

E-ISSN: 2360 – 6754; ISSN-L: 2360 – 6754

European Journal of Law and Public Administration

2019, Volume 6, Issue 2, pp. 148-156

<https://doi.org/10.18662/eljpa/92>

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Published by:

Lumen Publishing House

on behalf of:

**Stefan cel Mare University from Suceava,
Faculty of Law and Administrative Sciences,
Department of Law and Administrative Sciences**

PROFESSIONAL RESPONSIBILITY OF NOTARIES: ONTOLOGICAL ASPECT

Vitalii VDOVICHEN¹, Lidiia VDOVICHENA²

Abstract

The problem of professional responsibility of the notary is related to the specifics of the performance by the notary of their professional duties. However, the fact of realization of the received powers as a consequence of the profession creates conditions for imposing on such a person the specific nature of responsibility. It (responsibility) is determined by the increased requirements for the profession of notary, in particular, to commit them all kinds of notarial acts. The disclosure of the ontological nature of the professional responsibility of the notary is associated with the following main aspects. First, the professional responsibility of the notary is complex, since it acts as a system legal category, and therefore has a whole set of specific features. Secondly, another problem is the professional responsibility of the notary – this is the distinction of responsibility of legal entities and individuals engaged in notarial activities, and in particular, a very specific attitude of the legislator to the category of «professional». Thirdly, this is a comparison of categories of professional duty and professional responsibility, and here the essential stimulus in the notarial activity is the correspondence of professional duty to personal convictions, interests and abilities of the notary. Fourthly, this distinction between the categories of legal and professional liability of the notary, in particular the problem of legal liability of the notary for the current reform of the notary in Ukraine, requires legislative regulation, in addition, the legislative uncertainty of the notary's liability institution testifies to the lack of guarantees of notarial activity.

Keywords:

Responsibility; professional responsibility; notary public; professional; professional responsibility of the notary; professional duty of the notary.

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1. Introduction

Responsibility is one of the main legal categories used in law enforcement activities in various aspects. We distinguish between social, moral, political, legal and other responsibilities. Social responsibility is a concept that includes all kinds of responsibilities in society. A special nature of the purpose and methods of carrying out professional responsibility determines a number of peculiarities inherent in this type of responsibility. The complex concept of professional responsibility should clearly and precisely characterize its place in the system of legal categories.

At the same time, legal liability is always associated with an appropriate assessment of the consequences of the past, that is, the consequences of past behavior. Legal liability is always a consequence of the offense, that is, violation of legal norms, but not moral prohibitions [3: 627]. However, the fact of the availability and use of responsibility for persons engaged in professional activities for their actions (inaction) allows us to talk about professional responsibility, which is endowed with a number of peculiarities inherent to it.

In this perspective, the professional responsibility of the notary is manifested in the application to a person (who carries out professional activity on the basis of a license or authorization of the authorized body for its implementation), measures of state coercion in the form of sanctions (additional encumbrances) directed at the restoration of the disturbed property and / or personal area of a third person.

But this occurs only in the case of such a person done of harming third persons in the event of failure or improper performance of her professional duties.

2. Theoretical Background

The problem of professional liability of notaries does not find a comprehensive study, both among the scholar theorists of domestic legal science, and foreign. Typically, in this perspective, certain types of liability are investigated, which can be applied to notaries for committing offenses (crimes) in case of improper performance of their professional duties. The same questions of professional activity and the allocation of its features were researched by such scholars as N.Grishchenko [6], S.Kurpiakova [8], V.Yermilov [14], O.Khudyakov [7]. In addition, the research of the legal responsibility of notaries is directly presented by scientists: V.Sizosenko – study of legal liability of notaries [12], L.Ladina – studying the concept and task of administrative liability in the system of legal liability of a private

notary in accordance with Ukrainian legislation [10], N. Gorban – the principle of professional competence and moral and ethical standards of the notary's activity [5], T.Kurilo – features of the administrative responsibility of notaries for corruption offenses [9], M.Dyakovich – study of civil legal aspects of the responsibility of the notary [2] and other. All the above-mentioned studies have great theoretical and practical significance. However, to date, the jurisprudence has not found an unambiguous solution to a number of problems of professional liability notaries doctrinal nature. In addition, in most articles of scientists of this problem were applied and were aimed at investigating the responsibility of the notary in a particular area of law enforcement activities.

3. Argument of the paper

The main points in the study of the professional responsibility of the notary should be noted: 1) the professional responsibility of the notary has a complex nature, since it acts as a system legal category, and therefore endowed with a whole set of specific features; 2) the problem of distinguishing the responsibility of legal entities and individuals engaged in notarial activities, and in particular, a very specific attitude of the legislator to the category of “professional”; 3) the comparison of categories of the professional duty of the notary and the professional responsibility of the notary, and here the essential stimulus in the notarial activity is the correspondence of the professional duty to personal convictions, intersections and skills of the notary; 4) delineation of the categories of legal and professional liability of the notary.

4. Arguments to support the thesis

For the emergence of professional liability of a notary, a key feature is the violation of property or personal non-property rights of persons who have applied to a notary in connection with the performance of their professional duties. Since the category of "wrongdoing" applies not only to offenses that the person has suffered damage, it can be manifested in the imposition of disciplinary, administrative, criminal sanctions against the notary. Therefore, the confirmation of other types of liability of an offense in the actions of the notary may contribute to the establishment of an offense in the actions of the notary as a condition of his professional responsibility. Thus, in Romania, the grounds for disciplinary liability of a notary are negligence in the performance of professional duties, unmotivated absence in the notary's office, violation of professional secrecy, behavior that

disgraces the profession of notary. Disciplinary proceedings against a lawyer are carried out by the Disciplinary Council of the Chamber of Notaries. Notaries may be subject to disciplinary action in the form of a written warning; a fine to be paid to the Notary Chamber's budget; removal from office for a term not exceeding 6 months; termination of notaries activity [4: 72].

However, for the professional responsibility of the notary, all the specific features that determine any other professional liability are characteristic. The most **important specific characteristics of the professional responsibility of the notary** include the following [3: 628]: 1) the professional responsibility of the notary acts as a significant and constant factor of any activity carried out by a notary and which always includes the risks of professional mistakes, omissions and negligence; 2) professional liability is always applicable to individuals and legal entities engaged in a professional activity on a fee basis and on the basis of a permit document, namely: licenses or permissions for carrying out the appropriate type of professional activity issued specifically by the Authorized Agency; 3) the variety of types of damage that may be caused by a notary public who carries out professional activities for his client; 4) the person who carries out professional activities has a professional responsibility for actions (inaction) committed during the validity of the relevant document (license, permit), which establishes the right of the subject to carry out professional activities for a specified period of time. Thus, according to Romanian law, the procedure for obtaining a notary's consent by the parties for notarial acts is elaborated by the law of Romania, after the document has been completed, it is read out to the sides, and the notary has to find out whether the sides understand its contents, and whether their intentions are correctly reflected. In the presence of motivated grounds, the notary may obtain the consent of the sides to commit an act separately, but only on the same day. In this case, in the notarial deed, the notary must specify the time and place of obtaining the consent of each of the sides. Receiving the consent of the deaf, dumb, or deaf is carried out in writing and signed by these persons personally [11]; 5) professional liability, as a rule, is of a contractual nature (but it is not excluded that professional liability may not be contractual in nature). However, when performing professional activities, creative thinking is always necessary and sometimes in non-standard situations. It is then that professional mistakes can cause significant damage to the lives, health and property of third parties. But at the same time, professionals (individuals who carry out professional activities on an individual basis or employees of a legal entity) act in their opinion honestly and impartially in the performance of their professional duties. They mostly deliberately do not commit

professional mistakes. And this points to the personal and subjective nature of perceiving professional responsibility by every professional; 6) an important criterion for the interaction between a person who carries out professional activities and his client is the degree of performance of professional commitments and potential realization in real life. The economic relationship between a person who carries out professional activities and his client is often uneven in terms of value and professional activities (notary, doctor, lawyer, auditor, etc.) of the corresponding monetary equivalent or property belonging to her, to cover losses from professional mistakes and omissions; 7) an important feature of professional responsibility is the time lag between the provision of professional services and the harm caused by professional mistakes, negligence and omissions made by a professional in the exercise of his professional activities; 8) the general basis for regulation and evaluation of professional activity and its results are legal norms that establish the legal grounds for the emergence of professional liability, as well as public assessment of professional responsibility can be carried out by applying business and professional ethics standards and comparing them with professional standards of activity; 9) professional responsibility is inextricably linked with the professional risks that may arise when a person performs his professional activities and in the event of injury to a third person as a result of professional mistakes made by a professional. Thus, in particular, according to Romanian law, the notary is obligated to find out the real relations between the interested persons in the notary's case and acts, to check whether the goal they seek to achieve does not contradict the law and to clarify the legal consequences that may come to them [11].

The problem of separation of responsibility of legal entities and individuals engaged in notarial activities. Here the situation develops in this way. So, some scholars believe that only individuals who are self-employed and registered as private entrepreneurs can carry professional responsibility. A professional is an individual who has a higher education, has special knowledge and appropriate professional training. In civilian traffic, individuals can act directly (subjects of civil law), and indirectly (in the form of employees of a legal entity, or an individual - an entrepreneur). An employee of a legal entity or an individual – an entrepreneur, or an individual – an entrepreneur, has all the features of a professional who, while carrying out professional activities, is a potential cause of damage to third person – clients who consume professional services. And such notaries have professional mistakes. Other scholars believe that professional liability can be borne not only by individuals, but also by legal entities. For example, N.B. Gryshchenko thinks that professional liability can be incurred both by

legal entities and individuals who carry out professional activities in accordance with the obtained license and other requirements established by the current legislation [6]. Moreover, the activity of legal entities related to the provision of professional services depends, first of all, on the professional skills of individuals who work under an employment contract or perform part of their professional duties under civil-law contracts (medical activities, accounting and audit firms and others). However, legal consequences for damage caused to third person due to professional misconduct of individuals occur in the legal entity that attracted them to professional activities. Therefore, in the indicated cases, the use of the term “professional liability” for legal entities is completely well-considered and justified. In addition, the basis for the occurrence of professional liability is in any case an offense (unintentional – or even without guilt – the assumption by a person who carries out the professional activity of a professional mistake) committed by an individual professional who works in an institution, organization or enterprise at the performance of a corresponding type of professional activity [3: 630].

Professional duty of the notary and professional liability of the notary. The legality and credibility of the transaction, which the notary certifies, must be no doubt, and the notary must be sure of what is his professional duty. Violation of this duty by the notary indicates the possibility of involving the notary in civil liability because of the presence in his actions of a civil offense: wrongfulness (violation of the duty not to suppose violations of the law), damage to the person against whom the transaction was committed in violation of the law, and even guilty (even in the form of negligence) of the notary. The problem of the professional duty of the notary is one of the key issues in the general structure of the deontological basis of the notary's activities. Its importance is due to the fact that in the activities of the notary there is almost no controlling authority, except for his own consciousness. Indeed, at the time of the reception of persons who seek a notary in order to protect and protect their rights and interests (the applicants), the notary does not report to any of the bosses, because they simply do not have them [1]. Analysis of professional duty shows that the combination of legal and moral in its content is based on the principle of moral justification of normative regulations [13]. In other words, the legal aspect of professional duty must be based on the moral principles of social life, to reflect their particularities in their structure during the implementation of civil legal relations. Significant influence on the professional duty of the notary also makes the duty of the public, which is unified and universal in relation to any professional activity. In other words, the public duty has no professional direction, it is conditioned by the norms

of morality that exist in the given society and does not depend on any corporate norms.

Legal liability of the notary and professional liability of the notary. The problem of legal liability of the notary for the current reform of the notary in Ukraine needs legislative regulation. The legal uncertainty of the institution of the responsibility of the notary testifies to the lack of guarantees of notarial activity. This is the cause of violations of the rights of the notary, and citizens and legal entities who have applied for notarial acts. At the same time, the current Ukrainian legislation does not clearly establish the professional responsibility of the notary. This, in particular, concerns the amount of compensation for damage by the notary, types of pecuniary damage that are subject to a notary public, the notion of civil liability of the notary, etc. In turn, these shortcomings of the legislation complicate, and in some cases even make it impossible to attract notaries to legal liability, which does not promote the protection of the rights of participants in the notarial process.

5. Conclusions

The main duty of the lawful state in the field of protecting the rights of citizens is not only the restoration or recognition of violated or disputed rights, but also the prevention of their violation or controversy. Today, the implementation of such a task in Ukraine also relates to the institution of the notary as an authority of unquestionable jurisdiction. In recent years, the role and significance of the notarial form of protection has steadily increased in Ukraine. And this, in turn, is conditioned both by the development of the legal system, in particular by the expansion of the number of private property objects, the development of civilian circulation, and the growth in all social levels of the need for efficient and highly professional activities of notaries.

The professional responsibility of the notary is related to his normative behavior. The fulfillment of their direct professional duties is ensured by both positive incentives and negative (liability). However, the nature of the professional responsibility of the notary is poorly investigated, since the overwhelming majority of scientific works focuses on certain types of legal liability, which creates a kind of gaps in the regulation of the normative behavior of the notary. The ontological nature of the professional responsibility of the notary is expressed by the following points. The professional responsibility of the notary is of a complex nature, as it exists as a system legal category, and therefore endowed with a whole set of specific features. The division of responsibility of legal entities and individuals

engaged in notarial activities is of a practical nature and is more relevant to certain types of legal liability, but in no way concerns the professional liability of the notary. The essential stimulus in the notarial activity is the compliance of the professional duty with the personal convictions, interests and abilities of the notary. The quality of the performance of the notarial activity depends on how harmoniously the personal interests and convictions of the notary are correlated with the requirements of professional duty. In this aspect, we are talking about the extent to which the professional duty of its content may affect the personal qualities of the notary, and the nature of such influence is determined. If in the process of activity there is a difference between them, then measures of legal coercion come to the aid of moral incentives - to act in accordance with the legislation of Ukraine. Otherwise, the notary's attraction to a certain type of legal liability should become inevitable. In addition, the distinction between the categories of legal and professional liability of the notary is not mutually exclusive, they are entirely consistent and both have the right to exist, and depending on the approach they can be understood either as a duty to experience adverse effects, or as one of the measures state coercion.

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