BALTIC JOURNAL OF LAW & POLITICS
VOLUME 4, NUMBER 2 (2011)
ISSN 2029-0454
http://www.versita.com/bjlp

Cit.: *Baltic Journal of Law & Politics* 4:2 (2011): 24-51
DOI: 10.2478/v10076-011-0011-6

SANCTIONS FOR ATTORNEY MISCONDUCT IN RELATION TO A CLIENT UNDER LITHUANIAN AND GERMAN LAW

Edita Gruodytė

Professor; Dr.
Vytautas Magnus University Faculty of Law (Lithuania)

Contact information
Address: S Ožeškienės str. 18, Kaunas 44254, Lithuania
Phone: +370 37 327993
E-mail address: e.gruodyte@tf.vdu.lt

Stefan Kirchner

Researcher
Georg August University, Faculty of Law (Germany)
Attorney at Law (Rechtsanwalt, admitted to the bar in Germany)
Rechtsanwaltskanzlei Kirchner, Frankfurt am Main (Germany)

Contact information
Address: Rechtsanwaltskanzlei Kirchner, Platz der Einheit 1, 60327 Frankfurt am Main, Germany
Phone: +49(176)23890182
E-mail address: mail@humanrightslawyer.eu

Received: September 6, 2011; reviews: 2; accepted: November 17, 2011.

ABSTRACT

Legal ethics is important for the daily work of attorneys; yet, it hardly receives enough attention in the training of lawyers. This article seeks to show how legal ethics matters and which consequences seemingly small ethics violations can have for attorneys. One key aspect of the client-attorney relationship is the trust which is placed in the attorney by the client. Both Germany and Lithuania prohibit that attorneys represent both parties in a legal dispute, a prohibition which can be surprisingly far-reaching. In this article the authors, both of whom are practicing attorneys, look at the differences and similarities between the legal frameworks in Lithuania and Germany as well as the impact the globalization and

Europeanization of legal ethics has had on the domestic laws in their respective jurisdictions. Particular attention is given to the sanctions which can be imposed on attorneys for misconduct in the form of representation which betrays the trust of a client and which is therefore specifically prohibited by the law. Among other issues, the distinction between professional sanctions and punishments under criminal law will be dealt with, as well as the conditions under which attorneys in either jurisdiction are barred from accepting a specific case to begin with.

KEYWORDS

Ethics, attorney, client, Lithuania, Germany

INTRODUCTION

"The movement towards a universal global culture, precipitated by the increasing interdependence of global economies, technologies and political systems, implies the declining significance of national systems of governance and the increasing harmonisation of culture, political ideologies and values."[1] Over the last decades there have been unavoidable processes of Internationalization and especially Europeanization of legal services. Practitioners should meet high standards not only of one national law, but they must be able to work and provide legal services for foreign clients. Probably every lawyer in this global society at least occasionally needs to contact colleagues from other countries and be able to advise his client or represent his interests in matters related to foreign law. Having in mind these sorts of challenging issues for today's lawyers, it appears necessary to investigate how questions of professional ethics are regulated in this context of globalization.

"Ethics as moral philosophy [...] also include[s] discourse on professional conduct and professional codes, often in the space between morality and the particular profession at issues, such as, for example, legal ethics."[2] Therefore we will have to keep both neighboring aspects in mind – morality as well as professional rules of conduct. In fact, ethics matters more to lawyers than they (who are often more versed in the practical discipline of law than the more arcane disciplines of ethics or morality) might often acknowledge. In fact, "[t]he ethical dimension is present, whether implicitly or explicitly, in every decision to follow, break, determine, interpret or re-interpret the law. The question of what is the function of law is not only part of every decision of how to apply it, but it is part of the individual's ethical task for which no general or abstract answers can be provided in a meaningful way."[3] What can be said in any case is that, as attorneys, it is our

> ethical task [...] to maintain personal responsibility and care for every engagement with legal problems. This responsibility does not preclude or in any way denigrate the use of legal forms. On the contrary, the legal forms are the tools and language of the lawyer and the judge. But the lawyer and the judge are no more simply the instruments of the socio-legal structure than an actor is merely the instrument of an abstracted character. It is not simply the case that

---

[1] Andrew Boon and John Flood, "Globalization of Professional Ethics? The Significance of Lawyers' International Codes of Conduct," *Legal Ethics* 2 (1999): 56.
[2] Alexander Boldizar and Outi Korhonen, "Ethics, Morals and International Law," *European Journal of International Law* 10 (1999): 282.
[3] *Ibid*.: 310.

> the conception of [the] lawyer as [an] instrument divorced from the underlying person is morally wrong or unadvised. Rather, it is philosophically nonsensical – the character cannot exist without the actor – and the analytic pretence that one can is an unethical abdication of responsibility and care.[4]

At the end of the day, every attorney has to live up to the requirements of the profession. These requirements do not serve primarily the client or the advocate, but are rather to be understood as being in the service of justice itself. What it all comes down to is that the blindfolded woman with the scales and the sword is not merely an ideal—lawyers are expected to work on behalf of justice.

Having established that ethics do indeed matter in the law firm as well as in the courtroom and are by no means restricted to supposed ivory towers (such as universities), the key question of this article is whether there is a globalization (or at least an Europeanization) of professional ethics applicable to attorneys. In order to answer this question, the authors, both of whom are practicing lawyers,[5] decided to look at the example of two EU countries: the first, Germany, which has old and deep western traditions, and the other, Lithuania, a smaller country which has regained independence after the fall of the Soviet Union. Keeping in mind that professional ethics is a very broad issue, this article focuses on only one particular problem, albeit one which provides a challenge to attorneys in virtually all jurisdictions, namely, the question of the misconduct of an attorney in relation to a client.

The discussion has to be seen against the backdrop of the fact that both countries are represented in the IBA (International Bar Association)[6] and the CCBE (The Council of Bar and Law Societies of Europe)[7], which have International Codes of Conduct, and which might lead to a certain degree of convergence in both states, and that similar regulations should be applied in both countries.

We will provide some general observations regarding the two legal systems, and introduce basic legal acts and regulations concerning the principles of legal ethics. In a second step, we will compare the understanding of what constitutes attorney misconduct in Lithuania and Germany. The third part will include a discussion of possible consequences for attorneys. In this context we will look not only at the law from a theoretical perspective but will also include some empirical aspects before concluding with a discussion of the question whether a form of

[4] *Ibid*.: 311.
[5] Edita Gruodytė is an advocate in Lithuania, Stefan Kirchner an advocate in Germany
[6] Lithuania is represented in the IBA since the year 1992 by the Lithuanian Bar Association; Germany is represented in the IBA by the *Bundesrechtsanwaltskammer* (BRAK) and the *Deutscher Anwaltsverein* (DAV).
[7] The Lithuanian Bar became a full member from 1994; Germany is represented in the IBA by the *Bundesrechtsanwaltskammer* (BRAK) and the *Deutscher Anwaltsverein* (DAV).

Globalization or Europeanization of professional ethics has indeed reached Lithuania and/or Germany.

1. GENERAL REMARKS

Professional ethics is very important in the daily practice of attorneys and regulated by legal acts in both countries. Generally speaking, there are similarities (such as the existence of special institutions which have been created for the purpose of solving lawyers' ethical questions, the Attorney Courts in Germany and the Courts of Honour in Lithuania, the requirement for attorneys to have a professional insurance, the deeper meaning and role of the attorney profession in the context of the overall judicial system, sanctions for ethical infringements, etc.) but there are also a number of differences. Probably the greatest difference is the possibility of a criminal liability in addition to a professional liability which is foreseen under German Criminal Law for the betrayal of a client by an attorney in case of a conflict of interest.

Mistakes can happen in every profession, yet, in some professions a simple mistake will have graver consequences than in others. This is particularly true for our profession. A missed deadline in court proceedings can mean the difference between a functioning company and bankruptcy; an overlooked precedent can have most serious repercussions for the private lives of our clients. It is therefore necessary to avoid mistakes and to be prepared for those cases in which, despite all preparations, all safety measures and controls, the work of an attorney does in fact damage a client. While not all damages can be compensated in kind, at least some degree of financial compensation ought to be possible. Therefore, every attorney in Germany and Lithuania is required to have insurance which will cover such mistakes – in Germany up to a sum of at least 250,000 € per case,[8] in Lithuania a minimum of 28,962 € per case.[9] This requirement is so strict that when applying for a license to practice law, any lawyer who wishes to become a *Rechtsanwalt*, an attorney who is allowed to practice independently, under German law, has to have a contract with an insurance company for that type of *Berufshaftpflichtversicherung* before he or she is admitted to the bar.[10] The same rule also exists under Lithuanian law.[11] Such errors therefore should usually be dealt with by insurance

---

[8] *Bundesrechtsanwaltsordnung (Law on the Profession of Attorneys of the Federal Republic of Germany)*: § 51, section 4, subsection 1; in: *Bundesgesetzblatt (Federal Publication of Legislation)*, 1959, Volume I.
[9] *Government Resolution No. 1067 "For Approval of Lawyers Professional Liability Insurance Rules"*, Official Gazette (2004, no.133-4796).
[10] This follows already from the general requirement that German attorneys have to be covered by such insurance at all times (*Bundesrechtsanwaltsordnung*, *supra* note 8: § 51, section 1).
[11] "An advocate shall be entered on the List of Practising Advocates of Lithuania when he: […] 2) is covered by insurance of an advocate or a professional partnership of advocates against professional civil liability" (*Law on the Bar of the Republic of Lithuania*, Official Gazette (2004, no. 50-1632): Article 17).

companies, which is common in Germany but rarely found in Lithuania. Probably because of those reasons, in Germany only in the case of systematic errors, e.g. if an attorney is completely unable to run his or her business, the bar association will consider revoking his or her license.[12] This approach is in line with the status of the *Rechtsanwalt* as a free profession[13] rather than a commercial enterprise.[14]

Under German law, issues of insufficient quality of the legal service provided or of bad timing, in particular in the case of missed deadlines, can give rise to complaints at the bar and warnings towards the attorney. This 'warning' is already a form of punishment. Both under German and Lithuanian law for such matters, especially if they are done repeatedly, there is the possibility even to lose one's license. In Germany, the revocation of the license to practice law will require serious misconduct and although it is theoretically possible that insufficient services amount to serious misconduct, such cases will rather lead to claims for the insufficient performance of the legal consulting contract between the client and the attorney, including claims for compensation to be paid by the attorney for errors in the work of the attorney. In Lithuania tort claims for legal malpractice are also possible but not as popular as in Germany. This goes so far that there are a number of attorneys in Germany who specialize in legal malpractice cases, essentially making a living off the mistakes of their colleagues. In fact, an attorney who gets a new case in which another attorney has already been involved in the past is well advised to both question the motives of the client for the requested change of attorneys as well as the work of his or her predecessor.

One more difference among two countries is that in Germany the bar can revoke a law license; for example, if a *Rechtsanwalt* has fallen into debt,[15] even in the case of small debts[16] and already before insolvency.[17] In case an attorney does not have sufficient funds anymore, it is assumed that there is an inherent risk of unethical behavior, which will be prevented by revoking the law license in case of poverty, regardless of whether or not the attorney in question has actually committed any errors or has been found guilty of any form of wrongdoing. The reason behind this rather harsh approach lies in the second aspect of the German understanding of the legal profession: the *Rechtsanwalt* is not merely a commercial actor and a law firm is not merely a commercial business. Rather, the attorney is considered to be a "*unabhängiges Organ der Rechtspflege*", an independent organ

[12] *Bundesrechtsanwaltsordnung*, *supra* note 8: § 14.
[13] *Ibid*.: § 2, section 1.
[14] *Ibid*.: § 2, section 2.
[15] *Ibid*.: § 14 (2), no. 7.
[16] Hermann Kulzer, "Widerruf der Anwaltszulassung wegen Vermögensverfalls und Insolvenzplan als Chance (Repeal of the Admission to the Bar Due to Financial Collapse and the Insolvency Plan as a Chance)," (May 4, 2009) // http://www.anwalt.de/rechtstipps/widerruf-der-anwaltszulassung-wegen-vermoegensverfalls-und-insolvenzplan-als-chance_003773.html.
[17] BGH, Decision of 17 September 2007 – AnwZ (B) 75/07.

or instrument in the service of justice.[18] In Lithuania sanctions from the bar may follow for the financial infringements also, but usually they follow if a lawyer is not paying monthly contributions to the bar, or for example, if he or she does not provide required declarations or did not pay taxes as required[19].

The German view of the attorney as serving justice rather than being primarily concerned about earning money is also emphasized by the Lithuanian bar especially when examining disciplinary cases. While this view might sound overly idealistic, it is in fact a system which has worked fairly well for a long time. One aspect of this approach is, for example, that German law does not know a system of *pro bono* consulting[20] but rather requires every attorney to advise and if necessary represent clients who cannot afford to pay their bills.[21] The attorney will be paid by the court, but only at the minimum legal rate depending on the material value of the case, notwithstanding the actual workload incurred by the attorney. In fact, German attorneys are almost never allowed to provide legal services free of charge and also the no win-no pay approach is only possible in a very limited number of cases—nor will it be necessary because of the combination of state funded legal aid payments and the obligation on the part of attorneys to take such cases. In Lithuania, the law on the bar does not require the provision of legal services free of charge, but foresees such an opportunity for the attorney and also emphasizes that the advocate's activities are not economic-commercial.[22] Lithuania has a special law[23] which provides conditions and a system of state aid for the persons in order to enable them to adequately assert their violated or disputed rights and the interests. Like in Germany, in Lithuania such lawyers are either provided some money from state but the sums in question are fairly small when compared with commercial clients and the bureaucratic effort involved is too high to make this profitable, so usually at least in Lithuania it is not popular for big commercial law firms to provide such help. In Germany, offering completely free legal services, that is, *pro bono* in the classical sense of the term, used to be forbidden until recently and is still limited today.[24] Only a recent legislative change allows for providing free legal services, both by attorneys and others, although non-attorneys require the supervision by an attorney or another lawyer who is qualified to work as a judge, unless they consult only a limited group, such as relatives or

[18] *Bundesrechtsanwaltsordnung*, *supra* note 8: § 1.
[19] For example, during time period from 2008 until 2011 there were 16 sanctions issued against lawyers for not paying their contributions to the bar: 13 censures and 3 reprimands.
[20] Norbert Westenberger, "Pro Bono – Tue Gutes und rede darüber," *BRAK Magazin* 6/2009: 6 // http://www.brak-mitteilungen.de/brakmag_6_2009.pdf.
[21] *Beratungshilfegesetz (Law on Legal Aid)*: § 3, section 1; in: *Bundesgesetzblatt (Federal Publication of Legislation)*, 1980, Volume I.
[22] *Law on the Bar of the Republic of Lithuania*, supra note 11: Article 4.
[23] *Law on State-Guaranteed Legal Aid of the Republic of Lithuania*, Official Gazette (2000, no. 30-827; 2005, no. 18-572).
[24] Norbert Westenberger, *supra* note 20: 6.

close friends for free.[25] The same law, the *Rechtsdienstleistungsgesetz* (Law on the Provision of Legal Services) allows non-attorneys to provide some limited legal services in relation to their primary work (e.g. a car dealer might advice a buyer on the required insurances, a labor union official might advise workers on issues of collective labor law, etc.). In this context, there are still a number of unanswered questions regarding the question of how to ensure a sufficient quality of the legal services provided by non-professionals. The emergence of international law firms on the German legal market could be thought to have thrown this approach into disarray, but interestingly enough, this has not (yet) happened. Although big law firms usually do not serve poor clients, the main reason is that they usually have a different type of profile and do not advertise in the same way as smaller law firms do. In recent years, big law firms have begun to engage in U.S.-style pro bono work. This might be seen as an indicator of the globalization of the culture of lawyering – a trend which might turn out to be stronger than the force of domestic laws.

Advertising is one more issue which is regulated a bit differently in both countries. In Germany already for several years advertisements for legal services are allowed, albeit they are, while not forbidden anymore, still looked down upon by more conservative members of the legal establishment. Still, it is rather the form of advertising which is restricted than advertisements by law firms as such.[26] In the past, the only way a law firm could advertise was, for instance, to announce the hiring of a new attorney with a small advertisement in the local newspaper or – still popular among older lawyers – to announce office holidays (and, more importantly, a week or two later the end of the office holidays) in local newspapers, essentially telling potential clients that the firm exists and is open for business. In a certain sense, this attitude still informs the law in Germany: advertisements have to be purely informative, i.e. provide the information that legal services are provided. Advertisements may not be aimed at getting a particular case or client (which is why the use of Google AdWords is forbidden[27] since it targets particular internet users instead of the general public, although in practice it is a common method of advertising among German attorneys), nor may they go beyond being merely informative (e.g. is a logo of a law firm forbidden which shows a charging bull,

---

[25] *Rechtsdienstleistungsgesetz (Law on the Provision of Legal Services)*: § 6 (2), sentence 1; in: *Bundesgesetzblatt (Federal Publication of Legislation)*, 2007, Volume I, pp. 2840 et seq.

[26] *Bundesrechtsanwaltsordnung*, *supra* note 8: § 43b Advertising ("A *Rechtsanwalt* is only permitted to advertise his/her services in as far as the advertising in question provides matter-of-fact information concerning the form and the nature of the professional services and as long as it is not aimed at soliciting specific instructions or a specific brief.").

[27] *Case no. 7 O 16794/06*, Judgment of 26 October 2006, Landgericht (District Court) München I, 7th Chamber for Private Law.

meant to symbolize the aggressiveness of the law firm in question?[28]). Even the words which may be used to describe different levels of specialization or experience in different fields of law are carefully prescribed. In Lithuania, on the other hand, attorneys are completely forbidden to advertise. Article 42 of the Law on the Bar expressly provides that "an advocate is prohibited from advertising his professional activities". But the law foresees several exceptions – data about an advocate or a professional partnership of advocates could be indicated in informative and other publications, on official letterforms, business cards, representative items, as well as when an advocate or a professional partnership of advocates are indicated as providers of sponsorship in accordance with the procedure prescribed by laws.[29] In practice this means the same as the limited advertising in Germany. So far, the old model of the attorney as a servant of justice through the service to his or her client remains a valid description of the current state of affairs for the legal profession in both countries.

2. THE UNDERSTANDING OF ATTORNEY MISCONDUCT IN LITHUANIA AND GERMANY

2.1. LEGAL PROVISIONS

In both countries the ethics of the profession of attorney are not merely ethics but they are legally codified. In Germany, the key rules can be found in § 43a IV of the *Bundesrechtsanwaltsordnung* (BRAO), the Federal Law on Attorneys as well as in § 3 BO (the *Berufsordnung*,[30] the professional regulation applicable to attorneys).[31] While in Lithuania the Law on the Bar[32] and the Code of Ethics[33] are the most relevant laws. One should mention that, after analyzing the aforementioned laws, it is rather difficult to provide a complete enumeration of violations which could be treated as an attorney's misconduct in relation to a client. For example, the Law on the Bar in Lithuania foresees that a disciplinary action may be instituted against an advocate in case he or she violates Law on the Bar, the Lithuanian Code of Ethics for Advocates and for any other professional misconduct.[34] Basically, there are two separate bases for initiating disciplinary

[28] *Case no. 34 O 169/98*, Judgment of 09 December 1998, Landgericht (District Court) Düsseldorf, 4th Chamber for Business Law.
[29] *Law on the Bar of the Republic of Lithuania*, supra note 11: Article 42.
[30] *Berufsordnung für Rechtsanwälte (Ordinance on the Profession of Attorneys of the Federal Republic of Germany)* // http://www.brak.de/w/files/02_fuer_anwaelte/bora_stand_01.03.11.pdf.
[31] Wolfgang Hartung, "Berufs- und Berufsordnungsrecht (Professional and Professional Order Law)": 1607; in: Hans-Ulrich Büchting and Benno Heussen, eds., *Beck'sches Rechtsanwalts-Handbuch (Beck's Handbook for Attorneys)*, 9th ed. (Munich: Verlag C. H. Beck, 2007).
[32] *Law on the Bar of the Republic of Lithuania*, supra note 11.
[33] *Lithuanian Code of Ethics for Advocates*, Official Gazette (2005, no.130-4681).
[34] *Law on the Bar of the Republic of Lithuania*, supra note 11: Article 52.

responsibility: (1) the violation of specific laws (Law on the Bar or Code of Ethics) and (2) any other professional misconduct.

The last category should be understood as any other behavior of an attorney which is not regulated by the aforementioned specific legal acts. This means that it is very general and difficult to define in advance, but probably it should include such violations as making some crime punishable in accordance with Criminal code or some administrative infringement or violating some tax laws, etc. Some more guidance regarding a classification of potential violations is provided by the Court of Honour of Advocates, which divides potential violations into four big categories in accordance to the question of who was the victim of the misconduct in question, i.e. violations of advocate functions and ethics in relation (1) to a client, (2) to courts and other institutions, (3) to the Bar Association or (4) to society at large. Such a categorization appears to be somewhat artificial and could be disputed – especially the last two categories which could be generally put under the second category but because such a categorization was made in the Court of Honour of Advocates case review for 2008-2011[35] attorneys in Lithuania are well-advised to follow this guidance provided by the Court of Honour of Advocates. All violations in relation to a client (first category) in the Court of Honour of Advocates review are divided into three major groups: (1) Infringements of loyalty to client, confidentiality violations and conflicts of interests, (2) Ill- timed provision of agreed legal services, (3) Quality of legal services and limits of advocate responsibilities (obligations) to client.

All three categories are directly related to a form of misconduct in relation to a client but the first category is probably the most complicated and causes most problems in practice. We will therefore limit our research to this category.

In Lithuania, there are two kinds of restrictions on attorneys' activities—ones based on "blood" and ones grounded on the activity itself. An advocate is not allowed to act as a representative or defense counsel in legal proceedings initiated against his parents (including adoptive parents), spouse (partner), children (including adopted children), brothers and sisters or where any of those persons the attorney is involved with are employed as judges or pre-trial investigation officers (restrictions based on blood).

Restrictions based on prior legal services mean that an advocate is not allowed to be representative or a defense counsel of the adverse party in the same proceedings, or to act as an advocate in proceedings in which he or she has participated as a judge, an arbiter, a prosecutor, a pre-trial investigation officer or

[35] M. Kukaitis, "The Court of Honour of Advocates Case Review for 2008-2011" (2011) [unpublished material, on file with E. Gruodytė].

a private prosecutor.[36] This aspect also is important in Germany, too – albeit with some modifications.

Under German law, the attorney's loyalty to the client is regulated most notably in § 43a *Bundesrechtsanwaltsordnung (BRAO)*, which follows logically from § 43 BRAO, according to which a German attorney, a *Rechtsanwalt*, has to "practise his/her profession conscientiously. A *Rechtsanwalt* must show that he/she is worthy of the respect and the trust that his/her status as *Rechtsanwalt* demands, both when practicing and when not practicing his/her profession." It is this status of attorneys, the trust of the public in the justice system, which will be referred to time and again, directly and indirectly, in the context of the professional liability of attorneys. Among the basic duties under § 43a BRAO is the duty not to represent conflicting interests. § 43a BRAO requires a *Rechtsanwalt* may not "enter into any ties that pose a threat to his/her professional independence."[37] He or she is sworn to secrecy,[38] objectivity,[39] "must exercise the requisite care in handling any assets entrusted to him/her."[40] and is obliged "to engage in continuing professional development."[41] Most notable, though, is the shortest of all sections of § 43a BRAO, section 4, according to which "A *Rechtsanwalt* may not represent conflicting interests."[42] This norm is complemented by § 45 BRAO, which clarifies that:

> (1) A *Rechtsanwalt* may not practise: 1. if he/she has already been concerned with the same legal issue as a judge, an arbitrator, a public prosecutor, a member of the public service, a notary or as the administrator of a notariat; 2. if the *Rechtsanwalt* has recorded a deed as a notary or as a notary's deputy or as the administrator of a notariat and its legality or interpretation is in dispute or enforcement proceedings are being carried out on its basis; 3. if the *Rechtsanwalt* is to take action against the bearer of the assets the *Rechtsanwalt* manages in matters in which the *Rechtsanwalt* has had a prior involvement as an administrator in insolvency, an administrator of a deceased's estate, an executor, a legal representative or guardian or in a similar capacity; 4. if the *Rechtsanwalt* was already professionally involved in the same matter outside his/her practice as *Rechtsanwalt* or outside of another activity in the meaning of § 59a para. 1 sentence 1; this shall not apply if such professional involvement has come to an end. (2) A *Rechtsanwalt* may not: 1. become involved in matters with which he/she was already concerned as a *Rechtsanwalt* against the bearer of the assets to be managed, as an administrator in insolvency, an administrator of a deceased's estate, an executor, a legal representative or guardian or in a

[36] *Law on the Bar of the Republic of Lithuania*, supra note 11: Article 25.
[37] *Bundesrechtsanwaltsordnung*, *supra* note 8: § 43a, sec. 1.
[38] *Ibid*.: § 43a, sec. 2.
[39] *Ibid*.: § 43a, sec. 3.
[40] *Ibid*.: § 43a, sec. 5, sentence 1.
[41] *Ibid*.: § 43a, sec. 6.
[42] *Ibid*.: § 43a, sec. 4.

similar capacity; 2. practise in respect of matters with which he/she was already involved outside his/her profession as *Rechtsanwalt* or outside of another activity in the meaning of § 59a para. 1 sentence 1.[43]

But the obligations of attorneys do not end there. Unlike in Lithuania, there is a special article in German Criminal code or *Strafgesetzbuch* (StGB), § 356 StGB, which is directly concerned with the relation between an attorney and his or her client or clients, headlined "*Parteiverrat*", which literally means "party betrayal". According to this norm, criminal liability arises to an attorney or other legal consultant in cases in which he serves both parties to a legal dispute through counsel or action.

In Germany, the prevention of conflict of interests is therefore not only a matter of legal ethics or professional rules, but the matter is considered so serious as to require a separate rule in the criminal code. § 356 StGB not only protects the clients in an individual case but also the trust between clients and advocates in general, and thereby is deemed to serve the justice system as a whole. Notwithstanding the differences in both countries, the violations derive from basic duties and obligations of lawyers.

2.2. UNDERSTANDING CONFLICT OF INTERESTS

Both countries have a similar understanding regarding conflict of interests. In Lithuania the term is defined in the Lithuanian Code of Ethics for Advocates. An advocate is not allowed to provide legal services, to represent, or to be a defense counsel for two or more clients for the same legal problem in the same case if the interests of clients are adverse. If while representing clients a conflict of interests or some danger in which a violation of confidentiality or infringement of attorney independence could arise surfaces, the advocate should stop providing legal services.[44] Analogous norms are either provided in the BRAO, requiring a German attorney to practice his or her profession conscientiously. A *Rechtsanwalt* must show that he or she is worthy of the respect and the trust that his or her status as *Rechtsanwalt* demands, both when practicing and when not practicing the chosen profession.[45] This respect is not one owed to the attorney as a person but to the justice system as a whole of which the attorney is a part. In case of a "negligent breach of the duties under" the BRAO or the professional code of conduct, the Attorney Court is to impose sanctions.[46] But the attorney's responsibility does not end there: according to § 113 (2) BRAO, any behavior "on the part of a

[43] *Ibid*.: § 45, sec. 1 and 2.
[44] *Lithuanian Code of Ethics for Advocates*, *supra* note 33: Article 3.
[45] *Ibid*.: § 43, sentence 2.
[46] *Bundesrechtsanwaltsordnung*, *supra* note 8: § 113, sec. 1.

Rechtsanwalt outside his/her field of professional duties which represents an unlawful act or an act likely to incur a fine shall be considered a breach of duty subject to sanctions by the Lawyers' Disciplinary Court if, in the circumstances of the individual case, it is particularly likely to undermine the respect and trust of persons seeking access to justice in a way that is significant for a *Rechtsanwalt*'s professional practice".[47] Again, the respect referred to here is necessary for the proper functioning of the justice system.

The aim of this prohibition is to protect the trust of a client in a chosen advocate and a legal certainty, that the data revealed by the client will not be used against his/her interests. Loyalty to a client means that an advocate is acting in the framework defined by law, observing established professional legal practices and standards that he or she is acting fairly and reasonably, in the best interest of a client. The principle of the loyalty owed by the attorney to the client is closely related to the confidentiality principle which is equally important for the practice of law because usually a client will reveal information to his or her attorney which is not known to third persons, information which is not (and is not meant to be) freely available and the client reasonably expects that the advocate would protect the revealed information as a professional secret. This expectation of secrecy does not end with the end of the client-attorney relationship. Trust in an advocate is an underlying element of client-attorney relations. Therefore there is a direct relation between the three terms – conflict of interests, loyalty to a client and confidentiality.

In the opinion of the Courts of Honor in Lithuania, the principle of loyalty is in force even for former clients. In the courts' view, any representation against a former client without his or her consent is possible only if at least two of the following conditions are established:

- Sufficient time interval after the end of relations with old client and taking of new client. A reasonable time limit in opinion of the Court is at least one year.
- Separation of legal services provided for the first and the second clients. In deciding this issue, important questions could be identity of the dispute matter, the moment when the dispute matter arose, the actions of an advocate while providing legal services, the information obtained by the advocate it's content and similar matters.[48]

For example the Court of Honor established in a disciplinary case that an adjunct of advocate V. R. provided legal services for the municipality of Kalvarija between the 9th of June 2008 and the 17th of April 2009. After terminating legal

[47] *Ibid.*: § 113.
[48] M. Kukaitis, *supra* note 35: 4.

services on the initiative of the Kalvarija municipality the adjunct of advocate V. R as early as on the 28th of April 2009 made agreements with third persons for the provision of legal services. These new agreements were in conflict with the interests of the previous client, the Kalvarija municipality. V. R. represented those new clients while having relations with the previous client, prepared legal documents and represented them in courts against Kalvarija municipality even in the disputes which already had existed while V. R was acting for the first client Kalvarija municipality. In this case the court established that there was an infringement of legal ethics.[49]

In this group of infringements there is a violation of loyalty mainly while representing opposite interests of parties. For example, the adjunct of an advocate L. M. provided legal services to a company and to shareholders of the same company. Later, when a conflict arose between shareholders and company, the adjunct terminated the legal services agreement with the shareholders but continued to represent the interests of the company in a civil case against the very same shareholders whom he had represented earlier. Additionally, the adjunct gave testimony in the court as a witness about his previous shareholder clients. It is evident that in such a case there is a rough violation of loyalty to the client and a danger that the information provided to the lawyer would be used against the client, leading to an infringement of confidentiality. In such a case an advocate must cease to provide legal services to both parties.[50]

But there are also some unusual issues. In another case[51] an advocate, G. G., was punished by the Court of Honour for violation of loyalty even without starting to provide services to one of the clients. The advocate accepted and left documents provided by the first client, who provided documents while willing to get legal services from the advocate. The advocate made no actions for the first client but while having the aforementioned documents in his possession, he agreed to provide and provided legal services for the second client with adverse interests. The court held that accepting a potential client’s legal documents even without providing legal services or even without making a contract for legal services still can lead to a conflict of interests because the advocate as a professional is responsible for establishing a written contract of legal services. Therefore, the fact that there was no written contract for legal services does not eliminate liability of the advocate because contracts according to Lithuanian civil code could be made orally or by express actions. A legal services contract was therefore created in the moment the

[49] *Ibid*.: 3 *et seq*.
[50] *Ibid*.: 2.
[51] *Ibid*.: 1 *et seq*.

attorney accepted the documents in question – even if he would only answer the question whether to accept the case or not.

In a key case, the advocate M. M., provided legal services for his client and the financial situation of his client and his property interests and possibilities were known to the attorney. There was no agreement between parties as to the final price for the legal services. The advocate asked his client to pay a certain amount of money and his client did not agree. The attorney then terminated the contract for the provision of legal services and brought a claim against his client in court. When the case was still pending in court, the advocate, while implementing temporal protection means (arrest of goods for a certain amount), went to a bailiff asking to transfer to him his client's arrested goods and later when the director of his client was appointed as the person responsible for holding arrested goods, the advocate refused to return the goods in question.[52] The Court of Honour established a conflict of interest because there was no final decision regarding their dispute and taking almost all the goods from the market, disturbing the activity of the store and not returning the goods to the director, discredited the name of the advocate and devalued the honor of an advocate in the client's eyes. He acted against his client in such a manner that the clients' activity was inconvenienced, causing a conflict of interests.

2.3. BETRAYAL OF THE PARTY

Given the function of attorneys in the service of justice, it becomes a bit clearer why mere errors do not give rise to the same level of sanctions in Germany as they do in Lithuania. We will therefore focus our investigation on the "betrayal" of the client by the attorney as the most severe form of a conflict of interest. This focus appears even more justified when one considers that the betrayal of one's party by an attorney is not merely an issue for the *Anwaltsgerichte*, the attorney courts, essentially the German equivalent of the honour courts in Lithuania, but also for the regular courts, because allowing this form of a conflict to happen is not only considered a violation of ethical rules but is actually a crime under the German Criminal Code.

2.3.1. INTRODUCTION

The key norm in the *Strafgesetzbuch* (StGB), the German Criminal Code concerning the relation between an attorney and his or her client or clients, apart from other norms which are applicable more generally, is the aforementioned § 356

[52] *Ibid.*: 5 *et seq.*

StGB. According to this norm, an attorney or other legal consultant who serves both parties to a legal dispute through advice or action will be punished with three months to five years of imprisonment.[53] In the following we will concentrate on the responsibility of attorneys rather than non-lawyers.[54] The law only applies to the work of the attorney for a client, hence requires a legal relation between attorney and client, even if it is not in writing or limited to one legal question.[55] The minimum penalty is not a monetary fine but imprisonment, which makes this crime different from many other white-collar crimes. The possible punishment is also notable for another reason: usually German Criminal courts will avoid short prison sentences of less than six months. The idea of punishment is to re-integrate the criminal into society. Short prison terms are thought to be counter-productive in this regard, in particular for first time offenders because they can bring the defendant in even closer contact to other criminals. Because the punishment has to be proportionate to the guilt of the perpetrator, fines are therefore often preferred over short term prison sentences of less than half a year. Thus, the fact that § 356 StGB requires a jail term in any case and also allows specifically for short terms is remarkable. If party A has been betrayed with the consent of party B to the detriment of party A, the punishment for the attorney (or other legal consultant) is increased to a minimum of one year.[56]

2.3.2. *MENS REA*

The *mens rea* required is intent: the attorney has to know that he or she is serving two clients with conflicting interests.

2.3.3. *ACTUS REUS*

While the question of *mens rea* is easy to answer, the question of *actus reus* is more complex: Betrayal of a party means that the attorney serves more than one party to a legal case in the same legal matter.[57] The term party is to be understood more broadly, as in terms of procedural law: parties within the meaning of § 356

---

[53] *Strafgesetzbuch (German Criminal Code)*: § 356, sec. 1; in: *Reichsgesetzblatt (Imperial Publication of Legislation)*, 1871; *Bundesgesetzblatt (Federal Publication of Legislation)*, 1998, Volume I.
[54] On the applicability of § 356 StGB to non-lawyers who provide legal advice *see* Günter Heine, "§ 356 Parteiverrat": 2987; in: Adolf Schönke, Horst Schröder, Theodor Lenckner, Peter Cramer, Walter Streer, Albin Eser, Günter Heine, Walter Perron, Detlev Sternberg-Lieben, Jörg Eisele, Nikolaus Bosch, Bernd Hecker, Jörg Kinzig, Ulrike Schittenhelm, *Strafgesetzbuch (Criminal Code)*, 28th ed. (Munich: Verlag C. H. Beck, 2010).
[55] *Cf*. Thomas Fischer, *Strafgesetzbuch und Nebengesetze (Criminal Code and Supplementary Laws)*, 58th ed. (Munich: Verlag C.H. Beck, 2011), pp. 2402 *et seq*.
[56] *Strafgesetzbuch*, *supra* note 53: § 356, sec. 2.
[57] Thomas Fischer, *supra* note 55, p. 2403; *Case no. 1 StR 226/64*, Judgment of 6 October 1964, Bundesgerichtshof (Supreme Court), 1st Senate for Criminal Law; in: *BGHSt (Collection of the Judgments and Decisions of the Supreme Court in Criminal Law Cases)*, Volume 20.

StGB are not just the parties to a lawsuit; in fact, a party within the meaning of this norm is everybody who has a "material legal interest"[58] in the outcome of the case,[59] regardless of whether he or she (or a legal person) is a party to the dispute in the procedural sense of the term.[60]

Similar to the situation in Lithuania, the "same" legal matter[61] does not require that the attorney acted in one and the same proceedings for both parties. Rather, the issues need to be so closely related as to form the same case.[62] The sameness of the legal matter therefore refers to the facts of the case. A few small cases might illustrate this further. An attorney might not represent somebody who has caused a traffic accident and in subsequent criminal proceedings the victim with regard to a tort claim against the driver.[63] In the field of divorce law, § 356 StGB often surprises clients in cases in which both husband and wife wish to get a consensual divorce: German law requires both husband and wife to be represented by an attorney in the divorce proceedings. Even in cases in which both parties are in full agreement concerning the divorce and its consequences (custody over children, financial compensation etc.), both husband and wife need their own lawyer and cannot choose to have the same attorney.[64] In criminal cases, several defendants who are accused of having committed a crime together are all required to have a separate attorney[65] – a rule which is also found in the code on criminal procedure.[66] The idea behind this rule is to prevent an attorney from "sacrificing" one client in order to allow the other one to get away unpunished. It is, though, permitted that the attorneys who represent such defendants cooperate in creating a joint defensive strategy.[67] In some instances, these lines are still blurred. The Appeals Court in the district of Koblenz once even decided that an attorney who

[58] Herbert Tröndle and Thomas Fischer, *Strafgesetzbuch und Nebengesetze (Criminal Code and Supplementary Laws)*, 53rd ed. (Munich: Verlag C.H. Beck, 2006), p. 2230; *Case no. 4 StR 724/53*, Judgment of 4 February 1954, Bundesgerichtshof (Supreme Court), 4th Senate for Criminal Law: 304; in: *BGHSt (Collection of the Judgments and Decisions of the Supreme Court in Criminal Law Cases)*, Volume 5; *Case no. 4 StR 344/62*, Judgment of 16 November 1962, Bundesgerichtshof (Supreme Court), 4th Senate for Criminal Law; in: *BGHSt (Collection of the Judgments and Decisions of the Supreme Court in Criminal Law Cases)*, Volume 18; *Case no. 2 Ws 585/84*, Judgment of 14 August 1984, Oberlandesgericht (Court of Appeals) Koblenz, 2nd Senate for Criminal Law; in: *Neue Juristische Wochenschrift* 39 (1985); *Case no. 1 Ss 12/94*, Judgment of 27 May 1994, Oberlandesgericht (Court of Appeals) Zweibrücken, 1st Senate for Criminal Law; in: *Neue Zeitschrift für Strafrecht* 14 (1995).

[59] Herbert Tröndle and Thomas Fischer, *supra* note 58.

[60] *Ibid*.

[61] Günter Heine, *supra* note 54: 2988.

[62] *Ibid*.; *Case no. 4 StR 344/62*, *supra* note 58: 193

[63] Herbert Tröndle and Thomas Fischer, *supra* note 58, p. 2230; *Case no: 5St RR 60/94*, Judgment of 29 September 1994, Bayerisches Oberstes Landesgericht (former Highest Court of Criminal Law in Bavaria, now defunct), 5th Senate for Criminal Law.

[64] *Case no. 5 StR 180/62*, Judgment of 26 June 1962, Bundesgerichtshof (Supreme Court), 5th Senate for Criminal Law; in: *BGHSt (Collection of the Judgments and Decisions of the Supreme Court in Criminal Law Cases)*, Volume 17; *Case no. 3 StR 13/91*, Judgment of 13 February 1991, Bundesgerichtshof (Supreme Court), 3rd Senate for Criminal Law; in: *Zeitschrift für Wirtschafts- und Steuerstrafrecht* 10 (1991).

[65] *Cf*. Thomas Fischer, *supra* note 55, p. 2404.

[66] *Strafprozessordnung (Criminal Procedure Law)*: § 146; in: *Bundesgesetzblatt (Federal Publication of Legislation)*, 1987, Volume I.

[67] Thomas Fischer, *supra* note 55, p. 2404.

lodges a criminal complaint with the police on behalf of client A against B is allowed to represent B in the subsequent criminal proceedings[68] – a decision which remains questionable given the strict interpretation of § 356 StGB by the Supreme Court in other cases. After all, the idea behind § 356 StGB is to avoid conflicts of interest. Attorneys therefore have to keep the interests of their clients in mind. That said, clients are not able to prevent the attorney's criminal liability by consenting to the attorney representing somebody else against their interest.[69] Thus, the norm again deviates from the normal standards of German criminal law: under general rules of German criminal law, consent – assuming it is valid – already excludes the *actus reus*, meaning that there is no criminal offense to begin with. Under § 356 StGB, the consent of the client becomes not altogether meaningless but at least of limited use to the defendant[70] – which indicates that § 356 StGB protects more than just the interests of the clients. Also the fact that only the increased penalty in § 356 (2) StGB requires a collaboration and a damage to the betrayed client indicates that the norm in its basic form (§ 365 (1) StGB) protects the justice system and the public image of attorneys in general.[71]

The conflict of interest has to exist at the time of the crime[72] and the attorney must have worked for both parties.[73] Both aspects show a fundamental difference from the law in Lithuania, which is significantly more restrictive of the work of attorneys. There are cases, though, in which German law, too, prohibits an attorney from acting for one client if he or she has already acted for the other party at an earlier date. In this context, Chinese walls become particularly relevant because the matter is considered to have been entrusted not just to one attorney but to the law firm as a whole.[74] Not only does the trust between client and attorney not end with the (procedural) end of the matter in question,[75] an attorney is also barred under § 356 StGB from representing the interests of party A against party B which arise out of a contract between both parties which the attorney had drafted on behalf of party B at an earlier point in time.[76]

Serving both parties includes any form of material legal support[77] and is understood broadly. In fact, an attorney can even harm the interests of his client by omission.[78]

---

[68] *Case no. 2 Ws 585/84*, *supra* note 58; cited also by Herbert Tröndle and Thomas Fischer, *supra* note 58, p. 2230.
[69] Thomas Fischer, *supra* note 55, p. 2406.
[70] *Cf*. *ibid*., p. 2406.
[71] Ibid.; with further references there.
[72] Herbert Tröndle and Thomas Fischer, *supra* note 58, p. 2232.
[73] *Ibid*.
[74] *Ibid*.
[75] *Cf*. Kristian Kühl, *Strafgesetzbuch – Kommentar (Criminal Code – Commentary)*, 27th ed. (Munich: Verlag C. H. Beck, 2011), p. 1601.
[76] Thomas Fischer, *supra* note 55, p. 2403.
[77] *Ibid*., p. 2405.

In any case, does the attorney have to act against his or her duties ("*pflichtwidrig*")? Supporting one violates the attorney's professional duty towards the other.[79] The duty in question is the attorney's general duty towards the client. These duties are codified in § 45 I, II BRAO, closing the circle to the professional rules mentioned earlier.

3. RESPONSIBLE BODIES AND POSSIBLE SANCTIONS

Attorneys must prevent a conflict of interests. This duty is not only a consequence of the rules of the profession of attorneys but also a matter of other sanctions, including criminal law. As we have seen, in Germany both the bar and Attorney Courts on one hand and the regular Criminal Courts on the other hand can deal with the matter. This does not constitute a violation of the principle of *ne bis in idem* since this principle only applies to criminal law, not to more administrative (in the widest sense of the term) measures such as those by the bar or Attorney Courts. In a sense, this approach is not so different from other cases in which a license is revoked as a consequence of a misconduct which can also have repercussions under criminal law: if one drives a car while under the influence of alcohol or other drugs one can lose the driving license already before being convicted of a crime.

In Lithuania, it is the Bar Association or the Minister of Justice who decides whether to institute disciplinary action against an attorney. According to Lithuanian law practice nearly all disciplinary cases are initiated by the Bar Association after some complaint is obtained. Both countries have a special court for the hearing of cases. In Lithuania it is the Court of Honour of Advocates, while in Germany professional court is called *Anwaltsgericht* (Lawyers' Disciplinary Court). In both countries there is the possibility to initiate civil or criminal cases, but in Lithuania it is uncommon.

These two institutions are allowed to impose sanctions which differ from one another. In Lithuania, as possible sanctions, the Law on the Bar[80] allows for a censure, a reprimand, a public reprimand as well as for the invalidation of the decision of the Lithuanian Bar Association to recognize the person as an advocate.

But such a choice of sanctions could also mean that the Lithuanian bar is forced to punish lawyers by applying the strictest sanction. In order to address those issues it is useful to review the practices in both countries.

---

[78] *Ibid*.
[79] *Ibid*., pp. 2405 *et seq*.
[80] *Law on the Bar of the Republic of Lithuania*, supra note 11: Article 53.

All disciplinary cases against advocates shall be heard by the Court of Honour of Advocates. Its decisions may be appealed to the Vilnius Regional Court. The general limitation term for starting a disciplinary action is six months from the date of the violation, but in such cases if the actions of the advocate were unknown, hidden or established by court, the term of six months is calculated from the time when it became evident to the time when the court decision was enacted.[81]

According to review of the Court of Honor, between 2008 and 2011 there were 131 cases established, and 128 cases that finished with decisions.[82]

In the practice of the Court of the Honor, the last sanction—invalidation of the decision—is usually provided in the cases when the violation is very serious, or there are several violations and an advocate does not act correctly after the procedure is initiated. For example, the Court of the Honor applied such a penalty to the advocate Č. K, because he made several agreements with several different clients obliging him to provide various legal services. From one client he took 1500 litas, but made none of the promised legal actions. He signed legal services agreements with two other clients but the advocate did not take necessary actions in court, did not provide the required documents and because of that the court's special decision (decision in absentia) was admitted against the interests of the client and later the court denied the right of appeal. From the third client the advocate took 8000 litas and also failed to take any action. The advocate did not provide the agreed-upon services to the clients and also avoided returning the taken money which could be evaluated as fraud in the opinion of the court of honor. In addition, the advocate, after having been asked in writing by the Lithuanian bar to provide an explanation regarding the aforementioned facts, did not provide them till the requested date. By this the advocate also violated the ethical norms of the ethical code regulating relations with the bar institutions.[83]

In the next case, advocate L.R. took 10 000 litas from the client for agreed upon services, but because of personal reasons did not provide the agreed services. The advocate did not return the paid money and she was punished for the third time by the Court of Honor—this time the sanction consisted in the invalidation of the decision.[84]

After analyzing the practices of the Court of Honor, the conclusion can be drawn that the most serious sanction is applied only if the violation has been serious; or, if it has been a repeated offense and unethical behavior demonstrated towards the bar.

---

[81] *Order by the Minister of Justice No. 1R-278 "For Publishing the order of Examination of bar Disciplinary Actions"*, Official Gazette (2007, no.79-3197): Section 19.
[82] M. Kukaitis, *supra* note 35: 1.
[83] *Ibid*.: 7.
[84] *Ibid*.: 8.

In cases in which the last condition is absent, usually the bar will not apply the most serious sanction. For example, in the case of the advocate T. U. the advocate's behavior was considered for the fourth time by the court, and the last time for the omission of the term to provide an appeal complaint to the court, and the advocate even did not try to renew the missed term. The court could not provide the sanction for this behavior because the term of six months was missed. But the advocate also did not write an additional complaint for the same client, which he had promised to submit.[85]

The other three sanctions are more often used for punishment of unethical behavior. The Court of the honor also provides public reprimands. For example in the case of the advocate R. R.,[86] the Court of Honor established that while providing legal services, the advocate lacked the necessary care (for his client). He, being the professional, was found responsible for communicating with a client to explain all the circumstances in such a manner that it would be clear for the client. The advocate who does not collaborate with his clients, who does not explain to his client his rights in a proper and understandable manner, an advocate who is late in providing services in accordance with accepted legal contract, who fails to appear at court hearings without serious reasons, and without informing his client and the court beforehand, is deemed to have violated the principles of fairness, carefulness, and the obligation to properly represent the client. Accordingly, R. R. was sanctioned by public reprimand.

In another case, the advocate, A. J., was punished with the same sanction for the following violations: he agreed to prepare and serve an appeal complaint and also to prepare a new complaint. Because of the shortcomings of the appeal complaint it was not accepted by the court. Another established fact in this case was that the same advocate made a peace agreement in a civil case for compensation of damages regarding previous professional activities and in the peace contract the advocate was obliged to pay 5000 litas by the agreed upon time; but it was not even partially fulfilled until the proceedings in the Court of the Honor. Also, the advocate did not reply to the written requests from the bar to provide explanations.[87]

In the third case, a public reprimand was provided for the advocate A. M. because she was obliged to provide a complaint using a private indictment procedure, but the court three times refused to accept the complaint because it was not in accordance with the requirements of criminal procedure code. In the opinion of the court of first instance, the complaint was baseless and there was no evidence

[85] *Ibid*.: 7 *et seq*.
[86] *Ibid*.: 11.
[87] *Ibid*.: 10.

provided that the advocate explained to her client the consequences of the complaint. While acting as a professional and signing the legal services contract she had created baseless expectations on the part of the client and an unrealistic hope to win the case and to get some material benefit, and because of those reasons the court of the first instance concluded that by her actions the advocate partially took on risk, which was evaluated equally and awarded 500 litas (to return the partially obtained fee) and 220.80 litas in court expenses in favor of the client. The advocate did not implement the court decision benevolently.[88]

In Germany the attorney court or *Anwaltsgericht* can impose a warning, a caution, a fine of up to twenty-five thousand euro, a ban on acting as representative and counsel in certain fields of law for a period of between one and five years or the exclusion from the legal profession.

It is evident that the two first sanctions and the last one are analogous in their nature to the legal situation in Lithuania, only the wording is a bit different. With regard to the remaining sanctions, the German attorney courts have somewhat more restrictive sanctions at their disposal, such as a financial penalty and the restriction of activity which Lithuania does not have.

As can be seen, there are similarities but also notable differences between German and Lithuanian law. German law is stricter because of the existence of criminal law rules, yet from the perspective of the attorney, the risk to lose his or her license is equal in both jurisdictions. The existing differences are somewhat marginal in that the maximum punishment for attorneys is the same in both states: the license to practice law can be revoked altogether, thereby depriving an attorney of all means to earn his or her livelihood. In any jurisdiction, the prohibition to work in one's profession, for which many years of training were necessary, is a severe punishment. Although the betrayal of a party carries the risk of a prison term under German law, it is the risk of losing the license to practice law which serves as the greatest deterrent to violations of the client's trust in the loyalty of the attorney. In fact, one could argue that this punishment is so severe that it inevitably raises questions of proportionality. A store clerk who attacks a customer might serve some time in jail but is not legally prevented from working as a store clerk again (although he or she might find it difficult to find a job again). A truck driver who runs a red light might lose his or her driving license and will have to renew it before being able to work again. But an attorney who is found guilty of misconduct will have essentially forfeited his or her lifetime's work for one instance of misconduct. The only way to justify such strict measures is by keeping in mind that it is not the individual client who is protected here but the judicial system as such. The

[88] *Ibid*.: 12 *et seq*.

changing perception of law firms as economic entities in a globalizing, profit-oriented situation makes this approach appear old-fashioned. Yet at the same time it is necessary that the courts have this tool at their disposal for the sake of preventing abuses and protecting the judicial process as a whole. It should, though, be preserved for only the most severe cases. This in turn requires the judicial process to work in any case as there is of course also an inherent risk of invalid complaints (e.g. by former clients who were dissatisfied with the outcome of their case etc.) which have to be sorted out by the relevant authorities lest they cause undue damage to attorneys who have been accused unjustly.

4. THE EFFECTS OF GLOBALIZATION ON THE ETHICS OF THE LEGAL PROFESSION

Which effect will the globalization of legal ethics have on the situation in these two countries? Will it have an effect at all or are the domestic rules already in line with the requirements of emerging global legal ethics?

One example for a global set of soft law rules of legal ethics is the general principles which have been set up by the International Bar Association (IBA). Principle 4 of the International Bar Association General Principles[89] requires attorneys "not [to] place themselves in a position in which their clients' interests conflict with those of [another] client".[90] To place yourself in a position in which a conflict of interest occurs is a valid description of the strict requirements of German law concerning the betrayal of a party. The IBA principles are, obviously, phrased more generally than the German Criminal Code, which is not surprising, given that the IBA principles have to make sense to attorneys in Lithuania as well as in Liechtenstein or Brazil or Bangladesh, and that the Criminal Code has to comply with the *nulla poena sine lege stricta* requirement; nevertheless, their essences are compatible.

In particular when it comes to corporate clients which have a number of diverse legal needs, and in an environment like the German legal market, which is dominated by a large number of small and medium sized law firms and the usual relatively small number of international law firms, another problem arises, especially in the field of corporate law. Client A retains the services of a law firm on one issue; but client B, who retains the services of the same law, firm might be working in the same business and compete with client A. If the same law firm works for both clients A and B, who might not be opposite parties in a legal dispute but nevertheless competing in business, the attorneys for said law firm may acquire

[89] Reprinted in: Andrew Boon and John Flood, *supra* note 1: 57.
[90] *Ibid*.

knowledge of the technology used by client A. In order to prevent business secrets from accidentally leaking from client A to client B and to prevent even the appearance of a conflict of interest, firms erect so called "Chinese walls". All members of the law firm will be informed that attorneys working for client A are not to communicate about the case not only, as they are legally required anyway, with third parties but also with their colleagues in the very same law firm who work for client B. Usually both groups of lawyers will be informed by email about the establishment of the Chinese wall and will be provided with a list of attorneys included in either group of colleagues. Apart from the codenames used for either project involved, no further information is given. Under existing German law, this appears to be an absolute necessity, not only to prevent claims for damages by clients but also to protect attorneys against the risk of criminal sanctions.

Indeed, German criminal law requires even more: already when considering whether to accept a case, there must be a mechanism in place which prevents that—for example, the Hamburg office of a law firm must know whether the Munich office of the same firm has already accepted the other side of a legal dispute as a party. While large firms will usually have the technological infrastructure in place to prevent conflicts of interest and one-lawyer firms will not have this problem, in particular medium sized law firms with several offices are challenged to comply with the law. In essence, also small and medium sized law firms with just a few lawyers and offices will not only have to provide the same quality of service as big firms in order to remain competitive, they will also have to ensure that their internal organization is sufficient to comply with the requirements of the criminal code. The emergence of an industry of external companies which consult law firms on issues of organization and compliance with regulations which apply to law firms is witness to the complexities modern law firms are faced with. For some time to come, bridging this gap will remain a challenge for smaller law firms which want to compete beyond their region of origin.

CONCLUSIONS

We have seen a number of differences but also many similarities between the relevant laws in Lithuania and Germany. The main difference between both sets of domestic rules, though, is the code-oriented approach under Lithuanian law as opposed to a more general approach under German law. The latter is somewhat untypical for Germany, which is traditionally perceived to be a nation of codes. The recourse to general rules in combination with reliance on precedents, despite the absence of a clear doctrine of precedent in German law (at least one which could be

compared to the Common law principle of *stare decisis*), makes it somewhat harder for attorneys to know which conduct is allowed and which conduct is forbidden. As has already been the case with the development of the law on advertising by law firms, the details of the client-attorney relationship will be left for the courts to decide. It places a certain burden on the shoulders of German attorneys in that they have an obligation to research the existing case law before taking actions (or refraining from an action, which might be called for), which raises issues of concern with regard to the loyalty owed to the client, while the Lithuanian approach, making reference to specific laws, allows for more legal certainty since the laws can simply be changed as necessary. It is perfectly conceivable for the Lithuanian parliament to adopt rules on the establishment of, for example, Chinese Walls. Under the German system, it is left to the courts to develop more precise rules based on general laws.

Both approaches seem to fit well to the current needs of the legal communities in the respective country. While Lithuania is still a young EU member state with an economy which is still in the process of getting closer to the larger EU states, which in turn leads to responding tasks for many lawyers working in Lithuania, clear rules are necessary. This is even more so since the comparatively small size of the population and the resulting small number of cases also means that there are, in absolute terms, fewer opportunities for the courts to actually shape the law through their jurisprudence. For the time being, a clear regulation of what is permitted and which conduct is not allowed is in the interest of attorneys in Lithuania, who gain legal certainty; however, it is also in the interest of their clients and the justice system in general. German bar associations, attorney courts and criminal courts, on the other hand, have had more than half a century to develop the law, not to mention a far larger number of attorneys, which translates into a larger body of case law.

Both countries appear to be well-equipped for the contemporary and near-term challenges of the globalization and Europeanization of legal ethics. Regarding the Europeanization of legal ethics, Germany might be somewhat slower to respond to new demands of EU law than Lithuania's code-based approach, since the courts will have to have an opportunity to respond. But, the general nature of the existing norms also means that Germany is less likely to run afoul of future EU legislation in this area as long as the existing norms can be interpreted in a manner which would bring them into conformity with EU law.

When it comes to the globalization of legal ethics, both states appear to comply with the existing requirements regarding the attorney's loyalty towards the client. Future developments in this field are more likely to affect Germany first, not

least due to its status as the world's second largest exporting nation. Lithuania could benefit from taking the German experience into account when updating the relevant laws to the demands of the globalization of legal ethics. Professional associations of attorneys in Germany, such as the bar associations, however, could take the codification in Lithuania as an inspiration to provide attorneys with similar, albeit non-binding, guidelines as to which conduct is permissible, based on the jurisprudence of the German courts. Until such guidelines exist, it will fall to legal scientists to explore and explain the law as it has been – and continues to be – interpreted, if not outright created, by the courts. This in turn requires a closer involvement of academicians with everyday legal practice, which is again something which Germany can, and should, learn from the Lithuanian experience.

BIBLIOGRAPHY

1. Boldizar, Alexander, and Outi Korhonen. "Ethics, Morals and International Law." *European Journal of International Law* 10 (1999): 279-311.
2. Boon, Andrew, and John Flood. "Globalization of Professional Ethics? The Significance of Lawyers' International Codes of Conduct." *Legal Ethics* 2 (1999): 29-57.
3. Fischer, Thomas. *Strafgesetzbuch und Nebengesetze (Criminal Code and Supplementary Laws)*. 58th ed. Munich: Verlag C. H. Beck, 2011.
4. Hartung, Wolfgang. "Berufs- und Berufsordnungsrecht (Professional and Professional Order Law)": 1603-1622. In: Hans-Ulrich Büchting and Benno Heussen, eds. *Beck'sches Rechtsanwalts-Handbuch (Beck's Handbook for Attorneys)*. 9th ed. Munich: Verlag C. H. Beck, 2007.
5. Heine, Günter. "§ 356 Parteiverrat": 2985-2993. In: Adolf Schönke, Horst Schröder, Theodor Lenckner, Peter Cramer, Walter Streer, Albin Eser, Günter Heine, Walter Perron, Detlev Sternberg-Lieben, Jörg Eisele, Nikolaus Bosch, Bernd Hecker, Jörg Kinzig, and Ulrike Schittenhelm. *Strafgesetzbuch (Criminal Code)*. 28th ed. Munich: Verlag C. H. Beck, 2010.
6. Kühl, Kristian. *Strafgesetzbuch – Kommentar (Criminal Code – Commentary)*. 27th ed. Munich: Verlag C. H. Beck, 2011.
7. Kulzer, Hermann. "Widerruf der Anwaltszulassung wegen Vermögensverfalls und Insolvenzplan als Chance (Repeal of the Admission to the Bar Due to Financial Collapse and the Insolvency Plan as a Chance)." (May 4, 2009) // http://www.anwalt.de/rechtstipps/widerruf-der-anwaltszulassung-wegen-vermoegensverfalls-und-insolvenzplan-als-chance_003773.html.

8. Kukaitis, M. "The Court of Honour of Advocates Case Review for 2008-2011" (2011) [unpublished material, on file with E. Gruodytė].

9. Tröndle, Herbert, and Thomas Fischer. *Strafgesetzbuch und Nebengesetze (Criminal Code and Supplementary Laws)*. 53rd ed. Munich: Verlag C.H. Beck, 2006.

10. Westenberger, Norbert. "Pro Bono – Tue Gutes und rede darüber (Pro Bono – Do Good and talk about it)." *BRAK Magazin* 6/2009: 4–6 // http://www.brak-mitteilungen.de/brakmag_6_2009.pdf.

LEGAL REFERENCES

1. *Beratungshilfegesetz (Law on Legal Aid)*: 689 *et seq*. In: *Bundesgesetzblatt (Federal Publication of Legislation)*. 1980. Volume I.

2. *Berufsordnung für Rechtsanwälte (Ordinance on the Profession of Attorneys of the Federal Republic of Germany)* // http://www.brak.de/w/files/02_fuer_anwaelte/bora_stand_01.03.11.pdf.

3. *Bundesrechtsanwaltsordnung (Law on the Profession of Attorneys of the Federal Republic of Germany)*: 565 *et seq*. In: *Bundesgesetzblatt (Federal Publication of Legislation)*. 1959. Volume I.

4. *Case no. 1 Ss 12/94*. Judgment of 27 May 1994. Oberlandesgericht (Court of Appeals) Zweibrücken, 1st Senate for Criminal Law: 35-36. In: *Neue Zeitschrift für Strafrecht* 14 (1995).

5. *Case no. 1 StR 226/64*. Judgment of 6 October 1964. Bundesgerichtshof (Supreme Court), 1st Senate for Criminal Law: 41-44. In: *BGHSt (Collection of the Judgments and Decisions of the Supreme Court in Criminal Law Cases)*. Volume 20.

6. *Case no. 2 Ws 585/84*. Judgment of 14 August 1984. Oberlandesgericht (Court of Appeals) Koblenz, 2nd Senate for Criminal Law: 1177. In: *Neue Juristische Wochenschrift* 39 (1985).

7. *Case no. 3 StR 13/91*. Judgment of 13 February 1991. Bundesgerichtshof (Supreme Court), 3rd Senate for Criminal Law: 221-222. In: *Zeitschrift für Wirtschafts- und Steuerstrafrecht* 10 (1991).

8. *Case no. 34 O 169/98*. Judgment of 9 December 1998. Landgericht (District Court) Düsseldorf, 4th Chamber for Business Law.

9. *Case no. 4 StR 344/62*. Judgment of 16 November 1962. Bundesgerichtshof (Supreme Court), 4th Senate for Criminal Law: 192-200. In: *BGHSt (Collection of the Judgments and Decisions of the Supreme Court in Criminal Law Cases)*. Volume 18.

10. *Case no. 4 StR 724/53*. Judgment of 4 February 1954. Bundesgerichtshof (Supreme Court), 4th Senate for Criminal Law: 301-312. In: *BGHSt (Collection of the Judgments and Decisions of the Supreme Court in Criminal Law Cases)*. Volume 5.
11. *Case no. 5 StR 180/62*. Judgment of 26 June 1962. Bundesgerichtshof (Supreme Court), 5th Senate for Criminal Law: 305-307. In: *BGHSt (Collection of the Judgments and Decisions of the Supreme Court in Criminal Law Cases)*. Volume 17.
12. *Case no. 7 O 16794/06*. Judgment of 26 October 2006. Landgericht (District Court) München I, 7th Chamber for Private Law.
13. *Case no: 5St RR 60/94*. Judgment of 29 September 1994. Bayerisches Oberstes Landesgericht (former Highest Court of Criminal Law in Bavaria, now defunct), 5th Senate for Criminal Law.
14. *Government Resolution No. 1067 "For Approval of Lawyers Professional Liability Insurance Rules".* Official Gazette, 2004, no.133-4796.
15. *Law on State-Guaranteed Legal Aid of the Republic of Lithuania*. Official Gazette, 2000, no. 30-827; 2005, no. 18-572.
16. *Law on the Bar of the Republic of Lithuania*. Official Gazette, 2004, no. 50-1632.
17. *Lithuanian Code of Ethics for Advocates*. Official Gazette, 2005, no.130-4681.
18. *Order by the Minister of Justice No. 1R-278 "For Publishing the Order of Examination of Bar Disciplinary Actions".* Official Gazette, 2007, no.79-3197.
19. *Rechtsdienstleistungsgesetz (Law on the Provision of Legal Services)*: 2840 *et seq*. In: *Bundesgesetzblatt (Federal Publication of Legislation)*. 2007. Volume I.
20. *Strafgesetzbuch (German Criminal Code)*: 127 et seq; 3322 et seq. In: *Reichsgesetzblatt (Imperial Publication of Legislation)*. 1871. *Bundesgesetzblatt (Federal Publication of Legislation)*. 1998. Volume I.
21. *Strafprozessordnung (Criminal Procedure Law)*: 1074 *et seq*. In: *Bundesgesetzblatt (Federal Publication of Legislation)*. 1987. Volume I.