belarusian authorities have repeatedly violated international standards governing the legal profession by restricting in law and practice the freedoms of expression and association of lawyers, autonomy in the internal management of the bar associations, the free and unhindered exercise of the profession, and the right to a fair trial and an effective remedy in disciplinary proceedings.
2. In response to alerts from the Human Rights Centre “Viasna” (HRC “Viasna”), FIDH’s member organization in Belarus, about the recent wave of repression against lawyers representing defendants in politically sensitive cases, the Observatory for the protection of human rights defenders, a partnership between FIDH and the World Organization Against Torture (OMCT), in collaboration with the Paris Bar, organized an international investigation mission (“the mission”) to Minsk from 17 to 19 January 2018. On June 29, 2018, based on an investigation conducted in January 2018, a report has been released documenting restrictions on the independence of lawyers in Belarus. This report criticises the executive power’s stranglehold on the capacity of lawyers defending cases which the authorities consider to be ‘sensitive’ to practise their profession. In Belarus, lawyers defending cases considered by the authorities to be ‘troublesome’ are generally exposed to retaliatory measures, which can culminate in their expulsion, against a background of changes to the legal framework that have gradually placed Belarusian bars, and lawyers themselves, under the direct authority of the Ministry of Justice. Such retaliatory measures are often initiated following repression by the authorities of large-scale protests, as in 2010 and 2017.

In the course of the past few years, the bars have been stripped of their primary function, which is to guarantee independence and ensure the regulation of the profession. Access to the profession and its organisation now fall under the almost exclusive competence of civil servants in the Ministry of Justice.

A. Background and framework

3. The purpose of this submission, based on the information gathered during this investigation mission, is to raise the question of the right to a fair trial more precisely under the light of the question of the independence of the legal profession.
4. The right to a fair trial is guaranteed under the 14th article of the International Covenant on Civil and Political Rights (ICCPR), ratified by Belarus on November 12th, 1973. This article aims to ensure the proper administration of justice and guarantees several rights, which include equality before the law, independent and impartial and the ability of lawyers to defend citizens and their rights without fear any persecution or harassment.
5. During the second cycle of the Universal Periodic Review in 2015, 265 recommendations were made to Belarus, of which 158 were accepted and 107 were noted. The recommendations made to Belarus concerning the independence and impartiality of the judicial system (recommendations 129.51, 129.52, 129.53), have been accepted by Belarus.
6. Belarus has accepted a recommendation from France to, “*Reform the judiciary to ensure its independence and the respect of international norms such as the respect of the right of the defense*”

and the right to a fair trial. Review regulations on the appointment, dismissal and disciplinary procedures against judges as well as the length of their mandates". Belarus has also accepted Switzerland's recommendation to "*Ensure that the judiciary is free from any interference from other branches of Government*". However, these recommendations have not been effectively implemented.

7. It is important to note that during the second cycle of the UPR in 2015, no recommendation made to Belarus, mentions the situation of lawyers in particular. However, according to the Special Rapporteur on the independence of judges and lawyers, lawyers, prosecutors and judges, because of their legitimate work in the defense of human rights and fundamental freedoms, fall into the category of human rights defenders and are particularly exposed to the risk of being under-represented.
8. Belarus has also accepted in 2015 recommendations concerning the protection and security of human rights defenders (recommendations 129.61, 129.62, 129.63 and 129.78, 129.79). For example, Japan recommended that Belarus, "*Ensure the safety of human rights defenders and journalists, as well as their human rights, particularly freedom of expression and the press; and undertake swift and transparent investigation in response to the reports of intimidation, reprisal, threats and violence*". Nor have these recommendations been effectively implemented.

B. Legislative framework in Belarus and international standards

9. At the international level, the **Basic Principles on the Role of Lawyers**, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Havana, Cuba from 27 August to 7 September 1990 ("Havana Principles"), are the reference instrument governing practice of the legal profession.
10. Under the Havana Principles, the legal profession is structured around four key principles: freedom of expression and association, independence of internal management of the bar, freedom to exercise the profession without hindrance and the right to a fair hearing and an effective remedy in case of disciplinary proceedings.
11. At the normative level, the status of lawyers is governed by a set of texts which have gradually placed the legal profession under the supervision of the authorities and in particular the Ministry of Justice. The texts governing the issues related to obtaining, renewing and revoking licenses, addressed in this report, include the following:
 - Law on the Bar No. 334-3 of 30 December 2012, amended on 11 July 2017 by Law No. 42-3;
 - Decision of the Ministry of Justice No. 58 "On certain issues governing the question of licensing of activities concerning provision of legal services" of 7 March 2014;
 - Presidential Decree No. 265 "On certain issues governing exercise of the legal profession" of 14 June 2012;
 - Presidential Decree No. 450 governing authorization to exercise various professions of 1 September 2010;
 - Rule No. 1363 governing authorization to exercise the legal profession adopted on 20 October 2003 by the Council of Ministers of Belarus and amended in December 2010;

- Decision of the Ministry of Justice No. 105 on “Regulation of the Qualification Commission on issues relating to the legal profession in the Republic of Belarus” of 30 November 2016;
- Regulation of the Ministry of Justice “On the qualification procedures for lawyers” of 2 February 2012, amended by Regulation of 16 May 2017.

12. This joint communication addresses the following issues:

- The supervision of the internal management of the bar and the “selection” of presidents of the bar by the Ministry of Justice
- The general regime governing the legal profession and the possibility of suspension or revocation of license at any time by the Ministry of Justice through disciplinary procedures that may result in expulsion
- The targeting of human rights lawyers by threats to revoke their license.

I. Supervision of the internal management of the bar and “selection” of presidents of the bar by the Ministry of Justice

A. Lawyers subject to the strict control of the Ministry of Justice

13. **Firstly, the governing bodies of the bar are placed under the authority of the Ministry of Justice**, which is **entitled to submit applications for the post of president of the bar associations**, to **suggest their resignation** or to **dismiss** a bar association president in the event that the Qualification Commission – which is also under the authority of the Ministry (see above) – establishes that he/ she infringed legislation.
14. The Ministry of Justice can also adopt regulations on the activities of the bar and the **suspension of decisions** taken by the bar’s governing bodies or the presidents or vice-presidents of bar associations and can annul such decisions.
15. Moreover, the Ministry provides assistance to bar associations on legal information about the profession and assists them in **organizing continuous professional training for lawyers**, which infringes Principle 24 of the Havana Principles on the independence of lawyers in the promotion of their continuing education and training.
16. The Ministry also drafts and approves proposals on ethical standards for lawyers. Decision No. 39 of the Ministry of Justice of 6 April 2012 established new ethical standards contravening Principle 26 of the Havana Principles, which provides that organizations of lawyers must be able to establish their codes of professional conduct independently.
17. Furthermore, since 1997, only lawyers registered with the bar are allowed to practice, despite the provision of the Law on the Bar of 1993 which states that, “*Citizens who [had] obtained authorization to practice as a lawyer in accordance with the laws in force, [were] entitled to exercise their professional right by registering with the bar. By a decision of the bar and in accordance with the procedure set down by the respective bar, the profession [could] be practiced within the framework of legal advice services or other organizational structures*” (Article 3). Thus lawyers could practice without being registered with the bar but as part of another form of association of lawyers.

18. Although registration with the bar is compulsory in many countries, in Belarus the obligation of lawyers to register with the bar increases their dependence on the authorities given that – *as discussed above* – the bars are controlled by the Ministry of Justice.

B. Inspection of bars and lawyers by the Ministry of Justice

19. Another significant control mechanism used against the bar and lawyers is the inspection power vested in the Ministry of Justice by the Law on the Bar and Presidential Decree No. 510 of 16 October 2009 “On improvements to inspection activities (monitoring) in the Republic of Belarus”. Under this text, the Ministry can carry out inspections of the bars and lawyers’ professional activities at any time.

20. In addition, the Law on the Bar of 2011 does not contain any provision guaranteeing the confidentiality of agreements between lawyer and client. Accordingly, the authorities can seize documents considered confidential under Principle 22 of the Havana Principles, and establish alleged violations of the regulations to justify, in an abusive manner, expulsions or revocations of licenses.

21. At the end of December 2010, as a result of inspections of lawyers who represented political figures detained during mass demonstrations on 19 December 2010 against the contested result of the election of President Alexander Lukashenko, the Ministry of Justice discovered violations of professional ethics rules in the actions of some of them. The inspections were carried out not only by the Ministry but also by the KGB which is not endowed with such authority. At the time, the Minsk City Bar refused to accept the Ministry of Justice’s request to initiate disciplinary proceedings against the lawyers in question, considering that the alleged violations identified by the Ministry did not justify the prohibition on continued legal practice. Moreover this refusal led to the dismissal of the President of the Bar Council and to the adoption of a new Law on the Bar at the end of 2011, which increases the Ministry of Justice’s grip on the bar.

22. In April and July 2017, inspections were conducted by the Ministry of Justice in the Minsk City Bar and the Mogilev City Bar. It is important to note that the violations identified during inspections by the Ministry of Justice in 2011, as in 2017, mainly concerned technical and formal breaches (which are not connected to legal practice nor to accounting, see below).

23. Following the inspections in 2017, the following “violations” were identified:

- Absence of lawyer’s signature on the contract with the client: relating to contracts which had not been challenged by any party;
- Violations of the numbering scheme of contracts in the register: relating to contracts held internally by each lawyer;
- Indication of the expiry date of the lawyer’s license on the contract with the client. It should be noted that until 1 March 2016, licenses were granted for a five-year period. Since then licenses are issued which do not specify the period of validity. The date of validity and the date of expiry shown on the former licenses should no longer be taken into account since all licenses are now valid for an indefinite period. In the contracts mentioned above, lawyers used the former license template which contained an expiry

date and this was invoked by the authorities in an abusive manner in order to sanction them;

- Absence of the date of provision of legal support services on the counterfoil of the lawyer's internal register;
- Unused or damaged pages of the lawyer's journal not correctly "crossed out" (under the regulations, they should be marked with a cross [X]) ;
- Use of paper with the law firm's letterhead to send letters to various recipients. Given that the Law on the Bar provides that the lawyer, rather than the legal consultancy, has the right to request information from various bodies (state, non-state or jurisdictional), the Minister considered that the use of the firm's letterhead constituted an infringement. However, the wording of the Law is unclear and does not expressly prohibit use by lawyers of materials with the name of their firm for the purposes of correspondence with third parties.

24. According to a lawyer interviewed by the mission delegation, *"During the inspection, we noticed that particular attention was paid to certain lawyers. In some law firms, inspectors came with a list of lawyers to be controlled"*.

25. Lawyers have no possibility to contest the conclusions of the Ministry's inspection – only the bar concerned can challenge.

Recommendations:

- 1) Allow bar associations to operate without any interference from the authorities relating to the regulation of the profession, including access to the profession, application of disciplinary measures and the organization of training.**
 - 2) Allow free elections of presidents of bar associations in Belarus by their peers without interference from or control by the Ministry of Justice, including by approving the list of candidates as currently required.**
 - 3) Guarantee the confidentiality in all circumstances of both verbal and written communications between lawyers and their clients.**
 - 4) Allow relevant Special Procedures of the United Nations Human Rights Council access to the country, including the Special Rapporteurs on the Situation of Human Rights Defenders, on the Situation of Human Rights in Belarus and on the Independence of Judges and Lawyers.**
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II. The general regime governing the legal profession : the possibility of suspension or revocation of licenses at any time by the Ministry of Justice through disciplinary procedures that may result in expulsion

26. Under Article 7.1 of the Law on the Bar, in order to be authorized to practice as a lawyer, a person must be a Belarusian citizen with legal training, have a minimum of three years' professional experience in his/her area of legal specialism, have undertaken a traineeship in a law firm, have passed an exam with the Qualification Commission, have obtained a license to practice law and be a member of the bar. The amendment to the Law on the Bar of July 2017 added Article 7.2 allowing

legal advice or litigation services to be provided by foreign lawyers from States with which Belarus has signed international agreements on this issue. Foreign lawyers who wish to practice in Belarus must be listed on the register of lawyers held by the Ministry of Justice.

A. The general regime based on a qualification examination

27. As discussed above, the composition of the Qualification Commission, whose mandate includes the organization of the professional entrance examination and its activities is managed by the Ministry of Justice. All licenses are issued by the Ministry of Justice.
28. Since 1 March 2016, in accordance with Presidential Decree of 26 November 2015 No. 475, **a lawyer's license to practice is granted for an indefinite period. However every five years lawyers are subject to a qualification procedure before a "Qualification Commission" under the authority of the executive, or at any time on request of the Ministry of Justice.** As a result, every five years lawyers are subject to so-called "ordinary qualification" proceedings, while at the request of the authorities lawyers may be summoned to "exceptional qualification" proceedings, often following control procedures targeting certain lawyers in particular (see below), regardless of the date of their last ordinary qualification procedure or its outcome.
29. The Deputy Minister of Justice, Mr. Igor Tushynskiy, considers that this renewable qualification procedure is a means of "*ensuring that lawyers remain competent throughout their career*". In practice, the extremely vague nature of provisions combined with the power to nominate members of the Qualification Commission in charge of examinations gives the authorities full discretion to remove certain lawyers they consider to be critical.

B. Disciplinary proceedings conducted by the Ministry of Justice

30. In Belarus, in addition to the general regime based on a qualification "examination" allowing lawyers' fitness to practice to be controlled, there is also a **parallel disciplinary procedure led by the Ministry of Justice**, which grants the Ministry the power to collect any information which may prove a breach of a lawyer's professional obligations. According to the Deputy Minister, Mr. Igor Tushynskiy, this system is aimed at "guaranteeing the protection of lawyers and their rights" by the Ministry. In practice, it **represents an additional tool of executive control over certain lawyers considered troublesome by the authorities.**
31. In general, the Ministry of Justice is authorized to suspend the validity of a lawyer's license **at any time** in the event of **serious violations of laws or regulations governing the issuing of licenses.** There are two lists of serious violations: one under the Rules governing "authorization to practice a certain type of occupation" (Article 110), the other under Rules governing "authorization to practice as a lawyer" (Article 17)¹. The range of situations covered by these lists gives the authorities wide discretion to apply these rules on a selective and discretionary basis.

¹ The serious violations listed in the Rules governing "authorisation to practise a certain type of occupation" (Article 110, <http://pravo.by/document/?guid=3871&p0=P31000450>, in Russian) are the following: acceptance of cash payment without paying commission to the office of the treasurer of the Bar Council by means of the standard receipt; refusal to provide legal assistance where the law so requires; holding or resuming elective office within independent organs of the bar where licence has been suspended; purchase or acquisition of the subject of

32. Moreover, under Article 38 of the Law on the Bar, **the Ministry is authorized to bring disciplinary proceedings against lawyers and suspend their licenses for the duration of the proceedings.** Article 22 of Law on the Bar states that such disciplinary proceedings **can be initiated by the Minister of Justice him- or herself.** Accordingly, the Minister of Justice may suspend a lawyer's license following a disciplinary procedure which he or she initiated. Decisions in disciplinary cases are taken by a disciplinary commission composed of members of the bar elected by the General Assembly: the commission decides whether to terminate disciplinary proceedings or to impose a disciplinary sanction in the form of a warning, a reprimand or expulsion².
33. Furthermore, Article 24.2 of the Law on the Bar **sets out extremely vague criteria which may lead to the expulsion of a lawyer from the bar,** including inactivity for more than one year, committing two or more breaches of the "rules and conditions of legal practice, set down by law, within a twelve-month period" or "insufficient qualifications"³⁰. The assessment of all these concepts is left to the discretion of the authorities. Indeed, it should be noted that assessment of the specific notion of "lack of competence" falls within the jurisdiction of **the Qualification Commission, an organ under the authority of the Ministry of Justice.**
34. In the event of expulsion of a lawyer from a regional bar for reasons specified Article 24.2, the Ministry of Justice of the Republic of Belarus can decide to revoke his or her license.

Recommendations:

- 5) **While it is permissible to have a qualification or certification procedure, it should only relate to the professional skills of lawyers and sanctions must only be applied by professional bodies without interference from public authorities. This is fundamental to ensure the independence of lawyers.**
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III. Human rights lawyers particularly targeted by threats to revoke their license

35. In Belarus, the authorities often respond to mass demonstrations – almost systematically obstructed and repressed by the State – with **retaliatory measures against lawyers representing leaders of protest movements or protesters before the courts.** The authorities particularly target lawyers in the most publicized and politically sensitive cases, with the aim of sending a signal to other lawyers.

the dispute between the client and the other party, in particular acquisition of rights to property; and a behaviour infringing the Lawyers' Code of Ethics. The serious violations listed in the Rules governing "authorisation to practise as a lawyer" (Article 17) are the following: transfer of a lawyer's licence to another person; measures aimed at preventing authorised agents from controlling lawyers' activities; repeated violation of laws governing the authorisation to practise as lawyers; concealment of income received by lawyers in the framework of their activity; violation of rules governing the calculation of fees for legal support services; refusal to provide legal assistance and violation of internal regulations in detention centres.

² Article 25 of the same Law states that a disciplinary sanction may be the subject of an appeal, lodged within one month, before the Disciplinary Commission of the Bar of the Republic of Belarus, which acts as an appellate tribunal.

36. Thus, following protests in 2010, **six lawyers who had represented candidates in the presidential election, as well as protesters, before the courts had their licenses to practice revoked.** They were Mr. **Aleh Aheyev**, Ms. **Tatiana Aheyeva**, Mr. **Vladimir Tolstik**, Ms. **Tamara Garaieva**, Mr. **Pavel Sapelka** and Ms. **Tamara Sidorenko**.
37. As highlighted in a previous FIDH report published in 2011, the Ministry of Justice claimed at the time that “*Some attorneys are abusing their right to defend individuals by presenting false information about the progress of the investigation, opportunities for defendants to exercise their right to legal assistance, their state of health, and conditions of detention, and are presenting biased information about the work of the country’s law enforcement agencies*”³. The expression “some attorneys” was aimed in particular at the lawyers mentioned above⁴. During the mission, the delegation met four of them. To date, none of the four have been able to recover their license.
38. Although the Law on the Bar (Art. 8) provides for the possibility of requesting a new license one year after revocation, or three years in the case of the lawyer’s expulsion from the bar, the lawyers met, emphasized the ineffectiveness of such a process in their situations, given the political nature of the cases.
39. “*I was expelled from the bar and as a result my license was withdrawn by decision of the new Minsk Bar following a request from the Ministry of Justice to initiate disciplinary proceedings against me. What is more, this request was made at the initiative of the KGB*”, said Mr. **Pavel Sapelka** during an interview with the mission. “*This shows that the prohibition on practicing my profession as a lawyer is not related to a lack of competence or a violation of legislation*”.
40. “*Requesting a new license makes no sense, not only because the system in place remains the same, but also because the authorities have continued to introduce new amendments, each one reducing the independence of the legal profession a little bit more*”, explained Mr. **Aleh Aheyev**.

A. Situation of lawyers who have agreed to represent the accused in the so-called "Patriots' Case" or "White Legion Case"

41. Furthermore, **protests in the spring of 2017 gave rise to a new wave of persecution aimed at several lawyers who had agreed to represent the accused in the so-called “Patriot Case” or “White-Legion Case”**, in violation of international principles governing the legal profession. In this instance, the authorities were able to invoke the legal framework put in place following the

³ See FIDH Report, *Belarus: Restrictions on the Political and Civil Rights of Citizens Following the 2010 Presidential Election*, June 2011: https://www.fidh.org/IMG/pdf/rapport_Belarus_En_web.pdf

⁴ It should however be recalled that at the time, given the absence of reasons, the Minsk City Bar had refused to initiate disciplinary proceedings against them. On 18 February 2011, the then President of the Minsk City Bar, Mr. Alexander Pylchenko, had said in a press statement that, “*All the executive staff of the Minsk City Bar think that the situation is critical and represents a real threat to the independence of the bar as a legal institution and to the independence of individual lawyers*”. On the same day, Mr. Alexander Pylchenko was expelled from the Ministry’s Qualification Commission (see below). On 25 February 2011, the Bar Council condemned *Mr. Alexander Pylchenko’s “style of work”* and “*declared further exercise of his functions as President of the Bar Association impossible*”. See FIDH Report, *Belarus: Restrictions on the Political and Civil Rights of Citizens Following the 2010 Presidential Election*, https://www.fidh.org/IMG/pdf/rapport_Belarus_En_web.pdf

waves of repression of 2010-2011, which at the time had enabled them to put the bars under supervision in violation of international principles on the role of lawyers.

42. In September 2017, **eight of the 16 lawyers representing defendants in the “White Legion” case**, most of whose names are not mentioned on security grounds, **were summoned to take an “exceptional qualification” examination organized by the Ministry of Justice**, despite the fact that several months earlier some of them had already obtained an ordinary qualification before the Certification Commission of their regional bar. Following this exceptional qualification procedure, among the eight lawyers concerned, Ms. Anna Bakhtina was struck off and subsequently lost her license (see below), while seven others were declared as allegedly “partially complying with legal requirements”.
43. As a result, these lawyers were obliged to take a new “exceptional qualification” examination at the end of March 2018, during which they were required to prove that they were duly implementing the Commission’s recommendation “on improving their professional qualification”. Although the lawyers concerned all passed their qualification examinations, this demonstrates that under the laws in force, the executive is in a position to exert constant pressure by making wholly arbitrary requests to lawyers to prove their qualifications at any time.
44. *“The checks undertaken by the Ministry of Justice in July 2017, which resulted in us being summoned to take an exceptional qualification examination were carried out selectively: the inspectors had lists of lawyers to verify and eight of the 16 lawyers representing the accused in the “White Legion” case were on the list”*, commented one of the lawyers interviewed by the mission delegation.

B. Revocation of Ms. Anna Bakhtina’s licence

45. On 12 September 2017, Ms. **Anna Bakhtina**, who was representing Miroslav Lozovskii, arrested in March 2017 at the opening of the “Patriot case”, had her license suspended by the Qualification Commission following an exceptional qualification examination on the pretext of “insufficient qualification” (competence) to practice law. Ms. Anna Bakhtina has more than 38 years of professional legal experience, as a prosecutor for 13 years and since then as a lawyer. Moreover, Ms. Anna Bakhtina has represented several defendants in politically motivated trials. In 2011, she defended Ms. Iryna Halip, journalist and wife of Andrei Sannikov, presidential candidate in 2010 and former political prisoner. In 2016, she represented the blogger Eduard Palchis.
46. *“No reasons were given for the decision, taken at the end of the interview, concluding that I am insufficiently qualified, which contravenes national law. I refused to sign because without knowing the reasons for suspension of my licence, I wouldn’t have been able to challenge the Commission’s decision before a tribunal,”* explained Anna Bakhtina.
47. On 31 October 2017, the Moskovskiy Court, in the Minsk District, confirmed the Qualification Commission’s decision to suspend Anna Bakhtina’s licence. She has not appealed the first instance decision.
48. It should be noted that this was not the first time that Anna Bakhtina has been the target of harassment by the authorities through extraordinary qualification proceedings. On 26 July 2011, a

Qualification Commission of the regional bar had already concluded that Anna Bakhtina did not possess sufficient professional qualifications. At the time, the journalist Iryna Halip, who was represented by Anna Bakhtina, was under house arrest in relation to a criminal case against her for participation in mass protests on 19 December 2010, and formally charged with organizing public disorder.

49. In July 2011, the lawyer **Daria Lipkina**, who defended Nikita Likhovid, an activist in a political opposition movement “For liberty”, was also summoned to pass exceptional qualification procedure and as a result was declared having “insufficient qualification”. At the time, Anna Bakhtina and Daria Lipkina challenged the results of the qualification examination. As a result, on 4 August 2011, they both appeared before the Qualification Commission with members are selected by the Ministry of Justice.

50. In parallel, on 30 July 2011, Anna Bakhtina and Daria Lipkina submitted their case to the United Nations Special Rapporteur on the independence of judges and lawyers. It is likely that international attention at the time eventually contributed to a decision of the Commission in favour of Anna Bakhtina and Daria Lipkina, since their licences were ultimately not revoked.

Recommendations:

- 6) End all forms of judicial harassment against human rights defenders in Belarus, including human rights lawyers.**
 - 7) Ensure that lawyers can exercise their professional duties free from any obstruction, intimidation or pressure.**
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We can provide technical assistance, as needed, to facilitate Belarus’ compliance with these recommendations, in particular with the review of legislation to bring it into conformity with international and regional human rights standards.

The Paris Bar



The International Observatory for Lawyers in Danger

