

# **Human Rights in Patient Care:**

## *A Practitioner Guide*

**UKRAINE**

**L'viv  
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2012**

**Byrne I., Ezer T., Cohen J., Overall J., Senyuta I.**

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Practitioner Guide belongs to the series of books, prepared within the frameworks of international project of the Open Society Institute. The book elucidates the rights and duties of patients and medical workers, forms and ways of these rights protection on the international, regional and national levels. The issues of forensic examinations fulfillment are also highlighted in the manual. The book contains a number of constitutional provisions, legal norms of laws and bylaw acts regulating every right and duty separately together with practical examples of their observance and violation, as well as examples from legal practice and useful pieces of advice as regards understanding and application of law. Appendixes contain samples of procedural documents, list of literature used, reference information and glossaries (international and national).

The edition is designed for lawyers, who are interested in protection of human rights in health care sphere as well as for representatives of law enforcing bodies. It can be also useful for health care system workers, participators of the insurance market services, students, postgraduates, scientists and lecturers of medical and law educational institutions, law enforcing organizations and physical persons who are interested in legal regulation of the health care sphere. All practitioner guides are displayed on the web site [www.health-rights.org](http://www.health-rights.org).

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# Preface

The right to health has long been treated as a "second generation right," which implies that it is not enforceable at the national level, resulting in a lack of attention and investment in its realization. However, this perception has significantly changed as countries increasingly incorporate the right to health and its key elements as fundamental and enforceable rights in their constitutions and embody those rights in their domestic laws. Significant decisions by domestic courts, particularly in Asia, Africa, and Latin America, have further contributed to the realization of the right to health domestically and to the establishment of jurisprudence in this area.

Although these and other positive developments toward ensuring the highest attainable standard of physical and mental health represent considerable progress, the right to health for all without discrimination is not fully realized, because, for many of the most marginalized and vulnerable groups, the highest attainable standard of health remains far from reach. In fact, for many, interaction with health care settings and providers involves discrimination, abuse, and violations of their basic rights. As I explored in my report to the UN General Assembly on informed consent and the right to health, violations to the right to privacy and to bodily integrity occur in a wide range of settings. Patients and doctors both require support to prevent, identify, and seek redress for violations of human rights in health care settings, particularly in those cases in which power imbalances—created by reposing trust and by unequal levels of knowledge and experience inherent in the doctor-patient relationship—are further exacerbated by vulnerability due to class, gender, ethnicity, and other socioeconomic factors.

Although there are a large number of publications on the principles of human rights, very little has been available in the area of the application of human rights principles in actual health care settings. In this context, the present guide fills a long-felt void. The specific settings detailed in this guide are Eastern European countries, but the guide is useful beyond this context in the international settings. I hope it will encourage the establishment of protective mechanisms and legislative action relating to violations within health care settings. Not only will it help to support health care providers, legal practitioners, and health activists to translate human rights norms into practice, it will also ultimately help communities to raise awareness, mobilize, and claim the rights they are entitled to.

The authors have done a huge service in furthering the right to health. They deserve full credit for undertaking this arduous task. The Open Society Institute

also needs to be thanked for funding and publishing this very important work. I have no doubt that this practitioner guide will generate a greater appreciation for the role of human rights in the delivery of quality health care in patient care settings and will also prove to be an invaluable resource for those working to realize the right to health.

**Anand Grover**

*United Nations Special Rapporteur on the Right to Health*

# Acknowledgments

This guide is the product of the cooperative effort of a number of dedicated people and organizations. The idea grew out of genuine concern and the sincere belief of many of these individuals that, considering the dependent position of patients in relation to their health care providers, the promotion of human rights norms in the realm of patient care will secure the human dignity of both patients and health care professionals alike.

Organizations supporting this project include the International Renaissance Foundation (Ukraine), the Law and Health Initiative (LAHI) of the Open Society Institute Public Health Program, and the OSI Human Rights and Governance Grants Program (HRGGP). Much appreciation is owed to the individuals from these organizations who were most directly involved: **Victoria Tymoshevska** and **Maria Vynnytska** (International Renaissance Foundation) for coordination of the project; **Tamar Ezer** and **Jonathan Cohen** (LAHI), who, in addition to fulfilling general oversight and editing responsibilities, coauthored the introduction with **Judith Overall** and also coauthored the international and regional procedures chapter;<sup>1</sup> **Mariana Berbec Rostas** (HRGGP), for updating the regional procedures section; **Paul Silva** (OSI Communications Officer), for his advice and coordination of work on the guide's design; and **Jeanne Criscola**, the designer.

Special thanks is owed to **Iain Byrne, Senior Lawyer** at INTERIGHTS, for writing the chapters on the international and regional frameworks for human rights in patient care and for preparing the glossary with **Judith Overall** and to **Leo Beletsky** for review of the domestic portions of the PG draft. Thanks are also due to **Sara Abiola** for the language and format editing of the international and regional framework chapters and to **Anna Kryukova** for preparing the ratification chart. Also deserving thanks are **Dmytro Klapaty, Oksana Kohut, Olena Chernilevska** (All-Ukrainian public organization "Foundation of medical law and bioethics of Ukraine) for the updates of the national part of the guide. We would also like to thank **Natalia Kariaeva** for translation of the national part, **Lyubov Kyrienko** for literary editing and **Vitaliy Slichnyi** for formatting of the Ukrainian version.

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<sup>1</sup> This chapter builds on material in *Health and Human Rights: A Resource Guide*, published by Open Society Institute and Equitas and edited by J. Cohen, T. Ezer, P. McAdams, and M. Miloff. An HTML version of this resource guide is available at: <http://equalpartners.info/> (Ukrainian version: *Health Care and Human Rights: A Resource Guide*/ edited by J. Cohen, T. Ezer, P. McAdams, and M. Miloff; translated from English by N. Shevchuk; scientific editor of the Ukrainian version I. Senyuta. – enlarged edition. – L'viv: Editorial house LOBF "Medicine and law", 2011. – 600 p., is available on the web site [www.healthrights.org.ua](http://www.healthrights.org.ua)). The appendix to the international and regional procedures chapter is excerpted, with permission, from the *Human Rights Centre, University of Essex, publication Reported Killing as Human Rights Violations*, by Kate Thompson and Camille Giffard, pages 127–130.

Thanks is also owed to **Andryi Rokhanskyi** (Law enforcement group of Charkiv), **Dmytro Groysmam**, **Victor Rolik** (Law enforcement group of Vinnitsa), **Zoryana Chernenko** (National University of Kyiv-Mohyla Academy), **Khrystyna Tereshko** (All-Ukrainian public organization “Foundation of medical law and bioethics of Ukraine”), **Lyudmyla Deshko** (Donetsk National University), **Lyudmyla Solop** (lawyer) **Oleksandr Angelov**, **Victor Gluhovskyi** (South Ukrainian centre of citizen’s rights in the sphere of health protection) for their commentaries.

Finally, this guide would not exist if it were not for the enthusiasm and personal dedication paid to this project by **Judith Overall**, OSI Consultant, M.Ed, MSHA, JD.

*Author of the national part*

*Scientific editor*

*Chief of the project*

***Iryna Senyuta***

# Foreword to Ukrainian Edition

Medical law in Ukraine is moving forward, attracting more and more specialists, who both on doctrinal and law enforcement levels, influence its successful development in different aspects. Transformational changes in national medical law occur under the impact of foreign experience, world implementation and integration processes.

The handbook – “Human Rights in Patient Care: A Practitioner Guide” – is a new source for the bookshelves of professionals who are interested in theoretical and legal issues of human rights in the sphere of health care protection.

You hold a book, non-typical both by its shape and content. This is due to the unity of achievement of foreign and national experts and by the presumed great practical effect of the book.

Within the framework of an international project, carried out by the Open Society Institute (New York, USA), aimed at the preparation of a series of practical guides “Human Rights in Patient Care: A Practitioner Guide”, there were working groups from eight states: Armenia, Georgia, Kazakhstan, Kyrgyzstan, Macedonia, Moldova, Russia, and Ukraine. Ukrainian national project started in September 2007, as one of the four original countries of the OSI project.

As all other volumes in the “series,” the Ukrainian one is composed of international and national parts. In the first part is an analysis of international and regional standards of human rights in the sphere of health care, and mechanisms of their protection. In the second part the elements of the legal status of national major medical relations, subjects and forms of judicial and non judicial protection are elucidated. There are also a glossary and appendixes. This book has been prepared on the grounds of the laws of Ukraine current at the date of October 1, 2011.

The edition is designed in a form acceptable to specialists of different interests and is filled with multivectoral material, combining elements of theory, practical pieces of advice, legal regulation issues and actual examples from practice. For the first time an effort has been made to characterize legal status of a patient and medical worker in the context of medical care provision, to define the issues of proceedings in medical cases, and to exclude obstacles to their practical resolution.

The major tasks of authors of the Practitioner Guide include: 1) to concentrate the attention of practitioners on human rights’ aspects, and make a person and his/her benefits, considered to be the highest social value in the society, be the issue, which law enforcement practice has to deal with; 2) to give pieces of



advice, aimed at practice optimization and to expand the legal arsenal of lawyers dealing with health care issues; 3) to elucidate the legal and practical material through a balanced approach to issues of “doctor-patient” relations.

When starting any “construction” it is very important to take care of the basis of the building – in our case it is a book. This edition is “built” on strong foundations of the legislation, legal practice and legal decisions. The walls of our handbook are made of bricks, which were formed by daily painstaking work of specialists in the sphere of legal protection, legal education and advocacy. In its final shape, the edition will serve the aim, which every “legal builder” in this field wants to achieve: protection of human rights in the sphere of health care.

The international part of the national edition of the Practitioner Guide is the same in all of the Guides, with views of experts as to practical mechanisms and procedures, and definition apparatus in health care sphere included. The outline of the national part for all of the county Guides has been preserved, but its content is filled with national peculiarities. Taking into account Ukraine national legal doctrine, medical /legal practice, and complex and synergetic approaches to material presentation Ukrainian author elucidates conceptual issues of the following: health care system functioning, human rights in the sphere of health care protection, focusing the attention on legal status of the elements of medical and legal relation subjects in one of the most important spheres of state and public life.

This book is the next brick in the process of formation of a national source base and provides material for legal views and strategies of lawyers while dealing with medical cases. The authors are looking forward to receiving commentaries and recommendations of specialists in Ukraine, practical examples of their own and of their colleagues’, and also pieces of legal advice, which will help to permanently improve the electronic version of the book placed on the web site [www.healthrights.org.ua](http://www.healthrights.org.ua).

*Author of the national part*

*Scientific editor*

*Chief of the project*

**Iryna Senyuta**

1.1 INTRODUCTION

1.2 OVERVIEW OF THE GUIDE

1.3 TABLE OF ABBREVIATIONS

1.4 TABLE OF RATIFICATIONS

# 1

## Introduction

### 1.1 Introduction

This guide is part of a series published in cooperation with the Law and Health Initiative of the Open Society Institute (OSI) Public Health Program, OSI's Human Rights and Governance Grants Program, International Renaissance Foundation (Ukraine), OSI's Russia Project and the Soros Foundations of Armenia, Georgia, Kazakhstan, Kyrgyzstan, Macedonia and Moldova. Designed as a practical "how to" manual for lawyers, it aims to provide an understanding of how to use legal tools to protect basic rights in the delivery of health services. The guide systematically reviews the diverse constitutional provisions, statutes, regulations, bylaws, and orders applicable to patients and health care providers and categorizes them by right or responsibility. It additionally highlights examples and actual cases argued by lawyers.

The aim of the guide is to strengthen awareness of existing legal tools that can be used to remedy abuses in patient care. If adequately implemented, current laws have the potential to address pervasive violations of rights to informed consent, confidentiality, privacy, and nondiscrimination. As this effect can be accomplished through both formal and informal mechanisms, this guide covers litigation and alternative forms for resolving claims, such as enlisting ombudspersons and ethics review committees. It is hoped that lawyers and other professionals will find this book a useful reference in a post-Soviet legal landscape, which is often in rapid flux.

This guide addresses the concept of “human rights in patient care,” which brings together the rights of patients and health care providers. The concept of human rights in patient care refers to the application of general human rights principles to all stakeholders in the delivery of health care. These general human rights principles can be found in international and regional treaties, such as the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the European Convention on the Protection of Human Rights and Fundamental Freedoms; and the European Social Charter. These rights are universal and can be applied in the context of health care delivery just as they can be in any other context.

## 1.2 Overview of the Guide

Chapters 2 and 3 of the guide respectively cover the international and regional laws governing human rights in patient care. They examine relevant “hard” and “soft” laws and provide examples of cases and interpretations of treaty provisions. These two chapters are identically organized around the established human rights applicable to both patients and providers. These are the rights to liberty and security of the person; privacy; information; bodily integrity; life; highest attainable standard of health; freedom from torture, cruel, inhuman, and degrading treatment; participation in public policy; nondiscrimination and equality for patients; decent work conditions; freedom of association; and due process for providers. Chapter 4 provides information on the international and regional procedures for protecting these rights.

Chapters 5, 6, 7, and 8 are country specific. Chapter 5 clarifies the legal status of international and regional treaties ratified, signed, or adopted by Ukraine; explains the country’s use of precedent; and includes a brief description of the legal and health systems. Chapter 6 deals with patient rights and responsibilities. The patient rights section is organized according to the rights in the European Charter of Patients’ Rights, with the addition of any country-specific rights not specifically covered by the charter. Drawn up in 2002 by the Active Citizenship Network—a European network of civic, consumer, and patient organizations—the European Charter of Patients’ Rights is not legally binding, but it is generally regarded as the clearest and most comprehensive statement of patient rights. The charter attempts to translate regional documents on health and human rights into 14 concrete provisions for patients: rights to preventive measures, access, information, informed consent, free choice, privacy and confidentiality, respect of patients’ time, observance of quality standards, safety, innovation, avoidance of unnecessary suffering and pain, personalized treatment, the filing of complaints, and compensation. These rights have been used as a

reference point to monitor and evaluate health care systems across Europe and as a model for national laws. Chapter 6 uses the rights enumerated in the European Charter of Patients' Rights as an organizing principle, but along with each right, the applicable binding provisions under the national laws are presented and analyzed. These rights are then cross-referenced with the more general formulation of rights in the international and regional chapters. Chapter 7 focuses on provider rights and responsibilities, including the right to work in decent conditions, the right to freedom of association, the right to due process, and other relevant country-specific rights.

Chapter 8 covers the national mechanisms for enforcement of both patient and provider rights and responsibilities. These mechanisms include administrative, civil, and criminal procedures and alternative mechanisms, such as the Office of the Public Prosecutor, ombudspersons, ministries of internal affairs, ethics review committees, and inspectorates of health facilities. The chapter additionally contains an annex of sample forms and documents for lawyers to file.

The final section is a glossary of terms that are relevant to the field of human rights in patient care. Some versions of the guide also include a section of the glossary with country-specific terminology. The glossary will enable greater accessibility of law, health, and human rights material.

## Uses of the Guide

The guide has been designed as a resource for both litigation and training. It may be particularly useful in clinical legal-education programs. Although designed for lawyers, the guide may additionally be of interest to medical professionals, public health managers, Ministries of Health and Justice personnel, patient advocacy groups, and patients who desire a firmer understanding of the legal basis for patient and provider rights and responsibilities and the available mechanisms for enforcement.

## Companion Websites

The field of human rights in patient care is constantly changing and evolving, necessitating the need for regular updates to the guide. Electronic versions of the guides will be periodically updated at [www.health-rights.org](http://www.health-rights.org). The website of Ukrainian branch is <http://healthrights.org.ua>. This international home page links to country websites, which include additional resources gathered by the country working groups that prepared each guide. These resources include relevant laws and regulations, case law, tools and sample forms, and practical tips for lawyers. The websites also provide a way to connect lawyers, health providers, and patients concerned about human rights in health care. Each of the websites provides a mechanism for providing feedback on the guides.

### Note from the Authors

The material in this guide represents the views of an interdisciplinary working group composed of legal and medical experts. The guide does not carry judicial or legislative authority and it does not substitute for legal advice from a qualified lawyer. Rather, it represents the authors' attempt to capture the current state of the law and legal practice in the field of human rights in patient care in Ukraine. The authors welcome any comments concerning errors or omissions, suggested additions to the guide, and questions about how the law might apply to a particular factual scenario.

As this guide illustrates, in Ukraine, the field of human rights in patient care is still new and evolving. Many of the statutory provisions cited in the guide have not been authoritatively interpreted by courts, and those that have still remain open to additional application and interpretation. There remain huge gaps in understanding how, in practice, to apply human rights in patient care. This guide is, therefore, a starting point for legal inquiry, not a final answer. It is hoped that this guide will attract new professionals to the field of human rights in patient care, and that future editions will be much richer in their elaboration of legal protections.

## 1.3 Table of Abbreviations

<b>ABBREVIATION</b>	<b>TITLE</b>
AC	Advisory Committee
CAT	Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment
CE	ILO Committee of Experts
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social, and Cultural Rights
CHR	Commission on Human Rights
CMW	International Convention on the Protection of the Rights of All Migrants Workers and Members of their Families
COE	Council of Europe
CRC	Committee on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECOSOC	UN Economic and Social Council
ECSR	European Committee of Social Rights
EPHA	European Public Health Alliance
ESC	European Social Charter
EU	European Union
FCNM	Framework Convention for the Protection of National Minorities
HRC	Human Rights Committee
IAPO	International Alliance of Patients' Organizations
ICCPR	International Covenant on Civil and Political Rights

ABBREVIATION	TITLE
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ICN	International Council of Nurses
ILO	International Labour Organization
OHCHR	Office of the High Commissioner for Human Rights
SR	Special Rapporteur on the Right to Health
UDHR	Universal Declaration of Human Rights
UN	United Nations
UPR	Universal Periodic Review
WHO	World Health Organization
WMA	World Medical Association



## 1.4 Table of Ratifications

<b>DOCUMENTS</b>	<b>Date of Accession</b>	<b>Date of Signature</b>	<b>Date of Ratification</b>	<b>Entry into Force</b>	<b>Applicable In-country Legislation</b>	<b>Reservation Entered</b>
<b>INTERNATIONAL</b>						
International Covenant on Civil and Political Rights (ICCPR)		20.03.1968	19.10.1973			
Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR-OP)	25.12.1990			25.10.1991		
International Covenant on Economic, Social and Cultural Rights (ICESCR)		20.03.1968	19.10.1973			
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)			19.12.1980	03.09.1981		

<b>DOCUMENTS</b>	<b>Date of Accession</b>	<b>Date of Signature</b>	<b>Date of Ratification</b>	<b>Entry into Force</b>	<b>Applicable In-country Legislation</b>	<b>Reservation Entered</b>
Convention for the Elimination of All Forms of Racial Discrimination (CERD)		07.03.1966	21.01.1969	07.04.1969		
Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment (CAT)		02.05.1996	05.05.1997	01.09.1997		
Optional Protocol to the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT-OP)		23.09.2005	21.07.2006			
Convention on the Rights of the Child (CRC)		21.02.1990	27.02.1991	27.09.1991		
International Convention on the Protection of the Rights of All Migrants Workers and Members of their Families (CMW)						

<b>DOCUMENTS</b>	<b>Date of Accession</b>	<b>Date of Signature</b>	<b>Date of Ratification</b>	<b>Entry into Force</b>	<b>Applicable In-country Legislation</b>	<b>Reservation Entered</b>
Convention on the Rights of Persons with Disabilities (DRC)		24.09.2008				
<b>EUROPEAN (REGIONAL)</b>						
Convention on Human Rights and Biomedicine 1997		22.03.2002				
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)		04.11.1950	17.07.1997	11.09.1997		
European Social Charter 1961		02.05.1996				
European Social Charter 1996		07.05.1999		14.09.2006		

<b>DOCUMENTS</b>	<b>Date of Accession</b>	<b>Date of Signature</b>	<b>Date of Ratification</b>	<b>Entry into Force</b>	<b>Applicable In-country Legislation</b>	<b>Reservation Entered</b>
Framework Convention for the Protection of National Minorities 1995		15.09.1995	09.12.1997			
EU Charter of Fundamental Rights						



## 2.1 INTRODUCTION

## 2.2 KEY SOURCES

## 2.3 PATIENTS' RIGHTS

Right to liberty and security of the person

Right to privacy

Right to information

Right to bodily integrity

Right to life

Right to the highest attainable standard of health

Right to freedom from torture and cruel, inhuman, and degrading treatment

Right to participate in public policy

Right to nondiscrimination and equality

## 2.4 PROVIDERS' RIGHTS

Right to work in decent conditions

Right to freedom of association

Right to due process and related rights

# 2

## **International Framework for Human Rights in Patient Care**

### **2.1 Introduction**

This chapter presents the main standards that safeguard human rights in patient care internationally and examines how United Nations (UN) treaty-monitoring bodies have interpreted these standards. The chapter is divided into three parts. The first part describes the key international sources governing human rights in patient care. The second examines patients' rights, and the third focuses on the rights of providers. Each part includes subsections that discuss the standards and relevant interpretations connected to a particular right (e.g., the Right to Liberty and Security of the Person) and also provide some examples of potential violations. The standards addressed include binding treaties, such as the International Covenant on Civil and Political Rights (ICCPR), and nonbinding policies developed by the UN and nongovernmental organizations (NGOs), such as the World Medical Association's Declaration on Patients' Rights.

## 2.2 Key Sources

### UNITED NATIONS

#### Universal Declaration of Human Rights (UDHR)

The UDHR is not a treaty but it is highly authoritative. It has shaped the evolution of modern human rights law, and many of its provisions are effectively reproduced in international treaties (see below). Many of its provisions have also achieved the status of customary international law— they are universal and indisputable.

Key provisions include:

- Article 3 (right to life)
- Article 5 (prohibition on torture and cruel, inhuman, or degrading treatment)
- Article 7 (protection against discrimination)
- Article 12 (right to privacy)
- Article 19 (right to seek, receive, and impart information)
- Article 25 (right to medical care)

#### TREATIES

All of the seven major international human rights treaties contain guarantees relating to the protection of human rights in patient care. While these treaties are binding on those states that have ratified them, their standards have strong moral and political force even for nonratifying countries. Many, such as the two international covenants and the Convention on the Rights of the Child (CRC), have been widely (and, in the case of the latter, almost universally) ratified.<sup>1</sup>

The treaty-monitoring bodies have issued numerous General Comments (GCs) to serve as authoritative guides for the interpretation of treaty standards. For example, the Committee on Economic and Social Rights (CESCR) issued GC 14 on Article 12 of the International Covenant on Civil and Political Rights (ICESCR), interpreting the right to health as the right to control one's own health and body.

All of the treaty bodies monitor compliance through the consideration of periodic state reports and then issue concluding observations.<sup>2</sup> The majority—including the

<sup>1</sup> Office of the UN High Commissioner for Human Rights (OHCHR). Status of the Ratifications of the Principle International Human Rights Treaties, <http://www2.ohchr.org/english/bodies/docs/status.pdf>. Accessed November 14, 2009.

<sup>2</sup> OHCHR. Human Rights Bodies. <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx>. Accessed November 14, 2009.



Human Rights Committee (HRC), Committee on the Elimination of Discrimination Against Women (CEDAW), Committee Against Torture (CAT), Committee on the Elimination of Racial Discrimination (CERD), and the Committee on the Rights of Persons with Disabilities (CRPD)—may now also consider individual complaints provided that, in most cases, the State has ratified the appropriate optional protocol to the treaty.<sup>3</sup> Together, these materials can be used to further interpret the standards.

- ▶ **International Covenant on Civil and Political Rights (ICCPR)<sup>4</sup>**  
Together with the UDHR and the ICESCR, the ICCPR forms part of the International Bill of Rights. The ICCPR is monitored by the HRC.

Relevant provisions include:

- Article 2(1) (prohibition on discrimination)
- Article 6 (right to life)
- Article 7 (prohibition on torture)
- Article 9 (right to liberty and security)
- Article 10 (right to dignity for detainees)
- Article 17 (right to privacy)
- Article 19(2) (right to information)
- Article 26 (equality before the law)

- ▶ **International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>5</sup>**

The ICESCR is monitored by the CESCR. Key provision:

- Article 12 (right to highest attainable standard of health) (See General Comment 14)<sup>6</sup>

<sup>3</sup> OHCHR. Human Rights Bodies: Complaint Procedures, <http://www2.ohchr.org/english/bodies/petitions/index.htm>. Accessed November 14, 2009. The ICESCR will also have its own complaints mechanism in the near future, following adoption of an optional protocol by the UN in December 2008 and its opening for ratification on September 24, 2009.

<sup>4</sup> International Covenant on Civil and Political Rights (ICCPR). United Nations General Assembly Resolution 2200A [XXI]. December 16, 1966. <http://www2.ohchr.org/english/iaw/ccpr.htm>. Accessed November 14, 2009.

<sup>5</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR). United Nations General Assembly Resolution 2200A[XXI]. December 16, 1966. <http://www2.ohchr.org/english/iaw/cescr.htm>.

<sup>6</sup> Official Documents Center of the United Nations. <http://daccessdds.un.org/doc/UNDOC/GEN/G00/439/34/PDF/G0043934.pdf?0penElement>. Accessed November 14, 2009.

The SR (currently, Anand Grover, who replaced Professor Paul Hunt in August 2008) is an independent expert who is mandated by the UN to investigate how the right to the highest attainable standard of health can be effectively realized. The SR conducts country visits, produces annual reports, and carries out in-depth studies into particular issues. For example, in September 2007, the SR produced draft guidelines for pharmaceutical companies on access to medicines.<sup>7</sup>

Other relevant provisions include:

- Article 2(1) (prohibition on discrimination)
- Article 10(3) (protection of children)
- Article 11 (adequate standard of living)

**Note: Special Rapporteur (SR) on the Right to Health<sup>8</sup>**

▶ **Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>9</sup>**

Monitored by the Committee on the Elimination of Discrimination against Women. Key provisions:

- Article 12 (elimination of discrimination against women in health care)
- Article 14(2)(b) (right of women in rural areas to have access to adequate health care facilities)

(See also General Recommendation 24 on Article 12 (women and health), a comprehensive analysis of women's health needs and recommendations for government action.)<sup>10</sup>

▶ **Convention for the Elimination of All Forms of Racial Discrimination (CERD)<sup>11</sup>**

Monitored by the Committee on the Elimination of Racial Discrimination. Key provision:

<sup>7</sup> OHCHR. <http://www2.ohchr.org/english/issues/health/right/docs/draftguid.doc>.

<sup>8</sup> OHCHR. Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, <http://www2.ohchr.org/english/issues/health/right/>. Accessed November 14, 2009.

<sup>9</sup> Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). United Nations General Assembly. December 18, 1979. <http://www2.ohchr.org/english/law/cedaw.htm>. Accessed November 14, 2009.

<sup>10</sup> UN Committee on the Elimination of Discrimination Against Women. CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health) <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom24>. Accessed November 14, 2009.

<sup>11</sup> International Convention for the Elimination of all Forms of Racial Discrimination (ICERD). UN General Assembly Resolution 2106 [XX]. December 21, 1965. <http://www2.ohchr.org/english/law/cerd.htm> Accessed November 14, 2009.

- Article 5(1)(e) (prohibition on race discrimination in public health and medical care)

▶ **Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment (CAT)<sup>12</sup>**

Monitored by the Committee Against Torture, the CAT introduced a new optional protocol in 2002 that focuses on prevention of torture.<sup>13</sup>

▶ **Convention on the Rights of the Child (CRC)<sup>14</sup>**

Monitored by the Committee on the Rights of the Child, the CRC contains a comprehensive range of civil, political, economic, social, and cultural rights guarantees.

Key provision:

- Article 24 (right to highest attainable standard of health)

▶ **International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW)<sup>15</sup>**

Monitored by the Committee on Migrant Workers, the CMW contains a comprehensive range of civil, political, economic, social, and cultural rights guarantees.

Key provisions:

- Article 28 (right to medical care)
- Articles 43 and 45(1)(c) (equal treatment in health care)

<sup>12</sup> Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. UN General Assembly Resolution 39/46. December 10, 1984. <http://www2.ohchr.org/english/law/cat.htm>. Accessed November 14, 2009.

<sup>13</sup> Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. UN General Assembly Resolution A/RES/57/199. December 18, 2002. <http://www2.ohchr.org/english/law/cat-one.htm>. Accessed November 14, 2009.

<sup>14</sup> Convention on the Rights of the Child (CRC). UN General Assembly Resolution 44/25. November 20, 1989. <http://www2.ohchr.org/english/law/crc.htm>, Accessed November 14, 2009.

<sup>15</sup> International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families. UN General Assembly Resolution 45/158. December 18, 1990. <http://www2.ohchr.org/english/law/cmw.htm>. Accessed November 14, 2009.

▶ **Convention on the Rights of Persons with Disabilities (CRPD)<sup>16</sup>**

The CRPD applies to people with “long-term physical, mental, intellectual or sensory impairments,” and seeks to “ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity.”<sup>17</sup> The CRPD contains a comprehensive range of civil, political, economic, social, and cultural rights guarantees. It was entered into force on May 12, 2008.

Key provision:

- Article 25 (health)

Other relevant provisions include:

- Article 5 (equality and nondiscrimination)
- Articles 6 and 7 (women and children)
- Article 9 (access to medical facilities and services)
- Article 10 (right to life)
- Article 14 (liberty and security)
- Article 15 (freedom from torture, etc.)
- Article 16 (freedom from exploitation, violence, and abuse)
- Article 17 (protection of physical and mental integrity)
- Article 19 (independent living)
- Article 21 (access to information)
- Article 22 (respect for privacy)
- Article 26 (habilitation and rehabilitation)
- Article 29 (participation in public life)

## NONTREATY INSTRUMENTS

▶ **UN Standard Minimum Rules for the Treatment of Prisoners<sup>18</sup>**

▶ **UN Body of Principles for the Protection of All Persons Under Any Form of Detention<sup>19</sup>**

<sup>16</sup> Convention on the Rights of Persons with Disabilities (CRPD). UN General Assembly Resolution. December 13, 2006. <http://www2.ohchr.org/english/law/disabilities-convention.htm>. Accessed November 14, 2009.

<sup>17</sup> CRPD. Article 1.

<sup>18</sup> Standard Minimum Rules for the Treatment of Prisoners. Economic and Social Council Resolution 663 C (XXIV). July 31, 1957. <http://www2.ohchr.org/english/law/treatmentprisoners.htm>. Accessed November 14, 2009.

<sup>19</sup> Body of Principles for the Protection of All Persons Under Any Form of Detention. UN General Assembly Resolution 43/173. December 9, 1998. <http://www2.ohchr.org/english/law/bodyprinciples.htm>. Accessed November 14, 2009.

- ▶ **UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care**<sup>20</sup>

### ADDITIONAL INTERNATIONAL DOCUMENTS

There are also a number of other important international consensus documents that do not have the binding force of a treaty but exert considerable political and moral force.

- ▶ **WHO Alma-Ata Declaration 1978**<sup>21</sup>

This declaration reaffirms that health is a state of complete physical, mental, and social well-being, not merely the absence of disease or infirmity, and is a fundamental human right (Article 1). It focuses on the importance of primary health care.

- ▶ **Charter on the Right to Health 2005 (International Union of Lawyers)**<sup>22</sup>

This charter addresses issues such as privacy and informed consent.

- ▶ **Declaration on the Rights of the Patients 2005 (revised) (World Medical Association (WMA))**<sup>23</sup>

This declaration addresses issues such as the rights to confidentiality, information, and informed consent. The following is an excerpt from the preamble:

*The relationship between physicians, their patients and broader society has undergone significant changes in recent times. While a physician should always act according to his/ her conscience, and always in the best interests of the patient, equal effort must be made to guarantee patient autonomy and justice. The following Declaration represents some of the principal rights of the patient that the medical profession endorses and promotes. Physicians and other persons or bodies involved in the provision of health care have a joint responsibility to recognize and uphold these rights. Whenever*

<sup>20</sup> Principles for the Protection of Persons with Mental Illness and Improvement of Mental Health Care. UN General Assembly Resolution 46/119. December 17, 1991. <http://www2.ohchr.org/english/law/principles.htm>. Accessed November 14, 2009.

<sup>21</sup> Declaration of Alma-Ata. September 6, 1978. [http://www.who.int/hpr/NPH/docs/declaration\\_almaata.pdf](http://www.who.int/hpr/NPH/docs/declaration_almaata.pdf). Accessed November 14, 2009.

<sup>22</sup> Charter on the Right to Health. International Union of Lawyers. UIA General Assembly. August 31, 2005. [www.uanet.org/documents/quuia/resolutions/Sante4GB.pdf](http://www.uanet.org/documents/quuia/resolutions/Sante4GB.pdf). Accessed November 15, 2009.

<sup>23</sup> Declaration on the Rights of the Patient. World Medical Association. WMA Assembly September/October 1981. <http://www.wma.net/en/30publications/10policies/I4/index.html>. Accessed November 15, 2009.

*legislation, government action or any other administration or institution denies patients these rights, physicians should pursue appropriate means to assure or to restore them.*

► **Declaration on Patient-Centred Healthcare 2007, International Alliance of Patients' Organizations (IAP0)<sup>24</sup>**

This declaration was produced by IAP0 as part of its effort to advocate internationally, with a strong voice for patients, on relevant aspects of health care policy, with the aim of influencing international, regional, and national health agendas and policies.

The document espouses five principles:

- **Respect:**

*Patients and carers have a fundamental right to patient-centred healthcare that respects their unique needs, preferences and values, as well as their autonomy and independence.*

- **Choice and empowerment:**

*Patients have a right and responsibility to participate, to their level of ability and preference, as a partner in making healthcare decisions that affect their lives. This requires a responsive health service which provides suitable choices in treatment and management options that fit in with patients' needs, and encouragement and support for patients and carers that direct and manage care to achieve the best possible quality of life. Patients' organizations must be empowered to play meaningful leadership roles in supporting patients and their families to exercise their right to make informed healthcare choices.*

- **Patient involvement in health policy:**

*Patients and patients' organizations deserve to share the responsibility of healthcare policy-making through meaningful and supported engagement in all levels and at all points of decision-making, to ensure that they are designed with the patient at the centre. This should not be restricted to healthcare policy but include, for example, social policy that will ultimately impact patients' lives.*

- **Access and support:**

*Patients must have access to the healthcare services warranted by their condition. This includes access to safe, quality and appropriate services, treatments, preventive care and health promotion activities. Provision should be made to ensure that all patients can access necessary services, regardless of their condition or socio-*

<sup>24</sup> International Alliance of Patients' Organizations (IAP0). Declaration on Patient-Centred Healthcare, [www.patientsorganizations.org/](http://www.patientsorganizations.org/). Accessed November 15, 2009.

*economic status. For patients to achieve the best possible quality of life, healthcare must support patients' emotional requirements, and consider non-health factors such as education, employment and family issues which impact on their approach to healthcare choices and management.*

- Information:

*Accurate, relevant and comprehensive information is essential to enable patients and carers to make informed decisions about healthcare treatment and living with their condition. Information must be presented in an appropriate format according to health literacy principles considering the individual's condition, language, age understanding, abilities and culture.*

▶ **Jakarta Declaration on Leading Health Promotion into the 21st Century (1997)<sup>25</sup>**

This declaration is the final outcome document of the Fourth International Conference on Health Promotion. It lays down a series of priorities for health promotion in the twenty-first century, including social responsibility, increased investment and secured infrastructure, and empowerment of the individual.

▶ **Position Statement: Nurses and Human Rights 1998, International Council of Nurses (ICN)<sup>26</sup>**

The ICN views health care as the right of all individuals, regardless of financial, political, geographic, racial, or religious considerations. This right includes the right to choose or decline care, including the rights to acceptance or refusal of treatment or nourishment; informed consent; confidentiality; and dignity, including the right to die with dignity.

The ICN addresses the rights of both those seeking care and the providers. Nurses have an obligation to safeguard and actively promote people's health rights at all times and in all places. This obligation includes assuring that adequate care is provided within the scope of the available resources and in accordance with nursing ethics. In addition, the nurse is obliged to ensure that patients receive appropriate information in understandable language prior to giving their consent for treatment or procedures, including participation in research.

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<sup>25</sup> Jakarta Declaration on Leading Health Promotion into the 21st Century. World Health Organization (WHO). July 21-25, 1997. [www.who.int/hpr/NPH/docs/jakarta\\_declaration\\_en.pdf](http://www.who.int/hpr/NPH/docs/jakarta_declaration_en.pdf). Accessed November 15, 2009.

<sup>26</sup> Position Statement: Nurses and Human Rights. International Council of Nurses, [www.icn.ch/pshumrights.htm](http://www.icn.ch/pshumrights.htm). Accessed November 15, 2009.

## 2.3 Patients' Rights

This section explores international protection of nine critical patients' rights: the rights to liberty and security of the person; privacy and confidentiality; information; bodily integrity; life; highest attainable standard of health; freedom from torture, cruel, inhuman, and degrading treatment; participation in public policy; and nondiscrimination and equality for patients.

The CESCR has provided the most significant international legal commentary on the rights of patients. Its elaboration on UN General Comment 14 on the right to the highest attainable standard of health (under Article 12 of the ICESCR) has been particularly influential. In addition, the CESCR has frequently condemned governments for failing to devote adequate resources to health care and services for patients. At this writing, however, the lack of an individual complaint mechanism has hampered the ability of the CESCR to examine specific violations beyond the systemic failures identified in country reports. The expected introduction of such a mechanism should provide the CESCR with an opportunity to mirror the work of its sister body, the HRC, in developing significant case law on human rights in patient care.

Although the CESCR has elaborated on the right to health with the most detail, other UN monitoring bodies have also provided significant comments on patients' rights. The HRC has frequently cited Articles 9 and 10 of the ICCPR to condemn the unlawful detention of mental health patients and the denial of medical treatment to detainees, respectively. It has also upheld the need to protect confidential medical information under Article 17 of the ICCPR and has used the right to life under Article 6 of the ICCPR to safeguard medical treatment during pretrial detention. Additionally, as detailed below, UN bodies concerned with monitoring racial and sex discrimination have examined equal access to health care.

In addition to binding treaty provisions, other international standards, such as the Standard Minimum Rules for the Treatment of Prisoners, also provide significant reference points regarding patients' rights. Although these standards cannot be directly enforced against states, patients and their advocates can use them to progressively interpret treaty provisions.

### Right to Liberty and Security of the Person

#### EXAMPLES OF POTENTIAL VIOLATIONS

**A person is detained indefinitely on mental health grounds without any medical opinion being sought**



■ **Residents of an institution are not informed about their right to apply to a court or tribunal to challenge their involuntary admission**

■ **A female drug user is detained in hospital after giving birth and is denied custody of her child**

## HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

► **Article 9(1) ICCPR:** *Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*

- The HRC has stated that treatment in a psychiatric institution against the will of the patient constitutes a form of deprivation of liberty that falls under the terms of Article 9 of the ICCPR.<sup>27</sup> In this context, the HRC has considered a period of 14 days of detention for mental health reasons without review by a court incompatible with Article 9(1) of the ICCPR.<sup>28</sup>
- The HRC has stated, in relation to arbitrary committal under mental health legislation, in a case in which the victim was at the time considered to be legally capable of acting on her own behalf:<sup>29</sup>

*[T]he State party has a particular obligation to protect vulnerable persons within its jurisdiction, including the mentally impaired. It considers that as the author suffered from diminished capacity that might have affected her ability to take part effectively in the proceedings herself; the court should have been in a position to ensure that she was assisted or represented in a way sufficient to safeguard her rights throughout the proceedings.... The Committee acknowledges that circumstances may arise in which an individual's mental health is so impaired that so as to avoid harm to the individual or others, the issuance of a committal order; without assistance or representation sufficient to safeguard her rights, may be unavoidable. In the present case, no such special circumstances have been advanced. For these reasons, the Committee finds that the author's committal was arbitrary under article 9, paragraph 1, of the Covenant.<sup>30</sup>*

<sup>27</sup> UN Human Rights Committee (HRC). *A. v. New Zealand*, Communication No. 754/1997. (CCPR/C/66/D/754/1997). Views adopted July 15, 1999. See also UN Human Rights Committee (HRC). *Fijalkowska v. Poland*. Communication No. 1061/2002: Poland. (CCPR/C/84/1061/2002). Views adopted July 26, 2005.

<sup>28</sup> HRC. *Concluding Observations of the Human Rights Committee: Estonia*, 2003. (CCPR/C0/77/EST).

<sup>29</sup> HRC. *Fijalkowska v. Poland*. Communication No. 1061/2002(CCPR/C/84/1061/2002). Views adopted July 26, 2005.

<sup>30</sup> *Ibid.*, para. 8.3.

- ▶ **Article 25 CRC:** *States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement*
- ▶ **Article 14 CRPD:**
  1. *States Parties shall ensure that persons with disabilities, on an equal basis with others:*
    - (a) *Enjoy the right to liberty and security of person;*
    - (b) *Are not deprived of their liberty unlawfully or arbitrarily and that any deprivation of liberty is in conformity with the law; and that the existence of a disability shall in no case justify a deprivation of liberty*
  2. *States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.*
- ▶ **UN Body of Principles for the Protection of All Persons Under Any Form of Detention**
- ▶ **UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care**
- ▶ **Article 6 Charter on the Right to Health:** *No one may be deprived of liberty on the ground of medical danger to oneself or others unless this danger is certified by competent and independent physicians and by a judicial ruling made in accordance with the due process of law.*

## Right to Privacy

### EXAMPLES OF POTENTIAL VIOLATIONS

- **A doctor discloses a patient's history of drug use or addiction without his or her consent**
- **Government requires disclosure of HIV status on certain forms**
- **Health care workers require young people to obtain parental consent as a condition of receiving sexual health services**
- **Residents of an institution have no place to keep their personal possessions**

## HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- ▶ **Article 17(1) ICCPR:** *No one shall be subjected to arbitrary or unlawful interference with his privacy family home or correspondence, nor to unlawful attacks on his honor and reputation.*
- ▶ **Article 16(1) CRC:** *No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family home or correspondence, nor to unlawful attacks on his or her honor and reputation.*
- ▶ **Article 12 ICESCR:** *The State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*
- ▶ **CESCR GC 14, para. 12:** *Accessibility of information should not impair the right to have personal health data treated with confidentiality.*
- ▶ **CESCR GC 14, para. 23:** *The realization of the right to health of adolescents is dependent on the development of youth-friendly health care, which respects confidentiality and privacy and includes appropriate sexual and reproductive health services.*
- ▶ **Article 22 CRPD:** *(1) No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy family or correspondence or other types of communication or to unlawful attacks on his or her honor and reputation. Persons with disabilities have the right to the protection of the law against such interference or attacks. (2) States Parties shall protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others.*
- ▶ **Article 8 Charter on the Right to Health:** *Physicians are bound by professional confidentiality to ensure due respect for patient privacy. This confidentiality... contributes to the effectiveness of medical care. Exceptions to medical confidentiality strictly limited by law; may serve only the goals of protection of health, safety or public hygiene. Patients are not bound by medical confidentiality. Physicians may be relieved of their obligation to maintain professional confidentiality if they become aware of attacks on the dignity of the human person....*

### ▶ **Principle 8 WMA Declaration on the Rights of the Patients**

#### *Right to confidentiality*

- a. *All identifiable information about a patient's health status, medical condition, diagnosis, prognosis and treatment and all other information of a personal kind must be kept confidential, even after death. Exceptionally descendants may have a right of access to information that would inform them of their health risks.*

- b. *Confidential information can only be disclosed if the patient gives explicit consent or if expressly provided for in the law. Information can be disclosed to other health care providers only on a strictly “need to know” basis unless the patient has given explicit consent.*
- c. *All identifiable patient data must be protected. The protection of the data must be appropriate to the manner of its storage. Human substances from which identifiable data can be derived must be likewise protected.*

**Note: Confidentiality of Sexual and Reproductive Health Information**

Clearly the need to protect the confidentiality of medical information can have an impact across a range of health issues. Confidentiality is particularly vital in relation to sexual and reproductive health, however. Examinations by UN treaty-monitoring bodies in the context of right to privacy have included (i) condemnation of a legal duty imposed on health personnel to report cases of abortions as part of a general criminalization of the procedure without exception, thereby inhibiting women from seeking medical treatment and jeopardizing their lives;<sup>31</sup> (ii) the need to investigate allegations that women seeking employment in foreign enterprises are subjected to pregnancy tests and are required to respond to intrusive personal questioning followed by the administering of antipregnancy drugs;<sup>32</sup> and (iii) the need to address the concerns and need for confidentiality of adolescents with respect to sexual and reproductive health, including those married at a young age and those in vulnerable situations.<sup>33</sup>

<sup>31</sup> HRC. Concluding Observations of the Human Rights Committee: Chile, 1999. (CCPR/C/79/Add.104); Concluding Observations: Venezuela, 2001. (CCPR/C/0/71/ VEN).

<sup>32</sup> HRC. Concluding Observation of the Human Rights Committee: Mexico, 1999. (CCPR/C/79/Add.109). Requirement for women to have access to appropriate remedies where their equality and privacy rights had been violated.

<sup>33</sup> CRC. Concluding Observations of the Committee on the Rights of the Child: Djibouti, 2000. (CRC/C/15/Add.131).

## Right to Information

### EXAMPLES OF POTENTIAL VIOLATIONS

- **Government bans publications about drug use or harm reduction, claiming it promotes illegal activity**
- **Young people are deliberately denied information about sexually transmitted diseases (STDs) and the use of condoms**
- **Roma women lack access to information on sexual and reproductive health**

### HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- ▶ **Article 19(2) ICCPR:** *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally in writing or in print, in the form of art, or through any other media of his choice.*
  - A member of the HRC noted that in the case of *Zheludkov v. Ukraine*:<sup>34</sup>

*“A person’s right to have access to his or her medical records forms part of the right of all individuals to have access to personal information concerning them. The State has not given any reason to justify its refusal to permit such access, and the mere denial of the victim’s request for access to his medical records thus constitutes a violation of the State’s obligation to respect the right of all persons to be ‘treated with humanity and with respect for the inherent dignity of the human person/ regardless of whether or not this refusal may have had consequences for the medical treatment of the victim’”*<sup>35</sup>
- ▶ **Article 12 ICESCR:**

*The State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*

  - **CESCR GC 14, para. 12(b)(iv):** *[Health care accessibility] includes the right to seek, receive and impart information and ideas concerning health issues.*

<sup>34</sup> HRC. *Zheludkov v. Ukraine*. Communication No. 726/1996. (CCPR/C/76/D/726/1996). Views adopted October 29, 2002.

<sup>35</sup> Individual opinion by Ms. Cecilia Medina Quiroga (concurring).

- **CESCR GC 14, para. 23:** *States Parties should provide a safe and supportive environment for adolescents, that ensures the opportunity to participate in decisions affecting their health, to build life skills, to acquire appropriate information, to receive counselling and to negotiate the health behaviour choices they make.*
- ▶ **Article 17 CRC:** *States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual, and moral well-being and physical and mental health.*<sup>36</sup>
- ▶ **Article 21 CRPD:** *States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive, and impart information and ideas on an equal basis with others and through all forms of communication of their choice, as defined in article 2 of the present Convention, including by: (a) Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost.*
- ▶ **Principle 7 WMA Declaration on the Rights of the Patients:**
  - a. *The patient has the right to receive information about himself/herself recorded in any of his/her medical records, and to be fully informed about his/her health status including the medical facts about his/her condition. However; confidential information in the patient's records about a third party should not be given to the patient without the consent of that third party.*
  - b. *Exceptionally information may be withheld from the patient when there is good reason to believe that this information would create a serious hazard to his/her life or health.*
  - c. *Information should be given in a way appropriate to the patient's culture and in such a way that the patient can understand.*
  - d. *The patient has the right not to be informed on his/her explicit request, unless required for the protection of another person's life.*
  - e. *The patient has the right to choose who, if anyone, should be informed on his/her behalf.*

<sup>36</sup> CRC. General Comment 4 of the Committee on the Rights of the Child: Adolescent Health and Development in the Context of the Convention on the Rights of the Child. (CRC/GC/2003/4).

▶ **Principle 5 IAPO Declaration on Patient-Centred Healthcare:**<sup>37</sup>

*Accurate, relevant, and comprehensive information is essential to enable patients and carers to make informed decisions about health care treatment and living with their condition. Information must be presented in an appropriate format according to health literacy principles considering the individual's condition, language, age, understanding, abilities, and culture.*

**Note: Access to Sexual and Reproductive Health Information**

The provision of appropriate and timely information with respect to sexual and reproductive health is particularly crucial. UN treaty-monitoring bodies have urged States to improve access in light of increasing teenage abortions and sexually transmitted diseases,<sup>38</sup> including HIV/AIDS,<sup>39</sup> with such information also extending to children<sup>40</sup> and to people in areas with prevalent alcohol and tobacco use.<sup>41</sup>

<sup>37</sup> APO. IAPO Policy Statement on Health Literacy, <http://www.patientsorganizations.org/showarticie.pl?id=126&n=962>. Accessed November 6, 2009.

<sup>38</sup> UN Committee on Economic Social and Cultural Rights (CESCR). Concluding Observations of the Committee on Economic, Social and Cultural Rights: Lithuania, 2004. (E/C.12/1/Add.96). UN Committee on Elimination of Discrimination Against Women (CEDAW). Concluding Observations of the Committee on Elimination of Discrimination Against Women: Costa Rica, 2003. (A/58/38 [SUPP]). See also UN Committee on Economic Social and Cultural Rights (CESCR). Concluding Observations of the Committee on Economic, Social and Cultural Rights: China, 2005. (E/C.12/1/Add.107).

<sup>39</sup> CESCR. Concluding Observations of the Committee on Economic Social and Cultural Rights: Chile, 2004. (E/C.12/Add.105). See also CESCR. Concluding Observations of the Committee on Economic Social and Cultural Rights: Cameroon, 1999. (E/C.12/Add.40). See also CEDAW. Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Ethiopia, 2004. (A/59/38 [SUPP]).

<sup>40</sup> CRC. Concluding Observations of the Committee on the Rights of the Child: Mozambique, 2002. (CRC/C/15/Add.172). See also CRC. Concluding Observations of the Committee on the Rights of the Child: Indonesia, 2004. (CRC/C/15/Add.203).

<sup>41</sup> CESCR. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ukraine, 2001. (E/C.12/1/Add.65).

## Right to Bodily Integrity

### EXAMPLES OF POTENTIAL VIOLATIONS

- **A Roma woman is sterilized against her will**
- **Doctors compel a drug-using pregnant woman to undergo an abortion**
- **Treatment is routinely given to residents of an institution without their consent as they are assumed to lack the capacity to make decisions about their treatment and care**
- **Patients at a psychiatric hospital are treated as part of a clinical medication trial without being informed that they are included in the research**
- **Patients are given electroconvulsive therapy (ECT) that is described to them as “sleep therapy”**

### HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

#### **Note: Right to Bodily Integrity**

The right to bodily integrity is not specifically recognized under the ICCPR or ICESCR, but it has been interpreted to be part of the right to security of the person (ICCPR 9), the right to freedom from torture and cruel, inhuman, and degrading treatment (ICCPR 7), the right to privacy (ICCPR 17), and the right to the highest attainable standard of health (ICESCR 12).

- ▶ **Article 12(1) CRC:** *States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
- ▶ **Article 39 CRC:** *States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect, and dignity of the child.*
- ▶ **Article 17 CRPD:** *Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.*



- ▶ **Article 12 ICESCR:** *The State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*
- **CESCR GC 14 para 8:** *[The right to health includes] the right to be free from nonconsensual medical treatment and experimentation.*
- ▶ **International Ethical Guidelines for Biomedical Research Involving Human Subjects<sup>42</sup>**
- ▶ **Article 5 Charter on the Right to Health:** *Consent of the patient must be required before any medical treatment, except in case of emergency only as strictly provided by law.*
- ▶ **Principles 2-6 WMA Declaration on the Rights of the Patients:**
  2. *Right to freedom of choice*
    - a. *The patient has the right to choose freely and change his/her physician and hospital or health service institution, regardless of whether they are based in the private or public sector.*
    - b. *The patient has the right to ask for the opinion of another physician at any stage.*
  3. *Right to self-determination*
    - a. *The patient has the right to self-determination, to make free decisions regarding himself or herself. The physician will inform the patient of the consequences of his/her decisions.*
    - b. *A mentally competent adult patient has the right to give or withhold consent to any diagnostic procedure or therapy. The patient has the right to the information necessary to make his/her decisions. The patient should clearly understand the purpose of any test or treatment, what the results would imply and what would be the implications of withholding consent.*
    - c. *The patient has the right to refuse to participate in research or the teaching of medicine.*
  4. *The unconscious patient*
    - a. *If the patient is unconscious or otherwise unable to express his/her will, informed consent must be obtained whenever possible, from a legally entitled representative.*

<sup>42</sup> Council for International Organizations of Medical Sciences (CIOMS). International Ethical Guidelines for Biomedical Research Involving Human Subjects. Geneva 2002. [http://www.cioms.ch/frame\\_guidelines\\_nov\\_2002.htm](http://www.cioms.ch/frame_guidelines_nov_2002.htm). Accessed November 15, 2009.

- b. *If a legally entitled representative is not available, but a medical intervention is urgently needed, consent of the patient may be presumed, unless it is obvious and beyond any doubt on the basis of the patient's previous firm expression or conviction that he/she would refuse consent to the intervention in that situation.*
  - c. *However; physicians should always try to save the life of a patient unconscious due to a suicide attempt.*
5. *The legally incompetent patient*
- a. *If a patient is a minor or otherwise legally incompetent, the consent of a legally entitled representative is required in some jurisdictions. Nevertheless the patient must be involved in the decision-making to the fullest extent allowed by his/her capacity.*
  - b. *If the legally incompetent patient can make rational decisions, his/her decisions must be respected, and he/she has the right to forbid the disclosure of information to his/her legally entitled representative.*
  - c. *If the patient's legally entitled representative, or a person authorized by the patient, forbids treatment which is, in the opinion of the physician, in the patient's best interest; the physician should challenge this decision in the relevant legal or other institution. In case of emergency the physician will act in the patient's best interest.*
6. *Procedures against the patient's will*
- Diagnostic procedures or treatment against the patient's will can be carried out only in exceptional cases, if specifically permitted by law and conforming to the principles of medical ethics.*

**Note: Genital Mutilation and the Right to Bodily Integrity**

Treaty-monitoring bodies have recognized that practices such as genital mutilation can infringe girls' right to personal security and their physical and moral integrity by threatening their lives and health.<sup>43</sup>

<sup>43</sup> CEDAW. Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Burkina Faso, 2000. (A/55/38 [SUPP]). See also CEDAW. Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Cameroon, 2000. (A/55/38 [SUPP]).

## Right to Life

### EXAMPLES OF POTENTIAL VIOLATIONS

- **Doctors refuse to treat a person who is experiencing a drug overdose because drug use is illegal, resulting in the person's death**
- **Drug users die as a result of poor fire safety in a locked hospital ward**
- **Government places arbitrary legal restrictions on access to life-saving HIV- prevention or treatment**
- **The mortality rate of an institution is particularly high during the winter months due to the poor condition of the building, inadequate sanitation and heating, and poor quality of care**
- **A patient at a psychiatric hospital known to be at risk of committing suicide is not monitored adequately and subsequently takes her own life**

### HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- ▶ **Article 6(1) ICCPR:** *Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*
  - HRCGC 6, paras. 1 and 5: The right to life “should not be interpreted narrowly” or “in a restrictive manner,” and its protection “requires that States adopt positive measures ... to increase life expectancy.”
  - The HRC, in finding a violation of Article 6 and Article 10(1) of the ICCPR, in a case in which a healthy young man who fell ill in a pretrial detention center did not receive any medical treatment despite repeated requests for assistance and subsequently died, noted that:
 

*It is incumbent on States to ensure the right to life of detainees, and not incumbent on the latter to request protection...it is up to the State party by organizing its detention facilities to know about the state of health of the detainees as far as may be reasonably be expected. Lack of financial means cannot reduce this responsibility.*<sup>44</sup>

<sup>44</sup> HRC. *Lantsova v. The Russian Federation*. Communication No. 763/1997). (CCPR/C/74/763/1997). Views adopted March 26, 2002.

- Because the detention center had a properly functioning medical service within and should have known about the dangerous change in the victim’s state of health, the state was required to take immediate steps to ensure that the conditions of detention were compatible with its obligations under Articles 6 and 10. Such obligations are retained even where private companies run such institutions.<sup>45</sup>
  - While not explicitly recognizing the right to an abortion, the HRC has stated that states have a duty to take measures to ensure the right to life of pregnant women whose pregnancies are terminated, thereby ending the blanket ban on the procedure.<sup>46</sup>
- ▶ **Article 10 CRPD:** *States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.*

## Right to the Highest Attainable Standard of Health

### EXAMPLES OF POTENTIAL VIOLATIONS

- **State fails to take progressive steps to ensure access to antiretroviral drugs for people living with HIV or to prevent mother-to-child HIV transmission**
- **Doctors and health facilities are not located in proportionate proximity to certain poor neighborhoods**
- **State systematically fails to provide training in palliative care for its medical personnel**
- **A child in a social care home becomes bedridden due to malnutrition**
- **Adults and children are placed on the same wards in a psychiatric hospital**
- **Women with mental disabilities are denied reproductive health services**

<sup>45</sup> HRC. General Comment 20 of the Human Rights Committee. (A/47/40/ [SUPP]).

<sup>46</sup> HRC. Concluding Observations of the Human Rights Committee: Chile, 1999. (CCPR/C/79/Add.104) See also UN Committee on the Elimination of Discrimination Against Women (CEDAW). General Comment 19 of the Committee on the Elimination of Discrimination Against Women: Violence against Women. (A/47/38 [SUPP]).

## HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- **Article 12 ICESCR:** *(1) The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. (2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:... (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.*
- **CESCR GC 14, para. 4:** *The right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.*
  - **CESCR GC 14, para. 12:** *Health care and services must be available, in sufficient quantity, accessible (physically and economically) to all without discrimination, culturally acceptable and of good quality.*
  - **CESCR GC 14, paras. 30-37:** *In delivering such services, states are under a duty to progressively realize the right to health while ensuring that they respect people's own resources,<sup>47</sup> protect them against the negative actions of third parties, and fulfill or provide sufficient resources where there are none.*
  - **CESCR GC 14, paras. 46-52:** *Violations of the right to health can be caused by deliberate acts or failures to act by the state.*
  - *In the context of obligations under Article 12 of the ICESCR, the CESCR has frequently condemned states for failing to devote adequate resources to health care and services because of the obviously detrimental impact of that failure on patients.<sup>48</sup>*

<sup>47</sup> Some obligations such as nondiscrimination are immediately realizable without qualification.

<sup>48</sup> CESCR. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Uruguay, 1997. (E/C.12/1/Add.18). Alarm expressed at fact that very low wages paid to nurses led to a low ratio of nurses to doctors (lower than 1:5), tending to diminish the quality and accessibility of medical care available to the community. See also UN Committee on Economic, Social and Cultural Rights (CESCR). Concluding Observations of the Committee on Economic, Social and Cultural Rights: Congo, 2000. (E/C.12/1/Add.45). Grave concern expressed at decline of standard of health, due in part to ongoing financial crisis, which resulted in serious shortage of funds for public health services; UN Committee on Economic Social and Cultural Rights (CESCR). Concluding Observations of the Committee on Economic, Social and Cultural Rights: Mongolia, 2000. (E/C.12/1/Add.47). Deteriorating health situation for population since 1990 in light of decreasing government expenditure on health from 5.8 percent of GDP in 1991 to 3.6 percent in 1998.

- *The CESCR has required that states should introduce appropriate legislation to safeguard patient rights, including redress for medical errors.*<sup>49</sup>
- ▶ **Article 3(3) CRC:** *States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety health, in the number and suitability of their staff; as well as competent supervision.*
- ▶ **Article 24 CRC:** *(1) States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services. (2) States Parties shall pursue full implementation of this right and, in particular; shall take appropriate measures: (a) To diminish infant and child mortality; (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;... (d) To ensure appropriate pre-natal and post-natal health care for mothers.*
- In the context of the right to health, the Committee on the Rights of the Child has criticized the incompatibility of a proposed free trade agreement being negotiated by three Latin American countries and the United States and, in particular, the right to access low-cost drugs and social services by poor people.<sup>50</sup> The committee went on to recommend that a study on the impact of trade standards should be carried out.<sup>51</sup>
- ▶ **Article 25 CRPD:** *States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation. In particular; States Parties shall:*

<sup>49</sup> CESCR. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Russia, 2003. (E/C.12/1/ADD.94).

<sup>50</sup> CRC. Concluding Observations of the Committee on the Rights of the Child: Ecuador, 2005. (CRC/C/15/Add.262). Examen de los informes presentados por los Estados bajo el artículo 44 de la Convención Internacional de los Derechos del Niño (13/09/05).

<sup>51</sup> in so doing, the committee was reiterating the recommendations issued by the CesCR in June 2004 (e/C.12/1/add.100), which urged ecuador to “conduct an evaluation of the effects of international trade standards on the right to health of all persons and to make ample use of the flexibility clauses allowed by the agreement on trade-Related aspects of intellectual Property of the World trade Organization (WtO), so as to provide access to generic drugs and, more generally, to enable the universal enjoyment of the right to health in ecuador.”

*(a) Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programs as provided to other persons, including in the area of sexual and reproductive health and population-based public health programs;*

*(b) Provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons;*

*(c) Provide these health services as close as possible to people's own communities, including in rural areas;*

*(d) Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by inter alia, raising awareness of the human rights, dignity autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care;*

*(e) Prohibit discrimination against persons with disabilities in the provision of health insurance, and life insurance where such insurance is permitted by national law; which shall be provided in a fair and reasonable manner;*

*(f) Prevent discriminatory denial of health care or health services or food and fluids on the basis of disability*

## Right to Freedom from Torture and Cruel, Inhuman, and Degrading Treatment

### EXAMPLES OF POTENTIAL VIOLATIONS

- **Fearing prosecution by the state, a doctor refuses to prescribe morphine to relieve a patient's pain**
- **A person is denied mental health treatment while in detention and instead is locked in solitary confinement**
- **Staff of an AIDS ward permit television cameras to film patients without patients' consent and broadcast the footage on local television**
- **Female residents of an institution are required to shower together, supervised by male staff**

## HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- ▶ **Article 7 ICCPR:** *No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment In particular; no one shall be subjected without his free consent to medical or scientific experimentation.*
- ▶ **Article 10(1) ICCPR:** *All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.*
  - The HRC has made clear that Article 10(1) of the ICCPR applies to any person deprived of liberty under the laws and authority of the State, who is held in a prison or hospital — particularly, in a psychiatric hospital—or in a detention camp, correctional institution, or elsewhere, and that States Parties should ensure that the principle stipulated therein is observed in all institutions and establishments within their jurisdiction where persons are being held.<sup>52</sup>

The HRC has reaffirmed on a number of occasions that the obligation under Article 10(1) of the ICCPR to treat individuals with respect for the inherent dignity of the human person encompasses the provision of, inter alia, adequate medical care during detention.<sup>53</sup> Often in conjunction with Article 7, it has gone on to find

<sup>52</sup> HRC. General Comment 21 of the Human Rights Committee. (A/47/40 [SUPP]).

<sup>53</sup> HRC. *Kelly v. Jamaica*. Communication No. 256/1987. (CCPR/C/41/D/253/1987). Views adopted April 8, 1991. Breach of Article 10(1), where a prisoner contracted health problems as a result of a lack of basic medical care and was only allowed out of his cell for 30 minutes each day. See also UN Human Rights Committee (HRC). *Linton v. Jamaica*. Communication No. 255/1987. (CCPR/C/46/D/255/1987). Views adopted October 22, 1992. Denial of adequate medical treatment for injuries sustained during aborted escape attempt breached Articles 7 and 10(1); UN Human Rights Committee (HRC). *Bailey v. Jamaica*. Communication No. 334/1988. (CCPR/C/47/D/334/1988); UN Human Rights Committee (HRC). *Thomas v. Jamaica*. Communication No. 321/1988. (CCPR/C/49/D/321/1988). Views adopted October 19, 1993; UN Human Rights Committee (HRC). *Mika Miha v. Equatorial Guinea*. Communication No. 414/1990. (CCPR/C/51/D/414/1990). Views adopted July 8, 1994; UN Human Rights Committee (HRC). *Colin Johnson v. Jamaica*. Communication No. 653/1995. (CCPR/C/64/D/653/1995). Views adopted October 20, 1998; UN Human Rights Committee (HRC). *Kalenga v. Zambia*. Communication No. 326/1988. (CCPR/C/48/D/326/1988). Views adopted July 27, 1993.



breaches of this obligation on numerous occasions.<sup>54</sup> Specifically, in relation to the mentally ill in detention facilities (both in prisons and mental health institutions), the HRC has required improvements in hygienic conditions and the provision of regular exercise and adequate treatment.<sup>55</sup> Failure to adequately treat a mental illness condition that is exacerbated by being on death row can also amount to a breach of Articles 7 and/or 10(1).<sup>56</sup>

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- <sup>54</sup> HRC. *Whyte v. Jamaica*. Communication No. 732/1997. (CCPR/C/63/D/732/1997). Views adopted July 27, 1998. Failure to treat asthma attacks and injuries sustained through beatings. See also UN Human Rights Committee (HRC). *Leslie v. Jamaica*. Communication No. 564/1993. (CCPR/C/63/D/564/1993). Views adopted July 31, 1998. Lack of adequate medical treatment for beatings and stabbing on basis that Leslie was due to be executed imminently; UN Human Rights Committee (HRC). *Henry v. Jamaica*. Communication No. 610/1995. (CCPR/C/64/D/610/1995). Views adopted October 20, 1995. Lack of medical treatment despite a recommendation from a doctor that prisoner be operated on; UN Human Rights Committee (HRC). *Pennant v. Jamaica*. Communication No. 647/1995. (CCPR/C/64/D/647/1995). Views adopted October 20, 1998; UN Human Rights Committee (HRC). *Levy v. Jamaica*. Communication No. 719/1996. (CCPR/C/64/D/719/1996). Views adopted November 3, 1998; UN Human Rights Committee (HRC). *Marshall v. Jamaica* Communication No. 730/1996. (CCPR/C/64/D/730/1996). Views adopted November 3, 1998; UN Human Rights Committee (HRC). *Morgan and Williams v. Jamaica*. Communication No. 720/1996. (CCPR/C/64/D/720/1996). Views adopted November 3, 1998; UN Human Rights Committee (HRC). *Morrison v. Jamaica*. Communication No. 663/1995. (CCPR/C/64/D/663/1995). Views adopted November 3, 1998; UN Human Rights Committee (HRC). *Brown v. Jamaica*. Communication No. 775/1997. (CCPR/C/65/D/775/1997). Views adopted March 23, 1999; UN Human Rights Committee (HRC). *Bennett v. Jamaica*. Communication No. 590/1994. (CCPR/C/65/D/590/1994). Views adopted March 25, 1999; UN Human Rights Committee (HRC). *Smith and Stewart v. Jamaica*. Communication No. 668/1995. (CCPR/C/65/D/668/1995). Views adopted April 8, 1999; UN Human Rights Committee (HRC). *Mulezi v. Democratic Republic of the Congo*. Communication No. 962/2001. Views adopted July 6, 2004; UN Human Rights Committee (HRC). *Saidov v. Tajikistan*. Communication No. 964/2001. Views adopted July 8, 2004.
- <sup>55</sup> HRC. *Concluding Observations of the UN Human Rights Committee: Bosnia and Herzegovina*, 2006. (CCPR/C/BIH/CO/1).
- <sup>56</sup> HRC. *Williams v. Jamaica*. Communication No. 609/1995. (CCPR/C/61/D/609/1995). Views adopted November 4, 1997.

In relation to Article 10(1), the HRC has found a violation where a prisoner on death row was denied medical treatment<sup>57</sup> and where severe overcrowding in a pretrial detention center resulted in inhumane and unhealthy conditions, eventually leading to the detainee's death.<sup>58</sup> Other examples of violations of Articles 7 and 10(1) include a case in which a detainee had been held in solitary confinement in an underground cell, was subjected to torture for three months, and was denied the medical treatment his condition required<sup>59</sup> and a case where the combination of the size of the cells, hygienic conditions, poor diet and lack of dental care resulted in a finding of a breach of Articles 7 and 10(1).<sup>60</sup>

Denying a detainee direct access to his medical records, particularly where this may have consequences for his treatment, can constitute a breach of Article 10(1).<sup>61</sup> Where a violation has occurred, the obligation to provide an effective remedy under Article 2(3)(a) of the ICCPR can include the provision of appropriate medical and psychiatric care.<sup>62</sup>

<sup>57</sup> HRC. *Lewis v. Jamaica*. Communication No. 527/1993. Views adopted July 18, 1996. Appointments to treat skin condition not kept over period of 2 1/2 years. See also *Pinto v. Trinidad and Tobago*. Communication No. 232/1987. (CCPR/A/45/40 [vol. II SUPP]). Views adopted July 20, 1990. The HRC reaffirmed that the obligation to treat individuals deprived of their liberty with respect for the inherent dignity of the human person encompasses the provision of adequate medical care during detention and that this obligation, obviously, extends to persons under the sentence of death. However, the facts did not disclose a violation where the allegations of ill treatment and lack of medical care were uncorroborated and made at a late stage in the application; UN Human Rights Committee (HRC). *Henry and Douglas v. Jamaica*. Communication No. 571/1994. (CCPR/A/51/40 [vol. II SUPP]), CCPR/C/57/D/571/1994). Views adopted July 25, 1996. Keeping Henry in a cold cell after he was diagnosed for cancer breached Articles 7 and 10(1); UN Human Rights Committee (HRC). *Leehong v. Jamaica*. Communication No. 613/1995. (CCPR/A/54/40 [vol. II]), (CCPR/C/66/D/613/1995). Views adopted July 13, 1999. Prisoner on death row only allowed to see a doctor once, despite sustained beatings by warders and request for medical attention.

<sup>58</sup> HRC. *Lantsova v. The Russian Federation*. Communication No. 763/1997. Views adopted March 26, 2002.

<sup>59</sup> HRC. *Setelich/Sendic v. Uruguay*. Communication No. R.14/63. (CCPR/A/37/40). Views adopted October 28, 1981.

<sup>60</sup> HRC. *Howell v. Jamaica*. Communication No. 798/1998. (CCPR/A/59/40 [vol. II], C/79/D/798/1998). Views adopted October 21, 2003).

<sup>61</sup> HRC. *Zheludkov v. Ukraine*. Communication No. 726/1996. (CCPR/A/58/40 [vol. II], CCPR/C/76/D/726/1996). Views adopted October 29, 2002. See concurring opinion of Quiroga, which states that committee's interpretation of Article 10(1) relating to access to medical records is unduly narrow and that mere denial of records is sufficient to constitute a breach, regardless of consequences.

<sup>62</sup> HRC. *Sahadath v. Trinidad and Tobago*. Communication No. 684/1996. (CCPR/A/57/40 [vol. II], CCPR/C/684/1996). Views adopted April 2, 2002.

- ▶ **Article 1 CAT:** *(1) For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. (2) This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.*
- ▶ **Article 2 CAT:** *(1) Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. (2) No exceptional circumstances whatsoever; whether a state of war or a threat of war; internal political in stability or any other public emergency may be invoked as a justification of torture. (3) An order from a superior officer or a public authority may not be invoked as a justification of torture.*
- ▶ **Article 4 CAT:** *(1) Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. (2) Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.*
- ▶ **Article 10 CAT:** *(1) Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military medical personnel, public officials and other persons who may be involved in the custody interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.*
- ▶ **Article 13 CAT:** *Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill treatment or intimidation as a consequence of his complaint or any evidence given.*
- ▶ **Article 14 CAT:** *(1) Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death*

*of the victim as a result of an act of torture, his dependants shall be entitled to compensation. (2) Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.*

- ▶ **Article 16 CAT:** *(1) Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular; the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment. (2) The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.*

The Committee Against Torture has identified overcrowding, inadequate living conditions, and lengthy confinement in psychiatric hospitals as “tantamount to inhuman or degrading treatment.”<sup>63</sup> It has also condemned, in similar terms, extreme overcrowding in prisons where living and hygiene conditions would appear to endanger the health and lives of prisoners,<sup>64</sup> in addition to lack of medical attention.<sup>65</sup>

The committee has also emphasized that medical personnel who participate in acts of torture should be held accountable and punished.<sup>66</sup>

### **Note: Special Rapporteurs on Torture**

Successive UN Special Rapporteurs on Torture have found numerous abuses of detainees’ health and access to health services that amount to breaches of prohibitions against torture and/or cruel, inhuman, or degrading treatment. Special Rapporteurs have noted that conditions and the inadequacy of medical services are often worse for pretrial detainees than for prisoners.<sup>67</sup> Some of the worst abuses include: failure to provide new detainees with access to a

<sup>63</sup> OHCHR. Concluding Observations: Russia. (CAT/C/RUS/C0/4).

<sup>64</sup> OHCHR. Concluding Observations: Cameroon. (CAT/C/CR/31/6).

<sup>65</sup> OHCHR. Concluding Observations: Nepal. (CAT/C/NPL/C0/2). See also observations on Paraguay (CAT/C/SR.418) and Brazil (CAT/C/SR.471).

<sup>66</sup> OHCHR. Concluding Observations: Argentina. (A/48/44).

<sup>67</sup> M. Nowak. Report of the Special Rapporteur on Torture, mission to Jordan (addendum), 2007a. (UN doc. A/HRC/33/Add.3); T. van Boven. Report of the Special Rapporteur on torture, mission to Uzbekistan (addendum), 2003. (UN doc. E/CN.4/2003/68/Add.2).

medical professional and with sanitary living conditions;<sup>68</sup> failure to segregate those with contagious diseases such as tuberculosis;<sup>69</sup> completely unacceptable quarantine procedures;<sup>70</sup> and insufficient provision of food, leading in some instances to conditions approaching starvation.<sup>71</sup>

Another issue repeatedly raised by UN Special Rapporteurs on Torture is the impact on the mental health of children who enter the justice system and the accompanying threats presented by inhuman and violent conditions.<sup>72</sup>

- ▶ **Article 37 CRC:** *States Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment*
- ▶ **Article 39 CRC:** *States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.*
- ▶ **Article 15 CRPD:** *(1) No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular; no one shall be subjected without his or her free consent to medical or scientific experimentation. (2) States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.*
- ▶ **Code of Conduct for Law Enforcement Officials**
- ▶ **Article 2:** *In the performance of their duty; law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.*

<sup>68</sup> N. S. Rodley. Report of the Special Rapporteur on Torture, mission to the Russian Federation (addendum), 1994. (UN doc. E/ CN.4/1995/34/ Add. 1).

<sup>69</sup> Rodley. Report of the Special Rapporteur on Torture, mission to Azerbaijan, 2000. (UN doc. E/CN.4/2001/66/Add.1).

<sup>70</sup> Rodley. Report of the Special Rapporteur on Torture, mission to Azerbaijan, 2000. (UN doc. E/CN.4/2001/66/Add.1); Nowak. Report of the Special Rapporteur on Torture, mission to Moldova, 2009. (UN doc. A/HRC/10/44/Add.3).

<sup>71</sup> Rodley. Report of the Special Rapporteur on Torture, mission to Kenya (addendum), 2000. (UN doc. E/CN.4/2000/9/Add.4).

<sup>72</sup> Nowak. Report of the Special Rapporteur on Torture, mission to Nigeria, 2007. (UN doc. A/HRC/7/3/Add.4.0); Nowak. Report of the Special Rapporteur on Torture, mission to Moldova, 2009. (UN doc. A/HRC/10/44/Add.3); Rodley. Report of the Special Rapporteur on Torture, mission to Kenya (addendum), 2000. (UN doc. E/ CN.4/2000/9/Add.4).

- ▶ **Article 5:** *No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances...as a justification of torture or other cruel, inhuman or degrading treatment or punishment.*

- ▶ **Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982).**<sup>73</sup>

- ▶ **UN Body of Principles for the Protection of All Persons under Any Form of Detention**

**Principle 1:** *All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.*

**Principle 6:** *No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.*

- ▶ **UN Standard Minimum Rules for Treatment of Prisoners**<sup>74</sup>

#### **Rules 22-26 on Medical Services**

Rule 22(1) requires that every institution should have at least one qualified medical officer who has some knowledge of psychiatry. More generally, medical services should be organized in collaboration with the public health system and should include appropriate psychiatric services. Rule 22(2) requires the transfer of sick prisoners to specialist institutions as appropriate while also ensuring that prison hospitals are properly equipped and staffed. Under Rule 22(3), the services of a qualified dental officer shall be available to every prisoner.

Rule 23 focuses on the provision of pre- and postnatal care and nursery care for women and their children and ensures that, whenever practicable, babies will be born in an external hospital.

Rule 24 requires that the medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view to diagnose any physical or mental illnesses and to segregate prisoners with infectious or contagious conditions.

<sup>73</sup> OHCHR. <http://www.wfrrt.net/humanrts/instree/h3pmerhp.htm>.

<sup>74</sup> OHCHR. Standard Minimum Rules for the Treatment of Prisoners, <http://www2.ohchr.org/english/law/treatmentprisoners.htm#wpl018277>.

Under Rule 25, the medical officer should see all sick prisoners on a daily basis and report to the prison director whenever he determines that a prisoner's physical or mental health is being adversely affected by his detention. In addition, in line with Rule 26, the medical officer shall regularly inspect and report upon prisoners' food, hygiene, sanitation, heating, lighting, clothing, and bedding. The director shall, after considering the reports, take immediate action as required.

- ▶ **Physicians for Human Rights Principles on the Effective Investigation and Documentation of Torture: the Istanbul Protocol.**<sup>75</sup>

## Right to Participate in Public Policy

### EXAMPLES OF POTENTIAL VIOLATIONS

- **An indigenous group is denied any say in policy decisions affecting their health and well-being on the grounds of their perceived lack of competence**
- **Lesbian, Gay, Bisexual, and Transgender (LGBT) groups are deliberately excluded from participating in the development of policies that address HIV/AIDS**

### HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- ▶ **Article 25 ICCPR:** *Every citizen shall have the right and the opportunity without... distinctions... (a) To take part in the conduct of public affairs, directly or through freely chosen representatives.*
- ▶ **Article 7 CEDAW:** *State Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular; shall ensure to women, on equal terms with men, the right: ...(b) [t]o participate in the formulation of government policy and the implementation thereof.*
- ▶ **Article 14(2)(a) CEDAW:** *The right of rural women to participate in development planning.*
- ▶ **Article IV WHO Alma-Ata Declaration:** *The people have the right and the duty to participate individually and collectively in the planning and implementation of their health care.*

<sup>75</sup> Physicians for Human Rights. Istanbul Protocol, [www.physiciansforhumanrights.org/library/istanbul-protocol.html](http://www.physiciansforhumanrights.org/library/istanbul-protocol.html).



- ▶ **Principle 2 IAPO Declaration on Patient-Centred Healthcare: Choice and Empowerment:** *Patients have a right and responsibility to participate, to their level of ability and preference, as a partner in making health care decisions that affect their lives. This requires a responsive health service which provides suitable choices in treatment and management options that fit in with patients' needs, and encouragement and support for patients and carers that direct and manage care to achieve the best possible quality of life. Patients' organizations must be empowered to play meaningful leadership roles in supporting patients and their families to exercise their right to make informed health care choices.*
  
- ▶ **Principle 3 IAPO Declaration on Patient-Centred Healthcare: Patient involvement in health policy:**<sup>76</sup> *Patients and patients' organizations deserve to share the responsibility of health care policy-making through meaningful and supported engagement in all levels and at all points of decision-making, to ensure that they are designed with the patient at the center. This should not be restricted to health care policy but include, for example, social policy that will ultimately impact on patients' lives.*
  
- ▶ **Article 12 ICESCR:** *(1) The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. (2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:... (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.*
  
- **CESCR GC 14, paras. 43 and 54:** The CESCR has called for countries to adopt “a national public health strategy and plan of action” to be “periodically reviewed, on the basis of a participatory and transparent process.” In addition, “[promoting health must involve effective community action in setting priorities, making decisions, planning, implementing and evaluating strategies to achieve better health. Effective provision of health services can only be assured if people’s participation is secured by States.”

<sup>76</sup> See also iAPO's Policy Statement on Patient Involvement at <http://www.patientsorganizations.org/showarticie.pl?id=590&n=962>.



## Right to Nondiscrimination and Equality

### EXAMPLES OF POTENTIAL VIOLATIONS

- **Asylum seekers are denied access to all health care apart from emergency treatment**
- **Hospitals routinely place Roma women in separate maternity wards**
- **Drug users are underrepresented in HIV treatment programs despite accounting for a majority of the people living with HIV**
- **A woman with a diagnosis of schizophrenia is told by nursing staff that her abdominal pains are “all in your mind”; she is later diagnosed as having ovarian cancer**

### HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- ▶ **Article 26 ICCPR:** *All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color; sex, language, religion, political or other opinion, national or social origin, property birth or other status.*
- ▶ **Article 2(2) ICCPR; Article 2(2) ICESCR:** *The States Parties to the present Covenant undertake to guarantee the rights enunciated in the present Covenant shall be exercised without discrimination of any kind as to race, colour; sex, language, religion, political or other opinion, national or social origin, birth or other status.*
- ▶ **CESCR GC 14, para. 12:** *The CESCR has stated that health facilities, goods, and services have to be accessible to everyone without discrimination “and especially to the most vulnerable and marginalized sections of the population.” In particular, such health facilities, goods, and services “must be affordable for all,” and “poorer households should not be disproportionately burdened with health expenses as compared to richer households.” The CESCR has further urged particular attention to the needs of “ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities and persons with HIV/AIDS.”*
- ▶ **CESCR GC 5, para. 15:** *The CESCR has defined disability-based discrimination as “any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise*

of economic, social or cultural rights.” It has gone on to emphasize the need “to ensure that not only the public health sector but also private providers of health services and facilities comply with the principle of non-discrimination in relation to persons with disabilities.”<sup>77</sup>

To ensure equality between men and women in accessing health care, the CESCR has stated that it requires, at a minimum, the removal of legal and other obstacles that prevent men and women from accessing and benefiting from health care on the basis of gender. This requirement includes, inter alia, addressing the ways in which gender roles affect access to determinants of health, such as water and food; the removal of legal restrictions on reproductive health provisions; the prohibition of female genital mutilation; and the provision of adequate training for health care workers to deal with women’s health issues.<sup>78</sup>

- ▶ **Article 5 CERD:** *In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour; or national or ethnic origin, to equality before the law; notably in the enjoyment of the following rights:... (e) Economic, social and cultural rights, in particular:... (iv) The right to public health, medical care, social security and social services.*
- **CERD GR 30, para. 36:** The CERD has recommended that the States that are party to the Convention, as appropriate to their specific circumstances, ensure that they respect the right of non-citizens to an adequate standard of physical and mental health by, inter alia, refraining from denying or limiting their access to preventive, curative and palliative health services.
- ▶ **Article 12 CEDAW:** *(1) States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning. (2) Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy; confinement and the post-natal period, granting free services where necessary as well as adequate nutrition during pregnancy and lactation.*

<sup>77</sup> CESCR. General Comment 14 of the Committee on Economic, Social and Cultural Rights: The right to the highest attainable standard of health. (E/C. 12/2004/4).

<sup>78</sup> CESCR. General Comment 16 of the Committee on Economic, Social and Cultural Rights: The equal right of men and women to enjoyment of all economic, social, and cultural rights (article 3 of the International Covenant on Economic, Social and Cultural Rights). (E/C. 12/2005/4).

- ▶ **Article 14(2)(b) CEDAW:** *States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular; shall ensure to such women the right: To have access to adequate health care facilities, including information, counselling and services in family planning.*
  
- ▶ **Article 23 CRC:** *( 1) States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity promote self-reliance and facilitate the child's active participation in the community. (2) States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child. (3) Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development. (4) States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.*
  
- ▶ **Article 28 CMW:** *Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment.*
  
- ▶ **Article 43 CMW:** *( 1) Migrant workers shall enjoy equality of treatment with nationals of the State of employment in relation to: (e) Access to social and health services, provided that the requirements for par-*

*participation in the respective schemes are met; (2) States Parties shall promote conditions to ensure effective equality of treatment to enable migrant workers to enjoy the rights mentioned in paragraph 1 of the present article whenever the terms of their stay as authorized by the State of employment, meet the appropriate requirements.*

- ▶ **Article 45(I)(c) CMW:** *(1) Members of the families of migrant workers shall, in the State of employment, enjoy equality of treatment with nationals of that State in relation to: Access to social and health services, provided that requirements for participation in the respective schemes are met*
- ▶ **Article 1 CRPD:** *The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity*
- ▶ **Article 12 CRPD:** *(1) States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law. (2) States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. (3) States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. (4) States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law.*
- ▶ **Article 25 CRPD:** *States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation.*
- ▶ **Article 23 Convention Relating to the Status of Refugees**
- ▶ *The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.*
- ▶ **Article 3 Charter on the Right to Health:** *Duty of states to institute health services that are available, accessible, and affordable for every individual.*

- ▶ **Principle 1 WMA Declaration on the Rights of the Patients:** *Every person is entitled without discrimination to appropriate medical care.*

- ▶ **Principle 4 IAPO Declaration**

*Patients must have access to the health care services warranted by their condition. This includes access to safe, quality and appropriate services, treatments, preventive care and health promotion activities. Provision should be made to ensure that all patients can access necessary services, regardless of their condition or socio-economic status. For patients to achieve the best possible quality of life, health care must support patients' emotional requirements, and consider non-health factors such as education, employment and family issues which impact on their approach to health care choices and management.*

- ▶ **Resolution on Medical Care for Refugees (World Medical Association)<sup>79</sup>**

*Physicians have a duty to provide appropriate medical care regardless of the civil or political status of the patient, and governments should not deny patients the right to receive, nor should they interfere with physicians' obligation to administer; adequate treatment; and*

*Physicians cannot be compelled to participate in any punitive or judicial action involving refugees or IDPs or to administer any non-medically justified diagnostic measure or treatment, such as sedatives to facilitate easy deportation from the country or relocation; and*

*Physicians must be allowed adequate time and sufficient resources to assess the physical and psychological condition of refugees who are seeking asylum.*

**Note: The right to nondiscrimination and equal access to medical services**

UN treaty bodies have frequently condemned states for failing to ensure equal access to medical services (often due to a lack of sufficient resources) for marginalized and vulnerable groups. These groups have included indigenous people living in extreme poverty;<sup>80</sup> refugees of a particular nationality;<sup>81</sup>

<sup>79</sup> World Medical Association. Resolution on Medical Care for Refugees. [www.wma.net/e/policy/mIO.htm](http://www.wma.net/e/policy/mIO.htm). Accessed November 22, 2009.

<sup>80</sup> CERD. Concluding Observations of the Committee on the Elimination of Racial Discrimination: Bolivia, 1996. (CERD/C/304/ Add.10). See also CESCR. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Mexico, 1999. (E/C.12/1/Add.14). State was urged to take more effective measures to ensure access to basic health care services for all children and to combat malnutrition, especially among children belonging to indigenous groups living in rural and remote areas.

<sup>81</sup> CERD. Concluding Observations: Japan, 2001. (A/56/18 [SUPP]). Different standards of treatment are applied to Indochinese refugees compared to those from other nationalities.

children, older persons, and persons with physical and mental disabilities;<sup>82</sup> and those living in rural areas where the geographical distribution of health services and personnel shows a heavy urban bias.<sup>83</sup> In one country, the CESCR noted with regret that 90 percent of the population had no access to health services.<sup>84</sup> In another case, a state was criticized for inadequate medical care provided to low-income patients and was urged to subsidize expensive drugs required by chronically ill and mentally ill patients.<sup>85</sup>

Treaty bodies have emphasized the importance of ensuring that those infected with particular diseases, such as HIV/AIDS, should not be the subject of discrimination and stigmatized as a result of their medical condition.<sup>86</sup>

Two groups that continue to suffer from unequal access to health services are women and young people, which frequently leads to high mortality rates.<sup>87</sup> Both groups, particularly women living in rural areas<sup>88</sup> and especially vulnerable groups of children (such as girls, indigenous children, and children living in poverty), will

<sup>82</sup> CESCR. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Finland, 2000. (E/C.12/1/Add.52). Failure of certain municipalities to allocate sufficient funds to health care services, resulting in inequality with regard to levels of provision depending on the place of residence.

<sup>83</sup> CESCR. Concluding Observations: Mali, 1994. (E/1995/22). See also concluding observations Guatemala, 1996. (E/1997/22); Paraguay, 1996. (E/1997/22 (1996)). Noting the very small number of medical and paramedical personnel in the country; Mongolia, 2000. (E/2001/22). Noting the long-term deterioration in health situation and need to improve access to health care services for the poor and in rural areas.

<sup>84</sup> CESCR. Concluding Observations: Nepal, 2001. (E/2002/22). The committee notes that under the current national health plan for 1997-2017, the role of the state in the development of a national health care system, consistent with the structural adjustment programs, is minimized. It further notes that the mental health service was insufficient and that no community mental health program was available.

<sup>85</sup> CESCR. Concluding Observations: China, 2005. (E/C.12/1/ADD.107). See also concluding observations Russian Federation, 2003. (E/C.12/1/ADD.94). Committee criticizes Russia for frequent failure of hospitals and clinics in poor regions to stock essential drugs.

<sup>86</sup> CEDAW. Report of the Committee on the Elimination of Discrimination against Women, 2001. (A/56/38 [SUPP]). See also CESCR. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Russian Federation, 2003. (E/2004/22).

<sup>87</sup> ICESCR. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Peru, 1997. (E/1998/22). See also concluding observations Ukraine, 2001. (E/2002/22). Noting deterioration in the health of the most vulnerable groups, especially women and children, and in the quality of health services. Committee urges state to ensure that its commitment to primary health care is met by adequate allocation of resources and that all persons, especially from the most vulnerable groups, have access to health care.

<sup>88</sup> CEDAW. Report of the Committee on the Elimination of Discrimination against Women: Burkina Faso, 2000. (A/55/38).

often experience multiple discrimination, requiring specific targeted measures and sufficient budgetary allocations.<sup>89</sup>

## 2.4 Providers' Rights

Numerous international treaties and conventions include rights that are designed to protect workers and ensure safe and healthy work environments. The United Nations and its agencies, including the International Labor Organization, have developed some of these international labor standards and monitor their implementation. This section presents several standards and how they have been interpreted in relation to three key rights for health care providers. These include the right to (i) work in decent conditions, including the receipt of fair pay; (ii) freedom of association, including association with trade unions and the right to strike; and (iii) due process and related rights to receive a fair hearing and an effective remedy, protection of privacy and reputation, and freedom of expression and information.

Part I of this section covers the right to work in decent conditions. Part II discusses the right to freedom of association. Part III explores the right to due process and related rights. Each section begins with a discussion of the significance of that particular right for health providers and is followed by examples of potential violations. The relevant standards from various UN treaties are reproduced, including those of general application and the standards that refer to particular groups. Key interpretative materials are then summarized, and interpretive guidelines are drawn from the concluding observations, general comments, and case law of official monitoring bodies.

### Right to Work in Decent Conditions

UN treaty-monitoring bodies have made it clear that there is no right that requires an individual be provided with work or the occupation of one's choice. States must, however, refrain from unduly hindering the ability of individuals to freely pursue their chosen careers. Furthermore, states are required to ensure the fair treatment of migrant workers, a requirement that is particularly relevant for medical professionals, who are often recruited from other countries to staff hospitals and clinics. The Convention on Migrant Workers emphasizes states' obligation to foreign-born employees.

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<sup>89</sup> CRC. Convention on the Rights of the Child. Concluding Observations: Bolivia, 1993. (CRC/C/16).



The UN bodies have conducted surveys of workers' pay and conditions, and these investigations have resulted in specific references to the treatment of health care personnel. The concern for medical professionals is driven in part by the poor remuneration that they receive in some countries.

## Right to Work

### EXAMPLES OF POTENTIAL VIOLATIONS

- **All overseas migrant workers from country X, including a number who are employed as doctors and nurses, are summarily expelled after diplomatic relations are broken off following a trade dispute**
- **Female employees are subject to frequent sexual harassment by other members of staff with no action taken to stop harassment**
- **There is no regulation of working hours for medical staff, who are frequently required to work in excess of 80 hours per week**

### HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- ▶ **Article 23(1) Universal Declaration of Human Rights (UDHR):** *Everyone has the right to work; to free choice of employment, to just and favourable conditions of work and to protection against unemployment*
- ▶ **Article 6(1) International Covenant on Economic, Social and Cultural Rights (ICESCR):** *(1) The States Parties to the present Covenant recognize the right to work; which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right*
  - **CESCR GC 18, para. 1:** *The right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity Every individual has the right to be able to work; allowing him/her to live in dignity The right to work contributes at the same time to the survival of the individual and to that of his/her family and insofar as work is freely chosen or accepted, to his/her development and recognition within the community*
  - **CESCR GC 18, para. 4:** *The right to work, as guaranteed in the ICESCR, affirms the obligation of States parties to assure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly This definition underlines the fact that respect for the individual and his dignity is expressed through the freedom of the individual regarding the*



*choice to work; while emphasizing the importance of work for personal development as well as for social and economic inclusion.*

- **CESCR GC 18, paras. 6, 23, and 25:** The right to work does not mean there is an absolute and unconditional right to obtain employment but that rather that the state should ensure that neither itself or others (such as private companies) do anything unreasonably or in a discriminatory way to prevent a person from earning a living or practicing their profession.
- **CESCR GC 16, para. 23:** *Implementing article 3, in relation to article 6, requires inter alia, that in law and in practice, men and women have equal access to jobs at all levels and all occupations and that vocational training and guidance programmes, in both the public and private sectors, provide men and women with the skills, information and knowledge necessary for them to benefit equally from the right to work.*
- In addition to frequent criticisms of states' high levels of unemployment, the CESCR has also condemned (a) the expulsion of HIV-positive foreign workers with valid work permits;<sup>90</sup> (b) the disproportionate number of women in low paid part time work;<sup>91</sup> and (c) the downsizing of the public sector with significant social repercussions.<sup>92</sup>

► **International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)**

- The CERD has expressed concern on numerous occasions about the failure of states to address the lack of employment opportunities for ethnic minorities and migrant workers.<sup>93</sup>
- The CERD has held that the examination and quota system for doctors trained overseas did not breach a migrant worker's right, under Article 5(e)(i) of the ICERD. Article 5(e)(i) guarantees the right to work and freely choose employment without distinction as to race, color, or national or ethnic origin.<sup>94</sup>

<sup>90</sup> ICESCR. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Libyan Arab Jamahiriya, 1997. (E/1998/22 (1997)).

<sup>91</sup> ICESCR. Concluding Observations: United Kingdom of Great Britain and Northern Ireland, 1997. (E/1998/22). See also concluding observations on Ukraine, 1995 (E/1996/22).

<sup>92</sup> ICESCR. Concluding Observations: Solomon Islands, 1999. (E/2000/22).

<sup>93</sup> CERD. Concluding Observations of the Committee on the Elimination of Racial Discrimination: Poland, 1997. (A/52/18). See also concluding observations Norway, 1994 (A/49/18); United Kingdom of Great Britain and Northern Ireland, 1991 (A/46/18); Israel, 1998 (A/53/18); The Netherlands, 1998 (A/53/18); Lebanon, 1998 (A/53/18); Azerbaijan, 1999 (A/54/18); Denmark, 2000 (A/55/18); Latvia, 2003 (A/58/18); Iceland, 2005 (A/60/18); and Turkmenistan, 2005 (A/60/18).

<sup>94</sup> CERD. Opinion regarding B. M. S. v. Australia, 1996. (C/54/D/8/1996); Procedural Decisions, 1999. (A/54/18).

- ▶ **Article 11 UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms 1998:95** *Everyone has the right, individually and in association with others, to the lawful exercise of his or her occupation or profession. Everyone who, as a result of his or her profession, can affect the human dignity human rights and fundamental freedoms of others should respect those rights and freedoms and comply with relevant national and international standards of occupational and professional conduct or ethics.*

### Standards related to women

- ▶ **Article 11(1) Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW):** *States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:*
  - (a) *the right to work as an inalienable right of all human beings;...*
  - (c) *The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;....*

### Standards related to migrant workers

- ▶ **Article 51 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families:** *Migrant workers who in the State of employment are not permitted freely to choose their remunerated activity shall neither be regarded as in an irregular situation nor shall they lose their authorization of residence by the mere fact of the termination of their remunerated activity prior to the expiration of their work permit, except where the authorization of residence is expressly dependent upon the specific remunerated activity for which they were admitted. Such migrant workers shall have the right to seek alternative employment, participation in public work schemes and retraining during the remaining period of their authorization to work, subject to such conditions and limitations as are specified in the authorization to work.*

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<sup>95</sup> UN General Assembly Resolution 53/144. December 9, 1998.

## Right to Fair Pay and Safe Working Conditions

### EXAMPLES OF POTENTIAL VIOLATIONS

- **Nurses and ancillary staff are paid less than the national minimum wage**
- **A staff canteen remains open despite repeatedly failing to meet basic hygiene standards**
- **Medical staff in the X-ray department are frequently exposed to dangerously high levels of radiation due to faulty equipment that has not been checked or replaced**
- **A nurse is infected with HIV due to improperly sterilized medical equipment**

### HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- ▶ **Article 7 ICESCR:** *The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (a) Remuneration which provides all workers, as a minimum, with: (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant; (b) Safe and healthy working conditions; (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence; (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay as well as remuneration for public holidays.*
- ▶ **Article 12 ICESCR:** *(1) The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. (2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for... (b) [t]he improvement of all aspects of environmental and industrial hygiene. ...*
  - The CESCR has expressed concern about a range of working-condition issues, including: the need to harmonize the labor code with international standards, especially with regard to maternity

leave;<sup>96</sup> disparities in pay and conditions between the private and public sectors (in teaching);<sup>97</sup> discrimination in employment on the grounds of political opinion;<sup>98</sup> the lack of a national minimum wage for public sector employees and the serious deterioration of some of those employees' (specifically, teachers') salaries in terms of purchasing power; the conflictual nature of relations between teachers and the state and the apparent ineffectiveness of the measures taken to remedy that situation;<sup>99</sup> ineffective campaigns to increase awareness of hygiene and safety in the workplace where they are frequently below established standards;<sup>100</sup> the fact that standards for the protection of workers concerning limits on the duration of the working day and weekly rest are not always fully met due to some areas of the private sector being dilatory in enforcing the relevant legislation;<sup>101</sup> the lack of legislation to protect workers who are not covered by collective bargaining agreements in relation to a minimum wage, health and maternal benefits, and safe working conditions;<sup>102</sup> unsafe working conditions and lack of compensation for workplace injury;<sup>103</sup> the privatization of labor inspections and control systems;<sup>104</sup> legislation that favors individual negotiation with employers over collective bargaining;<sup>105</sup> the need for effective implementation of legislative provisions concerning job security;<sup>106</sup> and the allowance of excessive working hours in both the public and private sectors.<sup>107</sup>

- **International Convention on Civil and Political Rights (CCPR)**
- The UN Human Rights Council (HRC) has condemned sexual

<sup>96</sup> ICESCR. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ecuador, 1990 (E/1991/23).

<sup>97</sup> ICESCR. Concluding Observations: Spain, 1991 (E/1992/23); Concluding Observations Columbia, 1991 (E/1992/23).

<sup>98</sup> ICESCR. Concluding Observations: Germany, 1993. (E/1994/23).

<sup>99</sup> ICESCR. Concluding Observations: Uruguay, 1994 (E/1995/22). see also concluding observations Finland, 1996 (e/1997/22).

<sup>100</sup> ICESCR. Concluding Observations: Argentina, 1994 (E/1995/22).

<sup>101</sup> ICESCR. Concluding Observations: Austria, 1994 (E/1995/22).

<sup>102</sup> ICESCR. Concluding Observations: Suriname, 1995 (E/1996/22).

<sup>103</sup> ICESCR. Concluding Observations: Russian Federation, 1997 (E/1998/22). The committee later condemned the large number of illegal dismissals and nonpayment of wages.

<sup>104</sup> ICESCR. Concluding Observations: Argentina, 1999 (E/2000/22).

<sup>105</sup> ICESCR. Concluding Observations: Australia, 2000 (E/2001/22). ICESCR. Concluding Observations: Finland, 2000. (E/2001/22).

<sup>106</sup> ICESCR. Concluding Observations: Finland, 2000 (E/2001/22).

<sup>107</sup> ICESCR. Concluding Observations: Japan, 2001 (E/2002/22).

harassment in the workplace<sup>108</sup> and the lack of implementation of laws concerning labor standards. Laws concerning labor standards include those that call for adequate monitoring of working conditions and sufficient funding for labor inspection workforce.<sup>109</sup>

- ▶ **Article 4 International Labour Organization (ILO) Occupational Safety and Health Convention No. 155, 1981:**<sup>110</sup> *The state is under an obligation to formulate, implement and periodically review a coherent national policy on occupational safety occupational health and the working environment with the aim of preventing accidents and injury to health arising out of linked with or occurring in the course of work, by minimising, so far as is reasonably practicable, the causes of hazards inherent in the working environment*

- ▶ **Article 3(1) ILO Occupational Health Services Convention No. 161, 1985**<sup>111</sup>

*States undertake to develop progressively occupational health services for all workers, including those in the public sector.*

- ▶ **Article 2(1) ILO Promotional Framework for Occupational Safety and Health Convention No. 187, 2006:**<sup>112</sup> *States under a duty to promote continuous improvement of occupational safety and health to prevent occupational injuries, diseases and deaths, by the development, in consultation with the most representative organizations of employers and workers, of a national policy national system and national programme.*

<sup>108</sup> ICCPR. Chile, 1999. (A/54/40 [vol. 1]). See also ICCPR. Trinidad and Tobago, 2001 (A/56/40 [vol. I]).

<sup>109</sup> ICCPR. Dominican Republic, 1993. (A/48/40 [vol. I]). See also ICESCR. El Salvador, 1996 (E/1997/22).

<sup>110</sup> International Labour Organization (ILO). Occupational Health Services Convention No. 155, 1981. [http://www.ilocarib.org.tt/projects/cariblex/conventions\\_19.shtml](http://www.ilocarib.org.tt/projects/cariblex/conventions_19.shtml).

<sup>111</sup> ILO. Occupational Health services Convention no. 161, 1985. <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C161>.

<sup>112</sup> ILO. Promotional Framework for Occupational Safety and Health Convention. <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C187>

## Standards related to nursing staff

### ▶ ILO Nursing Personnel Convention<sup>113</sup> No. 149, 1977:<sup>114</sup>

**Article 1(2):** *This Convention applies to all nursing personnel, wherever they work.*

- ▶ **Article 2:** *(1) Each Member which ratifies this Convention shall adopt and apply in a manner appropriate to national conditions, a policy concerning nursing services and nursing personnel designed, within the framework of a general health programme, where such a programme exists, and within the resources available for health care as a whole, to provide the quantity and quality of nursing care necessary for attaining the highest possible level of health for the population. (2) In particular; it shall take the necessary measures to provide nursing personnel with— (a) education and training appropriate to the exercise of their functions; and (b) employment and working conditions, including career prospects and remuneration, which are likely to attract persons to the profession and retain them in it. (3) The policy mentioned in paragraph 1 of this Article shall be formulated in consultation with the employers' and workers' organisations concerned, where such organisations exist. (4) This policy shall be co-ordinated with policies relating to other aspects of health care and to other workers in the field of health, in consultation with the employers' and workers' organisations concerned.*

<sup>113</sup> ILO. Nursing Personnel Convention no. 149, 1977. <http://www.ilo.org/public/english/dialogue/sector/publ/health/c149.pdf>. the preamble states: Recognising the vital role played by nursing personnel, together with other workers in the field of health, in the protection and improvement of the health and welfare of the population, and Recognising that the public sector as an employer of nursing personnel should play an active role in the improvement of conditions of employment and work of nursing personnel, and Noting that the present situation of nursing personnel in many countries, in which there is a shortage of qualified persons and existing staff are not always utilised to best effect, is an obstacle to the development of effective health services, and Recalling that nursing personnel are covered by many international labour Conventions and Recommendations laying down general standards concerning employment and conditions of work, such as instruments on discrimination, on freedom of association and the right to bargain collectively, on voluntary conciliation and arbitration, on hours of work, holidays with pay and paid educational leave, on social security and welfare facilities, and on maternity protection and the protection of workers' health, and Considering that the special conditions in which nursing is carried out make it desirable to supplement the above-mentioned general standards by standards specific to nursing personnel, designed to enable them to enjoy a status corresponding to their role in the field of health and acceptable to them, and Noting that the following standards have been framed in co-operation with the World Health Organisation and that there will be continuing co-operation with that Organisation in promoting and securing the application of these standards....

<sup>114</sup> ILO. Table of ratifications. <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C149>.

**Article 6:** *Nursing personnel shall enjoy conditions at least equivalent to those of other workers in the country concerned in the following fields: (a) hours of work, including regulation and compensation of overtime, inconvenient hours and shift work; (b) weekly rest; (c) paid annual holidays; (d) educational leave; (e) maternity leave; (f) sick leave; (g) social security.*

**Article 7:** *Each Member shall, if necessary endeavour to improve existing laws and regulations on occupational health and safety by adapting them to the special nature of nursing work and of the environment in which it is carried out.*

### **Note: Working Conditions and Health Care Professionals**

UN treaty-monitoring bodies have made specific reference to health personnel on numerous occasions. There is general consensus about the need to take measures to increase the salaries of nurses.<sup>115</sup> The failure to pay medical staff their salaries for extended periods also presents an issue, as it leads many doctors to seek employment overseas. Monitoring bodies have also noted the pressing need to allocate funds to hospitals and health care services on a priority basis in order to restore health services to an operational level and to ensure that doctors, nurses, and other medical personnel are able to resume work as soon as possible.<sup>116</sup> The low wages of the medical staff and the suboptimal living and working conditions in hospitals have also generated concern.<sup>117</sup> Finally, the “brain drain” associated with the exodus of health professionals due to poor working conditions in the health sector in their home countries has been cited as problematic.<sup>118</sup>

### **Standards related to women**

- ▶ **Article 10(2) ICESCR:** *Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.*
- ▶ **Article 7 ICESCR:** *The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (a) Remuneration which provides all workers, as a minimum, with: (i) Fair wages and equal*

<sup>115</sup> ICESCR. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Uruguay, 1997. (E/1998/22).

<sup>116</sup> CRC. Concluding Observations of the Committee on the Rights of the Child: Solomon Islands, 2003. (CRC/C/132).

<sup>117</sup> ICESCR. Concluding Observations: Georgia, 2002. (E/2003/22).

<sup>118</sup> ICESCR. Concluding Observations: Zambia, 2005. (E/2006/22).



*remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant; (b) Safe and healthy working conditions; (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence; (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay as well as remuneration for public holidays.*

- **CESCR GC 16, para. 24:** *Article 1 (a) of the Covenant requires States parties to recognize the right of everyone to enjoy just and favourable conditions of work and to ensure, among other things, fair wages and equal pay for work of equal value. Article 3, in relation to article 1 requires, inter alia, that the State party identify and eliminate the underlying causes of pay differentials, such as gender-biased job evaluation or the perception that productivity differences between men and women exist. Furthermore, the State party should monitor compliance by the private sector with national legislation on working conditions through an effectively functioning labour inspectorate. The State party should adopt legislation that prescribes equal consideration in promotion, non-wage compensation and equal opportunity and support for vocational or professional development in the workplace. Finally; the State party should reduce the constraints faced by men and women in reconciling professional and family responsibilities by promoting adequate policies for childcare and care of dependent family members.*
- ▶ **Article 11(1)(f) CEDAW:** *States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:... [t]he right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.*
- ▶ **Article 11(2) CEDAW:** *In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures: (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status; (b) To introduce maternity leave with pay or with comparable social benefits without loss of for-*



*mer employment, seniority or social allowances; (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities; (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.*

- **CEDAW General Recommendation 24 on Article 12, para. 28:** *When reporting on measures taken to comply with article 12, States parties are urged to recognize its interconnection with other articles in the Convention that have a bearing on women's health. Those articles include ... article 11, which is concerned, in part, with the protection of women's health and safety in working conditions, including the safeguarding of the reproductive function, special protection from harmful types of work during pregnancy and with the provision of paid maternity leave.*
- CEDAW has offered frequent criticism of the disproportionate number of women occupying low-paid, low-skilled, and part-time work, including in the health sector.<sup>119</sup> The CEDAW committee has also highlighted the relative absence of women from high decision-making professional and administrative positions in both the public and private sectors (evidence of the so-called “glass-ceiling” phenomenon).<sup>120</sup>
- CEDAW has also condemned: the lack of regulations to penalize and remedy sexual harassment in the workplace in the private sector;<sup>121</sup> <sup>122</sup> the poor working conditions of women workers in both the private and the public sectors, particularly with respect to the nonimplementation of minimum wage levels and the lack of social and health benefits;<sup>123</sup> discrimination against women on the grounds of pregnancy and maternity in spite of policies that prohibit

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<sup>119</sup> CEDAW. Report of the Committee on the Elimination of Discrimination Against Women: Belarus, 2004. (A/59/38 [part I]).

<sup>120</sup> CEDAW. Report of the Committee: Finland, 1995. (A/50/38). See also reports of the committee on Ethiopia, 1996 (A/51/38) and Albania, 2003 (A/58/38 [part I]).

<sup>121</sup> CEDAW. Report of the Committee: Argentina, 1997. (A/52/38/Rev. 1 [part II]). see also report of the committee on Cuba, 2000 (A/55/38 [part II]).

<sup>122</sup> CEDAW. Report of the Committee: China, 1999. (A/54/38/Rev. 1 [part I]).

<sup>123</sup> CEDAW. Report of the Committee: Bangladesh, 1997. (A/52/38/Rev. 1 [part II]).

- this practice;<sup>124</sup> the lack of affordable childcare;<sup>125</sup> and the need to expand the number of creches available for working mothers.<sup>126</sup>

### Standards related to workers with disabilities

- ▶ **Article 7 CESCRC:** *The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular...*
- **CESCRC GC 5, para. 25:** The right to “the enjoyment of just and favourable conditions of work” (Article 7) applies to all disabled workers, whether they work in sheltered facilities or in the open labor market. Disabled workers may not be discriminated against with respect to wages or other conditions if their work is equal to that of nondisabled workers. States parties have a responsibility to ensure that disability is not used as an excuse for creating low standards of labor protection or for paying below-minimum wages.

### Standards related to race, noncitizens, and migrant workers

- ▶ **Article 5(e)(i) CERD:** *In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour; or national or ethnic origin, to equality before the law; notably in the enjoyment of the rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration.*
- ▶ **CERD GC 30, paras. 33-35:** [The committee recommends] that the States parties to the Convention, as appropriate to their specific circumstances, adopt the following measures: ... **(33)** Take measures to eliminate discrimination against non-citizens in relation to working conditions and work requirements, including employment rules and practices with discriminatory purposes or effects; **(34)** Take effective measures to prevent and redress the serious problems commonly

<sup>124</sup> CEDAW. Report of the Committee: Guyana, 2001. (A/56/38 [part II]). The committee recommended development of a national policy for the private and public sectors to include minimum mandatory and paid maternity and parental leave and also to include provisions for effective sanctions and remedies for violation of laws regarding maternity leave. It also recommended establishment of training programs for the staff of the labor office to facilitate prosecution and ensure the effective enforcement of existing laws for both the public and private sectors.

<sup>125</sup> CEDAW. Report of the Committee: Ireland, 2005. (A/60/38 [part II]).

<sup>126</sup> CEDAW. Report of the Committee: Bangladesh, 2004. (A/59/38 [part II]).

faced by non-citizen workers, in particular by non-citizen domestic workers, including debt bondage, passport retention, illegal confinement; rape and physical assault; **(35)** Recognize that; while States parties may refuse to offer jobs to non-citizens without a work permit, all individuals are entitled to the enjoyment of labour and employment rights, including the freedom of assembly and association, once an employment relationship has been initiated until it is terminated.

- ▶ **Article 25 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families** **(1)** *Migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and: (a) Other conditions of work, that is to say overtime, hours of work, weekly rest; holidays with pay safety health, termination of the employment relationship and any other conditions of work which, according to national law and practice, are covered by these terms; (b) Other terms of employment, that is to say minimum age of employment, restriction on home work and any other matters which, according to national law and practice, are considered a term of employment. (2) It shall not be lawful to derogate in private contracts of employment from the principle of equality of treatment referred to in paragraph 1 of the present article. (3) States Parties shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle by reason of any irregularity in their stay or employment. In particular, employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of such irregularity.*
  
- ▶ **Article 70:** *States Parties shall take measures not less favourable than those applied to nationals to ensure that working and living conditions of migrant workers and members of their families in a regular situation are in keeping with the standards of fitness, safety, health and principles of human dignity.*

## Right to Freedom of Association

The ability of workers to be able to form, join, and run associations without undue interference is critical to their ability to effectively defend their rights. Health care professionals enjoy the same collective action rights as other employees. Although the health sector provides an essential service, this fact only precludes its members from work stoppage in certain exceptional circumstances. Although UN jurisprudence on freedom of association has focused on the treatment of NGOs and political parties, the interpretation of the core aspects of the right can also be applied to professional associations and trade unions. The latter are also the subject of relevant ILO standards.

Certain provisions of the UN Human Rights Defenders Declaration emphasize the role of health care providers as human rights defenders who implement and protect social rights and fundamental civil rights, such as life and freedom from torture and inhuman or degrading treatment.<sup>127</sup>

## Right to Freedom of Association and Assembly

### EXAMPLES OF POTENTIAL VIOLATIONS

- **A professional medical association is not approved by the Ministry of Health because its president is a leading member of an opposition political party**
- **Authorities prevent a rally for improved pay and conditions for health workers from taking place without any justification**

### HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

#### General standards

- ▶ **Article 20 Universal Declaration of Human Rights (UDHR):** *(1) Everyone has the right to freedom of peaceful assembly and association. (2) No one may be compelled to belong to an association.*
- ▶ **Article 21 International Covenant on Civil and Political Rights (ICCPR):** *The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.*
  - Although freedom of assembly is not an absolute right, any restrictions on the ability of people to peacefully protest must be justified in line with the conditions explicitly stated in Article 21 of the ICCPR.<sup>128</sup>

<sup>127</sup> UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. (A/RES/53/144). [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.RES.53.144.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.RES.53.144.En).

<sup>128</sup> S. Joseph, J. Schultz, and M. Castan. *The ICCPR: Cases, Materials and Commentary*. (Oxford: Oxford University Press, 2004), 569.

► **Article 22 ICCPR:** *(1) Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests. (2) No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right. (3) Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.*

- It is not clear whether Article 22 of the ICCPR also includes the freedom not to join an association, in which case trade union “closed shop” practices would amount to a breach, although it is probable that the article does include this freedom.<sup>129</sup>
- Procedural formalities for recognition of associations must not be so onerous as to amount to a substantive restriction on Article 22 of the ICCPR.<sup>130</sup>
- Although legislation governing the incorporation and status of associations may be, on its face, compatible with Article 22, de facto state practice restricting the right to freedom of association through a process of prior licensing and control has been condemned.<sup>131</sup>

► **Article 2 ILO Convention No. 87 on the Freedom of Association and Protection of the Right to Organise:**<sup>132</sup> *Workers and employers, without distinction whatsoever; shall have the right to establish and, subject only to the rules of the organisation concerned to join organisations of their own choosing without previous authorisation.*

- The right to establish and to join organizations for the promotion and defense of workers’ interests without previous authorization is a fundamental right under Article 2 of ILO Convention No. 87 that should be enjoyed by all workers without any distinction

<sup>129</sup> Ibid., 582. See also HRC. *Gauthier v. Canada*. Communication No. 633/1995. Views adopted May 5, 1999.

<sup>130</sup> HRC. Concluding Observations of the Human Rights Committee: Belarus, 1997. (CCPR/C/79/Add.); Concluding Observations: Lithuania, 1997. (CCPR/C/79/Add. 87).

<sup>131</sup> HRC. Concluding Observations: Lebanon, 1997. (A/52/40 [vol. I]).

<sup>132</sup> ILO. Table of ratifications. <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl7C087>.

whatsoever; hospital personnel are entitled to take full advantage of this right.<sup>133</sup>

- A law providing that the right of association is subject to authorization granted by a government department purely in its discretion is incompatible with the principle of freedom of association as guaranteed by ILO Convention No. 87.<sup>134</sup>
- ▶ **UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (the Human Rights Defenders Declaration) 1998.**<sup>135</sup>

**Article 1:** *Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.*

**Article 5:** *For the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others, at the national and international levels: (a) To meet or assemble peacefully; (b) To form, join and participate in non-governmental organizations, associations or groups; (c) To communicate with non-governmental or intergovernmental organizations.*

### Standards related to women

- ▶ **Article 7(c) CEDAW:** *States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right to participate in non-governmental organizations and associations concerned with the public and political life of the country.*
- ▶ **Article 3 CEDAW:** *States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.*

<sup>133</sup> ILO. Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee, 2005.

<sup>134</sup> ILO. Freedom of Association: Digest of Decisions and Principles, 2005; Digest of Decisions and Principles, 1996; and 332nd Report of the Freedom of Association Committee. Case No. 2225.

<sup>135</sup> UN General Assembly Resolution 53/144. December 9, 1998. [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.RES.53.144.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.RES.53.144.En).

- **CESCR GC 16 on Article 3: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights, E/2006/22 (2005) 116, para. 25:** *Article 8, paragraph 1 (a), of the Covenant requires States parties to ensure the right of everyone to form and join trade unions of his or her choice. Article 3, in relation to article 8, requires allowing men and women to organize and join workers' associations that address their specific concerns. In this regard, particular attention should be given to domestic workers, rural women, women working in female-dominated industries and women working at home, who are often deprived of this right.*

### Standards related to race

- ▶ **Article 5(d)(ix) CERD:** *In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour; or national or ethnic origin, to equality before the law, notably in the enjoyment of [t]he right to freedom of peaceful assembly and association.*

## Trade Unions and the Right to Strike

### EXAMPLES OF POTENTIAL VIOLATIONS

- **Health sector trade unions or professional associations have not been approved by the Ministry of Health to represent members**
- **A nurse cannot work at a particular hospital unless she joins the only trade union recognized by the management, as part of a “closed shop” agreement**
- **Some doctors and nurses are dismissed after taking collective action over their poor pay and conditions**

### HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- ▶ **Article 22 ICCPR: (1)** *Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests. (2)* *No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police*



*in their exercise of this right. (3) Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.*

- Trade unions have specific protection under Article 22(1) of the ICCPR;<sup>136</sup> Article 22(3) emphasizes preexisting obligations under ILO Convention 87.
- The need for multiple trade unions to be lawfully guaranteed has been emphasized by both the HRC and the CESCR,<sup>137</sup> and the absence of enabling legislation has been condemned.<sup>138</sup>
- Workers' rights—including collective bargaining, protection against reprisals for exercising free association rights, and freedom from unnecessary interference in trade union activities—have been reaffirmed by the HRC<sup>139</sup> and the CESCR<sup>140</sup> on numerous occasions.
- The HRC has found breaches of both Article 22 and 19 ( free expression) for the unlawful detention of individuals because of their trade union activities.<sup>141</sup>
- Trade union protection includes ensuring that foreign workers are not barred from holding official positions and that unions are not dissolved by the executive.<sup>142</sup>

<sup>136</sup> Article 22(1) of the ICCPR reads: Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

<sup>137</sup> ICCPR. Brazil, 1996. (A/51/40 [vol. I]); ICESCR. Rwanda, 1989. (E/1989/22).

<sup>138</sup> ICCPR. Georgia, 1997. (A/52/40 [vol. I]).

<sup>139</sup> ICCPR. Costa Rica, 1999. (A/54/40 [vol. I]). “Freedom of association, including the right to collective bargaining, should be guaranteed to all individuals. Labour legislation should be reviewed and, where necessary, reformed to introduce measures of protection against reprisals for attempts to form associations and trade unions and to ensure that workers have access to speedy and effective remedies.” See also Dominican Republic, 2001. (A/56/40 [vol. I]); Argentina, 1995. (A/50/40 [vol. I]); Guatemala, 1996. (A/51/40 [vol. I]); Nigeria, 1996. (A/51/40 [vol. I]); Bolivia, 1997. (A/52/40 [vol. I]); Venezuela, 2001. (A/56/40 [vol. I]).

<sup>140</sup> ICESCR. Jamaica, 1990. (E/1990/23).

<sup>141</sup> Burgos v. Uruguay. (R.12/52); ICCPR. A/36/40. July 29, 1981; Pietraroia v. Uruguay. (R.10/44); ICCPR. A/36/40. March 27, 1981; Weinberger v. Uruguay. (R.7/28); ICCPR. A/36/40. October 29, 1980; Sohn v. Republic of Korea. (518/1992); ICCPR. (A/50/40 [vol. II]). July 19, 1995. (CCPR/C/54/D/518/1992).

<sup>142</sup> HRC. Concluding Observations of the Human Rights Committee: Senegal, 1997. (CCPR/C/79/Add.).



- Article 22(3) does not implicitly guarantee the right to strike.<sup>143</sup>
- The denial to civil servants of the right to form associations and to bargain collectively has been condemned as a violation of Article 22 of the ICCPR.<sup>144</sup>
- An absolute ban on strikes by public servants who are not exercising authority in the name of the state and are not engaged in “essential services,” as defined by the ILO, may violate Article 22 of the ICCPR.<sup>145</sup>

▶ **Article 23(4) UDHR:** *Everyone has the right to form and to join trade unions for the protection of his interests.*

▶ **Article 8 ICESCR**

1. *The States Parties to the present Covenant undertake to ensure:*

*(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;*

*(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;*

*(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;*

*(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.*

2. *This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.*

3. *Nothing in this article shall authorize States Parties to the International Labour*

*Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.*

<sup>143</sup> Majority view in *J. b. and Ors v. Canada*. (118/82). a sizeable minority of the committee dissented, however.

<sup>144</sup> HRC. Concluding Observations: Lebanon, 1997. (A/52/40 [vol. I]); ICCPR. Chile, 1999. (A/54/40 [vol. I]).

<sup>145</sup> ICCPR. Germany, 1997. (A/52/40 [vol. I]).

- In contrast to Article 22(3) ICCPR, Article 8(1)(d) ICESCR contains an explicit guarantee of the right to strike, which the CESCR has stated could be self-executing.<sup>146</sup>
  - “Consultation and co-operation are no substitute for the right to strike” under Article 8(1) of the ICESCR.<sup>147</sup>
  - The CESCR has condemned the refusal of some employers to recognize or deal with new, “alternative” unions and the fact that some employers take adverse action, including dismissal, against union activists.<sup>148</sup>
  - The apparent lack of measures to enable workers’ and employers’ organizations to participate in discussions about the determination of minimum wages for public sector employees has been criticized by the CESCR,<sup>149</sup> as has been the failure to enact legislative measures to regulate the access of employers’ and workers’ organizations to the National Labour Council and other relevant organs.<sup>150</sup>
- ▶ **ILO Convention 87 on the Freedom of Association and Protection of the Right to Organise<sup>151</sup>**

**Article 2:** *Workers and employers, without distinction whatsoever; shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.*

**Article 3: (1)** *Workers’ and employers’ organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes. (2)* *The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.*

<sup>146</sup> ICESCR. Luxembourg, 1990. (E/1991/23). It is questioned whether the covenant, virtually alone among applicable international human rights treaties, is considered a non-self-executing in its totality. It was observed that, by contrast, the covenant contained a number of provisions that the great majority of observers would consider to be self-executing. These included, for example, provisions dealing with nondiscrimination, the right to strike, and the right to free primary education.

<sup>147</sup> ICESCR. Rwanda, 1989. (E/1989/22). See also Peru, 1997. (E/1998/22). Convention expresses concern about the ineffectiveness of labor legislation to protect the rights of trade unions, including the right to strike.

<sup>148</sup> ICESCR. Russian Federation, 1997. (E/1998/22).

<sup>149</sup> ICESCR. Uruguay, 1994. (E/1995/22).

<sup>150</sup> ICESCR. Belgium, 1994. (E/1995/22).

<sup>151</sup> ILO. Table of ratifications. <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C087>.

**Article 4:** *Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority.*

**Article 5:** *Workers' and employers' organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers.*

► **ILO Convention 98 on Right to Organize and Collective Bargaining:**<sup>152</sup>

**Article 1: (1)** *Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment (2) Such protection shall apply more particularly in respect of acts calculated to: (a) Make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership; (b) Cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or; with the consent of the employer; within working hours.*

**Article 2: (1)** *Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.*

**Article 6:** *This Convention does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way.*

- *Although there is no explicit recognition of the right to strike in any ILO convention or recommendation, the ILO's Freedom of Association Committee frequently states that the right to strike is a fundamental right of workers and of their organizations<sup>153</sup> and defines the limits within which it may be exercised. In addition, two resolutions of the International Labour Conference, which provide*

<sup>152</sup> ILO. Table of ratifications. <http://www.ilo.org/ilolex/cgi-lex/ratificc.pl?7C098>.

<sup>153</sup> ILO. Digest of Decisions and Principles of the Freedom of Association Committee, 1952. Fourth (revised) edition. During its second meeting, in 1952, the Committee on Freedom of Association declared strike action to be a right and laid down the basic principle underlying this right, from which all others to some extent derive and which recognizes the right to strike to be one of the principal means by which workers and their associations may legitimately promote and defend their economic and social interests.

*guidelines for ILO policy, have emphasized recognition of the right to strike in member states in at least two resolutions.<sup>154</sup>*

- *Persons employed in public hospitals should enjoy the right to collective bargaining as guaranteed by ILO Convention No. 98.<sup>155</sup>*
- *Recognition of the principle of freedom of association in the case of public servants does not necessarily imply the right to strike.<sup>156</sup>*
- *The ILO Freedom of Association Committee has acknowledged that the right to strike can be restricted or even prohibited in the public service or in certain essential services when striking could cause serious hardship to the national community, provided that the limitations are accompanied by certain compensatory guarantees.<sup>157</sup>*
- *The ILO Committee has expressly stated that the hospital sector is considered an essential service for the purposes of prohibiting work stoppages.<sup>158</sup> More broadly, to determine situations in which a strike could be prohibited in an essential service, there must be a clear and imminent threat to the life, personal safety, or health of the whole or part of the population.<sup>159</sup> Within those services considered essential, however, certain categories of employees, such as hospital laborers and gardeners, should not be deprived of the right to strike.*

<sup>154</sup> ILO. Resolution Concerning the Abolition of Anti-Trade Union Legislation in the States Members of the International Labour Organisation, 1957. Resolution called for the adoption of “laws ... ensuring the effective and unrestricted exercise of trade union rights, including the right to strike, by the workers. See also Resolution Concerning Trade Union Rights and Their Relation to Civil Liberties, 1970. Resolution invited the governing body to instruct the director-general to take action in a number of ways “with a view to considering further action to ensure full and universal respect for trade union rights in their broadest sense,” with particular attention to be paid, inter alia, to the “right to strike.”

<sup>155</sup> ILO. 306th Report of the Freedom of Association Committee. Case No. 1882.

<sup>156</sup> ILO. Digest, 2005; Digest, 1996; and 304th Report of the Freedom of Association Committee. Case No. 1719.

<sup>157</sup> ILO. Digest of Decisions and Principles of the Freedom of Association Committee, 2005; Digest, 1996; 300th Report of the Freedom of Association Committee. Case No. 1791; 302nd Report. Case No. 1849; and 318th Report. Case No. 2020.

<sup>158</sup> ILO. Digest, 2005; Digest, 1996; 300th Report of the Freedom of Association Committee. Case No. 1818; 306th Report. Case No. 1882; 308th Report. Case No. 1897; 324th Report. Case No. 2060 and Case No. 2077; 329th Report. Case No. 2174; 330th Report. Case No. 2166; and 338th Report. Case No. 2399.

<sup>159</sup> ILO. Digest, 2005; Digest, 1996; 320th Report. Case No. 1989; 324th Report. Case No. 2060; 329th Report. Case No. 2195; 332nd Report. Case No. 2252; 336th Report. Case No. 2383; and 338th Report. Case No. 2326 and Case No. 2329.

## Right to Due Process and Related Rights

This section outlines the relevant due process standards that health care providers enjoy when commencing or responding to civil proceedings, including disciplinary matters. It does not deal with the rights of the accused in criminal proceedings.<sup>160</sup> As in previous sections, material that elaborates on the interpretation of standards in relation to health sector personnel has been highlighted. Relevant standards from the 1998 UN Human Rights Defenders Declaration underscore the fact that health care providers, in addition to enjoying the same core rights as patients, are defenders of rights in their daily work.

The first part of this section examines the right to a fair hearing. The second part focuses on the related right to an effective remedy. The interpretation of what is meant by a “suit at law” under Article 14(1) of the ICC PR continues to evolve, although regulation of the activities of a professional body and scrutiny of such regulations by the courts may fall within its scope.

This section also details those standards that protect the privacy rights of health care providers— in and outside the workplace—and their honor and reputations. In addition, there is a brief discussion of standards that address the right to free expression and the right to impart information. These liberties are particularly important as they might offer protection to whistle-blowers who seek to place certain information in the public domain. This protection is important because public sector employees are often reluctant to disseminate information due to fear of adverse consequences.

## Right to a Fair Hearing

### EXAMPLES OF POTENTIAL VIOLATIONS

- **A doctor facing disciplinary proceedings is unable to obtain access to all of the evidence presented against him in advance of the hearing**
- **A nurse facing a medical negligence suit has still not been given a hearing date five years after commencement of the proceedings**

### HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

#### ▶ **Article 14(1) ICCPR**

*All persons shall be equal before the courts and tribunals. In the*

<sup>160</sup> The United Nations Human Rights Treaties. Rights of the accused in criminal proceedings, <http://www.bayefsky.com/bytheme.php/id/1041>.

*determination of any criminal charge against him, or of his rights and obligations in a suit at law; everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.*

- The concept of “suit at law” under Article 14(1) of the ICCPR is based on the nature of the right in question rather than on the status of one of the parties (whether state or nonstate). The particular forum that the legal systems employ to adjudicate individual claims does not determine the nature of the right (an especially important condition in the case of common law systems).<sup>161</sup>
- The regulation of the activities of a professional body and the scrutiny of such regulations by the courts may raise issues under Article 14.<sup>162</sup>
- Purely administrative proceedings will fall outside the scope as not amounting to a determination of civil rights and obligations.<sup>163</sup>
- The notion of a “tribunal” in Article 14(1) refers to a body—regardless of denomination—that is a) established by law; b) independent of the executive and legislative branches of government; and c) in specific cases enjoys judicial independence in deciding legal matters in proceedings that are judicial in nature.<sup>164</sup>
- Determination of public law rights falls within the scope of Article 14(1) if, within the relevant municipal legal system, it is conducted by a court of law or if the administrative determination is subject to judicial review.
- Article 14 does not, however, appear to guarantee a right of judicial review of public law determinations by administrators or administrative tribunals and does not guarantee that any such review entails evaluation of the merits.
- The right to a fair hearing in a civil suit encompasses:
  - ⇒ Equality before the courts:<sup>165</sup> This distinction is narrower than the right of equality before the law under Article 26 of

<sup>161</sup> HRC. General Comment 32 of the Human Rights Committee; *Y. L. v. Canada*. (112/81). Applying this interpretation, claim for disability pension did amount to a “suit at law.” See also *Casanovas v. France*. (441/90). Covers procedure concerning employment dismissal; *Jansen-Gielsen v. The Netherlands*. (846/99). Tribunal proceedings to determine the psychiatric ability of people to perform their jobs amounted to “suit at law.”

<sup>162</sup> *J. L. v. Australia*. (491/92).

<sup>163</sup> *Kolanowski v. Poland*. (837/98). Challenge to the fact that denied promotion of police officer was not covered but dismissals from public service are (*Casanovas v. France* [441/90]). See also *Kazantzis v. Cyprus*. (972/01). Procedure for appointing public servants (in this case, judicial appointments) did not fall within scope of Article 14.

<sup>164</sup> HRC. General Comment 32 of the Human Rights Committee, paras. 18 and 19.

<sup>165</sup> *Ibid.*, paras. 3 and 7.

the ICCPR as the latter applies to all organs involved in the administration of justice and not just to judicial power.<sup>166</sup>

⇒ Access to courts:<sup>167</sup> Access includes the provision of legal aid.<sup>168</sup> Article 14 ICCPR requires that states provide for particular causes of action “in certain circumstances” and for competent courts to determine those causes of action, although it is not clear what those circumstances are.<sup>169</sup>

- Article 14, in guaranteeing procedural equality, cannot be interpreted as guaranteeing equality of results or absences of error on the part of the competent tribunal.<sup>170</sup>
- Elements of a fair hearing in a civil suit encompass equality of arms,<sup>171</sup> respect for the principle of adversarial proceedings, preclusion of ex officio worsening of an earlier verdict, and an expeditious procedure.<sup>172</sup>
- Public hearings in civil suits have been explicitly recognized by the HRC, subject only to limited public interest exceptions.<sup>173</sup>
- Placing the burden of proof on defendants in civil cases is permissible.<sup>174</sup>
- Examples of breaches of Article 14 include: refusing to allow a complainant to attend the proceedings and to have the opportunity to brief legal representatives properly,<sup>175</sup> failing to inform the author of his appeal date until after it has taken place,<sup>176</sup> refusal of an administrative tribunal to admit crucial evidence,<sup>177</sup> and failure

<sup>166</sup> *Ibid.*, para. 65.

<sup>167</sup> *Ibid.*, paras. 8, 9, and 12.

<sup>168</sup> *Bahamonde v. Equatorial Guinea*. (468/91); *Avellanal v. Peru*. (202/86); and HRC GC 32, para. 10.

<sup>169</sup> *Mahuika v New Zealand*. (547/93).

<sup>170</sup> HRC. GC 32, para. 26; *B. D. B v. The Netherlands*. (273/88).

<sup>171</sup> HRC. GC 32, para. 13. See concurring individual opinion of Prafullachandra Natwarlal Bhagwati in *Pezoldova v. The Czech Republic*. (757/1997). “As a prerequisite to have a fair and meaningful hearing of a claim, a person should be afforded full and equal access to public sources of information. ...”

<sup>172</sup> *Moraël v. France*. (207/86). See also *Fei v. Colombia*. (514/92); HRC. GC 32, para. 27 on delay.

<sup>173</sup> HRC. GC 32, paras. 28 and 29. See also *van Meurs v. The Netherlands*. (215/1986).

<sup>174</sup> HRC. GC 32, para. 9.4.

<sup>175</sup> *Wolf v. Panama*. (289/88).

<sup>176</sup> *Thomas v. Jamaica*. (272/88).

<sup>177</sup> *Jansen-Gielen v. The Netherlands*. (846/99). Proceedings to determine psychiatric ability to perform job.



- to permit one litigant to submit comments on the other side's submissions.<sup>178</sup>
- ▶ **Article 26 ICCPR:** *All persons are equal before the law and are entitled without any discrimination to the equal protection of the law*
- ▶ **Article 5(a) CERD:** *In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour; or national or ethnic origin, to equality before the law; notably in the enjoyment of the following rights: The right to equal treatment before the tribunals and all other organs administering justice*
- ▶ **Article 15(1) CEDAW:** *States Parties shall accord to women equality with men before the law.*

## Right to an Effective Remedy<sup>179</sup>

### EXAMPLES OF POTENTIAL VIOLATIONS

- **No damages are awarded to a doctor after his reputation has been damaged following the appearance of unsubstantiated and false accusations of medical negligence in the media**
- **A nurse is unable to appeal an employment tribunal decision to a court**

### HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- ▶ **Article 2(3) ICCPR**  
*Each State Party to the present Covenant undertakes:*
  - (a) *To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy notwithstanding that the violation has been committed by persons acting in an official capacity;*
  - (b) *To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*
  - (c) *To ensure that the competent authorities shall enforce such remedies when granted.*

<sup>178</sup> Aarela and Anor v. Finland. (779/97).

<sup>179</sup> UN. Human Rights Defenders Declaration. Article 9.



- There is a clear link between the right to an effective remedy and the right to a fair hearing and/or due process and, in general, this provision needs to be respected whenever any guarantee of Article 14 has been violated.<sup>180</sup>
- Remedies must be accessible and effective. Although a remedy generally entails appropriate compensation, reparation can, where appropriate, involve restitution, rehabilitation, and measures of satisfaction, such as public apologies, public memorials, guarantees of nonrepetition and changes in relevant laws and practices, and actions to bring to justice the perpetrators of human rights violations.<sup>181</sup>
- States are required, as part of the obligation under Article 2(3)(a) of the ICCPR, to ensure determination of the right to a remedy by a competent judicial, administrative, or legislative authority,<sup>182</sup> a guarantee that would be void if it were not available in cases in which a violation of the ICCPR had not been established. The State is not obliged to make such procedures available, however, regardless of how unmeritorious the claim might be.<sup>183</sup>

▶ **Article 2(1) ICESCR**

- Each state party to the present covenant undertakes to take steps, individually and through international assistance and cooperation, especially in economic and technical matters, to the maximum extent allowed by its available resources, with a view to achieving progressively the full realization of the rights recognized in the present covenant by all appropriate means, including, particularly, the adoption of legislative measures.
- Administrative remedies will, in many cases, be adequate. Any such remedies should be accessible, affordable, timely, and effective. The ultimate right of judicial appeal from administrative procedures is also often appropriate, however. There are some obligations, such as (but by no means limited to) those concerning nondiscrimination, for which the provision of some form of judicial remedy is indispensable.<sup>184</sup>

▶ **Article 9 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Human Rights Defenders Declaration) 1998<sup>185</sup>**

<sup>180</sup> HRC. General Comment 32 of the Human Rights Committee, para. 58.

<sup>181</sup> HRC. General Comment 31 of the Human Rights Committee, paras. 15 and 16.

<sup>182</sup> *ibid.*, para. 15.

<sup>183</sup> *Kazantzis v. Cyprus*. (972/01).

<sup>184</sup> ICESCR, General Comment 9. (E/C. 12/1998/24, CESCR). December 3, 1998.

<sup>185</sup> UN General Assembly Resolution 53/144. December 9, 1998.

- All human rights defenders have the right to an effective remedy and to protection in the event of the violation of their rights. This right includes the right to complain about the policies and actions of government bodies and officials. In turn, the state should conduct a prompt and impartial investigation or ensure that an inquiry takes place whenever there is reasonable ground to believe that a violation has occurred in any territory under its jurisdiction.

## Right to Protection of Privacy and Reputation

### EXAMPLES OF POTENTIAL VIOLATIONS

- **The phone of a hospital chief executive is bugged without any prior lawful authorization**
- **A doctor involved in a civil suit against a hospital for unfair dismissal finds out that his correspondence has been routinely intercepted and read without his knowledge**

### HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- ▶ **Article 17 ICCPR: (1)** *No one shall be subjected to arbitrary or unlawful interference with his privacy family or correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks.*
- ▶ **HRC General Comment 16 on the Right to Privacy**
  - The term “home” is to be understood to indicate the place where a person resides or carries out his usual occupation.<sup>186</sup>
  - Even with regard to interferences that conform to the covenant, relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted. Compliance with Article 17 requires that the integrity and confidentiality of correspondence should be guaranteed de jure and de facto. Surveillance, whether electronic or other; interceptions of telephonic, telegraphic, and other forms of communication; wiretapping; and recording of conversations should be prohibited. Searches of a person’s home should be restricted to a search for necessary evidence and should not be allowed to amount to harassment.<sup>187</sup>

<sup>186</sup> HRC. General Comment 16 of the Human Rights Committee. August 4, 1988.

<sup>187</sup> Ibid., para. 8.

- The gathering and holding of personal information on computers, data banks, and other devices, whether by public authorities or by private individuals or bodies, must be regulated by law.<sup>188</sup>
- The state is obliged to provide protection under the law against any unauthorized interferences with correspondence<sup>189</sup> and to ensure strict and independent (ideally, judicial) regulation of any such practices, including wiretapping.<sup>190</sup>
- Searches—of a home (and workplace) and of a person—should also be subject to appropriate safeguards.<sup>191</sup>
- The protection of honor and reputation under Article 17 is probably limited to unlawful rather than arbitrary attacks—in other words, attacks that fail to comply with an established legal procedure.<sup>192</sup> Given the HRC’s interpretation of “lawful” in the context of another ICCPR provision (Article 9[4]), the term may extend beyond domestic law.<sup>193</sup>
- Professional duties of confidence, such as those undertaken by the medical profession, are an important aspect of the right to privacy, and any limitations on professional privilege must be specified in detail.<sup>194</sup>

► **Article 19(3) ICCPR:** *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.*

<sup>188</sup> Ibid., para. 10.

<sup>189</sup> Ibid., para. 8; HRC. Concluding Observations of the Human Rights Committee: Zimbabwe, 1998. (CCPR/C/79/Add.89).

<sup>190</sup> HRC. Concluding Observations: Poland, 1999. (CCPR/C/79/Add.10). See also Concluding Observations: Lesotho, 1999. (CCPR/C/79/Add. 106).

<sup>191</sup> HRC. General Comment 16 of the Human Rights Committee, para. 8.

<sup>192</sup> I. Pv. Finland. (450/91); Joseph, Schultz, and Castan. The ICCPR, 494.

<sup>193</sup> Joseph, Schultz, and Castan. The ICCPR, 494.

<sup>194</sup> HRC. Concluding Observations of the Human Rights Committee: Portugal, 2003. (CCPR/C0/78/PRT ).

## Right to Free Expression and Information<sup>195</sup>

### EXAMPLES OF POTENTIAL VIOLATIONS

- **A senior health service manager is dismissed after revealing that a hospital has been purchasing unlicensed drugs**
- **State authorities intervene to prevent employees from learning that their hospital contains dangerously high levels of radiation**

### HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- ▶ **Article 19(2) ICCPR:** *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally in writing or in print, in the form of art; or through any other media of his choice.*
  - The right to free expression under Article 19 of the ICCPR includes the freedom to impart information, and any restrictions that do not accord with acceptable limitations contained in Article 19(3), such as public order or public health, could result in a breach.<sup>196</sup>
  - Therefore, in theory, whistleblowers within the medical profession could be protected from unlawful prosecution provided that the information they are seeking to put into the public domain cannot legitimately be restricted.
  - Permissible limitations on public health grounds under Article 19 are unclear, although it has been suggested that prohibiting misinformation on health-threatening activities could be justified.<sup>197</sup>
  - Freedom of expression (including that of the media) can be lawfully restricted to protect the rights and reputation of others, through, for example, the use of reasonable civil defamation laws.<sup>198</sup>
- ▶ **Article 5(d)(viii) CERD:** *In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour; or national or ethnic origin, to equality before the law; notably in the enjoyment of the following rights: The right to freedom of opinion and expression....*

<sup>195</sup> See also Human Rights Defenders Declaration 1998, Article 6.

<sup>196</sup> Laptsevich v. Belarus. (780/97).

<sup>197</sup> Joseph, Schultz, and Castan. The ICCPR, 525.

<sup>198</sup> Ibid., 541.

▶ **Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Human Rights Defenders Declaration) 1981”**

**Article 6:** *Everyone has the right, individually and in association with others:*

*(a) To know; seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems;*

*(b) As provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms;*

*(c) To study discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters.*

### 3.1 INTRODUCTION

### 3.2 KEY SOURCES

### 3.3 PATIENTS' RIGHTS

Right to liberty and security of the person

Right to privacy

Right to information

Right to bodily integrity

Right to life

Right to the highest attainable standard of health

Right to freedom from torture and cruel, inhuman,  
and degrading treatment

Right to participate in public policy

Right to nondiscrimination and equality

### 3.4 PROVIDERS' RIGHTS

Right to work in decent conditions

Right to freedom of association

Right to due process and related rights

# 3

## Regional Framework for Human Rights in Patient Care

### 3.1 Introduction

This chapter elaborates on the main standards that safeguard human rights in patient care within Europe (as defined geographically by the Council of Europe [COE]) and examines how they have been interpreted by supranational bodies, most notably the European Court of Human Rights (ECtHR) and the European Committee of Social Rights (ECSR). As in the preceding chapter on the international framework, this chapter is divided into three parts that describe key regional sources governing human rights in patient care and also examine patients' and providers' rights. Each part includes subsections that discuss the standards and relevant interpretations connected to a particular right (for example, the right to liberty and security of the person) and also provide some examples of potential violations. The standards addressed include binding treaties, such as the [European] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights [ECHR]), the European Social Charter (ESC), and other standards developed by the COE and civil society, such as the highly significant European Charter of Patients Rights.

## 3.2 Key Sources

### COUNCIL OF EUROPE

- ▶ **Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine 1997 (European Convention on Human Rights and Biomedicine)<sup>1</sup>**

This convention sets out certain basic patient rights principles based on the premise that there is a “need to respect the human being both as an individual and as a member of the human species and recognising the importance of ensuring the dignity of the human being.”<sup>2</sup> It is binding on ratifying states.

Key provisions include:

- Equitable access to health care (Article 3)
- Protection of consent (Chapter II, Articles 5-9)
- Private life and right to information (Chapter III, Article 10)

- ▶ **European Convention on Human Rights (ECHR)<sup>3</sup>**

The ECHR is the leading regional human rights instrument and it has been ratified by all Council of Europe member states. It is enforced by the ECtHR, which hands down binding decisions that frequently involve monetary compensation for victims.

Relevant provisions include:

- Article 2 (right to life)
- Article 3 (protection against torture and cruel, inhuman or degrading treatment)
- Article 5 (right to liberty and security of person)
- Article 6 (access to a fair hearing)
- Article 8 (right to privacy)
- Article 13 (right to effective remedies)
- Article 14 (prohibition of discrimination)

<sup>1</sup> Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine. <http://conventions.coe.int/Treaty/EN/Treaties/Html/164.htm>.

<sup>2</sup> Subsequent additional protocols have been produced on prohibition of cloning (Treaty No. 168), transplantation of organs and tissues (Treaty No. 186), and biomedical research (Treaty No. 195).

<sup>3</sup> European Convention on Human Rights. <http://www.hri.org/docs/ECHR50.html>.



▶ **European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment**

Article 1 establishes the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which monitors compliance with the treaty through regular monitoring visits to places of detention. The rest of the treaty sets out the membership and working methods of the committee.

▶ **European Social Charter 1961 and 1996 (ESC)<sup>4</sup>**

The ESC is the leading regional economic and social rights instrument. It is monitored by the ECSR through a system of periodic state reporting and collective complaints. Originally drafted in 1961, the ESC was significantly revised in 1996, although some states have not ratified the later version and have the option as to which provisions they accept.

Given the generality of many of the clauses and given the progressive/liberal approach of the ECSR, patients' rights can be advocated under a number of provisions even in the absence of acceptance of the specific health care guarantees.

Relevant provisions include:

- Article 11 (right to protection of health)
- Article 13 (right to social and medical assistance)
- Article 14 (right to benefit from social welfare services)
- Article 15 (right of persons with disabilities to independence, social integration and participation in the life of the community)
- Article 16 (right of the family to social, legal and economic protection)
- Article 17 (right of children and young persons to appropriate social, legal and economic protection)
- Article 19 (right of migrant workers and their families to protection and assistance)
- Article 23 (right of elderly persons to social protection)

The ECSR has stated that rights related to health in the ESC are inextricably linked to their counterpart guarantees in the ECHR because “human dignity is the fundamental value and indeed the core of positive European human rights law—and health care is a prerequisite for the preservation of human dignity.”<sup>5</sup>

<sup>4</sup> Council of Europe (COE). European Social Charter. [http://www.coe.int/VE/Human\\_Rights/ Esc/](http://www.coe.int/VE/Human_Rights/Esc/).

<sup>5</sup> International Federation of Human Rights Leagues (FIDH) v. France. (14/2003).

▶ **Framework Convention for the Protection of National Minorities 1995<sup>6</sup>**

This binding treaty guarantees equal treatment for all ethnic and other minorities.

Relevant provisions include:

- Article 4(2) (adoption of adequate measures to promote, in all areas of economic, social, political, and cultural life, full and effective equality for persons belonging to a national minority, taking due account of the specific conditions of the persons belonging to national minorities)

▶ **Recommendation No. R (2000) 5 of the Committee of Ministers to member states on the development of structures for citizen and patient participation in the decision-making process affecting health care<sup>7</sup>**

Although not binding, this recommendation possesses strong political and moral authority. It focuses on the need to ensure effective participation for all in increasingly diverse and multicultural societies where groups such as ethnic minorities are frequently marginalized.

## EUROPEAN UNION

▶ **EU Charter of Fundamental Rights<sup>8</sup>**

Signed in Nice, France, on November 7, 2000, this charter sets out in a single text, for the first time in the history of the European Union (EU), the whole range of civil, political, economic, and social rights belonging to European citizens and all persons resident in the EU. The charter was incorporated as part two of the treaty establishing a constitution for Europe on June 18, 2004. After the rejection of the proposed EU constitution, an adapted version of this charter was retained and proclaimed in Strasbourg on December 12, 2007, before the signing of the Treaty of Lisbon, which makes it legally binding.

<sup>6</sup> Framework Convention for the Protection of National Minorities. <http://conventions.coe.int/treaty/en/Treaties/Html/157.htm>.

<sup>7</sup> COE. Recommendation Rec No. R (2000) 5. <https://wcd.coe.int/ViewDoc.jsp?id=340437&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>.

<sup>8</sup> Charter of Fundamental Rights of the European Union, [http://www.europarl.europa.eu/charter/default\\_en.htm](http://www.europarl.europa.eu/charter/default_en.htm).

The charter's full implications for EU member states remain unclear, but it will be an important reference point even for countries outside of the EU, especially with respect to those in the process of accession.

Key provision:

Article 35 (right to health protection as the “right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices,” specifying that the EU must guarantee “a high level of protection of human health”)

Other relevant provisions include:

- Article 1 (the inviolability of human dignity)
- Article 2 (the right to life)
- Article 3 (the right to the integrity of the person)
- Article 6 (the right to security)
- Article 8 (the right to the protection of personal data)
- Article 21 (the right to non-discrimination)
- Article 24 (the rights of the child)
- Article 25 (the rights of the elderly)
- Article 34 (the right to social security and social assistance)
- Article 37 (the right to environmental protection)
- Article 38 (the right to consumer protection)

► **Proposed EU Directive on Patients' Rights in Cross Border Health Care<sup>9</sup>**

After repeated delays, the European Commission released this proposed directive, together with a communication on improving cooperation between member states in this area, on July 2, 2008. The aim of the directive is to create legal certainty on the issue, thereby avoiding potential court cases, as the EU treaty grants individuals the right to seek health care in other member states, a principle confirmed by several clear rulings by the European Court of Justice.

Under the treaty's major provisions:

- **Patients** have the right to seek health care abroad and to be reimbursed the same amount that they would have received if

<sup>9</sup> The draft directive, along with other key documents, communication from the commission, and press releases are available at [http://ec.europa.eu/health/ph\\_overview/co\\_operation/healthcare/cross-border\\_healthcare\\_en.htm](http://ec.europa.eu/health/ph_overview/co_operation/healthcare/cross-border_healthcare_en.htm).

they had sought care in their home country. The directive will provide clarity as to how these rights can be exercised, including the limits that member states can place on cross-border health care and the level of financial coverage provided for it.

- **Member states** are responsible for health care provided on their territory. Patients should be confident that the quality and safety standards of the treatment they will receive in another member state are regularly monitored and based on sound medical practices.

In its press release, the commission stated that the directive “provides a solid basis to unlock the huge potential for European cooperation to help improve the efficiency and effectiveness of all EU health systems.”<sup>10</sup>

The European Public Health Alliance (EPHA) has expressed some concerns about the draft directive, including in relation to patients’ rights and whether it can really resolve the existing significant differences concerning access to and quality of health care between member states. The EPHA goes on to warn that the directive may merely lead to financial savings for the tiny minority who can already afford “health care tourism” as opposed to equal access for all.

## NONTREATY INSTRUMENTS

### ► **The European Charter of Patients’ Rights<sup>11</sup>**

*“As European citizens, we do not accept that rights can be affirmed in theory; but then denied in practice, because of financial limits. Financial constraints, however justified, cannot legitimize denying or compromising patients’ rights. We do not accept that these rights can be established by law; but then left not respected, asserted in electoral programmes, but then forgotten after the arrival of a new government”<sup>12</sup>*

Drawn up in 2002 by the Active Citizenship Network, a European network of civic, consumer, and patient organizations, this charter provides a clear, comprehensive statement of patients’ rights. The statement was part of a grassroots movement across Europe that encouraged patients to play a more active role in shaping the delivery

<sup>10</sup> European Commission. “Commission Adopts Proposal for Directive on Patients’ Rights in Cross-Border Healthcare.” July 2, 2008. (IP/08/1080).

<sup>11</sup> European Charter of Patients’ Rights, [http://www.activecitizenship.net/health/european\\_charter.pdf](http://www.activecitizenship.net/health/european_charter.pdf).

<sup>12</sup> Ibid., preamble.

of health services and was also an attempt to convert regional documents concerning the right to health care into specific provisions.<sup>13</sup>

The charter identifies 14 concrete patients' rights that are currently at risk: the right to preventive measures, access, information, consent, free choice, privacy and confidentiality, respect of patients' time, observance of quality standards, safety, innovation, avoidance of unnecessary suffering and pain, personalized treatment, the filing of complaints, and compensation.

Although the charter is not legally binding, a strong network of patients' rights groups across Europe has successfully lobbied their national governments for recognition and adoption of the rights it addresses.<sup>14</sup> The charter has also been used as a reference point to monitor and evaluate health care systems across Europe.

► **WHO Declaration on the Promotion of Patients' Rights in Europe: European Consultation on the Rights of Patients, Amsterdam<sup>15</sup>**

*"In its scope and focus, this document seeks to reflect and express people's aspirations not only for improvements in their health care but also for fuller recognition of their rights as patients. In so doing, it keeps in mind the perspectives of health care providers as well as of patients. This implies the complementary nature of rights and responsibilities: patients have responsibilities both to themselves for their own self-care and to health care providers, and health care providers enjoy the same protection of their human rights as all other people. There is a basic assumption in the text that the articulation of patients' rights will in turn make people more conscious of their responsibilities when seeking and receiving or providing health care, and that this will ensure that patient/provider relationships are marked by mutual support and respect."<sup>16</sup>*

This nonbinding declaration was issued by the WHO Regional Office for Europe in 1994 and has become a significant reference point. Taking as its conceptual foundation the

<sup>13</sup> The pharmaceutical company Merck & Co., Inc., also provided funding for this movement.

<sup>14</sup> One of the activities of new EU member states during the process of preparation for accession in the EU was adjustment of health care legislation toward European legislation and standards. Many countries, such as Bulgaria, adopted new health law, whose structure and contents are strictly in line with the European Charter of Patients' Rights.

<sup>15</sup> World Health Organization (WHO). Declaration on the Promotion of Patients' Rights in Europe, [www.who.int/genomics/public/eu\\_declaration1994.pdf](http://www.who.int/genomics/public/eu_declaration1994.pdf).

<sup>16</sup> Ibid.

International Bill of Rights, the ECHR, and the ESC, the declaration focuses on rights to information, consent, confidentiality and privacy and care and treatment.

▶ **The WHO Ljubljana Charter on Reforming Health Care 1996**<sup>17</sup>

This charter contains a number of fundamental principles to ensure that “health care should first and foremost lead to better health and quality of life for people.”<sup>18</sup> Specifically, it recommends that health care systems be people-centric and calls for patient participation in shaping improvements.

### 3.3 Patients’ Rights

Just as in the preceding chapter on the international framework, this section is structured around nine critical patient rights: the rights to liberty and security of the person; privacy; information; bodily integrity; life; highest attainable standard of health; freedom from torture, cruel, inhuman, and degrading treatment; participation in public policy; and nondiscrimination and equality for patients.

The lack of an explicit provision guaranteeing the right to health in the ECHR has not prevented the ECtHR, the ECHR’s supervisory and enforcement body, from addressing some patients’ rights issues. Article 5, which guarantees the right to liberty and security of person, has been used by the ECtHR to protect the rights of those detained on mental health grounds. Article 3 has outlawed the use of torture and/or cruel, inhuman, or degrading treatment against detainees, including those detained on mental health grounds. Article 8, safeguarding the right to privacy, has been successfully argued in relation to unlawful disclosure of personal medical data. Beyond these examples, however, the ECtHR has been reluctant to indirectly recognize a positive right to health, although the door has been left open in relation to the right to life under Article 2 in cases in which preexisting obligations have not been fulfilled. This reluctance is in line with the ECtHR’s general desire not to make decisions that could have a significant economic and/or social impact on policy or resources.

On the other hand, in Article 11 of the ESC, the ESCR has specifically defined the right to protection of health, together with a number of related guarantees, such as the right to social and medical assistance under Article 13. Because

<sup>17</sup> Ljubljana Charter on Reforming Health Care, <http://www.bmj.com/cgi/content/full/312/7047/1664>.

<sup>18</sup> Ibid.

the ESC cannot be used by individual victims, however, all of the ECSR's analysis relates to country reports or to the collective complaints mechanism and, therefore, tends to be general in nature (stating, for example, that health care systems must be accessible to everyone or that there must be adequate staff and facilities). To date, under the collective complaints mechanism, the ECSR has only considered one right to health care case, concerning denial of medical assistance to poor illegal immigrants. Therefore, there is great potential for development of the ECSR's case law further in this area.

Other significant sets of standards discussed in this chapter, such as the European Charter of Patients' Rights, also contain a number of specific relevant guarantees, but these standards lack any form of supervisory body. They, therefore, cannot be directly enforced by victims to gain redress. Nonetheless, that does not mean that they cannot be referred to when arguing claims under binding treaties, such as the ECHR and the ESC, in order to better interpret the treaties' own provisions. In turn, increased references to nonbinding documents such as the European Charter of Patients' Rights will help them gain further credibility and strength so that, over time, some of their provisions might attain customary international law status.<sup>19</sup>

## Right to Liberty and Security of the Person

### EXAMPLES OF POTENTIAL VIOLATIONS

- **A person is detained indefinitely on mental health grounds without efforts to seek any medical opinion**
- **Residents of an institution are not informed about their right to apply to a court or tribunal to challenge their involuntary admission**
- **A female drug user is detained in hospital after giving birth and is denied custody of her child**

### HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

#### ▶ **Article 5(l)(e) ECHR**

*Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:... the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants...*

<sup>19</sup> Article 38(l)(b) of the Statute of the International Court of Justice refers to "international custom" as a source of international law, specifically emphasizing the two requirements of state practice and acceptance of the practice as obligatory.

- The ECtHR has not defined the phrase “unsound mind” on the basis that its meaning is continually evolving.<sup>20</sup> It has established, however, that there must be objective expert medical evidence that the person at the relevant time is of unsound mind (other than in emergencies).<sup>21</sup> Therefore, detention pursuant to the order of a prosecutor, without obtaining a medical opinion, will breach Article 5(1)(e), even if the purpose of the detention is to obtain such an opinion.<sup>22</sup>
- The ECtHR has established a number of procedural guarantees in relation to the application of Article 5(1)(e):
  - Committing somebody to confinement must only occur according to a properly prescribed legal procedure and cannot be arbitrary. In relation to the condition of “unsound mind,” this guarantee means that the person must have a recognized mental illness and require confinement for the purposes of treatment.<sup>23</sup>
  - Any commitment must be subject to a speedy periodic legal review that incorporates the essential elements of due process.<sup>24</sup>
  - Where such guarantees have not been adhered to, the ECtHR has been prepared to award damages for breaches of a person’s liberty under Article 5(1)(e).<sup>25</sup>
- Detention under Article 5(1)(e) can be justified both in the interests of the individual and on public safety grounds.<sup>26</sup> A relevant factor in determining the legality of detention is whether the detention occurs in a hospital, clinic, or other appropriate authorized institution.

The fact that detention may be in a suitable institution has no bearing on the appropriateness of the patient’s treatment or conditions under which he or she is detained.<sup>27</sup> A violation of Article 5(1)(e) was found

<sup>20</sup> *Litwa v. Poland*. (33 EHRR 53). Providing definition of alcoholism for purposes of Article 5(1)(e).

<sup>21</sup> *Herz v. Germany*. (44672/98); *Rakevich v. Russia*. (No 58973/00).

<sup>22</sup> *Varbanov v. Bulgaria*. (31365/96).

<sup>23</sup> *Winterwerp v. The Netherlands*. (6301/73). See also *HL v. UK* (45508/99). System of detaining “informal patients” in psychiatric institutions did not incorporate sufficient procedural safeguards in order to prevent arbitrary deprivations of liberty.

<sup>24</sup> *X v. United Kingdom*. (7215/75).

<sup>25</sup> *Gajcsi v. Hungary*. (34503/03). Patient unlawfully detained for three years in a Hungarian psychiatric hospital, where the commitment procedure was superficial and insufficient to show dangerous conduct.

<sup>26</sup> *Litwa v. Poland*. (33 eHRR 53). see also *Hutchinson Reid v. UK*. (37 eHRR 9). Detention under article 5(1)(e) of a person with psychopathic personality disorder justified both in the interests of the individual and on public safety grounds, even where his condition was not susceptible to medical treatment.

<sup>27</sup> *Ashingdane v. UK*. (7 EHRR 528)



where a person was detained as a person infected with HIV—after having transmitted the virus to another man as a result of sexual activity—on the grounds that a fair balance had not been struck between the need to ensure that the virus did not spread and the individual’s right to liberty.<sup>28</sup>

## Right to Privacy

### EXAMPLES OF POTENTIAL VIOLATIONS

- **A doctor discloses a patient’s history of drug use or addiction without their consent**
- **Government requires disclosure of HIV status on certain forms**
- **Health care workers require young people to obtain parental consent as a condition of receiving sexual health services**
- **Residents of an institution have no place to keep their personal possessions**

### HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

#### ► **Article 8(1) ECHR**

*Everyone has the right to respect for his private and family life, his home and his correspondence.*

- *The ECtHR has held that “the protection of personal data, not least medical data, is of fundamental importance to a person’s enjoyment of his or her right to respect for private and family life ... Respecting the confidentiality of health data is a vital principle in the legal systems of [State] Parties. ...It is crucial not only to respect the sense of privacy of the patient but also to preserve his or her confidence in the medical profession and in the health services in general.”<sup>29</sup>*

*The reasons for such protection are clear: without it, those in need of medical assistance may be deterred from revealing such information of a personal and intimate nature as may be necessary in order to receive appropriate treatment and, even, from seeking such assistance, thereby endangering their own health and, in the case of transmissible diseases, that of the community.<sup>30</sup>*

<sup>28</sup> Enhorn v. Sweden. (56529/00).

<sup>29</sup> M. S. v. Sweden. (27/08/1997); Z v. Finland. (25 EHRR 371).

<sup>30</sup> Z v. Finland. (25 EHRR 371).

*The ECtHR has gone on to note that the disclosure of health data “may dramatically affect a person’s private and family life, as well as social and employment situation, by exposing him or her to opprobrium and the risk of ostracism.”<sup>31</sup> Disclosure is clearly particularly damaging in case of HIV infection. Therefore sufficient safeguards in domestic law must be in place. A person’s body concerns the most intimate aspect of one’s private life<sup>32</sup> so there are clear links between the right to privacy and the right to bodily integrity.<sup>33</sup>*

▶ **Article 10(1) European Convention on Human Rights and Biomedicine:**

*Everyone has the right to respect for private life in relation to information about his or her health.*

▶ **Article 13(1) COE Recommendation No. R (2004) 10:** *All personal data relating to a person with mental disorder should be considered to be confidential. Such data may only be collected, processed and communicated according to the rules relating to professional confidentiality and personal data collection.*

▶ **Article 6 European Charter of Patients’ Rights:** *Every individual has the right to the confidentiality of personal information, including information regarding his or her state of health and potential diagnostic or therapeutic procedures, as well as the protection of his or her privacy during the performance of diagnostic exams, specialist visits, and medical/surgical treatments in general.*

▶ **Article 4(1) and (8) Declaration on the Promotion of Patients’ Rights in Europe:** *All information about a patient’s health status ... must be kept confidential, even after death.... Patients admitted to health care establishments have the right to expect physical facilities which ensure privacy.*

▶ **Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data:**<sup>34</sup> *Provides additional safeguards to protect a person’s privacy with respect to the automatic processing of personal data (i.e., data protection).*

<sup>31</sup> Ibid.

<sup>32</sup> Y. F. v. Turkey. (24209/94). A forced gynecological exam conducted on woman in police custody breached Article 8 of the ECHR.

<sup>33</sup> Glass v. UK. (39 EHRR 15). The practice of administering diamorphine to a severely mentally and physically ill child against the clearly expressed wishes of the mother breached Article 8 of the ECHR.

<sup>34</sup> Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, <http://conventions.coe.int/treaty/EN/Treaties/Html/108.htm>.

- **Article 5:** *Quality of data: Personal data undergoing automatic processing shall be: obtained and processed fairly and lawfully; stored for specified and legitimate purposes and not used in a way incompatible with those purposes; adequate, relevant and not excessive in relation to the purposes for which they are stored; accurate and, where necessary kept up to date; preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored.*
- **Article 6:** *Special categories of data: Personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, may not be processed automatically unless domestic law provides appropriate safeguards. The same shall apply to personal data relating to criminal convictions.*
- **Article 7:** *Data security: Appropriate security measures shall be taken for the protection of personal data stored in automated data files against accidental or unauthorised destruction or accidental loss as well as against unauthorised access, alteration or dissemination.*
- **Article 8:** *Additional safeguards for the data subject Any person shall be enabled: (a) to establish the existence of an automated personal data file, its main purposes, as well as the identity and habitual residence or principal place of business of the controller of the file;*  
*(b) to obtain at reasonable intervals and without excessive delay or expense confirmation of whether personal data relating to him are stored in the automated data file as well as communication to him of such data in an intelligible form; (c) to obtain, as the case may be, rectification or erasure of such data if these have been processed contrary to the provisions of domestic law giving effect to the basic principles set out in Articles 5 and 6 of this convention; (d) to have a remedy if a request for confirmation or; as the case may be, communication, rectification or erasure as referred to in paragraphs b and c of this article is not complied with.*

## Right to Information

### EXAMPLES OF POTENTIAL VIOLATIONS

- **Government bans publications about drug use or harm reduction, claiming they promote illegal activity**
- **Young people are deliberately denied information about STDs and the use of condoms**
- **Roma women do not have access to information about sexual and reproductive health**

### HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- ▶ **Article 8(1) ECHR:** *Everyone has the right to respect for his private and family life, his home and his correspondence.*
  - The ECtHR has held that there is a positive obligation for the state to provide information to those whose right to respect for family and private life, under Article 8, is threatened by environmental pollution,<sup>35</sup> suggesting that any claim to the right to information in relation to health protection will have more prospects for success under Article 8 than Article 10.
- ▶ **Article 10(1) ECHR:** *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
  - The ECtHR has narrowly interpreted Article 10 of the ECHR as only prohibiting authorities from restricting a person from receiving information that others wish to impart and not imposing a positive obligation on the state to collect and disseminate information on its own motion.<sup>36</sup>
- ▶ **Article 3 European Charter of Patients' Rights:** *Every individual has the right to access to all kind of information regarding their state of health, the health services and how to use them, and all that scientific research and technological innovation makes available.*

<sup>35</sup> Ibid. See also *McGinley and Egan v. UK*. (27 EHRR 1). Positive obligation could arise under Article 8 in relation to provision of information about risks of exposure to radiation.

<sup>36</sup> *Guerra v. Italy*. (26 EHRR 357).

- ▶ **COE Recommendation No. R (2000) 5 of the Committee of Ministers to member states on the development of structures for citizen and patient participation in the decision-making process affecting health care.**

*II. Information*

*6. Information on health care and on the mechanisms of the decision-making process should be widely disseminated in order to facilitate participation. It should be easily accessible, timely easy to understand and relevant.*

*7. Governments should improve and strengthen their communication and information strategies should be adapted to the population group they address.*

*8. Regular information campaigns and other methods such as information through telephone hotlines should be used to heighten the public's awareness of patients' rights. Adequate referral systems should be put in place for patients who would like additional information (with regard to their rights and existing enforcement mechanisms).*

- ▶ **Article 10(2) European Convention on Human Rights and Bio-medicine:** *Everyone has the right to know any information collected about his or her health.*
- ▶ **Article 2(2) and (6) Declaration on the Promotion of Patients' Rights in Europe:** *Patients have the right to be fully informed about their health status, including the medical facts about their conditions; about the proposed medical procedures, together with potential risks and benefits of each procedure; about alternatives to the proposed procedures, including the effect of non-treatment; and about the diagnosis, prognosis, and progress of treatment. [Moreover; patients] have the right to choose who, if any one, should be informed on their behalf.*

## Right to Bodily Integrity

### EXAMPLES OF POTENTIAL VIOLATIONS

- **A Roma woman is sterilized against her will**
- **Doctors compel a drug-using pregnant woman to undergo an abortion**
- **Treatment is routinely given to residents of an institution without their consent as they are assumed to lack the capacity to make decisions about their treatment and care**
- **Patients at a psychiatric hospital are treated as part of a clinical medication trial without being informed that they are included in the research**
- **Patients are given ECT (electroconvulsive therapy) but are told that it is “sleep therapy”**
- **HIV tests are routinely administered without informed consent**

### HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- ▶ **Article 5 European Convention on Human Rights and Biomedicine:** *An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it.*
- ▶ **Article 18 COE Recommendation No. R (2004) 10: Council of Europe guidelines concerning the protection of the human rights and dignity of persons with mental disorder.** A person should be subject to involuntary treatment for a mental disorder only if: the individual has a mental disorder which “represents a significant risk of serious harm to his or her health or to other persons;” less intrusive means of providing appropriate care are not available; and “the opinion of the person concerned has been taken into consideration.”
- ▶ **Articles 4 and 5 European Charter of Patients’ Rights:** *A patient has the right to refuse a treatment or a medical intervention and to change his or her mind during the treatment; refusing its continuation ... [and] the right to freely choose from different treatment procedures and providers on the basis of adequate information.*
- ▶ **Articles 3(1) and (2) Declaration on the Promotion of Patients’ Rights in Europe:** *[T]he informed consent of the patient is a prerequisite for any medical intervention [and] [a] patient has the right to refuse or halt a medical intervention.*

- ▶ **Article 3 EU Charter of Fundamental Rights:** *(1) Everyone has the right to respect for his or her physical and mental integrity. (2) In the fields of medicine and biology the following must be respected in particular: (a) the free and informed consent of the person concerned, according to the procedures laid down by law; (b) the prohibition of eugenic practices, in particular those aiming at the selection of persons; (c) the prohibition on making the human body and its parts as such a source of financial gain; (d) the prohibition of the reproductive cloning of human beings.*

### **Note: ECHR and the Right to Bodily Integrity**

The right to bodily integrity is not specifically recognized under the ECHR, but it has been interpreted to be part of the right to security of the person (ECHR 5), the right to freedom from torture and cruel, inhuman, and degrading treatment (ECHR 3), the right to privacy (ECHR 8), and the right to the highest attainable standard of health (ESC 11).

- The ECtHR has found in relation to Article 8 of the ECHR that a person's body concerns the most intimate aspect of one's private life.<sup>37</sup> It has gone on to hold that a breach of physical and moral integrity occurred when dimorphine was administered to a son against his mother's wishes and a DNR (Do Not Resuscitate) order was placed in his records without his mother's knowledge.<sup>38</sup>
- English courts have considered whether the compulsory treatment of a mentally competent patient has the potential to breach Articles 8 and 3 of the ECHR (even if the proposed treatment complies with the legislative requirements). Relevant factors include the consequences of the patient's not receiving the proposed treatment, the treatment's possible side effects, and the potential for less invasive options.<sup>39</sup>

- ▶ **European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment**

- The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has stated that every competent patient should be given the opportunity to refuse treatment or any other medical intervention. Any derogation from this fundamental principle should be based upon law and should only relate to clearly and strictly defined exceptional circumstances.

<sup>37</sup> Y. F. v. Turkey. (24209/94).

<sup>38</sup> Glass v. United Kingdom. (61827/00).

<sup>39</sup> R (on the application of PS) v. (1) Responsible Medical Officer (Dr. G) and (2) Second Opinion Appointed Doctor (Dr. W). (EWHC 2335 [Admin.]).

## Right to Life

### EXAMPLES OF POTENTIAL VIOLATIONS

- **No one calls 911 in the case of a drug overdose due to fear of arrest, and the person subsequently dies**
- **Drugs users die in locked hospital wards**
- **Government places unjustified legal restrictions on access to lifesaving HIV prevention or treatment**
- **The mortality rate of an institution is particularly high during the winter months due to the poor condition of the building, inadequate sanitation and heating, and poor quality of care**
- **A patient of a psychiatric hospital known to be at risk of suicide is not monitored adequately and subsequently takes her own life**

### HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- ▶ **Article 2(1) ECHR:** *Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*

- Given the recognizable problems that arise in determining the allocation of limited resources for health care and the general reluctance of the ECtHR to sanction states for the impact of their economic decisions, it is likely that a breach of Article 2 for denial of health care will only be found in exceptional cases:<sup>40</sup>

*"[I]t cannot be excluded that the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under the positive limb of Article 2. However; where a Contracting State has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, it cannot accept that matters such as error of judgment on the part of a health professional or negligent co-ordination among health professionals in the treatment of a particular patient are sufficient of themselves to call a Contracting State to account from the standpoint of its positive obligations under Article 2 of the Convention to protect life"<sup>41</sup>*

<sup>40</sup> In *Nitecki v. Poland* (65653/01), no breach of Article 2 was found where the authorities only paid 70 percent of the cost of lifesaving drugs prescribed to a patient, with the latter expected to pay the remainder.

<sup>41</sup> *Powell v. UK*. (No 45305/99). Claim by parents that circumstances surrounding the alleged falsification of their son's medical records and the authorities' failure to investigate this matter properly gave rise to a breach of Article 2 (1) was declared inadmissible.



- The ECtHR has held that an issue may arise under Article 2 “where it is shown that the authorities ... put an individual’s life at risk through the denial of health care which they had undertaken to make available to the population generally”<sup>42</sup> —in other words, where there are preexisting obligations, these must not be applied in a discriminatory manner.
- The ECtHR has held that the right to life can impose a duty to protect those in custody, including in cases in which the risk derives from self-harm.<sup>43</sup> The ECtHR will consider whether the authorities knew or ought to have known that the person “posed a real and immediate risk of suicide and, if so, whether they did all that could have been reasonably expected of them to prevent that risk.”<sup>44</sup>
- In relation to medically caused deaths, states are required under Article 2 to create regulations compelling public and private hospitals: 1) to adopt measures for the protection of patients’ lives, and 2) to ensure that the cause of death, if in the case of the medical profession, can be determined by an “effective, independent judicial system” so that anyone responsible can be made accountable. Civil law proceedings may be sufficient in cases of medical negligence provided they are capable of both establishing liability and providing appropriate redress, such as damages.<sup>45</sup>
- To date, there has been no substantive decision on euthanasia, apart from the determination by the ECtHR that the right to life does not mean the right to die.<sup>46</sup>
- The ECtHR has also left open the possibility that Article 2 could be engaged in a situation in which sending a terminally ill person back to their country of origin could seriously shorten their life span or could amount to cruel and inhuman treatment due to inadequate medical facilities.<sup>47</sup>

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<sup>42</sup> *Cyprus v. Turkey*. (35 EHRR 731).

<sup>43</sup> *Keenan v. United Kingdom*. (33 EHRR 913).

<sup>44</sup> *Ibid.*

<sup>45</sup> *Calvelli and Ciglio v. Italy*. (32967/96). The dissenting judgments favored the use of criminal proceedings. On the facts, by accepting compensation through the settling of civil proceedings with respect to the death of their baby, plaintiffs denied themselves access to the best means of determining the extent of responsibility of the doctor concerned.

<sup>46</sup> *Pretty v. UK*. (35 EHRR 1).

<sup>47</sup> *D v. UK*. (24 EHRR 423). Issues under Article 2 were indistinguishable from those raised under Article 3.

## Right to the Highest Attainable Standard of Health

### EXAMPLES OF POTENTIAL VIOLATIONS

- **State fails to take progressive steps to ensure access to antiretroviral drugs to prevent mother-to-child HIV transmission**
- **Doctors and health facilities are not located in close proximity to certain poor neighborhoods**
- **State fails to provide any training in palliative care for its medical personnel**
- **A child in a social care home becomes bedridden due to malnutrition**
- **A hospital is unable to provide the appropriate specialist pediatric services for children who instead have to be treated with adult patients**
- **Women with mental disabilities are denied reproductive health services**

### HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- ▶ **Article 11 ESC:** *With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures designed inter alia: (1) to remove as far as possible the causes of ill-health; (2) to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health; (3) to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.*
  - The ESCR has stated that Article 11 includes physical and mental well-being in accordance with the definition of health in the WHO Constitution.<sup>48</sup>
  - States must ensure the best possible state of health for the population according to existing knowledge, and health systems must respond appropriately to avoidable health risks, i.e., those controlled by human action.<sup>49</sup>
  - The health care system must be accessible to everyone (see the section on right to nondiscrimination and equality). Arrangements for access must not lead to unnecessary delays in provision. Access to treatment must be based on transparent criteria, agreed

<sup>48</sup> COE. Conclusions of the European Committee of Social Rights. (XVI1-2); Conclusions 2005. Statement of interpretation of Article 11.

<sup>49</sup> COE. Conclusions: Denmark. (XV-2).

upon at national level, taking into account the risk of deterioration in either clinical condition or quality of life.<sup>50</sup>

- There must be adequate staffing and facilities with a very low density of hospital beds, combined with waiting lists, amounting to potential obstacles to access for the largest number of people.<sup>51</sup>

In relation to advisory and educational facilities, the ESCR has identified two key obligations: 1) developing a sense of individual responsibility through awareness campaigns and 2) providing free and regular health screening especially for serious diseases.<sup>52</sup>

- ▶ **Articles 8-10 The European Charter of Patients' Rights: The charter refers to the right to "the observance of quality standards" "safety" and "innovation."**
- ▶ **Article 5(3) WHO Declaration on the Promotion of Patients' Rights in Europe:** *Patients have the right to a quality of care which is marked both by high technical standards and by a humane relationship between the patient and health care provider.*
- ▶ **Article 35 EU Charter on Fundamental Rights:** *Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities.*

### **Note: ECHR and Detainees' Right to Health**

The ECtHR has ruled that states have a duty to protect the health of detainees and that lack of treatment may amount to a violation of Article 3, which prohibits torture and cruel, inhuman, and degrading treatment or punishment.<sup>53</sup>

<sup>50</sup> COE. Conclusions: United Kingdom. (XV-2).

<sup>51</sup> COE. Conclusions: Denmark. (XV-2).

<sup>52</sup> COE. The Right to Health and the European Social Charter, [http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/FactsheetHealth\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/FactsheetHealth_en.pdf).

<sup>53</sup> Hurtado v. Switzerland. (280-A); Ilhan v. Turkey. (34 EHRR 36).

## Right to Freedom from Torture and Cruel, Inhuman, and Degrading Treatment

### EXAMPLES OF POTENTIAL VIOLATIONS

- **Fearing prosecution by the state, a doctor refuses to prescribe morphine to relieve a patient's pain**
- **A prisoner suffering from cancer is denied treatment**
- **A drug user is denied mental health treatment while in detention**
- **Residents of an institution are not allowed to keep their own clothes as all clothes are communal**
- **Female residents of an institution are required to have showers together, supervised by male staff**

### HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- ▶ **Article 3 ECHR: *No one shall be subjected to torture or to inhuman or degrading treatment or punishment***
  - The former European Commission on Human Rights has stated that it “did not exclude that the lack of medical care in a case where someone is suffering from a serious illness could in certain circumstances amount to treatment contrary to Article 3.”<sup>54</sup>
  - However, the medical cases that the ECtHR has examined in relation to Article 3 have tended to involve those who are confined either (a) under the criminal law or (b) on mental health grounds. With respect to both forms of detention, failure to provide adequate medical treatment to persons deprived of their liberty may violate Article 3 in certain circumstances.<sup>55</sup> Breaches will tend to amount to inhuman and degrading treatment rather than torture.
  - Article 3 cannot be construed as laying down a general obligation to release detainees on health grounds, however. Instead, the ECtHR has reiterated the “right of all prisoners to conditions of detention which are compatible with human dignity, so as to ensure that the manner and method of execution of the measures imposed do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention.”<sup>56</sup>

<sup>54</sup> Tanko v. Finland. (23634/94).

<sup>55</sup> Hurtado v. Switzerland. (280-A); İlhan v. Turkey. (34 EHRR 36).

<sup>56</sup> Mouisel v. France. (38 EHRR).

- In relation to prisoners' health and well-being, this condition includes the provision of requisite medical assistance.<sup>57</sup> Where the lack of this assistance gives rise to a medical emergency or otherwise exposes the victim to "severe or prolonged pain," the breach of Article 3 may amount to inhuman treatment.<sup>58</sup> However, even when these results do not occur, a finding of degrading treatment may still be made if the humiliation caused to the victim by the stress and anxiety that he suffers due to the lack of assistance is severe enough.<sup>59</sup> For example, this finding was made in a case in which lack of medical treatment for the applicant's various illnesses, including TB, contracted in prison, caused him considerable mental suffering, thereby diminishing his human dignity.<sup>60</sup>
- Should a prisoner's state of health require adequate medical assistance and treatment beyond that available in prison, he should be released subject to appropriate restrictions in the public interest.<sup>61</sup>
- Where detainees have preexisting conditions, it may not be possible to ascertain to what extent symptoms at the relevant time resulted from the conditions of the imposed detention. However, this uncertainty is not determinative as to whether the authorities have failed to fulfill their obligations under Article 3. Therefore, proof of the actual effects of the conditions of detention may not be a major factor.<sup>62</sup>
- Examples of breaches of Article 3 include: the continued detention of a cancer sufferer, causing "particularly acute hardship;"<sup>63</sup> significant defects in the medical care provided to a mentally ill prisoner known to be suicide risk;<sup>64</sup> and systematic failings in relation to the death of a heroin addict in prison.<sup>65</sup>

<sup>57</sup> Kudla v. Poland. (30210/96).

<sup>58</sup> McGlinchey v. UK. (37 EHRR 821).

<sup>59</sup> Sarban v. Moldova. (3456/05).

<sup>60</sup> Hummatov v. Azerbaijan. (9852/03) and (13413/04).

<sup>61</sup> Wedler v. Poland. (44115/98). See also Mousiel v. France. (38 EHRR 34).

<sup>62</sup> Keenan v. UK. (33 EHRR 48). The treatment of a mentally ill person may be incompatible with the standards imposed by Article 3 with regard to the protection of fundamental human dignity, even though the person may not be able to point to any specific ill effects.

<sup>63</sup> Mousiel v. France. (38 EHRR 34). Finding the detention amounted to inhuman and degrading treatment.

<sup>64</sup> Keenan v. UK. (33 EHRR 48). Finding failure to refer to psychiatrist and lack of medical notes.

<sup>65</sup> McGlinchey and Ors v. UK. (37 EHRR 821). Finding inadequate facilities to record weight loss, gaps in monitoring, failure to take further steps including admission to hospital.

- In a recent case against Ukraine, the ECtHR found a breach of Article 3 both in terms of the conditions of detention in a pretrial detention center (overcrowding, sleep deprivation, and lack of natural light and air) and the failure to provide timely and appropriate medical assistance to the applicant for his HIV and tuberculosis infections.<sup>66</sup>
- If an individual suffers from multiple illnesses, the risks associated with any illness he suffers during his detention may increase and his fear of those risks may also intensify. In these circumstances, the absence of qualified and timely medical assistance, coupled with the authorities' refusal to allow an independent medical examination of the applicant's state of health, leads to the person's strong feeling of insecurity, which, combined with physical suffering, can amount to degrading treatment.<sup>67</sup>
- Generally, compulsory medical intervention in the interests of the person's health, where it is of "therapeutic necessity from the point of view of established principles of medicine," will not breach Article 3.<sup>68</sup> In such cases, however, the necessity must be "convincingly shown," and appropriate procedural guarantees must be in place. Furthermore, the level of force used must not exceed the minimum level of suffering/humiliation that would amount to a breach of Article 3, including torture.<sup>69</sup>
- The combined and cumulative impact on a detainee of both the conditions of detention and a lack of adequate medical assistance may result in a breach of Article 3.<sup>70</sup>
- The mere fact that a doctor saw the detainee and prescribed a certain form of treatment cannot automatically lead to the conclusion that the medical assistance was adequate.<sup>71</sup>
- The authorities must also ensure that there is a comprehensive record concerning the detainee's state of health and the treatment he underwent while in detention<sup>72</sup> and that the diagnoses and care are prompt and accurate.<sup>73</sup> The medical record should

<sup>66</sup> Yakovenko v. Ukraine. (15825/06). See also *Hurtado v. Switzerland* (A 280-A). An X-ray, which revealed a fractured rib, was only ordered after a delay of six days.

<sup>67</sup> *Khudobin v. Russia*. (59696/00).

<sup>68</sup> *Jalloh v. Germany*. (44 EHRR 667).

<sup>69</sup> *Nevrmerzhitsky v. Ukraine*. (43 EHRR 32). Finding that force feeding of prisoner on hunger strike was unacceptable and amounted to torture. See also *Herczegfalvy v. Austria*. (15 EHRR 437). Finding that forcible administration of drugs and food to violent prisoner on hunger strike complied with established medical practice.

<sup>70</sup> *Popov v Russia*. (26853/04); *Lind v. Russia*. (25664/05); *Kalashnikov v. Russia*. (47095/99) and (ECHR 2002-VI).

<sup>71</sup> *Hummatov v. Azerbaijan*. (9852/03) and (13413/04); *Malenko v. Ukraine*. (18660/03).

<sup>72</sup> *Khudobin v. Russia*. (59696/00).

<sup>73</sup> *Aleksanyan v. Russia*. (46468/06).

contain sufficient information, specifying the kind of treatment the patient was prescribed, the treatment he actually received, who administered the treatment and when, how the applicant's state of health was monitored, etc. In the absence of such information, the court may draw appropriate inferences.<sup>74</sup> Contradictions in medical records have been held to amount to a breach of Article 3.<sup>75</sup>

- Experimental medical treatment may amount to inhuman treatment in the absence of consent.<sup>76</sup> During the drafting of the convention, compulsory sterilization was considered to amount to a breach.<sup>77</sup>
- Medical negligence that does not cause a level of suffering/stress/anxiety in excess of the minimal level of humiliation, as defined by the ECtHR, will not involve a breach of Article 3.

► **European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment**

The convention's monitoring mechanism, the European Committee for the Prevention of Torture (CPT), monitors compliance with Article 3 of the European Convention on Human Rights through regular visits to places of detention and institutions. Its mandate includes prisons, juvenile detention centers, psychiatric hospitals, police holding centers, and immigration detention centers. The CPT has established detailed standards for implementing human rights-based policies in prisons and has also set monitoring benchmarks.<sup>78</sup>

The CPT has emphasized the impact of overcrowding on prisoners' health.<sup>79</sup> It has also highlighted the frequent absence of sufficient natural light and fresh air in pretrial detention facilities and the impact of these conditions on detainees' health.<sup>80</sup>

- **Article 11 European Charter of Patients' Rights:** *Each individual has the right to avoid as much suffering and pain as possible, in each phase of his or her illness. The health services must commit themselves to taking all measures useful to this end, like providing palliative care treatment and simplifying patients' access to them.*

<sup>74</sup> Hummatov v. Azerbaijan. (9852/03) and (13413/04); Melnik v. Ukraine. (72286/01). See also Holomiov v. Moldova. (30649/05).

<sup>75</sup> Radu v. Romania. (34022/05).

<sup>76</sup> X v. Denmark. (32 DR 282).

<sup>77</sup> COE. Travaux Préparatoires of the European Convention on Human Rights. Volume 1.

<sup>78</sup> COE. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The CPT Standards. (CPT/Inf/E [2002, rev. 2006]).

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

- ▶ **Articles 5(10) and (11) Declaration on the Promotion of Patients’ Rights in Europe:** *Patients have the right to relief of their suffering according to the current state of knowledge.... Patients have the right to humane terminal care and to die in dignity.*
  - The ECSR has stated in relation to Article 11 of the ESC that conditions of stay in hospital, including psychiatric hospitals, must be satisfactory and compatible with human dignity.<sup>81</sup>

## Right to Participate in Public Policy

### EXAMPLES OF POTENTIAL VIOLATIONS

- **An indigenous group is denied any meaningful participation in decisions regarding the design of appropriate systems to meet their health care needs**
- **LGBT groups are deliberately excluded from developing policies on addressing HIV/AIDS**
- **Civil society organizations are excluded from government deliberations to prepare applications for funds from the Global Fund to Fight AIDS, Tuberculosis and Malaria**
- **The government negotiates a large-scale clinical trial without consulting or requiring researchers to consult affected communities**

### HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- ▶ **Article 5.3 Fundamental Principles of the Ljubljana Charter on Reforming Health Care:** *Health care reforms must address citizens’ needs, taking into account their expectations about health and health care. They should ensure that the citizen’s voice and choice decisively influence the way in which health services are designed and operate. Citizens must also share responsibility for their own health.*
- ▶ **Part III European Charter of Patients’ Rights: Section on the Rights of Active Citizenship:** **Citizens have the “right to participate in the definition, implementation and evaluation of public policies relating to the protection of health care rights.”**

<sup>81</sup> COE. Conclusions of the European Committee of Social Rights. (XVII-2); Conclusions 2005. Statement of interpretation of Article 11; Conclusions 2005: Romania.



▶ **COE Recommendation No. R (2000) 5 of the Committee of Ministers to member states on the development of structures for citizen and patient participation in the decision-making process affecting health care**<sup>82</sup>

*Recommends that the governments of member states:*

- *ensure that citizens' participation should apply to all aspects of health care systems, at national, regional and local levels and should be observed by all health care system operators, including professionals, insurers and the authorities;*
- *take steps to reflect in their law the guidelines contained in the appendix to this recommendation;*
- *create legal structures and policies that support the promotion of citizens' participation and patients' rights, if these do not already exist;*
- *adopt policies that create a supportive environment for the growth, in membership, orientation and tasks, of civic organisations of health care "users", if these do not already exist;*
- *support the widest possible dissemination of the recommendation and its explanatory memorandum, paying special attention to all individuals and organisations aiming at involvement in decision-making in health care.*

*The guidelines in this recommendation cover: citizen and patient participation as a democratic process; information; supportive policies for active participation; and appropriate mechanisms.*

▶ **Committee of Ministers Recommendation No. R (2006) 18 to member states on health services in a multicultural society**<sup>83</sup>

*5.1. Patient training programmes should be developed and implemented to increase their participation in the decision-making process regarding treatment and to improve outcomes of care in multicultural populations.*

*5.2. Culturally appropriate health promotion and disease prevention programmes have to be developed and implemented as they are indispensable to improve health literacy in ethnic minority groups in terms of health care.*

<sup>82</sup> COE. Recommendation No. R (2000) 5. <https://wcd.coe.int/ViewDoc.jsp?id=340437&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.

<sup>83</sup> COE. Committee of Ministers Recommendation No. R (2006) 18. <https://wcd.coe.int/ViewDoc.jsp?id=1062769&BackColorInternet=9999CC&BackColorIntranet>.

5.3. *Ethnic minority groups should be encouraged to participate actively in the planning of health care services (assessment of ethnic minorities' health needs, programme development), their implementation and evaluation.*

## Right to Nondiscrimination and Equality

### EXAMPLES OF POTENTIAL VIOLATIONS

- **Asylum seekers are denied access to all health care apart from emergency treatment**
- **Hospitals routinely place Roma women in separate maternity wards**
- **Drug users are underrepresented in HIV-treatment programs despite fact that they account for a majority of people living with HIV**
- **A woman with a diagnosis of schizophrenia is told by nursing staff that her abdominal pains are “all in your mind” and is later diagnosed as having ovarian cancer**
- **A person with intellectual disabilities is not provided with the appropriate community care support to effectively socially integrate in the community**

### HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- ▶ **Article 14 ECHR: Prohibition of Discrimination:** *The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color; language, religion, political or other opinion, national or social origin, association with a national minority, property; birth or other status.*
  - Article 14 is not a stand-alone provision—in other words, it must be argued in conjunction with one of the substantive provisions of the ECHR.<sup>84</sup> For this reason, the court has not always examined Article 14 claims in cases in which it has already found a violation of the main provision.
  - To date, there have been no significant Article 14 decisions in relation to health care. Because Article 14 case law has increased during the last decade in areas such as racial discrimination and sexual orientation, it is likely that this circumstance will change in the future.

<sup>84</sup> A stand-alone provision on non-discrimination in the form of Protocol 12 to the convention entered into force in 2005 but has not been widely ratified. <http://www.humanrights.coe.int/Prot12/Protocol%2012%20and%20Exp%20Rep.htm>.

- The main principles for considering an Article 14 claim are: evidence that there has been a difference of treatment on one of the nonpermitted categories (although this condition is not exhaustive); and, if so, the existence of an objective and reasonable justification for such difference.<sup>85</sup>
- The court has also recently accepted the use of statistics to prove indirect discrimination,<sup>86</sup> a practice that in itself may not amount to impermissible discrimination but that disproportionately affects members of a particular group.

▶ **Article 11 ESC (taken together with Article E of the charter guaranteeing nondiscrimination)**

*With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organizations, to take appropriate measures designed inter alia: (1) to remove as far as possible the causes of ill- health; (2) to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health; (3) to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.*

▶ **Article 15 ESC: Rights of persons with disabilities to vocational training, rehabilitation and social resettlement**

*With a view to ensuring to persons with disabilities, irrespective of age and the nature and origin of their disabilities, the effective exercise of the right to independence, social integration and participation in the life of the community the Parties undertake, in particular: (1) to take the necessary measures to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes wherever possible or; where this is not possible, through specialised bodies, public or private; (2) to promote their access to employment through all measures tending to encourage employers to hire and keep in employment persons with disabilities in the ordinary working environment and to adjust the working conditions to the needs of the disabled or; where this is not possible by reason of the disability by arranging for or creating sheltered employment according to the level of disability. In certain cases, such measures may require recourse to specialised placement and support services; (3) to promote their full social integration and participation in the life of the community in particular through measures, including technical aids, aiming to overcome barriers to communication and mobility and enabling access to transport, housing, cultural activities and leisure.*

<sup>85</sup> Rasmussen v. Denmark. (7 EHRR 371).

<sup>86</sup> D. H. v. Czech Republic. (57325/00).

- The ECSR has stated that the health care system must be accessible to everyone and that restrictions on the application of Article 11 ESC must not be interpreted in such a way as to impede disadvantaged groups' exercise of their right to health.<sup>87</sup>  
Specifically the right of access to care requires that care must not represent an excessively heavy cost for the individual, and steps must be taken to reduce the financial burden on patients from the most disadvantaged sections of the community.<sup>88</sup>
- The ESCR, in considering a claim brought against France that it had violated (a) the right to medical assistance of poor illegal immigrants on very low incomes under Article 13<sup>89</sup> of the Revised European Social Charter<sup>90</sup> by ending their exemption from charges for medical and hospital treatment<sup>91</sup> and (b) the rights of children of immigrants to protection under Article 17 of the revised charter<sup>92</sup>

<sup>87</sup> COE. Conclusions of the European Committee of Social Rights. (XVI1-2); Conclusions 2005. Statement of interpretation of Article 11.

<sup>88</sup> COE. Conclusions: Portugal. (XVII-2).

<sup>89</sup> Article 13: With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake: (1) to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition; (2) to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights; (3) to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want; (4) to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11 December 1953.

<sup>90</sup> The Revised Social Charter of 1996 (ETS No. 163) embodies in one instrument all the rights guaranteed by the original charter of 1961 (ETS No. 035) and its additional protocol of 1988 (ETS No. 128) and adds new rights and amendments adopted by the parties. The revised charter is gradually replacing the initial, 1961 treaty.

<sup>91</sup> International Federation of Human Rights Leagues (FIDH) v. France. (13/2003).

<sup>92</sup> Article 17: With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed: (1) (a) to ensure that children and young persons, taking account of the rights and duties of their parents, have the care, the assistance, the education and the training they need, in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose; (b) to protect children and young persons against negligence, violence or exploitation; (c) to provide protection and special aid from the state for children and young persons temporarily or definitively deprived of their family's support; (2) to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools.'

by a 2002 legislative reform that restricted their access to medical services for children, upheld the claim of the children but not of the adults.

With regard to Article 13, the ESCR did find, based on a purposive interpretation of the ESC consistent with the principle of individual human dignity, that medical assistance protection should extend to illegal and to lawful foreign migrants (although this condition did not apply to all ESC rights). This finding is highly significant in relation to the protection afforded to such marginalized groups within Europe. On the facts, however, by a majority of nine to four, the ESCR found no violation of Article 13 as illegal immigrants could access some forms of medical assistance after three months of residence, and all foreign nationals could, at any time, obtain treatment for “emergencies and life threatening conditions.” By contrast, the ESCR found a violation of Article 17 (the right of children to protection), even though the affected children had similar access to health care as adults, because Article 17 was considered more expansive than the right to medical assistance. In response to the decision, the government of France changed its policy in relation to migrant children.<sup>93</sup>

▶ **Article 3 European Convention on Human Rights and Biomedicine<sup>94</sup>**

*Equitable access to health care*

▶ **Article 23 Convention Relating to the Status of Stateless Persons**

*The contracting states shall accord to stateless persons lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.*

▶ **Article 4 Framework Convention for the Protection of National Minorities**

*The Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited.*

<sup>93</sup> The government issued a circular on March 16, 2005, which provided that “all care and treatment dispensed to minors resident in France who are not effectively beneficiaries under the State medical assistance scheme is designed to meet the urgency requirement.” (CIRCULAR DHOS/DSS/DGAS).

<sup>94</sup> Convention on Human Rights and Biomedicine. <http://conventions.coe.int/Treaty/en/Treaties/Word/164.doc>.

*The Parties undertake to adopt; where necessary adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities.*

*The measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination.*

▶ **Committee of Ministers Recommendation No. R (2006) 18 to member states on health services in a multicultural society**

This recommendation includes a number of strategies for promoting health and health care for multicultural populations, including: nondiscrimination and respect for patient rights; equal access to health care; overcoming language barriers; sensitivity to health and socioeconomic needs of minorities; empowerment; and greater participation and development of appropriate knowledge base of the health needs of multicultural populations.

▶ **Paragraph 4 COE Parliamentary Assembly Recommendation 1626 (2003) on the Reform of Health Care Systems in Europe: Reconciling equity, equality and efficiency<sup>95</sup>**

*Member states should take as their main criterion for judging the success of health system reforms the existence of effective access to health care for all, without discrimination, as a basic human right.*

▶ **Article 2 European Charter of Patients Rights: Right of Access**  
*Every individual has the right of access to the health services that his or her health needs require. The health services must guarantee equal access to everyone, without discriminating on the basis of financial resources, place of residence, kind of illness or time of access to services.*

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<sup>95</sup> COE. Parliamentary Assembly Recommendation 1626 (2003). <http://assembly.coe.int/Documents/AdoptedText/TA03/ EREC1626.htm>.

## 3.4 Providers' Rights

This section presents relevant European regional standards as they appear in the European Convention on Human Rights and the European Social Charter. It also explains how these standards have been interpreted in relation to three key rights for health care and service providers: (i) work-related rights, including the right to work and to equal opportunity based on sex; (ii) freedom of association, including the right to form trade unions and the right to strike; and (iii) due process and related rights to a fair hearing, effective remedy, protection of privacy and reputation, and freedom of expression and information.

The chapter is divided into three major sections. Part I discusses the right to work in decent conditions; Part II discusses freedom of association; and Part III discusses due process and related rights. Each section outlines the significance of the right for health providers and gives examples of potential violations. The relevant standards from the Council of Europe treaties are then presented. Finally, key interpretative guidelines based on case law and concluding observations of state reports issued by the monitoring bodies are summarized.

### Right to Work in Decent Conditions

The right to work and rights in work are governed by the European Social Charter (ESC). Although they are not the focus of this section, relevant ECHR standards may include Article 2 (the right to life) and Article 3 (the prohibition of torture and subjection to inhuman or degrading treatment or punishment) insofar as they provide safeguards against ill treatment in the workplace.

The European Committee of Social Rights (ECSR) has provided extensive interpretation of the right to work in decent conditions in the ESC, particularly in the following four areas: the right to work (article 1[2]) and to equal opportunity based on sex (article 20); the right to reasonable daily and weekly working hours (article 2[1]); the right to safe and healthy working conditions (article 3); and the right to a fair remuneration.<sup>96</sup> Each of these is discussed in turn in this section. Although there is little or no direct reference to health sector personnel, they enjoy the same level of protection as other workers.

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<sup>96</sup> A digest of the case law of the ECSR is regularly updated and available at [http://www.coe.int/t/dghl/monitoring/socialcharter/Digest/DigestIndex\\_en.asp](http://www.coe.int/t/dghl/monitoring/socialcharter/Digest/DigestIndex_en.asp).

## Right to Work and to Equal Opportunity Based on Sex

### EXAMPLES OF POTENTIAL VIOLATIONS

- **A female doctor is constantly passed over for promotion despite having more relevant experience and better qualifications than male colleagues**
- **All nationals from a country are banned from taking jobs in the health sector following a territorial dispute subsequently referred to the International Court of Justice**
- **Female employees are subject to frequent sexual harassment by other members of staff, and no action is taken to stop harassment**

### HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

#### ▶ **Article 1(2) ESC: The right to work**

*With a view to ensuring the effective exercise of the right to work, the Parties undertake to protect effectively the right of the worker to earn his living in an occupation freely entered upon.*

- Article 1(2) of the ESC, ensuring the effective exercise of the right to work, is further divided into three separate issues:
  - a) the prohibition of all forms of discrimination in employment (which overlaps with the right to equal opportunity based on sex);
  - b) the prohibition of any practice that might interfere with a worker's right to earn a living in an occupation freely entered upon;<sup>97</sup>
  - c) the prohibition of forced or compulsory labor.

The first two of these issues are discussed below, with an emphasis on the definition and scope of discrimination. Acceptable domestic policies to combat discriminatory practices that limit enjoyment of the right to work, as set forth in Article 1, are also outlined.

#### *Prohibition of all forms of discrimination in employment*

- The ESC defines discrimination as the different treatment of persons in comparable situations where such treatment does not pursue a legitimate aim, is not based on objective and reasonable grounds, or is not proportionate to the aim pursued.<sup>98</sup>

<sup>97</sup> COE. Conclusions of the European Committee of Social Rights. Conclusions (II and XVI-1). Statements of interpretation of Article 1§2.

<sup>98</sup> Syndicat national des Professions du Tourisme v. France. (6/1999). Decision on the merits of 10 October 2000.



The assessment of whether a difference in treatment pursues a legitimate aim and is proportionate takes into account Article G, "the limitation provision of the ESC."<sup>99</sup>

- Under Article 1(2), legislation should prohibit any discrimination in employment on grounds of, inter alia, sex, race, ethnic origin, religion, disability, age, sexual orientation, and political opinion.<sup>100</sup> This provision is inherently linked to other provisions of the ESC, in particular to Article G,<sup>101</sup> the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on grounds of sex) and Article 15(2) (the right of persons with disabilities to employment).
- Legislation should prohibit both direct and indirect discrimination.<sup>102</sup>
- Indirect discrimination arises when a measure or practice that is identical for everyone, without a legitimate aim, disproportionately affects persons having a particular religion or belief, disability, age, sexual orientation, political opinion, ethnic origin, etc.<sup>103</sup>
- Discrimination may also result from the failing to take positive account of all relevant differences or failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible to and by all.<sup>104</sup>
- The discriminatory acts and provisions prohibited by this provision are ones that may occur in connection with recruitment or with employment conditions in general. Remuneration, training, promotion, transfer, and dismissal or other detrimental action are especially important.<sup>105</sup>
- In order to make the prohibition of discrimination effective, domestic law must at least provide for:
  - the power to set aside, rescind, abrogate, or amend any provision contrary to the principle of equal treatment, which

<sup>99</sup> COE. Conclusions: Greece. (XVI-1).

<sup>100</sup> COE. Conclusions: Iceland. (XVI11-1); Conclusions 2006 (Albania).

<sup>101</sup> Article g: The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals. The restrictions permitted under this Charter to the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed.

<sup>102</sup> COE. Conclusions: Austria. (XVI11-1).

<sup>103</sup> David Harris et al. *Law of the European Convention on Human Rights*. (Oxford: Oxford University Press, 2009), 607.

<sup>104</sup> *Association Internationale Autisme-Europe (AIAE) v. France*. (13/2002). Decision on the merits of 4 November 2003.

<sup>105</sup> COE. Conclusions: Austria. (XVI-1).

- appears in collective labor agreements, in employment contracts, or in firms' own regulations;<sup>106</sup>
- protection against dismissal or other retaliatory action by the employer against an employee who has lodged a complaint or taken legal action;<sup>107</sup>
  - appropriate and effective remedies that are adequate and proportionate and available to victims in the event of an allegation of discrimination. The imposition of predefined upper limits to compensation that may be awarded are not in conformity with Article 1(2).<sup>108</sup>
- Domestic law should also provide for an alleviation of the burden of proof that rests with the plaintiff in discrimination cases.<sup>109</sup>
  - The following measures also contribute to combating discrimination in accordance with Article 1(2) of the ESC:
    - Recognizing the right of trade unions to take action in cases of employment discrimination, including action on behalf of individuals.<sup>110</sup>
    - The right to challenge discriminatory practices that violate the right to take collective action
    - Establishing a special, independent body to promote equal treatment, particularly by providing discrimination victims with the support they need to take proceedings
    - States parties to the ESC may make foreign nationals' access to employment while in their territories subject to possession of a work permit. They cannot, however, in general, ban nationals of other states from occupying jobs for reasons other than those set out in Article G. The only jobs from which foreigners may be banned are those that are inherently connected with the protection of the public interest or national security and involve the exercise of public authority.<sup>111</sup>
    - Exclusion of individuals from functions on grounds of previous political activities, either in the form of refusal to recruit or dismissal, is prohibited, unless the job relates to law and order and national security or to functions involving such responsibilities.<sup>112</sup>
  - The ECSR has offered limited interpretation of the following

<sup>106</sup> COE. Conclusions: Iceland. (XVI-1).

<sup>107</sup> COE. Conclusions: Iceland. (XVI-1).

<sup>108</sup> COE. Conclusions 2006: Albania.

<sup>109</sup> COE. Conclusions 2002: France; Syndicat Sud Travail et Affaires Sociales v. France. (24/2004). Decision on the merits of 16 November 2005.

<sup>110</sup> COE. Conclusions: Iceland. (XVI-1).

<sup>111</sup> COE. Conclusions 2006: Albania.

<sup>112</sup> COE. Conclusions 2006: Lithuania.

standard: “Prohibition of any practice that might interfere with workers’ right to earn their living in an occupation freely entered upon.” Practices that could violate this standard include:

- The lack of adequate legal safeguards against discrimination in respect to part-time work. In particular, there must be rules to prevent nondeclared work through overtime and equal pay, in all its aspects, between part-time and full-time employees;<sup>113</sup>
- Undue interference in employees’ private or personal lives associated with or arising from their employment situation, in particular through electronic communication and data collection techniques.<sup>114</sup>

► **Article 20 ESC: Equal opportunity based on sex**

*All workers have the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex.*

*With a view to ensuring the effective exercise of the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex the Parties undertake to recognize that right and to take appropriate measures to ensure or promote its application in the following fields: (a) access to employment, protection against dismissal and occupational reintegration; (b) vocational guidance, training, retraining and rehabilitation; (c) terms of employment and working conditions, including remuneration; (d) career development; including promotion.*

## Right to Reasonable Daily and Weekly Working Hours

### EXAMPLES OF POTENTIAL VIOLATIONS

- **A doctor regularly works 100 hour weeks including, on occasion, 18-hour shifts**
- **A nurse is forced to work overtime without prior agreement**

### HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- **Article 2(1) ESC: Reasonable working hours to ensure the right to just conditions of work:** *With a view to ensuring the effective exercise of the right to just conditions of work, the Parties undertake to provide for reasonable daily and weekly working hours, the working*

<sup>113</sup> COE. Conclusions: Austria. (XVI-1).

<sup>114</sup> COE. Conclusions 2006. Statement of Interpretation on Article 1§2.

*week to be progressively reduced to the extent that the increase of productivity and other relevant factors permit.*

- Article 2(1) ESC guarantees workers the right to reasonable limits on daily and weekly working hours, including overtime. This right must be guaranteed through legislation, regulations, collective agreements, or any other binding means. In order to ensure that the limits are respected in practice, an appropriate authority must supervise whether the limits are being respected.<sup>115</sup>
- The ESC does not expressly define what constitutes reasonable working hours, instead it assesses situations on a case-by-case basis: extremely long working hours (more than 16 hours in any one day<sup>116</sup> or, under certain conditions, more than 60 hours in one week<sup>117</sup> are unreasonable and therefore contrary to the ESC.
- Overtime work must not simply be left to the discretion of the employer or the employee. The reasons for overtime work and its duration must be subject to regulation.<sup>118</sup>
- Article 2(1) also provides for the progressive reduction of weekly working hours, to the extent permitted by productivity increases and other relevant factors. These “relevant factors” may include the nature of the work to be performed and the safety and health risks to which workers are exposed.<sup>119</sup>
- Periods of “on call” duty during which the employee has not been required to perform work for the employer do constitute effective working time and cannot be regarded as rest periods, in the meaning of Article 2 of the ESC, except in the framework of certain occupations or particular circumstances and pursuant to appropriate procedures. The absence of effective work cannot constitute an adequate criterion for regarding such a period as a period of rest.<sup>120</sup>

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<sup>115</sup> COE. Conclusions I. Statement of Interpretation on Article 2§1.

<sup>116</sup> COE. Conclusions: Norway. (XIV-2).

<sup>117</sup> COE. Conclusions: The Netherlands. (XIV-2).

<sup>118</sup> COE. Conclusions. (XIV-2). Statement of Interpretation on Article 2(1). 106 | HUMAN RIGHTS IN PATIENT CARE

<sup>119</sup> Ibid.

<sup>120</sup> Confederation Française de l'Encadrement CFE-CGC v. France. (16/2003). Decision on the merits of 12 October 2004.

## Right to Safe and Healthy Working Conditions

### EXAMPLES OF POTENTIAL VIOLATIONS

- **Medical staff in the X-ray department are frequently exposed to dangerously high levels of radiation due to faulty equipment that has not been checked or replaced**
- **A nurse is infected with HIV after medical equipment is not properly sterilized**
- **A staff canteen remains open despite repeatedly failing basic hygiene standards**

### HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

► **Article 3 ESC: The right to safe and healthy working conditions**

*With a view to ensuring the effective exercise of the right to safe and healthy working conditions, the Parties undertake, in consultation with employers' and workers' organisations: To formulate, implement and periodically review a coherent national policy on occupational safety occupational health and the working environment The primary aim of this policy shall be to improve occupational safety and health and to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, particularly by minimising the causes of hazards inherent in the working environment; (1) to issue safety and health regulations; (2) to provide for the enforcement of such regulations by measures of supervision; (3) to promote the progressive development of occupational health services for all workers with essentially preventive and advisory functions.*

- The right of every worker to a safe and healthy working environment is a "widely recognised principle, stemming directly from the right to personal integrity, one of the fundamental principles of human rights."<sup>121</sup>
- The purpose of Article 3 ESC is thus directly related to that of Article 2 of the European Convention on Human Rights, which recognises the right to life.<sup>122</sup>
- Article 3 ESC applies to both the public and private sectors.<sup>123</sup>
- Occupational risk prevention must be a priority. It must be incorporated into the public authorities' activities at all levels and form part of other public policies (on employment, persons with

<sup>121</sup> COE. Conclusions i. statement of interpretation on article 3.

<sup>122</sup> COE. Conclusions. (XIV-2). Statement of Interpretation on Article 3.

<sup>123</sup> COE. Conclusions II. Statement of Interpretation on Article 3.

disabilities, equal opportunities, etc.).<sup>124</sup> The policy and strategies adopted must be assessed and reviewed regularly, particularly in light of changing risks.

- At the employer level, in addition to compliance with protective rules, there must be regular assessment of work-related risks and the adoption of preventive measures geared to the nature of risks in addition to information and training for workers. Employers are also required to provide appropriate information, training, and medical supervision for temporary workers and employees on fixed-term contracts (for example, taking account of employees' accumulated periods of exposure to dangerous substances while working for different employers).<sup>125</sup>
- The ESC does not actually define the risks to be regulated. Supervision takes an indirect form, referring to international technical occupational health and safety standards, such as the ILO conventions and European Community Directives on health and safety at work.
- Domestic law must include framework legislation (often, the Labour Code) that sets out employers' responsibilities, workers' rights and duties, and specific regulations. The risks that the ECSR currently highlights include:
  - establishment, alteration, and upkeep of workplaces (equipment, hygiene);
  - hazardous agents and substances;
  - risks connected with certain sectors (the health sector is not expressly mentioned).
- Most of the risks listed above have to be covered by a specific regulation, i.e., they must set out rules in sufficient detail for them to be applied properly and efficiently.<sup>126</sup> Accordingly, the ECSR does not consider that states are required to introduce specific insurance for occupational diseases and accidents to comply with Article 3(2).<sup>127</sup>
- All workers, all workplaces, and all sectors of activity must be covered by occupational health and safety regulations.<sup>128</sup>
- There is a need for regular inspections and effective penalties for breaches.

<sup>124</sup> COE. Conclusions 2005: Lithuania.

<sup>125</sup> COE. Conclusions 2003: Bulgaria.

<sup>126</sup> COE: Conclusions: Norway. (XIV-2).

<sup>127</sup> Marangopoulos Foundation for Human Rights (MFHR) v. Greece. (30/2005). Decision on the merits of 6 December 2006.

<sup>128</sup> COE. Conclusions 2005: Estonia.

## Right to a Fair Remuneration

### EXAMPLES OF POTENTIAL VIOLATIONS

- Some health staff are only paid the equivalent of 40 percent of the national average wage, and ancillary staff are paid less than the national minimum wage
- A nurse working overtime receives the same wage that she is normally paid

### HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

#### ▶ Article 4 ESC: The right to a fair remuneration

*With a view to ensuring the effective exercise of the right to a fair remuneration, the Parties undertake: (1) to recognise the right of workers to a remuneration such as will give them and their families a decent standard of living; (2) to recognise the right of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases; (3) to recognise the right of men and women workers to equal pay for work of equal value; (4) to recognise the right of all workers to a reasonable period of notice for termination of employment; (5) to permit deductions from wages only under conditions and to the extent prescribed by national laws or regulations or fixed by collective agreements or arbitration awards. The exercise of these rights shall be achieved by freely concluded collective agreements, by statutory wage-fixing machinery or by other means appropriate to national conditions.*

- To be considered fair within the meaning of Article 4(1) of the ESC, wages must be above the poverty line in a given country—in other words, 50 percent of the national average wage. In addition, a wage must not fall too far short of the national average wage. The threshold adopted by the ESCR is 60 percent.<sup>129</sup>
- Employees who work overtime must be paid at a higher rate<sup>130</sup> than the normal wage rate. Article 4(2) permits granting an employee leave to compensate for overtime, provided that the leave is longer than the overtime hours worked. It is not sufficient, therefore, to offer employees leave of equal length to the number of overtime hours worked.<sup>131</sup>

<sup>129</sup> COE. Conclusions. (XIV-2). Statement of Interpretation on Article 4§1. The committee's calculations are based on net amounts, (after deduction of taxes and social security contributions). Social transfers (for example, social security allowances or benefits) are taken into account only when they have a direct link to the wage.

<sup>130</sup> COE. Conclusions I. Statement of Interpretation on Article 4§2.

<sup>131</sup> COE. Conclusions: Belgium. (XIV-2).

Exceptions to Article 4(2) may be authorized in certain specific cases. These “special cases” have been defined by the ECSR as “state employees, management executives, etc.”<sup>132</sup> With respect to state employees, confining exceptions to “senior officials” is compatible with Article 4(2).<sup>133</sup> Exceptions to receipt of a higher rate of overtime pay cannot, however, be applied to all state employees or public officials, irrespective of their level of responsibility.<sup>134</sup> Exceptions may be applied to all senior managers. The ECSR has ruled that certain limits must apply, however, particularly on the number of hours of overtime not paid at a higher rate.<sup>135</sup>

- Women and men are entitled to “equal pay for work of equal value,” and this right must be expressly provided for in legislation.<sup>136</sup> The equal pay principle should apply to all jobs performed by both women and men. The principle of equality should cover all the elements of pay, including minimum wages or salary plus all other benefits paid directly or indirectly in cash or in kind by the employer to the worker.<sup>137</sup> It must also apply to full-time and part-time employees, covering the calculation of hourly wages, pay increases, and the components of pay.<sup>138</sup>
- Domestic law must provide for appropriate and effective remedies in the event of alleged wage discrimination.<sup>139</sup> Employees who claim that they have suffered discrimination must be able to take their cases to court.
- Domestic law should provide for an alleviation of the burden of proof in favor of the plaintiff in discrimination cases. Anyone who suffers wage discrimination on grounds of sex must be entitled to adequate compensation, sufficient to make good the damage suffered by the victim and to act as a deterrent to the offender.<sup>140</sup> In cases of unequal pay, any compensation must, at minimum, cover the difference in pay.<sup>141</sup>

<sup>132</sup> COE. Conclusions: Ireland. (IX-2).

<sup>133</sup> COE. Conclusions: Ireland. (X-2).

<sup>134</sup> COE: Conclusions: Poland. (XV-2).

<sup>135</sup> Confédération Française de l'encadrement CFe-CgC v. France. (9/2000). Decision on the merits of 16 november 2001.

<sup>136</sup> COE. Conclusions: Slovak Republic. (XV-2, addendum).

<sup>137</sup> COE. Conclusions i. statement of interpretation on article 4§3.

<sup>138</sup> COE. Conclusions: Portugal. (XVI-2).

<sup>139</sup> COE. Conclusions I. Statement of Interpretation on Article 4§3.

<sup>140</sup> COE. Conclusions. (XI11-5). Statement of Interpretation on Article 1 of the Additional Protocol.

<sup>141</sup> COE. Conclusions: Malta. (XVI-2).



## Right to Freedom of Association

Freedom of association is recognized under Article 11 of the ECHR. Although the European Court of Human Rights has only examined this right in a limited number of cases, it has confirmed that it includes the freedom to abstain from joining an association. In addition, the ECtHR has determined that official regulatory body members do not fall within the scope of the guarantee. This finding is particularly important for medical professionals as these bodies are established by law and have the authority to discipline their members.<sup>142</sup>

The most comprehensive analysis of the right to strike has been made under the ESC. The ECtHR has engaged in a more limited exploration of trade unions, which includes upholding workers' right to strike.

This section covers two aspects of freedom of association: the freedom of association and assembly, found in Article 11 of the ECHR, and the right to form trade unions and to strike, addressed by Articles 5, 6, 21, and 22 of the ESC.

## Right to Freedom of Association and Assembly

### EXAMPLES OF POTENTIAL VIOLATIONS

- **A professional medical association is not approved by the Ministry of Health because its president is a leading member of an opposition political party**
- **Without any justification, authorities prevent a rally for improved pay and conditions for health workers from taking place**

### HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

- ▶ **Article 11 ECHR:** *(1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. (2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety for the prevention of disorder or crime, for the protection of health or morals*

<sup>142</sup> See also International Centre for the Protection of Legal Rights. INTERIGHTS Manual for Lawyers. Article 11 of the European Convention of Human Rights: Freedom of Assembly and Association, <http://www.interights.org/view-document/index.htm?id=520>. Provides information on how the ECtHR has interpreted Article 11 of the ECHR.

*or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.*

- Under Article 11, “association” is an autonomous concept that is not dependent on the classification adopted under domestic law. This factor is relevant but not decisive.<sup>143</sup>
- The right to freedom of association under Article 11 applies to private law bodies only. Public law bodies (i.e., those established under legislation) are not considered to be “associations” within the meaning of Article 11. This limited scope of the right may be particularly relevant for health professionals and the compulsory membership of their national professional bodies.<sup>144</sup>
- The right also includes the freedom not to join an association or trade union.<sup>145</sup>
- Article 11(2) permits “lawful restrictions” to be placed on certain public officials (for example, the armed forces and the police) and on members of the “administration of the state.”<sup>146</sup> The latter term should be narrowly interpreted, however; the ECtHR left open whether it should apply to teachers.<sup>147</sup>

<sup>143</sup> Chassagnou and Ors v. France. (29 EHRR 615). Hunters' associations in France are held to be “associations” for purposes of Article 11 even though government argued that they were public law institutions.

<sup>144</sup> Le Compte v. Belgium. (4 EHRR 1). After being suspended by the regulatory body for their profession, doctors unsuccessfully complained about their compulsory membership in it and their subjection to the jurisdiction of its disciplinary organs. Given the regulatory body's public law status—it was integrated with the structure of the state, and judges were appointed to most of its organs by the state—its functions of regulating medical practice and maintaining the register of practitioners, and its administrative, rule making, and disciplinary powers, the court held that it was also relevant that there were no restrictions on practitioners establishing or joining their own professional associations. See also the subsequent cases of Albert and Le Compte v. Belgium (7299/75, etc.) as regards medical doctors; Revert and Legallais v. France (14331/88 and 14332/88) as regards architects; A. and others v. Spain (13750/88) as regards bar associations; and Barthold v. Germany (8734/79) as regards veterinary surgeons. See also O. VR. v. Russia (44139/98) and A v. Spain (6 DR 188).

<sup>145</sup> Young and Ors v. UK. (4 EHRR 38). “Closed shop,” compulsory membership of the rail trade union breached Article 11. See also Sigurjonsson v. Iceland. (A264).

<sup>146</sup> This approach has been endorsed by ESCR experts but not by the ILO Freedom of Association Committee, although Article 9(1) of ILO Convention No. 87 limiting public servants' rights does not refer to “administration of the state.”

<sup>147</sup> Vogt v. Germany. (21 EHRR 205). The court has left open whether teachers are members of the “administration of the state,” but the commission decided that they are not.

## Trade Unions and the Right to Strike

### EXAMPLES OF POTENTIAL VIOLATIONS

- **A nurse is refused a promotion on the grounds that she has been “causing problems” for the management through her trade union activities**
- **A collective agreement between a trade union and health authority management ensures that 30 percent of the vacant posts will be reserved for the union’s members**
- **There is a blanket ban on all health sector workers, prohibiting them from taking any form of industrial action**

### HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

#### ► **Article 5 ESC: The right to organize**

*With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Parties undertake that national law shall not be such as to impair; nor shall it be so applied as to impair; this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations.*

- Article 5 of the ESC applies both to the public and to the private sector.<sup>148</sup> Domestic law must guarantee the right of workers to join a trade union and include effective punishments and remedies when this right is not respected.
- Under Article 5, workers must be free to join and free not to join a trade union.<sup>149</sup> Any form of compulsory trade union membership imposed by law is incompatible with Article 5.<sup>150</sup>
- Domestic law must clearly prohibit all preentry or postentry “closed shop” clauses and all union security clauses (automatic deductions from wages).<sup>151</sup> Consequently clauses in collective agreements

<sup>148</sup> COE. Conclusions I. Statement of Interpretation on Article 5.

<sup>149</sup> COE. Conclusions 1. Statement of Interpretation on Article 5.

<sup>150</sup> COE. Conclusions III. Statement of Interpretation on Article 5.

<sup>151</sup> COE. Conclusions VIII. Statement of Interpretation on Article 5.

or legally authorized arrangements whereby jobs are reserved in practice for members of a specific trade union are a breach of Article 5.<sup>152</sup>

- Trade union members must be protected from any harmful consequence that their trade union membership or activities may have on their employment, particularly any form of reprisal or discrimination in the areas of recruitment, dismissal, or promotion. Where such discrimination occurs, domestic law must make provision for compensation that is adequate and proportionate to the harm suffered by the victim.<sup>153</sup>
- Trade unions and employers' organizations must be independent from excessive state interference in relation to their infrastructure or effective functioning.<sup>154</sup> For example, trade unions are entitled to choose their own members and representatives, and there should be not excessive limits on the reasons for which a trade union may take disciplinary action against a member.<sup>155</sup> Further, trade union officials must have access to the workplace, and union members must be able to hold meetings at work, subject to the requirements of the employer.<sup>156</sup>
- Trade unions and employer organizations must be free to organize without prior authorization, and initial formalities, such as declaration and registration, must be simple and easy to apply. If fees are charged for the registration or establishment of an organization, they must be reasonable and designed only to cover strictly necessary administrative costs.<sup>157</sup>
- Registration requirements as to the minimum number of members comply with Article 5 if the number is reasonable and presents no obstacle to the founding of organizations.<sup>158</sup>
- Domestic law may restrict participation in various consultation and collective bargaining procedures to certain representative trade unions, subject to certain criteria being met.<sup>159</sup>
- The right to strike may be restricted, provided that any restriction satisfies the conditions laid down in Article G, which outlines the circumstances that can justify limitation of rights guaranteed by the charter. Any limitation must serve a legitimate purpose and be necessary in a democratic society for the protection of the rights

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<sup>152</sup> COE. Conclusions: Denmark. (XV-1).

<sup>153</sup> COE. Conclusions 2004: Bulgaria.

<sup>154</sup> COE. Conclusions: Germany. (XI1-2).

<sup>155</sup> COE. Conclusions: United Kingdom. (XVII).

<sup>156</sup> COE. Conclusions: France. (XV-1).

<sup>157</sup> COE. Conclusions: United Kingdom. (XV-1).

<sup>158</sup> COE. Conclusions: Portugal. (XI11-5).

<sup>159</sup> COE. Conclusions: Belgium. (XV-1); Conclusions: France. (XV-1).

and freedoms of others or for the protection of public interest, national security, public health, or morals.<sup>160</sup>

- Prohibiting strikes in sectors that are essential to the community is deemed to serve a legitimate purpose, as strikes in these sectors could pose a threat to public interest, national security, and/or public health. Simply banning strikes, however, even in essential sectors—particularly when they are extensively defined, for example, as “energy” or “health”—is not deemed proportionate to the specific requirements of each sector. At most, the introduction of a minimum service requirement in these sectors might be considered in conformity with Article 6(4).<sup>161</sup>

▶ **Article 19(4) ESC: The right of migrant workers and their families to protection and assistance**

*With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Party the Parties undertake:... (4) to secure for such workers lawfully within their territories, insofar as much matters are regulated by law or regulations or are subject to the control of administrative authorities, treatment not less favorable than that of their own nationals in respect of the following matters:... (b) membership of trade unions and enjoyment of the benefits of collective bargaining.*

▶ **Article 6 ESC: The right to bargain collectively**

*With a view to ensuring the effective exercise of the right to bargain collectively the Parties undertake: (1) to promote joint consultation between workers and employers; (2) to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements; (3) to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes; and recognise: (4) the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.*

- Public officials enjoy the right to strike under Article 6(4). Prohibiting all such officials from exercising the right to strike is not permissible. The right of certain categories of public officials to strike may be restricted, however. Under Article G, these

<sup>160</sup> COE. Conclusions: Norway. (X-1). Regarding article 31 of the charter.

<sup>161</sup> COE. Conclusions i. statement of interpretation on article 6§4; Confederation of independent trade unions in Bulgaria, Confederation of Labour “Podkrepa” and european trade union Confederation v. Bulgaria. (32/2005). Decision on the merits of 16 October 2006.

restrictions should be limited to public officials whose duties and functions, given their nature or level of responsibility, are directly related to national security or to the general public interest.<sup>162</sup>

- A strike should not be considered a violation of the contractual obligations of the striking employees, constituting a breach of their employment contract; participation should be accompanied by a prohibition of dismissal. If strikers are fully reinstated when the strike has ended and their previously acquired entitlements (for example, pensions, holidays, and seniority) are not affected, then formal termination of the employment contract does not violate Article 6(4).<sup>163</sup> Any deduction from strikers' wages should not exceed the proportion of their wage that would be attributable to the duration of their strike participation.<sup>164</sup> Workers who are not members of the striking trade union but participate in the strike are entitled to the same protection as the trade union members.<sup>165</sup>

▶ **Article 21 ESC: The right to information and consultation**

*With a view to ensuring the effective exercise of the right of workers to be informed and consulted within the undertaking, the Parties undertake to adopt or encourage measures enabling workers or their representatives, in accordance with national legislation and practice: (a) to be informed regularly or at the appropriate time and in a comprehensible way about the economic and financial situation of the undertaking employing them, on the understanding that the disclosure of certain information which could be prejudicial to the undertaking may be refused or subject to confidentiality; and (b) to be consulted in good time on proposed decisions which could substantially affect the interests of workers, particularly on those decisions which could have an important impact on the employment situation in the undertaking.*

▶ **Article 22 ESC: The right to take part in the determination and improvement of the working conditions and working environment**

*With a view to ensuring the effective exercise of the right of workers to take part in the determination and improvement of the working conditions and working environment in the undertaking, the Parties undertake to adopt or encourage measures enabling workers or their representatives, in accordance with national legislation and practice, to contribute: (a) to the determination and the improvement of the working conditions, work organisation and working environment; (b) to the protection of health and safety within the undertaking; (c) to*

<sup>162</sup> *ibid.*

<sup>163</sup> COE. Conclusions I. Statement of Interpretation on Article 6 §4.

<sup>164</sup> COE. Conclusions: France. (XI11-1); Confederation Française de l'Encadrement (CFE CGC) v. France. (16/2003). Decision on the merits of 12 October 2004.

<sup>165</sup> COE. Conclusions: Denmark. (XVI11-1).

*the organisation of social and socio-cultural services and facilities within the undertaking; (d) to the supervision of the observance of regulations on these matters.*

► **Article 11 ECHR: Freedom of assembly and association**

*(1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*

- The right to form and join trade unions is a subdivision of freedom of association and is not a special and independent right under Article II.<sup>166</sup>
- Article 11 does not explicitly guarantee any particular treatment of trade unions, such as the right to be consulted by the government or to strike.<sup>167</sup> Trade unions, however, should be heard and should be permitted to take action to protect the occupational interests of their members.<sup>168</sup>
- This protection can include the right to strike, which may only be limited under certain circumstances.<sup>169</sup>

## Right to Due Process and Related Rights

Health providers have rights to due process when complaints about their conduct are lodged against them. The ECtHR has provided extensive interpretation of the right to a fair hearing, which is protected in Article 6 of the ECHR. It is clear that this right covers matters such as licensing and medical negligence suits against a hospital.

Administrative proceedings do not necessarily need to comply with Article 6, provided that, at some point, there is an opportunity to appeal to a judicial process that does adhere to Article 6 standards. Similarly, legal proceedings do not need to meet fair trial standards at each stage of the process. Rather, courts will assess whether the proceedings, taken together as a whole, constitute a fair trial.

This section discusses four aspects of due process and related rights: the interpretation of the right to a fair hearing in Article 6(1) of the ECHR; the guarantee of effective remedy articulated in Article 13 of the ECHR; the protection of privacy and reputation in Article 8 of the ECHR; and the protection of freedom of expression and information in Article 10 of the ECHR.

<sup>166</sup> National Union of Belgian Police v. Belgium. (1 EHRR 578).

<sup>167</sup> Schmidt and Dahlstrom v. Sweden. (1 EHRR 632).

<sup>168</sup> National Union of Belgian Police v. Belgium. (1 EHRR 578).

<sup>169</sup> Wilson and Ors v. UK. (35 EHRR 20). Court found violation of Article 11 where law permitted an employer to derecognize trade unions for collective bargaining purposes and to offer inducements to employees to relinquish some of their union rights.



It should be noted that there is no explicit right to information under the ECHR, and Article 10 (freedom of expression) offers only very limited protection in relation to information. There is no right to impart information, and the right to receive has been narrowly interpreted.

Freedom of expression can be restricted legitimately, through application of Article 8, to protect the rights and reputation of others. For example, the media does not have an absolute right to publish unwarranted attacks on public officials.

## Right to a Fair Hearing

### EXAMPLES OF POTENTIAL VIOLATIONS

- **A doctor facing a disciplinary hearing is denied the opportunity to contest the allegations made against him**
- **A disciplinary body decides, without explanation, that all of its hearings should take place in private**
- **A nurse’s disciplinary hearing takes more than three years to complete, during which time she is suspended**

### HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

#### ► **Article 6(1) ECHR: Right to a fair hearing**

*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*

- Article 6(1) of the ECHR applies to the determination of civil rights or criminal charges. It also covers all related proceedings between the state and the individual or between private parties, the result of which is “decisive” for civil rights and obligations.<sup>170</sup>
- In *Konig v. Federal Republic of Germany* the court found: “Whether or not a right is to be regarded as civil ... must be determined by reference to the substantive contents and effects of the right—and

<sup>170</sup> *Ringeisen v. Austria*. (1 eHRR 466).



not its legal classification—under the domestic law of the State concerned.<sup>171</sup>

- A merely investigative procedure will not engage Article 6(1),<sup>172</sup> even though pretrial proceedings may be determinative of civil rights and obligations under certain circumstances.<sup>173</sup>
- The ECtHR has confirmed that civil rights and obligations are implicated in disciplinary proceedings that determine the right to practice a profession. The ECtHR was ruling on claims brought by medical professionals in these cases.<sup>174</sup> Licensing decisions are also covered.<sup>175</sup>
- Article 6(1) will usually apply where an individual claims compensation from a public authority for an unlawful act provided there is a right to such compensation. Medical negligence proceedings against a hospital have been held to be covered.<sup>176</sup>
- Disputes relating to private law relations between private employers and employees fall within the scope of Article 6(1).<sup>177</sup> As a general rule, however, disputes relating to the employment of public servants fall outside of it.<sup>178</sup>
- In civil proceedings, a litigant has the right to:
  - real and effective access to a court;
  - notice of the time and place of the proceedings;<sup>179</sup>
  - a real opportunity to present his/her case;
  - a reasoned decision.
- There is no express requirement for legal aid in civil cases. In order to give effect to the right of access and the need for fairness, however, some assistance may be required in certain cases.<sup>180</sup>
- Entitlement to present one's case effectively is not as strong in the civil context as it is in the criminal context. There is no automatic requirement to be present and to have an oral hearing. The principle

<sup>171</sup> *Konig v. Federal Republic of Germany*. (2 eHRR 170).

<sup>172</sup> *Fayed v. UK*. (18 eHRR 393).

<sup>173</sup> *Brennan v. UK*. (34 eHRR 50).

<sup>174</sup> *Konig v. Germany*. (2 EHRR 170). Concerning the revocation of the applicant's permission to practice as a doctor in proceedings before the tribunal for the medical Profession; *Wickramsinghe v. UK*. (31503/96).

<sup>175</sup> *Konig v. Germany*. (2 EHRR 170). Disciplinary proceedings led to the withdrawal of the applicant's licence to run a medical clinic.

<sup>176</sup> *H v. France*. (12 EHRR 74).

<sup>177</sup> *Obermeier v. Austria*. (13 EHRR 290).

<sup>178</sup> *Lombardo v. Italy*. (21 EHRR 188).

<sup>179</sup> *De La Pradelle v. France*. (A 253-B).

<sup>180</sup> *Airey v. Ireland*. (2 EHRR 305); *P and Ors v. UK*. (35 EHRR 31).

of the “equality of arms” does apply, however,<sup>181</sup> and can be violated by mere procedural inequality.<sup>182</sup>

- The same principle applies to the submissions of nonparties to the proceedings.<sup>183</sup>
- Both parties have a right to be informed of the other’s submissions and other written material and have a right to reply.<sup>184</sup> Disclosure is crucial for a fair hearing.<sup>185</sup>
- Although there is no obligation on a court to obtain an expert report merely because one party seeks it,<sup>186</sup> where an expert is appointed, there must be compliance with the equality of arms principle.<sup>187</sup>
- In order to comply with the obligation to give a reasoned decision, the court or tribunal does not need to provide a detailed answer to every argument, but needs to address the essential issues in the case.<sup>188</sup>
- A decision-making disciplinary or administrative process does not need to comply with Article 6 at all stages, provided it is subject to appeal and/or judicial review.<sup>189</sup>
- Similarly, even where an adjudicatory body is not impartial and independent, it will not breach Article 6(1) if its deliberations are subject to control by a body that has the power to quash its decision.<sup>190</sup>
- The right to a public hearing includes disciplinary hearings of professionals.<sup>191</sup>
- Determining whether a hearing has been held within a reasonable time will depend upon a number of relevant factors, including

<sup>181</sup> Ruiz-Martin v. Spain. (16 EHRR 505).

<sup>182</sup> Fischer v. Austria. (ECHR 33382/96).

<sup>183</sup> Van Orshoven v. Belgium. (26 EHRR 55). Breach of Article 6(1), where applicant, who had been struck off the medical register following disciplinary proceedings, was given no prior notice of submission by the advocate-general intended to advise the court.

<sup>184</sup> Dombo Beheer B. V. v. The Netherlands. (18 EHRR 213).

<sup>185</sup> Ruiz Torija v. Spain. (19 EHRR 55).

<sup>186</sup> H v. France. (12 EHRR 74).

<sup>187</sup> Mantovanelli v. France. (24 EHRR 370). Claimants in medical negligence case had not been given an opportunity to give instruction to court-appointed expert.

<sup>188</sup> Helle v. Finland. (26 EHRR 159).

<sup>189</sup> Le Compte v. Belgium. (5 EHRR 533). The Court of Cassation’s review of a medical disciplinary body was insufficient for Article 6(1) as the court did not “take cognisance” of the merits of the case, as many aspects fell outside of its jurisdiction.

<sup>190</sup> Kingsley v. UK. (35 EHRR 10).

<sup>191</sup> Diennet v. France. (21 EHRR 554). Concluding that misconduct hearing of a general practitioner should have been in public, except in the event that a confidential private or professional matter arose in the proceedings.

the complexity of the case, the applicant's conduct, and the importance of what is at stake for the applicant.<sup>192</sup> The time period begins at the moment when proceedings are instituted<sup>193</sup> and does not end until all matters—including appeals and determination of costs—have been completed.<sup>194</sup>

## Right to an Effective Remedy

### EXAMPLES OF POTENTIAL VIOLATIONS

**No damages are awarded to a doctor after his reputation is damaged by unsubstantiated and false accusations of medical negligence that appear in the media**

**A nurse is unable to appeal an employment tribunal decision to a court**

### HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

#### ▶ Article 13 ECHR: Right to an effective remedy

*Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.*

- According to the terms of Article 13, the availability of a remedy must include the determination of the claim and the possibility of redress.<sup>195</sup> All procedures, including judicial and nonjudicial, will be examined.<sup>196</sup>
- Formal remedies that prevent examination of the merits of the claim, including judicial review, may not comply with Article 13.<sup>197</sup>
- The nature of the remedy required to satisfy the obligation under Article 13 will depend upon the nature of the alleged violation. In most cases, compensation will suffice. In all cases the remedy

<sup>192</sup> Gast and Popp v. Germany. (33 EHRR 37).

<sup>193</sup> Scopelliti v. Italy. (17 EHRR 493); Darnell v. UK (18 EHRR 205). the total period of nine years—for the determination of the dismissal of the applicant from a health authority following several judicial review applications, an industrial tribunal hearing, and an employment appeal tribunal hearing—was considered unreasonable.

<sup>194</sup> Somjee v. UK. (36 EHRR 16).

<sup>195</sup> Klass v. Germany. (2 EHRR 214).

<sup>196</sup> Silver v. UK. (5 EHRR 347).

<sup>197</sup> Peck v. UK. (36 EHRR 41).

must be “effective” in both practice and law, meaning that there must not be undue interference by state authorities.<sup>198</sup>

- The authority with the ability to provide the remedy must be independent of the body alleged to have committed the breach.<sup>199</sup>

## Right to Protection of Privacy and Reputation

### EXAMPLES OF POTENTIAL VIOLATIONS

■ **The phone of a hospital’s chief executive is bugged without any prior lawful authorization**

■ **A doctor involved in a civil suit against a hospital for unfair dismissal finds out that his correspondence has been routinely intercepted and read without his knowledge**

### HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

#### ▶ **Article 8 ECHR: Privacy and reputation**

*(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security public safety or the economic well-being of the country for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

- The term “private life,” within the context of Article 8 of the ECHR can extend to an individual’s office, offering protection, for example, against the unlawful bugging of telephone calls.<sup>200</sup> Protection can extend to certain behavior and activity that takes place in public, depending on whether the individual had a “reasonable expectation of privacy” and whether that expectation was voluntary waived.<sup>201</sup> It has been held, however, that private life is not engaged by “real time” closed-circuit television if no images are recorded, although once a systematic record is made or the image is processed in some way, it will be engaged.<sup>202</sup>

#### ▶ **Article 10(2) ECHR: Limiting free expression to protect rights and reputation of others**

<sup>198</sup> Aksoy v. Turkey. (23 EHRR 553).

<sup>199</sup> Khan v. UK. (31 EHRR 45); Taylor-Sabori v. UK. (36 EHRR 17).

<sup>200</sup> Halford v. UK. (20605/92). Concluding that bugging of private telephone calls made to an office telephone could constitute a breach of Article 8.

<sup>201</sup> Von Hannover v. Germany. (43 EHRR 7).

<sup>202</sup> Peck v. UK. (36 EHRR 41).

*The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security territorial integrity or public safety for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

## Right to Freedom of Expression and Information

### EXAMPLES OF POTENTIAL VIOLATIONS

- **A senior health service manager is dismissed after revealing that a hospital has been purchasing unlicensed drugs**
- **State authorities intervene to prevent employees from receiving information that their hospital contains dangerously high levels of radiation**
- **A senior health services manager is dismissed after revealing that a hospital has been purchasing unlicensed drugs**

### HUMAN RIGHTS STANDARDS AND RELEVANT INTERPRETATIONS

► **Article 10(1) ECHR: Freedom of expression including information**

*Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

- There is no right to impart information under Article 10 of the ECHR. The right to receive information has been narrowly interpreted as prohibiting the authorities from restricting a person from receiving information that others may wish to impart. The state has no positive obligation to collect and disseminate information on its own motion.<sup>203</sup>
- Civil servants, insofar as they should enjoy public confidence, can be protected from “offensive and abusive verbal attacks.” Even in such cases, however, civil servants have a duty to exercise their powers by reference to professional considerations only, without being unduly influenced by personal feelings.<sup>204</sup>

<sup>203</sup> Guerra and Ors v. Italy. (26 EHRR 357).

<sup>204</sup> Yankov v. Bulgaria. (39084/97).

4.1 INTRODUCTION

4.2 THE INTERNATIONAL SYSTEM

4.3 THE EUROPEAN SYSTEM

4.4 COMPLAINT PROCEDURE: EUROPEAN CONVENTION ON  
HUMAN RIGHTS

# 4

## International and Regional Procedures

### 4.1 Introduction

International and regional human rights mechanisms play an important role in the implementation of rights. These mechanisms were established to enforce governments' compliance with the international and regional human rights treaties they have ratified. These treaties make up the so-called "hard law" of international human rights, and the interpretations of the treaty mechanisms make up "soft law" that is not directly binding on governments. There are two main types of enforcement mechanisms:

- ▶ **courts, which act in a judicial capacity and issue rulings that are binding on governments in the traditional sense; and**
- ▶ **committees, which examine reports submitted by governments on their compliance with human rights treaties and, in some cases, examine individual complaints of human rights violations.**

## 4.2 The International System

### Human Rights Committee

#### MANDATE

The Human Rights Committee (HRC) oversees government compliance with the International Covenant on Civil and Political Rights (ICCPR). The HRC has two mandates: to monitor country progress on the ICCPR by examining periodic reports submitted by governments and to examine individual complaints of human rights violations under the Optional Protocol to the ICCPR.

#### CIVIL SOCIETY PARTICIPATION

NGOs can submit “shadow reports” to the HRC on any aspect of a government’s compliance with the ICCPR. Shadow reports should be submitted through the HRC Secretariat based at the Office of the High Commissioner for Human Rights (OHCHR) in Geneva, which also keeps a calendar of when governments come before the committee. The HRC meets three times a year. Individuals and NGOs can also submit complaints to the HRC under the Optional Protocol.

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 Committee on Economic, Social, and Cultural Rights

### Committee on Economic, Social, and Cultural Rights

#### MANDATE

The Committee on Economic, Social, and Cultural Rights (CESCR) oversees government compliance with the International Covenant on Economic, Social, and Cultural Rights (ICESCR). The CESCR monitors country progress on the ICESCR by examining periodic reports submitted by governments.

#### CIVIL SOCIETY PARTICIPATION

NGOs can submit “shadow reports” to the CESCR on any aspect of a government’s compliance with the ICESCR. Shadow reports should be submitted through the CESCR Secretariat based at the Office of the High Commissioner for Human Rights (OHCHR) in Geneva, which also keeps a calendar of when governments come before the committee. The CESCR meets twice a year.



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## Committee on the Elimination of Racial Discrimination

**MANDATE**

The Committee on the Elimination of Racial Discrimination (CERD) is the body of independent experts that monitors implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) by states. It monitors country progress on ICERD by examining periodic reports submitted by governments. The committee then addresses its concerns and recommendations to the country in the form of “concluding observations.” Besides commenting on country reports, CERD monitors state compliance through an early-warning procedure and through the examination of interstate and individual complaints.

**CIVIL SOCIETY PARTICIPATION**

NGOs can submit “shadow reports” to the CERD on any aspect of a government’s compliance with the ICERD. Shadow reports should be submitted through the CERD Secretariat based at the Office of the High Commissioner for Human Rights (OHCHR) in Geneva, which also keeps a calendar of when governments come before the committee. CERD meets twice a year.

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## INTERNATIONAL LABOUR ORGANIZATION

### MANDATE

The International Labour Organization (ILO), located within the United Nations, is primarily concerned with respect for human rights in the field of labor. In 1989, they adopted the Convention concerning Indigenous and Tribal Peoples in Independent Countries. States must provide periodic reports on their compliance with the convention to the ILO and to national employers' and workers' associations. National employers' and workers' associations may submit comments on these reports to the ILO. The ILO Committee of Experts (CE) evaluates the reports and may send "Direct Requests" to governments for additional information. The CE then publishes its "observations" in a report, which is presented at the International Labour Conference. On the basis of this report, the Conference Committee on the Application of Standards may decide to more carefully analyze certain individual cases and publishes its conclusions. Additionally, an association of workers or employers may submit a representation to the ILO alleging that a member state has failed to comply with the convention, and a member state may file a complaint against another member state.

### CIVIL SOCIETY PARTICIPATION

The convention encourages governments to consult indigenous peoples in preparing their reports. Indigenous peoples may also affiliate with a workers' association or form their own workers' association in order to more directly communicate with the ILO. The CE meets in November and December of each year, and the International Labour Conference is held in June.

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## COMMITTEE ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMAN

### MANDATE

The Committee on the Elimination of All Forms of Discrimination Against Women oversees government compliance with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The committee has three mandates: to monitor country progress on CEDAW by examining periodic

reports submitted by governments, to examine individual complaints of violations of women's rights under the Optional Protocol to CEDAW, and to conduct missions to state parties in the context of concerns about systematic or grave violations of treaty rights.

### **CIVIL SOCIETY PARTICIPATION**

NGOs can submit “shadow reports” to the committee on any aspect of a government's compliance with CEDAW. Shadow reports should be submitted through the Division for the Advancement of Women in New York, which also keeps a calendar of when governments come before the committee. The committee meets twice a year. Individuals and NGOs can also submit complaints to the committee under the Optional Protocol or they can encourage the committee to undertake country missions as part of its inquiry procedure.

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## **COMMITTEE ON THE RIGHTS OF THE CHILD**

### **MANDATE**

The Committee on the Rights of the Child oversees government compliance with the Convention on the Rights of the Child (CRC). It monitors country progress on the CRC by examining periodic reports submitted by governments.

### **CIVIL SOCIETY PARTICIPATION**

NGOs can submit “shadow reports” to the committee on any aspect of a government's compliance with the convention. Shadow reports should be submitted through the CRC Secretariat based at the Office of the High Commissioner for Human Rights (OHCHR) in Geneva, which also keeps a calendar of when governments come before the committee. The committee meets three times a year.

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## **UN CHARTER BODIES**

In addition to the treaty bodies listed above, there are a number of bodies created for the protection and promotion of human rights under the Charter of the United Nations.

The principal charter body is the Human Rights Council (HRC), which replaced the Commission on Human Rights (CHR) in 2006. The HRC is a subsidiary organ of the United Nations General Assembly with a mandate “to address situations of violations of human rights, including gross and systematic violations.”

The responsibilities of the HRC include: the Universal Periodic Review (UPR), the Special Procedures, the Human Rights Council Advisory Committee (formerly the Sub-Commission on the Promotion and Protection of Human Rights), and the Complaints Procedure. These responsibilities are summarized at <http://www2.ohchr.org/english/bodies/hrcouncil/>.

### **UNIVERSAL PERIODIC REVIEW (UPR)**

Beginning in 2008, the HRC will periodically review the human rights obligations and commitments of all countries. All UN member states will be reviewed for the first time within four years. A working group will meet for two weeks, three times a year, to carry out the review. The review will take into account a report from the state concerned, recommendations from the Special Procedures and Treaty Bodies, and information from nongovernmental organizations and national human rights institutions.

### **SPECIAL PROCEDURES**

“Special Procedures” is the general term given to individuals (known as Special Rapporteurs, Special Representatives, or Independent Experts) or to groups (known as Working Groups) that are mandated by the HRC to address specific country situations or thematic issues throughout the world. The HRC currently includes 28 thematic and 10 country Special Procedures.

Special Procedures activities include responding to individual complaints, conducting studies, providing advice on technical cooperation at the country level, and engaging in general promotional activities. The Special Procedures are considered “the most effective, flexible, and responsive mechanisms within the UN system.”

Special Procedures cited in this practitioner guide include:

Working Group on Arbitrary Detention

- Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions
- Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health
- Special Rapporteur on Violence against Women, Its Causes and Consequences
- For more information about the Special Procedures, see <http://www.ohchr.org/english/bodies/chr/special/index.htm>.

### **HUMAN RIGHTS COUNCIL ADVISORY COMMITTEE**

The Human Rights Council Advisory Committee functions like a think tank, providing expertise and advice and conducting substantive research and studies on issues of thematic interest to the HRC at its request. The committee is made up of 18 experts who serve in their personal capacity for a period of three years.

### **COMPLAINTS PROCEDURE**

This confidential complaints procedure allows individuals or organizations to bring complaints about “gross and reliably attested violations of human rights” to the attention of the HRC. The procedure is intended to be “victims oriented” and is expected to conduct investigations in a timely manner. Complaints are reviewed by two working groups that meet for five days at least twice a year.

### **ECONOMIC AND SOCIAL COUNCIL**

The UN Economic and Social Council (ECOSOC) coordinates the work of 14 specialized UN agencies, functional commissions, and regional commissions working on various international economic, social, cultural, educational, and health matters. The ECOSOC holds several short sessions per year and an annual substantive session for four weeks every July.

The ECOSOC consults regularly with civil society, and nearly 3,000 NGOs enjoy consultative status. ECOSOC-accredited NGOs are permitted to participate, present written contributions, and make statements to the council and its subsidiary bodies. Information about NGOs with consultative status can be found at <http://www.un.org/esa/coordination/ngo/>.

ECOSOC agencies and commissions that may be cited in or that may be relevant to this practitioner guide include the following:

- Commission on the Status of Women
- Commission on Narcotic Drugs
- Commission on Crime Prevention and Criminal Justice
- Committee on Economic, Social and Cultural Rights
- International Narcotics Control Board

## 4.3 The European System

### EUROPEAN COURT OF HUMAN RIGHTS

#### MANDATE

The European Court of Human Rights (ECtHR), a body of the Council of Europe (COE), enforces the provisions of the European Convention on Human Rights (ECHR). The ECtHR adjudicates both disputes between states and complaints of individual human rights violations. The Committee of Ministers of the Council of Europe is responsible for monitoring the implementation of judgments made by the ECtHR. (See note on Committee of Ministers below.)

#### CIVIL SOCIETY PARTICIPATION

Any individual or government can lodge a complaint directly with the ECtHR alleging a violation of one of the rights guaranteed under the convention, provided they have exercised all other options available to them domestically. An application form may be obtained from the ECtHR website ([www.echr.coe.int/echr/](http://www.echr.coe.int/echr/)). The COE has established a legal aid scheme for complainants who cannot afford legal representation. NGOs can file briefs on particular cases either at the invitation of the president of the court or as *amici curiae* (“friends of the court”) if they can show that they have an interest in the case or have special knowledge of the subject matter and can also show that their intervention would serve the administration of justice. The hearings of the ECtHR are generally public.

#### CONTACT

European Court of Human Rights  
Council of Europe  
F-67075 Strasbourg-Cedex, France  
Tel: +33 3 88 41 20 18; Fax: + 33 3 88 41 27 30  
Web: [www.echr.coe.int](http://www.echr.coe.int)

### EUROPEAN COMMITTEE OF SOCIAL RIGHTS

#### MANDATE

The European Committee of Social Rights (ECSR), also a body of the COE, conducts regular legal assessments of government compliance with provisions of the European Social Charter (ESC). These assessments are based on reports submitted by governments at regular two- to four-year intervals, known as supervision cycles. The governmental committee and the Committee of Ministers of the Council of Europe also evaluate government reports under the ECSR. (See note on Committee of Ministers below.)

## **CIVIL SOCIETY PARTICIPATION**

Reports submitted by governments under the ESC are public and may be commented upon by individuals or NGOs. International NGOs with consultative status with the COE and national NGOs authorized by their government may also submit collective complaints to the COE alleging violations of the charter.

### **CONTACT**

Web: [www.humanrights.coe.int/cseweb/GB/index.htm](http://www.humanrights.coe.int/cseweb/GB/index.htm)

## **COMMITTEE OF MINISTERS**

The Committee of Ministers ([www.coe.int/cm](http://www.coe.int/cm)) is the decision-making body of the COE. It is composed of the foreign ministers of all COE member states (or their permanent representatives).

In addition to supervising judgments of the ECtHR and evaluating reports under the ECSR, the Committee of Ministers also makes separate recommendations to member states on matters for which the committee has agreed to a “common policy”—including matters related to health and human rights.

Some of these recommendations are provided by the Parliamentary Assembly of the Council of Europe ([www.assembly.coe.int](http://www.assembly.coe.int)), which is a consultative body composed of representatives of the parliaments of member states.

## **ADVISORY COMMITTEE**

### **MANDATE**

The Advisory Committee (AC) assists the Committee of Ministers in monitoring compliance with the Framework Convention for the Protection of National Minorities (FCNM). It monitors country progress on the FCNM by examining periodic reports submitted by governments. Besides examining these reports, the AC may hold meetings with governments and request additional information from other sources. The AC then prepares an opinion, which is submitted to the Committee of Ministers. Based on this opinion, the Committee of Ministers issues conclusions concerning the adequacy of measures taken by each state party. The AC may be involved by the Committee of Ministers in the monitoring of the follow-up to the conclusions and recommendations.

## **CIVIL SOCIETY PARTICIPATION**

NGOs can submit “shadow reports” to the AC on any aspect of a government’s compliance with the FCNM. Shadow reports should be submitted through the FCNM Secretariat, ([http://www.coe.int/t/dghl/monitoring/minorities/2\\_Monitoring/NGO\\_Intro\\_en.asp](http://www.coe.int/t/dghl/monitoring/minorities/2_Monitoring/NGO_Intro_en.asp))

### **CONTACT**

Directorate General of Human Rights  
Secretariat of the Framework Convention for the Protection of National Minorities  
F-67075 Strasbourg-Cedex, France  
Tel: +33/(0)3 90 21 44 33;  
Fax: +33/(0)3 90 21 49 18  
Email: [minorities.fcnm@coe.int](mailto:minorities.fcnm@coe.int)  
Web: [www.coe.int/minorities](http://www.coe.int/minorities)



## 4.4 Complaint Procedure: European Convention on Human Rights

This section excerpts and updates information from the publication *Reported Killing as Human Rights Violations* by Kate Thompson and Camille Giffard (published by the Human Rights Centre, University of Essex).

**TABLE: BASIC FACTS ON THE EUROPEAN COURT OF HUMAN RIGHTS**

Origin:	How was it created?	By the 1950 European Convention on Human Rights, revised by Protocol 11 to that convention, 1994
	When did it become operational?	In 1998, under the revised system
Composition:	How many persons is it composed of?	As many judges as there are states parties to the convention
	Are these persons independent experts or state representatives?	Independent experts
Purpose:	General objective	To examine complaints of violation of the ECHR
	Functions	Interstate complaints (compulsory) (Article 33 ECHR)
		Individual complaints (compulsory) (Article 34, ECHR)
		Fact finding (in the context of individual complaints only and an optional step in the procedure)

### WHAT ARE THE ADMISSIBILITY REQUIREMENTS?

A communication will be declared inadmissible if:

- the communication is anonymous;
- the communication has not been submitted within six months of the date of the domestic authorities' final decision in the case;
- the communication is manifestly ill founded or an abuse of the right of petition;
- the communication is incompatible with the provisions of the Convention
- the application is substantially the same as one that has already been considered by the court or as another procedure of

international investigation and contains no new and relevant information;

- domestic remedies have not been exhausted, except where the remedies are ineffective or unreasonably prolonged.

As of June 1, 2010, in accordance with Protocol 14 to the ECHR (Council of Europe Treaty Series No. 194), a new admissibility requirement allows the court to declare inadmissible applications where the applicant has not suffered a significant disadvantage, unless respect for human rights requires an examination of the application on the merits and provided that no case may be rejected on this ground that has not been duly considered by a domestic tribunal (Article 12 of Protocol 14, amending Article 35 of the ECHR). In order to avoid rejection of cases warranting an examination on the merits, single-judge formations and committees will not be able to apply this new criterion for the first two years after the entry into force of Protocol 14 (Article 20 of the protocol).

### **WHAT SHOULD YOUR APPLICATION CONTAIN?**

Your initial letter should contain:

- a brief summary of your complaints;
- an indication of which convention rights you think have been violated;
- an indication of the remedies you have used;
- a list of the official decisions in your case, including the date of each decision, who it was made by, and an indication of what it said (attach a copy of each of these decisions).

If you later receive an application form, you should follow the instructions on that form and in the accompanying letter.

**TABLE: BASIC CHRONOLOGY OF INDIVIDUAL COMPLAINT  
PROCEDURE TO THE ECHR**

Your initial letter, containing brief summary information, is sent to the court



You may be asked for further information; if it appears that there may be a case, you will be sent an **application form**



Upon receipt, your completed application is **registered** and brought to the **attention of the court**



The allegations are **communicated to the government**, which is asked to submit its **observations on the admissibility** of the application



You **reply** to the government's observations



The court decides if the application is **admissible** (sometimes, the court may hold an **admissibility hearing**)



Possibility of **friendly settlement**



CParties are asked to submit any **further observations** on the merits or **additional evidence**



The court considers the merits and adopts a **judgment**, possibly after an **oral hearing**



The court usually decides the question of **just satisfaction** when it makes its judgment, but could choose to do so at a later date instead



The state party must **execute the judgment** under the **supervision of the Committee of Ministers** of the Council of Europe

**TABLE: PRACTICALITIES OF USE OF INDIVIDUAL COMPLAINT PROCEDURE TO THE ECHR**

Who can bring a case under this procedure?	Individuals, NGOs, and groups of individuals claiming to be victim of a human rights violation; a case can be brought by a close relative of the victim where the victim cannot do so in person, for example, if he or she has disappeared or died
Is there a time limit for bringing an application?	Six months from the date of the final decision taken in the case by the state authorities
Can you bring a case under this procedure if you have already brought one under another procedure concerning the same set of facts?	No
Do you need legal representation?	Legal representation is not necessary at the time of the application, but is required for proceedings after the case has been declared admissible, unless the president of the court gives exceptional permission for the applicant to present his or her own case
Is financial assistance available?	Yes, but only if the application is communicated to the government; the applicant will need to fill out a statement of means, signed by a domestic legal aid board, as legal aid is only granted where there is a financial need
Are amicus curia briefs accepted?	Yes, with permission (Rule 44 of the Rules of Court)
Who will know about the communication?	In principle, the proceedings are public unless the President of the Chamber decides otherwise. In exceptional cases, where an applicant does not wish his or her identity to be made public and submits a statement explaining the reasons for this, anonymity may be authorized by the president.
How long does the procedure take?	Several years
What measures, if any, can the mechanism take to assist the court in reaching a decision?	Fact-finding hearings, expert evidence, written pleadings, and oral hearings

Are provisional or urgent measures available?	Yes, but they are practices that have been developed by the court and have no basis in the convention and are applied only in very specific cases, mainly immigration/ deportation cases, where there is a “real risk” to a person (Rule 39 of the Rules of Court)
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## HELPFUL GUIDELINES

- Under the original procedure, which was replaced in 1998, the initial stages of the case took place before the European Commission on Human Rights. If you are researching a particular topic under the convention case law, remember to search for reports by the commission and also for court judgments.
- If the six-month period within which an application must be submitted is about to expire, and there is no time to prepare a full application, you can send a “stop the clock” application with a short summary of your complaint, which should be followed by the complete application as soon as possible.
- For the purpose of respecting the deadlines set by the court, keep in mind that the court considers the date of posting—not the date of receipt—as determinative. It is advisable, however, to notify the court on the day of the deadline that the submission has been posted, either via email or telephone or by faxing a copy of the application cover letter.
- The court may, on its own initiative or at the request of one of the parties, obtain any evidence it considers useful to the case, including by holding fact-finding hearings. Where such measures are requested by one of the parties, that party will normally be expected to bear the resulting costs, although the chamber may decide otherwise. If you do not wish to bear such costs, it is advisable to word your letter carefully—for example, suggest to the court that it might wish to exercise its discretion to take measures to obtain evidence.
- The court carries out most of its regular work in chambers of seven judges. Where a case is considered to raise a serious issue or might involve a change in the views of the court in relation to a particular subject, it can be referred to a grand chamber of 17 judges. Where a case has been considered by a chamber and a judgment delivered, it is possible, in exceptional cases, to request within three months of the judgment that the case be referred to the grand chamber for reconsideration (Rule 73 of the Rules of Court).
- As of June 1, 2010, in accordance with Protocol 14 to the ECHR (Article 6), the court will carry out its regular work in the following structures: (1) A single-judge formation, assisted by a nonjudicial rapporteur from the registry, will be able to declare inadmissible or strike out an individual application in clear-cut cases, where the inadmissibility of the application is manifest from the outset (Article 7 of Protocol 14 of the ECHR, which will become Article 27); (2) Three-judge committees will rule, in a simplified procedure, on both the admissibility and the merits of an application in cases where the underlying question falls under the already well-established case law of the court, that is, those cases consistently applied by a chamber (Article 8 of Protocol 14, which

will become Article 28 of the ECHR); (3) Seven-judge chambers will rule, through joint decisions, on both the admissibility and merits of individual applications that have not been considered under Articles 27 or 28 (Article 9 of the Protocol 14, amending current Article 29 of the ECHR); (4) A seventeen-judge grand chamber will rule on cases referred by one chamber and raising a serious question about the interpretation of the convention or its protocols, or where the resolution of a question before the chamber might have a result inconsistent with a judgment previously delivered by the court (Articles 30 and 31 of the ECHR).

- In accordance with Protocol 14 to the ECHR, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings in all cases before a chamber or the grand chamber (Article 13, amending Article 31 of the ECHR). This factor becomes significant in cases where the commissioner's experience may help the court by highlighting structural or systemic weaknesses in the respondent or other high-contracting parties (Article 13 of the protocol).
- It is possible to request the interpretation of a judgment within one year of its delivery (Rule 79 of the Rules of Court). It is also possible to request, within six months of the discovery, the revision of a judgment if important new facts are discovered that would have influenced the court's findings (Rule 80 of the Rules of Court).

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5.1 STATUS OF INTERNATIONAL AND REGIONAL LAW

5.2 STATUS OF PRECEDENT

5.3 LEGAL AND HEALTH SYSTEMS



# 5

## Country-Specific Notes

### 5.1 Status of International and Regional law

Since 1991, the legal system of the independent Ukrainian state has undergone major changes. Ukraine joined the Council of Europe (1995) and adopted the Constitution (June 28, 1996). In 1994, the Agreement on Partnership and Cooperation between Ukraine and the European Communities and their Member States was ratified, and in 2005 the Cabinet of Ministers of Ukraine and the Council on Cooperation between Ukraine and the European Union approved an action plan for advancing compatibility of legislative systems “Ukraine – European Union” (February 12, 2005). Ukraine has adopted a number of international legal standards in the domains of human rights and health care, has created conditions for integration of international norms into its national legislation. In 2008, Ukrainian Medical Society became a member of the World Medical Association at the General Assembly (October 15-18, 2008, Seoul). Consequently, the impact of legislative practices of the organization on the national health care legislation has been increasing.

According to Article 9 of the Constitution of Ukraine, current international treaties ratified by the Verkhovna Rada of Ukraine are part of the national legislation of Ukraine. Ratification of international treaties that contravene the Constitution of Ukraine is possible only after relevant amendments to the Constitution of Ukraine had been made.

Having become a member of the European and World community, Ukraine simultaneously took a wide range of obligations, aimed at promoting integration into “world territory”. The mentioned obligations flow out from the ratified by Ukraine constituent documents of such important organizations as United Nations (UN) and its specialized bodies, in particular World Health Organization (WHO), Council of Europe (CE) etc. It’s a common knowledge that availability of an obligation entails responsibility for its non-fulfillment or improper fulfillment. Therefore, when analyzing legal status of international and regional standards, one should focus on responsibility that is applied in case of their non-fulfillment.

In case Ukraine does not observe obligations it took according to the ratified international treaties, of course, there can occur unfavorable consequences. According to article 5 of UN Statute, in case there had been taken preventive or compulsory measures to one of the UN members, the General Assembly, under the recommendation of UN Defense Council is empowered to suspend realization of rights and privileges, that belong to UN Member. More severe sanction can be imposed to the Member of the UN in case it systematically breaks the principles foreseen by the Statute, namely it can be excluded from the Organization by the General Assembly under the recommendation of Defense Council (article 6 of the UN Statute).

Very important is Ukraine’s membership in the WHO\*, and as a result proper execution of all the decisions that are passed within the frameworks of this organization, and regulate health care issues more closely. To fulfill its tasks goals, WHO according to the Statute of this Organization is entitled to adopt the rules as regards sanitary and quarantine requirements and other measures, directed against international spread of diseases, the nomenclature of diseases, death reasons and practice of public health care, standards of diagnostic methods, etc. These rules are obligatory for state-members of the WHO. Another very important authority has WHO according to article 23 of the Statute, where it goes about the right of Assembly of WHO to give recommendations to members of the Organization, that fall within its competence. In case member of the Organization doesn’t fulfill its financial obligations before the organization or in case of other exclusive circumstances, an Assembly can under the conditions it finds appropriate, temporarily deprive the member of an organization of a vote and right to service. An Assembly is empowered to restore these rights under certain conditions. (Article 7 of the Statute).

Every member of the CE, including Ukraine, according to the Statute of CE, shall recognize the principles of supremacy of law and exercising of human rights

and fundamental freedoms, by all persons, that are under their jurisdiction and shall effectively cooperate to achieve the goals of CE. (Article 3 of the Statute). The Constituent documents of CE also foresee responsibility, in particular for gross violation of article 3, member of the CE can be temporarily deprived of right of representation, and the Committee of Ministers can ask this member to withdraw from the CE according to article 7 of the Statute. If this member doesn't fulfill this request, the Committee can pass a decision on termination of membership of this member, from the date that is defined by the Committee.

One of the key regional standards of the CE, as it has been mentioned, is a Convention on human rights and fundamental freedoms (1950), ratified by Ukraine in 1997. European Court of Human Rights is the body which promotes observance on the Convention and leads its activity by passing judgments, including ones concerning Ukraine.

To regulate the relations, that arise from the state obligation to fulfill the judgment of the European Court of Human Rights in cases against Ukraine, together with the necessity to exclude the reasons for breach of the Convention on human rights and fundamental freedoms and its protocols by the Ukraine, implementation into Ukrainian legal proceedings and administrative practice the European standards of human rights, creation of necessary prerequisites to decrease the number of complaints to the European Court against Ukraine there had been adopted the law of Ukraine "On Execution of the judgments and implementation of practice of the European Court of Human Rights" of February 2, 2006.

To secure observance of the conventional provisions by our State, that were determined in the judgment against Ukraine\*, exclude the drawbacks of a systematic character, that form the basis of the established infringement, and to exclude the grounds for submitting complaints against Ukraine to the European Court, caused by the problem, that had already been a subject of consideration in Court, measures of general character are taken. They include: a) making amendments to the current legislation and practice of its application; b) making amendments to the administrative practice; c) provision of legal expertise of the draft laws.

In Ukraine there is conducted a constant and periodical verification of current laws and by-law acts, as regards their conformity to Convention and practice of the European Court of Human Rights and European Commission of Human Rights, namely in sphere that concern operation and functioning of law-enforcement bodies, criminal procedure, deprivation of liberty. Due to the results

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\* Judgment against Ukraine: a) final judgment of the European Court of Human Rights against Ukraine, which acknowledges a breach of a Convention on human rights and fundamental freedoms; b) final judgment of the European Court of Human Rights as regards fair satisfaction in case against Ukraine, c) judgment of the European Court of Human Rights concerning decision of a case in a friendly manner.

of such verifications, a body responsible for representation of Ukraine in the European Court of Human Rights and execution of its judgments (Ministry of Justice through Governmental authorized in the European Court), submits to the Cabinet of Ministers proposals as regards making amendments to current laws and by-law acts in order to make them in conformity with the requirements of the Convention and practice of the Court.

## 5.2 Status of Precedent

### CASE LAW IN UKRAINE

A continental legal system does not recognize judicial practice as a source of law. Ukrainian scholars and practitioners discuss the expediency of establishing and consolidating different ways of achieving uniformity of jurisprudence. In particular, it appears promising to develop at the legislative level the concept of jurisprudence constant, recognized by many continental systems of law, which states that when a significant number of decisions have utilized a certain provision of the law, this provision becomes essential for all subsequent decisions. In some countries such “precedents” are set by higher courts that possess semi-legislative functions. In our country, the decisions and other documents of the plenum of higher courts are of great importance for law enforcement. In particular, this follows from the analysis of the norms of Articles 38 and 45 of the Law of Ukraine “On the Judicial System and the Status of Judges.” It should, in addition, be noted that the authority of higher specialized courts also includes providing methodological guidance to the courts of lower order to ensure a uniform application of the norms of the Constitution and the laws of Ukraine in legal practice on the basis of generalization and analysis of court statistics as well as recommendations and clarification of issues related to the application of legislation in settling cases within relevant jurisdictions.

With the adoption of the Law of Ukraine “On Implementing Decisions and Applying Procedures of the European Court of Human Rights” of February 23, 2006, which in Article 17 states that courts use in their practice the Convention on Human Rights and Fundamental Freedoms (hereafter the Convention) and Court practice, understood as a source of law, the situation started to change. The analysis of fundamental positions taken on this issue gives grounds to state that in Ukraine the stand on judicial practice as an official source of law is strengthening even though at this stage it applies only to the European Court of Human Rights.

Nevertheless, in the process of law enforcement and law realization there can appear problems, in case position of the European Court on Human Rights differs from the one of Ukrainian lawmaker in the context of certain kind of legal relations regulation. For instance, the Court in its judgement “Religious Community of Jehovah’s Witnesses of the City of Moscow v. Russian Federation” (June 10, 2010) substantiated its position as regards realization of one’s right to personal inviolability in the context of approval of or refusal from medical interference, namely concerning mechanisms of law realization and conditions under which medical aid is to be provided urgently, the scope of rights of medical relations subjects and securement of a state obligation, based on protection of patient’s health and life\*. In this very context Ukrainian lawmaker has another legal position, foreseen in part 5 of article 284 of the Civil Code of Ukraine and in part 2 of Article 43 of the Law Ukraine “Principles of Ukrainian Health Care Legislation”.\*\*

Taking into account literal interpretation of the norm of article 13, 19 of the law of Ukraine “On Execution of judgements and application of practice of the European Court on Human Rights” one can notice the necessity of taking one of the general measures, namely making changes in the current legislation and practice of its implementation, that is, in the above mentioned example, to part 5 of Article 284 of Civil Code of Ukraine and part 2 of article 45 of the law Of Ukraine “Principles of Ukrainian Health Care Legislation” in part of regulation the procedure of providing medical care in emergency situations, in order to observe human right as they are foreseen in the Convention. Therefore we come to a conclusion, that in case positions of the European Court on Human Rights and norms of the legal act of Ukraine are in conflict, primary force have the norms of legal acts, until appropriate amendments are made into the legislation.

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\* The essence of The European Convention lies in respect to human dignity and freedom, and the definition of self-determination and personal autonomy are considered to be important principles, that form the basis of interpretation of the guarantees of their observation (see paragraphs 61 and 65 of the European Court on Human Rights judgement “Pretti v. The United Kingdom”. Possibility to lead the way of life, which citizen has chosen at his own discretion, means the possibility to carry out an activity that is considered as harmful and dangerous to health of this citizen. In case of refusal from medical care, even if such refusal can cause lethal consequences, a compulsory treatment, without a consent of an adult and capable patient is treated as interference into his personal inviolability and infringement upon the rights foreseen in article 8 of the European Convention (see paragraphs 62 and 63 of the European Court on Human Rights on Human Rights judgment “Pretti v. The United Kingdom” and decision of the European Commission of December 10 1984 in case “Akmani and Others v. Belgium” [paragraph 135 of the European Court on Human Rights judgement “Religious Community of Jehovah’s Witnesses of the City of Moscow v. Russian Federation” (June 6, 2010)].

\*\* In urgent situations, when the life of a patient is really endangered, his/his relatives’ consent for medical interference is unnecessary. (part 5 article 284 of Civil Code of Ukraine, part 2 article 43 of the law of Ukraine “On Principles of Ukrainian Health Care Legislation)

## 5.3 Legal and Health Systems

### Legal System

Ukraine belongs to the continental legal system where the main source of law is a legal act. Another no less important feature of the national legal system is the principle of hierarchical subordination between various legal acts and a pronounced codified nature of law. With contemporary intense forms of communication, the boundaries between legal systems of the world lose their sharpness. Each national legal family, while self-improving, takes into consideration achievements of other systems. In particular, one observes a tendency towards significant convergence between the Roman-Germanic and Anglo-Saxon legal systems.

Legal system of Ukraine is based on several principles, which are put into the basis of law enforcement and realization of law.

**Analogy of law and analogy of the law.** When realizing legal norms law-enforcement body sometimes faces the loopholes in legislation, that is a complete or partial absence of norms regulating legal relations.

In connection with this there had been worked out means of eluding the loopholes in the process of law enforcement. That means were named an analogy. There are the following types of analogy.

**Analogy of the law** – the case or certain legal issue is solved using legal norm that regulates similar issues. Application of an analogy is forbidden if, it is directly prohibited by the law, or if the law associates the appearance of certain legal consequences with availability of specific norms.

**Analogy of law** – the case or certain legal issue is solved on the basis of legal principles, general basics and content of the legislation.

An analogy is not used in the sphere of criminal legislation and legislation on administrative offences.

According to the Letter of Ministry of Justice of Ukraine of January 30, 2009, No H-35267-18, when solving the case on the analogy of law or analogy of the law it is obligatory to observe the following requirements.

- An analogy is admissible only in case of complete or partial absence of legal norms;
- Public relations, where an analogy is applied, must be of legal nature;
- Merits of the case and an available legal norm shall be similar as regards their legal features.
- A legal norm that regulates similar relations search shall be primarily conducted within the frameworks of same branch of law and only then in other branches of law and in legislation in general.
- A decision passed as a result of analogy application shall not be in conflict with rules of the law and its aim.
- The reasons for analogy application to a certain case shall be motivated.

When applying analogy of law of essential importance are legal principles, fixed in the Main Law of the State. Taking into account the fact that constitutional norms

are norms of direct action, therefore a law enforcement subject, relying upon his own conscience, can motivate the decision, referring to constitutional norms. An analogy shall be applied on the grounds of legality. Therefore only judicial bodies – the courts are empowered to use the analogy, observing all procedural norms and procedural guarantees. A case decision, passed owing to the analogy, shall not be in conflict with current legislation.

**Concurrence of legal norms.** Concurrence of legal norms, that is when certain legal issue can be regulated by different legal acts, which are in conflict with each other is typical for the legal system of Ukraine. In order to solve legislative clashes in a proper way, one should keep in mind clarifications, indicated in the letter of Ministry of Justice of Ukraine of December 26, 2008. No. 758-0-2-08-19 “To the practice of application of legal norm in case of a clash”, in particular:

1. In case legal norms issued by the same lawmaking body are in conflict, there should be applied an act, that was issued later, even if an act, which was adopted earlier is still standing. Such inconsistency may appear as a result of the fact that adoption of a new act is not usually followed by abolition of a prior outmoded act, regulating the same issue.
2. In case legal acts adopted by different bodies, superior and inferior are in conflict, there should be applied an act, adopted by superior body, the one that has higher legal force.
3. In case two acts adopted by the same body, but with different legal force are in conflict, there should be applied an act of higher legal force. For instance, in case of inconsistency between Constitution of Ukraine and the law of Ukraine, adopted by the same body – Supreme Rada of Ukraine, there should be applied a Constitution as an act of higher legal force.
4. In case of divergence between general and special acts, priority has the special one, if it wasn't abrogated by the general act that was adopted later.
5. If international treaty of Ukraine, which come into force in an established order, foresees other rules than acts of national legislation, there should be applied an international treaty (paragraph 2 article 19 of the law of Ukraine “On international treaties” of June 29, 2004)

Current international treaties of Ukraine, that were ratified by the Supreme Rada of Ukraine, are considered to be part of national legislation and are applied in order foreseen for the norms of national legislation. If international treaty which come into force in an established order, foresees other rules than acts of national legislation of Ukraine, there should be applied the rules of international treaty.



## Health Care System

The Law of Ukraine “Principles of Ukrainian Health Care Legislation” enforces the principles of the health care system of Beveridge (English model), which are gradually implemented both in legislative and in medical practice and are manifested in family and private health care, insurance, multi-source financing, high social standards. Management of the health care system is carried out by the Ministry of Health of Ukraine and other central bodies of executive power which constitute authority for individual health care institutions, local state administration and local authorities, the Academy of Medical Sciences of Ukraine. Besides state bodies, that are closely connected with health care sphere, this system functionates owing to control and managing functions of other state institutions, in particular President of Ukraine (through the activity of Administration of President of Ukraine, Council of National Security and Defense of Ukraine), Supreme Rada of Ukraine (in particular, Committee of Supreme Rada on Health Care Issues), Ukrainian Parliament Commissioner for Human Rights, Cabinet of Ministers of Ukraine (in particular through the activity of profile Ministries and other central bodies of the executive state power), General Procurators Office of Ukraine and its local bodies, and bodies of the judicial system of Ukraine.

Consulting and advisory bodies, subject to regulation in the health care sector, include: 1) National Council on TB and HIV/AIDS Prevention, 2) National Coordinating Council Against Drug Abuse at the Cabinet of Ministers of Ukraine, 3) Inter-departmental Coordinating Council at the Ministry of Health on Inter-departmental Cooperation Between Health Care Institutions. 4) Public Council at the Ministry of Health of Ukraine (permanent, central, public, collegiate, consulting and advisory, supervisory and expert body), 5) Public Council at the Ministry of Health of Ukraine on the Issues of Cooperation with All-Ukrainian Council of Churches and Religious Organizations (permanent, consulting and advisory body), 6) Council of Young Scientists at the Ministry of Health of Ukraine (permanent, consulting body), 7) Board of the Ministry of Health of Ukraine. 8) Scientific Medical Board of the Ministry of Health of Ukraine (permanent, consulting body considering the issues of medical science in Ukraine development), 9) Coordinative Board on the Management of Quality of Medical Care of the Ministry of Health of Ukraine (permanent, consulting and advisory body), 10) Coordinative Board on the Management of Quality of Medical Care of the Ministry of Health of Autonomous Republic of Crimea, of Regional Headquarters, of Kyiv and Sevastopol Local State Administrations, 11) Coordinative Board on the Management of Quality of Medical Care of Local Health Care Departments of Local and Regional Bodies of Self-government 12) Clinical and Expert Commissions of the Ministry of Health of Ukraine (permanent body, executing coordinative, consulting and advisory function concerning organization of clinical and expert quality of medical care evaluation), 13) Clinical and Expert Commissions of the Ministry of Health of Autonomous Republic



of Crimea, Departments of Health Care, Kyiv and Sevastopol Local State Administrations (permanent body for collegiate consideration of the clinical and expert issues of diagnostics, treatment and rehabilitation, of citizens' complaints and other persons, who were provided with medical care on a certain medical territory, issues of medical care quality, as far as applications of enterprises, organizations, institutions and funds of social insurance, courts, bodies of procuracy, regards these issues on behalf of chief of health care institution, 14) Clinical and Expert Commissions of Health Care Departments of Local Regional Bodies of Self-Government, 15) Medical Board of a Health Care Institution (permanent, consulting and advisory body).

## STRUCTURE OF THE MINISTRY OF HEALTH OF UKRAINE





## 6.1 PATIENTS' RIGHTS

- 6.1.1 Right to Preventive Measures
- 6.1.2 Right of Access
- 6.1.3 Right to Information
- 6.1.4 Right to Consent
- 6.1.5 Right to Free Choice
- 6.1.6 Right to Privacy and Confidentiality
- 6.1.7 Right to Respect of Patients' Time
- 6.1.8 Right to the Observance of Quality Standards
- 6.1.9 Right to Safety
- 6.1.10 Right to Innovation
- 6.1.11 Right to Avoid Unnecessary Suffering and Pain
- 6.1.12 Right to Personalized Treatment
- 6.1.13 Right to Complain
- 6.1.14 Right to Compensation
- 6.1.15 Right to Life
- 6.1.16 Right not to Be Unlawfully Discriminated Against for Health Reasons
- 6.1.17 Right to Respect for Human Dignity in the Course of Receiving Medical Care

## 6.2 PATIENTS' RESPONSIBILITIES

- 6.2.1 Responsibility to Take Care of One's Health and Health of One's Children, and to Cause no Harm to Health of Other Citizens
- 6.2.2 Responsibility to Undergo Preventive Medical Screenings and Vaccinations
- 6.2.3 Responsibility to Provide Immediate Assistance to Other Citizens Whose Lives and Health are in Danger
- 6.2.4 Responsibility to Adhere to a Prescribed Treatment Regimen and Comply With the Internal Rules of a Health Care Institution
- 6.2.5 Responsibility to Receive Medical Assistance Without One's Own Consent or Consent of One's Own Representative in Emergency Situations When There Is a Real Threat to One's Life

# 6

## National Patients’ Rights and Responsibilities

### 6.1 Patients’ Rights

#### INTRODUCTION

At the current stage in the legal regulation of health care in Ukraine, the protection of human rights in health care is of great importance and relevance. A novelty of Ukrainian legislation is Article 24-1 “Protection of patients rights” of the law of Ukraine “On principles of Ukrainian Health Care Legislation”, where it has been declared the adoption of special law, which will define legal, economic, organizational basics of patients’ rights and legal interests protection. Multifaceted analysis of the national regulatory framework allows one to define clearly the rights of patients and to identify gaps in existing legislation in this area. For today patients’ rights are regulated most fully by the Law of Ukraine “Principles of Ukrainian Health Care Legislation” of November 19, 1992, the so-called Declaration of Human Rights for Health Care. In addition, the rights of patients can be determined on the basis of the norms of the Constitution of Ukraine of June 28, 1996, the Civil Code of Ukraine of January 16, 2003,

and the Physician's Oath approved by the Decree of the President of Ukraine of June 15, 1992. The elaboration of the national catalogue of patients' rights grounded in the European Charter of Patients' Rights is guided by the strategic course of Ukraine towards integration with the European Union and by numerous normative legal acts which reflect this course, in particular the Law of Ukraine "National Program for Adapting the Legislation of Ukraine to the Legislation of the European Union" of March 18, 2004, the Action Plan "Ukraine – European Union" approved by the Cabinet of Ministers of Ukraine on February 12, 2005 as well as an economic reform program for 2010-2014 "Prosperous Society, Competitive Economy, Efficient State" developed by the Committee on Economic Reform at the Administration of the President of Ukraine. This approach enables scholars and practitioners of medicine and law to identify gaps and shortcomings of the Ukrainian legislation, to define the main directions for improving the regulatory framework for health care, which is recognized as one of the priority areas for adapting the legislation of Ukraine to the legislation of the European Union (part V of the Law of Ukraine "National Program for Adapting the Legislation of Ukraine to the Legislation of the European Union" (18.03.2004)).

### 6.1.1 Right to Preventive Measures

#### a) Right 1 as stated in the European Charter of Patients' Rights (ECPR)

*Every individual has the right to a proper service in order to prevent illness.*

#### b) Right as stated in Country Constitution/ Legislation

- ▶ **Constitution of Ukraine of June 28, 1996 [Article 49 (parts 1, 2)].**

"Health care is provided through state funding of relevant socio-economic, medical and sanitary, health and prevention programs" (part 2).

- ▶ **Civil Code of Ukraine of January 16, 2003 [Articles 283, 286 (part 4)].**
- ▶ **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Articles 3 (part 1), 4 (paragraph 7), 6, 10 (paragraph "a", "b"), 31, 32, 35-1, 42, 43 (part 1), 53, 78 (paragraph "a")].**

In particular, according to Art. 4, the principles of health care include a preventive approach to health care.

Art. 6 guarantees the right to health which includes also the right to sanitary and epidemiological welfare on a territory or in a settlement where a citizen resides and a professional health and sanitary care.

“The state promotes healthy living of the population through ... the organization of medical, ecological and physical education ... creation of necessary conditions, including medical monitoring, for ... the development of a network of medical and athletic facilities, prevention clinics and other health care institutions ...” (part 1 Art. 32).

According to Art. 42, a medical intervention – the use of preventive methods ... that influence a human body – is allowed only when it can not harm the health of a patient.

- ▶ **On Ensuring Sanitary and Epidemiological Welfare of the Population: Law of Ukraine of February 24, 1994 (Articles 5 (parts 1, 2, 3), 21 (part 2)).**

“Health authorities and health care facilities, medical staff and employees of educational and cultural institutions must promote public hygiene skills, healthy lifestyle” (part 3 Art. 21).

- ▶ **On Protection of the Population from Infectious Diseases: Law of Ukraine of April 6, 2000 [Articles 10, 11, 12, 21].**

“Organizing and carrying out prophylactic and preventive measures ... is imparted to the executive authorities, local government ... public health care institutions, enterprises, other institutions and organizations irrespective of their form of ownership as well as citizens” (part 1 Art. 11).

- ▶ **On Psychiatric Care: Law of Ukraine of February 22, 2000 [Article 9].**

“An individual may be declared temporarily (for up to five years) or permanently unfit to perform certain activities (work, jobs, services) that may pose immediate danger to him/her or others because of a mental disorder. To establish the capacity of an individual to perform certain activities (work, jobs, services) that place special demands on the state of his/her mental health, the individual is subjected to mandatory preliminary (before the activity) and periodic (in the process of) psychiatric examinations”.

- ▶ **On Combating Tuberculosis: Law of Ukraine of July 5, 2001 [Articles 8, 9].**

“In order to ensure timely detection of individuals infected with mycobacterium tuberculosis and tuberculosis patients, preventive medical screenings of the population are also conducted” (part 2 Art. 8). Categories of

individuals who are subject to obligatory preventive medical screenings for tuberculosis are also determined (part 3 Art. 8).

### c) Supporting Regulations/ Bylaws/Orders

- ▶ **Framework for the Development of Health Care of the Population of Ukraine: Decree of the President of Ukraine of December 7, 2000 No. 1313/2000 [Section 2: Government Policy in the Health Care Sector, Section 5: Creating Conditions for Healthy Living].**

Section 2 singles out a number of most important directions and principles of health care development in Ukraine. In particular, it requires a reorientation of health care through the substantial strengthening of measures to prevent diseases and to create conditions for healthy living. Section 5 emphasizes an intensification of prevention activities in the health care system by improving the regulatory framework and formulating state policy aimed at preserving and promoting the health of the population

- ▶ **On the Physician's Oath: Decree of the President of Ukraine of June 15, 1992, [paragraphs 1, 6, part1].**

"All knowledge, strength and ability should be dedicated ... to treat and prevent diseases" (paragraph 1), "by example to promote education of physically and morally healthy generation" (paragraph 6).

- ▶ **Interdisciplinary Comprehensive Program for 2002-2011 "Health of the Nation": Resolution of the Cabinet of Ministers of Ukraine of January 10, 2002 No. 14 (section 1 (paragraph 14), section 3 (paragraphs 2, 4, 6, 11), section 4 (paragraph 5), section 7 (paragraph 7), section 8 (paragraphs 3, 5), section 9 (paragraphs 1, 3), section 10 (paragraph 8), section 13 (paragraph 5), section 14 (paragraphs 1, 2, 5), section 16 (paragraphs 2, 5, 8), section 17 (paragraphs 1, 4, 9), section 19, section 27 (paragraph 2), section 37 (paragraphs 3, 5)).**
- ▶ **National Development Plan for the Health Care System of Ukraine for the Period Ending in 2010: Resolution of the Cabinet of Ministers of Ukraine of June 13, 2007 No. 815 (paragraph 8).**
- ▶ **On the Procedure for Conducting Medical Examinations of Employees of Certain Categories: Order of the Ministry of Health of Ukraine of May 21, 2007 No. 246.**



- ▶ **On the Procedure for Conducting Medical Examinations and Management of Individuals who Abuse Drugs or Other Psychotropic Substances: Order of the Ministry of Health of Ukraine of June 16, 1998 No. 158/417.**
- ▶ **On the Procedure for Conducting Preventive Vaccinations in Ukraine, Quality Control and Circulation of Immunological Drugs: Order of the Ministry of Health of Ukraine of September 16, 2006 No. 595.**
- ▶ **Provision on Medical Offices at Pre-schools: Order of the Ministry of Health of Ukraine and Ministry of Education and Science of Ukraine of August 30, 2005 No. 432/496.**
- ▶ **On Improving Outpatient Care of Children in Ukraine: Order of the Ministry of Health of Ukraine of November 29, 2002 No. 434.**
- ▶ **On Clinical Examinations of the Population: Order of the Ministry of Health of Ukraine of August 27, 2010 No. 728 (paragraph 1).**

“Further development and improvement of preventive health care which aims at preventing diseases, promoting and strengthening health of every citizen of Ukraine is largely dependent on the success of clinical examinations of the population ... Prevention of diseases involves joint prevention measures by many centralized executive bodies and agencies, public organizations, expansion of scientific research aimed at preventing and reducing the incidence and prevalence of diseases, preservation and strengthening of public health”.

- ▶ **Framework on Management of Medical Care Quality in the Sphere of Health Care in Ukraine for the Period up to 2020. Order of Ministry of Health of Ukraine of August 1, 2011, No. 454.**
- ▶ **On Approval of Primary Records Form N 063-2/0 “Informed Consent and Evaluation of State of health of a Person or a Child by one of its Parents or other Legal Representative to Conduct Vaccination or Tuberculosis Examination” and a Instruction of its Filling in”: Order of Ministry of Health of Ukraine of January 31, 2009, No 1086.**
- ▶ **Concept of a Nationwide Program “Health – 2020: Ukrainian Dimension” Order of Cabinet of Ministers of Ukraine of October 31, 2011, No. 1164-r.**

## d) Provider Code(s) of Ethics

- ▶ **Code of Ethics of Physicians of Ukraine, adopted and signed at the National Congress of Health Care Organizations and at the X Congress of the Ukrainian Medical Association on September 27, 2009 [paragraphs 2.1, 3.2].**

“A primary goal of professional activities of a physician is ... disease prevention and rehabilitation of health” (paragraph 2.1). “...A physician is obliged, having taken into account specific characteristics of the disease, to use methods of prevention, diagnosis and treatments that he/she considers most effective in each case, keeping in mind the interests of the patient” (paragraph 3.2).

Framework on Management of Medical Care Quality in the Sphere of Health Care in Ukraine for the Period up to 2020. Order of Ministry of Health of Ukraine of August 1, 2011, No. 454.

## e) Other Relevant Sources

- ▶ **On Observance the Order Concerning Enrollment of the Child into Preschool Educational Institution: Letter of the Ministry of Science, Education, Youth and Sport of Ukraine of 25.05.2011, № 1/9-389.**

## f) Practical Examples

### 1. Example(s) of Compliance

Mr. K., born in 1994, together with his mother visited an outpatient clinic to have a preventive vaccination done. A nurse examined the patient, took his temperature to exclude any acute illness, informed his mother about possible side effects in post-vaccination period and obtained consent in writing from Mr. K and his mother. Only then the health care worker performed the vaccination.

### 2. Example(s) of Violation

Ms. N. filed an application to a kindergarten for her four-year old son. The head of the child care facility refused to accept the child, stating that the son of Ms. N. was vaccinated improperly, having violated the deadline requirements, and constitutes a danger to other children in the facility. The mother explained to the head of the preschool educational institution that her son could not get vaccinated on time because of medical counter indications and noted that she had a decision of the council of doctors that stipulated that the child could be admitted to and attend a kindergarten. The head did not alter her decision to refuse to accept the son to the pre-school.

### 3. Actual Case(s)

In April 2006, students of secondary school No. X in village D. were administered a Mantoux test. 15–20 minutes after the injection, the children felt indisposed and experienced deterioration of their state of health that led to their hospitalization. As the analysis of case histories testifies, prior to this type of diagnostic procedure all the children were for all practical purposes healthy. The parents of the children contacted the Research Institute of Virology, a leading academic virological organization. The specialists from the Institute concluded that introducing the children to the tuberculin caused a “glitch” in their immune system with subsequent allergic reorganization of the body and the development of autoimmune reactions. The tuberculin test was administered to the children in April 2006 in accordance with the Order of the Ministry of Health of Ukraine “On the Procedure for Conducting Preventive Vaccinations in Ukraine, Quality Control and Circulation of Immunological Drugs” of February 3, 2006 No. 48. The occurrence of iatrogenic illnesses in the children caused the parents to initiate a lawsuit (currently the case is pending in court). The plaintiffs in the case (seven in this case) demanded compensation for moral and material damage in the amount that cumulatively exceeded 7 million hryvnias.

### g) Practice Notes

1. Prevention services include: a) prevention counseling (hygienic instruction and education) of individuals and groups; b) preventive medical examinations to detect early forms of diseases and their risk factors and to carry out wellness activities; c) immunization (vaccination); d) clinical examinations (clinical management and rehabilitation); e) prevention health services (engaging into different kinds of physical activities, attending health resorts, physio-therapy services, massage, etc.).
2. In order to observe human rights when conducting vaccination or tuberculosis examination one should remember the following: a) prophylactic vaccinations are conducted in vaccination rooms, which are established as separate branch division of a hospital, outpatient polyclinic or treatment and preventive health care institutions (further – LPZ) notwithstanding the form of property and operate within LPZ of general education institutions, of educational institutions of III-IV accreditation level, first-aid posts of enterprises; b) in conducting a vaccination there can be involved medical workers (doctor, paramedic, senior specialist with medical education) who were specially trained, know the rules of organization and techniques of conducting vaccination and tuberculosis examination, as well as are skilled to provide urgent medical aid in cases of post-vaccine complications; c) conducting of medical examination is obligatory before vaccination of tuberculosis examination; d) before vaccination or tuberculosis examination there shall be obtained an informed, voluntary and competent consent patient’s consent or his legal representative. The form “Informed Consent and Evaluation of State of health of a Person or a Child by one of its Parents or other Legal Representative to Conduct Vaccination or Tuberculosis

Examination” (form N 063-2/0) is filled in for all patients that are subject to vaccination or tuberculosis examination, notwithstanding their place of residence. A filled in form means that a person or one of the parents of a child or other legal representative receive comprehensive information concerning procedure of conducting vaccination or tuberculosis examination, contraindications for vaccination or tuberculosis examination, vaccine and possible unfavorable consequences. e) prophylactic vaccinations shall be conducted in conformity with sanitary rules, by one-time and self-blocking syringes, which guarantee the safety of the injection during immunization (the dosage is correct and second application of a syringe is impossible) f) after vaccination and tuberculosis examination were conducted there shall be carried out medical observation, as it is indicated in the instructions list of a certain vaccine/toxoid/tuberculin. In case the instruction doesn't indicate on the period during which an observation shall be carried out, a person shall be stay under survey of a doctor within 30 minutes after vaccination. g) medical contraindications are settled by a commission on vaccination, created by order of an LPZ according to the List of medical contraindications to prophylactic vaccination; h) a refusal from vaccination is certified by a mark that medical worker had provided clarification concerning consequences of such refusal and form 063-2/0 is to be filled in and signed by a person (in case of vaccination of underage persons – by their relatives or other legal representatives that substitute them) and medical worker. A territorial Sanitary and epidemiological service is informed of the fact of refusal.

3. To ensure the rights of a patient in the course of a medical examination, one must attend to the following: a) “A Report on the Results of a Periodical Medical Examination of Employees” is written on the basis of the results of the periodic medical examination in six copies and is sent among others to the employer and the trade union representative and this does not constitute a violation of the patient's right to medical privacy, b) a non-routine medical examination of an employee is conducted at the expense of the employer; c) a decision regarding job fitness of an employee is made by a health care institution that conducted the medical examination; d) specialized health care institutions that have the right to establish the diagnosis of an occupational disease on the basis of the results of medical examinations conduct clinical examinations of high risk employees and those with suspected occupational diseases.
4. Taking into account the collisions of legal regulation, the legal practice in the sphere of vaccination, which is not uniform, it should be noted that the issue regarding the abilities – right to education and right to refuse from prophylactic vaccination realization had been excluded. These two rights had been continuously confronting each other, which caused numerous problems both in medical and legal practices. For the time being, according to departmental clarification, a denial of a chief of pre-school educational institution to enroll the child, who was not subjected to prophylactic vaccination, is against the legislation of Ukraine. Chief

of preschool educational institution is obliged to enroll the child if there are medical certificates of a certain form and conclusion of a physician, indicating that this child can go to this preschool institution. (Letter of the Ministry of Science, Education, Youth and Sport of Ukraine of 25.05.2011, No 1/9-389)

## **h) Cross-referencing Relevant International and Regional Rights**

Please review international and regional standards related to the right to preventive measures in the context of the right to the highest attainable standard of physical and mental health discussed in sections 2 and 3.

### **6.1.2 Right of Access**

#### **a) Right 2 as Stated in the ECPR**

*Every individual has the right of access to the health services that his or her health needs require. The health services must guarantee equal access to everyone, without discriminating on the basis of financial resources, place of residence, kind of illness or time of access to services.*

#### **b) Right as Stated in Country Constitution/Legislation**

▶ **Constitution of Ukraine of June 28, 1996 (Article 49 (parts 1, 3)).**

“Everyone has the right to health, medical care and medical insurance (part 1 Art. 49). “The state creates conditions for effective health care accessible to all citizens” (part 3 Art. 49).

▶ **Civil Code of Ukraine of January 16, 2003 [Articles 283, 284].**

“An individual has the right to health” (part 1 Art. 283).

▶ **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Articles 4 (part 4), 6].**

The principles of health care include, among others, equality of citizens, democracy and general accessibility of medical care and other services in the health care sector (part 4 Art. 4).

- ▶ **On Resistance to Diseases Caused by Human Immunodeficiency Virus (HIV), and Legal and Social Protection of People Living With HIV: The Law of Ukraine of 12.12.1991. (The wording of 23.12.2010.) [Article 4, (paragraphs 4, 7)]**

“The state guarantees accessibility, and good quality of medical examinations conducted to detect HIV infection including anonymous one, together with previous and further consultative care provision; (paragraph 4) accessibility to means of prophylactic measure, enabling prevention of contracting and spreading HIV through sexual contact (paragraph 7)”

- ▶ **On Approval of the National Program for the Development of Primary Health and Sanitary Care Based on Family Medicine for the Period Ending in 2011: Law of Ukraine of January 22, 2010.**

“The goal of the National Program ... is to reduce the rate of illnesses, disability and mortality by forming and ensuring efficient functioning of the system of public health care that provides affordable and high quality primary health care based on family medicine.”

- ▶ **On Procedure of Carrying out the System of Health Care Reform in Vinnitsa, Dnipropetrovsk and Donetsk Regions and in Kyiv: Law of Ukraine of July 7 2011, No. N 8603**

### **c) Supporting Regulations/ Bylaws/ Orders**

- ▶ **On Approval of the Interim Standards for Medical Care of Adolescents and Youth: Order of the Ministry of Health of Ukraine of June 2, 2009 No. 382.**

“Availability means that the youth has a real opportunity to access services through the simplification of the application process, maximal optimization of the office hours to the needs of the youth, provision of free, comprehensive services and so on.”

- ▶ **Framework for Ensuring Quality of Health Care Services in Ukraine for the Period Ending in 2010: Order of the Ministry of Health of Ukraine of August 1, 2011 No. 454.**

Improving access to medical care is identified among the goals for implementing the Framework, while an increase in the availability and quality of health care is an expected result.

- ▶ **On Approval of a Unitary Glossary of Definitions (Glossary) on the Issues of Management of Medical Care Quality: Order of the Ministry of Health of Ukraine of July 20, 2011 No. 427.**
- ▶ **Issues of Management of Medical Care Quality: Order of the Ministry of Health of Ukraine of July 20, 2011 No. 427.**

Accessibility of medical care – is a free access to health care services, notwithstanding geographical, economic, social, cultural, organizational or language barriers.

In the discussion of the Right to Free Care below, as related to the Right to Access, we will examine those aspects of the right in question that we believe to be the most important in the context of its implementation. All other aspects of the right will be analyzed in other sub-sections, including the right not to be unlawfully discriminated against for health reasons (sub-section 6.1.16).

## **Right to Free Health Care**

### **a) Every citizen has a right to free medical care in state or local health care institutions**

#### **b) Right as Stated in Country Constitution/Legislation**

- ▶ **Constitution of Ukraine of June 28, 1996 [Article 49 (part 3)].**

“State and municipal health care facilities provide health care free of charge.”

- ▶ **Criminal Code of Ukraine of April 5, 2001 [Articles 184 (part 1), 354].**

“Violation of the right to free health care:

An unlawful demand to pay for medical care in any state or municipal health care institution shall be fined up to one hundred untaxed minimum wages or result in an arrest for up to six months “(part 1 Art. 184).

- ▶ **On the Legal Status of Foreigners and Stateless Persons: Law of Ukraine of February 4, 1994 [Article 10].**

“Foreigners and stateless persons residing permanently in Ukraine and also those who were granted refugee status in Ukraine enjoy medical care at the level of its citizens” (part 1).

- ▶ **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Articles 8 (part 1,2), 18, 35-1 – 35-5]].**
- ▶ **On Protection of the Population from Infectious Diseases: Law of Ukraine of April 6, 2000 [Articles 10 (paragraph 4 part 1), 19 (paragraph 1 part 1)].**

“... Free medical care [is provided] to people suffering from infectious diseases at the state and municipal health care institutions and state research establishments”.

- ▶ **On Combating Tuberculosis: Law of Ukraine of July 5, 2001 [Articles 3 (part 2), 15 (part 1)]**

“The state ... determines ... that every citizen is provided with free tuberculosis care as well as accessibility and equal opportunities in receiving tuberculosis care ...”

- ▶ **On Protection of Childhood: Law of Ukraine of 26.04.2001. [Article 13 (paragraph 1 part 5)]**

“Children from large families shall be granted such benefits:  
1) Ability to get medicines by prescription of a physician for free;...”

### **c) Supporting Regulations/ Bylaws/ Orders**

- ▶ **On the Physician’s Oath: Decree of the President of Ukraine of June 15, 1992, [paragraph 2 part 1].**

“... Be selfless and sensitive ...”.

- ▶ **Program for Providing Citizens with Guaranteed by the State Free Medical Care: Resolution of the Cabinet of Ministers of Ukraine of July 11, 2002 No. 955.**

In Art. 2, the Regulation stipulates that state and municipal health care institutions provide free health care of the following types: 1) emergency and urgent care – at the pre-hospitalization stage, the care is provided by emergency and urgent care units when there is a threat to human life, 2) outpatient care, 3) hospital care is provided in case of a severe manifestation of a disease and in urgent cases when intensive treatment, round the clock medical supervision and hospitalization are needed, including when there are indications of an epidemic, to children, pregnant and parturient women, patients upon recommendations of medical and social expert commissions, medical advisory commissions, 4) emergency dental care (in full



is provided to children, disabled, pensioners, students, pregnant women, women with children under 3 years of age), 5) nurse medical care to rural residents, 6) health-resort care to disabled and sick children at specialized and children's health resorts, 7) maintenance of children in orphanages, 8) medical and social assessment of disability.

- ▶ **On Approval of the Procedure for Providing Medical Assistance to Foreigners and Stateless Persons Temporarily Staying on the Territory of Ukraine and Recognition of Some Resolutions of Cabinet of Ministers of Ukraine Void: Resolution of the Cabinet of Ministers of Ukraine of March 22, 2011 No. 667.**

“Foreigners and stateless persons, permanently residing in Ukraine, shall be provided with medical care, including with emergency one for a fee unless the legislation and international agreements ratified by Ukraine do not foresee otherwise” (paragraph 1).

- ▶ **On Regulating Free and Preferential Dispensing of Medicines by Prescription in Cases of Outpatient Care of Certain Groups of Population and Certain Categories of Diseases: Resolution of the Cabinet of Ministers of Ukraine of August 17, 1998 No. 1303.**

To ensure optimal use of budgetary funds, elimination of multiplicity of decisions as to free and preferential dispensing of medicines in cases of outpatient care of certain groups of population and treatment of certain categories of diseases, ... .. the list of the groups of population which in case of outpatient care receive medicines by prescription at no cost or on preferential terms (appendix 1 of the Order) and the list of categories of diseases which when treated on the outpatient basis are entitled for free dispensing of medicines (appendix 2 of the Order).

- ▶ **On the Procedure for Purchasing of Medicines by Health Care Establishments and Institutions Financed from the Budget: Order of the Ministry of Health of Ukraine of September 5, 1996 No. 1071.**

#### **d) Provider Code(s) of Ethics**

- ▶ **Code of Ethics of Physicians of Ukraine, adopted and signed at the National Congress of Health Care Organizations and at the X Congress of the Ukrainian Medical Association on September 27, 2009 [paragraph 6.2].**

“At state and municipal medical institutions, a doctor provides free medical care to patients within the amount of funding allocated to the institution.

Extortion by a doctor from a patient or his/her relatives of any fees not covered by the legislative and regulatory acts is criminal and immoral”.

### e) Other Relevant Sources

- ▶ **Decision of the Constitutional Court of Ukraine regarding the constitutional petition of 53 People’s Deputies of Ukraine to provide an official interpretation of the provision in part 3 of Article 49 of the Constitution of Ukraine “at state and municipal institutions, health care is provided free of charge” (the case of free medical care) of May 29, 2002.**

“The provision in part 3 of Article 49 of the Constitution of Ukraine “at state and municipal institutions, health care is provided free of charge”, according to the Constitutional Court of Ukraine, should be understood to mean that state and municipal health care facilities provide medical care to all citizens regardless of its extent without any prior, current or subsequent payment for the assistance.

The concept of medical care, the conditions under which medical insurance is introduced, including state medical insurance, the formation and use of voluntary health funds, and also the procedure for providing medical services that go beyond medical care on a fee basis at state and municipal health care institutions and a list of such services are to be determined by the law”.

- ▶ **Decision of the Constitutional Court of Ukraine regarding the constitutional petition of 66 People’s Deputies of Ukraine to examine the conformity of the Resolution of the Cabinet of Ministers of Ukraine “On Approval of the List of Paid Services Provided by State Health Care Institutions and Medical Schools” with the Constitution of Ukraine (the case of paid medical services) of November 25, 1998.**

“The Constitutional Court of Ukraine believes that “a way out of the critical situation pertaining to budgetary financing of health care ...lies in the change of ... the conceptual approach to solving problems related to ensuring the constitutional right to health care, namely: development, approval, and implementation of relevant national programs which would clearly delineate the extent of free medical care provided to all citizens at state and municipal health care institutions which is guaranteed by the state (including supported with government funding)

The list of services that cannot be provided free of charge by the state at state health care institutions includes a medical examination of individuals seeking:

- to obtain a drivers license (section I, paragraph 24, subparagraph “a”);

- to obtain a permit to acquire and carry weapons, except for military and other personnel who are required to carry weapons by law (section I, paragraph 24, subparagraph “b”);
- to obtain relevant documents to travel abroad on invitation of relatives who live abroad (section I, paragraph 24, subparagraph “d”);
- to obtain relevant documents for rehabilitation in medical and health resort facilities abroad initiated by the individual (section I, paragraph 24, subparagraph “d”);
- to obtain relevant documents for business travel, except for civil servants whose work requires such travel and who have relevant medical documents (section I, paragraph 24, subparagraph “d”).

## **f) Practical Examples**

### **1. Example(s) of Compliance**

Mr. Yu, an HIV-positive patient, visited a gastroenterologist at his local clinic with a complaint of pain in the stomach area. After the examination, the patient was diagnosed with stomach ulcer. The doctor noted that the patient can undergo an outpatient treatment, assigned a course of treatment, and issued a prescription, having explained to the patient that he is entitled to free medicines at the pharmacies since HIV-positive patients have the right to free medicines if any disease is present, regardless of the type of the main underlying disease.

### **2. Example(s) of Violation**

The Procuracy of city Kh. initiated a criminal case against a physician of one of the city health care institutions. The study of the case files demonstrates that a middle aged man with a chest pain came to the admissions department. However instead of providing immediate medical assistance to the patient, the medical staff sent his relatives to pay contributions to two charitable funds that operate at the hospital. Meanwhile, the patient was left to walk along the hallways of the admissions department without any assistance: this led to an abrupt deterioration of his state. Subsequently, the patient was diagnosed with an extensive myocardial infarction. After intensive resuscitation measures in the hospital and lasting outpatient rehabilitation, the patient survived but was assigned level 2 disability.

### **3. Actual Case(s)**

Ms. H. appealed to the court to compensate her for material and moral damages. Her underage son P. is disabled, suffering from epilepsy. Current legislation guarantees to him free anticonvulsant medication. Since her son did not receive free of charge medication regularly, she was forced to buy it out of pocket and therefore asked the court to compensate her for the material damage in the amount of 2,650 hryvnias and 97 kopecks. In addition, the plaintiff believed that

she suffered moral damages: namely, deterioration of her living standards, moral suffering. She thus asked the court to compensate her for the moral damage in the amount of 10,000 hryvnias.

In court, it was established that underage P. was suffering from epilepsy since childhood. According to the medical conclusion No. 24 of April 19, 2000, he is disabled and since 1995 he is registered at the Regional Neuro-psychiatric Hospital Named after Yu. and is under medical supervision there.

According to the Resolution of the Cabinet of Ministers of Ukraine of August 17, 1998 No. 1303 "On Regulating Free and Preferential Dispensing of Medicines by Prescription in Cases of Outpatient Care of Certain Groups of Population and Certain Categories of Diseases", Mr. P. has the right to preferential dispensing of monthly anticonvulsant medicines.

Given the above, the court decided that in this case the plaintiff's claims were justifiable and reasonable. The court decided to satisfy the claims in part, with the Regional Neuro-psychiatric Hospital Named after Yu. ordered to pay Ms. H. 2,650 hryvnias and 97 kopeks to compensate for the material damage caused and 900 hryvnias for the moral damage.

### **g) Practice Notes**

To ensure patients' right to free or preferential dispensing of medicines, one should remember the following: 1) free dispensing of medicines is carried out only in case of an outpatient treatment of a primary disease which qualifies the patient for benefits, 2) free and preferential dispensing of medicines in case of outpatient care is carried out by pharmacies on the basis of prescriptions written by doctors from the health care institutions servicing the area where the patient resides, 3) individuals who are treated in medical outpatient facilities affiliated with a particular company or organization and who are eligible for free or preferential dispensing of medicines receive the medicines from the pharmacies affiliated with these facilities, 4) free dispensing of medicines to disabled children under the age of 16 is carried out when a doctor's prescription is presented regardless of the place of residence of the child but within the confines of the Autonomous Republic of Crimea, individual regions, and the cities of Kyiv and Sevastopol, 5) AIDS patients and HIV-positive individuals regardless of the underlying disease are entitled to free medicines if they suffer from any other diseases.

### **h) Cross-referencing Relevant International and Regional Rights**

Please review international and regional standards related to the right of access in the context of the right to non-discrimination and equality discussed in sections 2 and 3.

## 6.1.3 Right to Information

### a) Right 3 as Stated in the ECPR

#### Article 3. Right to Information

*Every individual has the right to access to all kinds of information regarding their state of health, the health services and how to use them, and all that scientific research and technological innovation makes available.*

### b) Right as Stated in Country Constitution/Legislation

► **Constitution of Ukraine of June 28, 1996 [Articles 32 (part 3), 34].**

*“Every citizen has the right to examine the information about oneself that is not a state or other secret protected by law at the offices of state authorities, local government, institutions and organizations” (part 3 Article 32.).*

► **Civil Code of Ukraine of January 16, 2003 [Articles 285, 302].**

“The right to information about the state of one’s health:

1. An adult individual has the right to accurate and complete information about his/her state of health, including familiarization with relevant medical documents pertaining to health.

2. Parents (adoptive parents), guardians, trustees are entitled to information about the state of health of the child or the ward.

3. If information about a disease of an individual can worsen his/her health or impair the health of individuals identified in part two hereof, can impede treatment, health care practitioners have the right to provide incomplete information about the state of health of the individual, limit access to individual medical records.

4. In case of death of an individual, members of his/her family or other individuals authorized by them may be present when the causes of his/her death are examined and become acquainted with the conclusions about the causes of death and have the right to appeal these findings in court” (Art. 285).

► **On Information: Law of Ukraine of October 2, 1992 (wording of January 13, 2011) (Article 31).**

“Confidential information about physical person includes in particular data of persons health” (part 2 Article 11).

- ▶ **On Protection of Consumer Rights: Law of Ukraine of May 12, 1991 (in the reading of December 1, 2005) [Articles, 4 (part 4), 21 (part 1)].**

“... The rights of consumers are considered to be violated if in any way (except as provided by law) the right of a consumer to receive needed, accessible, accurate and timely information about a relevant product (any product, work or service) is restricted” (paragraph 5 part 1).

- ▶ **On Personal Data Protection: Law of Ukraine of June 1, 2010 [Articles 16-19].**
- ▶ **On Access to Public Information: Law of Ukraine of January 13, 2011. [Articles 1, 5, 6, 10, 11, 12, 13, 19-22]**
- ▶ **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Articles 6 (paragraph “f”), 39].**

Paragraph “f” of Art. 6 guarantees to an individual the right to accurate and timely information about his/her state of health and public health, including existing and possible risk factors and their degree.

“A patient who has reached adulthood is entitled to receive accurate and complete information about his/her state of health, including familiarization with relevant medical documentation regarding his /her health. Parents (adoptive parents), guardians, trustees have the right to obtain information about the state of health of the child or the ward” (parts 1, 2 Art. 39).

- ▶ **On Protection of the Population from Infectious Diseases: Law of Ukraine of April 6, 2000 [Articles 17, 19 (paragraph 2, part 1)].**

“Citizens ... are entitled to receive accurate information about the epidemic situation in Ukraine” (part 1)

“... Individuals suffering from infectious diseases or those who are carriers of bacteria have the right to receive accurate information about the outcome of their medical screening, examination, and treatment and to receive recommendations on prevention of infectious diseases” (paragraph 2 part 1 Art. 19).

- ▶ **On Psychiatric Care: Law of Ukraine of 22 February, 2000 [Article 6 (part 2)].**

“The right to obtain and use confidential information about the state of mental health of an individual and to receive psychiatric care belongs to the individual or his/her legal representative”.

- ▶ **On Resistance to Diseases Caused by Human Immunodeficiency Virus (HIV), and Legal and Social Protection of People Living With HIV: The Law of Ukraine of 12.12.1991. (The wording of 23.12.2010.) [Articles 7 (paragraph 3) 13 (paragraph 4)]**

“Transfer of data about the results of person’s medical examination aimed at HIV detection, about the fact whether a person has HIV or not, by medical worker is allowed only: to a person, who was examined; and in cases and under conditions foreseen by part 3 of article 6 of this law, – to parents or other legal representatives of such person... (part 4, article 13). In case HIV was detected during examination of children in the age under 14 and persons, recognized incapable in order established by law, an authorized medical worker informs of this fact parents and other legal representatives of these persons... (part 3 article 7).”

### **c) Supporting Regulations/ Bylaws/ Orders**

- ▶ **“On Lists of Data, that Include Official and Confidential Information in the Ministry of Health of Ukraine”: Order of Ministry of Health of Ukraine of August 16, No. 517.**
- ▶ **On Approval of Primary Records Form N 063-2/0 “Informed Consent and Evaluation of State of health of a Person or a Child by one of its Parents or other Legal Representative to Conduct Vaccination or Tuberculosis Examination” and a Instruction of its Filling in”: Order of Ministry of Health of Ukraine of January 31, 2009, No 1086.**

### **d) Provider Code(s) of Ethics**

- ▶ **Code of Ethics of Physicians of Ukraine, adopted and signed at the National Congress of Health Care Organizations and at the X Congress of the Ukrainian Medical Association on September 27, 2009 [paragraph 3.7].**

“A patient has the right to full information about his/her state of health but he/she can refuse an access to this information or designate an individual to whom the information about his/her state of health can be communicated. The information can be withheld from the patient in cases when there are substantial grounds for believing that it could cause him/her serious harm. However, if the patient insists, a doctor is obliged to provide him/her with full information. In case of unfavorable prognosis for the patient, he/she is to be informed delicately and carefully, leaving hope for the continuation of life, a possible successful outcome”.

## e) Other Relevant Sources

- ▶ **Decision of the Constitutional of Court of Ukraine regarding the official interpretation of Articles 3, 23, 31, 47, 48 of the Law of Ukraine “On Information” and Article 12 of the Law of Ukraine “On Procuracy” (the case of K. H. Ustymenko) of October 30, 1997.**

The Decision stipulates that medical information is data about state of health of an individual, his/her medical history, the purpose of the proposed studies and treatment, prognosis of the progression of the disease, including presence of the risk to life and health; this information according to its legal status is confidential. The Decision of the Constitutional Court of Ukraine also states that the duty of a doctor is to provide a patient and his/her family members or legal representatives with this information fully and in an accessible form at their request. This document also provides that in special cases when the information can harm the health of the patient, the doctor may limit the information. In this case, the doctor informs the family members or legal representatives of the patient, taking into account personal interests of the patient. The doctor acts in the same way when the patient is unconscious.

## f) Practical Examples

### 1. Example(s) of Compliance

Citizen applied in a written form to head doctor of health care institution, in which he asked to give him a copy of medical card of the in-patient and X-ray pictures of his son, born 1995. These materials were necessary for him in order to get a consultation of specialists of the Institute of Traumatology and Orthopedics of the Academy of Medical Sciences of Ukraine. Head doctor, having considered an application, gave the applicant appropriate medical documentation.

### 2. Example(s) of Violation

Following an established legal procedure, the wife of Mr. M. who died in one of the hospitals of city Kh. requested the chief of staff of the medical institution to provide her with medical documentation, in particular copies of the medical records needed to ascertain the actual circumstances of the death of her husband and protect the interests of his heirs. In response to her request, she received a letter signed by the chief of staff which stated that her request to receive the medical information contradicts Articles 39 and 40 of the Law of Ukraine “Principles of Ukrainian Health Care Legislation” and that the request to receive copies of the medical records violates the Law of Ukraine “On Information” and the Law of Ukraine “On Citizens’ Requests” and that the documents which she would like to receive can be provided only to the Procuracy and the courts in accordance with the established procedure.



### 3. Actual Case(s)

1. The Medical Social Expert Commission at the Department of Health and Medical Supplies of the City Administration of Kyiv (hereafter MSEC) refused to increase the level of disability assigned to Mr. B. In order to contest this unlawful, according to the citizen, decision of MSEC, he asked multiple times for an opportunity to familiarize himself with the records of his medical examination and to receive a formally certified copy of the act of medical examination by MSEC. Some of these requests remained unanswered while the responses he received contained a denial of his request without providing sufficient grounds for the denial.

In order to protect his right to medical information about his state of health, including the right to examine his medical records, Mr. B. appealed to the Administrative Court of one of the city districts of Kyiv to commit MSEC to undertake certain actions. During the trial, it was established that despite the fact that the information requested by the plaintiff concerning his person and the access to this information is not restricted by the law, the defendant denied the plaintiff an opportunity to get acquainted with the requested documents and to obtain officially certified copies of the examination conducted by MSEC; this is contrary to the norms of Articles 9, 31, part 8 of Article 32, and part 8 of Article 35 of the Law of Ukraine "On Information," Article 39 of the Law of Ukraine "Principles of Ukrainian Health Care Legislation." Thus, with respect to the plaintiff, the defendant acted not in the way the laws of Ukraine prescribe, without due consideration and lacking right judgment; therefore, these actions of the defendant are unlawful and the claims of Mr. B. are justified. The Ruling of the Regional Administrative Court of Kyiv of October 24, 2007 satisfied in full the claims of the plaintiff.

2. Attorney M. contacted Department of Health with a complaint against the actions of the chief of staff of one of the hospitals of city L. Among other things, the complaint stated that the attorney requested information about the state of health of Mr.D., a son of his client with whom he signed a written agreement to provide him with legal assistance. The attorney referred to paragraph 2 of Article 285 of the Civil Code of Ukraine: "Parents ... are entitled to the information about the state of health of their child." The response of the authorized body stated that, according to Article 1 of the UN Convention of 1989 (ratified by Ukraine in 1991 in compliance with the procedure established by the legislation) and Article 6 of the Family Code of Ukraine, every human being prior to 18 years of age is considered a child unless according to the law applied to this individual he or she reaches adulthood earlier. Mr. D. does not belong to this age group and therefore cannot be considered a child under the current legislation. However, an adult individual has the right to accurate and complete information about his or her state of health: in other words, Mr. D himself has this right. Therefore, given the circumstances, the parents have no right to receive the requested information. In addition, the attorney was reminded that he had not provided any documents that testify to his right to represent the interests of Mr. D. Consequently, all medical information as well as the fact of seeking medical assistance are withheld from him on the grounds of medical confidentiality as required by Article 286 of the Civil Code of Ukraine, Article 23 of the Law of Ukraine "On Information," Articles 39-1, 40 of the

Law of Ukraine “Principles of Ukrainian Health Care Legislation.” This information is confidential and is provided only to a patient or other individuals according to the procedure established by the legislation.

### **g) Practice Notes**

1. According to the national legislation, namely Article 1 of the UN Convention on the Rights of the Child and Article 6 of the Family Code of Ukraine, every human being prior to 18 years of age is considered a child unless according to the law applied to this individual he or she reaches adulthood earlier. As the analysis of legal practice testifies, sometimes petitions of legal representatives contain unlawful claims to information about, for instance, the state of health of the children which have reached adulthood. This information is not always requested by parents themselves, rather the requests can be contained in queries submitted by attorneys or petitions by other representatives who signed a contract to provide legal assistance to the parents or were given a written authority to represent the interests of the parents. Indeed, for parents children of any age are still children. However, from the point of view of the lawmakers, as stated above, an individual ceases to be a child when he or she reaches adulthood.
2. Article 34 of the Constitution of Ukraine serves as an important guarantee of the right to medical information. In part 2 of this article, it is stated that “everyone has the right to freely collect, store, use and disseminate information by oral, written or other means of his or her choice.” In part 3 of the same article of the Constitution of Ukraine, it is stated that the exercise of these rights may be restricted by the law to protect public health. According to Article 21 of the Law of Ukraine “On Information” of October 2, 1992, (wording of May 9, 2011) the undisclosed information doesn’t include, in particular, data of emergency situations, that occurred or may occur and endanger the safety of people, data of population state of health, medical service, social demographic indicators. According to part 4 of Article 8 of the Law of Ukraine “On State Secrets” of January 21, 1994, the information about the state of health of the population, their standard of living, including nourishment, clothing, shelter, medical care and social security as well as socio-demographic indicators does not constitute state secrets.
3. The right to medical information can be exercised only upon reaching adulthood (Article 1 of the Law of Ukraine “On Protection of Childhood”).
4. The extent of the information provided to the members of the family of a patient depends on the following:
  - 4.1) whether the patient is living and can exercise his or her rights;
 

If the patient is living, the issue of the right of parents (adoptive parents), a guardian, a trustee to the information about the state of health of the child or the ward is properly regulated in paragraph 2 of Article 285 of the Civil Code of Ukraine and part 2 of Article 39 of the Law of Ukraine “Principles of Ukrainian Health Care Legislation”. In order to preserve the right to

medical confidentiality, it appears to be correct that medical information is provided to the family members only upon the consent of the patient when the patient is living. Certainly, this should be a general rule the exceptions to which should be clearly specified in the legislation. Therefore, in our opinion, the provisions of the Decision of the Constitutional Court of Ukraine of October 30, 1997 (the case of K. H. Ustymenko), according to which a doctor is obliged to provide medical information upon a request of a patient or members of his or her family in full and in an accessible form, are correct in the sense of the responsibility of a doctor to provide the information upon a request of the family members of the patient only in case of the death of the patient, or upon the consent of the patient, or according to legally established exceptions when there is no consent of the patient.

4.2) whether the patient is dead;

The legislation regulates certain aspects of this problem. According to the Decision of the Constitutional Court of Ukraine of October 30, 1997 (the case of K. H. Ustymenko) (hereafter the Decision), a doctor is obliged to provide medical information upon a request of a patient or members of his or her family in full and in an accessible form. As is clear, the Decision refers to the two cases under consideration.

In the event of the death of an individual, the members of his or her family or other individuals authorized by them have the right to be present at the autopsy conducted to establish the cause of death and to examine the findings as to the cause of death as well as the right to appeal these findings in court (paragraph 4 of Article 285 of the Civil Code of Ukraine and part 5 of Article 39 of the Law of Ukraine “Principles of Ukrainian Health Care Legislation”). It deals with the right of the members of the family of the patient to examine the medical information in question but given a clearly defined extent of the medical information available for review. Using the principle of analogy of law, the need to protect the rights of the successors of a deceased patient (for example, the right to compensation for moral damage, as guaranteed by part 2 of Article 1168 of the Civil Code of Ukraine), one should in one’s appeal (petition, request) specify the extent of medical information requested by the applicant (not limited to those records that are clearly defined in the regulations) providing appropriate motivation.

5. Implementation of the right of a patient to examine relevant medical documents. There are two alternative paths for addressing this issue as long as the patient or his/her legal representative make a request in accordance with the procedure established by the legislation. The first path is for a staff member of a medical institution to provide officially certified copies of the requested medical records, and the second path is for a staff member to determine the conditions under which the individual(s) can be granted an opportunity to review medical records directly in the health care institution in question. Both of these procedures are currently correct procedures “from the point of view of the legislation.”

- 6.** Access by a representative or an attorney to medical information about their client (a patient at a health care institution). An attorney as well as a legal representative have the right to review primary medical documentation only upon presenting the documents that testify to their authority to represent the interests of a client (a patient at a health care institution) and an officially registered information request (for an attorney) and an application (for a legal representative). An information request or an application should have a copy of a letter of attorney, a warrant, or a contract supplied as Attachments, thus providing an individual who will consider the request with an opportunity to establish that the applicant has the right to review the information about the state of health of the client – the information that is confidential under the current legislation of Ukraine.

One should remember that the authority of a representative is established by a power of attorney, of a legal representative by a birth certificate or the decision on his/her appointment as a guardian or a trustee. The authority of an attorney as a representative is testified to by: 1) a proxy, 2) a contract, 3) a warrant issued by a relevant bar association and an excerpt from the contract, indicating the authority of the attorney as a representative or restricting his right to carry out certain procedural actions. An excerpt is validated by the signatures of the parties.

- 7.** Article 6 of the Law of Ukraine “On Advocacy” defines the rights of an attorney, including: 1) to collect information about the data that can be used as evidence: a) to request and receive documents or their copies from enterprises, institutions, organizations, associations, b) to get acquainted with the documents and materials needed to carry out assignments, except those protected by law as secrets; 2) to utilize scientific and technical means in accordance with the law.

The utilization by an attorney of scientific and technical means consists of conducting sound and video recordings, etc., the latter arising from the application of the principle of analogy of law to paragraph 5 of Part 2 of Article 1948 of the Criminal Procedure Code of Ukraine and relevant explanations provided in paragraph 12 of the Resolution of the Supreme Court of Ukraine “On the Application of Legislation that Guarantees the Right to Protection in Criminal Proceedings” of October 24, 2003, No. 8.

It should be noted that the Law of Ukraine “On Advocacy” does not make any provisions for specific deadline restrictions for consideration of attorneys’ requests and therefore by the principle of analogy of law the terms set forth in the Law of Ukraine “On Citizens’ Petitions” are to be used” (Art. 20).

- 8.** A health care employee has the right to limit the extent of the medical information provided in cases established by the law. For instance when the full information can harm the health of a patient (paragraph 3 of Article 285 of the Civil Code of Ukraine, part 4 of Article 39 of the Law of Ukraine “Principles of Ukrainian Health Care Legislation, Decision of the Constitutional Court of Ukraine of October 30, 1997). The legislator didn’t foresee the criteria of conditions that influence the scope of information that is provided, but

in the theory of medical law one can attribute to these cases the cases of certain diseases (for instance, oncology), or cases characterized by a particular state of a patient (including an incurable patient).

9. Provision of a right to medical information is carried out, using mechanisms, defined in the Law of Ukraine “On Citizens’ Appeals”.
10. One should remember the new mechanism established by the Law of Ukraine “On Protection of Personal Data” in the context of an access to personal data, a new means of implementing a petition – a request to access personal data (Articles 16- 19 of the Law of Ukraine “On Protection of Personal Data”).
11. While carrying out one’s right in the sphere of health care, a person may face the necessity to get data, which were obtained or created in the process of fulfilling ones powers, firstly Ministry of Health of Ukraine. In this context one should remember that Ministry of Health of Ukraine is a manager of information:
  - 1) Which was obtained or created by the Ministry while carrying out its powers and stays in its possession.
  - 2) which was obtained or created while securing the activity of institutions and organizations operating within the frameworks of Ministry of Health of Ukraine, of advisory and consulting bodies of the Ministry and stays in its possession.

Within the frameworks of access to public information in the sphere of health care one should pay attention at the following remarks:

- a) a request for information is submitted by a physical person or legal entity, association of citizens without a status of a legal entity in written or in oral form during personal reception or by post, e-mail, phone or fax.
- b) a request for information is submitted in a arbitrary form.
- c) while submitting a request for information a person shall indicate on the form of receiving an information which is convenient for him.
- d) on a requestor’s demand the first list of request copy shall be under the seal of Ministry of Health of Ukraine indicating the date of coming and incoming number of the request. Such copy shall be given back to requestor.
- e) There had been prepared a typical form of a request for information ( is available on the web site of the Ministry of Health of Ukraine and consulting room)
- f) a reply for a request shall be given in a way, chosen by a requestor within five days since the day of a requests coming (under the general rule).
- g) Information for the request shall be given for free. In case requested information contains the documents of more than 10 sheets, a requestor shall be informed of this very fact within five days from the day of request’s coming and a requestor is informed of the actual expenses connected with copying or printing of documents and of the props and order of compensation of such expenses. Information is given within three working days after compensation of actual expenses has been confirmed.

## **h) Cross-referencing Relevant International and Regional Rights**

Please review international and regional standards related to the right to information discussed in sections 2 and 3.

### **6.1.4 Right to Consent**

#### **a) Right 4 as Stated in the ECPR**

##### **Article 4. Right to Consent**

*Every individual has the right of access to all information that might enable him or her to actively participate in the decisions regarding his or her health; this information is a prerequisite for any procedure and treatment, including the participation in scientific research.*

#### **b) Right as Stated in Country Constitution/Legislation**

- ▶ **Constitution of Ukraine of June 28, 1996 [Articles 28 (part 3), 29 (part 1)].**

“No person without his or her voluntary consent may be subjected to medical, scientific or other experiments” ( part 3 Article 28). “Everyone has the right to bodily integrity” (part 1 Art. 29).

- ▶ **Civil Code of Ukraine of January 16, 2003 [Articles 284 (parts 3, 4, 5), 286 (part 4), 289].**

“Providing medical care to an individual who has attained 14 years of age is carried out upon his or her consent. A competent adult individual who understands the significance of his/her actions and can control them has the right to refuse a treatment. In urgent cases, if there is a real threat to the life of an individual, medical assistance is granted without a consent of the individual or his or her parents (adoptive parents), guardian, trustee (parts 3, 4, 5 Art. 284).

- ▶ **Criminal Code of Ukraine of April 5, 2001 (Article 151).**

“An unlawful placement in a psychiatric institution:

1. A placement in a psychiatric institution of a mentally healthy individual who is known to be such is punishable by an arrest for a term of three to six months or a restriction of freedom for up to two years or an imprisonment

for the same term and a withdrawal of the right to occupy certain positions or engage in certain activities for up to three years.

2. The same act that caused serious consequences is punishable by an imprisonment for a term of two to five years and a withdrawal of the right to occupy certain positions or engage in certain activities for up to three years.”

▶ **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Articles 42, 43, 44].**

“A consent of an informed patient, according to Article 39 of the Law of Ukraine “Principles of Ukrainian Health Care Legislation,” is needed to apply methods of diagnosis, prevention and treatment. A patient under 14 years of age (a minor) and a patient recognized by law as incompetent undergoes a medical intervention upon the consent of his/her legal representatives. In urgent cases, when a real threat to the life of a patient is present, a consent of the patient or his/her legal representatives to carry out a medical intervention is not needed.

If a lack of consent can lead to serious consequences for a patient, a doctor must explain this to the patient. If after the explanation is given the patient refuses a treatment, the doctor has the right to obtain from the patient a written confirmation of the refusal, and if such confirmation cannot be obtained, the doctor may certify the lack of consent by means of a relevant act in the presence of witnesses.

A patient who has acquired full civil capacity and understands the significance of his/her actions and can control them has the right to refuse a treatment. If a refusal originates with a legal representative of a patient and can have grave consequences for the patient, the doctor must inform the guardianship and custody authorities” (Art. 43).

▶ **On Psychiatric Care: Law of Ukraine of February 22, 2000 [Articles 6 (part 6), 11, 12, 13].**

“A psychiatric examination is conducted by a psychiatrist at the request or with a conscious consent of an individual; in case of an individual under 14 years of age (a minor) – at the request or with a consent of his/her parents or another legal representative; in case of an individual recognized legally as incompetent – at the request or with a consent of his/her guardian” (part 2 Article 11). “Outpatient psychiatric care is provided by a psychiatrist at the request or with a consent of an individual; in case of an individual under 14 years of age (a minor) – at the request or with a consent of his/her parents or another legal representative; in case of an individual recognized legally as incompetent – at the request or with a consent of his/her guardian ...” (part 2 Article 12.). “An individual is admitted to a psychiatric institution voluntarily – at his/her request or with his/her consent” (part 1 Article 13.).



▶ **On Protection of the Population from Infectious Diseases: Law of Ukraine of April 6, 2000 [Article 12 (part 6)].**

“... Competent adult citizens receive preventive vaccinations upon their consent after being provided with objective information about the vaccination, the consequences of a refusal to undergo the vaccination and possible complications after the vaccination. Individuals under the age of fifteen or those legally recognized as incompetent undergo preventive vaccinations upon the consent of their objectively informed parents or legal representatives. Individuals aged between fifteen and eighteen or recognized by the court as partially competent undergo preventive vaccinations upon their consent after being provided with objective information and upon the consent of their objectively informed parents or legal representatives. If an individual and (or) his/her legal representatives refuse a mandatory preventive vaccination, a doctor has the right to obtain from them a written confirmation of the refusal and in case of a refusal to provide such a confirmation to have it confirmed by a relevant act in the presence of witnesses.”

▶ **On Measures Against Illicit Trafficking of Narcotic Drugs, Psychotropic Substances and Precursors as well as Their Abuse: Law of Ukraine of February 15, 1995 [Article 14]**

“If a medical screening or examination reveals that an individual who abuses drugs or psychotropic substances and who has been diagnosed as “addicted” requires treatment, including on inpatient or outpatient basis, a drug treatment specialist is obliged to suggest to this individual that he/she should undergo a voluntary drug treatment and supply this individual with a referral to a drug treatment facility for such a treatment.

▶ **On Resistance to Diseases Caused by Human Immunodeficiency Virus (HIV), and Legal and Social Protection of People Living With HIV: The Law of Ukraine of 12.12.1991. (The wording of 23.12.2010.) [Article 6, (articles 2, 3)]**

“Examination of children in the age under 14, and persons, recognized incapable in order established by the law is conducted at the request of their parents or legal representatives and in case of a recognized informed consent availability. Parents and legal representatives of these persons are entitled to be present during such examination conduction, be familiar with the results of examination and are obliged to keep the data, concerning the HIV status of persons, they represent confidential (part 2). Examination of children at the age under 14, deprived of parental care, who are under the guardianship of children educational institutions with full state maintenance, is conducted in case they realize the consequences of such examination at the request of their legal representatives and in case an informed consent of



such persons is available and in order to prescribe treatment, maintenance and support connected with HIV... of these children (part 3)”

### c) Supporting Regulations/ Bylaws/ Orders

- ▶ **On Approval of the Interim Standards for Medical Care of Adolescents and Youth: Order of the Ministry of Health of Ukraine of June 2, 2009 No. 382.**

“... Minors under the age of 14 receive medical services upon a consent of their parents and minors aged between 14 and 18 – upon their own consent and a consent of their parents (guardians, family members) in accordance with current laws; non-medical services (counseling, information) are provided upon a consent of the minor” (paragraph 3.1).

- ▶ **On Clinical Examination of the Population: Order of the Ministry of Health of Ukraine of August 27, 2010 No. 728 [paragraph 3.2].**

“As part of an annual medical examination ... girls of 15 years of age (upon their informed consent) undergo a digital rectal or bi-manual examination.”

### d) Provider Code(s) of Ethics

- ▶ **Code of Ethics of Physicians of Ukraine, adopted and signed at the National Congress of Health Care Organizations and at the X Congress of the Ukrainian Medical Association on September 27, 2009 (paragraph 3.5).**

“A voluntary consent of a patient to undergo an examination, a treatment or a study with his/her participation must be obtained by a doctor in the course of a personal conversation with the patient. This consent must be conscious ... If the patient is unable to express his/her consent consciously, the consent is given by a legal representative or a permanent guardian of the patient. Conducting therapeutic and diagnostic measures without the consent of a patient is allowed only when a threat to the life or health of the patient is present and he/she is unable to adequately evaluate the situation. Decisions in such cases should be taken collectively with the participation of the family of the patient. During a treatment of a child or a patient who is under the guardianship, a doctor must provide full information to his/her parents or guardians, obtain their consent to use any specific method of treatment or medication.”

## e) Other Relevant Sources

There are no other relevant sources on this matter.

## f) Practical Examples

### 1. Example(s) of Compliance

Ms. Yu, born in 1994 and 5 weeks pregnant, requested an obstetrician-gynecologist to administer her abortion. After a lengthy conversation with the patient, having conducted preabortion consultation concerning peculiarities of a chosen method of abortion, its potential consequences to health, and examined a patient carried out an abortion due to paragraph 17 of the “Instruction on Order of Carrying out an Artificial Abortion” approved by Order of Ministry of Health of Ukraine of July 20, 2006, No. 508 (in the wording of May 5, 2009).

### 2. Example(s) of Violation

Mr. G. was taken to the emergency department of a hospital where on the basis of necessary diagnostic procedures he was diagnosed with an acute intestinal obstruction which constitutes an absolute (vital) indication for surgery. An attending physician informed the patient of the diagnosis, the risks to his life and health; however, the patient expressed a number of concerns and comments about the viability of this medical intervention. The patient claimed that he did not have material means to cover the surgery and therefore refused the medical intervention. Having obtained patient’s refusal to undergo the surgical intervention in writing, the health care employee prescribed to him a medication treatment that turned out to be ineffective: two days later Mr. G. died in an intensive care unit.

### 3. Actual Case(s)

In April 2005, Mr. Ts. (who at the time in question was a minor) together with his father visited a cardiologist, Dr. T., at the central district hospital on account of feeling ill. Having examined the EKG of the heart which was done previously, the doctor did not find any deviations from the norm. He examined the neck of the patient and, given the height of the patient, he concluded that the patient is probably suffering from a pinched nerve. The doctor provided neither the patient nor his father with any medical information, did not obtain a consent from the patient to undergo the medical intervention he intended to perform; rather, he asked Mr. Ts. to lie down on the couch and carried out several manual manipulations that involved sharp turns of the head.

After the medical intervention carried out by the doctor to correct a disk slippage in the cervical spine, the patient’s condition significantly worsened. For a long period of time, Mr. Ts. was treated at a specialized medical center. He was diagnosed with Atlantoaxial subluxation and was assigned the treatment that included a cervical collar. From November 2005 to September 2006, Mr. Ts. was on the leave of absence from his studies.

Following an established procedure, the father of Mr. Ts. filed a complaint with the Procuracy. The latter upon the results of the investigation refused to initiate criminal proceedings due to the absence of a crime, as per Article 137 of the Criminal Code of Ukraine, Article 140 of the Criminal Code of Ukraine, and paragraph 2 of Article 6 of the Criminal Procedure Code of Ukraine. As to the violations of the procedure for medical examinations and filling out medical documentation by the cardiologist, the prosecutor initiated disciplinary proceedings against Mr. T., and accordingly the chief of staff of the medical establishment issued an order whereby the doctor was reprimanded. The patient initiated a lawsuit to be compensated for the moral and material damage caused by the damage to his health. On December 23, 2009, the court ruled to partially satisfy the claim: it decided in favor of the plaintiff to recover financial damages in the amount of 7,585 hryvnias and recover 3,000 hryvnias for moral damages caused by an improper medical care provided.

### **g) Practice Notes**

1. The following are the criteria of legality of a patient's consent or refusal of a medical intervention: 1) awareness (being informed), 2) voluntariness, 3) competence.
2. Awareness is related to the right of an individual to medical information. An informed consent or refusal of a medical intervention presupposes providing the patient in accordance with a legally specified procedure with medical information and updates regarding the needed medical intervention on the basis of which the patient or/ and his legal representative can exercise his or her right to bodily integrity and can make a decision whether to accept or refuse the medical intervention.
3. The information that should be provided to a patient is of two types, namely: general, i.e. medical information, and specialized, i.e. information regarding the proposed medical intervention which is different in each individual case rather than applies generally to the treatment of a given illness, etc.

Medical information: a) state of health of an individual, b) history of the illness, c) purpose of proposed tests and therapeutic measures, d) forecast of a possible progression of the illness, d) risks to life and health involved.

Information about a medical intervention: a) purpose of the medical intervention, b) duration of the medical intervention, c) consequences of the medical intervention, d) alternative methods of treatment of the illness, e) forecast and risks of the proposed medical intervention.

4. Voluntariness, as the second criterion required for an informed consent or refusal of a medical intervention, constitutes acceptance by the patient or/ and his legal representative of the decisions about his or her state of health in the process of which he/she exercises the right to bodily integrity without any influence of any outside factors. The consent must be voluntary, that is not arrived at under any pressure on the patient or/

and his legal representative, with the guaranteed opportunity to revoke the consent at any time thereafter.

5. Competence is patient's or/ and his legal representative, ability to make decisions about accepting or refusing a medical intervention, guaranteed by the legislation, if they are of a normatively established age and are capable.

As a general rule and according to the legislation, the following individuals are incompetent to give consent to a medical intervention: a) individuals under 14 years of age, b) incompetent individuals. c) individuals, whose capability is limited (the lawmaker didn't express his will as regards realization of a right to consent for medical intervention, by this group of people, which can be understood as a result of literary interpretation of the norm of part 3 Article 284 of Civil Code of Ukraine and part 1 Article 43 of the Law of Ukraine "On Principles of Ukrainian Health Care Legislation). Taking into account the rights of a physical person, whose legal capability is limited, that are foreseen by Article 37 of Civil Code of Ukraine, similar approach to regulation of the right to refuse from medical interference by these group of people, we come to a conclusion that persons whose capability is limited are incompetent to realize their right to give a consent for medical interference. Individuals from 14 to 18 years of age undergo a medical intervention upon the consent of the minor patient and of the parents (guardians, family members) of the patient..

An analysis of the legislation establishes that the following individuals are incompetent to refuse a medical intervention (as a general rule): a) individuals under 18 years of age (if full civil capacity has not been reached or granted to them earlier in accordance with the law ), b) incompetent individuals.

6. In law enforcement practice, problems associated with the implementation of the right to consent may emerge while attempting to preserve compliance with one of the criteria of legality: namely, competence. The order of the Ministry of Health of Ukraine "On Approval of the Interim Standards for Medical Care of Adolescents and Youth" of June 2, 2009 No. 382 (hereinafter, the Standards) establishes the requirement to obtain a consent of both subjects of a medical legal relation (a patient and his/her parents / guardians / family members) in particular when providing medical assistance to an underage patient (from 14 to 18 year of age). Therefore, while analyzing the prerogatives of each of the subjects, namely the right to consent to a medical intervention that both the patient and his/her parents (guardians, family members) have, one should clarify possible ways of implementing this right:

- 1) if a consent to a medical intervention is given by both subjects of a medical legal relation, then there do not exist any problems for carrying out medical practice;

- 2) if a patient gives his/her consent to undergo a medical intervention while, for example, the parents do not give a consent, a health care practitioner who must perform the intervention faces a problem since he/she

does not have legal grounds for performing the intervention without having an opportunity to obtain a consent to the necessary intervention in full. Under these circumstances (except for urgent cases when the consent of the patient or his/her legal representatives for a medical intervention is not required), one should utilize the following mechanisms:

a) in accordance with a generally known legal maxim, when there are several competing legal regulations of varying legal power, one should apply the one that is higher in the hierarchy of legal acts: for example, a law rather than a subordinate legislative act. Both the Civil Code of Ukraine and the Law of Ukraine “Principles of Ukrainian Health Care Legislation” set a limit of 14 years of age for the realization of the right to consent to a medical intervention. The Standard is designed to refine and clarify certain aspects of the realization of this right which are established by the laws. So, if there is a “conflict” between the Standard, which under certain legal circumstances could produce the conditions that create obstacles for the patient to realize his/her right, and the said laws, one should follow the regulation supplied in the vanguard document;

b) Complying with part 3 of Article 284 of the Civil Code of Ukraine and part 1 of Article 43 of the Law of Ukraine “Principles of Ukrainian Health Care Legislation”, a health care employee obtains a personal consent of a minor patient. In addition, the employee must ensure the second component of the consensus – a consent of the parents, as provided in part 5 of Article 43 of the Law of Ukraine “Principles of Ukrainian Health Care Legislation”. In other words, if a legal representative of the patient refuses to give consent and this refusal can have grave consequences for the patient, the doctor must inform the guardianship and custody authorities. Thus, on the one hand, one can achieve a legislative balance and, on the other hand, ensure realization of human rights in the provision of medical care;

3) If a minor patient does not consent to a medical intervention, but, for example, his/her parents give a consent, a health care employee must behave in the following manner under these circumstances, in compliance with current legislation:

the right to refuse a medical intervention belongs to a competent adult patient (part 4 of Article 284 of the Civil Code of Ukraine, part 4 of Article 43 of the Law of Ukraine “Principles of Ukrainian Health Care Legislation”), i.e. a minor patient is not endowed with this power, and therefore a component associated with the refusal by a minor patient does not have any legal consequences for the health care employee who having received a consent from the parents can provide necessary medical care to the patient.

7. The format of a consent or a refusal of a medical intervention. As a general rule, a consent can be given both in an oral and in a written form, because the legislation does not define any of the forms as mandatory. A refusal can also be given in both formats, since the norms proscribe only the right of a doctor to obtain a refusal in writing, not the obligation (... the doctor has the right to obtain a written confirmation from the patient, and if the

written confirmation cannot be obtained, the refusal can be confirmed by a relevant act in the presence of witnesses).

8. A medical intervention without the consent of a patient and/or his/her legal representatives is permitted in emergency situations. The law does not contain a list of emergency situations which pose a real threat to the life of a patient, thus giving a doctor the right to perform a surgery, to use complex diagnostic methods and to perform other kinds of medical interventions without a consent. One should remember that in these cases, the doctor operates under a state of emergency. The state of emergency occurs under certain conditions: namely, when a) a danger to human life is real, not potential; therefore, when a so-called planned surgery is used as a possible method of treatment, one can not appeal to the state of emergency; b) a threat to life cannot be eliminated by means other than the selected method of intervention (for example, a surgery, a blood transfusion); c) the damage caused by the medical intervention should constitute less danger for the patient than the damage caused by the pathology or the injury addressed by this intervention.
9. See also practice notes in *subchapter 7.1.9*

## **h) Cross-referencing Relevant International and Regional Rights**

Please review international and regional standards related to the right to consent in the context of the following rights:

- the right to freedom and bodily integrity, discussed in sections 2 and 3.
- the right to privacy, discussed in sections 2 and 3.
- the right to freedom from torture and other cruel, inhuman and degrading treatment, discussed in sections 2 and 3.
- the right to bodily integrity, discussed in sections 2 and 3.
- the right to the highest attainable standard of physical and mental health, discussed
- in sections 2 and 3.

## **6.1.5 Right to Free Choice**

### **a) Right 5 as Stated in the ECPR**

#### **Article 5. Right to Free Choice**

***Each individual has the right to freely chose from among different treatment procedures and providers on the basis of adequate information.***

## b) Right as Stated in Country Constitution/Legislation

- ▶ **Civil Code of Ukraine of January 16, 2003 [Articles 284 (part 2), 633].**

“An individual who has reached fourteen years of age and who requested medical care to be provided to him/her has the right to choose a doctor and a method of treatment in accordance with latter’s recommendations” (part 2 Art. 284).

“A contract is public when one party – the entrepreneur – undertakes an obligation to sell goods, perform work or provide services to anyone who requests them (retail, public transportation, communication, medical, hotel services, banking, etc.)” (part 1 Art. 633).

- ▶ **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Articles 6 (paragraph “d”), 34 (part 2), 36, 38].**

Paragraph “e” of Article 6 stipulates that every citizen of Ukraine has the right to health which includes, inter alia, skilled medical and sanitary care, including free choice of a doctor and a health care institution.

“An attending physician is selected by a patient or appointed in order established by these principles. A patient has the right to demand a replacement of the doctor (Art. 34).

“Every patient who has reached fourteen years of age and who requested medical care to be provided to him/her has the right to free choice of a doctor, if the latter can offer his/her services, and a choice of treatment, following doctor’s recommendations. Every patient has the right, whenever it is justified by his condition, to be admitted to any health care institution of his/her choice, if the institution is able to provide appropriate treatment” (Art. 38).

- ▶ **On Protection of Consumer Rights: Law of Ukraine of May 12, 1991 (in the reading of December 1, 2005) [Article 21].**

“... The rights of a consumer are considered violated when a sale of a product in any way violates the right of the consumer to freedom of choice of the products (any goods, services or work) (paragraph 1 part 1).

- ▶ **On Resistance to Diseases Caused by Human Immunodeficiency Virus (HIV), and Legal and Social Protection of People Living With HIV: The Law of Ukraine of 12.12.1991. (The wording of 23.12.2010.) [Article 6, (part 4)]**

“Free examination aimed at HIV detection and the corresponding pre-examination and after examination consultation, preparation and issuance of a conclusion about examination results can be conducted by medical institutions notwithstanding form of their property and subordination, by the services of social support and other organizations dealing with prevention of diseases caused by HIV, which acquired special licence to conduct such activity and have an accredited medical laboratory”

- ▶ **On Protection of the Population from Infectious Diseases: Law of Ukraine of April 6, 2000 [Article 7].**
- ▶ **On Combating Tuberculosis: Law of Ukraine of July 5, 2001 [Article 8 (part 1)].**
- ▶ **On Measures Against Illicit Trafficking of Narcotic Drugs, Psychotropic Substances and Precursors as well as Their Abuse: Law of Ukraine of February 15, 1995 [Article 14 (part 4)].**

“Treatment of addiction to narcotic drugs or psychotropic substances is performed at health care facilities regardless of their form of ownership that have permits of the Ministry of Health of Ukraine to carry out such an activity.”

### **c) Supporting Regulations/ Bylaws/ Orders**

- ▶ **Provision on the Procedure for Sending Citizens for Treatment Abroad: Resolution of the Cabinet of Ministers of Ukraine of December 8, 1995 No. 991.**
- ▶ **Instructions on the Procedure for Issuing Documents that Certify Temporary Disability of Citizens: Order of the Ministry of Health of Ukraine of November 13, 2001 No. 455 [paragraph 1.5].**

Paragraph 1.5 of the Instructions contains a prohibition for certain categories of health care professionals and health care institutions to issue disability leave certificates. According to paragraph 1.5.2. of the Instructions, “physicians at private health care institutions, private physicians (individuals—agents of entrepreneurial activity) have no right to issue disability leave certificates”.



- ▶ **Instructions on the Procedure for Filling Out a Disability Leave Certificate: Order of the Ministry of Health of Ukraine, the Ministry of Labor and Social Policy of Ukraine, Social Insurance Fund for Temporary Disability, Social Insurance Fund for Work Accidents and Occupational Diseases of November 3, 2004 No. 532 / 274/136-os/1406 [paragraph 3.8].**

“Individuals whose temporary disability occurred outside of the area of their permanent residence and work receive a disability leave certificate signed by the chief of staff of a medical institution, certified with a round seal of the institution. A note is placed under the heading “I permit to issue a disability leave certificate” with a mandatory record made in the outpatient or inpatient medical chart.

- ▶ **On Regulating the Procedure for Sending Citizens for Treatment Abroad: Order of the Ministry of Health of Ukraine of November 1, 2006 No. 725 (in the reading of February 28, 2008 No. 307).**
- ▶ **On Clinical Examination of the Population: Order of the Ministry of Health of Ukraine of August 27, 2010 No. 728 [paragraph 3].**

“Organisational support and management of clinical examinations are carried out by the health care authorities or health care facilities that are in charge of providing health care to the population on the administrative territory in question.”

- ▶ **On Procedure of Selection a Doctor, That Provides With Primary Medical Care: Order of Ministry of Health of Ukraine of July, 28, 2011, No. 443.**

#### **d) Provider Code(s) of Ethics**

- ▶ **Code of Ethics of Physicians of Ukraine, adopted and signed at the National Congress of Health Care Organizations and at the X Congress of the Ukrainian Medical Association on September 27, 2009 [paragraph 3.5].**

“A doctor must respect the right of a patient to free choice of a physician and his/her involvement in making decisions about medical treatment ...”

#### **e) Other Relevant Sources**

There are no other relevant sources on this matter.

## f) Practical Examples

### 1. Example(s) of Compliance

Mr. P. became ill while staying with his family in another city, not in the area of his permanent residence. He asked a local physician to visit him at home; the latter provided him with a required medical care but refused to issue a disability leave certificate to him on the grounds that Mr. P. did not permanently reside at the current address. The patient requested the chief of staff of the medical institution in charge of the area of his sojourn to issue him a disability leave certificate which he received and the certificate was certified with the signature of the chief of staff.

### 2. Example(s) of Violation

Ms. N., born in 1948, forwarded a request to the chief of staff of an outpatient health care institution to change her primary care physician. She justified her request by claiming that the doctor was inattentive and did not perform his duties properly. The chief of staff flatly refused to change the primary care physician of the patient and suggested that she should switch to a private health care institution since all his doctors were overloaded and could not be attentive to each patient.

### 3. Actual Case(s)

Mr. Yu, born in 2001, who lived in city D., was hospitalized in a serious condition with an acute glomerulonephritis in the city children's hospital. During the treatment, the condition of the child rapidly deteriorated, it was necessary to conduct hemodialysis, but this could not be carried out at the hospital in question. The parents insisted on transferring their son to the regional children's hospital, where an artificial kidney system was available. The attending physician claimed that the hospitalization of local patients at the regional hospital was not permitted and that the local hospital had all necessary equipment and specialists to assist Mr. Yu. In a day, the patient in a critical condition was transferred to an intensive care unit. The parents appealed to the chief of staff of the institution with a complaint in writing that inappropriate medical care was being provided, in particular pointing out the violation of their right to a free choice of a health care institution, a choice of the methods of treatments, guaranteed to them by Articles 6 and 38 of the Law of Ukraine "Principles of Ukrainian Health Care Legislation." By the order of the chief of staff, a council of doctors examined the patient and it was decided to transfer him to the regional hospital for further treatment, including hemodialysis. The chief of staff of the regional specialized children's hospital did not object to admitting Mr. Yu, who was provided with all necessary medical care.

## g) Practice Notes

1. The internal structure of the right to freedom of choice in the domain of health care consists of five elements (options), namely: a) the right to free choice of a doctor, b) the right to choose methods of treatment fol-

lowing doctor's recommendations, c) the right to choose a health care institution, d) the right to change a doctor upon patient's demand, e) the right to receive treatment abroad in case needed assistance cannot be provided in health care institutions in Ukraine.

2. A patient can exercise the above analyzed rights only after having reached the age of 14.
3. The protection of the right to free choice of a doctor and a medical institution is primarily carried out through the procedure of contacting medical officials, such as the head of a department, a deputy chief of staff of a medical facility and the chief of staff. A written statement, duly executed, registered and addressed to the above officials, which includes references to legal acts that guarantee the right to free choice in most cases produces a desired result – medical assistance is provided in the hospital of choice or by the doctor selected.
4. In private hospitals not owned by the state which provide medical services on the basis of a public contract the protection of the right to freedom of choice of a doctor or a medical institution is realized on the basis of the provisions of the Civil Code of Ukraine and the Law of Ukraine "On Protection of Consumer Rights."
5. A contract regarding medical services is according to its legal nature a public contract. The conditions of a public contract are the same for all consumers, except those who are legally entitled to appropriate benefits. An entrepreneur does not have the right to favor some consumers over others in entering with them into a public contract unless otherwise established by law. An entrepreneur has no right to refuse to enter into a public contract if he/she has the capacity to provide the consumer with relevant goods (work, services). In other words, a patient can not be denied medical services when such services can be provided by the medical institution in question. In case of an unlawful refusal on the part of the entrepreneur to enter into a public contract, he/she has to reimburse the damage to consumers incurred by the refusal.

## **h) Cross-referencing Relevant International and Regional Rights**

Please review international and regional standards related to the right to free choice in the context of the following rights:

- the right to freedom and bodily integrity, discussed in sections 2 and 3.
- the right to privacy, discussed in sections 2 and 3.
- the right to freedom from torture and other cruel, inhuman and degrading treatment, discussed in sections 2 and 3.
- the right to bodily integrity, discussed in sections 2 and 3.
- the right to the highest attainable standard of physical and mental health, discussed in sections 2 and 3.

## 6.1.6 Right to Privacy and Confidentiality

### a) Right 6 as Stated in the ECPR

#### **Article 6. Right to Privacy and Confidentiality**

*Every individual has the right to confidentiality of personal information, including information regarding his or her state of health and potential diagnostic or therapeutic procedures, as well as the protection of his or her privacy during the performance of diagnostic exams, specialist visits, and medical/surgical treatments in general.*

### b) Right as Stated in Country Constitution/Legislation

- ▶ **Constitution of Ukraine of June 28, 1996 [Articles 49 (parts. 1, 2), 34].**

“There shall be no interference with one’s private and family life, except in the cases stipulated in the Constitution of Ukraine. Collection, storage, use and dissemination of confidential information about an individual without his/her consent is not permitted, except in the cases determined by law and only in the interests of national security, economic prosperity and human rights” (Art. 32).

- ▶ **Civil Code of Ukraine of January 16, 2003 [Articles 285 (part 4), 286].**

“The right to confidentiality of one’s state of health:

1. An individual has the right to confidentiality regarding one’s state of health, the fact of seeking medical assistance, diagnosis, and the information obtained during one’s medical examination.

2. One may not demand and provide information about the diagnosis and treatment of an individual to his/her place of work or study.

3. An individual must refrain from disseminating the information referred to in the first paragraph of this Article which became known to this individual in connection with his/her official duties or from other sources” (Art. 286).

- ▶ **Criminal Code of Ukraine of April 5, 2001 [Article 132, 145].**

“An unlawful disclosure of a medical secret:

A willful disclosure of a medical secret by an individual to whom it became known in connection with carrying out his/her professional or official duties and if this action caused grave consequences is punishable by a fine of up to fifty times the untaxed minimum wages or public service for up to two hundred and forty hours or a withdrawal of the right to occupy certain positions or engage in certain activities for up to three years, or correctional labor for up to two years.” (Article 145)

- ▶ **On Information: Law of Ukraine of October 2, 1992 (Article 46 (part 3)).(in wording of January 13, 2011).**

“Confidential information is the one concerning physical person... Confidential information can be extended due to the will (under the consent) of a corresponding person, in order and under conditions established by her, and in other cases established by the law”

- ▶ **On Personal Data Protection: Law of Ukraine of June 1, 2010 [Article 7].**

“Processing of personal data ... concerning one’s health or sex life is prohibited” (part 1 Art. 7).

- ▶ **On Access to Public Information: Law of Ukraine of January 13, 2011. [Articles 6-8].**

- ▶ **On State Secrets: Law of Ukraine of January 21, 1994 [Article 8 (part 4)].**

“... Information about public health, standard of living, including food, clothing, shelter, medical care and social security as well as about socio-demographic indicators, state of police, public education and culture do not constitute a state secret”.

- ▶ **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Articles 39-1, 40, 78 (“d”)].**

“A patient has the right to confidentiality of the information about his/her state of health, the fact of seeking medical assistance, diagnosis, and the information obtained during his/her medical examination.

One may not demand and provide information about a diagnosis and treatment of an individual to his/her place of work or study”(Art. 39-1).

“Medical employees and other individuals who in the course of performing their professional or official duties become aware of an illness, medical examination and its results, sex and family life of an individual have no right to disclose this information except in the cases provided for by the legislation. While using the information that constitutes a medical secret in the educational process and research, including its publication in specialized literature, one should ensure the anonymity of a patient”(Art. 40).

- ▶ **On Psychiatric Care: Law of Ukraine of February 22, 2000 [Article 6 (parts 1, 8)].**

“Medical staff and other professionals involved in providing psychiatric care and individuals who as the result of training or performing professional,

official, community or other duties became aware of a mental disorder suffered by an individual, of the fact of seeking psychiatric assistance and treatment in a psychiatric facility or a stay at a psycho-neurological institution for social protection or special education, as well as other information about the mental state of an individual, his/her private life, may not divulge this information ..." (part 1 Art. 6).

- ▶ **On Resistance to Diseases Caused by Human Immunodeficiency Virus (HIV), and Legal and Social Protection of People Living With HIV: The Law of Ukraine of 12.12.1991. (The wording of 23.12.2010.) [Article 13 , (part 3)]**

"Information about the results of medical examination, presence or absence of HIV infection in an individual who underwent a medical examination is confidential and constitutes a medical secret. Medical workers are obliged to take certain measures in order to provide confidentiality of information about persons living with HIV, and protection of such information from illegal disclosure"

- ▶ **On Protection of the Population from Infectious Diseases: Law of Ukraine of April 6, 2000 [Article 26 (part 2)].**

"Information about an individual being infected with an infectious disease that is sexually transmitted, medical examinations on this account which he/she underwent, data related to his/her sex life which was received in connection with the performance of professional duties by officials and medical staff at a health care institution constitutes a medical secret."

### **c) Supporting Regulations/ Bylaws/ Orders**

- ▶ **On the Physician's Oath: Decree of the President of Ukraine of June 15, 1992, [paragraph 3 part 1).**

"... guard a medical secret; do not use it to harm an individual".

- ▶ **On Approval of the Instructions on the Procedure for Recording, Storing and Using Documents, Case Files, Excerpts and Other Material Media Containing Confidential Information that is Owned by the State: Resolution of the Cabinet of Ministers of Ukraine of November 27, 1998 No. 1893.**

The Instructions define a procedure for maintenance, storage, use and destruction of documents, case files, excerpts, magnetic and other physical media containing confidential information that is the property of the state which are mandatory for all central executive bodies, the Cabinet of Min-

isters of the Autonomous Republic of Crimea, local executive authorities, local government, enterprises, institutions and organizations regardless of their form of ownership.

- ▶ **Instructions on the Procedure for Filling Out a Disability Leave Certificate: Order of the Ministry of Health of Ukraine, the Ministry of Labor and Social Policy of Ukraine, Social Insurance Fund for Temporary Disability, Social Insurance Fund for Work Accidents and Occupational Diseases of November 3, 2004 No. 532 / 274/136-os/1406 (paragraph 3.2).**

“... A preliminary diagnosis, a final diagnosis, and the ICD-10 code can be disclosed only upon a written consent of a patient. Otherwise, the preliminary and final diagnoses and the ICD-10 code must not be disclosed. If upon a written approval of the head of the department due to deontological concerns, a doctor changes the wording of the diagnosis and the ICD-10 code of the actual disease, he/she must make a note in the inpatient or outpatient file that provides reasons for the change of the diagnosis and the ICD-10 code.”

- ▶ **On Approval of the Interim Standards for Medical Care of Adolescents and Youth: Order of the Ministry of Health of Ukraine of June 2, 2009, No. 382 (Interim Standard 4).**

“In an establishment, one maintains confidentiality while providing services, including correspondence, maintenance of medical records, telephone conversations, etc., except in the cases provided for by current legislation.”

- ▶ **Licensing Conditions for Conducting Certain Types of Business Activities in Medical Practice: Order of Ministry of Health of Ukraine of February 2, 2011 No. 49. [paragraph 4.1]**
- ▶ **“On Lists of Data, that Include Official and Confidential Information in the Ministry of Health of Ukraine”: Order of Ministry of Health of Ukraine of August 16, No. 517.**

#### **d) Provider Code(s) of Ethics**

- ▶ **Code of Ethics of Physicians of Ukraine, adopted and signed at the National Congress of Health Care Organizations and at the X Congress of the Ukrainian Medical Association on September 27, 2009 [paragraph 3.6).**

“Every patient has the right to guard personal secrets. A doctor as well as other individuals involved in providing medical care, must keep medical secrets even after the death of a patient, as well as the fact of the patient seeking medical assistance, in the absence of other instructions from the patient or when the disease does not threaten his family and society. Confidentiality extends to all information obtained in the course of treating a patient (including diagnosis, methods of treatment, prognosis).”

## e) Other Relevant Sources

- ▶ **Clarification Concerning Procedure of Indicating the Diagnosis in the Letter of Disability of a Patient: Letter of the Executive Board of Social Insurance Fund for Temporary Disability of 23.03.2011, No 04-30-620.**

“Primary diagnosis, final diagnosis and MKX – 10 code should be indicated in the letter of disability exclusively under the written permission of a patient. Another way of indication of Primary diagnosis, final diagnosis and MKX – 10 code is not foreseen.

- ▶ **Decision of the Constitutional Court of Ukraine regarding the official interpretation of Articles 3, 23, 31, 47, 48 of the Law of Ukraine “On Information” and Article 12 of the Law of Ukraine “On Procuracy (the case of K. H. Ustymenko): Law of Ukraine of October 30, 1997.**

In its Decision, the Constitutional Court of Ukraine established that it is prohibited not only to collect but also to store, use and disseminate confidential information about an individual without his/her prior consent, except as provided by law and only in the interests of national security, economic prosperity, human rights and freedoms of an individual. Confidential information includes information about an individual, including his/her state of health. Moreover, we emphasize the need to distinguish between two terms – medical secret, i.e. information about a patient and medical information, i.e. information for a patient.

## f) Practical Examples

### 1. Example(s) of Compliance

An employer and a trade union organization requested a health care institution to provide them with the information about the state of health of the employee, Ms. L., in particular, her diagnosis. Soon thereafter they received a reply from the chief of staff of the health care institution which contained a refusal to provide the information requested. The chief of staff said that the information requested



by the employer and the trade union constitutes a medical secret and therefore is confidential and is not to be disclosed.

## 2. Example(s) of Violation

Ms. Yu. filed a complaint with the Central District Court of city M. to compensate her for the damage caused by the disclosure of her HIV-positive status and, as a consequence, her loss of employment. The health care institution where the woman underwent a preventive medical screening sent to her employer an excerpt from her inpatient medical file that listed the HIV diagnosis. The plaintiff did not receive any information about her diagnosis from the medical institution. Instead, the officials of the medical institution in question informed the father of Ms. Yu. of the diagnosis.

## 3. Actual Case(s)

Pecherskyj District Court of Kyiv held hearings of an administrative lawsuit initiated by S. Poberezhets to establish as illegal and contradicting the legal acts of higher legal authority the Order “On Approval of a Sample Technical Description of a Disability Leave Certificate and Instructions on the Procedure for Filling Out a Disability Leave Certificate” of November 3, 2004 No. 532 / 274/136-os/1406 in the part that contains: a) an approval of a sample disability leave certificate, b) an approval of the technical description of the disability leave certificate, c) an approval of the Instructions on the procedure for filling out the disability leave certificate.

In the administrative lawsuit, the plaintiff asked the court to recognize as illegal and contradicting the legal acts of higher legal authority the order to include in a disability leave certificate the information regarding a preliminary and a final diagnosis and a disease code from the International Classification of Diseases and Related Health Problems (ICD-10).

On July 25, 2006, the court decided to satisfy the administrative lawsuit of S. Poberezhets against the Ministry of Health of Ukraine, the Ministry of Labor and Social Policy of Ukraine, the Social Insurance Fund for Temporary Disability, the Social Insurance Fund of Ukraine for Work Accidents and Occupational Diseases to recognize the Order as illegal and contradicting the legal acts of higher legal authority: in particular, to recognize as illegal and contradicting legal acts of higher legal authority the provisions of the Order regarding the inclusion in a disability leave certificate of preliminary and final diagnoses and the disease code from ICD-10 and to eliminate these provisions from the Order.

## g) Practice Notes

1. The following information constitutes the content of a medical secret: a) information about the state of health of a patient, b) information about the illness, c) information about the diagnosis, d) information obtained during a medical examination, d) information about the fact of seeking medical assistance, e) information about the medical examination and

its results, f) information about the methods of treatment, g) information about the sexual behavior and family life of an individual.

All the information obtained in the course of providing medical assistance should be subject to medical confidentiality. It can provisionally be divided into two groups: 1) medical information, 2) non-medical information, i.e., the information that pertains to the private life and the family of an individual. Each of these groups of information refer both to a patient (diagnosis, prognosis, harmful habits, family and personal life, etc.) and to the relatives of the patient (hereditary diseases, the state of health of the relatives, their private and family life, etc.), depending on each individual case.

2. The subjects of medical confidentiality are health care employees and other individuals who become aware of the information that constitutes a medical secret due to their professional duties.

On the basis of the review of legal documents and medical and legal literature on medical secrets, one can single out the following groups of subjects:

I) medical staff (the chief of staff of a medical institution, his/her deputies, doctors, nurses, obstetricians, support personnel, etc.).

II) other individuals who in the course of performing their professional duties come in contact with confidential information. This group is divided into the following subgroups: 1) individuals who work at a health care institution but are not medical practitioners (drivers, cafeteria personnel at a medical institution, archivists of medical records, administrative personnel, etc.), 2) pharmaceutical personnel, 3) students who come in contact with confidential information in the course of their medical training and internship at health care institutions, 4) employees of an insurance company, 5) Representatives of bodies of health care system management, in particular personnel at departments of health at the governmental and municipal organizations, 6) employees of educational institutions (preschool educational institutions, elementary and high schools for social rehabilitation, educational rehabilitation centers, etc.) 7) individuals who acquire confidential information in accordance with the law (departments of preliminary and criminal investigation, courts, People's Deputies, etc.).

3. Immunity of a witness. Article 51 of the Civil Action Code of Ukraine ("Individuals Who Are Not Subject to Questioning as Witnesses") provides that individuals who cannot be questioned as witnesses are individuals who, according to the law, are required to keep secret a particular type of information that has been entrusted to them in connection with their employment (paragraph 2, part 1, Article 51).

According to paragraph 1 of part 1 of Article 69 of the Criminal Procedure Code of Ukraine, questioning of lawyers and other law professionals who, according to the law, are entitled to provide legal assistance either in person or by proxy as well as questioning of physicians regarding the facts that were entrusted to them or became known to them in the course of their professional activities is possible only if they are exempted from the obliga-

tion to safeguard the professional secret or maintain the confidentiality of the information by the individual who entrusted them with this information. However, the law permits questioning these individuals as witnesses regarding any other facts that can serve as evidence in a case, as for instance when an attorney or a doctor happen to be eyewitnesses of a crime.

4. The time limit on safeguarding a medical secret; namely, the status of the confidentiality requirement after the death of the individual involved. There exists a school of thought that upholds the absolute nature of medical confidentiality, including after the death of a patient. The law regulates this issue only in terms of part 4 of Article 285 of the Civil Code of Ukraine and part 5 of Article 39-1 of the Law of Ukraine “Principles of Ukrainian Health Care Legislation” which guarantee the right of the family members or other individuals authorized by them to be present at the investigation of the cause of death of the patient and review the findings on the cause of death as well as the right to contest those findings in court in case of the death of the patient. In our opinion, one should agree with those researchers who allow as exceptions to the general rule a disclosure of the secrets of the dead. These exceptions include a disclosure of the information for the sake of the rehabilitation of the individual who died but always only upon the consent of the successors, relatives and heirs of the deceased, protection of the rights of family members because they have the right to non-pecuniary damage etc. Interested individuals who request this information must provide appropriate reasons for the need to receive it (for details see section 6.1.3).
5. See also practice notes in *subchapter 7.1.7*.

## **h) Cross-referencing Relevant International and Regional Rights**

Please review international and regional standards related to the right to privacy in sections 2 and 3.

## **6.1.7 Right to Respect of Patients’ Time**

### **a) Right 7 as Stated in the ECPR**

#### **Article 7. Right to Respect of Patients’ Time**

***Each individual has the right to receive necessary treatment within a swift and predetermined period of time. This right applies at each phase of the treatment.***

## **b) Right as Stated in Country Constitution/Legislation**

- ▶ **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Articles 34 (part 2), 78 (paragraph “a” part 1)].**

“Medical workers shall... provide timely and qualified medical care” [paragraph “a” part 1, Article 78].”

- ▶ **Framework on Management of Medical Care Quality in the Sphere of Health Care in Ukraine for the Period up to 2020. Order of Ministry of Health of Ukraine of August 1, 2011, No. 454.**

## **c) Supporting Regulations/ Bylaws/ Orders**

- ▶ **On Measures to Improve Emergency Medical Care of the Population in Ukraine: Order of the Ministry of Health of Ukraine of August 29, 2008 No. 500 [paragraph 2.1].**

“Providing emergency medical care to patients on any given territory at the pre-hospitalization stage in the shortest time possible after receiving an emergency call”.

## **d) Provider Code(s) of Ethics**

- ▶ **Code of Ethics of Physicians of Ukraine, adopted and signed at the National Congress of Health Care Organizations and at the X Congress of the Ukrainian Medical Association on September 27, 2009 [paragraph 3.3].**

“... A doctor must dedicate to a patient sufficient time and attention required to make a correct diagnosis, to carry out complete assistance, to justify prescriptions and recommendations for further treatment, to provide the patient with this information in detail and in a form comprehensible to him/her...”

## **e) Other Relevant Sources**

There are no other relevant sources on this matter.

## **f) Practical Examples**

### **1. Example(s) of Compliance**

Ms. D. came to see an ophthalmologist with her underage child. In spite of the fact that the office hours of the doctor have already ended, it was the end

of the working day, he still examined the child without a delay and prescribed necessary treatment.

## 2. Example(s) of Violation

Mr. N., born in 1930, came to visit a physician at an outpatient clinic, complaining of a headache and an increase in blood pressure. On this day, in spite of his age and the state of his health, he waited to be seen by the doctor all day because the doctor examined patients slowly and left her office several times without any explanation to the patients who waited in line. 30 minutes before the end of the office hours, the doctor said that she will not see anybody else that day because she had to fill out a lot of medical records. The doctor said that all who did not receive assistance that day could, given their condition which she estimated “by the eye”, return to see her next day. Only due to his own persistence did Mr. N. receive medical care on the day in question.

## 3. Actual Case(s)

The Department of Health of city T. received a complaint from Mr. Zh. The latter pointed out that he called an ambulance for his wife who suffered from an acute pain that was caused, as subsequently established, by a renal colic. As stated by the plaintiff, half an hour passed after he made the first emergency call before he called again and requested an ambulance a second time. Although he was assured that the ambulance had already left, it arrived only in an hour. The plaintiff stated in his complaint that he was outraged most of all by the arrogant attitude of the medical staff and a delay in providing medical care to his wife who was suffering for a long time. By the order of the head of the Department of Health, a commission was set up which carried out an official investigation to verify the facts presented in the complaint. The commission prepared a statement in which it pointed out shortcomings in providing emergency medical care to the population, with the view of the requirements set forth in the Order of the Ministry of Health of Ukraine “On Measures to Improve Emergency Medical Care of the Population in Ukraine” of August 29, 2008 No. 500. The head of the Department of Health forwarded this statement together with his recommendations to optimize the functioning of the emergency unit to the chief of staff of the unit. In addition, a reply to the plaintiff was prepared with the description of the response measures undertaken. The head of staff of the emergency unit implemented disciplinary measures against those responsible.

## g) Practice Notes

The actions of the medical staff, in particular a failure to arrive to assist the patient upon an emergency call, a superficial, formal, delayed examination of the patient who required medical care can be assessed according to Art. 139 of the Criminal Code of Ukraine (“Failure of a Health Care Employee to Provide a Patient with Medical Assistance”). A failure of a health care employee to provide necessary medical care to a patient at a health care institution due to careless or irresponsible attitude to his/her

professional responsibilities, including those associated with promptness of providing medical assistance, is subject to Article 140 of the Criminal Code of Ukraine (“Inadequate Carrying Out of Professional Duties by a Medical or Pharmaceutical Employee”).

## **h) Cross-referencing Relevant International and Regional Rights**

Please review international and regional standards related to the right to respect of patients' time in the context of the right to the highest attainable standard of physical and mental health discussed in sections 2 and 3.

### **6.1.8 Right to the Observance of Quality Standards**

#### **a) Right 8 as Stated in the ECPR**

##### **Article 8. Right to the Observance of Quality Standards**

*Each individual has the right of access to high quality health services on the basis of the specification and observance of precise standards.*

#### **b) Right as Stated in Country Constitution/Legislation**

- ▶ **Constitution of Ukraine of June 28, 1996 [Article 49 (part 1)].**

*“Everyone has the right to health, medical assistance and medical insurance ”.*

- ▶ **Civil Code of Ukraine of January 16, 2003 [Articles 284 (part 1)].**

*“An individual has the right to receive medical assistance ”.*

- ▶ **Criminal Code of Ukraine of April 5, 2001 [Articles 139, 140].**

“A failure of a medical employee to provide a patient with medical care:

1. A failure of a health care practitioner to provide a patient with assistance without good reasons when the health care practitioner must in accordance with established rules provide such assistance if he/she knows in advance that this failure can have grave consequences for the patient is fined up to fifty times untaxed minimum wages and a withdrawal of the right to occupy certain positions or engage in certain type of activities for up to three years, or public services for up to two hundred hours, or correctional labor for up to two years.

2. The same action if it caused the death of the patient or other grave consequences is punishable by restriction of freedom for a term of four years or imprisonment for up to three years and an optional withdrawal of the right to occupy certain positions or engage in certain type of activities for up to three years” (Art. 139).

“Inadequate carrying out of professional responsibilities by medical or pharmaceutical employees:

1. A failure to carry out or inadequate carrying out of professional duties by a medical or pharmaceutical employee due to careless or irresponsible attitude to them when they cause grave consequences for a patient is punishable by withdrawal of the right to occupy certain positions or engage in certain types of activities for up to five years, or correctional labor for up to two years, or restriction of freedom for up to two years or imprisonment for the same period of time.

2. The same action if it caused any grave consequences to a minor is punishable by restriction of freedom for a term of five years or imprisonment for up to three years and withdrawal of the right to occupy certain positions or engage in certain type of activities for up to three years” (Art. 140).

- ▶ **On Protection of Consumer Rights: Law of Ukraine of May 12, 1991 (in the reading of December 1, 2005) [Article 4 (paragraph 2 part 1), 6].**

According to part 1 of Art. 4, a consumer has among others the right to an adequate quality of products and services (paragraph 2).

Article 6 confirms the right of consumers to adequate quality of products (any products (goods), work or services produced, performed or provided to meet social needs). A contractor shall transfer to the consumer products of adequate quality and also provide information about these products. A contractor at the request of the consumer is obliged to provide documents confirming the adequate quality of the product.

- ▶ **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Articles 6 (paragraph “e”), 14-1, 33, 34 (part 2), 35 – 35-5, 78 (paragraph “a”)].**

Article 6 guarantees the right to qualified medical and sanitary care, including free choice of a doctor, a choice of methods of treatment following doctor’s recommendations and a health care institution (paragraph “e”).

- ▶ **On Protection of the Population from Infectious Diseases: Law of Ukraine of April 6, 2000 [Article 24 (part 1)].**
- ▶ **On Approval of the National Program for the Development of Primary Health and Sanitary Care Based on Family Medicine for the Period Ending in 2011: Law of Ukraine of January 22, 2010.**

### c) Supporting Regulations/ Bylaws/ Orders

- ▶ **On the Physician's Oath: Decree of the President of Ukraine of June 15, 1992, [paragraph 1 part 1].**

“To devote all his/her knowledge, strength and abilities to the protection and improvement of the health of an individual ... provide medical care to all who need it”.

- ▶ **Framework for Ensuring the Quality of Health Care Services in Ukraine for the Period Ending in 2020: Order of the Ministry of Health of Ukraine of August 1, 2011 No. 454.**

The tasks for implementing the Framework include protection of the interests of the patient in the course of receiving quality health care. Besides this there had been defined major ways of solving problems in the sphere of increasing the quality of medical services, in particular creation of an effective system of medical services standartization.

- ▶ **On Approval of the Uniform Methods for Developing Clinical Guidelines, Medical Standards, Uniform Clinical Protocols for Medical Assistance, Local Protocols for Medical Assistance (Clinical Tracks for Patients) on Evidence-based Medicine: Order of the Ministry of Health of Ukraine, Academy of Medical Sciences of Ukraine of February 19, 2009 No. 102/18.**

Modern approach to improving the quality of medical care aims at controlling and improving the functioning of the health care system, increasing its effectiveness through the practice based on evidence and high quality clinical studies as the basis of clinical information. Modern medical practice requires doctors to use only the most reliable evidence, requires patients to take an informed active part in prevention programs and in the process of receiving medical care. An indicator of quality of health care is either a quantitative or a qualitative indicator that is supported by evidence or consensus about its direct impact on the quality of health care and is defined retrospectively.

- ▶ **On Approval the Plan of Measures Concerning the Framework of Clinical and Laboratory Researches Conduction for the Period Ending in 2015: Order of Ministry Of Health of Ukraine of October 17, 2010 No. 1003.**
- ▶ **On Procedure of Carrying out a Control and Management of Quality of Medical Care: Order of Ministry of Health of Ukraine of March 26. 2009. No. 189.**



“The purpose of carrying out a control over quality of medical care is a securement of patients’ rights to obtain a medical care in a necessary amount and of proper quality by way of optimal application of personnel and material and technical resources of health care, application of perfect medical technologies (paragraph 7)”

- ▶ **On Procedure of Management of Quality of Medical Care: Order of Ministry of Health of Ukraine of February 24, 2010, No. 163.**
- ▶ **On Approving the Standards of Medical Care Provision and Indicators of Medical Care Quality: Order of the Ministry of Health of Ukraine of December 28, 2002 No. 507.**  
The list of medical care quality indicators includes:
  1. Accessibility of medical care.
  2. Economy of medical care.
  3. Effectiveness of medical care.
  4. Continuity of medical care.
  5. Scientific and technical level of medical care.
  6. The level of observance of medical care manufacturability.
  7. The level of clinical quality.
  8. The level of diagnostic’s quality.
  9. The level of quality of medical care
  10. The level of quality of medical examination.
  11. The level of quality of prophylactic.
  12. The level of quality of rehabilitation.
  13. The level patients are satisfied with the medical care they received.
- ▶ **On Approval of a Unitary Glossary of Definitions (Glossary) on the Issues of Management of Medical Care Quality: Order of the Ministry of Health of Ukraine of July 20, 2011 No. 427.**

#### **d) Provider Code(s) of Ethics**

- ▶ **Code of Ethics of Physicians of Ukraine, adopted and signed at the National Congress of Health Care Organizations and at the X Congress of the Ukrainian Medical Association on September 27, 2009 (paragraph 3.2).**

“ A doctor is responsible for the quality and humanity of medical care provided to patients and any other professional actions that intervene in the life and health of an individual.

#### **e) Other Relevant Sources**

There are no other relevant sources on this matter.

## f) Practical Examples

### 1. Example(s) of Compliance

Ms. V., born in 1940, while in an airport waiting room, felt weak and experienced an acute chest pain. She sought medical help at the airport clinic where she was provided with necessary assistance until the arrival of a cardiac ambulance crews. The patient was hospitalized with myocardial infarction for an inpatient treatment.

### 2. Example(s) of Violation

After a road accident, a 23 year old resident of city K was transported to the central district hospital of the city where he was treated for three days in an intensive care with a diagnosis of brain injury. Two days later, the patient died. The protocol (file) of autopsy states that the cause of death was an internal injury of the gastrointestinal tract with an extensive hemorrhage which in the course of treatment was not diagnosed. Based on this document, a criminal case against the attending physician of the central district hospital was opened and a forensic investigation was initiated which established the inadequacy of the assistance provided by the doctor.

### 3. Actual Case(s)

Defendants Mr. S. and Mr. T., health care employees, who on May 22, 2007 held the offices of the head of the maternity department of the central district hospital of district N., region P. (hereinafter, the hospital) and of the obstetrician-gynecologist at the maternity department respectively, failed to fulfill their professional duties while assisting with Ms. D.'s delivery due to careless and irresponsible attitude to their duties which caused grave consequences – the death of the mother.

On May 22, 2007 at 7:30, the pregnant woman commenced giving birth and at 17:00 of that day the delivery reached its active phase. Since in the course of the delivery complications emerged, the doctors decided to resort to surgery – a cesarean section (the surgery was performed on May 22, 2007).

After the surgery, contrary to the requirements of the provisions of the Order of the Ministry of Health of Ukraine “On Organizing Inpatient Obstetric, Gynecological, and Neonatal Care in Ukraine” of December 29, 2003 No. 620, the doctors left the woman without their supervision. Due to this, an atonic bleeding in the postoperative period (caesarean section) suffered by the patient was diagnosed late and in addition the obstetrician-gynecologist Mr. S. did not supply the maternity department with the required reserve components of blood.

This inaction led to the onset of a hemorrhagic shock of the 3-4 degree in the patient: namely, as it became known at 20:10 of the same day, the patient lost 1200 ml of blood, indicating that the patient remained without medical supervision for 40 minutes. As a result, the untimely diagnosis of the patient, Ms. D, with uterine bleeding, delayed medical care in conjunction with its inadequacy led to the development of irreversible changes in the brain tissue of the mother and subsequently caused the death of the victim.

On March 29, 2010, having examined the case, the court passed a verdict to convict Mr. S. on the basis of part 1 of Article 140 of the Criminal Code of Ukraine for 2 (two) years of restriction of freedom and on the basis of part 1 of Article 140 of the Criminal Code of Ukraine to deprive Mr. T of the right to hold a position of an obstetrician-gynecologist for 3 years and on the basis of paragraph “d” of Article 1 of the Law of Ukraine “On Amnesty” of December 12, 2008 to release Mr. T. from serving the sentence imposed. The court decided to satisfy the civil suit of Ms. K. (the mother of the victim) in full: namely, it ordered Mr. S. and Mr. T. to compensate Ms. K. jointly for material damage in the amount of 282.86 hryvnias and for moral damage in the amount of 100,000 hryvnias. A separate resolution was passed in the case.

### **g) Practice Notes**

- 1.** Control over quality of medical care is conducted by the clinical expert commissions of the Ministry of Health of Ukraine (further Commissions). Commissions control the quality of medical care solely or by clinical and expert commissions of Autonomous republic of Crimea, of regions and of the towns of Kyiv and Sevastopol.
- 2.** Control over quality of medical care in the health care institutions of state or communal property, subordinated to Ministry of Health of Ukraine is carried out by the Commissions during in or out checks by way of making request and obtaining necessary papers of medical institutions to provide an examination of primary medical papers.
- 3.** Order of the Ministry of Health of Ukraine is a ground for control over quality of medical care. An act of expert control of a form approved by the Ministry of Health of Ukraine shall be prepared, taking into account the results of an examination. An act shall be signed by all members of the Commission and every page of the act is certified by them. A sitting of a Commission shall be added to the protocol.
- 4.** A conclusion of the act of expert control shall be approved by the simple majority vote of members of the Commission. In case there is an equal number of votes, the vote of a chief of the commission shall be considered decisive. Under the decision of minister of health of Ukraine can be conducted a second control over quality of medical care in case half of the commission members do not agree with an act of expert control.
- 5.** Copies of an act of an expert control of the Commission may be given to applicants on their request.
- 6.** A quality of medical care control shall be conducted in cases a) of death b) of complications c) of invalidity of working age persons d) of hospitalization for the second time and for same reasons within the same year e) of illnesses demanding extended or shortened treatment (or temporary disability) f) of different diagnosis g) connected with complaints of patients or their relatives.

7. Control of medical care quality can be external and internal. An external one is conducted by way of planned or non planned checks as regards observance of license conditions of medical practice, expert evaluation of whether medical institutions meet the requirements of state accreditation, attestation of doctors and junior specialists with medical education. An internal is a control, conducted by medical commissions, morbid anatomy conferences, doctors (self-control) and headships of medical institutions by way of examination whether a provide medical care meets the requirements of state standards, norms, clinical protocols
8. All applications that were submitted to the Commission shall be considered within 30 days. In case a Commission can't make a decision during this period if time, a term of consideration can be prolonged up to 15 days.
9. The issue of the quality of any service, including medical service, provided to a consumer, a patient, is regulated by the Law of Ukraine "On Protection of Consumer Rights."
10. Adequate quality of service is a property of the products of the service which meet the requirements established for this category of products by the legislative acts and the conditions of the contract with the consumer. Quality of medical care – is a proper (according to standards, clinical protocols) realization of all measures, which are safe, rational and accepted from the point of view of costs, which are used in this society and influence the mortality, morbidity and invalidity.
11. Inadequate carrying out of professional duties by a health care practitioner due to his/her careless or irresponsible attitude to them is subject to criminal responsibility under Article 140 of the Criminal Code of Ukraine. Inadequate carrying out of professional duties occurs when a medical or pharmaceutical employee carries out his/her duties partially, carelessly, superficially, not as required by the standards of his/her professional activity.
12. Standards for providing medical assistance and clinical protocols for individual nosologies and areas of medical activity which dictate to medical staff how to provide medical assistance are part of Ukrainian health care legislation.
13. To understand the law correctly, one should remember the following correlation in medical practice: clinical guidelines answer the question: "What can be done?" (standards of clinical practice); standards of medical care answer the question "How should it be done given the conditions in the country?"; protocols for medical care answer the question "How should it be carried out?".
14. Clinical guidelines and standards of medical care differ in their legal status. Clinical guidelines are a professional document that is adopted at a forum of an association or another organization of specialists, includes systematized provisions as regards medical service, worked out on the basis of evidence-based medicine and is aimed at supporting a doctor and a patient while making decisions in different clinical situations. Clinical guidelines are a normative document adopted at the national level by the

Ministry of Health of Ukraine and has a mandatory status, defines norms, requirements to an organization and criteria of quality of medical care provision, as well as indicators, that will be used to carry out an audit on different levels of system of medical care quality management. A limited number of the standards of medical care is developed, depending on the social and medical priorities, and they include groups of diseases or conditions that affect large groups of working age population and lead to major losses in the economy of the country. Standards of medical care foresee rules, standards as well as indicators of quality of medical care of certain kind provision, which are worked out taking into consideration modern level of medical science and practice development.

- 15.** Protocols for medical care are also a normative document, which defines the requirements as regards diagnostic, medical, prophylactic and rehabilitation methods of medical care provision and their consistency. Protocols provide rules and technologies for implementing standards of medical care, determine the procedure for interaction between subjects of medical care relations and the conditions for a transition from one stage of medical care to another. Clinical protocols are approved by the Ministry of Health of Ukraine.
- 16.** Consumer rights are considered to be violated (Article 21 of the Law of Ukraine “On Protection of Consumer Rights”) when at the stage of consumption of the product the right to free choice of the product by the consumer is violated in any way; when the right of the consumer to obtain all necessary, available, reliable and timely information about the relevant product is violated (except as provided by law); when the consumer is provided with the product that is dangerous, of inadequate quality, or fraudulent.
- 17.** To protect one’s violated right to medical care, an individual may use all necessary legal instruments, including the courts. The protection of consumer rights is carried out by courts in accordance with Article 22 of the Law of Ukraine “On Protection of Consumer Rights.”
- 18.** The quality of medical care in the event of a conflict between the subjects of a medical relationship in the course of a medical hearing is established by the bureau of forensic examinations and clinical and expert commissions.
- 19.** The State ensures the quality and safety of medical care of patients through the system of certification, licensing, accreditation and standardization as well as through proper training and re-training of medical and pharmaceutical personnel utilizing existing national standards of training and exercising control over all forms of medical practice.

## **h) Cross-referencing Relevant International and Regional Rights**

Please review international and regional standards related to the right to the observance of quality standards in the context of the right to the highest attainable standard of physical and mental health discussed in sections 2 and 3 and the right to life discussed in sections 2 and 3.

### **6.1.9 Right to Safety**

#### **a) Right 9 as Stated in the ECPR**

##### **Article 9. Right to Safety**

***Each individual has the right to be free from harm caused by the poor functioning of health services, medical malpractice and errors, and the right of access to health services and treatments that meet high safety standards.***

#### **b) Right as Stated in Country Constitution/Legislation**

- ▶ **Constitution of Ukraine of June 28, 1996 [Article 49 (part 1)].**

*“Everyone has the right to health care, medical assistance and medical insurance.”*

- ▶ **Civil Code of Ukraine of January 16, 2003 [Article 284 (part 1)].**

*“An individual has the right to receive medical assistance.”*

- ▶ **“On Advertising: Law of Ukraine of July, 3, 1996 [Article 21]**

- ▶ **Criminal Code of Ukraine of April 5, 2001 [Articles 139, 140].**

- ▶ **On Protection of Consumer Rights: Law of Ukraine of May 12, 1991 (in the reading of December 1, 2005) [Articles 4 (paragraph 3 part 1), 6 (paragraph 3 part 1)].**

The law guarantees the right of consumers to the safety of products (goods, work, or services) (Article 4) and notes that the requirements regarding the safety of a product for life and health of consumers are established by legal documents (Article 6).

▶ **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Articles 42, 44].**

“A medical intervention is allowed only if it can not harm the health of a patient. A medical intervention that is associated with risks to the health of a patient is permitted as an exception when there is an urgent need for it and when a potential harm from the use of methods of diagnosis, prevention or treatment is less than that expected in case of non-interference and the danger to the life of the patient cannot be eliminated by other means. Risky methods of diagnosis, prevention or treatment are recognized as acceptable if they meet current scientific well-founded requirements designed to prevent the real threat to life and health of the patient, are used upon a consent of the patient informed of their possible harmful effects on the patient and the doctor utilizes all measures appropriate in such cases to prevent damage to life and health of the patient” (Art. 42).

“In medical practice, only the methods of prevention, diagnosis, treatment, and rehabilitation as well as medicines approved for use by the Ministry of Health of Ukraine are to be utilized.

New methods of prevention, diagnosis, treatment, rehabilitation and medicines that are in the process of being approved but are not yet approved for use can be utilized to treat an individual only upon obtaining his/her written consent. In case of individuals under 14 years of age (minors), above mentioned methods and medicines can be used upon a written consent of their parents or legal representatives; in case of individuals aged between 14 and 18 years, upon their written consent and a written consent of their parents or legal representatives; in case of individuals whose civil capacity is limited, upon their written consent and a written consent of their guardians; in case of individuals recognized as legally incompetent, upon a written consent of their legal representatives. When obtaining a consent for the use of new methods of prevention, diagnosis, treatment, rehabilitation and medicines that are in the process of being approved but are not yet approved for use, one should supply an individual and (or) his/her legal representative with information about the goals, methods, side effects, potential risks and expected results” (Art. 44).

▶ **On Psychiatric Care: Law of Ukraine of February 22, 2000 [Article 7].**

▶ **On Protection of the Population from Infectious Diseases: Law of Ukraine of April 6, 2000 [Article 13 (part 3)].**

▶ **On Resistance to Diseases Caused by Human Immunodeficiency Virus (HIV), and Legal and Social Protection of People Living With HIV: The Law of Ukraine of 12.12.1991. (The wording of 23.12.2010.) [Article 4, (paragraph 4)]**

### c) Supporting Regulations/ Bylaws/ Orders

- ▶ **On Approval of the Interim Standards for Medical Care of Adolescents and Youth: Order of the Ministry of Health of Ukraine of June.2, 2009 No. 382.**
- ▶ **On Approving the Temporary Branch Classifier of Medical Procedures (Services): Order of The Ministry of Health of Ukraine of February 14, 2007, No. 67.**
- ▶ **Framework on Management of Medical Care Quality in the Sphere of Health Care in Ukraine for the Period up to 2020. Order of Ministry of Health of Ukraine of August 1, 2011, No. 454.**

### d) Provider Code(s) of Ethics

- ▶ **Code of Ethics of Physicians of Ukraine, adopted and signed at the National Congress of Health Care Organizations and at the X Congress of the Ukrainian Medical Association on September 27, 2009 [paragraphs 3.8, 3.12, 3.14).**

“In case of an error or when as the result of it unforeseen complications emerge, a doctor must inform the patient, a colleague in higher standing or the head of the department and in the absence of complications -- the administration of the establishment where he/she works and direct his/her actions immediately to correct negative consequences without waiting for instructions. If necessary, he/she should involve other specialists, informing them honestly about the nature of the error or the complications that occurred. ... A doctor has no right to leave patients when there is a state of general danger” (paragraph 3.12). “A doctor can not offer to a patient the methods of treatment, pharmaceuticals and other medical products not admitted into general circulation by the Ministry of Health of Ukraine in accordance with the legal procedure” (paragraph 3.14).

### e) Other Relevant Sources

There are no other relevant sources on this matter.

### f) Practical Examples

#### 1. Example(s) of Compliance

While providing a patient, Mr. K., born in 1941, with medical information, a physician informed the patient that to enhance the medication therapy used, it would be advisable to follow the procedure developed by the scientists of the research institute. The health care practitioner explained to the patient that this



procedure is still at the stage of testing, the results are positive, so if the patient agrees to use it, he must give his consent in writing.

## 2. Example(s) of Violation

While providing assistance to a minor, an attending physician decided to use medicines which were not approved for general circulation since other means, in his opinion, did not give the desired result. In a few days, the patient's condition dramatically worsened and the patient was transferred to an intensive care unit where he died without regaining consciousness the next day. The parents of the boy learned that the doctor used medicines not yet approved for use by the Ministry of Health of Ukraine.

## 3. Actual Case(s)

On March 26, 2009, Ms. O., born in 1995, visited the gynecology department of the clinical hospital No. 4 of city D. In the doctors' office, she turned to the obstetrician-gynecologist Ms. Zh. with a request to administer her abortion, explaining that she already has a small child, is in a difficult financial situation, and her husband is against having a second child. The doctor agreed to perform an abortion, she obtained a consent of the patient in writing and immediately directed her into the surgery room where she performed the abortion. In the process of the abortion, the doctor became suspicious of a perforation of the uterus and decided to hospitalize the patient at the gynecology department, where the patient was administered a series of diagnostic tests that did not establish the presence of a perforation. Three days later, when the sepsis began, the diagnosis of the perforation of the uterus was confirmed when the complex of all the necessary diagnostic measures was utilized. Ms. O. was urgently sent for surgery—complete hysterectomy including removal of the fallopian tubes—as the result of which the patient was deprived of the reproductive function. On the basis of this fact, a criminal law suit was initiated against the doctor, Ms. Zh., under part 2 of Article 140 of the Criminal Code of Ukraine. During the pre-trial investigation, a forensic medical examination was carried out which concluded that the doctor committed several violations of professional duties and the actions of the doctor caused serious damage to the patient. The case was referred for trial on the basis of finding the doctor guilty. A civil law suit was initiated to compensate the patient for moral damages in the amount of 60,000 hryvnias. During the proceedings, the attorney of the defendant applied for amnesty, resulting in a court order to terminate criminal proceedings in connection with the release of Ms. Zh. from criminal responsibility. Ms. O. initiated civil proceedings to compensate her for moral damage in the amount of 60,000 hryvnias caused by the improper actions of the doctor. In this case, the court passed a decision to satisfy the claim in part: to recover from the clinical hospital No. 4 of city D. compensation in the amount of 40 thousand hryvnias in favor of the plaintiff.

### g) Practice Notes

1. Responsibility for compliance with safety practices related to health and life of patients at health care institutions in the course of providing medical care falls on the administration and medical workers of these institutions or individual health care practitioners at the place of their activities.
2. To protect this right, one can utilize all the mechanisms and procedures covered in Chapter 8.

### h) Cross-referencing Relevant International and Regional Rights

Please review international and regional standards related to the right to the observance of quality standards in the context of the right to the highest attainable standard of physical and mental health discussed in sections 2 and 3 and the right to life discussed in sections 2 and 3.

## 6.1.10 Right to Innovation

### a) Right 10 as Stated in the ECPR

#### **Article 10. Right to Innovation**

*Each individual has the right of access to innovative procedures, including diagnostic procedures, according to international standards and independently of economic or financial considerations.*

### b) Right as Stated in Country Constitution/Legislation

#### ▶ **Constitution of Ukraine of June 28, 1996 [Article 28 (part 3)].**

“No person can be subjected to medical, scientific or other experiments without his/her free consent.”

#### ▶ **Civil Code of Ukraine of January 16, 2003 [Articles 281 (parts 3, 7), 289 (parts 4), 290].**

“Medical, scientific and other experiments can be carried out only on an adult competent individual upon his/her free consent. Clinical experiments are carried out in conformity with the law.” (part 3 Art. 281). “Given medical indications, an adult woman has the right to artificial insemination and a transfer of an embryo into her body” (part 7 Art. 281).

#### ▶ **“On Advertising: Law of Ukraine of July, 3, 1996 [Article 21**

- ▶ **Criminal Code of Ukraine of April 5, 2001 [Articles 141, 142, 143, 149].**

“Violations of the rights of a patient:

Conducting clinical trials of medicines without a written consent of a patient or his/her legal representative, or on a minor or an incompetent individual if these actions caused the death of the patient or other grave consequences is punishable by restriction of freedom for a term of three to five years or imprisonment for the same term” (Art. 141).

“Illegal experiments on a person:

1. Illegal biomedical, psychological or other experiments on an individual if they created danger to his/her life or health is punishable by a fine of two hundred untaxed minimum wages, or correctional labor for up to two years or restriction of freedom for a term of four years accompanied by a withdrawal of the right to occupy certain positions or engage in certain type of activities for up to three years.

2. The action defined in the first paragraph of this Article if committed against a minor, two or more individuals, by means of coercion or deception, and also if it caused long term health disorders in the victim is punishable by restriction of freedom for a term of five years or imprisonment for the same term with an optional withdrawal of the right to occupy certain positions or engage in certain types of activities for up to three years” (Art. 142).

- ▶ **Family Code of Ukraine of January 10, 2002 [Article 123].**

1. When a wife gives birth to a child conceived through the use of assisted reproductive technologies carried out upon a written consent of her husband, he is recorded as the father of the child.

2. When an embryo of a child conceived by a couple through the use of assisted reproductive technologies is transferred into the body of another woman, the child’s parents are the couple.

3. A couple is recognized as the parents of a child when the child is born by the wife after a human embryo conceived by her husband and another woman through the use of assisted reproductive technologies was transferred into the body of the wife”.

- ▶ **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Articles 45, 47, 48, 51].**

Performing bio-medical experiments on people is permitted given their socially useful purpose when they are scientifically well-founded, there exist benefits from a possible success that outweigh the risk of causing serious damage to the health or life of the patients, there is transparency in carrying out the experiment, full information concerning the procedure of the experiment is provided to and a free consent is obtained from an

adult competent individual who is subjected to the experiment, and medical confidentiality is maintained. It is prohibited to conduct research experiments on patients, prisoners or prisoners of war, as well as therapeutic experiments on individuals whose ailment has no direct connection to the goals of the therapeutic experiment” (Art. 45).

“An artificial insemination and embryo implantation are used in accordance with the terms and procedures established by the Ministry of Health of Ukraine, given the presence of medical indications for an adult women who undergoes such a procedure, provided there is a written consent of the couple and the anonymity of a donor and medical confidentiality are ensured” (Art. 48).

- ▶ **On Banning Reproductive Human Cloning: Law of Ukraine of December 14, 2004.**

- ▶ **On Transplantation of Organs and Other Anatomical Materials to a Human Being: Law of Ukraine of July 16, 1999 [Articles 6 (part 1), 16].**

“Transplantation as a method of treatment is used only if there are medical indications and upon a consent of an objectively informed competent recipient only in those cases when the removal of danger to life or restoration of health of the recipient is not possible through other methods of treatment” (part 1 Art. 6).

“Every competent adult individual may give a written consent to or reject an offer to become a donor of anatomical materials in the event of his/her death. In the absence of such declaration, the anatomical materials of a deceased competent adult individual can be taken upon a consent of a spouse or relatives who lived with the deceased. The anatomical materials of a deceased minor, partially competent or incompetent individual can be taken upon a consent of their legal representatives ... The anatomical materials of a deceased competent adult individual whose donor application is not available as well as of a minor, partially competent and incompetent individual may not be taken if a consent of the individuals listed in part one of this Article was not obtained or can not be obtained” (Art. 16).

- ▶ **On Medicines: Law of Ukraine of April 4, 1996 [Articles 7, 8].**

### **c) Supporting Regulations/ Bylaws/ Orders**

- ▶ **On Approval of the State Program “Reproductive Health of the Nation” for the Period Ending in 2015: Resolution of the Cabinet of Ministers of Ukraine of December 27, 2006 No. 1849.**

- ▶ **Rules for Civil Status State Registration in Ukraine: Order of the Ministry of Justice of Ukraine of October 18, 2000 No. 52 / 5.**
- ▶ **On Approval of the Instructions on the Procedure for the Use of Assisted Reproductive Technologies: Order of the Ministry of Health of Ukraine of December 23, 2008 No. 771.**
- ▶ **On Approval of the Procedure for Referring Women for the First Round of Treatment of Infertility Using Methods of Assisted Reproductive Technologies on the Grounds of Absolute Medical Indications Paid for from the Budget: Order of the Ministry of Health of Ukraine of November 29, 2004 No. 579.**
- ▶ **On Approval of the Plan of Action to Carry Out Measures for Enforcing the Implementation of the State Program “Reproductive Health of the Nation for the Period Ending in 2015”: Order of the Ministry of Health of Ukraine of July 4, 2007 No. 372/34.**
- ▶ **On Improving of Health Care to Individuals in Need of Sex Change (Correction) Provision: Order of the Ministry of Health of Ukraine of February 3, 2011 No. 60.**
- ▶ **A Regulation on Commission on Sex Change (Correction): Order of the Ministry of Health of Ukraine of February 3, 2011 No. 60.**
- ▶ **Procedure for Medical Examination of Individuals in Need of Sex Change (Correction): Order of the Ministry of Health of Ukraine of February 3, 2011 No. 60.**
- ▶ **On Approval of the Procedure for Clinical Trials of Medicines and Expert Review of the Materials of Clinical Trials and Approval of the Model Regulation on Ethics Commissions: Order of the Ministry of Health of Ukraine of September 23, 2009 No. 690.**
- ▶ **Model Regulation on Ethics Commissions: Order of the State Inspectorate for Quality Control of Medicines at the Ministry of Health of Ukraine of May 14, 2010 No. 56.**
- ▶ **On Introducing Telemedicine in Health Care Institutions: Order of the Ministry of Health of Ukraine of March 26, 2010 No. 261.**
- ▶ **On Approving the Temporary Branch Classifier of Medical Procedures (Services): Order of The Ministry of Health of Ukraine of February 14, 2007, No. 7**

- ▶ **Framework on Management of Medical Care Quality in the Sphere of Health Care in Ukraine for the Period up to 2020. Order of Ministry of Health of Ukraine of August 1, 2011, No. 454.**

#### **d) Provider Code(s) of Ethics**

- ▶ **Code of Ethics of Physicians of Ukraine, adopted and signed at the National Congress of Health Care Organizations and at the X Congress of the Ukrainian Medical Association on September 27, 2009 [paragraph 3.1 section 5 “Scientific Research Involving Patients”, section 6 “New Medical Technologies ”].**

“ Scientific research involving patients may be carried out by doctors only when it complies with all of the following conditions: a) when it is aimed at improving the health of patients who participate in the experiment, b) when it becomes a significant contribution to the medical science and practice c) when the results of previous studies and existing data do not suggest the presence of risk to develop complications, d) on condition that all necessary measures for patient safety are procured” (paragraph 5.5).

Actions of a doctor applying new medical technologies (transplantation of human organs and tissues, human genome interventions, reproductive function interventions, etc.) are defined by the ethical and legislative acts of Ukraine, recommendations and requirements of the World Health Organization, UNESCO Bioethics Committee and Commission on Bioethics” (paragraph 6.1).

#### **e) Other Relevant Sources**

There are no other relevant sources on this matter.

#### **f) Practical Examples**

##### **1. Example(s) of Compliance**

Many people are still wary of IVF as a means of conception for fear of violating female bodily functions. But there exists evidence that after a baby conceived in this way is born, many women become pregnant again on their own. The global rate of success of this method is 25-30%. It is the same as that of natural conception. That is from among a hundred couples seeking to conceive only 25-30 do conceive. In particular, lately in vitro fertilization has already been conducted “in a phial” – IVF and ICSI. The first case of in vitro fertilization in Ternopil resulted in a city resident who could not conceive for about ten years being now poised to become a mother. Several other women after the same procedure are waiting for a confirmation of their pregnancy.

## 2. Example(s) of Violation

A couple that could not have children visited a medical center with an aim to address their problem through reproductive technologies. Due to a negligent attitude of doctors to their professional duties, as part of the surrogacy program, the eggs and sperm used for insemination were derived not from the couple. The embryos were transferred into the uterus of a “surrogate mother” who bears a child for this couple.

## 3. Actual Case(s)

Mr. K., who was hospitalized in an emergency care hospital with an acute myocardial infarction, died in an intensive care unit. The wife appealed to the Prosecutor with a complaint of inadequate actions of the medical employees of the health care institution in question. An inspection found out a number of professional violations that were committed by the medical staff both in the course of providing medical care and in conducting a clinical trial of a medicine. On the basis of these findings, a criminal lawsuit was initiated under part 1 of Article 140 and Article 141 of the Criminal Code of Ukraine. In the course of preliminary investigation, it was established that in the process of admitting the patient to the hospital, the doctor at the hospital intensive care unit examined the patient for the purpose of his inclusion in the ExTrakt-Timi 25 trial. The patient’s medical file contained an informed consent of Mr. K. to be included in a clinical trial as part of the project “The Use of Enoxaparin for Thrombolytic Reperfusion in the Treatment of an Acute Myocardial Infarction”. Examination of this document revealed several violations in the implementation of the patient’s right to consent to a bio-medical experiment: from inadequate information provided to a violation of voluntariness in obtaining the consent. Several forensic examinations were carried out in this case—forensic medical as well as forensic technical examinations—which revealed the facts of negligent attitude to one’s professional duties, violation of the procedure for conducting clinical trials, counterfeiting of primary medical documentation. The case is at the stage of preliminary investigation.

## g) Practice Notes

1. It is extremely difficult for biological parents who provided the embryo for subsequent placement in the uterus of a surrogate mother to prove their right to a newborn child. The registration of the birth of the child is carried out by the woman (a donor) upon an application submitted by the couple who gave consent for her fertilization. In this case, together with the document confirming the birth of the child by the woman a notarized written consent of the woman (a donor) to register the couple as parents of the child is submitted. A medical birth certificate records the donor woman – a surrogate mother.
2. The Family Code of Ukraine contains the presumption of paternity of the couple, the Code of Civil Registration in Ukraine clearly exhibits legislative protection of a surrogate mother and contains the presumption of her maternity.

3. If there is a need to ensure the interests of an individual in the area of surrogate motherhood, one should remember the contractual relationship involved. It is reasonable that a couple that wishes to have a baby, a surrogate mother and a health care facility which carries out the implantation of the embryo are the parties to the contract.
4. In the case of a transplantation, there operates a presumption of a refusal to undergo the intervention.
5. A trade in human anatomical materials other than the bone marrow is prohibited.
6. The terms of legality of an artificial insemination and embryo implantation are:
  - a competent adult woman as the subject of the right exercised;
  - written consent of the couple;
  - guarantee of the anonymity of the donor;
  - preservation of medical confidentiality.
7. In connection with sex change an application on making amendments in a birth civil status act can be submitted to the department of civil status acts registration at the place of applicant's residence or at the location of a health care institution of Ukraine, which issued a sex change certificate. After the amendments in a birth civil status act had been made an applicant receives a birth certificate once more.

## **h) Cross-referencing Relevant International and Regional Rights**

Please review international and regional standards related to the right to innovation in the context of the right to the highest attainable standard of physical and mental health discussed in sections 2 and 3

### **6.1.11 Right to Avoid Unnecessary Suffering and Pain**

#### **a) Right 11 as Stated in the ECPR**

##### **Article 11. Right to Avoid Unnecessary Suffering and Pain**

***Each individual has the right to avoid as much suffering and pain as possible, in each phase of his or her illness.***



## b) Right as Stated in Country Constitution/Legislation

### ▶ **Constitution of Ukraine of June 28, 1996 [Articles 3, 28 (part 2)].**

“Person’s life and health, honor and dignity, inviolability and safety are recognized in Ukraine as the highest social value” (Art. 3).

“No one shall be subjected to torture, cruel, inhuman or degrading treatment or punishment” (part 2 Art. 28).

### ▶ **Civil Code of Ukraine of January 16, 2003 [Article 289 (part 2)].**

“An individual can not be subjected to torture, cruel, inhuman or degrading treatment or punishment”.

### ▶ **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Articles 6, 8 (part 2), 35-4, 52].**

### ▶ **On Approval of the National Programme to Combat Cancer for the Period Ending in 2016: Law of Ukraine of December 23, 2009.**

### ▶ **On Approval of the National Programme for HIV Prevention, Treatment, Care and Support to HIV-infected and AIDS Patients for 2009-2013: Law of Ukraine of February 19, 2009.**

## c) Supporting Regulations/ Bylaws/ Orders

### ▶ **On the Physician’s Oath: Decree of the President of Ukraine of June 15, 1992, [paragraph 2 part 1].**

“... To be selfless and responsive to patients ...”

### ▶ **On Approval of the Clinical Protocol for Providing Palliative Care, Symptomatic and Immunosuppressive Therapy to HIV and AIDS Patients: Order of the Ministry of Health of Ukraine of July 3, 2007 No. 368**

“...Relieving pain and other symptoms of the illness to improve the quality of life of a patient, educating the family of the patient in how to alleviate the suffering of the loved one ... Medical services in palliative care should be available around the clock”.

### ▶ **On Approval of the Sample Regulation on Hospice and Palliative Care Departments for HIV and AIDS Patients: Order of the Ministry of Health of Ukraine of December 27, 2007 No. 866.**

- ▶ **On Approval of the Sample Regulation on “Hospice” hospital (department, palliative treatment ward) for Tuberculosis Patients: Order of the Ministry of Health of Ukraine of June 11, 2010 No. 483.**
- ▶ **On Establishing the State Enterprise “Institute of Palliative and Hospice Medicine” at the Ministry of Health of Ukraine: Order of the Ministry of Health of Ukraine of July 24, 2008 No. 159-O.**
- ▶ **Instruction defining an order of medical provision in the Security Service of Ukraine: Order of the Security Service of Ukraine of 08.10.2007 (paragraph 7. 1)**

“A patient has a right to:

... pain connected with disease or/ and medical intervention...”

- ▶ **On Approving of a Typical Table of Equipping Medical Institutions, Providing Health Care to Cancer Patients with Major Medical Accessories and Products of Medical Purpose. Order of Ministry of Health of Ukraine of December 15, No. 954.**
- ▶ **On Approving the Order of Drugs, Psychotropic Substances and Precursors Circulation in Health Care Institutions of Ukraine. Of January 21, 2010, No. 11.**

#### **d) Provider Code(s) of Ethics**

- ▶ **Code of Ethics of Physicians of Ukraine, adopted and signed at the National Congress of Health Care Organizations and at the X Congress of the Ukrainian Medical Association on September 27, 2009 [paragraph 3.11].**

“A doctor must remain next to a dying patient until the last moments of the patient’s life, provide appropriate therapy and supervision, maintain adequate quality of life, maximally relieve physical and mental suffering of the patient and his/her family utilizing all the means available”.

#### **e) Other Relevant Sources**

There are no other relevant sources on this matter.

## f) Practical Examples

### 1. Example(s) of Compliance

Plaintiff Mr. Yu initiated a lawsuit against the central hospital of city D. in order to be compensated for moral damage. On October 27, 2005 he was injured at work and sought medical assistance at the hospital. On the same day, he was hospitalized with the diagnosis of “trauma to the right half of the chest” but did not receive any treatment and was discharged for work on October 31, 2005. The plaintiff repeatedly explained to the head of the Trauma Department Mr. B. that he felt a sharp pain in the chest, suggesting that he had broken bones, and asked for an adequate course of treatment and pain management, but this was denied to him. After the discharge from the hospital, his condition worsened, and Mr. Yu was forced to seek help from another health care institution where he has received appropriate medical care. The claims of Mr. Y were satisfied, the court decided to order the defendant to pay 5,000 hryvnias to compensate for the moral damage caused.

### 2. Example(s) of Violation

For almost two weeks in one of the regional hospitals, a woman was dying from cancer “with a pronounced pain syndrome”. Only after a neighbor in the ward complained to the chief of staff of the merciless behavior of the attending physician, the woman was prescribed opioid analgesics. This decision was made the day before the death of the patient.

### 3. Actual Case(s)

In March 2007, Mr. B. was arrested by the police on suspicion of having committed a crime. He was charged with committing a crime under part 2 of Article 121 and part 3 of Article 185 of the Criminal Code of Ukraine and “detention” was used as a precautionary measure. The case was referred to the District Court of district Z., region Kh. In April 2007, while in prison No. X, he was diagnosed with cancer (hiperrefroma) of the left kidney T3-4 N1 M1, metastatic process in lungs 4/II class. group, and chronic liver cirrhosis.

The representative of Mr. B. repeatedly submitted to the court a petition to change the preventive measure used because of the grave state of health of Mr. B., but none of the petitions was granted. Moreover, Mr. B. was mandatorily transported to the court hearings of his case (the court is located 50 km from the prison), which inflicted to him great physical and moral suffering.

Both before and during his detention in prison, Mr. B. constantly complained of an intolerable pain. According to the medical certificate issued by the head of the medical unit of the prison, Mr. B. was provided with symptomatic treatment, including narcotic analgesics; however, Mr. B. claimed that the amount prescribed to him was insufficient given the last stage of the disease. Besides, the prison did not have its own specialist-oncologist and because of this the applicant suffered daily pain and suffering.

An address to the European Court of Human Rights states that the failure to provide adequate medical care violated Art. 3 of the Convention on Human

Rights and Fundamental Freedoms. In addition, induced transportation of Mr. B. to and from the hearings caused him pain and physical and moral suffering that may fall under the definition of “torture” as defined in Art. 3 of the Convention. On the basis of the request addressed to the European Court of Human Rights and to the relevant government authorities, Mr. B. was hospitalized in the regional cancer hospital where his malignant tumor was removed and he received a proper postoperative treatment, radiation therapy, etc.

### **g) Practice Notes**

1. Pain management as one type of medical intervention has indications, counter indications and complications. It is usually a supplementary intervention, additional to the main intervention: for example, the main intervention is delivery and supplementary intervention is epidural anesthesia. Pain management aims to ease and relieve the pain without slowing down the process of the main medical intervention and without harming the patient.
2. Palliative care is provided to patients at the last stages of incurable diseases and includes a complex of measures directed at easing of physical and emotional sufferings of a patient and providing of psycho-physical and moral support of their family members.
3. A relief of pain and other symptoms to improve the quality of life of a patient is one of the leading normatively defined principles of palliative care, and therefore, while justifying one’s request, in order to create conditions for realizing the right in question and in spite of the imperfections of the legal regulation of this issue, one should utilize this fundamental approach.

### **h) Cross-referencing Relevant International and Regional Rights**

Please review international and regional standards related to the right to prevent possible suffering and pain in the context of the right to the highest attainable standard of physical and mental health discussed in sections 2 and 3

## **6.1.12 Right to Personalized Treatment**

### **a) Right 12 as Stated in the ECPR**

#### **Article 12. Right to Personalized Treatment**

*Each individual has the right to diagnostic or therapeutic programs tailored as much as possible to his or her personal needs.*

## b) Right as Stated in Country Constitution/Legislation

- ▶ **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Articles 6 (paragraph “e” part 1), 35-1 – 35-5, 38 (part 1), 39 (part 3), 43 (part 3)].**

Articles 6 and 38 provide for the choice of treatment in accordance with medical recommendations of the doctor and Article 1939 provides for the right to medical information, particularly regarding the goal of the proposed studies and treatment, prognosis of the possible development of the disease; Article 43 refers to the duty of the doctor to explain that the lack of a consent to a medical intervention can lead to serious consequences for the patient (that is, we are dealing with particular aspects of the right to personalized treatment that is defined through other rights of the patient).

## c) Supporting Regulations/ Bylaws/ Orders

- ▶ **A Guide to Qualificational Characteristics of Professions of Employees: Order of the Ministry of Health of Ukraine of March 29, 2002 No. 117**

Paragraph 35, “A neurosurgeon” – the doctor, in particular, justifies an outline, a plan and tactics for examination and treatment of a patient, indications and contraindications for the surgery, a plan for its preparation. He/she develops outlines for postoperative supervision of the patient, prevention of possible complications;

Paragraph 86, “A surgeon” – the doctor determines indications for hospitalization according to the type of the disease, tactics for medication-based and surgical treatment of the patient, taking into account his/her state, the need for preoperative preparation;

Paragraph 87, “a Pediatric Surgeon” – the doctor determines indications for hospitalization according to the type of the disease, tactics for medication-based and surgical treatment of the patient, taking into account his/her state, the need for preoperative preparation. He/she develops outlines for postoperative supervision of the patient;

Paragraph 90, “Cardiovascular Surgeon” – the doctor develops a plan for preparing the patient for either an urgent or a routine surgery, determines the level of disruption of hemostasis, prepares all functional systems of the body of the patient for the surgery. He/she detects possible transfusion reactions and complications, takes measures to address them. He/she develops outlines for postoperative management of the patient and measures for prevention of complications.

- ▶ **On Approval of the Uniform Methods for Developing Clinical Guidelines, Medical Standards, Uniform Clinical Protocols for Medical Assistance, Local Protocols for Medical Assistance (Clinical Tracks for Patients) on Evidence-based Medicine: Order of the Ministry of Health of Ukraine, Academy of Medical Sciences of Ukraine of February 19, 2009 No. 102/18.**

“Evidence-based medicine is fair, accurate and deliberate use of the best clinical research for making treatment choices for a particular patient”.

- ▶ **Framework on Management of Medical Care Quality in the Sphere of Health Care in Ukraine for the Period up to 2020. Order of Ministry of Health of Ukraine of August 1, 2011, No. 454.**

#### **d) Provider Code(s) of Ethics**

- ▶ **Code of Ethics of Physicians of Ukraine, adopted and signed at the National Congress of Health Care Organizations and at the X Congress of the Ukrainian Medical Association on September 27, 2009 (paragraph 3.2).**

“In his/her work, he/she must observe the Constitution and laws of Ukraine, existing regulations on medical practice, taking into account peculiarities of the disease, must use methods of prevention, diagnosis and treatments that are considered most effective in each case, guided by the interests of the patient ... In case of providing patient care under the circumstances not envisaged by the legislation, regulations and job instructions, a physician must consider primarily the interests of the patient, the principles of medical ethics and morality”.

#### **e) Other Relevant Sources**

There are no other relevant sources on this matter.

#### **f) Practical Examples**

##### **1. Example(s) of Compliance**

An obstetrician-gynecologist examined a 37 years old pregnant woman: the doctor gathered basic information pertaining to anamnesis and based on obstetric examination, filled out necessary medical documentation, determined the amount of general and individual laboratory tests needed. Given the age of the the woman, her complicated medical history (stillbirth with previous pregnancies), she sent the patient for medical genetic counseling, a screening for perinatal period infections and a screening for gestational diabetes.

## 2. Example(s) of Violation

On the third week of pregnancy, Ms. N. visited an obstetrician-gynecologist for a prenatal exam. The doctor gathered basic information related to anamnesis and the obstetric examination, filled out necessary medical documentation, determined the amount of laboratory tests needed. The pregnant woman regularly visited the doctor and repeatedly complained about the deterioration of her state of health which the doctor attributed to toxicosis. On the seventh month of pregnancy, Ms. N. was admitted to the hospital in a serious condition: it was determined that the fetus in the womb froze. The life of the woman was saved. After the diagnosis was established, it became clear that she did not have a screening for perinatal infection performed even though she repeatedly complained of poor health and stated that she could not get pregnant for a long time. While developing an individual plan for patient management, at the outset the doctor did not schedule necessary testing and did not point out the need to follow up with the patient, to take into account her state at a later stage.

## 3. Actual Case(s)

Mr. F. contacted a private health care institution to have a surgery performed to correct the pathology of intervertebral discs. Relying on Temporary Interdisciplinary Unified Standards for Medical Diagnostic and Therapeutic Technologies in Adult Inpatient Care in Health Care Institutions of Ukraine, approved by the Order of the Ministry of Health of Ukraine of July 27, 1998, the physician determined the amount of diagnostic studies the patient should undergo before the surgery. After the surgery, the patient's condition improved, he was able to move around on his own, but he developed purulent-septic complications, the possibility of which he was warned of by the doctor prior to the medical intervention. Mr. F. wrote a complaint against the doctor to the head of the clinic, noting that the doctor did not carry out prevention of possible complications, in particular, did not prescribe him antibiotics, did not develop a proper outline for postoperative supervision, did not observe his condition in the dynamic situation, indicating only that the standards for providing this type of care do not provide for the introduction of antibiotics. Hence, no individual approach to treatment was provided in this facility. In order to resolve the conflict, the chief of staff of the clinic reimbursed the patient for the cost of the stay and treatment in the clinic, institution, and the patient was provided with further assistance at the institution free of charge until his full recovery.

## g) Practice Notes

1. While examining medical records, it is necessary to analyze clinical standards or clinical protocols for specific medical nosology, to determine whether a medical practitioner performed a full range of diagnostic and therapeutic services, whether the state of health of the patient was taken into account, his/her medical history, whether preliminary examination of the patient was carried out. This can be achieved by comparing the medical history of an inpatient or an outpatient, on the one hand, and the standards, protocols for medical care on the other.

2. While choosing an individual plan for the diagnosis and treatment of a patient, a physician must obtain patient's consent to planned interventions.
3. While developing an individual plan for treatment, diagnosis, prevention or rehabilitation, a physician should consider the overall requirements set out in the regulations, principles of evidence-based medicine: that is, he/she must use systematically, precisely and consciously the best results of clinical trials for the treatment of a specific patient.

## **h) Cross-referencing Relevant International and Regional Rights**

Please review international and regional standards related to the right to personalized treatment in the context of the right to the highest attainable standard of physical and mental health discussed in sections 2 and 3 and in the context of the right to non-discrimination and equality discussed in sections 2 and 3.

### **6.1.13 Right to Complain**

#### **a) Right 13 as Stated in the ECPR**

##### **Article 13. Right to Complain**

*Each individual has the right to complain whenever he or she has suffered a harm and the right to receive a response or other feedback.*

#### **b) Right as Stated in Country Constitution/Legislation**

##### **▶ Constitution of Ukraine of June 28, 1996 [Article 40].**

“Everyone has the right to file an individual or a collective written petition or personally appeal to public authorities, local government and officials and employees of the bodies that are required to examine petitions and provide an answer within the period determined by law”.

##### **▶ On Citizens' Petitions: Law of Ukraine of October 2, 1996.**

“Citizens of Ukraine have the right to appeal to state authorities, local government, public associations, enterprises, institutions and organizations irrespective of their form of ownership, media, other officials in accordance with their executive responsibilities with comments, complaints and suggestions concerning their statutory activities, a petition or a request to



implement one's socio-economic, political and personal rights and interests as well as complaints of their violation" (part 1 Art. 1).

- ▶ **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Article 6 (paragraph "1")].**

Article 6 guarantees the right to appeal unlawful decisions and actions of employees, institutions and health care authorities.

### **c) Supporting Regulations/ Bylaws/ Orders**

- ▶ **On Immediate Measures to Ensure Implementation and Guarantee the Constitutional Right to Appeal to State and Local Authorities: Decree of the President of Ukraine of February 7, 2008 No. 109/2008.**
- ▶ **On Approval of the Instructions on Handling Citizens' Petitions by State and Local Authorities, Public Associations, Enterprises, Institutions and Organizations Regardless of Their Form of Ownership and in the Media: Resolution of the Cabinet of Ministers of Ukraine of April 14, 1997 No. 348.**
- ▶ **On Implementation of the Decree of the President of Ukraine of February 7, 2008 No. 109/2008 "On Immediate Measures to Ensure Implementation and Guarantee the Constitutional Right to Appeal to State and Local Authorities": Order of the Ministry of Health of Ukraine of March 14, 2008 No. 132.**

"To carry out a comprehensive analysis of handling of citizens' petitions and to take immediate steps to ensure implementation of the constitutional right of citizens to a written petition, an appointment in person, a mandatory well-grounded answer, strict implementation of the provisions of the Law of Ukraine "On Citizens's Petitions", organized handling of citizens' petitions ..." ( paragraph 1.1).

- ▶ **On Approval of the Provision on the Procedure for Handling Citizens' Petitions and Setting up Appointments at the Ministry of Internal Affairs of Ukraine: Order of Ministry of Internal Affairs of Ukraine of October 10, 2004 No. 1177.**
- ▶ **On Handling the Review and Resolution of Petitions and Setting up Appointments at the Offices of Procuracy of Ukraine of December 28, 2005 No. 9.**

**d) Provider Code(s) of Ethics**

There are no provisions in existing codes of ethics on this matter.

**e) Other Relevant Sources**

There are no other relevant sources on this matter.

**f) Practical Examples****1. Example(s) of Compliance**

Mr. N. filed a complaint with the Department of Health against the chief of staff of a health care institution. The head of the Department issued an executive order to set up a commission to carry out an internal investigation of the facts described in the petition. As a result, the commission prepared a statement on the basis of which the head of the Department provided the petitioner with a response within a month.

**2. Example(s) of Violation**

Mr. S., an attorney of Mr. Yu who due to a poor repositioning of a fractures at the Regional Hospital of Region Zh. received group III disability, sent a complaint to the Department of Health at the regional administration. Two months later, the attorney received a letter of response which stated that the review of the complaint found no violations of the professional duties by the doctors. In the complaint to the Ministry of Health of Ukraine, the attorney pointed out not only the biased and incomplete review of the petition but also the violation of the deadline for the review of the complaint. In particular, he noted that the date in the case number on the letter of response was indicated in compliance with the current legislation while the stamp on the envelope indicated a significant difference between the date that was specified in the letter of response and the date when the letter was mailed.

**3. Actual Case(s)**

Mr. N. filed a complaint against a health care practitioner at an outpatient clinic explaining that his son, born in 1985, visited the doctor with symptoms of malaise, hyperthermia, and pain. The doctor reassured the patient by stating that he had influenza and prescribed a medication-based treatment to him. A few days later the son was hospitalized with left-side pneumonia and strong intoxication. Mr. N., as a father, demanded that the chief of staff of the clinic examined the negligent performance of professional duties by the physician. In 15 days, the chief of staff of the clinic replied to the petitioner that according to current legislation, namely Article 16 of the Law of Ukraine "On Citizens' Petitions", a complaint on behalf of a minor must be submitted by his/her legal representative and a parent does qualify as one. However, at this point, according to Article 32 of the Civil Code of Ukraine, his son is no longer a minor so the father has no right to file a complaint on his son's behalf. The answer to his petition may be granted only

if the applicant in addition to the complaint includes a document that properly testifies to the scope of his authority (power of attorney).

### **g) Practice Notes**

1. Requirements for petitions one should keep in mind while resorting to this method of defense:
  - a) a petition must specify a full name (not just initials) and a place of residence of the citizen, formulate the issue clearly, stating a request or a demand;
  - b) petition format – oral or written; type of filing – by an individual (individual) or by a group of people (collective); method of filing – personally or through a representative whose powers are properly certified; method of delivering it to the recipient – directly by taking it there (one should obtain a receipt) or by mail (by registered or by certified mail);
  - c) a written petition must be signed and dated by the petitioner(s);
  - d) repeated petitions from the same citizen on the same issue are not reviewed by the same body if the first petition was resolved nor are those petitions that were submitted too late and petitions from individuals declared incompetent by the court;
  - d) a complaint on behalf of a minor or an incompetent individual is filed by his/her legal representatives;
  - e) a decision may be contested by appealing to higher authorities or higher officials within one year after being adopted, but not later than one month after the citizen became aware of the decision. A deadline missed due to valid reasons may be restored by an authority or an official that reviews the complaint;
  - e) petition review deadlines: petitions are reviewed and resolved within one month from the date of their receipt, and those that do not require further examination are reviewed without delay but not later than fifteen days from their receipt. If issues raised in the petition can not be resolved within one month, the head of the authority, enterprise, institution, organization or his/her deputy set necessary time for the review and inform the petitioner about it. However, the overall term for resolving the issues raised in the petition may not exceed forty-five days;
  - g) petitions are reviewed free of charge;
  - h) if a petitioner wants to be personally present (by oneself or with a representative) when the petition is reviewed, it is advisable to request in the complaint or the petition that the authority reviewing the petition secure this right.
2. Proposals, petitions and complaints by the same citizen on the same issue sent to different recipients and submitted to one and the same organization (duplicates) are recorded under the registration number assigned to the first proposal, petition, or complaint with the addition of a serial number that follows a slash.

3. Files to be permanently or temporarily (for more than 10 years) stored are transferred to the archives of the organization two years after they were closed. Files for temporary storage (for up to 10 years) are submitted to the archives by the decision of the head of the organization. After the expiration of the storage period, the proposals, petitions and complaints are destroyed.
4. All petitions received by the addressee must be accepted and uniformly recorded on the day of their arrival using registration cards suitable to be processed on personal computers or in the register (permitted to be used in organizations that receive annually up to 600 proposals, petitions and complaints and the same number of citizens' requests for an in person appointment). Envelopes (envelope clippings) are stored together with proposals, petitions, complaints. Registration of in person appointments is done on the cards, in a register or with the help of computers.
5. An administrative form of protection which includes an appeal (a written or an oral proposal (recommendation), a petition (solicitation) and a complaint) is discussed in section 8.2.2.

## 6.1.14 Right to Compensation

### a) Right 14 as Stated in the ECPR

#### **Article 14. Right to Compensation**

*Each individual has the right to receive sufficient compensation within a reasonably short time whenever he or she has suffered physical or moral and psychological harm caused by a health service treatment.*

### b) Right as Stated in Country Constitution/Legislation

- ▶ **Constitution of Ukraine of June 28, 1996 [Article 3 (part 1)].**
- ▶ **Civil Code of Ukraine of January 16, 2003 [Articles 22 (part 1), 23, 906, 1166 (part 1, 2), 1167 (part 1), 1168, 1195-1203, 1209].**

“An individual who suffered losses as a result of having his/her civil right violated is entitled to compensation” (Article 22). “A individual is entitled to compensation for moral damages due to violations of his/her rights. Moral damages are physical pain and suffering that an individual suffered due to an injury or other damage to health; emotional distress that an individual suffered due to an unlawful behavior in relation to him/her, members of his/her family or his/her close relatives; humiliation of honor and dignity of an individual as well as business reputation of an individual or a legal entity. Moral damages are compensated for with money, other property or otherwise. The size of monetary compensation for moral damages is

determined by the court depending on the nature of the offense, the degree of physical and mental suffering, decreased abilities of the victim or deprivation of the ability to exercise them, degree of guilt of the individual who inflicted moral damage, if it constitutes grounds for compensation, as well as other essential circumstances. When determining the amount of compensation, one takes into account the requirements of reasonableness and fairness. Moral damages are recoverable regardless of property damages to be compensated for and are not dependent on the size of the latter compensation. Moral damage is compensated for only once, unless otherwise provided by a contract or the laws.” (Article 23).

“Moral damage caused to an individual or an entity by unlawful decisions, actions or inaction shall be compensated by the person who caused it, if his/her guilt is established” (Art. 1167).

“Compensation for moral damage caused by an injury, other damage to health, or death of the individual:

1. Moral damage caused by an injury or other damage to health may be compensated for once or by means of monthly payments.

2. Moral damage caused by the death of an individual is compensated to the husband (wife), parents (adoptive parents), children (adopted children) as well as those who lived with the deceased as one family” (Art. 1168).

“An individual or a legal entity that has caused an injury or damage to the health of another individual is required to compensate the victim for the wages (income) lost due to the loss or reduction of professional or general capacities and compensate for additional expenses caused by the need for enhanced nutrition, rehabilitation at a resort, purchase of medication, prosthetics, outside care, etc.” (paragraph 1 Art. 1195). “Damage caused to an individual by an injury or other damage to health is compensated in addition to the pension assigned due to the loss of health or pension received previously as well as other income” (part 3 Art. 1195).

► **On Protection of Consumer Rights: Law of Ukraine of May 12, 1991 (in the reading of December 1, 2005) [Articles 4 (paragraph 5 part 1), 16].**

“A consumer has the right ... to be compensated for damages (losses) caused by defective or counterfeit products or products of poor quality and proprietary and moral (non-proprietary) damage caused by the products that constitute danger to life and health of people in the cases stipulated by law” (paragraph 5 part 1 Article 4).

Article 16 of this Law (“Proprietary Liability for Damage Caused by Defective Products or Products of Poor Quality”) states among other:

1. Damage to life, health or property of the consumer caused by defective products or products of poor quality is compensated in full, unless the law provides for a higher degree of liability.

2. Each victim has the right to demand compensation for damages suffered regardless of whether he/she had a contractual relationship with the manufacturer (provider, seller).

Given this, a consumer is required to prove: 1) presence of damage, 2) defects in the product, 3) presence of a causal link between the damage and the defects. The liability of the producer (provider), according to the provisions of this Law, does not depend on the actions or inaction of others who are related in some way to the damage caused by the defective products or products of poor quality.

5. A manufacturer (provider, seller) is exempt from liability if he/she proves that: 1) the damage was caused due to the fault of the consumer as a result of the violation of the established rules of use, storage or transportation of the products or force majeure, 2) he/she did not introduce the product into circulation, 3) the defect in the product resulted from the observance of legal requirements by the manufacturer or following mandatory prescriptions of the state authorities.

- ▶ **On Mandatory State Social Insurance for Temporary Disability and Costs Arising from a Birth or a Burial: Law of Ukraine of January 18, 2001 (Article 51).**
- ▶ **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Article 6 (paragraphs “k”, “l”)].**

Article 6 states that : “each citizen of Ukraine has the right to health which presupposes ... compensation for damage caused to health (paragraph “k”); ...to appeal unlawful decisions and actions of employees, institutions and health care authorities (paragraph “l”).”

- ▶ **On Protection of the Population from Infectious Diseases: Law of Ukraine of April 6, 2000 [Article 19 (paragraph 3 part 1)].**

“To initiate a lawsuit to be compensated for damages caused to one’s health and (or) property as a result of the violation of the laws that protect the population from infectious diseases”.

- ▶ **On Resistance to Diseases Caused by Human Immunodeficiency Virus (HIV), and Legal and Social Protection of People Living With HIV: The Law of Ukraine of 12.12.1991. (The wording of 23.12.2010.) (Article 17)**

“Persons, who were contaminated with HIV during blood (its components) transfusion, biological liquids, cell tissues and human organs transplantation, conduction of medical manipulations and execution of ones duties, have the right to judicial compensation for damages to their health”

“... The right to be compensated for damages related to the restriction of their rights which resulted from the disclosure of the fact that these individuals were infected with human immunodeficiency virus” (paragraph 1 part 2 Art. 17).

“People who were infected with an HIV-infection as a result of medical manipulations are entitled to a redress for the damage caused to their health by the responsible individual” (Art. 20).

▶ **On Psychiatric Care: Law of Ukraine of February 22, 2000 [Article 25 (paragraph 15 part 3)].**

“... The right to compensation for damages suffered or damages to one’s property as a result of an illegal placement into a psychiatric institution or neuropsychiatric institution for social protection or special education or because of a failure to provide safe conditions for psychiatric care or disclosure of confidential information about mental health and the fact of mental health care being provided”.

### c) Supporting Regulations/Bylaws/Orders

▶ **Framework on Management of Medical Care Quality in the Sphere of Health Care in Ukraine for the Period up to 2020. Order of Ministry of Health of Ukraine of August 1, 2011, No. 454.**

“The aim of the framework... is securement of reimbursement in case of medical medical damages incurment.”

### d) Provider Code(s) of Ethics

There are no provisions in existing codes of ethics on this matter.

### e) Other Relevant Sources

▶ **Responsibility of medical workers: Letter of the Ministry of Justice of Ukraine, Department of Constitutional, Labor and Humanitarian Legislation of January 20, 2011.**

▶ **On Judicial Practice in Cases of Compensation for Moral (Non-proprietary) Damage: Resolution of the Plenary Assembly of the Supreme Court of May 25, 2001 No. 5 (as amended by the Resolution of the Supreme Court of Ukraine of May 25, 2001 No. 5).**

“Moral damages are non-proprietary losses due to moral or physical suffering or other negative effects caused to an individual or a legal entity by unlawful actions or inaction of others.

A claim for compensation for moral (non-proprietary) damage must contain a statement of what the damage is, what wrongful actions or inaction caused the damage to the plaintiff, on what grounds he/she determined the extent of the damage, and what evidence confirms this.

According to the general rules for civil liability, while settling the dispute about the compensation for moral (non-proprietary) damage, the following is mandatory to be established: presence of the damage, unlawfulness of the actions of the individual/entity that caused the damage, presence of a causal connection between the damage and the unlawful actions as well as the guilt of the individual/entity that caused the damage. An individual or a legal entity is exempt from liability for non-proprietary damage if he/she proves that the latter was not due to his/her fault.

The court, in particular, must determine what evidence exists to support the fact of moral or physical suffering or non-proprietary losses by the plaintiff, what circumstances or what actions (inaction) caused the damage, what monetary sum or in what material form the plaintiff assesses the damage he/she suffered and on the basis of what considerations this assessment is based as well as other circumstances relevant to resolving the dispute. The court determines the amount of compensation for moral (non-proprietary) damage on the basis of the nature and extent of the suffering (physical, emotional, mental, etc.) incurred by the plaintiff, the nature of non-proprietary losses (their duration, possibility of recovery, etc.) and taking into consideration other circumstances. In particular, the state of health of the victim, the severity of forced changes to his/her life and employment relations, the degree of reduction of prestige, business reputation, time and effort needed to restore the previous state are taken into consideration. In doing this, the court relies on the requirements of reasonableness, fairness and deliberation.

If moral damage was caused to an individual, the obligation to compensate for it rests on the perpetrators regardless of whether the victim suffered any property damage and whether he/she was compensated for it”.

► **On the Procedure for Civil Lawsuits on Consumer Rights Protection: Resolution of the Plenary Assembly of the Supreme Court of Ukraine of April 12, 1996 No. 5.**

“... In hearing the lawsuits on consumer protection initiated as a result of inaccurate or incomplete information about goods (work, services) ... the court should proceed from the assumption that the consumer has no specialized knowledge about the properties and characteristics of the goods (work, services).

... Damage to life, health or property of consumers by goods (work, services) which contain structural, manufacturing, formulation or other flaws, or in connection with the use of the products, materials, equipment, tools, instruments and other means necessary to carry out given work or services by the provider regardless of his/her knowledge of their properties, or by selling goods (work, services) without compliance with specified require-



ments for the safety of life and health of consumers and their property, or in connection with the acquisition by the consumer of goods (work, services) without being provided with necessary, accessible and credible information which would grant an opportunity to make a competent choice—is compensated in full if the law does not provide for a higher degree of liability, and given such a law in the amount established by it. Each consumer-victim has the right to demand a compensation for the damage regardless of whether he/she is in a contractual relationship with the manufacturer (provider) and this right is valid for a term of specified service life (shelf life) of the product and, if the term is not set, for ten years from the time when the product was manufactured (work, services were accepted). If, in violation of the law, the manufacturer (provider, seller) failed to warn consumers about the availability of service life (shelf life) for the product or part of it (results of work), about the mandatory conditions for its use and possible consequences of the failure of complying with them, and about what to do after the service/shelf life term expires, the damage is subject to compensation even when the damage was caused after the expiration of the term”.

► **On the Procedure for Civil Lawsuits on Compensation for Damages: Resolution of the Plenary Assembly of the Supreme Court of Ukraine of March 27, 1992 No. 6.**

“In hearing lawsuits to compensate for damages, courts should bear in mind ... that a legal entity is liable only when the individual who is responsible for causing the damage has labor relations with this organization and the damage was caused in connection with him/her carrying out his/her employment (service) duties, regardless whether the labor contract in question was for a permanent, seasonal, temporary employment or he/she was an employee of the organization under other conditions” (paragraph 5). “An individual who is responsible for the damages caused due to the fault of another individual has the right to a counterclaim against the guilty person; it will not contradict the law for the victim to exercise the option of claiming compensation directly from the guilty person if by law the liability boundaries between the guilty person and the person responsible for him/her are the same” (paragraph 8).

► **On the Procedure for Civil Lawsuits on Compensation for Damages Caused by Businesses, Institutions, Organizations and Their Employees: Resolution of the Plenary Assembly of the Supreme Court of Ukraine of December 29, 1992 No. 14.**

“The demands of others based on improper carrying out of employment duties by an employee (compensation for damage to one’s property, health ...) are to be met by the enterprise to which the guilty employee is liable by recourse by the norms of labor legislation.

## f) Practical Examples

### 1. Example(s) of Compliance

Mr. Ts died in the cardiology department of a health care institution because of inadequate medical care provided. His daughter filed a complaint against the medical personnel with the police. The latter, on the basis of a preliminary investigation, found no grounds for a criminal investigation into the death of Mr. Ts. The daughter of the deceased initiated a civil lawsuit to compensate her for material and moral damages inflicted by her father's death with the hospital acting as a defendant in the case. The court partially satisfied the claim.

### 2. Example(s) of Violation

Mr. D., born in 1993, (who by the decision of the guardianship and care authorities was granted full civil capacity in order to enter into an employment contract) was hospitalized in a medical facility after a road accident. After a medical intervention was carried out to consolidate an open fracture of a tibia bone and a long postoperative period, it turned out that the patient developed iatrogenic pathology – osteomyelitis. The father initiated a lawsuit to recover the moral and material damage caused to him and his son by unlawful actions of the medical staff.

### 3. Actual Case(s)

In December 2006, Mr. M. filed a lawsuit against the Information and Advisory Center "T." to compensate him for material damage in the amount of 1,300 hryvnias and moral damage in the amount of 50,000 hryvnias. To substantiate his claim, the plaintiff cited the fact that in May 2006 he asked the defendant for medical assistance because he showed signs of some ailment of the urinary-reproductive system. On March 12, 2006, the plaintiff was examined at a branch of the defendant's company where the plaintiff was diagnosed with "chronic cystopyelitis" and was prescribed a three stage rehabilitation treatment using the drugs of the company "T." The course of treatment ended in September 2006. Since the condition and the state of health of Mr. M. did not improve as the result of the treatment, he went for a consultation to the Kharkiv Urological Center where he was examined and diagnosed with "prostate cancer". The plaintiff argued that due to the wrong diagnosis made by the defendant, he failed to detect the disease on time and receive appropriate medical care. The ruling of the court of November 14, 2007 granted the motion of the plaintiff to take to court as defendants for the center workers "T." Mr. R and Mr. K. The ruling of the court of November 21, 2005 granted the plaintiff's motion to secure compliance and impose a seizure of property of Center "T", Mr. R and Mr. K. in the amount of 52,000 hryvnias each, irrespective of the location of the property. The defendants challenged the ruling. The Court of Appeal concluded that the appeal must be met only in part given that the form of the satisfaction of the claim elected by the court is not commensurate with the amount of the claim. The Court decided to satisfy the claim in part as follows: to recover material damage in full, that is

in the amount of 1,300 hryvnias and to recover moral damage in the amount of 30 thousand hryvnias from the defendants jointly.

## **g) Practice Notes**

### **1. The right to compensation for moral damage.**

1.1. According to paragraph 1 of Article 60 of the Civil Procedure Code of Ukraine, each party is obliged to prove the circumstances to which it appeals as grounds for a claim. Paragraph 4 of the Resolution of the Plenary Assembly of the Supreme Court of Ukraine “On Judicial Practice in Cases of Compensation for Moral (Non-proprietary) Damage” indicates that, “according to Article 137 of the Civil Procedure Code of Ukraine, while filing a claim a plaintiff should state the grounds on which the amount of damage is determined and the evidence that supports it”.

In the majority of claims to compensate for moral damage filed in court, plaintiffs do not go beyond the statement: “I suffered moral damage”. However, the lack of evidence as to what kind of moral damage was incurred by the unlawful actions of the defendant (defendants) leads to a court ruling to suspend proceedings and, if no corrections are made by the plaintiff within a set period of time, the court rules to drop the case.

1.2. According to Article 57 of the Civil Procedure Code of Ukraine, evidence consists of any facts on the basis of which the court can determine the presence or absence of circumstances that either justify or challenge the claims and demands of the parties involved and other circumstances relevant to solving the case. These facts are determined on the basis of the statements of the parties involved, third parties, their representatives questioned as witnesses, witness testimonies, written evidence, material evidence, including audio and video recordings, conclusions of experts.

Psychological forensic examination constitutes one of the methods of establishing the fact of moral damage. A forensic psychologist can establish the presence or absence of signs of moral damage that was incurred to an individual and determine a material equivalent of the moral damage that was incurred. The findings of medical practitioners (for example, notes made by a psychiatrists on the state of health of a patient in primary medical documentation) serve as popular evidence of the state of health of the plaintiff and of the impact of negative emotional experiences on the deterioration of his or her health in cases that involve compensation for moral damage.

In the course of presenting evidence in court, one should clarify a causal link between each piece of evidence and the fact of causing moral damage. Availability of sufficient evidence guarantees a fair determination of the amount of compensation for moral damage by the court.

1.3. According to Article 268 of the Civil Code of Ukraine, the claims arising from the violation of personal, non-proprietary, rights do not expire. .

1.4. In those cases when the amount of compensation for moral damage is determined as a multiple of minimum wages or minimal untaxed income of a citizen, one should utilize the minimum wages or minimal untaxed income at the time of the proceedings.

1.5. When moral damage was caused by several defendants, the claims should be made against each individual defendant. When moral damage was caused by unlawful actions of several individuals, the amount of the compensation is determined taking into account the degree of liability of each of them. When moral damage was inflicted by a group of individuals collectively (interconnected, cumulative actions or actions unified by a single intention), the compensation is a joint responsibility.

1.6. According to Article 1172 of the Civil Code of Ukraine and paragraph 8 of the Resolution of the Plenary Assembly of the Supreme Court of Ukraine "On Judicial Practice in Cases of Compensation for Moral (Non-proprietary) Damage", when moral damage was caused by an individual in the course of performing his/her employment duties, the responsibility falls on the organization which employs this individual, and the individual is liable to the organization in the order of recourse. Under such circumstances, the claim is made against the employer (a health care institution or an individual entrepreneur) who acts as a defendant, and the medical practitioner whose actions caused the damage acts as the third party.

1.7. Moral damage is recoverable regardless of the compensation for material damage and is not dependent on the size of this compensation. Moral damage is compensated for only once, unless otherwise provided by a contract or by law. When determining the amount of compensation, one should take into account the requirements of reasonableness and fairness. In any case, the amount of compensation should be adequate for the moral damage incurred.

## 2. The right to compensation for material damage.

2.1. Among many ways to protect personal non-proprietary rights and, in particular, the rights of patients in the course of providing them with medical assistance or medical services, there is a right to restitution and other compensation for material damage. In the health sector, the responsibility falls onto health care institutions and medical practitioners who engage in private practice. Civil liability is divided into 2 types: 1) contractual; 2) delictual.

2.2. Contractual and delictual liabilities are delineated by the rule whereby if the conditions for a contractual claim are met, a non-contractual claim is not evoked: contractual claims supersede non-contractual claims. This, of course, does not weaken the liability established by law. The decision on contractual liability is made if the parties have contractual obligations. If there are no contractual obligations between the parties, it is permitted to resort to delictual liability.

2.3. When providing medical services under a payment contract, contractual liability is involved. Its amount cannot be less than the amount of delictual liability. On the contrary, the level of compensation for damages

can be increased in comparison with the general rule. The function of the contract in such cases is that with its help the obligation imposed by the law to compensate for the damage applies in one of the following three areas: grounds for the commitment, parties of the commitment, and content of the commitment.

The analysis of contractual obligations shows that, according to section 2 of Article 901 of the Civil Code of Ukraine, the rules established in Section 63 of “Services. General Considerations” apply to all service contracts (including medical service contracts) if they do not contradict the essence of the commitment.

2.4. The conditions for delictual liability in the health sector according to the civil legislation of Ukraine are: 1) an unlawful action (inaction) of medical staff, 2) damage caused to a patient, 3) a causal connection between the unlawful action and the onset of the damage, 4) liability of the party that inflicted the damage.

2.5. The civil legislation of Ukraine operates on the principle of the presumption of guilt of an individual who inflicted damage while providing medical assistance: consequently, innocence is to be proven by the individual that committed an offense. As a general rule defined in part 2 of Article 1166 and part 1 of Article 1167 of the Civil Code of Ukraine, an offender is exempt from compensating for material and moral damage when he or she proves that the damage was not due to his or her fault.

2.6. Article 1172 of the Civil Code of Ukraine requires compensation for the damage caused by employees (medical staff) while performing their job (employment duties) to be made by the legal entity (including a medical institution) or the individual that employ them. Under such circumstances, the employer (a health care institution or an individual entrepreneur) acts as a defendant while the medical employees whose actions caused the damage constitute a third party.

2.7. Material damage in the domain of health care consists of: a) actual losses – losses that an individual suffered or is forced to suffer to recover the violated right (medication, prosthetics, diagnosis, treatment and rehabilitation, resort rehabilitation, enhanced nutrition, outside care, burial, tombstone construction expenses (paragraph 1 part 2 Article 22, Articles 1195, 1201 of the Civil Code of Ukraine)), b) lost profits – revenue that an individual could realistically obtain under normal circumstances if his/her right were not violated (wages (income) lost due to the loss or decrease in professional capacities or total disability (paragraph 2 part 2 Article 22, Article 1195 of the Civil Code of Ukraine)).

2.8. The degree of loss of professional capacity (in a percentage format) as well as the need for outside assistance are determined by a forensic examination. If due to the damage to health, the victim incurs additional expenses for medical and social assistance, these expenses are to be recovered from the individual responsible for the damage, while the need for such expenses and their duration have to be confirmed by a forensic examination.

2.9. Recovery of additional expenses to be incurred by the victim in the future can be carried out within the timeframe specified in the conclusion of the Medical Social Examination Commission or forensic examination. While recovering the expenses for prosthetics, purchase of a resort trip for rehabilitation, a court must specify in its decision that the awarded amounts are to be transferred to the relevant organization that will provide these services to the victim.

2.10. In the case of death of a victim, an organization or a citizen responsible for the damage are required to reimburse funeral expenses (including funeral services and ceremonies) to individuals who incurred the expenses. Therefore, the claims to recover funeral expenses may be presented by the individuals that are entitled to compensation in connection with the death of a breadwinner and by outsiders – citizens and organizations that actually incurred the expenses. The cost of tombstone construction and fencing are based on their actual value but not above the marginal cost of standard tombstones and fences in the area in question.

2.11. For a detailed clarification of all other mechanisms of compensation for damage to health, examine, in particular, paragraphs 12, 17-22 of the Resolution of the Plenary Assembly of the Supreme Court of Ukraine “On Judicial Practice in Civil Cases of Compensation for Damages”.

## 6.1.15 Right to Life

**a) Every person has a right to life, including during his/her transformation into subject of medical relations – a patient.**

**b) Right as Stated in Country Constitution/Legislation**

▶ **Constitution of Ukraine of June 28, 1996 [Article 3, 21, 27, 64].**

“A human being, his/her life and health, honor and dignity, inviolability and safety are recognized in Ukraine as the highest social value” (Art. 3). “All people are free and equal in their dignity and rights” (Art. 21). “Everyone has an inalienable right to life. No one may be arbitrarily deprived of life. Responsibility of the government is to protect human life” (Art. 27). This right may not be restricted even in emergency or under martial law (Art. 64).

▶ **Civil Code of Ukraine of January 16, 2003 [Article 281].**

“The right to life:

1. An individual has an inalienable right to life.
2. An individual may not be deprived of life.

An individual has the right to protect his/her life and health, and the life and health of another individual from unlawful encroachments using any means not prohibited by law.

3. Medical, scientific and other experiments may be carried out only on a competent adult individual with his/her voluntary consent.

4. One may not satisfy the request of an individual to terminate his/her life.

5. Sterilization may take place only at the request of an adult individual. Sterilization of an incompetent individual on the grounds of medical indications

may be performed only with the consent of his/her guardian, in compliance with the requirements established by law.

6. An abortion performed no later than twelve weeks into pregnancy may be carried out upon the request of a woman.

In cases established by law, an abortion may be performed during pregnancy

of twelve to twenty-two weeks.

The list of circumstances that allow an abortion to be performed after twelve weeks of pregnancy is established by law.

7. An adult woman or man eligible on the grounds of medical indications has the right to undergo treatment programs that utilize assisted reproductive

technologies according to the procedure and conditions established by law” (Art. 281).

▶ **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Articles 50, 52 (part 3)].**

“Medical personnel may not perform euthanasia—an intentional acceleration of death or putting an incurable patient to death to end his/her suffering”. [part 3 Article 50].

### **c) Supporting Regulations/ Bylaws/ Orders**

▶ **On the Implementation of Article 281 of the Civil Code of Ukraine: Resolution of the Cabinet of Ministers of Ukraine of February 15, 2006 No. 144.**

▶ **On Approval of the State Program “Reproductive Health of the Nation” for the Period Ending in 2015: Resolution of the Cabinet of Ministers of Ukraine of December 27, 2006 No. 1849.**

▶ **Clinical Protocols for Obstetric and Gynecological Care: Order of the Ministry of Health of Ukraine of December 29, 2005 No. 782.**



- ▶ **On Improvement of Outpatient Obstetric and Gynecological Care in Ukraine: Order of the Ministry of Health of Ukraine of December 28, 2002 No. 503.**
- ▶ **On Organizing Stationary Obstetric, Gynecological and Neonatal Care in Ukraine: Order of the Ministry of Health of Ukraine of December 29, 2003 No. 620.**
- ▶ **Instructions on the Procedure for Abortions: Order of the Ministry of Health of Ukraine of July 20, 2006 No. 508.**
- ▶ **On the Use of Methods of Sterilization of Citizens: Order of the Ministry of Health of Ukraine of July 6, 1994 No. 121.**
- ▶ **Procedure for the Use of Methods of Surgical Sterilization of Women: Order of the Ministry of Health of Ukraine of July 6, 1994 No. 121.**
- ▶ **List of Medical Indications for Surgical Sterilization of Men: Order of the Ministry of Health of Ukraine of July 6, 1994 No. 121.**
- ▶ **Procedure for the Use of Methods of Surgical Sterilization of Men: Order of the Ministry of Health of Ukraine of July 6, 1994 No. 121.**
- ▶ **On Approval of the Procedure for Referring Women for the First Round of Treatment of Infertility Using Methods of Assisted Reproductive Technologies on the Grounds of Absolute Medical Indications Paid for from the Budget: Order of the Ministry of Health of Ukraine of November 29, 2004 No. 579.**
- ▶ **On Approval of the Plan of Action to Enforce Implementation of the State Program “Reproductive Health of the Nation” for the Period Ending in 2015: Order of the Ministry of Health of Ukraine of July 4, 2007 No. 372/34.**
- ▶ **On Approval of the Clinical Protocol for Resuscitation and Post Intensive Care of Newborn: Order of the Ministry of Health of Ukraine of June 8, 2007 No. 312.**
- ▶ **Instructions on Declaring Death of an Individual on the Grounds of Brain Death: Order of the Ministry of Health of Ukraine “On Approval of Legal Documents for Transplantation” of September 25, 2000 No. 226.**



- ▶ **Instructions on Determining the Criteria for Prenatal Period, Live Births, and Still Births: Order of the Ministry of Health of Ukraine of March 29, 2006 No. 179.**

According to this legal act, live birth means the expulsion or extraction from the body of the mother of a fetus which after the expulsion / extraction (regardless of the duration of pregnancy, whether or not the umbilical cord is cut and whether placenta separated) breathes or has any other signs of life such as heartbeat, umbilical cord pulsation, certain movements of skeletal muscles. Still birth means the expulsion or extraction from the body of the mother of a fetus that is on the 22 full week of pregnancy (after 154th day from the first day of the last normal menstrual period) or weighs 500 grams or more which does not breathe and does not show any signs of life such as heartbeat, umbilical cord pulsation, or certain movements of skeletal muscles.

#### **d) Provider Code(s) of Ethics**

- ▶ **Code of Ethics of Physicians of Ukraine, adopted and signed at the National Congress of Health Care Organizations and at the X Congress of the Ukrainian Medical Association on September 27, 2009 (paragraphs 3.11).**

“A doctor must be next to a dying patient till the last moment of his/her life ... The issue of termination of resuscitation measures should be decided collectively if possible and when the state of the individual is defined as an irreversible death according to the criteria established by the Ministry of Health of Ukraine. A doctor has no right to accelerate death deliberately, perform euthanasia or engage others to perform it” (paragraph 3.11).

#### **e) Other Relevant Sources**

- ▶ **Decision of the Constitutional Court of Ukraine regarding the constitutional petition of 51 Peoples’ Deputies of Ukraine to examine the conformity of Articles 24, 58, 59, 60, 93, 190-1 of the Criminal Code of Ukraine in part that makes provisions for death penalty as a form of punishment with the Constitution of Ukraine (the case of death penalty) of December 29, 1999.**

The court noted that the constitutional guarantee of the inalienable right of every individual to life, like all other rights and freedoms of citizens in Ukraine, is based on the following principle: exceptions to the rights and freedoms of citizens are established by the Constitution of Ukraine not by laws or other regulations. According to the provisions of part 1 of Art. 64 of the Constitution of Ukraine, “the constitutional rights and freedoms of

a human being and a citizen may not be restricted, except in the cases specified in the Constitution of Ukraine.”

## **f) Practical Examples**

### **1. Example(s) of Compliance**

Ms. H., 26 years of age who suffered from a congenital heart defect, became pregnant and decided to carry on with the pregnancy. However, after 22 weeks of pregnancy, the state of health of the patient rapidly deteriorated and it was decided to terminate the pregnancy on the grounds of medical indications.

### **2. Example(s) of Violation**

Citizen R, who got into a car accident prematurely, started her maternity activity and as a result she gave birth to a child that weighed 600 grams. A neonatologist informed the woman, that such children are not to be nurtured and nevertheless woman's requests to provide this child with resuscitation care, medical workers didn't consider the child viable and as a result didn't take any measures, which caused the death of a child.

### **3. Actual Case(s)**

Plaintiff D. brought proceedings against municipal health care institution “L central district hospital” (further – L. CDH), third person I, and asked the court to pass a decision, that would make the defendant compensate her moral damages, that were caused as a result of a damage to her health. Plaintiff indicated, that on September 16 2000, she applied to gynecology department of the L. CDH, to doctor I. for an operation of abortion. After the operation she felt bad, but the doctor didn't react to her complaints. Next day her state of health became worse, and was accompanied by a pain syndrome, and during the whole day nobody surveyed her and provided medical care. In the evening she was examined by the doctor on duty A, who indicated that as a result of uterine perforation, there happened a hematocele and a sepsis. She was operated on by doctors N and S. In her refined statement of claim D. referred to the fact she incurred moral damages, caused by physical pain, long postoperative treatment, problems with health, that appeared after the abortion was carried out, absence of normal sexual life, loss of reproductive function, deterioration of relations with her husband. She asked for compensation of 480 000 gryvnas.

A claim to L. CDH, third person I. for compensation of moral damages, that appeared as a result of injury to health, was partially satisfied. The court passed a decision to recover a plaintiff moral damages of 20 000 gryvnas (twenty thousand gryvnas).

## **g) Practice Notes**

- 1.** Right to health care, including right to medical care is a guarantee.
- 2.** The criteria of live birth are clearly defined in the legislation by the provisions of the Instructions on Determining the Criteria of Prenatal Period, Live Births, and Still Births approved by the Order of the Ministry of Health of Ukraine of March 29, 2006 No.179. As the analysis of this legal act demonstrates, only children who are born after 22 weeks of pregnancy or weight 500 gr. or more are considered to be live born, provided there are signs of life, and should be nursed. According to the aforementioned legal act, a newborn is born live if it exhibits at least one of the following characteristics: a) breathing, b) heartbeat c) umbilical venous pulsation, d) skeletal muscle movements. In absence of all (not any one) of these characteristics, a newborn is considered to be dead.
- 3.** Resuscitation assistance is provided to children born live (according to the criteria of live birth), taking into account their chances of survival on the basis of clinical protocols for neonatal resuscitation and taking into account the degree of their prematurity, intrapartum hypoxia, etc.
- 4.** Resuscitation measures in the cases that involve terminal conditions constitute the utmost manifestation of emergency care and always qualify as extreme necessity. When the decision not to resuscitate is made, it can only mean that the resuscitation measures have not been undertaken due to clinical death of the patient or sudden fading of bodily functions. The decision not to resuscitate is not equivalent to a refusal to treat the disease or, for instance, to provide an effective form of pain relief, as it can certainly cause considerable harm to the patient.
- 5.** A human being is considered dead at the moment brain death is established. Brain death means complete and irreversible loss of all brain functions. The moment of brain death can be established after ruling out all other possible under the circumstances causes for the loss of consciousness and bodily functions (Article 15 of the Law of Ukraine “On Transplantation of Organs and Other Anatomical Materials to a Human Being” of July 16, 1999). Brain death is equivalent to the death of a human being. The diagnosis of brain death is established by a council of physicians that includes an anesthesiologist with at least 5 years of experience in intensive care. To conduct special studies, the council should include other specialists with at least 5 years of experience in their respective fields of specialization, including those invited from other medical institutions as outside consultants. The members of the council are approved by the head of the intensive care department that cares for the patient and, in his/her absence, the physician on duty at the medical institution” (Instructions on Declaring Death of an Individual on the Grounds of Brain Death approved by the Order of the Ministry of Health of Ukraine “On Approval of Legal Documents for Transplantation” of September 25, 2000 No. 226).

## **h) Cross-referencing Relevant International and Regional Rights**

Please review international and regional norms, concerning human right to life and respect for human dignity during health care provision in the context of: right to life, illustrated in chapter 2 and chapter 3;

### **6.1.16 Right not to Be Unlawfully Discriminated Against for Health Reasons**

#### **a) Right as Stated in the ECPR**

There are no provisions in the ECPR on this matter.

#### **b) Right as Stated in Country Constitution/Legislation**

- ▶ **Constitution of Ukraine of June 28, 1996 [Articles 21, 22 (parts 2, 3), 24 (part 2)].**

“All people are free and equal in dignity and rights. Human rights and freedoms are inalienable and inviolable” (Art. 21). “Constitutional rights and freedoms are guaranteed and can not be annulled. When adopting new laws or amending existing laws, the content and scope of existing rights and freedoms may not be diminished” (Art. 22). “There can be no privileges or restrictions based on race, color, political, religious and other beliefs, sex, ethnic or social origin, property status, place of residence, linguistic or other characteristics” (Art. 24).

- ▶ **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Articles 6 (paragraph “j”), 9].**

Paragraph “j” of Art. 6 establishes the right of every citizen to legal protection against any illegal form of discrimination for health reasons.

“Restrictions of civil rights for health reasons:

1. On the grounds and in accordance with the laws of Ukraine, citizens may be for health reasons declared temporarily or permanently unfit for professional or other activities related to the increase in danger to others as well as to performance of certain public functions.
2. Using forced medical measures against individuals who committed socially dangerous acts, restriction of rights of citizens in the form of compulsory medical examinations or forced hospitalization and in connection with the quarantine measures is permitted only on the grounds and in accordance with the laws of Ukraine.

3. A decision to restrict the rights of citizens related to their state of health may be challenged in court” (Art. 9).

▶ **On Psychiatric Care: Law of Ukraine of February 22, 2000 [Article 9].**

“Restrictions associated with the performance of certain activities: Due to mental disorder, an individual may be declared temporarily (for up to five years) or permanently unfit to perform certain activities (work, jobs, services) that may pose immediate danger to oneself or others. To establish the capacity of an individual to perform certain activities (work, jobs, services) that place special requirements on the state of his/her mental health, he/she is subject to a preliminary (prior to the activity) and periodic (in the process of the activity) psychiatric examinations (Art. 9).

▶ **On Protection of the Population from Infectious Diseases: Law of Ukraine of April 6, 2000 [Article 23].**

“If individuals whose work involves servicing the population and may lead to the spread of infectious diseases carry infectious diseases, they, upon their consent, are temporarily transferred to perform the work that is not associated with the risk of spreading infectious diseases. If these individuals cannot be transferred to another job, they are suspended from work in the manner prescribed by law. During the period of their suspension from work, these individuals are paid temporary disability benefits”.

▶ **On Resistance to Diseases Caused by Human Immunodeficiency Virus (HIV), and Legal and Social Protection of People Living With HIV: The Law of Ukraine of 12.12.1991. (The wording of 23.12.2010.) [Article 17]**

“Job dismissing, refusal to hire, denial of admission to educational, medical institutions, social support and maintenance institutions and social services, as well as refusal to provide medical care and social services, restricting other rights of people living with HIV, on the grounds of his/her HIV status, and restriction of rights and duties of their relatives and on the same grounds is forbidden”

According to Art. 17 of this law, HIV-positive citizens of Ukraine enjoy all the rights and freedoms guaranteed by the Constitution and the laws of Ukraine, other legislative acts of Ukraine. According to Art. 18 of the same law, it is prohibited to deny them admission to health care institutions, to deprive them of medical care, to impair other rights of the individuals on the grounds that they are HIV-positive or to AIDS patients as well as impair the rights of their relatives and loved ones on these grounds.

▶ **On Combating Tuberculosis: Law of Ukraine of July 5, 2001 [Articles 8, 12].**

### **c) Supporting Regulations/Bylaws/Orders**

- ▶ **On Approval of a Unitary Glossary of Definitions (Glossary) on the Issues of Management of Medical Care Quality: Order of the Ministry of Health of Ukraine of July 20, 2011 No. 427.**
- ▶ **Framework on Management of Medical Care Quality in the Sphere of Health Care in Ukraine for the Period up to 2020. Order of Ministry of Health of Ukraine of August 1, 2011, No. 454.**

### **d) Provider Code(s) of Ethics**

- ▶ **Code of Ethics of Physicians of Ukraine, adopted and signed at the National Congress of Health Care Organizations and at the X Congress of the Ukrainian Medical Association on September 27, 2009 (paragraph 2.9).**

“A doctor must provide medical care within the domain of his/her specialization to all patients regardless of their age, sex, race, nationality, religion, social status, political opinions, place of residence, citizenship and other non-medical characteristics, including their financial situation.”

### **e) Other Relevant Sources**

There are no other relevant sources on this matter.

### **f) Practical Examples**

#### **1. Example(s) of Compliance**

Mr. N., who was HIV-positive, was hospitalized at the Department of Infectious Diseases of the City Hospital for Infectious Diseases with a suspected acute hepatitis. An attending physician, while filling out his medical records, learned about the patient's HIV status, this information however did not influence the quality and amount of medical care or treatment of the patient. In the process of diagnostic studies conducted, Mr. N. was diagnosed with “Hepatitis C, acute stage, icteric form.”

#### **2. Example(s) of Violation**

Mr. A. was transported to the admissions department of the emergency unit at the hospital from the scene of an accident with a double fracture of the lower limb. He was denied admission because during the processing of medical history and collecting of patient's data, the patient admitted that in the past he suffered from tuberculosis. To be admitted to the hospital, the patient was required to

present a letter of reference from a TB clinic testifying to the absence of the disease. After the patient presented such a reference, he was forced to procure a new one from the out of town TB clinic, demonstrating the reluctance of the hospital staff to provide this patient with medical care in general.

### 3. Actual Case(s)

Oleksij B., who was diagnosed as HIV-positive, was fired from his job as a driver for the editorial office of the district newspaper “Zlahoda”. He filed a lawsuit demanding to be restored in his job and to receive compensation for moral damage. The district newspaper “Zlahoda”, the district administration, the district council, and the treasury acted as defendants. During the trial, it was established that the editor-in-chief of the district newspaper committed a gross violation of the constitutional rights and freedoms of the HIV-positive citizen, degraded his dignity. The claim of Oleksij V. was satisfied by the decision of the District Court of October 18, 2004: he was restored in his job, and the defendants were ordered to compensate him for moral damage in the amount of 4,000 hryvnias. This case is considered to be one of the most high-profile cases in Ukraine and serves as a positive example of the effectiveness of the mechanisms of protection against unlawful forms of discrimination.

### g) Practice Notes

1. The right not be discriminated against for health reasons is guaranteed by the national legislation and provides every individual with an opportunity to exercise his/her rights and fulfill his/her responsibilities regardless of his/her state of health, except when subject to legal restrictions of such rights. The legislation of Ukraine prohibits any kind of unlawful discrimination while the restrictions of one’s rights for health reasons sanctioned by the law may be carried out only on the grounds and in the manner required by the law; any failure to comply may be appealed in accordance with the procedure established by the law. In particular, these restrictions are specified in Articles 19, 20, 84, 92-96 of the Criminal Code of Ukraine, Article 9 of the Law of Ukraine “Principles of Ukrainian Health Care Legislation”, Article 21 of the Law of Ukraine “On Protection of the Population from Infectious Diseases”, Articles 3, 4, 11, 12, 14 of the Law of Ukraine “On Psychiatric Care”, Articles 8, 12 of the Law of Ukraine “On Combating Tuberculosis”.
2. A rather effective mechanism to protect the right not to be discriminated against for reasons of health given as a rule an urgent need to obtain medical assistance is a written complaint addressed to the chief of staff of a health care institution and/or the head of the department of health at the local administration/council. This form of protection of the right is more efficient and often allows one to resolve the issue immediately while the review of the complaint by the local police, prosecutors, and courts may take time.

3. A request to provide a written explanation of the reasons and causes for a failure to realize a right can serve as a no less effective method of protection against discrimination. Any refusal to satisfy a request or a complaint should be grounded in the norms of the law: this usually leads to the satisfaction of the claim of a patient. In addition, written paperwork that documents a refusal to implement a human right in the health sector constitutes perfect evidence for the protection of the violated right in court. For example, administrative proceedings can establish the actions of state authorities, local governments, their officials and employees, other individuals involved in high level managerial activities, including delegated powers, as unlawful and violating human rights.

### **h) Cross-referencing Relevant International and Regional Rights**

Please, review international and regional norms concerning the right not to be unlawfully discriminated against for health reasons in the context of:

- right to physical inviolability, illustrated in chapter 2 and chapter 3.
- right to non-discrimination and equality, illustrated in chapter 2 and chapter 3.
- right to the highest and attainable level of physical and mental health, illustrated in chapter 2 and chapter 3.

## **6.1.17 Right to Respect for Human Dignity in the Course of Receiving Medical Care**

**a) Every person has a right to respect for her dignity, including during his/her transformation into subject of medical relations – patient.**

### **b) Right as Stated in Country Constitution/Legislation**

- ▶ **Constitution of Ukraine of June 28, 1996 [Article 28 (part 1, 2), 64, 68].**

“Everyone has the right to respect for his/her dignity. No one may be subjected to torture, cruel, inhuman or degrading treatment or punishment” (Art. 28). At the constitutional level, it is established that the right not to be subjected to torture, cruel, inhuman or degrading treatment or punishment (Art. 28) may not be restricted even in emergency or under martial law (Art. 64). Art. 68 establishes one of the constitutional duties, namely: not to infringe on the rights, freedoms, honor and dignity of others.



▶ **Civil Code of Ukraine of January 16, 2003 [Article 297].**

“The right to dignity and honor:

1. Everyone has the right to respect for his/her dignity and honor.
2. The dignity and honor of an individual is inviolable.
3. An individual may file a lawsuit to protect his/her dignity and honor” (Art. 297).

**c) Provider Code(s) of Ethics**

▶ **Code of Ethics of Physicians of Ukraine, adopted and signed at the National Congress of Health Care Organizations and at the X Congress of the Ukrainian Medical Association on September 27, 2009 (paragraphs 2.2, 3.13).**

“A doctor may not leave unattended any manifestations of violence or debasement of human dignity” (paragraph 3.13)”

**d) Other Relevant Sources**

▶ **On Judicial Practice in Cases of Protection of Dignity and Honor of an Individual as well as Business Reputation of an Individual or a Legal Entity: Resolution of the Plenary Assembly of the Supreme Court of Ukraine of February 27, 2009 No. 1.**

**e) Practical Examples**

**1. Example(s) of Compliance**

Citizen G. a commercial sex worker applied for gynecological help. Obstetrician-gynecologist listened to her complaints very attentively, collected her medical history, conducted proper medical examination, told her about the prophylactics of sexually transmitted diseases, and directed her to additional examination with a suspicion of a venereal disease.

**2. Example(s) of Violation**

May, 26, 2006 citizen of a town M. gave birth to a daughter, and May, 31 she and her daughter were hospitalized. June, 5 doctors were informed of the fact that the woman is HIV-infected. The same day doctors prohibited this woman to stay with a child and suggested that she left the hospital, and in the presence of nurses she was blamed of irresponsible attitude to maternity. Due to the decision of Leninskyj district court on September 4, 2007 her claim was satisfied and she was compensated moral damages, she was incurred by infringement of her right to respect of human dignity and honor.

### 3. Actual Case(s)

Citizen P. applied to court with a suit to citizen O., asking for the protection of her honor, dignity, reputation and for reimbursement of moral damages. During the court hearing, a plaintiff supported his claims and clarified that on October 11, 2006, a defendant, while carrying out his professional duties of a physician-traumaic in the presence of medical workers and students, disseminated information, that P. had been drunk, leads immoral way of life and as a result of which she was injured – closed fracture of a left radius in a typical place. P. highlighted that such information was misleading, and the ones defaming her honor and dignity. Plaintiff indicated that instead of timely medical care, she was humiliated and convicted. Citizen O. didn't recognize the claim and informed that his words were a joke, and a patient was provided with medical care according to requirements of providing medical care to adult population in outpatient polyclinics on the specialty "Orthopedics and Traumatology", approved by Order of Ministry of Health of Ukraine of December 28, 2002, No. 507. Plaintiff asked the court to compensate oblige a defendant to compensate her 1650 hryvnas moral damages, to apologize, and compensate a state duty that she paid -17 hryvnas. The court, having evaluated the facts, partially satisfied the claims, and passed a decision, obliging a defendant to compensate 1000 hryvnas of moral damages and also obliged a defendant to apologize.

### f) Practice Notes

1. Current legislation doesn't contain the definition of a term dignity, since it is a moral and ethical category and at the same time it is a personal non-pecuniary right.
2. Under the term dignity one should understand recognition of every physical person as unique biopsychological value. Honor is connected with positive social estimation of a person in the eyes of surrounding people, which is based on conformity of her actions (behavior) to generally accepted ideas of goodness and evil. (paragraph 4 of Resolution of the Plenary Assembly of the Supreme Court of Ukraine of February 27, 2009 No. 1. "On Judicial Practice in Cases of Protection of Dignity and Honor of an Individual as well as Business Reputation of an Individual or a Legal Entity")
3. A claim for protection of dignity, honor and working reputation may be submitted by physical person, in an analyzed example it is a patient, in case of dissemination of apocryphal data, which infringes upon person's non-pecuniary right, and other interested persons (in particular, family members, relatives), if such data directly or indirectly breach their rights.
4. Apocryphal is an information, which is misleading or was incorrectly presented; that is the one that contains data about events and phenomena, which didn't exist at all, or existed but the data of which are misleading (incomplete or distorted). Negative information about the person is considered misleading, if a person that disseminated such information doesn't prove the contrary. (Presumption of integrity).

5. Defendants in the case as regards protection of dignity, honor and working reputation is physical or juridical person, who or whis disseminated such misleading information and author of such information. Cases of such category shall not be considered due to the rules of Code of Administrartive Justice of Ukraine, since such disputes do not have a public character, even in case a party to a dispute is a subject of authority.
6. Legal structure of a delict, the availability of which can be a basis for satisfaction of a claim, is a complex of such circumstances: a) dissemination of information that is informing one or more persons of this very data and in any way. b) Disseminated information concerns a certain physical or juridical person, a plaintiff. c) dissemination of unreliable information, the one that is misleading d) Dissemination if information that breaches personal non-pecuniary rights, namely the one that damages certain personal non pecuniary interests, or interefers into persons free realization of her non-pecuniary right.
7. Ways of protection of ones dignity in case of dissemination of misleading data are: a) right to a reply; b) refutation of misleading information; c) compensation to a plaintiff for losses and moral damages, caused by such infringements.

### **g) Cross-referencing Relevant International and Regional Rights**

Please review international and regional norms, concerning human right to life and respect for human dignity during health care provision in the context of:

- right to the highest and attainable level of physical and mental health, illustrated in chapter 2 and chapter 3.
- right to be free from torture, cruel, inhuman and the one humiliating human dignity treatment, illustrated in chapters 2 and 3.

## 6.2 Patients' Responsibilities

### INTRODUCTION

Legal responsibility of an individual in the domain of health care is a mandatory particular form of human behavior that is defined by the law and is guaranteed by the state, that is aimed at ensuring the rights and protected interests of other individuals and/or promoting the preservation, strengthening, development and, in cases of health damage, recovery of the maximally attainable level of physical and mental state of one's own body.

Current health care legislation of Ukraine does not include norms that clearly regulate responsibilities of patients. Legal definition of this issue is refined through the process of a comprehensive analysis of the legal framework that regulates health care using the principle of "each right has a corresponding responsibility", i.e., whenever a health care provider has a right, then, naturally, a patient has a responsibility and vice versa.

In this Practitioner's Guide, we analyze general and special responsibilities of an individual in the domain of health care. General responsibilities pertain to all individuals engaged in health care while special responsibilities are a concern of only those individuals that are parties to a medical relationship, primarily, between a medical practitioner and a patient.

### 6.2.1 Responsibility to Take Care of One's Health and Health of One's Children, and to Cause no Harm to Health of Other Citizens

**a) Patients have the duty to take care of one's health and health of one's children, and to cause no harm to health of other citizens.**

**b) Responsibility as stated in Country Constitution/Legislation**

► **Criminal Code of Ukraine of April 5, 2001 [Articles 130, 133, 166].**

"Infecting somebody with human immunodeficiency virus or any other incurable contagious disease:

1. Consciously putting another individual in danger of being infected with human immunodeficiency virus or any other incurable contagious disease that is dangerous to human life is punishable by an arrest for up to three months or restriction of freedom for up to five years, or imprisonment for up to three years.

2. Infecting an individual with human immunodeficiency virus or another incurable infectious disease by another individual who knew that he/she is a carrier of this virus is punishable by imprisonment for a term of two to five years ..." (Art. 130).

"Infecting somebody with a venereal disease:

1. Infecting an individual with a venereal disease by another individual who knew about the presence of this disease is punishable by correctional labor for up to two years, or an arrest for up to six months, or restriction of freedom for up to two years or imprisonment for the same term ..." (Art. 133).

"Intentional neglect of a child or an individual under guardianship or custody:

Intentional failure of parents, guardians or trustees to carry out mandatory by law responsibilities to take care of the child or the individual under guardianship or custody which caused grave consequences is punishable by restriction of freedom for a term of two to five years or imprisonment for the same period of time" (Art. 166).

► **Administrative Code of Ukraine of December 7, 1984 [Article 173-2].**

"Committing domestic violence, that is intentionally committing any act of physical, psychological or economic nature (the use of physical violence that did not cause physical pain or bodily harm, threats, insults or harassment, deprivation of shelter, food, clothing, other property or funds for which the victim has a legal right, etc.), as the result of which the damage to physical or mental health of the victim was caused or could be caused as well as a failure to implement protective orders towards an individual against whom they were issued, a failure to complete correctional programs by an individual who committed an act of domestic violence is punishable by a fine of three to five times untaxed minimum wages or correctional labor for up to one month with twenty percent of the wages withheld and, if the circumstances of the case are such—and taking into account an individual offender—that these measures are found to be insufficient, by an administrative arrest for up to five days".

► **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Articles 10 (paragraph "a"), 32].**

"Citizens of Ukraine must take care of their health and the health of their children, not harm the health of other citizens" (paragraph "a" Article 10).

► **On Ensuring Sanitary and Epidemiological Welfare of the Population: Law of Ukraine of February 24, 1994 [Articles 5 (parts 1, 2, 3), 21 (part 2)].**

"Citizens must take care of their health and the health and hygiene education of their children, not harm the health of other citizens (part 1 Art. 5).

- ▶ **On Domestic Violence: Law of Ukraine of November 15, 2001 [Article 1].**

“Physical violence in the family is an intentional infliction on a family member by another family member of corporal injuries that lead or may lead to the death of the victim, harm to physical and psychological health of the victim, injure his/her honor and dignity.”

### **c) Supporting Regulations/ Bylaws/ Orders**

- ▶ **Framework for the Development of Health Care of the Population of Ukraine: Decree of the President of Ukraine of December 7, 2000 No. 1313/2000 [Section 2: “Government Policy in the Health Care Sector “, Section 5: “Creating Conditions for Healthy Living”].**
- ▶ **Interdisciplinary Comprehensive Program for 2002-2011 “Health of the Nation”: Resolution of the Cabinet of Ministers of Ukraine of January 10, 2002 No. 14 [section 1 (paragraph 14), section 3 (paragraphs 2, 4, 6, 11), section 4 (paragraph 5), section 7 (paragraph 7), section 8 (paragraphs 3, 5), section 9 (paragraphs 1, 3), section 10 (paragraph 8), section 13 (paragraph 5), section 14 (paragraphs 1, 2, 5), section 16 (paragraphs 2, 5, 8), section 17 (paragraphs 1, 4, 9), section 19, section 27 (paragraph 2), section 37 (paragraphs 3, 5)].**
- ▶ **National Development Plan for the Health Care System of Ukraine for the Period Ending in 2010: Resolution of the Cabinet of Ministers of Ukraine of June 13, 2007 No. 815 (paragraph 8).**
- ▶ **Framework on Management of Medical Care Quality in the Sphere of Health Care in Ukraine for the Period up to 2020. Order of Ministry of Health of Ukraine of August 1, 2011, No. 454.**

Among the tasks of a framework are foreseen incentives as regards healthy lifestyle of the population.

### **d) Provider Code(s) of Ethics**

- ▶ **Code of Ethics of Physicians of Ukraine, adopted and signed at the National Congress of Health Care Organizations and at the X Congress of the Ukrainian Medical Association on September 27, 2009 (paragraph 3.5.).**

“A doctor must protect the interests of a child or a patient who can not make an independent decision if it is clear that those around him/her are indifferent to the interests of his/her life and health or he/she is not sufficiently conscious of these interests”.

### **e) Other Relevant Sources**

There are no other relevant sources on this matter.

### **f) Practical Examples**

#### **1. Example(s) of Compliance**

A 10-year old girl was given a “terrible” diagnosis by the doctors: leukemia. The parents spent all their funds on treatment, sold all their properties. The child was in the hospital for almost two years (having gone through painful medical procedures). The doctors predicted for the child the life expectancy of 6 months. However, the parents of the girl cared for her, doing everything possible and impossible to save her life. All this gave a positive result: the condition of the patient improved, she is in remission.

#### **2. Example(s) of Violation**

A 7 year old girl who had a number of diseases saw a pediatrician. As it turned out, until 6 years of age, the child was brought up by her grandmother in the village and was completely healthy. When the parents took the daughter to live in city K. and immediately sent her to school, she suddenly began to get frequently sick. The parents did not pay enough attention to the complaints of the child regarding her health and did not seek medical advice. In 3 months, the girl was admitted to the hospital not only with a complaint of an abdominal pain, but she also began to stutter, had symptoms of enuresis, tearfulness, irritability and sleep disorder. The physician explained to the parents that the primary cause of childhood diseases is improper care of the child’s health.

#### **3. Actual Case(s)**

Ms. Yu, who was raising a three year old son, was issued a protective order under Art. 13 of the Law of Ukraine “On Prevention of Domestic Violence”, since the officer from children’s criminal services had previously issued an official warning to her for committing physical violence against her child, in particular a failure to take measures to treat the child. The child was hospitalized at the Children’s City Hospital with left-side pneumonia complicated by pleurisy and strong intoxication. An ambulance was summoned by the neighbors who saw the dismal state of the child that resulted from his mother raising the son alone, leading frivolous way of life, paying no attention to the child, not seeking medical care even when it became necessary.

### **g) Practice Notes**

1. Violation of physical or mental health of a family member by another family member constitutes a component of physical violence.
2. Family members include: a) individuals who are married, 2) individuals who reside as one family, but are not married to each other, 3) their children, 4) individuals who are under guardianship or care, 5) individuals who are directly or indirectly related provided that they are living together.
3. Methods of responding to domestic violence are: 1) forms of response by officers of local police and children's criminal services – a warning, a protective order, 2) administrative responsibility, 3) criminal responsibility.
4. One should remember the mechanism defined in part 5 of Article. 43 of the Law of Ukraine "Principles of Ukrainian Health Care Legislation" with regard to the refusal of medical intervention carried out by a legal representative of the patient which could have grave consequences for the latter. This normative provision establishes the responsibility of a doctor to report such a refusal and its consequences for the patient to the guardianship and care authorities that are among the bodies that, according to Art. 3 of the Law of Ukraine "On Prevention of Domestic Violence", are entrusted with the implementation of measures to prevent domestic violence.

## **6.2.2 Responsibility to Undergo Preventive Medical Screenings and Vaccinations**

**a) In cases established by the law patients are obliged to undergo preventive medical screenings and vaccinations.**

### **b) Responsibility as stated in Country Constitution/Legislation**

- ▶ **Civil Code of Ukraine of January 16, 2003 [Article 286 (part 4)].**

"An individual may be required to undergo a medical examination in cases established by law".

- ▶ **Administrative Code of Ukraine of December 7, 1984 [Articles 44-1, 45].**

"Evasion of medical screenings or medical examinations:

Evasion by an individual who suffers from drug addiction of medical examinations to establish the presence of drugs in the body will result in a fine ranging from five to eighteen untaxed minimum wages. Evasion by an individual who abuses drugs or psychotropic substances of medical examinations will result in a fine ranging from eighteen to forty-three times



the untaxed minimum wages” (Art. 44-1).

“Evasion of screenings and preventive treatment by individuals suffering from venereal diseases:

evasion of a screening by an individual for whom there is sufficient data that he/she suffers from a venereal disease or of treatment by an individual who has been in contact with a patient who suffers from a venereal disease and requires prophylactic treatment, which persists even after a warning has been issued to them by public health authorities, shall result in a fine of three to five times the untaxed minimum wages” (Art. 45).

▶ **Labor Code of Ukraine of December 10, 1971 [Articles 46, 169, 191].**

Art. 46 of the Code establishes the grounds for suspension of employees from work; in particular, a refusal or an evasion of compulsory medical examinations.

▶ **On Labour safety: Law of Ukraine of October 10, 1992 [Article 17].**

▶ **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Articles 10 (paragraph “b”), 30, 31].**

“Citizens of Ukraine in cases stipulated by law must undergo preventive medical screenings and vaccinations” (paragraph “b” Art. 10).

“Mandatory medical examinations:

For the protection of public health, preventive medical examinations of minors, pregnant women, employees of enterprises, institutions and organizations with harmful and dangerous working conditions, military personnel and individuals whose professional and other activities involves servicing the population or increased danger to others are organized” (Art. 31).

▶ **On Protection of the Population from Infectious Diseases: Law of Ukraine of April 6, 2000 [Article 12].**

“Employees of certain professions, enterprises and organizations whose activities may lead to infection of these employees and (or) spread of infectious diseases by them are subject to mandatory preventive vaccinations... Competent adult citizens undergo preventive vaccinations with their consent after being provided with objective information about the vaccine, the consequences of refusing to undergo the vaccination and possible complications after the vaccination ...”.

▶ **On Ensuring Sanitary and Epidemiological Welfare of the Population: Law of Ukraine of February 24, 1994 [Articles 5 (part 3), 7 (paragraph 5 part 1)].**

“Citizens must undergo mandatory medical examinations and vaccinations in cases established by law” (part 3 Art. 5).

### **c) Supporting Regulations/ Bylaws/ Orders**

- ▶ **On Approval of the Procedure for Mandatory Preliminary and Periodic Psychiatric Examinations and a List of Medical Psychiatric Counterindications for Carrying out Certain Types of Activities: Resolution of the Cabinet of Ministers of Ukraine of September 27, 2000 No. 1465.**
- ▶ **On Approval of the Procedure for Conducting Obligatory Preliminary and Periodical Psychiatric Examinations: Order of Ministry of Health of Ukraine of January 17, 2002, No. 12.**
- ▶ **On Approval of the Procedure for Conducting Medical Examinations of Employees of Certain Categories: Order of the Ministry of Health of Ukraine of May 21, 2007 No. 246.**
- ▶ **On Approval of the Procedure for Conducting Medical Examinations and Screenings of Individuals who Abuse Drugs or Other Psychotropic Substances: Order of the Ministry of Health of Ukraine of June 16, 1998 No. 158/417.**
- ▶ **On Procedure for Conducting Preventive Vaccinations in Ukraine, Quality Control and Use of Immunological Drugs: Order of the Ministry of Health of Ukraine of February 3, 2006 No. 48.**
- ▶ **Provision on Medical Offices at Pre-schools: Order of the Ministry of Health of Ukraine and Ministry of Education and Science of Ukraine of August 30, 2005 No. 432/496.**
- ▶ **On Improving Outpatient Care of Children in Ukraine: Order of the Ministry of Health of Ukraine of November 29, 2002 No. 434.**
- ▶ **On Approval of the Provision on Medical Examination of Driver's License Applicants and Drivers of Vehicles: Order of the Ministry of Health of Ukraine of June 5, 2000 No. 124/345.**
- ▶ **On Clinical Examination of the Population: Order of the Ministry of Health of Ukraine of August 27, 2010 No. 728.**

### **d) Provider Code(s) of Ethics**

There are no provisions in existing codes of ethics on this matter.

## e) Other Relevant Sources

There are no other relevant sources on this matter.

## f) Practical Examples

### 1. Example(s) of Compliance

Employees of the enterprise “X”, a manufacturer of beauty products, were sent to undergo a periodic preventive drug screening that is mandatory for this category of employees once a year. The employees underwent the drug screening, psychological testing and medical lab tests. After the screening, the staff received certificates for passing the preventive drug screening.

### 2. Example(s) of Violation

In one family in village B. of Polonskyj District, 4 people fell sick and died of diphtheria, including three children. Members of this family belonged to a religious sect and therefore refused to undergo a vaccination against the disease. As a result, the refusal of the medical intervention led to lethal consequences.

### 3. Actual Case(s)

An employer filed an application to have a periodic medical examination of two employees conducted: Mr. Zh., born in 1990, and Mr. N., born in 1991, (as individuals under 21 years of age). Sanitary-epidemiological services together with a trade union representative passed an act singling out these employees as those who should undergo the periodic medical examination. The employer provided conditions for conducting the examination, including a timely renewal of the contract with the health care facility, sent to the facility the lists of employees, informed the employees. But the employees, without providing grounds for their refusal, did not undergo the examination, assuring the employer that they were perfectly healthy. Since the deadline for passing the medical examination passed and the employees refused to undergo the examination, the employer dismissed the employees without pay on the basis of Article 46 of the Labor Code of Ukraine and paragraphs 3.6, 3.9 of the Order of the Ministry of Health of Ukraine “On Approval of the Procedure for Conducting Medical Examinations of Employees of Certain Categories.”

## g) Practice Notes

1. An employer dismisses from work those employees who fail to pass medical examinations within an established timeline and restrains from work those employees who by the results of medical examinations are established not to be fit to work for health reasons: this is not to be considered a violation of the right to personal integrity.
2. An employer has the right to submit an employee who evades mandatory medical examinations to disciplinary measures.

3. Upon a recommendation of appropriate officials from the State Sanitary and Epidemiological Service, enterprises, institutions and organizations are obliged to remove from work, study, attendance of pre-schools those individuals who are carriers of pathogens of infectious diseases, patients with infectious diseases dangerous for the surrounding, or people who are in contact with such patients, with payment of social security assistance in the manner established by law as well as those individuals who evade mandatory medical examinations or vaccinations against the infections listed by the centralized executive bodies managing the health care sector.

### **6.2.3 Responsibility to Provide Immediate Assistance to Other Citizens Whose Lives and Health Are in Danger**

**a) Patients shall provide immediate assistance to other citizens whose lives and health are in danger.**

**b) Responsibility as stated in Country Constitution/Legislation**

- ▶ **Criminal Code of Ukraine of April 5, 2001 [Article 136].**

“A failure to help an individual whose life is at risk:

A failure to assist a person who is in a life-threatening situation when such assistance can be provided, or a failure to inform appropriate authorities about this state of an individual or individuals, when such failure caused serious bodily injury, is punishable by a fine of two hundred to five hundred times the untaxed minimum wages or public labor for a term of one hundred and fifty to two hundred and forty hours, or an arrest for up to six months “.

- ▶ **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Articles 10 (paragraph “c”), 37].**

“Citizens must provide emergency care to other citizens whose life and health are threatened” (paragraph “c” Art. 10). “In urgent cases when medical assistance cannot be provided due to lack of medical personnel at hand ... citizens must provide transportation to transport a patient to a health care facility” (Art. 37).

**c) Supporting Regulations/Bylaws/Orders**

There are no relevant supporting regulations of this particular responsibility.

#### **d) Provider Code(s) of Ethics**

There are no provisions in existing codes of ethics on this matter.

#### **e) Other Relevant Sources**

There are no other relevant sources on this matter.

#### **f) Practical Examples**

##### **1. Example(s) of Compliance**

At about 11:30, on March 16, in a private house in city M., a fire broke out, the roof beams were burning. Rescuers from the Ministry of Emergency Situations (MES) localized the fire in the shortest possible time and saved the adjacent private buildings. During the fire, an 82-year old owner of the building and his 25-year-old grandson, who pulled the grandfather out of the fire, were in the building. The young man did not lose his presence of mind and administered first aid to an individual who was in the situation that presented threat to his life and health, he called the MES services to request a fire squad and an ambulance.

##### **2. Example(s) of Violation**

On the highway between city Ch. and city V., a driver of “Volkswagen” lost control of the vehicle, drove off the road and crashed into a tree. Due to the indifference of the motorists who were passing by the accident and did not provide first aid to the victims, 5 people died.

##### **3. Actual Case(s)**

A man was seriously injured in a rural area. The condition of the victim required immediate medical assistance, including a surgical intervention. A paramedic provided necessary medical assistance and called for an ambulance from the city, but given the serious condition of the patient and in order to avoid losing time, he asked the owner of a nearby car to take the victim to the hospital. The owner of the car (the car was in a working condition) refused the request of the paramedic, thus forsaking his responsibility to provide emergency assistance to an individual in a life-threatening situation. There were no other cars nearby. The victim died two and a half hours after having been injured while in an ambulance on the way to the hospital. An investigation into the death of the victim was conducted and on the basis of its results a criminal case regarding the failure to assist an individual in a life-threatening situation was opened (part 3 Art. 136 of the Criminal Code of Ukraine). The owner of the car was exempted from criminal liability under the Law of Ukraine on Amnesty (Article 44 of the Criminal Code of Ukraine).

### **g) Practice Notes**

1. If a health care practitioner failed to provide assistance to an individual in a life-threatening situation, he/she is subject to criminal liability under Art. 139 of the Criminal Code of Ukraine "Failure of a Medical Practitioner to Assist a Patient".

## **6.2.4 Responsibility to Adhere to a Prescribed Treatment Regimen and Comply With the Internal Rules of a Health Care Institution**

**a) This responsibility corresponds to the right of a health care practitioner to refuse to continue to oversee a patient.**

### **b) Responsibility as stated in Country Constitution/Legislation**

- ▶ **Criminal Code of Ukraine of April 5, 2001 [Articles 139, 140].**
- ▶ **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Article 34 (parts 2, 3)].**

Art. 34 of Principles establishes the responsibility of a patient via the right of a doctor, namely: "A doctor has the right to refuse to continue to oversee a patient if the latter does not adhere to medical prescriptions or internal rules of a health institution provided that such adherence does not threaten the life of the patient and public health. The doctor is not responsible for the health of a patient in case the latter refused to adhere to medical prescriptions or breached the regiment established for him/her"

### **c) Supporting Regulations/ Bylaws/ Orders**

- ▶ **Instructions on the Procedure for Filling Out a Disability Leave Certificate: Order of the Ministry of Health of Ukraine, the Ministry of Labor and Social Policy of Ukraine, Social Insurance Fund for Temporary Disability, Social Insurance Fund for Work Accidents and Occupational Diseases of November 3, 2004 No. 532 / 274/136-os/1406 (paragraph 4.1).**

"If a patient violated a prescribed regiment, a physician indicates the type of the violation in a disability leave certificate (e.g., late arrival to doctor's appointment, abuse of alcohol, drugs, toxic substances during treatment, showing up at work without a permission from the doctor, leaving a health care institution without permission, leaving to undergo treatment in another health care institution without receiving a certified permission to do so, etc.).

#### **d) Provider Code(s) of Ethics**

There are no provisions in existing codes of ethics on this matter.

#### **e) Other Relevant Sources**

There are no other relevant sources on this matter.

#### **f) Practical Examples**

##### **1. Example(s) of Compliance**

Mr. D. asked a family doctor for medical assistance on account of feeling ill. The doctor assigned a number of tests and thus established the diagnosis: “Arterial Hypertension”. He provided the patient with medical information and recommended certain methods of treatment. The patient agreed to the treatment, carefully followed all the instructions and kept all follow up visits with the doctor scheduled in advance.

##### **2. Example(s) of Violation**

A patient underwent a neurological surgery. While discharging the patient, an attending physician informed the patient about the postoperative regiment and how he should adhere to medical prescriptions, supplying him with a discharge sheet and a memo. For example, the patient was warned that the next day after the discharge he should visit a family doctor for a consultation in the office or call and ask a family doctor to visit him at home, inform the doctor of any complications. The patient contacted the doctor only four days later with a complaint of hyperthermia, general weakness, sharp pain in the area of the surgical intervention. A failure to comply with the recommendations resulted in the development of complications, their severity.

##### **3. Actual Case(s)**

Mr. D. was a patient at a gastroenterology department of the city hospital of city Zh. due to an aggravation of gastritis. The patient was assigned a treatment to which he consented but adhered to it only periodically. A nurse repeatedly complained to the doctor that despite her requests and explanations the patient refused to take pills, smoked in the hallway of the department, violated the dietary regiment. An attending physician also noted that the patient left the hospital without informing the medical staff about it, repeatedly failed to appear at the morning and evening rounds, did not follow prescriptions. Given the absence of the threat to life and health of the patient, the attending physician’s report, explanations of the nurse, the chief of staff of the hospital decided to discharge the patient from the hospital early and in a disability leave certificate indicated the violations of the assigned regiment by the patient, in accordance with Article 34 of the Law of Ukraine “Principles of Ukrainian Health Care Legislation” and paragraph 4.1 of the Instructions on the Procedure for Filling Out a Disability Leave Certificate: Order of the Ministry of Health of Ukraine, the Ministry of

Labor and Social Policy of Ukraine, Social Insurance Fund for Temporary Disability, Social Insurance Fund for Work Accidents and Occupational Diseases of November 3, 2004.

### **g) Practice Notes**

1. This responsibility corresponds to the doctor's right to refuse to continue to oversee a patient. Due to literary interpretation of legislative norms follows that only one subject from the circle of medical workers, is empowered with a right to refuse to continue to oversee a patient.
2. The legality of exercising this right is dependent on the absence of a threat to patient's life and public health in general and the following are the pre-conditions for the refusal: 1) the patient does not adhere to a prescribed treatment, 2) the patient does not adhere to the rules and regulations of the health care institution.
3. In terms of the first precondition, the doctor-patient relationship is based on the principle of equality and is dispositive. By exercising his or her right to receive professional medical care, including the right to make a choice of the methods of treatment, a patient gives an informed voluntary consent to a medical intervention in accordance with the legislation (part 2 of Article 284 of the Civil Code of Ukraine, Article 43 of the Law of Ukraine "Principles of Ukrainian Health Care Legislation"). From this point onward and until a refusal to continue with this intervention, the patient is responsible for adhering to the prescribed treatment. According to part 3 of Article 34 of the Law of Ukraine "Principles of Ukrainian Health Care Legislation", a doctor is not responsible for the state of health of a patient in case the latter refuses to adhere to the prescribed treatment.
4. In terms of the second precondition, the relationships between the parties of a medical contract are administrative, hierarchical. Namely, a patients who exercises his or her right to professional medical assistance, including the choice of a health care institution, must adhere to the rules and regulations of the health care institution of his/her choice. It is certainly a responsibility of health care practitioners to inform the patient of such rules, as confirmed by the patient's signature in his or her inpatient file. A doctor is not responsible for the state of health of the patient in case the latter violates the prescribed regiment and regulations (part 3 of Article 34 of the Law of Ukraine "Principles of Ukrainian Health Care Legislation").
5. The list of cases in which a physician has the right to refuse to provide medical assistance is clearly defined and comprehensive, thus serving as another guarantee of the rights of patients. As a general rule, a refusal to provide medical assistance to a patient is an unlawful act that in certain cases constitutes a criminal offense, namely: "Failure of a Medical Practitioner to Provide Medical Assistance to a Patient" (Article 139 of the Criminal Code of Ukraine), "Inadequate Carrying Out of Professional Duties by a Medical or Pharmaceutical Practitioner" (Article 140 of the Criminal Code of Ukraine), etc.
6. See also practice notes in subchapter 7.1.8.



### 6.2.5 Responsibility to Receive Medical Assistance Without One's Own Consent or Consent of One's Own Representative in Emergency Situations When There Is a Real Threat to One's Life

**a) This responsibility corresponds to the right of a health care practitioner to perform a medical intervention without the consent of a patient and/or his/her legal representatives.**

#### **b) Responsibility as stated in Country Constitution/Legislation**

- ▶ **Constitution of Ukraine of June 28, 1996 [Article 29 (part 1)].**

*“Every individual has the right to ... bodily integrity.”*

- ▶ **Civil Code of Ukraine of January 16, 2003 [Article 284 (part 5)].**

“In urgent cases, if there is a real threat to the life of an individual, medical assistance is granted without the consent of the individual or his or her parents (adoptive parents), guardian, trustee.”

- ▶ **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Article 43 (part 2)].**

“In urgent cases when there is a real threat to the life of a patient, the consent of the patient or his legal representatives to a medical intervention is not required.”

#### **c) Supporting Regulations/Bylaws/Orders**

There are no relevant supporting regulations of this particular responsibility.

#### **d) Provider Code(s) of Ethics**

- ▶ **Code of Ethics of Physicians of Ukraine, adopted and signed at the National Congress of Health Care Organizations and at the X Congress of the Ukrainian Medical Association on September 27, 2009 (paragraph 3.5).**

“Treatment and diagnostic measures may be performed without the consent of a patient only when there exists a threat to his/her life and health and when he/she is unable to evaluate the situation adequately.”

## e) Other Relevant Sources

There are no other relevant sources on this matter.

## f) Practical Examples

### 1. Example(s) of Compliance

A patient was diagnosed with kidney tumor without metastasis and presence of permanent macro hematuria. Physicians noted that, given the life signs of the patient, a nephrectomy will be performed. The patient had doubts, since he was warned of the high degree of risk associated with possible pulmonary embolism, major blood loss, and high mortality.

### 2. Example(s) of Violation

A woman on the fifth week of pregnancy contacted a medical institution to have abortion performed. During this medical intervention, a perforation of the uterus took place. The doctor did not immediately diagnose the injury. Only a day later, when the woman was hospitalized in a serious condition, the perforation was found; however, the woman did not give consent to have hysterectomy, arguing that she was young, had no children and did not want to lose her reproductive function. The doctors informed the patient about possible consequences, obtained a written refusal to the procedure, and assigned medication-based treatment. A few days later, in an intensive care unit, the patient died of multi-septic state.

### 3. Actual Case(s)

A 10-year old boy who fell from the balcony of the 3rd floor and received injuries which caused blood loss was hospitalized in the regional children's hospital. On the basis of examination, the doctors determined that the boy needed an urgent blood transfusion; however, the parents did not consent to the intervention, arguing that such a procedure can be dangerous for the child because there is a risk of an HIV infection, hepatitis B and C infections. The doctors informed the parents about possible consequences of their refusal for their son, but the parents insisted not to perform the transfusion. Having assessed the overall state of the patient, the council of doctors (headed by the clinical deputy chief of staff of the hospital), the medical practitioners decided that alternative methods were ineffective in this case, the extent of bleeding involved could not be stopped with medication-based treatment, the blood loss could not be compensated for by other means, and therefore, given the life signs, they decided to perform the blood transfusion. A few hours later, the state of the patient stabilized. The parents wrote a complaint against the medical practitioners to the Department of Health at the State Administration of region L. By the order of the head of the Department of Health, the commission was created which found that the medical practitioners were guided by the need of urgency, the medical intervention was carried out in accordance with current laws, on the basis of life (absolute) indications. The parents, who were invited to the commission's meeting when

it reviewed their complaint, were offered an explanation of all the possible consequences of their refusal for the child's health, the adequacy of the action of the doctors in this situation. The conflict between the parents and the doctors was thus resolved.

### **g) Practice Notes**

- 1.** The law does not contain a list of extreme emergency situations that pose a real threat to the life of a patient and which give a doctor the right to perform a surgery, use complex diagnostic methods, etc. without the consent of the patient or his/her legal representatives.
- 2.** By providing a patient with medical care in an urgent situation, a doctor acts in a state of emergency, that is the harm that can be caused to the patient is less than the averted danger.
- 3.** If a doctor failed to undertake all measures necessary to ensure a successful outcome of a surgery or another medical intervention, or otherwise improperly performed his/her professional duties, an appeal to the state of emergency is not going to be valid and, given an unfavorable outcome of the intervention, the physician will carry responsibility for his/her unlawful actions .
- 4.** See also practical advice in subsection 7.1.9.

## 7.1 PROVIDERS' RIGHTS

- 7.1.1 Right to Work in Decent Conditions
- 7.1.2 Right to Freedom of Association
- 7.1.3 Right to Due Process
- 7.1.4 Right to Conduct Medical and Pharmaceutical Activities According to One's Specialization and Qualifications
- 7.1.5 Right to Continuing Education and Training at Least Once Every Five Years in Relevant Institutions and Establishments
- 7.1.6 Right to Mandatory Insurance of Health Care Employees Against Damage to Life and Health While Carrying out Professional Duties at the Expense of the Owner of the Health Care Institution in Cases Established by Law
- 7.1.7 Right to Share Information About a Patient Without His/Her Consent or Consent of His/Her Representative
- 7.1.8 Right to Refuse Further Management of a Patient
- 7.1.9 Right to Conduct Medical Intervention Without Consent of a Patient and/or His/Her Legal Representatives

## 7.2 PROVIDERS' RESPONSIBILITIES

- 7.2.1 Responsibility to Provide Timely and Competent Medical Assistance; and Promote Public Health; Prevent and Treat Diseases
- 7.2.2 Responsibility to Provide Free Emergency Assistance to Citizens in Case of Accidents and Other Emergencies
- 7.2.3 Responsibility to Disseminate Scientific and Medical Knowledge Among the Population, to Promote Healthy Lifestyle, Including Using One's Own Example
- 7.2.4 Responsibility to Comply with the Requirements of Professional Ethics and Deontology and to Maintain Medical Secrecy
- 7.2.5 Responsibility to Advance Constantly Professional Knowledge and Skills
- 7.2.6 Responsibility to Provide Assistance in the Form of Counsel to One's Co-workers and Other Health Care Employees
- 7.2.7 Responsibility to Provide Patients or Other Qualified Individuals with Medical Information

# 7

## National Providers' Rights and Responsibilities

### 7.1 Providers' Rights

#### INTRODUCTION

This section focuses on providers' rights, including the rights to work in decent conditions, freedom of association, due process, and other relevant country-specific rights. The concept of human rights in patient care refers to the application of general human rights principles to all stakeholders in the delivery of health care and recognizes the interdependence of patients' and providers' rights. Health workers are unable to provide patients with good care unless their rights are also respected and unless they can work under safe and respectful conditions. For each right outlined in the section, there is a brief explanation of how that right relates to health providers; and examination of its basis in country legislation, regulations and ethical codes; examples of compliance and violation; and practical notes for lawyers on litigation to protect provider rights.

Medical practice of health care professionals is directly associated with realization of constitutional human and civil rights of individuals and citizens to health, medical assistance and health insurance. Efficient organization of the work of medical practitioners is a major factor in ensuring public health, which consequently leads to social stability in a society.

The rights and responsibilities that define the legal status of medical practitioners in accordance with the national legislative framework are the subject of study in this chapter. This chapter examines specific rights guaranteed by the laws of Ukraine and responsibilities of medical professionals which lay out the foundation for professional medical practice and for proper protection of the rights of patients.

The Law of Ukraine “Principles of Ukrainian Health Care Legislation” contains a long list of professional rights and responsibilities of medical practitioners that can rightly be divided into general, i.e. those related to the working conditions, protection of their health, etc., and special, i.e. those arising in the process of providing medical assistance to patients. Section 7.1 of this chapter examines some general rights as well as some special conditions. It is worth keeping in mind that equality and freedom of choice in the relationship “doctor-patient” is based on the formula “the right of one subject of a medical legal relation corresponds to the responsibility of another subject”. Hence, certain rights of health care employees can be derived from the content of the responsibilities of patients.

### 7.1.1 Right to Work in Decent Conditions

**a) Health workers enjoy a range of rights related to decent, safe, and healthy working conditions when providing care.**

**b) Right as Stated in Country Constitution/Legislation**

- ▶ **Constitution of Ukraine of June 28, 1996 [Article 43 (part 4)].**

“Everyone has the right to proper, safe and healthy working conditions ...”.

- ▶ **Labor Code of Ukraine of December 10, 1971 [Articles 2 (part 2), 153–155].**

“... Employees are entitled to healthy and safe working conditions ...” (part 2 Article 2). “At all enterprises, institutions and organizations, there should be created safe and hazard-free working conditions. Ensuring safe and hazard-free working conditions is the responsibility of the owner or an agency authorized by him/her”(Article 153).

- ▶ **Criminal Code of Ukraine of April 5, 2001 [Article 172].**
- ▶ **Administrative Code of Ukraine of December 7, 1984 [Article 41].**

“Violation of labor legislation and labor protection:

Violation of laws and regulations on labor protection incurs fines for employees in the amount of two to five times the untaxed minimum wages and for officials at enterprises, institutions and organizations irrespective of the form of their ownership and private entrepreneurs in the amount of five to ten times the untaxed minimum wages”(part 2 Article 41).

- ▶ **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Articles 5, 6 (paragraph “d”), 77 (paragraph “b”)].**

Article 6 of the Law guarantees the right to health, including inter alia the right to safe and healthy working conditions.

“Health care employees are entitled to adequate working conditions in their professional activities” (paragraph “b” Article 77).

- ▶ **On Labour Protection: Law of Ukraine of October 14, 1992, the (in the reading of November 21, 2002) [Articles 1, 4].**

According to Article 1 of the Law, the right to adequate safe and healthy working conditions is ensured via labor protection through a system of legal, social, economic, organizational, technical, sanitary and preventive measures and means aimed at preserving life and health and preventing disability in the course of employment.

- ▶ **On Psychiatric Care: Law of Ukraine of February 22, 2000 [Article 29].**

“A psychiatric facility owner or an authorized body must provide appropriate working conditions for medical professionals and other staff involved in providing psychiatric care, including taking care of those who provide psychiatric care” (paragraph 9 Article 29).

- ▶ **On Combating Tuberculosis: Law of Ukraine of July 5, 2001 [Article 23].**

“Owners of health care institutions that conduct TB diagnostic procedures and treatment of patients or agencies authorized by them must provide employees of these institutions with necessary means of protection and carry out appropriate regular medical examinations of the employees.”

- ▶ **On Resistance to Diseases Caused by Human Immunodeficiency Virus (HIV), and Legal and Social Protection of People Living With HIV: The Law of Ukraine of 12.12.1991. (The wording of 23.12.2010.) [Article 20]**

“An owner (an agency authorized by him/her) of a health care institution whose employees conduct diagnostic testing for HIV infection, provide medical assistance and social services to persons living with HIV, as well as come in contact with blood and other materials from infected persons, besmeared instruments, equipment or items, must supply the employees with necessary means of individual protection ... and also organize carrying out of an instruction of such employees as to special means of individual protection usage”.

### **c) Supporting Regulations/ Bylaws/ Orders**

- ▶ **Framework for the National Program for Improving Safety, Occupational Hygiene and Working Environment for 2006-2011: Regulation of the Cabinet of Ministers of Ukraine of May 11, 2006 No. 269-r.**

The goal of the Program is to develop and ensure implementation in practice of new safe technologies and scientific and technological advances in health care and occupational hygiene , to review and adapt national legislation on labor protection and occupational safety to that of the European Union in order to reduce occupational injuries and occupational diseases, to preserve labor potential of Ukraine and to create legal foundation for EU membership for Ukraine.

- ▶ **Issue of Prevention and Protection of the Population from HIV infection and AIDS: Resolution of the Cabinet of Ministers of Ukraine of December 18, 1998, No. 2026.**
- ▶ **On Approving the Norms of Working Time of Workers of Health Care Institutions: Order of the Ministry of Health of Ukraine of May 25, 2006, No. 319.**

### **d) Provider Code(s) of Ethics**

- ▶ **Code of Ethics of Physicians of Ukraine, adopted and signed at the National Congress of Health Care Organizations and at the X Congress of the Ukrainian Medical Association on September 27, 2009 [paragraph 4.5.].**



“Doctors – managers of health care institutions ... must undertake... creation of adequate conditions for professional activity ...”

## e) Other Relevant Sources

- ▶ **On the Status of Working Conditions, Safety, Level of Occupational Injuries and Occupational Diseases in the Country and Tasks for the FTU Member Organizations to Enhance the Influence of Trade Unions in Ensuring Healthy and Safe Working Conditions: Resolution of the Council of the Federation of Trade Unions of Ukraine of July 6, 2006 No. P-5 -2.**

## f) Practical Examples

### 1. Example(s) of Compliance

In 2008, health care institutions of Zaporizhzhia underwent inspections to establish whether the working conditions of health care employees were adequate. Results of the review of working conditions at the health care institutions were satisfactory – 12 chiefs of staff of the institutions were awarded for excellent performance.

### 2. Example(s) of Violation

Hospital No. 7 in Luhansk witnessed a tragedy: an oxygen tank explosion killed 16 people, among them medical staff of the establishment. To prevent similar accidents in the future, on behalf of the Government of Ukraine, the State Mining Industry Oversight Committee carried out a review of hospitals and facilities that fill tanks with oxygen. They established that gross violations at health care facilities were a regular phenomenon. After 1,288 inspections, the inspectors seized nearly 800 oxygen tanks that were stored on hospital premises (precisely this type of breach had led to numerous victims at the hospital in Luhansk), and the operation of further 2,500 tanks had to be temporarily stopped due to violations of safe operating conditions. It should be noted that before the explosion, the Committee had had no right to inspect hospitals due to the moratorium on inspections of small low risk enterprises, which include hospitals, introduced by the Government of Ukraine.

### 3. Actual Case(s)

While working as a doctor at a tuberculosis clinic, Ms. M. contracted a latent type of tuberculosis. After a lengthy and costly treatment, Ms. M. requested the chief of staff of the clinic to compensate her for her medical expenses. The chief of staff refused Ms. M.'s request, pointing out that she had been notified about the potential consequences of working at the clinic at the time she was hired. Ms. M contacted an official at the Department of Labor with a request to refund her the cost of her treatment. The official of the Department of Labor

explained to her that the compensation might be provided only when the fact of illness was confirmed by the conclusions of a medical expert commission. Having collected all necessary documents, including the conclusion of MSEC (Medical Social Expert Commission) which stated that Ms. M. had been subject to an occupational illness, Ms. M. initiated a lawsuit to compensate her for material and moral damages in connection with an occupational disease under part 1 of Article 23 of the Law of Ukraine "On Combating Tuberculosis". Presently, the case is being tried in court.

### **g) Practice Notes**

1. According to Article 153 of the Labor Code of Ukraine, an employee has the right to refuse an assigned task if, in any given occupational situation, carrying out this task presents a threat to his/her life or health or to the surrounding people and the environment. The presence of such a situation must be confirmed by an expert commission on occupational safety at a medical institution that includes a representative of the trade union and an authorized representative of the employees. The employee who refused to perform the task retains his/her average salary throughout this period.
2. An employee has the right to terminate an employment contract at his/her discretion if the employer does not comply with the legislation on occupational safety and the conditions of the labor agreement on this issue. In this case, the employee is paid a severance pay in the amount stipulated in the labor agreement but not less than three months' wages (part 3 Article 38, Article 44 of the Labor Code of Ukraine).
3. A mismatch between the existing conditions and the requirements of the legislation on labor protection constitute grounds for material liability of the company to the employee and the right of the employee to terminate a fixed term employment contract prematurely or resign without a two week notice. The qualifying conditions of this type are: a) working conditions at each workplace, b) safety of technological processes, machines, machinery, equipment and other assets, c) state of collective and individual protection, d) sanitary conditions.
4. When an employee is compensated for the damage to his/her health, the amount of compensation includes:
  - payment of lost wages (or appropriate portion thereof), depending on the degree of loss of professional performance by the victim;
  - payment of a one time support grant to the victim (to the family members and dependents of the deceased);
  - reimbursement of the cost of medical and social assistance (enhanced nutrition, prosthesis, at home care, etc.).

Moreover, the victim is entitled to compensation for moral damage caused to him/her, in accordance with the procedure established by law.

## **h) Cross-referencing Relevant International and Regional Rights**

Please, review international and regional norms, concerning right to adequate working conditions in the context of the following possibilities:

- right to work, illustrated in chapter 2.
- right to fair wage and safe working conditions, illustrated in chapter 2 and 3.
- right to work and equal possibilities, without sex discrimination, illustrated in chapter 3.
- right to reasonable duration of working day and working week, illustrated in chapter 3.

### **7.1.2 Right to Freedom of Association**

**a) Health workers' ability to form, join, and run associations without undue interference is critical to their ability to effectively defend their rights and provide good care.**

#### **b) Right as Stated in Country Constitution/Legislation**

- ▶ **Constitution of Ukraine of June 28, 1996 [Article 35 (parts 1, 3, 4)].**

“Citizens of Ukraine have the right to freedom of associations... in civil society organizations ... (part 1) ... have the right to participate in trade unions to protect their labor and socio-economic rights and interests (part 3)...”

- ▶ **Civil Code of Ukraine of January 16, 2003 [Article 314].**

“Individuals have the right to freedom of associations ... in civil society organizations ...” (part 1).

- ▶ **On Public Associations: Law of Ukraine of June 16, 1992.**

- ▶ **On Trade Unions, Their Rights and Guarantees of Their Activities: Law of Ukraine of September 15, 1999.**

“On the basis of their free will and without any permission, citizens of Ukraine have the right to form trade unions, to join them and leave them according to the conditions and procedure specified in their charters, to participate in trade union activities” (Article 6).

- ▶ **On Charity and Charitable Organizations: Law of Ukraine of September 16, 1997.**

- ▶ **On Employers' Organizations: Law of Ukraine of May 24, 2001.**

“Employers have the right to set up organizations of employers to exercise and protect their rights and realize their social, economic and other legitimate interests ...” (part 1 Article 2).

- ▶ **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Article 77 (paragraph “n” part 1)].**

“Health care ... employees have the right ... to set up medical societies, trade unions and other public organizations”.

### **c) Supporting Regulations/ Bylaws/ Orders**

- ▶ **Program for Ukraine’s Integration into the European Union: Decree of the President of Ukraine of September 14, 2000 N 1072/2000 [section 4].**

- ▶ **On Approval of the Provision on the Procedure for Legalizing Civic Associations: Resolution of the Cabinet of Ministers of Ukraine of February 26, 1993 No. 140.**

- ▶ **On Approval of the Provision on Unified Register of Civic Associations: Order of the Ministry of Justice of Ukraine of December 19, 2008 No. 2226 / 5.**

### **d) Provider Code(s) of Ethics**

- ▶ **Code of Ethics of Physicians of Ukraine, adopted and signed at the National Congress of Health Care Organizations and at the X Congress of the Ukrainian Medical Association on September 27, 2009 [paragraph 2.12].**

“A doctor has the right to participate actively in the work of professional unions and associations while at the same time enjoying their protection and support. Medical unions and associations must promote and provide each of its members with assistance in complying with and upholding the principles of professionalism, professional independence, morality, ethics and deontology.”

## e) Other Relevant Sources

- ▶ **“On the Law of Ukraine “On Civic Associations””:** Letter of the Supreme Arbitration Court of Ukraine of December 30, 1997 No. 01-8/500.
- ▶ **Recommendations on Record Keeping in Primary Trade Union Organizations (Trade Union Committee):** Standing Committee of the FTU Council on Organizational Issues of November 15, 2006.

## f) Practical Examples

### 1. Example(s) of Compliance

On June 30, 1990, the Inaugural (1st) Congress of Ukrainian Medical Association (hereinafter – UMA) took place. That same year, UMA became a member of the World Federation of Ukrainian Medical Associations (WFUMA), the 3rd Congress of which (the first one in Ukraine) was held in August 1990 in Kyiv and Lviv. UMA’s aim is to promote and strengthen public health in Ukraine, to develop medical science, to promote professionalism of health care employees, their legal and social protection.

### 2. Example(s) of Violation

A group of cardiologists decided to set up a public organization “Cardiologists of Region L.” To this end, they contacted the regional Department of Justice and submitted a set of required documents. However, they were unlawfully denied registration on the grounds that the region already had a public organization of physicians-cardiologists.

### 3. Actual Case(s)

Employees of a private health care institution of city L. decided to unite and create a voluntary non-profit public organization (a trade union). On March 15, 2009, at the founding meeting of the trade union, the charter of the organization was adopted.

In accordance with Article 16 of the Law of Ukraine “On Trade Unions, Their Rights and Guarantees of Their Activities”, the employees of the trade union filed an application with the City Department of Justice. The application contained the charter (regulations), the minutes of the founding meeting of the trade union with the decision to approve the charter, information on elected bodies, on the presence of trade union organizations in relevant administrative-territorial units, on the founders of the association—in other words, all the documents necessary for the legalization of the trade union. However, they were wrongly denied legalization on the grounds of the lack of compliance of the filed documents with current legislation despite the fact that, pursuant to Part 5 of Article 16 of the Law of Ukraine “On Trade Unions, Their Rights and Guarantees of Their Activities”, a legalizing authority may not refuse legalization of a trade union or an association

of trade unions. In case of the non-compliance of the documents submitted by a trade union or an association of trade unions with the status in question, the legalizing body must request the trade union or the association of trade unions to provide additional documentation necessary to verify their status.

Employees of the health care institution filed a complaint against the actions of the employee of the City Department of Justice with the Regional Department of Justice: due to timely response measures, the trade union was legalized.

### **g) Practice Notes**

1. Trade unions and their associations have the right to represent its members as a means of exercising their constitutional right to appeal for protection of their rights to courts, to the Parliament Commissioner for Human Rights and to international judiciary institutions.
2. Trade unions exercise their civic control over the payroll, compliance with labor laws and labor protection, creation of safe and non-harmful working conditions, adequate industrial and sanitary conditions, availability of means of individual and collective protection of employees.
3. Trade unions may set up legal aid and inspection services and commissions to carry out their functions.
4. The representatives of trade unions have the right to submit petitions to employers who are required to review them and provide detailed responses.

### **h) Cross-referencing Relevant International and Regional Rights**

Please, review international and regional norms, concerning the right to set up scientific medical societies, trade unions and other public organizations in the context of:

- right of assembly and consolidation.
- right to set up trade unions and right to go on strike, illustrated in chapter 3.

### 7.1.3 Right to Due Process

**a) Health care and service providers are potentially subject to a range of civil and administrative proceedings – disciplinary measures, medical negligence suits, administrative measures such as warnings, reprimands, suspension of activities, etc. – and are entitled to enjoyment of due process and a fair hearing.**

Health care employees are entitled to judicial protection, including judicial protection of professional honor and dignity, in accordance with the health care legislation of Ukraine.

#### **b) Right as Stated in Country Constitution/Legislation**

- ▶ **Constitution of Ukraine of June 28, 1996 [Articles 3, 55, 56, 59, 68].**

“A human being, his/her life and health, honor and dignity, bodily integrity and safety are recognized in Ukraine as the highest social value” (Article 3). “Rights and freedoms of human beings and citizens are protected by the courts. Everyone is guaranteed the right to challenge in court decisions, actions or inaction of state authorities, local government officials and employees” (parts 1, 2 Article 55). “Everyone has the right to legal assistance” (part 1 Article 59).

- ▶ **Criminal Procedure Code of Ukraine of December 28, 1960 [Articles 236-7, 236-8].**

“A resolution of an inquiry agency, an investigator, a prosecutor to institute criminal proceedings against a specific person or for a crime may be appealed in court at the administrative area where the agency or the official that issued the resolution is located in compliance with the rules of jurisdiction” (part 1 Article 236 -7).

- ▶ **Civil Procedure Code of Ukraine March 18, 2004 [Article 3].**

“Everyone has the right ... to appeal to courts for protection of their violated, unrecognized or disputed rights, freedoms or interests” (part 1 Article 3.).

- ▶ **Administrative Procedure Code of Ukraine of July 6, 2005 [Articles 6, 17-21].**

“Everyone is guaranteed the right to defend his/her rights, freedoms and interests in front of an independent and impartial court” (part 1 Article 6).

▶ **Civil Code of Ukraine of January 16, 2003 [Articles 15, 16, 297, 299].**

“Everyone has the right to defend his/her civil rights in the event of their infringement, non-recognition, or contestation” (part 1 Article 15). “Everyone has the right to appeal to courts for protection of his/her personal proprietary and non-proprietary rights and interests” (part 1 Article 16). “Everyone has the right to respect for his/her dignity and honor. Dignity and honor of an individual are inviolable. An individual has the right to appeal to the courts for protection of his/her dignity and honor” (Article 297). “An individual has the right to the inviolability of his/her business reputation. An individual may appeal to the courts for protection of his/her business reputation” (Article 299).

▶ **Labor Code of Ukraine of December 10, 1971 [Articles 128, 130, 134, 136, 137, 139, 147, 147-1, 148, 149, 150, 151, Chapter XV].**

“For each payment of wages, total amount of all deductions may not exceed 20%, and in cases provided for separately by the laws of Ukraine 50% of the wages to be paid to an employee” (Article 128).

“Employees are financially responsible for damage caused to the enterprise, institution or organization due to violation of labor regulations they are subject to. When proprietary liability is evoked, the rights and legitimate interests of employees are guaranteed by imposing liability only for direct actual damage and only in the extent and according to the procedure prescribed by the law provided that the damage caused to the enterprise, institution or organization was caused by unlawful action (inaction) of the employees. This liability is limited, as a rule, to a specific portion of employee’s wages and must not exceed the full amount of the damage caused, except as required by law” (parts 1, 2 Article 130).

For damage to the enterprise, institution or organization incurred in the course of carrying out employment duties, employees that caused the damage bear proprietary liability in the amount of the actual direct damage but not exceeding their average monthly wages” (part 1 Article 132).

“Prior to applying disciplinary deduction measures, an owner or a body authorized by him/her must require the violator of labor discipline to provide a written explanation. Only one disciplinary deduction may be applied to each violation of labor discipline. When selecting the type of penalty, the owner or the body authorized by him/her must consider the gravity of the offense committed, the damage caused, the circumstances under which the offense was committed, and previous record of the employee. A de-



duction is declared in the form of an order (regulation) and the employee is notified with a signature taken upon receipt” (Article 149).

“A disciplinary deduction may be appealed by the employee in the manner prescribed by law” (Article 150).

- ▶ **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Articles 77 (paragraph “o” part 1)].**

“Health care ... employees have the right ... to judicial protection ... of their professional honor and dignity.”

### c) Supporting Regulations/ Bylaws/ Orders

- ▶ **Framework for Ensuring the Quality of Health Care Services in Ukraine for the Period Ending in 2010: Order of the Ministry of Health of Ukraine of March 31, 2008 No. 166.**

“One of the tasks of the Framework is to provide protection of interests of health care employees against occupational hazards.”

- ▶ **Responsibility of Medical Workers: Letter of the Ministry of Justice of Ukraine, Department of Constitutional, Labor and Humanitarian Legislation of January 20, 2011.**

### d) Provider Code(s) of Ethics

- ▶ **Code of Ethics of Physicians of Ukraine, adopted and signed at the National Congress of Health Care Organizations and at the X Congress of the Ukrainian Medical Association on September 27, 2009 [paragraphs 2.4, 2.12, 4.5].**

“Humane goals, to which a doctor aspires, give him reason to seek legal protection of his/her own moral and ethical position and principles, personal dignity, financial security, creation of adequate conditions for professional activities” (paragraph 2.4). “The Commission on Bio-ethics, ethics commissions or committees at health care facilities, research institutions, universities, medical societies and associations have the right, when necessary, to uphold and defend in court the honor and dignity of [the doctor] with his/her consent as long as his/her professional actions comply with the Code of Ethics of Physicians of Ukraine” (paragraph 2.12). “Doctors, managers of health care facilities, scientific and educational institutions are obliged to ensure protection of moral and ethical position and principles, personal dignity ... of their subordinates” (paragraph 4.5).

## e) Other Relevant Sources

- ▶ **Decision of the Constitutional Court of Ukraine regarding the constitutional request of citizen Hennadij Ivanovych Soldatov to provide the official interpretation of the provisions of Article 59 of the Constitution of Ukraine, Article 44 of the Criminal Procedure Code of Ukraine, Articles 268, 271 of the Administrative Code of Ukraine (the case of the right to free choice of counsel) of November 16, 2000 No. 13-rp/2000.**

“... The statement that everyone is free to choose the defender of their rights should be understood as a constitutional right of a suspect, an accused or a defendant in defending himself/herself against charges and of an individual facing administrative charges in order to obtain legal aid to select as a defender of his/her rights an individual who is an expert in law and is legally entitled to provide legal aid in person or by proxy on behalf of a legal entity.”

- ▶ **Decision of the Constitutional Court of Ukraine regarding the constitutional request of citizen Halyna Pavlivna Dziuba to provide the official interpretation of part 2 of Article 55 of the Constitution of Ukraine and Article 248-2 of the Civil Procedure Code of Ukraine (the case of citizen H. P. Dziuba on the right to challenge in court unlawful actions of an official) of November 25, 1997 No. 6-zp.**

“Part 2 of Article 55 of the Constitution of Ukraine should be understood as follows: everyone, i.e. a citizen of Ukraine, a foreigner, a stateless person, has a guaranteed by the state right to appeal to a court of general jurisdiction decisions, actions or inaction of any governmental agency, local authorities, officials and employees when the citizen of Ukraine, the foreigner, the stateless person believes that these decisions, actions or inaction violate or infringe on the rights and freedoms of the citizen of Ukraine, the foreigner, the stateless person or hinder their implementation, and therefore require legal protection in court.”

- ▶ **On Judicial Practice in Cases of Compensation for Moral (Non-proprietary) Damage: Resolution of the Plenary Assembly of the Supreme Court of May 25, 2001 No. 5 (as amended by the Resolution of the Supreme Court of Ukraine of May 25, 2001 No. 5).**
- ▶ **On Judicial Practice in Cases of Protection of Dignity and Honor of an Individual as well as Business Reputation of an Individual or a Legal Entity: Resolution of the Plenary Assembly of the Supreme Court of Ukraine of February 27, 2009 No. 1.**

“... Dignity means recognition of the value of each individual as a unique bio-psychological entity, honor means positive social evaluation of an individual in the eyes of others based on the conformity of his/her actions (behavior) with generally accepted notions of good and evil, and reputation of an individual means public assessment of business and professional qualities acquired by this individual in carrying out employment, business, community or other duties.”

▶ **On the Procedure for Civil Lawsuits on Compensation for Damages: Resolution of the Plenary Assembly of the Supreme Court of Ukraine of March 27, 1992 No. 6.**

“By recourse, a responsible individual is charged the amount of expenses incurred in fulfilling the obligation to compensate for the damage, and if the law sets the limits of compensation or limits of liability of the responsible individual, then the individual is charged within these limits” (paragraph 8).

▶ **On the Procedure for Civil Lawsuits on Compensation for Damages Caused by Businesses, Institutions, Organizations and Their Employees: Resolution of the Plenary Assembly of the Supreme Court of Ukraine of December 29, 1992 No. 14.**

An employee is responsible to the enterprise (institution, organization) with which he/she has labor relations for the damage caused due to the violation of labor regulations. Compensation for the damage is provided regardless of whether the employee is faced with disciplinary, administrative or criminal liability for his/her actions (inaction) that caused the damage to the company, institution or organization. Under the rules of Article 132 of the Labour Code, employees who are responsible for damage caused to the enterprise, institution or organization in the course of carrying out their employment duties bear liability in the amount of actual direct damages but not in excess of their average monthly wages, except when the legislation demands compensation in excess of the amount of the wages. Direct real damage means, in particular, the loss, deterioration or decrease in the value of the property, the need for the enterprise, institution or organization to bear the cost of renovations, to acquire property or other assets or to make extra payments caused by the violation of employment regulations by an employee”.

▶ **On the Procedure for Handling Labor Disputes in Court: Resolution of the Supreme Court of Ukraine of November 6, 1992 No. 9.**

“As a general rule, individual labor disputes are settled by courts directly or after they are reviewed by the Committee on Labor Disputes (CLD) (paragraph 3). Under Article 233 of the Labor Code of Ukraine, the term

of one month (assigned to the settlement of labor disputes regarding the termination of employment) applies to all types of dismissal, regardless of the grounds for the termination of an employment contract (paragraph 4). Termination of an employment contract at the initiative of the owner or the body authorized by him/her is allowed only with the prior consent of the trade union, except as provided for in Articles 43 and 43 (1) of the Labor Code” (paragraph 15).

## **f) Practical Examples**

### **1. Example(s) of Compliance**

A plaintiff appealed to the court to defend her honor, dignity and business reputation and to procure a compensation for moral damages. She emphasized the fact that she had been working as an ambulance doctor at the Central City Hospital since 1990 and during the time of her employment she was repeatedly commended on her good work and was not subject to complaints by the administration, hospital staff or patients.

For a significant period of time, the defendant spread false information about her, orally as well as in the form of complaints that injured her honor, dignity and business reputation. In particular, on February 5, 2004, the defendant sent a complaint to the Executive Committee of the City Council in which he presented false information that injured honor, dignity and business reputation of the plaintiff, claiming that she showed lack of discipline, boorishness, insulted her fellow physicians and nursing staff in the course of her work. While on night duty, she did not want to work; when on call and in public places, she behaved arrogantly, demanded payment for the assistance she provided using methods of alternative medicine.

At the meeting of the trade union where the complaint was reviewed, and to which the plaintiff was not invited, she was issued a “public reprimand” for creating conflict situations at the workplace. However, on March 2, 2004, at the meeting convened to elect trade union representatives of the central hospital of city A. the facts specified in the complaint were not confirmed, as the minutes of the meeting attached to the case file testify.

The plaintiff was the target of increased attention and discussion among her co-workers and friends. The false information disseminated by the defendant became known to the patients of the plaintiff and certainly had an impact on her reputation and evoked in her a sense of humiliation and discomfort. In order to resume her former rhythm of life, she had to exert much effort, and this put a strain on her health. Because of the actions of the defendant, the plaintiff was depressed, suffered nervous stress, insomnia, often was ill and underwent several rounds of outpatient treatment.

The court decided to satisfy the claim in part by ordering a compensation for moral damage in the amount of 1,500 hryvnias.

## 2. Example(s) of Violation

On March 10, 2006, chief of staff D. of one of the hospitals in city D. received a letter from the deputy chief of staff K in which the latter proffered false information about the doctor-endocrinologist that injured his honor, dignity and business reputation.

The doctor asked the chief of staff to denounce as false the information that he had proven himself to be a scandalous, conflict igniting employee who could not find a common language with the rest of the team, constantly sent ungrounded complaints to different authorities, repeatedly disrupted consultations, made gross errors in diagnosis and methods of patient management, thus leading to increased postoperative complications, demonstrated insufficient professional level, threatened to appeal to the head of the department.

The doctor-endocrinologist explained that he had sufficient knowledge to carry his work, was trained abroad and, therefore, warned his co-workers against the use of outdated treatment methods. The doctor explained that he was defending his own position and this fact was falsely believed by the defendants to be conflict provoking, caused them to claim that he was a scandal seeking human being who could not find common language with the team. In addition, he did not write any complaints rather requested the senior staff of the hospital to protect his rights. He was not made acquainted with the schedules for hospital-internal consultations, did not sign any of them, therefore, the accusations of deliberately disrupting the work were unfounded.

He also considered as inaccurate the information about gross errors in diagnosis and methods of patient management, the claim not supported by any evidence, including by the fact that he was never subject to disciplinary measures. He requested the chief of staff to acknowledge the information contained in the letter as negative, not true, and such that injures his dignity, honor and business reputation as a human being, and therefore to denounce it in the same manner in which it had been disseminated. The doctor-endocrinologist said that if this information were not denounced, he would seek protection of his professional honor and dignity in court. The chief of staff D. noted that the health care employee responsible for disseminating the information outside the medical institution would be dismissed because he violated Article 1977 of the Law of Ukraine "Principles of Ukrainian Health Care Legislation".

## 3. Actual Case(s)

Ms. M. initiated proceedings in court to protect her honor, dignity and business reputation, citing the fact that she worked as a head nurse in the central hospital of district K. and was required to organize and check adherence of the middle and junior medical staff to employment schedule and duties.

The acting chief of staff of the hospital approved the list of responsibilities of junior nurses who care for patients in the Department of Surgery and the plaintiff was supposed to inform the rest of the staff of their responsibilities. The defendant, a trade union representative, in a written statement to the members of the trade union "Health Care and Law" noted that the request made by the head nurse for all the nurses to sign a list of their responsibilities was a provocation on

the part of the hospital administration the sole purpose of which was to evade paying for the work performed and so on. Because the information distributed by the defendant was not true, and no unlawful actions towards the medical staff employed took place, the plaintiff asked the court to order the trade union to refute the information that was not true and discredited her honor, dignity and business reputation by making an apology in front of all the members of the trade union "Health Care and Law" and the entire medical staff of the central regional hospital at the general meeting as well as demand payment of compensation for moral damage in the amount of 1,700 hryvnias.

The Court concluded on the basis of the analysis of the list of responsibilities involved that the list contained no instructions to expand the range of duties of the nurses, did not make other nurses responsible for performing the duties of a nurse who was absent and whose working hours fell on Saturday and Sunday. The mere fact of being acquainted with the responsibilities did not deprive the medical staff of the right, provided and guaranteed by the Constitution of Ukraine and the current labor legislation of Ukraine, to receive wages, to solve possible disputes in this area in court. The plaintiff was required to perform her duties by the job regulations approved in accordance with the existing procedure and this fact may not be considered a provocation on the part of the hospital administration. By calling the members of the trade union "Health Care and Law" not to sign the statement of their responsibilities, the defendant had seriously violated the procedure for the settlement of labor disputes specified in chapter 15 of the Labor Code of Ukraine.

According to Article 297 of the Civil Code of Ukraine, everyone has the right to respect for his/her dignity and honor. Dignity and honor of an individual are inviolable. Thus, by making public the appeal to the medical staff of the Department of Surgery of the central hospital of district K, which contained false, distorted information, the defendant by this action seriously violated the right of Ms. M. to respect of her dignity and honor, which is inviolable, degraded her business reputation in the eyes of her subordinate medical personnel in a way that contradicts the established rules of communication between people, moral foundations of the society.

Under these circumstances, the court had no doubts about the defendant causing moral damage to the plaintiff, who according to Article 280 of the Civil Code of Ukraine was subject to compensation. The court decided to satisfy the claim: to order the defendant to compensate the plaintiff for moral damages in the amount of 1,700 hryvnias.

## **g) Practice Notes**

1. In criminal law, the principle of presumption of innocence is operative: a person is not guilty of a crime and may not be subjected to criminal prosecution until his/her guilt is proven following an established legal procedure and is confirmed by the court's verdict. Nobody is obliged to prove his/her innocence of a committed crime (Article 62 of the Constitution of Ukraine). In civil law, the principle of presumption of guilt is operative: a person who caused the damage shall be relieved of the need

- to compensate for the damage if he/she proves that the damage was caused not due to his/her fault (Article 1166 of the Civil Code of Ukraine).
- 2.** Resolution to initiate criminal proceedings may be appealed in a court of general jurisdiction.
  - 3.** Claims arising from a breach of personal non-proprietary rights do not expire, except as provided by law (paragraph 1 part 1 Article 268).
  - 4.** Gains from inadequate performance by an employee of job duties not submitted or registered as state revenue (as well as other not submitted profits) may not be included in the damages recoverable from the employee (part 4 of Article 130 of the Labour Code of Ukraine).
  - 5.** An employee may not be deemed responsible for the damage caused by him/her in a state of emergency (part 4 of Article 130 of the Labor Code of Ukraine).
  - 6.** Employees bear financial responsibility in the full amount of the damage caused to their company, institution, organization due to their fault if the damage was caused by the actions of the employees which bear the characteristics of actions subject to criminal persecution (paragraph 3 of Article 134 of the Labor Code of Ukraine). An employee bears full financial responsibility not only in the cases when he/she was convicted, but also when the existence of the crime in his/her actions was established by the investigating authorities (criminal liability with the subsequent termination of the proceedings on non-rehabilitating grounds that do not exclude criminal responsibility).
  - 7.** A recourse claim may be brought to bear within three years from the date of the liability to compensate for damages being fulfilled (compensation in kind, periodic payments, etc.) (paragraph 8 of the Resolution of the Plenary Assembly of the Supreme Court of Ukraine “On the Procedure for Civil Lawsuits on Compensation for Damages Caused by Businesses, Institutions, Organizations and Their Employees”).
  - 8.** Disputes related to the suspension of employees from work upon the resolution of a prosecutor or an investigator are not subject to judicial review in civil proceedings and are resolved in the manner prescribed for appeals of the decisions of these bodies. After the repeal of such a resolution, the labor dispute is settled following the general procedure.
  - 9.** Regardless of who initiated the lawsuit—an employee, an employer, an agency authorized by him/her or a prosecutor—after the dispute is resolved by the Labor Disputes Committee, the court examines the case in limitation proceedings as a labor dispute resolved by the LDC, that is as a claim of an employee against an enterprises, institutions, organization.
  - 10.** An employee may apply for a settlement of a labor dispute directly to the court within three months from the day he/she learned or should have known of the violation of his/her rights, and in dismissal cases – within a month from the day a copy of the order of dismissal was handed to him/her or the date his/her employment record was handed to him/her.



11. Refusal of the trade union body to approve a dismissal constitutes the grounds for reinstatement of the employee at work.
12. An employee may not be dismissed during the period of temporary disability as well as during his/her stay on vacation. It includes annual and other leaves of absence granted to the employee with or without pay.
13. If the application for reinstatement at work was reviewed for more than one year and there was no fault of the employee in the delay, the average salary payment is made for the period of forced truancy for any time in excess of one year. When the employee is partly responsible, payments for forced truancy in excess of one year can be correspondingly reduced. The decision of the court regarding the guilt (the employee did not appear in court, committed other acts to delay the proceedings) or the innocence of the employee and regarding the extent of the reduction in benefits must be motivated.
14. An owner or a body authorized by him/her shall compensate an employee for moral damages if the violation of his/her legal rights resulted in mental suffering, loss of normal lifestyle and required extra effort to organize his/her life.

### **h) Cross-referencing Relevant International and Regional Rights**

Please, review international and regional norms, concerning right to judicial protection in the context of:

- right to fair case hearing, illustrated in chapter 2 and chapter 3.
- right to efficient method of legal protection, illustrated in chapter 2 and chapter 3.
- right to one's personal life and reputation protection, illustrated in chapter 2 and chapter 3.

## **7.1.4 Right to Conduct Medical and Pharmaceutical Activities According to One's Specialization and Qualifications**

**a) Health care providers are entitled to conduct medical and pharmaceutical activities according to one's specialization and qualification in order established by the legislation.**

### **b) Right as Stated in Country Constitution/Legislation**

- ▶ **Constitution of Ukraine of June 28, 1996 [Articles 43 (part 1), 53 (part 1)].**



*“Everyone has the right to education (Article 53) and the right to work (Article 43).”*

- ▶ **Tax Code of Ukraine of December 2, 2010 [Article 197 (paragraph 197.1.5, 197.1.6)].**

“Operations, connected with provision of services in the sphere of health protection by health care institutions, which obtained a licence to provide such services and provision of services by rehabilitation institutions to disabled persons and disabled children, which obtained a licence to provide such services in order established by the law, shall be released from taxation...”

- ▶ **On Higher Education: Law of Ukraine of January 17, 2002.**
- ▶ **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Articles 17, 74 (part 1), 74-1, 77 (paragraph “a”)].**

“Medical and pharmaceutical activities may be carried out by individuals with appropriate specialized education who meet the unified qualification standards” (part 1 Article 74). “Medical and pharmaceutical employees have the right to engage in medical and pharmaceutical activities according to their specialization and qualifications” (paragraph “a” Article 77). According to Article 74-1 of the Principles, individuals have the right to practice traditional medicine (healing).

- ▶ **On Licensing of Certain Types of Business Activities: Law of Ukraine of June 1, 2000 [Article 9].**

According to Article 9 of the Law (“Types of Business Activities Subject to Licensing), production, wholesale and retail of medicines (paragraph 9), medical practice (paragraph 26), processing of donor blood and its components and making preparations from it (p. 27) are subject to licensing.

### **c) Supporting Regulations/ Bylaws/ Orders**

- ▶ **On a Simplified System of Taxation, Accounting and Reporting of Subjects of Small Entrepreneurship: Decree of the President of Ukraine of July 7, 1998 No. 727/98 (in the wording of January 1, 2011).**
- ▶ **On Further Improvement of Certification of Physicians: Order of the Ministry of Health of Ukraine of December 19, 1997 No. 359.**

- ▶ **On the Procedure for Residency of Physicians and Subsequent Admission to Medical Practice: Order of the Ministry of Health of Ukraine of March 17, 1993 No. 48.**
- ▶ **On the Provision on the Certificate of Completion of Advanced Training and Retraining of Junior Medical and Pharmaceutical Specialists: Order of the Ministry of Health of Ukraine of September 7, 1993 No. 198.**
- ▶ **A Reference book of Qualification Characteristics of Professions. Number 78 “Health Care”: Order of the Ministry of Health of Ukraine of March 29, 2002 No. 117.**
- ▶ **On the Procedure for Admission to Medical and Pharmaceutical Practice in Ukraine of Citizens Who Completed Medical or Pharmaceutical Training in Educational Institutions Abroad: Order of the Ministry of Health of Ukraine of August 19, 1994 (in the reading of July 8, 2006) No. 118-S.**
- ▶ **On Granting Special Permission for Medical Practice in the Field of Alternative Medicine: Order of the Ministry of Health of Ukraine of August 10, 2000 No. 195.**
- ▶ **On Measures to Regulate Activities in the Field of Traditional and Alternative Medicine: Decree of the President of Ukraine of July 31, 1998 No. 823/98.**
- ▶ **On the Procedure for Certification and Assessment of Healing Abilities of Individual who Wish to Engage in Medical Activities in the Field of Traditional and Alternative Medicine: Order of the Ministry of Health of Ukraine of August 10, 2000 No. 195.**
- ▶ **On Approval of Standards for Administrative Services at the Ministry of Health of Ukraine: Order of the Ministry of Health of Ukraine of February 9, 2008 No. 65.**
- ▶ **Licencing Conditions for Conducting Certain Types of Business Activities in Medical Practice: Order of Ministry of Health of Ukraine of February 2, 2011 No. 49.**

“Medical practice is an activity associated with a set of special measures aimed at promoting better health, at improving sanitary culture, at preventing disease and disability, at diagnosis, assistance to individuals with acute and chronic illnesses and rehabilitation of the sick and the disabled which is carried out by individuals who have specialized education” (paragraph 1.3).

Licencing Conditions for Conducting Certain Types of Business Activities, Connected with Production, Wholesale and Retail Trading of Medicines: Order of Ukrainian State Inspection of Quality Control of Medical Drugs of September 21 2010 No. 340.

- ▶ **On Approval of the List of Licensing Bodies: Resolution of the Cabinet of Ministers of Ukraine of November 14, 2000 No. 1698. (the wording of October 21, 2010)**

#### **d) Provider Code(s) of Ethics**

There are no provisions in existing codes of ethics on this matter.

#### **e) Other Relevant Sources**

- ▶ **Letter of the State Committee of Ukraine on Regulatory Policy and Entrepreneurship of July 15, 2010 No. 9051. “On Approval of Licencing Conditions for the Year of 2010”.**
- ▶ **Letter of the State Committee of Ukraine on Regulatory Policy and Entrepreneurship of April 16, 2010 No. 4789. “On Labour Relations”.**
- ▶ **Letter of Ministry of Health of Ukraine “On Prohibition to Lease the Buildings” of January 19, 2011 No. 09-28/17.**
- ▶ **Letter of Ministry of Health of Ukraine “On Recommendation not to Approve the Lease of the Buildings” of January 19, 2011. No. 09-28/17.**
- ▶ **Letter of Ministry of Health of Ukraine “On Giving Some Clarifications as regards Licencing of Business Activity in Medical Practice” of July 20, 2010. No. 17.01.13-58/2622.**
- ▶ **Letter of the State Committee of Ukraine on Regulatory Policy and Entrepreneurship “On Copies of Licence in Branch Departments” of November 9, 2001, No. 4-431-1106/663.**
- ▶ **Letter of the State Committee of Ukraine on Regulatory Policy and Entrepreneurship “On Carrying out Medical Practice” of December 24, 2002, No. 4-431-1069/6927.**

- ▶ **Letter of the State Committee of Ukraine on Regulatory Policy and Entrepreneurship “On Issuing a Copy of a Licence in Case of Branch Department of a Licencee’ Location Change” of January 14, 2003, No 4-432-29/197.**
- ▶ **Letter of the State Committee of Ukraine on Regulatory Policy and Entrepreneurship “On Licencing of a Non-traditional Medicine” of March 12, 2004, No 1471.**
- ▶ **Letter of Ministry of Health of Ukraine “On Licencing of Paramedics Stations of Enterprises” of March 22, 2004 No/ 13/05/03-02-17.**
- ▶ **Letter of the State Committee of Ukraine on Regulatory Policy and Entrepreneurship “On Giving Clarifications Concerning Certain Types of Business Activity Licencing” of November 4, 2004, No 7706.**
- ▶ **Letter of the State Committee of Ukraine on Regulatory Policy and Entrepreneurship “On Giving Clarifications Concerning the Necessity to Obtain a Licence when Delivering Services of a Body Massage” of October 12, 2004, No 7010.**
- ▶ **Letter of the State Committee of Ukraine on Regulatory Policy and Entrepreneurship “On Order of Separated Departments Licencing” of July 18, 2007, No 5265.**
- ▶ **Letter of the State Committee of Ukraine on Regulatory Policy and Entrepreneurship “On Obtaining a Licence in Case of a Legal Entity’s Reorganization” of September 8, No. 7574.**

## **f) Practical Examples**

### **1. Example(s) of Compliance**

Ms. O. decided to practice alternative medicine; she collected a set of necessary documents, in accordance with the requirements established by law, and submitted them to the Committee on Traditional and Alternative Medicine at the Ministry of Health of Ukraine. The Committee refused to grant the applicant a license because she wanted to pursue this type of medical activity to treat cancer patients which does not belong to the range of activities permitted on general grounds.

## 2. Example(s) of Violation

One of the pharmacies of city K was caught carrying out illegal pharmaceutical activities. A pharmacy employee who was trained at a pharmaceutical school overseas did not have a license to conduct pharmaceutical activities from the Department of Health at the Council of city K. According to the national legislation, citizens of Ukraine trained in medical or pharmacy schools abroad may be permitted to conduct medical and pharmaceutical activities in Ukraine. Junior medical and pharmaceutical employees receive the permission from the Departments of Health at the regional (city) Councils.

## 3. Actual Case(s)

Ms. K. works as a nurse in a health care institution. She registered as a business entity, leases premises at the same health care institution, and provides massage services. Ms. K. asked an attorney of the trade union of health care employees for legal advice regarding the necessity of obtaining a license.

According to paragraph 26 of Article 9 of the Law of Ukraine “On Licensing of Certain Types of Business Activities”, medical practice as a form of business activity is subject to licensing. Business activities with the specialization of a “massage therapist” belong to medical practice (KVED-85.12). Under current legislation, these services may be provided by physical therapists with appropriate education and training, physicians and pediatricians, as well as nurses (Order of the Ministry of Health of Ukraine of December 25, 1992 No. 195).

According to the Resolution of the Cabinet of Ministers of Ukraine “On Approval of the List of Licensing Bodies” of November 14, 2000 No. 1698, the Ministry of Health of Ukraine is established as the licensing authority for this type of activity. Hence, Ms. K. started the process of obtaining a license.

## g) Practice Notes

1. A license to conduct business activities in medical practice may be granted to a legal entity, registered in accordance with the law, which set up a health care institution, and physical person – entrepreneur.
2. A license to conduct medical practice granted to a business entity certifies its right to conduct this type of activity in medical practice for a specified period of time and subject to its licensing conditions.
3. A license to conduct medical practice is granted for an unlimited period of time according to paragraph 5 of chapter I of the law of Ukraine “On making amendments to some laws of Ukraine, related to conditions of business management in Ukraine simplification”. But it should be remembered, that the term of a license, which subject of economic activity obtained before the above mentioned law came into force won’t be prolonged (paragraph 4 of chapter 2 of the law). Therefore, a license shall be redrafted, since the law doesn’t foresee the procedure of such license for an unlimited period of time prolongation.
4. A physical person – entrepreneur is empowered to employ doctors with higher medical education and junior specialists with medical education

according to the legislation (paragraph 2.5. of Licence Conditions for Conducting Certain Types of Business Activities in Medical Practice).

5. When applying a Simplified system of taxation, accounting and reporting of subjects of small entrepreneurship, physical persons – payers of a single tax, starting from the moment of a simplified system of taxation application up to the end of a calendar year, at any moment of carrying out entrepreneurial activity with participation of hired workers shall have not more than 10 persons, whose work is actually used, notwithstanding the changes in the number of workers which took place during calendar year” (Letter of State Tax Administration of Ukraine of July 30, 2008 No. 5509/K/ 17-0714).
6. Physicians, who do not work in certain medical specialty for about three years, are allowed to carry out medical practice after they passed an internship course.
7. In case of providing paid medical services a subject of economic activity shall give a consumer of such services (patient) certain document, ascertaining that a paid service has been delivered, under the law of Ukraine “On Protection of Consumer Rights”.

### **7.1.5 Right to Continuing Education and Training at Least Once Every Five Years in Relevant Institutions and Establishments**

**a) Medical workers have the right to continuing medical education and training at least every five years in relevant institutions and establishments.**

#### **b) Right as Stated in Country Constitution/Legislation**

- ▶ **On Higher Education: Law of Ukraine of January 17, 2002 [Article 10]**
- ▶ **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Article 77 (paragraph “c”)].**

“Medical and pharmaceutical employees have the right to continuing education and training at least once every five years in the relevant institutions and establishments.”

### c) Supporting Regulations/ Bylaws/ Orders

- ▶ **Register of Medical and Pharmaceutical Specialties: Orders of the Ministry of Health of Ukraine of June 9, 1993 No. 130 and of February 4, 1992 No. 24.**
- ▶ **On Further Improvement of the System of Residency Training of Doctors (Pharmacists): Order of the Ministry of Health of Ukraine of July 22, 1993 No. 166.**

“To ensure high level of qualifications of doctors (pharmacists), they are subject to continuing education and the level of their qualifications is subject to objective verification” (paragraph 1.1). “The main elements of the structure of continuing education is specialization and expansion of professional knowledge and skills” (paragraphs 1.2, 1.3). “Improvement as a form of training can be implemented through continuing education, thematic courses and pre-certification workshops (paragraph 2.2).

- ▶ **On Continuing Education of Junior Specialists with Medical and Pharmaceutical Degrees: Order of the Ministry of Health of Ukraine of September 7, 1993 No. 198.**
- ▶ **On Year-round Continuing Education and Training Courses for Junior Medical and Pharmaceutical Specialists: Order of the Ministry of Health of Ukraine of September 7, 1993 No. 198.**
- ▶ **On Approval of Primary Specialization (Residency) of Graduates of Medical (Pharmaceutical) Higher Educational Institutions of Ukraine: Order of the Ministry of Health of Ukraine of June 20, 1994 No. 104.**
- ▶ **On Approval of the Provision on Specialization (Residency) of Graduates of Higher Medical (Pharmaceutical) Educational Institutions of III-IV Level of Accreditation of Medical Departments of Universities: Order of the Ministry of Health of Ukraine of September 19, 1996 No. 291.**
- ▶ **On Further Improvement of Certification of Physicians: Order of the Ministry of Health of Ukraine of December 19, 1997 No. 359.**

“Certification of physicians is conducted in order to improve accountability for efficiency, work quality, and effective placement of specialists by taking into account their professional skills, experience and complexity of the work performed. Certification is an important form of moral and material incentives

aimed at improving functioning of health care facilities in order to improve further medical assistance to the population” (paragraph 1).

- ▶ **On Giving Clarifications as regards Licencing of Certain Types of Business Ativities: Letter of the State Committee of Ukraine on Regulatory Policy and Entrepreneurship of 4 November, 2004 No. 7706.**
- ▶ **On Giving Clarifications as regards the Necessity to Obtain a Licence by Those Delievering Body Massage Services: Letter of the State Committee of Ukraine on Regulatory Policy and Entrepreneurship of 12 October, 2004 No. 7010.**
- ▶ **On Order of Separated Subdivisions Licencing: Letter of the State Committee of Ukraine on Regulatory Policy and Entrepreneurship of 18 July. 2007 No. 5265.**
- ▶ **On Obtaining a Licence in Case of Legal Entity Reorganization: Letter of the State Committee of Ukraine on Regulatory Policy and Entrepreneurship of 8 September, 2008 No. 7574.**
- ▶ **Procedure for Certification and Examination of Healing Abilities of Individuals who Wish to Conduct Medical Practice in the Field of Traditional and Alternative Medicine: Order of the Ministry of Health of Ukraine of 10 August, 2000 No. 195.**
- ▶ **Directory of Qualifying Characteristics of Specialties of Employees. Issue 78. Health Care: Order of the Ministry of Health of Ukraine of 29 March, 2002 No. 117.**
- ▶ **On Approval of the Register of Health Care Institutions, Medical and Pharmaceutical Positions for Junior Specialists with Pharmaceutical Education at Health Care Institutions: Order of the Ministry of Health of Ukraine of 28 October, 2002 No. 385.**
- ▶ **On Improving Certification of Pharmacists: Order of the Ministry of Health of Ukraine of 12 December, 2006 No. 818.**
- ▶ **Provision on the Procedure for Certification of Pharmacists: Order of the Ministry of Health of Ukraine of 12 December, 2006 No. 818.**



- ▶ **On Certification of Junior Specialists with Medical Degrees: Order of the Ministry of Health of Ukraine of 23 November, 2007 No. 742.**
- ▶ **On Certification of Specialists with Higher Non-medical Education, Working in the Health Care System: Order of the Ministry of Health of Ukraine of 12 August, 2009 No. 588.**
- ▶ **On Approval of the Provision on Carrying out Exams on Pre-attestation Courses: Order of Ministry of Health of Ukraine of 18 May, 1994 No. 73.**

#### **d) Provider Code(s) of Ethics**

- ▶ **Code of Ethics of Physicians of Ukraine, adopted and signed at the National Congress of Health Care Organizations and at the X Congress of the Ukrainian Medical Association on 27 September, 2009 [paragraph 4.5].**

“Doctors who are heads of health care institutions ... must ensure ... creation of adequate conditions for continuing education and training of their subordinates.”

#### **e) Other Relevant Sources**

There are no other relevant sources on this matter.

#### **f) Practical Examples**

##### **1. Example(s) of Compliance**

Creation of the Center for Continuing Education of Doctors in the city and opening in 2006 an affiliated branch of the Department of Family Medicine of the National Medical Academy for Postgraduate Education named after P. L. Shupyk was an important step in improving training of qualified personnel for primary health care facilities; namely, family doctors, who are key figures in the modern system of health care, especially in rural areas. Already today 50% of the population of the region is served by family physicians, for rural residents the figure is 52%.

##### **2. Example(s) of Violation**

In one of the hospitals of city O., a doctor specializing in infectious diseases failed, for unknown reasons, to take a continuing education course. Having no intention to take this course, he submitted a fake certificate testifying that he allegedly had already passed the course. Hence, this doctor managed to continue working for three more years until the fact of counterfeit was discovered.

### 3. Actual Case(s)

A cardiologist of second category, Dr. O., wanted to take part in the Ukrainian Congress of Cardiologists to improve his own professional skills and asked the hospital administration for permission to do so by submitting a written request containing an invitation sent to him by the organizers of the Congress. The chief of staff of the hospital suggested that the doctor should take an unpaid vacation for 3 days to attend the event at his own expense, justifying his response by pointing out that the hospital's budget did not have provisions for doctors' participation in this type of events. The doctor tried to explain that the budget should contain funds for business trips, for which each employee working under an employment contract is entitled under Article 121 of the Labor Code of Ukraine ("Guarantees and Compensations for Business Trips"). In addition, the doctor stressed that one of the guarantees related to business trips was the guarantee that employees during the entire period of the trip continue to receive their average wages and that they should not take part in such activities at their own expense. The chief of staff, however, persisted in his denial, and consequently, the employee, unwilling to lose his wages for the time spent at the Congress as well as due to lack of his own funds to cover travel expenses and sojourn in another city and also not to aggravate relations with the employer, decided not to participate in the Congress.

### g) Practice Notes

1. To ensure high qualifications of doctors (pharmacists), they are required to participate in continuing education and are subject to regular objective examination of the level of their qualifications.
2. Given their needs in postgraduate training of physicians (specialization, advanced training, pre-certification programs), health care institutions fill out an application form for training for the following year using standard format and submit this application directly to the institutions (departments) of continuing education of physicians (pharmacists) and to the Ministry of Health of Ukraine prior to June 1 of each year.
3. The right of each doctor to advance his or her skills through continuing education is connected to the responsibility of a medical institution or a relevant Department of Health to provide him or her with such an opportunity.
4. Training of health care employees of health care institutions is financed from the state budget and is therefore conducted at the expense of the state.
5. The right to continuing education of health care employees corresponds to their responsibility to advance continually their professional knowledge and skills, identified in paragraph "f" of Article 78 of the Law of Ukraine "Principles of Ukrainian Health Care Legislation". In other words, there is an inextricable link between the opportunity guaranteed by the state to develop one's professional skills, on the one hand, and a range of requirements as to the relevant level of qualifications of health care employees,

on the other. A reluctance on the part of a doctor to exercise his/her right to continuing education through participation in pre-certification programs and therefore subsequent certification as a “doctor-specialist” after residency training deprives the individual from continuing to occupy his or her position in a health care institution.

6. See also practical advice in section 7.2.5.

### **7.1.6 Right to Mandatory Insurance of Health Care Employees Against Damage to Life and Health While Carrying out Professional Duties at the Expense of the Owner of the Health Care Institution in Cases Established by Law**

**a) Health care providers are entitled to mandatory insurance against damage to life and health while carrying out their professional responsibilities at the expense of the owner of health care institution.**

#### **b) Right as Stated in Country Constitution/Legislation**

- ▶ **Constitution of Ukraine of June 28, 1996 [Articles 46 (parts 1, 2), 49 (part 1)].**

“Citizens have the right to social protection, including the right to social security in cases of complete, partial or temporary disability. This right is guaranteed by general mandatory state social insurance based on contributions by citizens, enterprises, institutions and organizations as well as budgetary and other sources of social support” (Article 46).

- ▶ **Labor Code of Ukraine of December 10, 1971 [Articles 253-255].**

“Individuals working under an employment agreement (contract) at enterprises, institutions and organizations, regardless of their form of ownership, type of business activity and management, or for an individual are subject to mandatory social insurance” (Article 253).

- ▶ **Principles of Ukrainian Legislation on Mandatory State Social Insurance: Law of Ukraine of January 14, 1998 [Articles 1, 4].**

One of the types of mandatory social insurance is insurance against work accidents and occupational diseases that cause disability (paragraph 4 Article 4).

- ▶ **On Mandatory State Social Insurance Against Work Accidents and Occupational Diseases that Cause Disability: Law of Ukraine of September 23, 1999 [Articles 1, 8, 9, 13, 14, 21, 46].**

Article 8 of the Law specifies those individuals who are subject to mandatory insurance against accidents: 1) individuals who are employed under an employment agreement (contract), 2) students of educational institutions, clinical interns, postgraduate students, doctoral students involved in any type of work during, before or after classes, during classes while acquiring skills, during practical training (internships) while working at enterprises. This law also covers such accidents (insurance cases) as embryo damage due to an injury or an occupational disease of the woman during her pregnancy because of which the child is born disabled. The infant, in accordance with medical conclusions, is considered to be insured, and up to 18 years of age or until graduation, but not after 23 years of age, he/she receives social insurance against accidents (Article 9).

- ▶ **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Article 77 (paragraphs “e”, “je”)].**

“Medical and pharmaceutical employees have the right to mandatory insurance at the expense of the owner of the health institution in the event of damage to their life and health while performing their professional duties in cases provided by law (paragraph “f” Article 77) and the right to social assistance from the state in case of illness, injury or other disability that was caused while performing their professional duties (paragraph “g” Article 77).

- ▶ **On Combating Tuberculosis: Law of Ukraine of July 5, 2001 [Article 23].**

“Tuberculosis of any type contracted by medical and other employees who provide medical assistance to TB patients, work with live TB agents or materials that contain them is recognized as an occupational disease and the damage caused to health by it is compensated for in accordance with the law. Employees who provide medical assistance to TB patients, work with live TB agents or materials containing them, conduct TB diagnostic testing and provide treatment and diagnostic care to TB patients are subject to the mandatory state social insurance against occupational diseases at the expense of the owner of the health care institution or an agency authorized by him/her.”

- ▶ **On Protection of the Population from Infectious Diseases: Law of Ukraine of April 6, 2000 [Article 39].**

“Infectious diseases contracted by medical and other employees while carrying out their professional duties in an environment with a high risk for contracting infectious disease agents (while providing medical assistance to patients suffering from infectious diseases, working with live pathogens or in the epicenter of an infectious disease break out, implementing disinfection measures, etc.) belong to occupational diseases. The above mentioned employees of state and municipal health care institutions and state research institutes are subject to mandatory state insurance against infectious diseases in the manner and on the terms set by the Cabinet of Ministers of Ukraine “.

▶ **On Ensuring Sanitary and Epidemiological Welfare of the Population: Law of Ukraine of February 24, 1994 [Article 38].**

“Life and health of employees of the State Sanitary and Epidemiological Service are subject to mandatory state insurance against injury or occupational diseases contracted while performing their employment duties. In the event of such an injury or an occupational disease, an employee of the State Sanitary and Epidemiological Service receives a one-time monetary assistance ranging from three to five years of his base salary, depending on the degree of disability.”

▶ **On Resistance to Diseases Caused by Human Immunodeficiency Virus (HIV), and Legal and Social Protection of People Living With HIV: The Law of Ukraine of 12.12.1991. (The wording of 23.12.2010.) [Article 17]**

“HIV infection, a person was contaminated with, during her professional duties execution belongs to professional diseases”

▶ **On Psychiatric Care: Law of Ukraine of February 22, 2000 [Article 28].**

“Employees who participate in providing psychiatric care, including care for persons suffering from mental disorders, are subject to the mandatory state insurance against injury to their health or death related to carrying out their employment duties”

### **c) Supporting Regulations/ Bylaws/ Orders**

▶ **On Approval of the List of Occupational Diseases: Resolution of the Cabinet of Ministers of Ukraine of November 8, 2000 No. 1662.**

The list of occupational diseases of health care employees:

1. Autonomic/sensory polyneuropathy of upper limbs (angioneurosis) – working with medical equipment that generates ultrasound.
2. Infectious and parasitic diseases, including tuberculosis, hepatitis, AIDS, syphilis, leptospirosis – working in health care institutions (dealing with infectious diseases, tuberculosis, blood banks, etc.).
3. Mycosis – working in health care institutions (dealing with infectious diseases, tuberculosis, blood banks).
4. Dysbacteriosis, visceral candidiasis – use of antibiotics, fungi-producers, protein-vitamin concentrates, etc. in medical and pharmaceutical practice.
5. Allergic diseases: conjunctivitis, rhinopharyngolaryngitis, rhinosinusitis, asthmatic bronchitis, bronchial asthma – work related to exposure to allergens in the chemical-pharmaceutical industry, medical and pharmaceutical establishments.
6. Neuroses associated with prolonged direct provision of mental health services – work of medical staff in psychiatric facilities.

- ▶ **On Approval of the Lists of Industries, Enterprises, Jobs, Professions, and Positions that Qualify an Employee for an Early Retirement: Resolution of the Cabinet of Ministers of Ukraine of January 16, 2003 No. 36 [paragraph XIX].**
- ▶ **On Approval of the Procedure and Terms of Mandatory Insurance of Health Care Employees and Other Individuals Against Contracting Human Immunodeficiency Virus in the Course of Their Professional Activities as well as against Subsequent Disability or Death from the Diseases Caused by the Development of HIV and the List of Categories of Health Care Employees and Other Individuals Subject to Mandatory Insurance Against Contracting Human Immunodeficiency Virus in the Course of Their Professional Activities as well as Against Subsequent Disability or Death from the Diseases Caused by the Development of HIV: Resolution of the Cabinet of Ministers of Ukraine of October 16, 1998 No. 1642.**
- ▶ **Instructions on Establishing a Causal Connection Between Death and an Occupational Disease (Poisoning) or an Occupational Injury: Order of the Ministry of Health of Ukraine of November 15, 2005 No. 606.**

“A causal link between death and an occupational disease (poisoning) or an occupational injury is a connection that can be established to the progression of an occupational disease (poisoning) or the impact of an occupational injury taking into account their form, stages, severity of functional disorders, development of complications throughout one’s life, pathomorphological and histological changes in organs and systems of the body found during the autopsy and death” (part 2 chapter 1).

- ▶ **On Improving Treatment of HIV and AIDS Patients: Order of the Ministry of Health of Ukraine of December 12, 2003 No. 580.**
- ▶ **On Improving HIV Diagnosis: Order of the Ministry of Health of Ukraine of May 11, 2010 No. 388.**

#### **d) Provider Code(s) of Ethics**

There are no provisions in existing codes of ethics on this matter.

#### **e) Other Relevant Sources**

- ▶ **On the Procedure for Civil Lawsuits on Compensation for Damages: Resolution of the Plenary Assembly of the Supreme Court of Ukraine of March 27, 1992 No. 6.**

“Compensation for damages to health of employees due to injuries from accidents or occupational diseases is carried out according to the legislation on insurance against accidents.

While settling disputes about compensation for damages on the grounds of disability due to an occupational disease, the courts should bear in mind that the list of the diseases was approved by the Resolution of the Cabinet of Ministers of Ukraine of November 8, 2000 № 1662. As an exception, a disease not included in this list may be recognized as covered by the insurance if at the time of the settlement medical science has new information that provides grounds for treating this disease as occupational. An occupational disease is covered by the insurance even when its detection or diagnosis occurred at the time the victim was no longer in labor relations with the enterprise where he/she contracted the disease” (Article 14).

#### **f) Practical Examples**

##### **1. Example(s) of Compliance**

In hospitals of city K. in 2008, an inspection was carried out to establish whether medical personnel who provide medical assistance to HIV-infected individuals, conduct laboratory testing and research of HIV infection were insured. All of them were indeed insured by health care institutions against injury to life and health.

##### **2. Example(s) of Violation**

Mr. M., a chief of staff of a psychiatric institution, ordered medical personnel of this institution to obtain insurance at their own expense threatening them with being fired in case they failed to comply with his order. On the basis of numerous complaints of the medical staff, the chief of staff was prosecuted and all the employees were insured by the health care institution.

### 3. Actual Case(s)

An employee of a health care institution contacted one of the regional AIDS Prevention Centers claiming that his damaged skin came in contact with the blood of a patient. Contrary to the Order of the Ministry of Health of Ukraine “On Improving Treatment of HIV and AIDS Patients” of December 12, 2003 No. 580, he was denied immediate post-exposure prophylaxis. An intervention of an attorney of a public association, who directed a written request to the head of the AIDS Prevention Center asking for immediate post-exposure prophylaxis, forestalled a violation of the rights of the health care employee, who received post-exposure prophylaxis following an established procedure, thus preventing an occupational disease. In his request, the attorney indicated that under the above mentioned Order all health care employees working in institutions where there is a risk of HIV infection at the workplace should be able to receive immediate post-exposure prophylaxis. To do this, all regions stockpile ARV drugs, regional AIDS Prevention Centers provide advice regarding the procedure for post-exposure prophylaxis. Indications for administering post-exposure prophylaxis are skin damage by a sharp object (a prick or a cut by a sharp instrument) which was contaminated with blood, biological fluid mixed with blood or other potentially HIV infected materials or damaged skin / mucous membranes of a health care employee coming in contact with the specified materials.

### g) Practice Notes

1. Individuals who work under an employment agreement (contract) in health care institutions of any form of ownership do not bear any costs for insurance against accidents.
2. Medical and pharmaceutical employees who themselves are legal entities (entrepreneurs) may chose to sign an agreement with the Social Insurance Fund against Accidents regarding voluntary insurance against accidents (Article 11 of the Law of Ukraine “On Mandatory State Social Insurance against Work Accidents and Occupational Diseases that Cause Disability”).
3. The amount of the contribution to a mandatory state social insurance fund, depending on its type, is established annually by Verkhovna Rada of Ukraine for both employers and insured individuals for each type of insurance for a calendar year as a percentage rate. This takes place at the same time when the State Budget of Ukraine is approved, unless provided otherwise by the laws of Ukraine for certain types of mandatory state social insurances.
4. Disputes concerning the amount of insurance premiums as well as the extent of the damage and the right to compensation for it, imposition of fines and other issues are resolved in court. At one’s own discretion, a concerned individual may request a settlement of the dispute by a special commission of an executive branch of the Social Insurance Fund against Accidents. The commission is composed of representatives of the state, insured individuals, and insurers on public service and parity basis (Article



55 of the Law of Ukraine “On Mandatory State Social Insurance against Work Accidents and Occupational Diseases that Cause Disability”).

5. Payments for the first five days of disability due to an occupational injury or an occupational disease are carried out by the enterprise.
6. The principle that guides the behavior of medical personnel should be: “all patients should be treated as if they are infected by infections that can be transmitted through blood” (Order of the Ministry of Health of Ukraine “On Improving Treatment of HIV and AIDS Patients” of December 12, 2003).
7. A commission that investigates an accident may establish that the damage to health was not only the fault of the employer but also took place due to the violation of regulations on labor protection by the employee, then the amount of one-time compensation as a form of insurance payment is reduced by the decision of the commission, but not by more than 50%. Depending on the circumstances, the amount of one-time payment may be reduced on the grounds indicated above by the court.
8. When applying for compensation after three years from the date of the onset of disability due to an accident, payment of the compensation is made from the date of application filing.

### **7.1.7 Right to Share Information About a Patient Without His/Her Consent or Consent of His/Her Representative**

**a) A health care employee has the right to disclose confidential medical information without consent of an individual or his/her legal representatives in cases stipulated by law.**

#### **b) Right as Stated in Country Constitution/Legislation**

- ▶ **Constitution of Ukraine of June 28, 1996 [Articles 32 (part 2), 34 (part 3)].**

“Dissemination of confidential information about an individual ... is not permitted without his/her consent except in the cases determined by law and only in the interests of national security, economic prosperity and human rights, territorial integrity or civil order, in order to prevent disorder or crimes, to protect public health, reputation or rights of others, to prevent disclosure of information received in confidence, or to maintain the authority and impartiality of justice ...” (part 2 Article 32, part 3 Article 34).

- ▶ **Criminal Code of Ukraine of April 5, 2001 [Article 132, 145].**

▶ **Civil Code of Ukraine of January 16, 2003 [Article 285 (parts 2, 4)].**

“Parents (adoptive parents), guardians, trustees have the right to information about the state of health of the child or ward” (part 2 Article 285). “In case of death of a patient, members of his/her family or other individuals authorized by them may be present at the examination of the causes of his/her death, get acquainted with conclusions regarding the causes of death” (part 4 Article 285).

▶ **Family Code of Ukraine of January 10, 2002 [Article 30].**

“Results of a medical examination are confidential and are only disclosed to a bride/groom” (part 4 Article 30).

▶ **On Information: Law of Ukraine of October 2, 1992 [Article 30].**

“Classified information may be disclosed without a consent of its owner if it is socially significant, that is if it is an object of public interest and if the public’s right to know this information outweighs the right of the owner to protect it” (part 11).

▶ **On Ensuring Sanitary and Epidemiological Welfare of the Population: Law of Ukraine of February 24, 1994 [Article 7].**

“When there exists a threat of spreading an infectious disease; when there is a fact of avoidance of a mandatory medical examination or vaccination against officially listed infections; in order for companies, institutions and organizations—upon a recommendation of appropriate officials of the State Sanitary and Epidemiological Service—to remove from work, study, attendance of pre-school those people who are carriers of pathogens of infectious diseases, patients with infectious diseases that pose danger to others, or persons who have been in contact with such patients as well as persons who avoid mandatory medical examinations or vaccinations against infections that are officially listed by the central executive authorities in the health care sector” (paragraph 5 part 1 Article 7); “in case of extraordinary events and situations that threaten public health, sanitary and epidemiological welfare in order to provide information to the authorities, institutions and agencies of Sanitary and Epidemiological Service” (paragraph 6 part 1 Article 7).

▶ **On Prevention of Domestic Violence: Law of Ukraine of November 15, 2001 [Article 9].**

“Employees of centers for medical and social rehabilitation of victims of domestic violence ... report cases of domestic violence to district police

inspectors or officers of children's units of criminal police (paragraph 4 part 4) ... provide information on the issue of prevention of domestic violence at the request of relevant authorities (paragraph 5 part 4).

- ▶ **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Articles 39 (parts 2, 5), 39-1, 40, 43 (part 1)].**

“Parents (adoptive parents), guardians, trustees have the right to information about the state of health of the child or the ward (part 2 Article 39). “In case of death of a patient, members of his/her family or other individuals authorized by them may be present at the examination of the causes of his/her death, may get acquainted with conclusions regarding the causes of death” (part 5, Article 39).

- ▶ **On Psychiatric Care: Law of Ukraine of February 22, 2000 [Article 6 (parts 3, 4)].**

“Transfer of information about mental health of an individual and the fact of providing him/her with psychiatric care is permitted without a consent of the individual or without a consent of his/her legal representative in order: 1) to organize mental health care of an individual who suffers from a severe mental disorder, 2) to assist an inquiry, preliminary investigation or a trial, upon a written request of the person conducting the inquiry, an investigator, a prosecutor and the court ...” (part 4 Article 6).

- ▶ **On Resistance to Diseases Caused by Human Immunodeficiency Virus (HIV), and Legal and Social Protection of People Living With HIV: The Law of Ukraine of 12.12.1991. (The wording of 23.12.2010.) [Article 13]**

“... Information, about the results of person's examination aimed at HIV detection, about whether a person is HIV positive or not, is a medical secret. Medical workers are obliged to take necessary measures to provide proper reservation of such confidential information about the persons living with HIV and protection of this information from being illegally disclosed to third persons. (part 3, article 13)

Transfer of the above mentioned information by medical worker is allowed only:

to a person, who was examined, and in cases and under the conditions established in part 3, article 6 of this law – to parents or other representatives of these persons;

to other medical workers or medical institutions – only in connection with treatment of this person;

to other third persons – only under the court decision and in cases established by the law (article 13, part 4)

- ▶ **On Measures Against Illicit Trafficking of Narcotic Drugs, Psychotropic Substances and Precursors as well as Their Abuse: Law of Ukraine of February 15, 1995 [Article 14 (part 5)].**

“... Information about an individual receiving treatment at a drug treatment facility can be provided only to law enforcement agencies in case the individual is being brought to criminal or administrative justice.”

- ▶ **On Protection of the Population from Infectious Diseases: Law of Ukraine of April 6, 2000 [Article 26 (part 2)].**

“Information about an individual contracting an infectious disease that is sexually transmitted, undergoing a medical examination for this reason, information about his/her sex life received by officials and medical personnel of health care institutions in the course of performing their professional duties constitutes a medical secret. Transfer of such information is allowed only in cases established by the legislation of Ukraine.

- ▶ **On Combating Tuberculosis: Law of Ukraine of July 5, 2001 [Articles 12 (part 8), 17 (part 2)].**

“If a patient with active TB is released from a penal institution or a prison, the institution must notify the health care authorities at the place of residence chosen by the patient” (part 2 Article 17).

### **c) Supporting Regulations/ Bylaws/ Orders**

- ▶ **On the Physician’s Oath: Decree of the President of Ukraine of June 15, 1992, [paragraph 1 parts 3, 4].**

“Maintaining medical confidentiality, not using it to harm a person (paragraph 3) ... not hiding the truth when it could hurt a patient (paragraph 4).

- ▶ **Some Aspects of Conducting Investigations and Keeping Records of Accidents, Occupational Diseases, and Industrial Accidents: Resolution of the Cabinet of Ministers of Ukraine of August 25, 2004 No. 1112 (paragraph 9).**

“... When a victim of an accident asks for assistance without presenting a referral from the enterprise, the enterprise where the victim works, executive management of the fund responsible for the area where the enterprise is located or for the area where the accident took place when the individual involved is self-employed are informed, and if an acute form of an occupational disease (poisoning) is established, the institution (agency) of the

State Sanitary and Epidemiological Service servicing the enterprise where the victim works or an institution of this type that services the area where the accident took place in case of a self-employed individual are informed. “

- ▶ **On the Procedure for Investigating Accidents and Keeping Record of Non-industrial Accidents: Resolution of the Cabinet of Ministers of Ukraine of March 22, 2001 No. 270 (paragraph 6).**

“... In case of visits by or delivery of victims of accidents, either fatal due to injuries caused by another person or as a result of an accident that occurred due to being in contact with firearms, ammunition and explosive materials or as a result of a road accident, in order to notify the police, and in cases with fatal outcomes – the Procuracy.”

- ▶ **On Improving Voluntary Counseling and Testing for HIV Infection: Order of the Ministry of Health of Ukraine of August 19, 2005 No. 415 [paragraph 4.3].**

“Given that the information about HIV test results, presence or absence of HIV infection in a person who underwent a medical examination is confidential and constitutes a medical secret, the information may be disclosed only to the person to whom it refers, and in cases provided by the legislation of Ukraine also to legal representatives of such persons, health care institutions, Procuracy, investigation and inquiry agencies and courts.

This information may not be reported to state non-medical and private (both medical and non-medical) institutions, organizations, establishments, associations of citizens, even if pre-testing counseling was conducted at these institutions, organizations and establishments” (paragraph 4.3).

#### **d) Provider Code(s) of Ethics**

- ▶ **Code of Ethics of Physicians of Ukraine, adopted and signed at the National Congress of Health Care Organizations and at the X Congress of the Ukrainian Medical Association on September 27, 2009 (paragraphs 3.6.)**

“Medical information about a patient may be disclosed: 1) when there is a written consent of the patient, 2) if demanded on sound grounds by the investigation and inquiry agencies, prosecution, courts and State Sanitary and Epidemiological Service 3) if maintaining confidentiality substantially endangers the health and lives of patients and /or other people (dangerous infectious diseases), 4) in case other specialists are involved in the process of treatment who need the information on professional grounds. Examination of a patient is possible only with his/her consent, consent of his/her parents or his/her guardian. “

## e) Other Relevant Sources

There are no other relevant sources on this matter.

## f) Practical Examples

### 1. Example(s) of Compliance

While Mr. M. was undergoing inpatient treatment in a hospital in city K., the patient's wife asked the chief of staff of the hospital to provide her with medical records, including a copy of the patient file of her husband. In response to this request, she received a letter signed by the chief of staff of the hospital which stated that her request to obtain medical information violates the right of Mr. M. to medical confidentiality and violates Articles 39, 39-1 and 40 of the Law of Ukraine "Principles of Ukrainian Health Care Legislation."

### 2. Example(s) of Violation

Patient A. was treated in one of the hospitals of city Kh. with a diagnosis confirming a presence of a gynecological disease that did not present any significant threat to the life or health of the patient. The woman did not want to tell members of her family about the disease. In conversation with the attending physician, she asked him to keep this information confidential because she was afraid to lose the love and respect of her husband. Dr. M. in a telephone conversation with the husband of the patient, while answering his questions about the state of health of his wife, informed him about her diagnosis.

### 3. Actual Case(s)

Mr. N. was delivered to a hospital in connection with a surface knife wound received during a fight with his wife. The victim requested the doctor not to inform the police about the case. However, the doctor on his own initiative informed the police of the injury and the circumstances under which it was incurred. After being discharged, the patient filed a complaint with the Ministry of Health and the Procuracy against the doctor who revealed the information about his diagnosis, his state of health, and his family life. Mr. N.'s complaint was forwarded to the regional Department of Health. After an internal investigation, a detailed response was sent to the patient. In particular, the response stated that the doctor acted within the law and his actions did not violate the requirements specified in the Procedure for Investigating and Keeping Record of Non-industrial Accident which asserts the duty of health care facilities to send written notifications about accidents to relevant authorities.

## g) Practice Notes

1. While legitimately disclosing medical confidential information, a health care employee must remember the following:
  - a) while exercising the right to share information about a patient, a health care employee should have clear knowledge of the legal provisions that

regulate sharing of medical information, thus legitimately disclosing medical confidential information and should perform such actions upon receiving a formal request that follows the procedure prescribed by law;

b) while reviewing requests of entitled individuals, one should distinguish between those cases where these individuals need medical information in order to perform their employment duties (for example, to carry out internal inspections) and act as employers, and those cases where the individuals perform their official duties (for example, carry out investigations). Hence, in the first case, by providing medical information, health care employees would violate applicable laws of Ukraine, in particular Article 286 of the Civil Code of Ukraine, Article 39-1 of the Law of Ukraine “Principles of Ukrainian Health Care Legislation” and in the second case, they will act legally, regardless of the will of the patient or his/her legal representatives.

c) medical confidential information may be disclosed while preparing petitions, legal queries in the cases defined by law. One of these cases is when the disclosure of the information could serve the interests of relatives and heirs of a deceased, for instance, to compensate for damages caused by the death of the individual. The record should contain a note stating that the requested documents are necessary to protect one’s interests (to protect the interests of a client – for lawyers) as an heir in connection, for instance, with the death of a husband (wife);

d) if confidential medical information that is not subject to disclosure is needed to exercise one’s rights (the rights of clients – for lawyers), one can request such information during the trial by filing a request to obtain evidence under Article 137 of the Civil Procedure Code of Ukraine.

2. See also practical advice in section 6.1.3.

## **7.1.8 Right to Refuse Further Management of a Patient**

**a) Health care providers have the right to refuse management of a patient in cases foreseen by the legislation.**

**b) Right as Stated in Country Constitution/Legislation**

- ▶ **Criminal Code of Ukraine of April 5, 2001 [Articles 139, 140].**
- ▶ **Civil Code of Ukraine of January 16, 2003 [Article 284 (part 5)].**
- ▶ **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Articles 34 (parts 3, 4), 38, 43 (part 2)].**

“A doctor has the right to refuse further management of a patient if the latter fails to comply with medical prescriptions or internal regulations of the health care institution, provided that this refusal does not threaten the life and health of the patient and the health of the population. A doctor is not responsible for the health of a patient in case the latter refuses to follow medical prescriptions or violates the prescribed regiment (Article 34). “Every patient ... has the right to freedom of choice of a doctor as long as the latter offers his/her services .... Every patient has the right, whenever this is justified by his/her condition, to be admitted to any health care institution of his/her choice as long as the facility is able to provide appropriate treatment” (Article 38)

- ▶ **On Procedure of Selection a Doctor, That Provides With Primary Medical Care: Order of Ministry of Health of Ukraine of July, 28, 2011, No. 443**

### c) Supporting Regulations/ Bylaws/ Orders

- ▶ **Instructions on the Procedure for Filling Out a Disability Leave Certificate: Order of the Ministry of Health of Ukraine, the Ministry of Labor and Social Policy of Ukraine, Social Insurance Fund against Temporary Disability, Social Insurance Fund against Work Accidents and Occupational Illnesses of November 3, 2004 No. 532 / 274/136-os/1406 [paragraph 4.1].**

“Whenever a patient violates a prescribed regiment, a physician indicates the type of the violation in a disability leave certificate (for instance, late arrival at the doctor’s office, use of alcohol, drugs, toxic substances during the course of treatment, showing up to work without permission from the doctor; leaving the health care institution without permission; traveling for treatment to another health care institution without the record of the permission to do so, etc.).

### d) Provider Code(s) of Ethics

- ▶ **Code of Ethics of Physicians of Ukraine, adopted and signed at the National Congress of Health Care Organizations and at the X Congress of the Ukrainian Medical Association on September 27, 2009 [paragraph 3.4].**

“Except for emergency cases, a doctor has the right to refuse to treat a patient if he/she is convinced that there is no necessary mutual trust between him/her and the patient, if he/she feels him/herself not competent enough or does not have at his/her disposal necessary capacity for treat-



ment and in other cases as long as this does not contradict the Physician's Oath in Ukraine."

### **e) Other Relevant Sources**

There are no other relevant sources on this matter.

### **f) Practical Examples**

#### **1. Example(s) of Compliance**

In September 2002, Mr. K. visited Central Hospital of city L for an operation on an infected bedsore on his buttock. After the surgery, the doctor scheduled a series of procedures for the patient and recommended that he should stay in the hospital for 3 days for further observation of his condition, to which the patient agreed. However, the patient did not follow any of the recommendations and the next day he left the hospital. Because of this, the doctor refused to treat patient K. further, using his right guaranteed by Article 34 of the Law of Ukraine "Principles of Ukrainian Health Care Legislation." A few days later, Mr. K. again visited the hospital complaining of the worsening of his condition, he was provided with an expert medical assistance, but in his temporary disability leave certificate it was recorded that the patient did not adhere to the hospital regimen.

#### **2. Example(s) of Violation**

Ms. R. filed a lawsuit at the District Court to compensate her for moral damage caused by inadequate medical assistance provided to her in one of the dental clinics. The patient demanded compensation in the amount of 500 thousand hryvnias. She won the lawsuit and received the compensation – albeit in a 10 times smaller amount. The doctors and the clinic management did not agree with the court decision and therefore appealed it. However, the higher authorities left the decision unchanged.

The doctors were unable to substantiate their position. One reason turned out to be improper documentation. In particular, it was never established that the plaintiff refused to adhere to medical recommendations. The gist of the matter is that while the root canal of one of the patient's teeth was being re-filled, the surplus of the filling material penetrated into the mandibular canal and injured the lower alveolar nerve. The patient was assigned a conservative treatment, physiotherapy. However, according to the physician, she did not follow the recommendations because she was getting ready to go on vacation. Due to this, the doctor refused to treat the patient further. However, the clinic could not document the refusal of the patient to follow the recommendations; therefore, it had to pay compensation to the victim in the amount of 50 thousand hryvnias.

#### **3. Actual Case(s)**

A criminal investigation against Mr. P., the head of the Trauma Department of one of the hospitals of city N was completed. The doctor, who had almost thirty

years of work experience, was charged by the prosecution for leaving a patient in a high risk condition and the patient subsequently died. The District Prosecutor's office charged him under Article 139 of the Criminal Code of Ukraine "Failure of a Health Care Employee to Help a Patient." The circumstances of the case are the following: patient D was taken to the Trauma Department of the district hospital by his relatives who found him lying in the street. The relatives had searched for him for about a week and had already lost hope to find him alive. According to the investigation data, Mr. D. had been beaten. However, as evidenced by the case file, the physician on duty at the Trauma Department at the time refused to examine the patient claiming that the latter was dirty and had managed to annoy him in the past. It turned out that Mr. D. had already been sent to the hospital in the past but had not been hospitalized on account of various pretexts. The physician refused the offer of the relatives to wash the injured patient by themselves. Eventually, the victim was hospitalized in another hospital where in a few days he died. The commission experts who conducted the investigation concluded that if provided with timely care by physician P, Mr. D. would have lived because the injuries that had been inflicted on him did not constitute a threat to his life. The doctor continues to serve as the head of the department and claims that the case against him is imaginary. The maximum penalty which threatens the physician is restriction of freedom for a term of four years or imprisonment for up to three years with an optional withdrawal of the right to occupy certain positions or engage in certain types of activities for up to three years (part 2 of Article 139 of the Criminal Code of Ukraine).

### **g) Practice Notes**

1. In addition to Article 34 of the Law of Ukraine "Principles of Ukrainian Health Care Legislation" which clearly defines the right of a doctor to refuse to provide medical assistance, there is Article 38 of the same law which states that a patient has the right to a free choice of a doctor as long as the latter offers his/her services. The law does not provide for cases in which the physician has the right to refuse to assist a patient due to being unable to offer his/her services. This subjective notion gives rise to problems in legal practice; therefore, we propose to fill the legal gap by deontological norms (paragraph 3.4 of the Code of Ethics of Physicians of Ukraine). In practice, cases where a doctor can not offer his/her services could be interpreted as those that contain grounds for the doctor to refuse to manage a patients as defined in the Code of Ethics of Physicians of Ukraine.
2. Another legitimate ground for refusal to provide medical assistance is established by the norms in part 2 of Article 38 of the Law of Ukraine "Principles of Ukrainian Health Care Legislation." It follows from the provisions of this norm that except for emergency situations, a patient may be denied assistance if the institution selected by the patient is unable to provide appropriate treatment (for example, absence of necessary equipment, specialized experts, units).
3. See also practical advice in section 6.2.4.

## 7.1.9 Right to Conduct Medical Intervention Without Consent of a Patient and/or His/Her Legal Representatives

**a) Health care providers have the right to conduct medical intervention without consent of a patient and/or his/her legal representatives in certain cases.**

### **b) Right as Stated in Country Constitution/Legislation**

- ▶ **Constitution of Ukraine of June 28, 1996 [Article 29 (part 1)].**

“Every person has the right to ... bodily integrity.”

- ▶ **Civil Code of Ukraine of January 16, 2003 [Article 284 (part 5)].**

“In urgent cases, when there is a real threat to the life of an individual, medical assistance is provided without a consent of the individual or his or her parents (adoptive parents), guardian, trustee”.

- ▶ **Criminal Code of Ukraine of April 5, 2001 [Articles 92, 96].**

“A compulsory treatment may be ordered by the court, regardless of the sentence, for those individuals who committed crimes and have diseases that endanger the health of others” (part 1 Article 96).

- ▶ **Civil Procedure Code of Ukraine March 18, 2004 [Articles 10, 11].**

“A decision to satisfy a request of a psychiatrist, a representative of a psychiatric institution (Article 279) forms the basis for compulsory administering of appropriate psychiatric care. (part 2 Article 282).

“Having reviewed a request for compulsory admission to a TB institution or continuation of the treatment, the court makes a decision ... The decision to satisfy the request constitutes grounds for compulsory hospitalization or further treatment of an individual at a TB institution for the period of time established by law.” (Article 286).

- ▶ **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Article 43 (part 2)].**

“In urgent cases when there is a real threat to the life of a patient, a consent of the patient or his/her legal representatives for medical intervention is not required.”

- ▶ **On Ensuring Sanitary and Epidemiological Welfare of the Population: Law of Ukraine of February 24, 1994 [Article 28 (part 2)].**

“Those patients who suffer from especially dangerous infectious diseases are subject to compulsory inpatient treatment if they refuse to be admitted to a hospital, and those who are carriers of disease agents and persons who had contact with such patients are subject to compulsory medical supervision and quarantine following an established procedure.”

- ▶ **On Combating Tuberculosis: Law of Ukraine of July 5, 2001 [Article 12].**

“Patients suffering from infectious forms of tuberculosis, including those who are socially marginalized due to concomitant chronic alcoholism, drug addiction or substance abuse, are subject to compulsory hospitalization in TB facilities and are required to undergo appropriate treatment. In case of avoidance of mandatory hospitalization, these individuals are to be located, restrained and hospitalized in a TB facility in a compulsory manner by the decision of the court to prevent the spread of tuberculosis” (part 2 Article 12).

- ▶ **On Psychiatric Care: Law of Ukraine of February 22, 2000 [Articles 11, 12, 14].**

“Psychiatric examination of an individual may be conducted without his/her consent or without a consent of his/her legal representative in cases when the data obtained provide sufficient grounds for a reasonable claim that this individual suffers from a serious mental disorder ... A decision to conduct a psychiatric examination of an individual without his/her informed consent or without a consent of his/her legal representative is made by a psychiatrist on the basis of a written statement that contains information that provides sufficient grounds for such an examination” (part 3 Article 11). “Outpatient psychiatric assistance is provided to an individual without his/her informed consent or without a consent of his/her legal representative by a psychiatrist in a compulsory manner by the decision of a court (part 2 Article 12). “A person who suffers from mental disorder may be hospitalized in a psychiatric institution without his/her informed consent or without a consent of his/her legal representative when an examination or a treatment are possible only on inpatient basis and when it is established that this person suffers from a severe form of mental disorder ...” (Article 14).

- ▶ **On Protection of the Population from Infectious Diseases: Law of Ukraine of April 6, 2000 [Article 26 (part 1)].**

“Individuals who suffer from infectious diseases that are sexually transmitted are subject to compulsory treatment (anonymous, if requested).”

- ▶ **On Measures against Illicit Trafficking of Narcotic Drugs, Psychotropic Substances and Precursors as well as their Abuse: Law of Ukraine of February 15, 1995 [Articles 13, 16].**

“An individual who refuses to undergo a medical examination or medical screening is to be escorted to a drug treatment facility by the police” (part 2 Article 13). “An individual who is recognized as a drug addict but refuses to undergo a voluntary treatment or continues to use drugs after the treatment without a prescription of the doctor and whose relatives or other persons contacted the police or the Procuracy due to the dangerous behavior of the individual may be sent for a drug addiction treatment to a specialized drug addiction treatment facility of the Department of Health by the decision of the court while minors who have attained the age of sixteen may be sent to a specialized medical and educational institution for a term of up to one year” (part 1 Article 16).

### **c) Supporting Regulations/Bylaws/Orders**

There are no relevant supporting regulations of this particular right.

### **d) Provider Code(s) of Ethics**

- ▶ **Code of Ethics of Physicians of Ukraine, adopted and signed at the National Congress of Health Care Organizations and at the X Congress of the Ukrainian Medical Association on September 27, 2009 [paragraph 3.5].**

“Administering treatment and diagnostic measures without a consent of a patient is permitted only in cases when there is a threat to his/her life or health and he/she is unable to adequately evaluate the situation.”

### **e) Other Relevant Sources**

There are no other relevant sources on this matter

### **f) Practical Examples**

#### **1. Example(s) of Compliance**

A statement made by Psychiatric Hospital No. 2 of region B. indicated that since December 28, 2005 Mr. A had been undergoing a compulsory treatment at the Intensive Care Unit by the decision of the district court of city K. of November 25, 2005 in accordance with section 1 of Article 115 and part 1 of Article 131 of the Criminal Code of Ukraine because he had committed a socially dangerous act. At the end of the treatment, the mental state of the psychiatric patient did not improve. His answers to questions given after a pause were not always to the

point. His thinking was incohesive with signs of discontinuity, with obsessive ideas of manipulation and prosecution. He was internally tense, disturbed. He was reluctant to discuss what had happened and acknowledged his guilt only formally. He expressed suicidal thoughts. He had no critical assessment of his condition.

As it is clear from the conclusion of the council of doctors of June 3, 2009, patient A. suffered from a prolonged reactive psychosis, schizophrenia-like syndrome. Given the lack of positive changes in the mental state and behavior of the patient, he needed to continue with the treatment at the intensive care unit.

## 2. Example(s) of Violation

On February 8, 2007, the prosecutor of city S. reported that in 2006 about 60 children-orphaned from children's orphanages and boarding schools were unlawfully detained in a city psychiatric hospital for one month. As the prosecutor reported, a criminal case was opened on the basis of this fact. The prosecutor suggested that some children had been indeed in need of this type of aid, however, he expressed surprise at the fact that the psychiatric hospital treated young patients in a bureaucratic manner: "Doctors should have discharged those children who did not need hospital treatment immediately."

## 3. Actual Case(s)

Since 1978, Mr. N., a defendant, had worked as a full time surgeon at a municipal hospital of district S. city S. region T and according to part 1 of Article 364 of the Criminal Code of Ukraine did not constitute a hospital official. On June 8, 2007, during his time off, i.e. while not on duty as an emergency physician at the municipal hospital of district S. region T, he exceeded his authority in order to admit a victim, Mr. D., to the municipal psychiatric and neurological hospital of region T. as an inpatient, thus violating Articles 3 and 13 of the Law of Ukraine "On Psychiatric Care", Order of the Ministry of Health of Ukraine No. 304 of July 24, 2001 "On Approval of Certain Forms of Documents on Mental Health Care". Without permission and contrary to the procedure established by law, knowing that his actions might cause significant damage to Mr. D., he gave directions to hospitalize the patient at the regional municipal psychiatric and neurological hospital (hereinafter – RMPNH), assigning to the patient the diagnosis of "manic-depressive syndrome". On the basis of this, employees of the district division of the Ministry of Internal Affairs of Ukraine of district P. region T., who according to Article 8 of the Law of Ukraine "On Psychiatric Care" must provide assistance to medical staff upon their request in administering compulsory psychiatric care and ensuring safe conditions of access to an individual and his/her psychiatric examination, were summoned to arrive at the home of Mr. D. in city S. in order to transport him to RMPNH.

These actions of the doctor contradict Article 10 of the Law of Ukraine "On Psychiatric Care", according to which psychiatric assistance is provided by psychiatrists with legally obtained license. At the trial, the defendant Mr. N. pleaded not guilty to the charges against him. The victim stated that he was detained in the health care facility until June 12, 2007 and was then discharged since the con-

clusions of the council of doctors confirmed that he was mentally healthy while the diagnosis of manic-depressive syndrome recorded in the referral written by Mr. N. was not confirmed. The victim believes that the surgeon's actions caused considerable damage to his interests, including mental suffering, questioning of his mental health in the eyes of his family and friends.

The Court decided that the actions of the defendant should be classified under Article 356 of the Criminal Code of Ukraine as unauthorized, that is actions willfully committed contrary to the procedure established by law, the lawfulness of which was challenged by an individual citizen because they caused significant damage to the interests of the citizen. This assessment of the actions of the defendant was supported by the prosecution: on June 30, 2009, the prosecutor ordered the charges against the defendant to be changed (instead of being tried under part 1 of Article 366, part 1 of Article 365 and part 1 of Article 151 of the Criminal Code of Ukraine he was to be tried under Article 356 of the Criminal Code of Ukraine).

While deliberating a penalty for the defendant, the court took into account the severity of the offense, the identity of the offender and the circumstances mitigating the punishment, such as his positive assessment at his workplace and the place of his residence, illnesses he suffered, and therefore decided upon a punishment under Article 356 of the Criminal Code of Ukraine in the form of a fine which was deemed to be necessary and sufficient for the defendant to correct what had been done and to prevent further crimes.

There was no civil lawsuit filed in this case.

### **g) Practice Notes**

1. The law does not contain a list of extreme emergency situations that pose a real threat to the life of a patient which give a doctor the right to perform a surgery, use sophisticated methods of diagnosis or conduct other forms of medical intervention without a consent of the patient or his/her legal representatives.

The draft of the Law of Ukraine "On National System of Emergency Medical Assistance" gives one an idea of the national legislation on urgent care. According to Article 1 of this bill, urgent situation is an instant pathological change in the functions of the human body that threatens the life and health of an individual or people surrounding him/her.

2. Medical practice testifies that such "urgent cases" are covered by the system of emergency (urgent) surgery. In the doctrine, emergency surgery means that one can not postpone a surgery, that it is carried out on the basis of vital, absolute indications, that without the surgery, the death of the patient is inevitable, and that the surgery offers a chance for survival, especially if it is performed in a timely manner. "
3. Urgent surgeries (in emergency situations) are performed shortly after the admission of a patient to a hospital (within 1-2 hours) (acute appendicitis, intestinal obstruction, peritonitis, acute purulent diseases). Urgent surgeries are performed immediately; simultaneously one strives to forestall a



shock or even a clinical death (severe bleeding due to a rupture of the spleen, liver, a rupture of large vessels).

4. Absolute (vital) indications for a surgery are diseases and conditions that pose a threat to the life of a patient and that can be treated only by means of the surgery. This group of indications include, for example, asphyxia, bleeding of any etiology, acute diseases of the abdomen (acute appendicitis, acute cholecystitis, incarcerated hernia, acute purulent surgical diseases, acute intestinal obstruction, etc.).
5. The law ensures the right of a doctor to carry out medical intervention without a consent of a patient or his/her legal representatives, but only in exceptional cases, when a delay in diagnosis or a delay in administering a surgery threatens the life of the patient. In this case, one deals with the so-called vital indicators for complex diagnostic procedures that themselves can be life threatening and for performing surgical interventions. Resuscitation measures in terminal patients are the highest manifestation of emergency and always belong to the circumstances of extreme urgency, subject to the requirements of the law.

Actions of a doctor in emergency situations are actions performed under the conditions of absolute necessity that arises from the real danger threatening the life of a patient and can not be eliminated by any means other than a specific surgery, for example. The state of emergency occurs under certain conditions, namely when:

- danger to human life is real, not potential. Therefore, for example, when a so-called planned surgery is used as a possible method of treatment, it does not constitute the state of emergency;
  - threat to life cannot be eliminated by means other than the selected method of intervention (a surgery, a blood transfusion, etc.);
  - damage to be caused by a medical intervention should constitute less danger for the patient than the damage to be caused by the pathology or the injury addressed by this intervention.
6. In addition to the actions of a doctor in emergencies, the legislators established a series of legitimate conditions under which medical assistance may be provided without a consent of an individual or his/her legal representative and which will not be considered a violation of the right of the patient to consent or refusal of a medical intervention.
  7. Employees should not be responsible for the damage caused by the employee who was acting in a state of emergency (part 4 of Article 130 of the Labor Code of Ukraine).



## 7.2 Providers' Responsibilities

This section highlights professional responsibilities of health care employees defined in their entirety in Article 78 of the Law of Ukraine "Principles of Ukrainian Health Care Legislation." They are general, that is they consist of those tasks that are related to carrying out medical practice in general. Special responsibilities of health care employees are those related to providing medical assistance to a patient and are not systematically fixed in the current legislation of Ukraine but are "scattered" throughout individual Articles of Law. The latter are covered in section 6.1, in accordance with the principle of correspondence between rights and responsibilities.

### 7.2.1 Responsibility to Provide Timely and Competent Medical Assistance; and Promote Public Health; Prevent and Treat Diseases

**a) This responsibility of health care employees corresponds to the right of patients to quality medical assistance, discussed in section 6.1.8.**

#### **b) Responsibility as stated in Country Constitution/Legislation**

- ▶ **Constitution of Ukraine of June 28, 1996 [Article 49 (part 1)].**
- ▶ **Civil Code of Ukraine of January 16, 2003 [Article 284 (part 1), Chapter 63].**

"An individual has the right to receive medical assistance" (part 1 Article 284). "According to a contract to provide services, one party (a contractor) undertakes to perform the task set by the other party (a customer) to provide a service which is consumed in the process of committing certain acts or carrying out certain activities while the customer agrees to pay the contractor for the specified service, unless otherwise stated in the agreement. The provisions of this chapter may apply to all contracts for services (including health care – I.S.) (Article 901, Chapter 63).

- ▶ **On Protection of Consumer Rights: Law of Ukraine of May 12, 1991 (in the reading of December 1, 2005) [Articles 4, 6, 8, 10].**

Article 6 establishes the right of a consumer to proper quality of products (any product (goods), work or service, produced, performed or provided to meet social needs). A contractor shall convey to the consumer products

of an adequate quality and also provide information about these products. At the request of the consumer, the contractor is obliged to provide documents confirming adequate quality of the products.

- ▶ **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Articles 6 (paragraph “e”), 14-1, 34 (part 2), 35 – 35-5, 78 (paragraph “a” part 1)].**

“Health care employees must protect and promote public health, prevent and treat diseases, provide timely quality health care” (paragraph “a” Article 78).

“Timely and competent examination and curing of a patient is a duty of a doctor” (part 2 Article 34).

### **c) Supporting Regulations/ Bylaws/ Orders**

- ▶ **On the Physician’s Oath: Decree of the President of Ukraine of June 15, 1992 [paragraph 1 part 1].**

“To devote all knowledge, strength and abilities to the protection and improvement of the health of a human being, treat and prevent disease, provide medical assistance to all who need it”.

- ▶ **Interdisciplinary Comprehensive Program for 2002-2011 “Health of the Nation”: Resolution of the Cabinet of Ministers of Ukraine of January 10, 2002 No. 14 [section 31].**
- ▶ **Framework for Ensuring the Quality of Health Care Services in Ukraine for the Period Ending in 2020: Order of the Ministry of Health of Ukraine of August 1, 2011 No. 454.**

The tasks of the Framework include protection of interests of a patient in receiving quality health care.

- ▶ **On Approval of the Uniform Methods for Developing Clinical Guidelines, Medical Standards, Uniform Clinical Protocols for Medical Assistance, Local Protocols for Medical Assistance (Clinical Tracks for Patients) on Evidence-based Medicine: Order of the Ministry of Health of Ukraine, Academy of Medical Sciences of Ukraine of February 19, 2009 No. 102/18.**
- ▶ **On Approval the Plan of Measures Concerning the Framework of Clinical and Laboratory Researches Conduction for the Period Ending in 2015: Order of Ministry Of Health of Ukraine of October 17, 2010 No. 1003.**

- ▶ **On Procedure of Carrying out a Control and Management of Quality of Medical Care: Order of Ministry of Health of Ukraine of March 26. 2009. No. 189.**
- ▶ **On Procedure of Management of Quality of Medical Care: Order of Ministry of Health of Ukraine of February 24. 2010, No. 163.**
- ▶ **On Approval of a Unitary Glossary of Definitions (Glossary) on the Issues of Management of Medical Care Quality: Order of the Ministry of Health of Ukraine of July 20, 2011 No. 427.**
- ▶ **On Approving the Standards of Medical Care Provision and Indicators of Medical Care Quality: Order of the Ministry of Health of Ukraine of December 28, 2002 No. 507.**

The list of medical care quality indicators includes:

1. Accessibility of medical care.
  2. Economy of medical care.
  3. Effectiveness of medical care.
  4. Continuity of medical care.
  5. Scientific and technical level of medical care.
  6. The level of observance of medical care manufacturability.
  7. The level of clinical quality.
  8. The level of diagnostic's quality.
  9. The level of quality of medical care
  10. The level of quality of medical examination.
  11. The level of quality of prophylactic.
  12. The level of quality of rehabilitation.
  13. The level patients are satisfied with the medical care they received.
- ▶ **Licencing Conditions for Conducting Certain Types of Business Activities in Medical Practice: Order of Ministry of Health of Ukraine of February 2, 2011 No. 49. [paragraph 4.1]**

#### **d) Provider Code(s) of Ethics**

- ▶ **Code of Ethics of Physicians of Ukraine, adopted and signed at the National Congress of Health Care Organizations and at the X Congress of the Ukrainian Medical Association on September 27, 2009 [paragraphs 2.1, 2.3].**

Primary mission of professional activities of a physician (a practitioner and a researcher) is to preserve and protect the life and health of a human being in prenatal and postnatal period, to prevent diseases and promote health as well as reduce suffering caused by incurable diseases, at childbirth and in

death” (paragraph 2.1). “A doctor is fully responsible for his/her decisions and actions as to the life and health of patients” (paragraph 2.3).

### **e) Other Relevant Sources**

There are no other relevant sources on this matter.

### **f) Practical Examples**

#### **1. Example(s) of Compliance**

Ms. K. was hospitalized on her 39th week of pregnancy. The next day, the patient experienced an increase in blood pressure, so it was decided to conduct a cesarean section. During the surgery, her condition deteriorated, which was caused, as it turned out later, by the rejection of the standard medicine introduced during the surgery by the individual body of the patient. Previously, the deceased did not have any allergic reactions to medication. In spite of the skilled and conscientious medical assistance, the patient died.

#### **2. Example(s) of Violation**

Ms. N., who on December 25, 2004 at 2 am was admitted to the maternity ward of the central hospital of district I., was examined by doctors A. and B. within 24 hours of the admission. They decided upon natural birth as a method of delivery. On the same day at 22: 25, the pregnant woman naturally bore a living male child weighing 4 kg 300 g. The third stage of the labor was complicated by an inversion of the uterus and a uterine bleeding.

The head of the maternity department, Mr. A., a doctor of the highest qualification category, negligently treated his professional duties, refused to conduct medical manipulation to correct the uterus, and instructed doctor V., who did not have relevant practical skills and adequate medical certification, to carry out this manipulations. As a result, this manipulation was not performed in full, even though as a certified specialist Ms. V. should have mastered methods of stopping uterine bleeding and skills to correct the uterus. According to the opinion of the commission that conducted forensic analysis, manual correction of the uterus and, if it failed, a surgical treatment, including the removal of the uterus, was not carried out, even though such a correction could be carried out at the maternity department of the central hospital of district I. Due to the untimely and unqualified aid, the mother died.

#### **3. Actual Case(s)**

While undergoing treatment at a health resort, on November 19, 2007, Ms. M. fell due to an inadequate condition of the sidewalks (covered with ice) on the territory of the resort and received an injury – she suffered from a closed fracture of the left radius bone of a standard type. To receive medical assistance, she was sent to the trauma department of the central district hospital. Medical assistance was provided to the patient by a trauma specialist, who established the diagnosis of a standard fracture of the left radius bone with a displacement.

According to the certificate of November 19, 2007, she received the following medical interventions: radiography, correction, cast immobilization, X-ray control. It was also established that the patient was sober at the time of the accident. On November 23, 2007, Ms. M. went to see a doctor at an outpatient medical center of city D. with a complaint of wrist pain and swelling. An attending physician – a trauma specialist – confirmed the diagnosis established at the central district hospital. However, he also noted in the primary medical documentation that the treatment assigned to Ms. M at the central district hospital did not meet the clinical protocols of medical assistance for this condition. As a result of improper medical assistance at the central district hospital, the patient experienced exacerbation of her chronic condition and developed iatrogenic pathology—left wrist dysfunction. Ms. M. filed a lawsuit to compensate her for moral (50,000 hryvnias) and material (7,759.45 hryvnias) damages. The case is being tried in a court of first instance.

### **g) Practice Notes**

1. Medical assistance should be provided by health care employees according to quality standards in order not to violate the rights of patients. This is of practical importance to lawyers for determining the range of professional violations made in each individual case by doctors.
  - 1.1. Quality of health care in administrative law is determined through administrative processes within the system of health care. Standards of health care are: 1) organizational standards and standards of personnel management (condition and structural characteristics of premises, level of communication, technical and instrumental equipment of health care institutions, professional level of their staff which is adequate and necessary for providing health care of good quality), 2) qualitative and quantitative standards which directly determine the level of health care by determining its quality, thus serving as a way to detect and eliminate poor-quality health care (range of medical assistance provided, diagnostic, medical/technological, medical/social standards).
  - 1.2. Quality of health care in civil law is determined through contractual and legal relations and obligations associated with causing damage in the course of providing this type of care.
  - 1.3. Quality of health care in criminal law is determined through criminal responsibility for professional crimes the content of which is specified in the Criminal Code of Ukraine, including the failure of a health care employee to provide medical assistance to a patient (Article 139), improper carrying out of professional duties by a health care employee (Article 140).
  - 1.4. Quality of health care in labor law is determined through the employment relations between administration of a health care institution and health care employees. Providing adequate health care is part of responsibilities of a health care institution as an employer, its administration delegates this responsibility to its employees through employment contracts, collective bargaining agreements, internal labor regulations. Administration of a

health care institution employs medical personnel who have diplomas and certificates of specialist that certify their knowledge of modern medical diagnostic technology and their ability to provide good quality medical assistance. Failure of an employee to provide medical assistance according to quality standards constitutes basis for bringing an employee to disciplinary action.

1.5 Quality of medical service – is a service, due to which resources are allocated in a way, that medical and sanitary needs of those who need help most of all, are satisfied most effectively and to the limit, and medical care and prophylactics is carried out due to requirements of the highest level. (Unitary Glossary of Definitions (Glossary) on the Issues of Management of Medical Care Quality 2011)

2. See also practical advice in section 6.1.8.

## **7.2.2 Responsibility to Provide Free Emergency Assistance to Citizens in Case of Accidents and Other Emergencies**

**a) This responsibility of health care employees corresponds to the right of patients to accessible health care, including free medical assistance, and is discussed in section 6.1.2.**

### **b) Responsibility as stated in Country Constitution/Legislation**

- ▶ **Criminal Code of Ukraine of April 5, 2001 [Article 139].**
- ▶ **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Articles 37, 43 (part 2), 78 (paragraph “b” part 1)].**

“Health care employees must provide emergency assistance in case of accidents and acute stages of diseases (part 1 Article 37). “Health care employees must provide free emergency assistance to citizens in case of accidents and other emergencies” (paragraph “b” Article 78).

- ▶ **On Protection of the Population and the Territory from Man-made and Natural Disasters: Law of Ukraine of June 8, 2000 (Article 13).**

“To provide free medical assistance to victims of man-made emergencies and natural disasters ...there exists State Disaster Medical Service as a special type of public emergency service” (part 2 Article 13).

- ▶ **On Emergency Services: Law of Ukraine of December 14, 1999 [Article 8].**

State Disaster Medical Service is a special type of state emergency service. The main objective of the State Disaster Medical Service is to provide citizens with free medical assistance ... (part 3 Article 8).

### **c) Supporting Regulations/ Bylaws/ Orders**

- ▶ **On the Physician's Oath: Decree of the President of Ukraine of June 15, 1992, [paragraphs 1, 2 part 1].**

"...Provide medical assistance to those who need it" (paragraph 1)," ... be selfless and responsive to patients ..." (paragraph 2).

- ▶ **On Approval of the Provisions on the State Disaster Medical Service: Resolution of the Cabinet of Ministers of Ukraine of July 11, 2001 No. 827.**

"The main objective of the State Disaster Medical Service is to provide free medical assistance at the prehospital and hospital phases to disaster victims, rescuers and others involved in disaster relief, elimination of health and sanitary consequences of emergencies ..." (parts 1, 2 paragraph 12).

- ▶ **On Approval of the State Program for Creating a Unified System of Emergency Medical Assistance for the Period Ending in 2010: Resolution of the Cabinet of Ministers of Ukraine of November 5, 2007 No. 1290.**

"The goal of the program is to create conditions to increase availability and quality of emergency medical assistance, reduce disability and death due to accidents, injuries and poisonings ...."

- ▶ **On a Unified System of Emergency Medical Assistance: Order of the Ministry of Health of Ukraine of June 1, 2009 No. 370 [section 1 (paragraph 2)].**
- ▶ **On Approval of the Action Plan for Implementing the State Program for Creating a Unified System of Emergency Medical Assistance for the Period Ending in 2010: Order of the Ministry of Health of Ukraine of May 12, 2008 No. 245.**
- ▶ **Program for Providing Citizens with Guaranteed by the State Free Medical Assistance: Resolution of the Cabinet of Ministers of Ukraine of July 11, 2002 No. 955.**

“State and municipal health care institutions provide free medical assistance, including the following types of care: 1) emergency and urgent care is provided at the pre-hospital stage by emergency stations (units), emergency care centers in conditions that threaten human life, 3) inpatient care is provided in case of acute stages of diseases and in urgent cases when one needs intensive treatment, round the clock medical supervision or hospitalization, including during epidemics, to children, pregnant and parturient women, patients referred by medical and social expert commissions or councils of doctors (Article 2).

- ▶ **On Licensing Conditions for Carrying Out Business Activities in Medical Practice: Order of Ministry of Health Ukraine of February 2, 2011. No. 49. [paragraph 4.1].**

#### **d) Provider Code(s) of Ethics**

- ▶ **Code of Ethics of Physicians of Ukraine, adopted and signed at the National Congress of Health Care Organizations and at the X Congress of the Ukrainian Medical Association on September 27, 2009 [paragraph 2.6].**

“At state and municipal health care institutions, doctors provide free medical assistance to patients within the funding allocated to these institutions”.

#### **e) Other Relevant Sources**

There are no other relevant sources on this matter.

#### **f) Practical Examples**

##### **1. Example(s) of Compliance**

A five-year old child received serious burns during a fire. The minor patient was immediately hospitalized at the nearest health care institution. The family of the girl was in a difficult financial situation and was unable to purchase the drugs needed for treatment. Health care employees explained to the parents that the patient had the right to free emergency medical assistance, including free medication.

##### **2. Example(s) of Violation**

Around two o'clock at night, an ambulance brought a man with serious injuries from an accident to one of the hospitals of city D. The patient urgently needed surgery. Before commencing the surgery, the surgeon decided to talk to the family members. Noting that the surgery which the victim required cost 2,000 hryvnias, the surgeon tried to clarify whether the relatives had such funds and whether he should commence the surgery.



### 3. Actual Case(s)

On December 15, 2008, the court of district S of city L. examined a case regarding the charges brought by Ms. M., who acted as a legal representative on behalf of her underage son K., against secondary school No. X in city L., with nurse L. acting as the third party. The plaintiff demanded compensation for moral damages in the amount of 10,000 hryvnias.

The court established that on December 1, 2008 underage K. with friends was playing football on the playground of secondary school No. X in city L. During the game, an accident occurred: the boy suffered a closed fracture of the middle third of the right femur accompanied by a dislocation (as it turned out later in the hospital). Since the accident occurred on the playground of secondary school No. X in city L., underage K. was taken to the school's health care unit. Nurse L., who at that time was on duty, refused to provide the child with emergency medical assistance. She defended her actions by arguing that underage K. was not a student at school No. X in city L. and, therefore, the nurse was not obliged to provide him with medical assistance.

Due to the inaction of the health care employee, the mother transported the child to the hospital by a taxi 2 hours and 25 minutes after the accident occurred, where the boy received urgent medical assistance. By that time, the child was in a life-threatening condition.

In this case, nurse L. did not perform her duty as a health care employee to provide emergency medical assistance to underage K., who had suffered severe injuries. The child suffered moral damages which consisted of exposure to physical pain, mental worry, disruption of his way of life.

Due to this, the court of district S. of city L. ordered the claims of Ms. M. to be satisfied and the moral damage to be compensated for in full.

### g) Practice Notes

1. In urgent cases, when there exists a real threat to the life of a patient, a consent of the patient or his/her legal representatives to a medical intervention is not needed.
2. If a health care employee had to provide medical assistance to a patient and under specific circumstances had the opportunity to do so but did not do so without providing any justifiable reasons, he/she is subject to criminal responsibility under Article 139 of the Criminal Code of Ukraine. The decision as to whether the reasons for failing to provide medical assistance are justifiable is made by competent authorities in each case individually.
3. Justifiable reasons include, in particular, irresistible force, state of emergency (for example, the need to provide priority assistance to a more seriously ill person), illness of the health care employee in question, lack of equipment or medicines. One cannot recognize as legitimate the reasons that involve the health care employee being absent from the site of his/her employment (being at home or on the road), being off duty, absence of a consent of the patient or a consent of his/her legal representatives

to a medical intervention in an emergency situation when there exists a real threat to the life of the patient.

4. See also practical advice in section 6.1.2 and 7.1.9.

### **7.2.3 Responsibility to Disseminate Scientific and Medical Knowledge Among the Population, to Promote Healthy Lifestyle, Including Using One's Own Example**

**a) This responsibility of health care employees corresponds to the right of patients to preventive measures, which is discussed in section 6.1.1.**

#### **b) Responsibility as stated in Country Constitution/Legislation**

▶ **Constitution of Ukraine of June 28, 1996 [Article 49 (part 2)].**

“Health care is provided through state funding of relevant socio-economic, medical, sanitary and prevention programs.”

▶ **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Articles 32, 35-1, 78 (paragraph “c” part 1)].**

“The state promotes healthy living by disseminating scientific knowledge on health issues, organizing medical, environmental and physical education, implementing measures aimed at improving hygiene habits of the population ...” (part 1 Article 32.).

“Health care employees must disseminate scientific and medical knowledge among the population, promote healthy living, including by their own example” (paragraph “c” Article 78).

▶ **On Ensuring Sanitary and Epidemiological Welfare of the Population: Law of Ukraine of February 24, 1994 [Article 21 (parts 3, 4)].**

“Health care agencies and institutions, health care employees ... must promote public hygiene habits, healthy lifestyle” (part 3 Article 21).

▶ **On Measures to Prevent and Reduce Tobacco Consumption and its Harmful Impact on Public Health: Law of Ukraine of September 22, 2005 [Articles 14, 15].**

“Health care employees of health care institutions of all forms of ownership shall promote medical knowledge about prevention of diseases caused by smoking tobacco or other forms of its use, prevent their use among the population, especially among children and youth, provide practical advice on healthy lifestyle and recommend not starting to smoke or otherwise use tobacco products or discontinuing their use” (paragraphs 1, 2 part 1 Article 15).

- ▶ **On Wellness and Recreation of Children: Law of Ukraine of September 4, 2008 [Article 33 (paragraph 4 part 3)].**

### **c) Supporting Regulations/ Bylaws/ Orders**

- ▶ **Framework for the Development of Health Care of the Population of Ukraine: Decree of the President of Ukraine of December 7, 2000 No. 1313/2000 [section 5].**
- ▶ **On the Physician’s Oath: Decree of the President of Ukraine of June 15, 1992, [paragraph 6 part 1].**

“Using one’s own example to promote bringing up physically and morally healthy generation ...” (paragraph 6).

- ▶ **Interdisciplinary Comprehensive Program for 2002-2011 “Health of the Nation”: Resolution of the Cabinet of Ministers of Ukraine of January 10, 2002 No. 14 [section 1 paragraph 20, section 3 Introduction, section 19, section 37].**
- ▶ **Prosperous Society, Competitive Economy, Efficient State: Economic Reform Program for 2010-2014 of June 2, 2010 [section “Reforming Health Care”].**
- ▶ **National Development Plan for the Health Care System of Ukraine for the Period Ending in 2010: Resolution of the Cabinet of Ministers of Ukraine of June 13, 2007 No. 815 [paragraph 9].**
- ▶ **Framework on Management of Medical Care Quality in the Sphere of Health Care in Ukraine for the Period up to 2020. Order of Ministry of Health of Ukraine of August 1, 2011, No. 454.**

## d) Provider Code(s) of Ethics

- ▶ **Code of Ethics of Physicians of Ukraine, adopted and signed at the National Congress of Health Care Organizations and at the X Congress of the Ukrainian Medical Association on September 27, 2009 [paragraph 2.11].**

“A doctor must promote healthy lifestyle by his/her own behavior and other available means (lectures, talks, media, internet etc.) and serve as an exemple of adhering to its norms and rules”.

## e) Other Relevant Sources

There are no other relevant sources on this matter.

## f) Practical Examples

### 1. Example(s) of Compliance

When seeing his patients, physician T. from a regional hospital handed out brochures and booklets with information about HIV/AIDS and hepatitis B and C.

### 2. Example(s) of Violation

The head of one of the schools asked employees of a health care institution in city Ch. to conduct an educational event with teenagers about HIV/AIDS prevention. However, the head of staff of the medical institution refused to sent a health care employee to disseminate scientific and medical knowledge among students, arguing that education of children should be taken care of by parents and teachers while the duty of doctors is to cure.

### 3. Actual Case(s)

The court of district Z in city L. examined the lawsuit initiated by Ms. M against Municipal Hospital No. X in city L. to recognize as unlawful her dismissal, to reinstate her at work with the payment of average wages for the time of her forced absence.

The court established that Ms. M. worked as a cardiologist at Municipal Hospital No. X in city L. and on May 20, 2009 was fired for showing up at her workplace drunk, in accordance with paragraph 7 of part 1 of Article 1940 of the Labor Code of Ukraine.

The plaintiff considered her dismissal to be unlawful since she had previously been subject to only one disciplinary measure in the form of a reprimand and this could not serve as evidence of a systematic failure to fulfill the responsibilities entrusted to her by the employment agreement and internal labor regulations without a justifiable reason.

At the trial, the representative of the defendant indicated that the plaintiff had showed up at her workplace drunk, as evidenced by the relevant medical re-

port. It was noted that this behavior of the health care employee testified to the violation by the employee of her professional duties, in particular the duty to promote healthy lifestyle, including by her own example, of the rules of professional ethics. As a punishment for such an action, one can utilize a dismissal of an employee from work (in accordance with paragraph 7 of part 1 of Article 40 of the Labour Code of Ukraine).

Hence, the court recognized the dismissal of the doctor as legitimate and decided to deny the claim of Ms. M. against Municipal Hospital No. X in city L. whereby she requested to recognize her dismissal as unlawful and to reinstate her at work with the payment of average wages for the time of her forced absence.

### **g) Practice Notes**

1. Advanced training programs for health care employees should include special topics on methods and means of prevention and giving up of tobacco use.
2. For violating this duty, a disciplinary action may be brought against a health care employee.
3. See also practical advice in section 6.1.1.

## **7.2.4 Responsibility to Comply with the Requirements of Professional Ethics and Deontology and to Maintain Medical Secrecy**

**a) This responsibility of health care employees corresponds to the right of patients to confidentiality of information about their health, and is also highlighted through the prism of the right of health care employees to share information about a patient, discussed in section 7.1.7.**

### **b) Responsibility as stated in Country Constitution/Legislation**

- ▶ **Constitution of Ukraine of June 28, 1996 [Article 32 (parts 1, 2)].**
- ▶ **Civil Code of Ukraine of January 16, 2003 [Articles 285 (part 4), 286].**

“An individual has the right to confidentiality of information about his/her health, the fact of seeking medical assistance, diagnosis, and information obtained during his/her medical examination” (part 1 Article 286).

- ▶ **Criminal Code of Ukraine of April 5, 2001 [Article 145].**

“An unlawful disclosure of a medical secret:

A willful disclosure of a medical secret by an individual to whom it became known in connection with carrying out his/her professional or official duties if it caused grave consequences is punishable by a fine of up to fifty times the untaxed minimum wages or public service for up to two hundred and forty hours or withdrawal of the right to occupy certain positions or engage in certain activities for up to three years, or correctional labor for up to two years. “

- ▶ **On Information: Law of Ukraine of October 2, 1992 [in the wording of January 13, 2011] [Article 21].**
- ▶ **On Personal Data Protection: Law of Ukraine of June 1, 2010 [Article 7].**

“Processing of personal data is prohibited” (part 1). The provisions of this Article shall not apply ... if processing of personal data ... is needed for health care, to ensure care or treatment provided that such data are processed by health care employees or other individuals from health care institutions who are in charge of protecting personal data” (paragraph 6 part 2).

- ▶ **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Articles 39-1, 40, 76, 78 (paragraph “d” part 1)].**

“A medical secret:

Medical employees and other individuals who in the course of performing their professional or official duties become aware of an illness, medical examination and its results, sex and family life of an individual have no right to disclose this information except in the cases provided for by the legislation. While using the information that constitutes a medical secret in the educational process and research, including its publication in specialized literature, one must ensure the anonymity of a patient”(Article 40).

“Health care employees must adhere to the rules of professional ethics and deontology, preserve medical confidentiality” (paragraph “d” Article 78).

### **c) Supporting Regulations/ Bylaws/ Orders**

- ▶ **On the Physician’s Oath: Decree of the President of Ukraine of June 15, 1992, [paragraphs 1–4, 6 part 1].**

“To be invariably guided in one’s actions and thoughts by the principles of universal morality ...” (paragraph 2), to preserve confidentiality of medical information, not use it to harm a person” (paragraph 3), to adhere to the

rules of professional ethics ...” (paragraph 4) “... to uphold high ideals of compassion, love, harmony and mutual respect between people” (paragraph 6).

- ▶ **Interdisciplinary Comprehensive Program for 2002-2011 “Health of the Nation”:** Resolution of the Cabinet of Ministers of Ukraine of January 10, 2002 No. 14 [section 38].
- ▶ **Instructions on the Procedure for Filling Out a Disability Leave Certificate:** Order of the Ministry of Health of Ukraine, the Ministry of Labor and Social Policy of Ukraine, Social Insurance Fund against Temporary Disability, Social Insurance Fund against Work Accidents and Occupational Illnesses of November 3, 2004 No. 532 / 274/136-os/1406 [paragraph 3.2].

“... A preliminary diagnosis, a final diagnosis, and the ICD-10 code can be disclosed only upon a written consent of a patient. Otherwise, the preliminary and final diagnoses and the ICD-10 code must not be disclosed. If upon a written approval of the head of the department due to deontological concerns a doctor changes the wording of the diagnosis and the ICD-10 code of the actual disease, he/she must make a note in the inpatient or outpatient file that provides reasons for the change of the diagnosis and the ICD-10 code.”

- ▶ **Licensing Conditions for Conducting Business Activities in Medical Practice:** Order of Ministry of Health of Ukraine of February 2, 2011 No. 49 [paragraph 4.1 (part 6)].

“To adhere to the rules of professional ethics and deontology, to preserve medical confidentiality.”

- ▶ **On Lists of Data, that Include Official and Confidential Information in the Ministry of Health of Ukraine:** Order of Ministry of Health of Ukraine of August 16, No. 517.

#### **d) Provider Code(s) of Ethics**

- ▶ **Code of Ethics of Physicians of Ukraine, adopted and signed at the National Congress of Health Care Organizations and at the X Congress of the Ukrainian Medical Association on September 27, 2009 [paragraphs 2.1, 2.2, 3.6].**

“A doctor as well as other individuals involved in providing medical assistance must not disclose medical secrets even after the death of a patient nor the fact of the patient seeking medical assistance, in the absence of

other instructions from the patient or when the disease does not threaten his/her family and society. Confidentiality extends to all the information obtained in the course of treating a patient (including diagnosis, methods of treatment, prognosis).”

## e) Other Relevant Sources

- ▶ **Decision of the Constitutional of Court of Ukraine regarding the official interpretation of Articles 3, 23, 31, 47, 48 of the Law of Ukraine “On Information” and Article 12 of the Law of Ukraine “On Procuracy” (the case of K. H. Ustymenko) of October 30, 1997.**

At the request of a patient, his/her family members or legal representatives, a doctor must provide them with complete medical information in an accessible form. Rules for the use of information which is subject to medical confidentiality, i.e. the information about a patient, as opposed to medical information, i.e. the information for a patient, are established by Article 40 of the Law of Ukraine “Principles of Ukrainian Health Care Legislation” and part 3 of Article 46 of the Law of Ukraine “On Information.”

- ▶ **Clarification Concerning Procedure of Indicating the Diagnosis in the Letter of Disability of a Patient: Letter of the Executive Board of Social Insurance Fund for Temporary Disability of 23.03.2011, No 04-30-620.**

“Primary diagnosis, final diagnosis and MKX – 10 code should be indicated in the letter of disability exclusively under the written permission of a patient. Another way of indication of Primary diagnosis, final diagnosis and MKX – 10 code is not foreseen.

## f) Practical Examples

### 1. Example(s) of Compliance

Ms. N., head of the Department of Prevention and Treatment at the Regional Drug Addiction Treatment Center of the State Health Care Administration of Region M. (hereinafter – the Center), was reprimanded for the breach of labor discipline during a preventive drug examination on February 14, 2008 (she asked questions in a way that was offensive to human dignity) by Order No. 61-L of March 14, 2008. However Ms. N. filed a lawsuit against the Center demanding to recognize as illegal the Order to impose on her a disciplinary penalty. It was established that, while examining patients, the plaintiff put to them questions from the test “Audit” developed by the Ministry of Health of Ukraine (Instructions) and established diagnoses on the basis of the number of points scored. Psychological testing is obligatory during the exam. Witnesses (the individuals who complained to the chief of staff of the Center about what they considered to be an incorrect behavior



on the part of the doctor) noted that they in fact did not like the questions put to them in the course of the examination by the doctor: in their view, these questions were demeaning and insulting. This is why the plaintiff was reprimanded. At the proceedings, the court concluded that the head of the department was subjected to disciplinary action unlawfully because compliance with the requirements of the Instructions approved by the Ministry of Health of Ukraine can not be regarded as a breach of professional ethics and deontology of health care employees.

## 2. Example(s) of Violation

Ms. A. visited a gynecologist in Hospital No. 1 in city K. with the complaint of indisposition. On the basis of the exam, doctor S. established that Ms. A. was on the 3rd week of pregnancy. Then the doctor asked whether the woman was married. Having received a negative response, he began to humiliate the patient and threatened that he would notify her parents about the immoral behavior of their daughter.

The patient contacted the chief of staff of the hospital with a complaint of the violation of the rules of professional ethics and deontology by gynecologist S.

## 3. Actual Case(s)

The court of district K region K examined in open proceedings the lawsuit of Mr. O. against the central hospital of the region to cancel the order to impose a disciplinary action. The plaintiff supported his claim and explained that the disciplinary action was brought against him without any legal basis. At the previous session of the court, the representative of the defendant did not recognize the claim and applied for the case to be tried in absentia. After hearing the explanation of the plaintiff and his representative and examining the case file, the court concluded that the application was subject to satisfaction on the following grounds: in the order of April 15, 2009 No. 52-K, Mr. O. was reprimanded for the violation of deontological norms. The plaintiff was informed of the order to impose disciplinary measures only on May 25, 2009.

The order stated that the reason for the reprimand was the report submitted by Mr. O. and oral explanations of other health care employees. The representative of the defendant did not apply for a subpoena for questioning these employees as witnesses and did not provide the report of the plaintiff. In addition, neither the order nor the materials provided by the representative of the medical institution mentioned the time, the place and other factual circumstances of the alleged violation of labor discipline.

The Court noted that the term “deontology” should be understood in two ways. First of all, it constitutes professional ethics of health care employees, principles of conduct of medical staff in relation to patients designed to maximize the effectiveness of treatment. Secondly, it constitutes part of ethics that studies the issue of responsibilities, the scope of mandatory and moral requirements and the relations between them. Thus, the court concluded that by imposing a disciplinary punishment the hospital management took into account only the first aspect of the concept “deontology”.

Article 147 of the Labor Code of Ukraine specifies that only one method of punishment, including a reprimand, may be applied to an employee for a violation of labor discipline. According to the information provided by the health care institution, no deontological norms were adopted at the hospital. So, in general it was not clear what norms had been violated by Mr. O., when, under what circumstances and regarding whom (medical staff or patients).

Thus, the court concluded that the order in the part being disputed was groundless, and therefore the claim was lawful and was subject to satisfaction.

### **g) Practice Notes**

1. When clarifying the issue of bringing medical workers to responsibility for non-fulfillment of an analyzed duty, one should note, that it is possible under the condition rules of professional ethics and deontology are placed into a source of law. Nowadays moral and deontological norms are foreseen by Physicians' Oath – by-law act, and in the Law of Ukraine “On Principles of Ukrainian health Care Legislation”, in the latter it is foreseen by declarative definition of a medical worker behavior. Requirements of professional ethics and deontology are highlighted in vault of moral norms – Code of Ethics of Physicians of Ukraine. Medical workers shall not be responsible for breach of this Code provisions.
2. Moral norm with legal coloring, or a single legal and moral principle is one of the basics of medical practice – medical secret. In case of breach of this principle by medical worker, he/she will bear civil or criminal responsibility, depending on the conditions of the breach. Undoubtedly, moral and deontological responsibility will take place for breach of medical secret due to Code of Ethics of Physicians of Ukraine.
3. See also practice notes in subchapters 6.1.6 and 7.1.7.

## **7.2.5 Responsibility to Advance Constantly Professional Knowledge and Skills**

**a) This responsibility of health care employees corresponds to the right of patients to quality professional medical assistance, discussed in section 6.1.8.**

### **b) Responsibility as stated in Country Constitution/Legislation**

- ▶ **Criminal Code of Ukraine of April 5, 2001 [Article 140].**
- ▶ **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Article 78 (paragraph “e” part 1)].**

“Health care employees must constantly improve their professional knowledge and skills” (paragraph “e” Article 78).

### c) Supporting Regulations/ Bylaws/ Orders

- ▶ **Framework for the Development of Health Care of the Population of Ukraine: Decree of the President of Ukraine of December 7, 2000 No. 1313/2000 [Section 7].**

- ▶ **On the Physician’s Oath: Decree of the President of Ukraine of June 15, 1992, [paragraph 5 part 1].**

“Continually expend and improve one’s knowledge and skills ...”.

- ▶ **Interdisciplinary Comprehensive Program for 2002-2011 “Health of the Nation”: Resolution of the Cabinet of Ministers of Ukraine of January 10, 2002 No. 14 [section 33].**

- ▶ **National Development Plan for the Health Care System of Ukraine for the Period Ending in 2010: Resolution of the Cabinet of Ministers of Ukraine of June 13, 2007 No. 815 [paragraph 7].**

- ▶ **On Further Improvement of the System of Residency Training of Doctors (Pharmacists): Order of the Ministry of Health of Ukraine of July 22, 1993 No. 166.**

“To ensure high level of qualifications of doctors (pharmacists), they are subject to continuing education and the level of their qualifications is subject to objective verification” (paragraph 1.1). “The main elements of the structure of continuing education is specialization and expansion of professional knowledge and skills” (paragraphs 1.2, 1.3). “Improvement as a form of training can be implemented through continuing education, thematic courses and pre-certification workshops (paragraph 2.2).

- ▶ **Register of Medical and Pharmaceutical Specialties: Orders of the Ministry of Health of Ukraine of June 9, 1993 No. 130 and of February 4, 1992 No. 24.**

- ▶ **On Further Improvement of Certification of Physicians: Order of the Ministry of Health of Ukraine of December 19, 1997 No. 359.**

The main objective of certification is to determine the level of professional training of physicians, to assess their experience, further possible use of specialists, improvement of their professional skills (paragraph 1.2).

- ▶ **On Continuing Education of Junior Specialists with Medical and Pharmaceutical Degrees: Order of the Ministry of Health of Ukraine of September 7, 1993 No. 198.**
- ▶ **On Certification of Junior Specialists with Medical Degrees: Order of the Ministry of Health of Ukraine of November 23, 2007 No. 742.**
- ▶ **Framework on Management of Medical Care Quality in the Sphere of Health Care in Ukraine for the Period up to 2020. Order of Ministry of Health of Ukraine of August 1, 2011, No. 454.**
- ▶ **On the Procedure for Certification and Assessment of Healing Abilities of Individual who Wish to Engage in Medical Activities in the Field of Traditional and Alternative Medicine: Order of the Ministry of Health of Ukraine of August 10, 2000 No. 195.**
- ▶ **On Year-round Continuing Education and Training Courses for Junior Medical and Pharmaceutical Specialists: Order of the Ministry of Health of Ukraine of September 7, 1993 No. 198.**
- ▶ **On Organizing Training of Medical and Non-medical Staff to Provide Medical Assistance in Emergency Situations: Order of the Ministry of Health of Ukraine of March 18, 2005 No. 120.**
- ▶ **On Improving the System of Training to Provide Emergency Medical Assistance: Order of the Ministry of Health of Ukraine of November 13, 2009 No. 833.**

#### **d) Provider Code(s) of Ethics**

- ▶ **Code of Ethics of Physicians of Ukraine, adopted and signed at the National Congress of Health Care Organizations and at the X Congress of the Ukrainian Medical Association on September 27, 2009 [paragraph 2.3].**

“... A doctor must systematically improve his/her skills by utilizing in his/her practice the most effective previously known and the latest achievements of medical science in the manner prescribed by law.”

#### **e) Other Relevant Sources**

There are no other relevant sources on this matter.

## f) Practical Examples

### 1. Example(s) of Compliance

For more than 20 years already, doctors from Ukraine undergo training abroad. The purpose of these trips is to increase professional knowledge and skills of the health care employees. Upon acquiring new practical skills abroad, our health care employees successfully apply them in their practice in Ukraine, thus having a positive effect on the care of our citizens.

### 2. Example(s) of Violation

Mr. A., a physician of the first category from Hospital No. X in city Zh., did not increase the level of his professional knowledge and skills. As a result, in his medical practice, he committed significant errors (errors in the diagnosis of patients, etc.). Due to this, the chief of staff of Hospital No. X in city Zh. requested the Certification Commission to deprive the physician of his qualification category. Having considered the request, the Certification Commission decided to reduce the qualification category of physician A. from first to second.

### 3. Actual Case(s)

Ms. R. filed a lawsuit against Medical Center “Spektr” of LLC “BUVI” located in city F., demanding compensation for proprietary and material damages. Having suspected pregnancy and not wishing to give birth again, the plaintiff requested the defendant to diagnose and, if necessary, terminate her pregnancy at an earlier stage by means of vacuum aspiration, as a method of pregnancy termination least damaging to one’s health. The ultrasound did not confirm pregnancy and the diagnosis of uterine fibroma was established. However, one month later, given that pregnancy symptoms did not disappear, the plaintiff sought assistance from another private health care institution and received confirmation of her pregnancy. The next day, her pregnancy was also confirmed by the medical center “Spektr”. However, the deadline for early termination of pregnancy had already passed. The court found that the plaintiff suffered proprietary damage in the amount of the value of diagnostic ultrasound as well as moral damage due to an unwanted event – the birth of a child – which placed the family into a difficult financial situation. Unlawfulness of the actions of the doctor of the medical center “Spektr” was confirmed by the results of the investigation conducted by the Commission of the Ministry of Health of Ukraine which corroborated the absence of a gynecologist trained to conduct ultrasound studies at the center. Based on the above, on September 11, 2006, the Court of city F passed a decision to satisfy in part the plaintiff’s claims and to order the defendant to compensate her for proprietary damage in the amount of 45 hryvnias and for moral damage in the amount of 5,000 hryvnias and cover the plaintiff’s legal expenses in the amount of 68 hryvnias.

### **g) Practice Notes**

1. The right of health care employees to continuing education and advanced training at least once every five years in relevant institutions and establishments (paragraph “c” of Article 77 of the Law of Ukraine “Principles of Ukrainian Health Care Legislation”) corresponds to their responsibility to advance continually their professional knowledge and skills, identified in paragraph “e” of Article 78 of the Law of Ukraine “Principles of Ukrainian Health Care Legislation”. In other words, there is an inextricable link between an opportunity guaranteed by the state to develop one’s professional skills on the one hand, and a range of requirements as to the relevant level of qualifications of health care employees, on the other. Thus, a reluctance of a doctor to exercise his/her right to continuing education through participation in pre-certification programs and subsequent certification as a “doctor-specialist” after an initial internship deprives the individual of a chance to continue to occupy his/her position in a health care institution.
2. Individuals who did not work within a particular specialization for more than three years and individuals who were not certified when expected or who were denied new certification (or a confirmation of the current certification) may not engage in medical activities within this specialization without first undergoing training.
3. The responsibility analyzed in this section indicates that service providers must possess such characteristics as professionalism. For inadequate performance of their professional duties because of careless or dishonest attitude to them, health care employees are subject to criminal liability under Article 140 of the Criminal Code of Ukraine. Performance of professional duties is considered to be inadequate when a health care employee performs his/her duties not in full, carelessly, superficially, not as required in the interests of his/her professional activities.
4. See also practical advice in section 7.1.5.

## **7.2.6 Responsibility to Provide Assistance in the Form of Counsel to One’s Co-workers and Other Health Care Employees**

**a) Health care providers are obliged to provide assistance in the form of counsel to their co-workers and other health care employees.**

### **b) Responsibility as stated in Country Constitution/Legislation**

- ▶ **Civil Code of Ukraine of January 16, 2003 [Article 287 (part 1)].**

“An individual who is being treated on inpatient basis in a health care facility has the right to be seen by outside health care professionals.”

- ▶ **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Articles 6 (paragraph “n”), 78 (paragraph “f” part 1)].**

“Health care employees must provide assistance to their co-workers and other health care employees in the form of counsel” (paragraph “f” Article 78).

### **c) Supporting Regulations/ Bylaws/ Orders**

- ▶ **On the Physician’s Oath: Decree of the President of Ukraine of June 15, 1992, [paragraph 5 part 1].**

“If necessary, seek assistance from co-workers and never deny assistance to them, be fair to co-workers”.

- ▶ **On Approval of the State Program for Creating a Unified System of Emergency Medical Assistance for the Period Ending in 2010: Resolution of the Cabinet of Ministers of Ukraine of November 5, 2007 No. 1290.**

To provide the population with medical assistance at an appropriate level, one should, in particular, ensure cooperation between medical institutions ... and a system of assistance in the form of counsel.

- ▶ **On Approval of the Action Plan for Implementing the State Program for Creating a Unified System of Emergency Medical Assistance for the Period Ending in 2010: Order of the Ministry of Health of Ukraine of May 12, 2008 No. 245.**

“To introduce assistance provided by the Ukrainian Research Center for Emergency Medical Assistance and Disaster Medicine ... via telecommunication facilities and consisting of information and advice to medical staff of health care institutions ... regarding diagnosis and treatment of urgent conditions caused by the action of poisonous substances” (paragraph 7).

- ▶ **On Measures to Improve Emergency Medical Assistance to the Population in Ukraine: Order of the Ministry of Health of Ukraine of August 29, 2008 No. 500 [paragraph 3.10].**

“Organization of medical assistance and advice to health care institutions as to their preparedness to work under conditions of emergency” (paragraph 3.10. Sample Provision on the Deputy Chief of Staff of Emergency Units in Charge of Emergency Operations, Disaster Medicine and Civil Protection of the Population).

- ▶ **On a Unified System of Emergency Medical Assistance: Order of the Ministry of Health of Ukraine of June 1, 2009 No. 370 [section 2 (paragraph 3.4)].**

#### **d) Provider Code(s) of Ethics**

- ▶ **Code of Ethics of Physicians of Ukraine, adopted and signed at the National Congress of Health Care Organizations and at the X Congress of the Ukrainian Medical Association on September 27, 2009 [paragraphs 3.2, 4.2, 4.4, 4.6].**

“If necessary, a doctor must seek assistance from his/her co-workers” (paragraph 3.2). “... A doctor must treat his/her co-workers with respect and kindness” (paragraph 4.2). “In difficult clinical cases, doctors must provide advise and assistance to their co-workers in a respectful form. The outcome of the entire treatment process is the responsibility of only an attending physician who may chose either to take into account the recommendations or to reject them based exclusively on the interests of the patient” (paragraph 4.4). “Doctors must respect other medical and support personnel, ensure continued improvement of their skills” (paragraph 4.6).

#### **e) Other Relevant Sources**

There are no other relevant sources on this matter.

#### **f) Practical Examples**

##### **1. Example(s) of Compliance**

A regional outpatient clinic of region Ch. provides medical consultations in 24 fields. Number of visits to the clinic average 538 per day (a planned average is 375), that is the actual operational capacity exceeds the planned one in 1,4 times. There were found no violations of the procedure for providing medical advice to one’s co-workers and other health care employees by the medical staff of the clinic.

##### **2. Example(s) of Violation**

An ambulance brought patient O. to the admission office of one of the hospitals of city K. After an exam by a doctor from the intensive care unit, the patient was scheduled to be examined by doctors with other specializations – a physician,



a surgeon, a trauma specialist and a toxicologist. The toxicologist refused to examine the patient, citing lack of time. The deputy chief of staff of the hospital in charge of clinical operations was informed of the refusal. By his order, the toxicologist was sent to the admissions unit to provide counsel assistance to the medical personnel there.

### 3. Actual Case(s)

Ms. N., who was on the 37th week of pregnancy, was admitted to the maternity ward of a regional hospital in a serious condition. An attending physician followed the state of the pregnant woman, made all the necessary entries in the medical file of the inpatient. The condition of the patient deteriorated, and the attending physician informed the head of the maternity ward of this fact. The latter ignored the information, remarking to himself that the young inexperienced physician was excessively cautious. The head of the maternity ward said that he was preparing a report to health care authorities and as soon as he was free, he would take a look at the patient. In a critical condition, the pregnant woman was transferred to the intensive care unit, and the deputy chief of staff in charge of clinical operations was informed of this. The latter immediately called the council of physicians. A treatment plan for the patient in this serious condition was determined with the participation of consulting physicians with relevant specializations, the chief of staff and the doctors from the maternity ward, 7 people in total. The condition of the pregnant woman was stabilized.

To clarify the circumstances of this case, a commission was set up by the order of the chief of staff of the health care institution. In its conclusion, the commission pointed to the unprofessional actions of the head of the maternity ward, his inability to manage adequately activities of his staff, his inability to organize the process of providing qualified inpatient obstetric and gynecological care, his failure to advise young professionals, particularly in complicated clinical cases. The chief of staff of the hospital reprimanded the head of the maternity ward, sent him to take part in continuing education courses on the topic of organization and management of health care ahead of his regular schedule, as well as to attend courses in obstetrics and gynecology. In addition, he ordered quarterly seminars on deontology to be conducted at the hospital.

### g) Practice Notes

Types of assistance in the form of counsel:

1. Scheduled and emergency visits of medical consultants.
2. Counsel is a form of structuring of health care that requires joint action of at least three health care employee aimed at ensuring patients' right to health. Depending on the circumstances, there are the following types of counsel:
  - 2.1. Decision making in the context of providing medical assistance. For example, according to paragraph 12 of the Order of the Ministry of Health of Ukraine "On Approval of the Clinical Protocols for Obstetric and Gynecological Care" of December 15, 2003 No. 582, if a c-section reveals

Couvelaire uterus, a hysterectomy without the removal of the appendages is carried out. A decision to expand surgical intervention is adopted by a council of doctors.

2.2. Collegial examination of patients. For instance, in accordance with paragraph 4.8 of the Order of the Ministry of Health of Ukraine “On Organizing Inpatient Obstetric, Gynecological, and Neonatal Care in Ukraine” of December 29, 2003 No. 620, a serious condition of a patient requires convening a council of doctors immediately. To determine a treatment strategy for a complicated patient, upon a motion of the head of a department, a deputy chief of staff of the medical institution in charge of clinical operations appoints a council of doctors that includes consultants with relevant specializations, other doctors from the department, a hospital manager, and members of the staff of the outpatient subdivision (in an outpatient institution) – not fewer than 3 individuals. The protocol and the conclusions of the council are recorded in an inpatient medical file and are signed by all the members of the council.

2.3. An examination by a specialist. For example, according to paragraph 4.6 of the Order of the Ministry of Health of Ukraine “On Organizing Inpatient Obstetric, Gynecological, and Neonatal Care in Ukraine”, during the first 24 hours of patient’s stay in a hospital, the patient is examined by a physician who establishes a preliminary diagnosis; during the first 3 days in the hospital, the head of the department in conjunction with the physician establishes a clinical diagnosis with clarifications of the treatment plan, extent of additional tests, and consultations of relevant experts (if necessary).

3. Granting access to employees from other health care institutions and calling a medical council at the request of a patient. This is guaranteed to the patient by Article 287 of the Civil Code of Ukraine and paragraph “n” of Article 6 of the Law of Ukraine “Principles of Ukrainian Health Care Legislation”.

### **7.2.7 Responsibility to Provide Patients or Other Qualified Individuals With Medical Information**

**a) This responsibility of health care employees corresponds to the right of patients to information about their health, which is discussed in section 6.1.3.**

**b) Responsibility as stated in Country Constitution/Legislation**

- ▶ **Constitution of Ukraine of June 28, 1996 [Articles 32 (part 3), 34].**
- ▶ **Civil Code of Ukraine of January 16, 2003 [Article 285].**

“An adult individual has the right to accurate and complete information about his/her state of health, including familiarization with relevant medical documents related to health” (part 1).

- ▶ **On Information: Law of Ukraine of October 2, 1992 [in the wording of January 13, 2011] [Articles 11, 21].**
- ▶ **On State Secrets: Law of Ukraine of January 21, 1994 [Article 8 (part 4)].**
- ▶ **On Protection of Consumer Rights: Law of Ukraine of May 12, 1991 (in the reading of December 1, 2005) [Article 6].**

“... A contractor must deliver to a consumer products of adequate quality and provide information about these products ...” (part 1).

- ▶ **Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 [Articles 6 (paragraph “f”), 39].**

“A patient who has reached the age of majority is entitled to receive accurate and complete information about his/her health, including familiarization with relevant medical documentation regarding his/her health (part 1 Article 39). “Parents (adoptive parents), guardians, trustees have the right to obtain information about the state of health of the child or the ward (part 2 Article 39). “A health care employee must provide a patient with information about his/her health, purpose of proposed studies and treatment, possible prognosis for the disease, including risks to life and health, in an accessible form.” (part 3 Article 39).

### **c) Supporting Regulations/Bylaws/Orders**

- ▶ **On Submitting a Request for Public Information: Order of Ministry of Health of Ukraine of July 6, 2011, No. 395.**
- ▶ **On Lists of Data, that Include Official and Confidential Information in the Ministry of Health of Ukraine: Order of Ministry of Health of Ukraine of August 16, No. 517.**

### **d) Provider Code(s) of Ethics**

- ▶ **Code of Ethics of Physicians of Ukraine, adopted and signed at the National Congress of Health Care Organizations and at the X Congress of the Ukrainian Medical Association on September 27, 2009 [paragraphs 3.3, 3.5].**

“In the course of treatment while providing a patient with information about his/her condition and recommended treatment, a doctor should take into account personal characteristics of the patient, examine patient’s assessment of the situation” (paragraph 3.3). “When treating a child or a patient who is under guardianship, a doctor must provide complete information to his/her parents or guardians” (paragraph 3.5).

## e) Other Relevant Sources

**Decision of the Constitutional of Court of Ukraine regarding the official interpretation of Articles 3, 23, 31, 47, 48 of the Law of Ukraine “On Information” and Article 12 of the Law of Ukraine “On Procuracy (the case of K. H. Ustymenko) of October 30, 1997.**

The Decision of the Constitutional Court of Ukraine states that the responsibility of a doctor is to provide a patient and his/her family members or legal representatives with this type of information fully and in an accessible form at their request.

## f) Practical Examples

### 1. Example(s) of Compliance

Mr. L. requested City Hospital No. X in city O. to provide him with information about the health of his son, who was being treated at the intensive care unit of the hospital. Medical staff provided the father with an opportunity to examine the medical file of the inpatient while the doctor in charge explained to him the diagnosis established for his son, possible methods of treatment and their likely consequences in an accessible form.

### 2. Example(s) of Violation

On December 16, 2008, Mr. G. and his representative submitted a written request to the chief of staff of City Hospital No. 4 to enable them to examine medical records of an inpatient, Mr. G., who was suffering from mental illness. They were denied access to the records without any justification of the denial provided. On January 29, 2009, the plaintiff and his representative submitted a second written request to examine primary medical records of Mr. G. which they addressed to the chief of staff of the hospital, but they neither were given access to the documents nor were they provided with a response to their request. To protect his right to medical information, the patient had to appeal to the court.

### 3. Actual Case(s)

According to the lawsuit filed by Ms. M. against Hospital No. 5 in city K. demanding compensation for proprietary and moral damages, the district court of city K. established, on the basis of submitted evidence, that the defendant failed to provide prompt and competent medical assistance, namely: a laparoscopy was

performed improperly, causing bleeding which was not detected on time and the patient went into a hemorrhagic shock (paragraph “a” part 1 Article 78 of the Law of Ukraine “Principles of Ukrainian Health Care Legislation”). The doctors also failed their responsibility to provide the patient with information about her health, the purpose of proposed studies and treatment, possible prognosis for the disease, including risks to life and health in an accessible form. In particular, they failed to inform Ms. M. about possible consequences of the proposed medical intervention, the risk to her health (part 3, Article 39 of the Law of Ukraine “Principles of Ukrainian Health Care Legislation”). The decision of the court of March 24, 2006 made in absentia granted to the plaintiff the satisfaction of her claims in part: 200 hryvnias were allocated towards the compensation for proprietary damage and 10,000 hryvnias towards the compensation for moral damage. However, on March 15, 2007, the decision of the Court of Appeals of region D reduced the amount of compensation for moral damage to 3,000 hryvnias. The Court of Appeals concluded that the assigned amount of compensation for moral damage did not reflect the extent of moral and physical suffering and did not take into account the degree of responsibility of the defendant.

## **g) Practice Notes**

1. To ensure the right of patients to information about their state of health, it is of great practical importance to clarify the content (characteristics) of medical information. Health care employees must provide medical information that has the following characteristics:
  - 1.1. Accessible form that has two aspects: external and internal. An external aspect manifests itself in a patient, his/her legal representative or an individual authorized by him/her having an access to medical information: i. e., by means of filing a request, an attorney request or an information request to obtain information, and as a consequence, by obtaining the information. This can take the form of either receiving duly attested copies of required documents or receiving necessary information directly at a health care facility. An internal aspect manifests itself in the information being provided in an accessible form, with the patient or another individual entitled by law to the information being able to understand the content of the information.
  - 1.2. Accuracy of information: i. e., providing the information contained in medical records.
  - 1.3. Completeness of information: i. e., providing the amount of information specified in the procedural documents of an authorized individual or in the oral request of a patient or when a doctor obtains an informed consent to conduct a medical intervention, except when a health care employee exercises his/her right to provide incomplete information in the interests of the patient.
  - 1.4. Timeliness of information manifests itself in two forms of exercising the responsibility: a) providing information requested within a timeframe set by law; b) providing medical information prior to a medical intervention.
2. See also practical advice in section 6.1.3.

## 8.1 INTRODUCTION

## 8.2 JURISDICTIONAL METHODS OF PROTECTION OF HUMAN RIGHTS IN THE HEALTH SECTOR

### 8.2.1 Methods to Protect Human Rights in Court

### 8.2.2 Out of Court Methods of Protection

## 8.3 NON-JURISDICTIONAL METHODS OF PROTECTION OF HUMAN RIGHTS IN THE HEALTH SECTOR

## 8.4 FORENSIC EXAMINATION AND AUTOPSY

### 8.4.1 Forensic Examination

### 8.4.2 Autopsy

## 8.5 APPENDIX 1: SAMPLES OF PROCEDURAL DOCUMENTS

## 8.6 APPENDIX 2: INTERNATIONAL LEGAL CONTROL MECHANISMS

## 8.7 APPENDIX 3: NATIONAL LEGAL CONTROL MECHANISMS

## 8.8 APPENDIX 4: RECOMMENDED LITERATURE

# 8

## National Procedures and Appendixes

### 8.1 INTRODUCTION

The state recognizes the right of every citizen of Ukraine to health protection and guarantees protection of this right (Article 8 of the Law of Ukraine “On Principles of Ukrainian Health Care Legislation”). Rights and legal interests of patients can be infringed upon both in case the results of treatment do not satisfy a patient’s expectations and in case the treatment that was provided has certain drawbacks.

Therefore it is important to analyze forms of protection of the infringed rights of persons who were provided with medical care and the ones who were unlawfully denied such care.

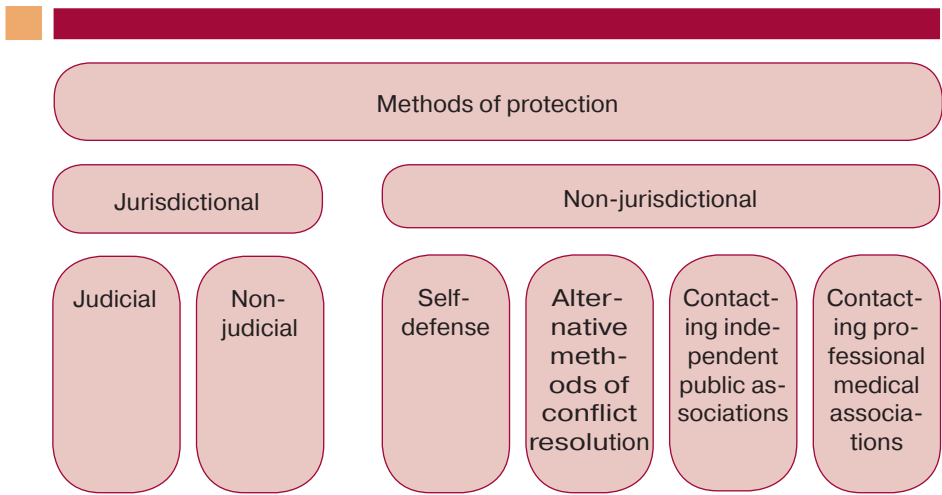
It is also necessary to elucidate the mechanisms of providers’ rights protection, certain aspects of which have been already characterized in subchapter 7.1.3. That is aimed at observing the balance in the relations “medical worker – patient.”

Appearance of the dispute in the process of providing medical care is a ground for protection of human rights in patient care. Such conflict is considered to be a

clash of opposite interests of subjects of medical-legal relations, caused by the peculiarities of their legal status realization. Subjects of a conflict in the sphere of health care provision are physical persons (patient, legal representative, medical worker, physician engaged into private practice, etc.) and legal entities (for example, health care institution, health care managing body).

Depending on the subject, who is applied to for protection of one’s infringed rights and the forms of human rights in health care protection are to be divided into judicial and non-judicial.

### METHODS OF PROTECTION OF RIGHTS OF SUBJECTS OF MEDICAL LEGAL RELATIONS



Classification of methods of protection of rights of subjects of medical legal relations is presented in a table format:



## JUDICIAL METHODS OF PROTECTION OF RIGHTS OF SUBJECTS OF MEDICAL LEGAL RELATIONS

Depending on the type and nature of violations of rights in the health sector, judicial resolution can be carried out in terms of

civil justice

criminal justice

administrative justice

constitutional justice

## NON-JUDICIAL METHODS OF PROTECTION OF RIGHTS OF SUBJECTS OF MEDICAL LEGAL RELATIONS

Contacting heads of public health care institutions or their subdivisions, or public health care administration, including Ministry of Health of Ukraine (administrative method)

Contacting the Commissioner of Verkhovna Rada of Ukraine on Human Rights

State Inspection on the Protection of Consumers' Rights

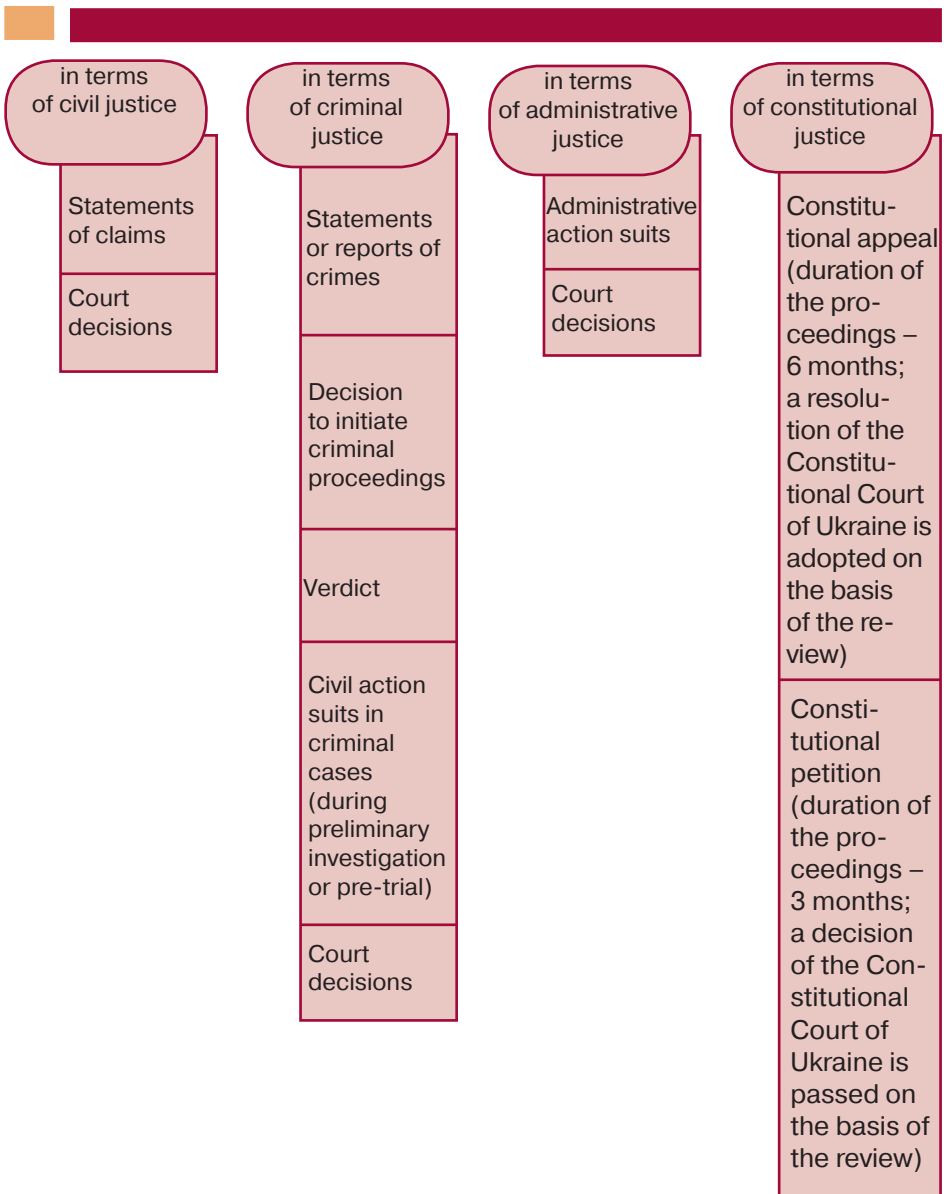
Contacting the Health Committee of Verkhovna Rada of Ukraine

Contacting the Procuracy

Contacting agencies of internal affairs (police)

## 8.2 JURISDICTIONAL METHODS OF PROTECTION OF HUMAN RIGHTS IN HEALTH CARE SECTOR

### 8.2.1 Methods to Protect Human Rights in Court



## a) Civil Procedure

Part 4 of Article 55 of the Constitution of Ukraine of June 28, 1996 guarantees everyone the right to protect his/her rights and freedoms from violation and unlawful encroachments by any legal means. According to Article 280 of the Civil Code of Ukraine (hereinafter – CC of Ukraine), every individual who suffered material and (or) moral damages as a result of the violation of his/her non-proprietary rights is entitled to compensation for damages.

A civil action suit is not only the most common method of exercising one's right to compensation for damages caused to one's health (material and moral) as provided in paragraph "l" of Article 6 of the Law of Ukraine "Principles of Ukrainian Health Care Legislation" of November 19, 1992, it is also a means to acknowledge the right, to terminate the action that violates it, to recognize the contract as invalid (this is especially relevant for complaints filed against private medical institutions). While choosing a civil action suit as a method of protection of violated rights in the health sector, one should clearly understand all its positive and negative aspects. A civil action suit is often virtually the only option available to obtain compensation for material and moral damages.

### Remember!

*Claims to compensate for damage caused by an injury, other health damage or death as well as claims arising from the violation of personal non-proprietary rights of an individual do not expire (paragraphs 1 and 3 of part 1 of Article 268 of the CC of Ukraine).*

An important advantage of this method of protection of one's rights lies in the fact that, according to Article 5 of the Law of Ukraine "On Court Fees", cases that involve claims to compensate for damage caused by an injury, other health damage or death are not subject to court fees with the obligation to pay the duty often being the reason for citizens with limited financial resources refusing to defend their rights in court. This provision is confirmed in paragraph 3 of Article 22 of the Law of Ukraine "On Protection of Consumer Rights" (given that patients are consumers of medical services), which states that consumers are exempt from paying state duties for claims arising from the violation of their rights.

According to Article 157 of the Code of Civil Procedure of Ukraine (further – CPC), the court examines a case within a reasonable timeframe but not longer than for two months from the beginning of the proceedings. In exceptional cases, at the request of the parties and taking into account the specificity of the case, the court may extend the duration of the trial but for no more than one month. In practice, in some cases, for various reasons, the proceedings last over 3-5 years only in the court of first instance. The criteria for establishing reasonable duration of a trial are common to all categories of cases (civil, criminal, economic, administrative). According to the Letter of the Supreme Court of Ukraine of

January 25, 2006 and paragraph 36 of the Resolution of the Plenary Assembly of the Supreme Court of Ukraine “On Application of Norms of Civil Procedure Legislation in Cases Tried in the Court of First Instance,” of June 12, 2009 No. 2, these include the following: the complexity of the case, plaintiff’s conduct and court procedure.

According to the provisions of Article 10 of the CPC of Ukraine, the obligation of each party to prove the circumstances appealed to as the basis for the claim or objections may pose some difficulty to a plaintiff-patient since gathering evidence is a difficult process for the patient due to insufficient awareness of different types of primary medical records and, in their absence, of secondary medical records that may contain partial information about the patient and the treatment process or other data important to the case. In these circumstances, a plaintiff should bear in mind the provisions of part 4 of Article 10 and Article 133 of the CPC of Ukraine regarding the legal obligation of the court to ensure availability of proof at the request of the interested party before the latter presents the case.

## METHODS OF COLLECTING EVIDENCE

### Attorney’s Request

- Article 6 of the Law of Ukraine “On the Bar”

### Complaint

- Articles 3, 16–21 of the Law of Ukraine “On Citizens’ Requests”

### Statement

- Articles 3, 15, 18–21 of the Law of Ukraine “On Citizens’ Requests”

### Petition

- Articles 3, 15, 18–21 of the Law of Ukraine “On Citizens’ Requests”

### Proposal

- Articles 3, 14, 20, 21 of the Law of Ukraine “On Citizens’ Requests”

### Remark

- Articles 3, 14, 20, 21 of the Law of Ukraine “On Citizens’ Requests”

### Request for access to personal data

- Articles 16–19 of the Law of Ukraine “On Protection of Personal Data”

### Request for information

- Articles 19–22 of the Law of Ukraine “On Access to Public Information”

No less difficult for a plaintiff is the issue of high cost of legal services (a plaintiff has expenses associated with the case, such as the cost of legal assistance, which he can claim a defendant to compensate) and the level of expertise of his/her representatives ( which can include the lawyer's knowledge of medical law in this instance, for example).

The grounds and the procedure for filing a civil action suit in court are defined in the CC of Ukraine and the CPC of Ukraine. According to the norms of substantive law, civil claims to compensate for proprietary and moral damages are filed against a health care institution on the basis of Article 1172 of the CC of Ukraine which establishes the liability of a legal entity to compensate for the damage caused by its employee(s) in the course of performing employment (official) duties, with medical employee(s) acting as a third party on the side of the defendant. When it comes to health care practitioners who have their own medical practice, the complaint is filed directly against the individual who caused the damage. A health care institution that compensates for the damage caused by it's employee(s) is entitled to a counterclaim against the guilty individual in the amount of paid compensation; this takes the burden off the court since there is no need to determine the percentage of liability of each individual responsible for the damage (part 1 of Article 1191 of the CC of Ukraine).

To initiate court proceedings to protect a violated right, one files a complaint which in its format and content has to meet the requirements of Article 119 of the CPC of Ukraine. The complaint must be signed by the plaintiff or his/her representative, with the date of its filing indicated. If the complaint is filed by the representative of the plaintiff, the power of attorney or other documents that prove his/her credentials are attached to the complaint.

As a general rule, the plaintiff must attach to the complaint copies of the complaint and copies of all the accompanying documents according to the number of the defendants and third parties.

**Remember!**

*According to part 2 of Article 120 of the CPC of Ukraine in regard to claims for damage caused by an injury, other health damage, or death, copies of the above documents are not required to be attached to the complaint.*

When an individual files a complaint in court to be compensated for damage caused by an injury, other health damage, or death of an individual, the legislation (parts 3, 5 of Article 110 of the CPC of Ukraine) establishes alternative venues for filing. The complaint may be filed at the place of the current location of the defendant (legal entity), at the registered place of residence or at the place of the current location of the defendant (an individual), at the place of registered

residence or current location of the plaintiff, at the place where the damages were incurred, at the place of contract signing.

According to Article 131 of the CPC of Ukraine, the parties must submit their evidence to the court before or during the preliminary hearing of the case, and if the preliminary hearing does not take place, prior to the main proceedings. The evidence submitted with the violation of this requirement is not accepted unless the party proves that there are serious reasons for the evidence not being submitted on time. During preliminary hearings, the decision is made as to the ways of procuring evidence: interrogation of witnesses, scheduling of forensic examination, requesting and reviewing the evidence, including at its original location, etc.

**Remember!**

*In accordance with part 4 of Article 61 of the CPC of Ukraine (“Grounds for Dismissal of Evidence”), the sentence in a criminal case which came into force is binding for the court that deals with civil legal consequences of actions of the individual against whom the sentence was passed as to whether these actions took place and whether they were committed by this individual.*

## GROUNDS FOR NOT PRESENTING THE EVIDENCE

Circumstances admitted by the parties and others involved in the case do not require proof (part 1 of Article 61 of the CPC of Ukraine)

Circumstances recognized by the court as common knowledge do not require proof (part 2 of Article 61 of the CPC of Ukraine)

Circumstances established by the prior decision of the court in a civil, commercial or administrative case which came into force do not require proof in the trial of other cases involving the same individual or individuals in relation to whom these circumstances were established (part 3 of Article 61 of the CPC of Ukraine)

A verdict in a prior criminal case which came into force or a resolution of the court in a prior administrative case is binding for the court that deals with civil legal consequences of actions of the individual against whom either the criminal sentence was passed or the administrative resolution of the court was adopted as to whether these actions took place and whether they were committed by the individual (part 4 of Article 61 of the CPC of Ukraine)

It is worthwhile to draw attention to new civil legislation that provides additional legal instruments for protection of human rights, namely the review of judicial decisions by the Supreme Court of Ukraine. Parties and other individuals involved in a case have the right to request a review of judgments in civil cases after they have been reviewed in cassation proceedings. Requests to review can be based upon one of two grounds.

A request to review court decisions on the ground of unequal application by the court of cassation of the same norms of substantive law which resulted in passing different content-wise judicial decisions in similar cases, must be filed:

a) within one month of adjudication for which the application is being filed;

b) within one month from the day of the court decision cited as evidence of unequal application by the court of cassation of the same norms of substantive law which resulted in different content-wise judicial decisions in similar legal cases, if it were approved after the adjudication regarding which the application is being filed but not later than one year after it.

A request to review court decisions on the ground of an international judicial institution whose jurisdiction is recognized by Ukraine admitting to a violation of international obligations in the course of the trial must be filed no later than one month from the date when the individual in whose favor the decision was made by the international judicial institution whose jurisdiction is recognized by Ukraine learned of this decision coming into force.

The above method of protection of human rights is new. The experience of the Supreme Court of Ukraine is not yet extensive, and therefore this method creates difficulties in practice. It is necessary to keep in mind the following issues while resorting to this method of protection:

1) a request to review court decisions is filed with the Supreme Court of Ukraine via the High Specialized Court of Ukraine on Civil and Criminal Cases;

2) one does not need to pay court fees upon submitting a request to review court decisions only when the grounds for the review is the fact that an international judicial institution whose jurisdiction is recognized by Ukraine admitted to a violation of international obligations in the course of the trial;

3) proceedings in the case are initiated by the High Specialized Court of Ukraine on Civil and Criminal Cases, and a resolution regarding this is adopted within fifteen days of the receipt of the request;

4) a resolution to initiate proceedings in the case together with the request to review judicial decisions and all the attached documents is forwarded to the Supreme Court of Ukraine within five days from the date of its adoption;

5) the Supreme Court of Ukraine reviews the case for no longer than one month after opening the proceedings, and if the application is satisfied on the grounds defined in the legislation of Ukraine, the Court adopts a resolution;

6) if the Supreme Court of Ukraine establishes that the ruling in the case under review is illegitimate, it annuls the ruling in full or in part and forwards the case for a new trial to the court of cassation. If the ruling is reviewed on the grounds



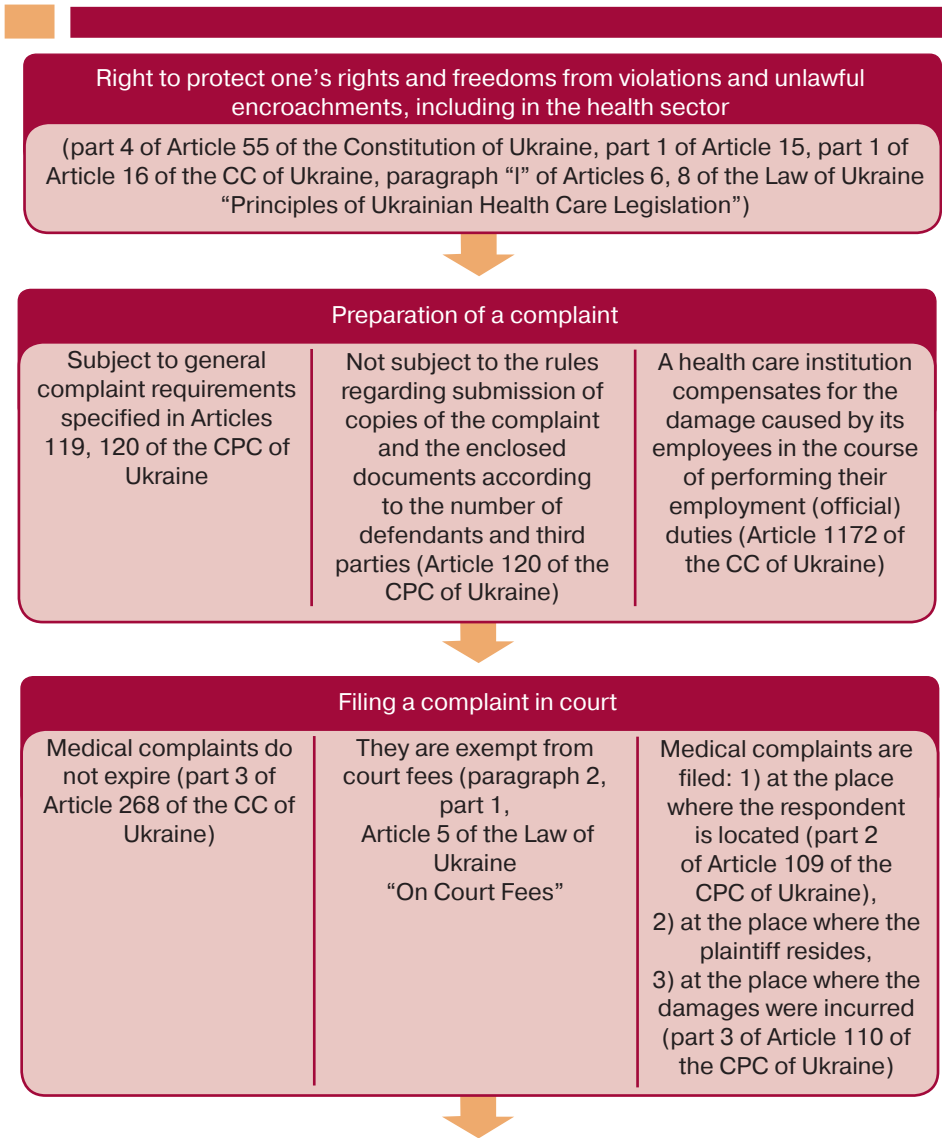
of an international judicial institution whose jurisdiction is recognized by Ukraine admitting to a violation of international obligations in the course of the trial, the Court annuls the ruling in full or in part and forwards the case for a new trial to the court that passed the disputed decision;

7) while preparing the request to review judicial decisions, one should: 1) clearly present court decisions that demonstrate unequal application by the court of cassation of the same norms of substantive law in similar cases; 2) select resolutions of the Plenary Assembly of the Supreme Court of Ukraine relevant for the case; 3) in the context of the case, analyze the practice of the European Court of Human Rights which, according to Article 17 of the Law of Ukraine “On Enforcement of Decisions and Application of the Practice of the European Court of Human Rights,” is the source of law; 4) provide grounds that justify one’s claim of unequal enforcement of law by the court of cassation while remembering that the structure and content of the request to review judicial decisions differs from a cassation complaint;

8) a decision may be reviewed only on the grounds of unequal application by the court of the norms of substantive law, and therefore no procedural violations may be appealed to as grounds for the review of the decision.

Civil proceedings on human rights in the health sector are conducted according to general rules of civil procedure. The difference may lie only in the tactics used by the court to handle the case, which are selected by a representative in the case, taking into consideration peculiarities of the case and the nature of the evidence.

## JUDICIAL METHODS OF PROTECTION OF HUMAN RIGHTS IN TERMS OF CIVIL JUSTICE





### Trial in the court of first instance

<p>Opening of the proceedings takes place within three days of the receipt of the statement of claims or the expiration of the deadline set to address shortcomings but not later than the next day after the receipt by the court of the information regarding the place of residence (sojourn) of the individual, as stipulated in part 3 of Article 122 of the CPC of Ukraine (part 4 of Article 122 of the CPC of Ukraine)</p>	<p>The defendant has the right to file a counterclaim prior to the commencement of the main trial (Article 123 of the CPC of Ukraine)</p>	<p>Objection against the claim (Article 128 of the CPC of Ukraine)</p>	<p>Pre-trial* (within 10 days from the date of the commencement of the proceedings (Article 129 of the CPC of Ukraine)</p>	<p>Trial (within a reasonable timeframe but not later than two months from the date of the commencement of the proceedings) (Article 157 of the CPC of Ukraine):</p> <ul style="list-style-type: none"> <li>– consideration of the merits (Article 173 of the CPC of Ukraine);</li> <li>– court debates (Article 193 of the CPC of Ukraine);</li> <li>– court decision (Article 208 of the CC of Ukraine)</li> </ul>
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\* Unnecessary stage, conducted at judge's own discretion (paragraph 4, part 5 article 122 CpC of Ukraine)



Forensic examination			
It is appointed at the request of individuals involved in the case (Article 143 of the CPC of Ukraine)	Petition, forensic examination fee, grounds for appeal	Types of examinations: preliminary, re-examination, supplementary, commission and comprehensive	Fees for forensic examination are paid by the party that made a motion to appoint the examination; the parties divide the fee equally when the petition is put forward by both parties (Article 86 of the CPC of Ukraine)



Appeal of a court decision	
An appeal of the court decision is filed within ten days of the announcement of the decision (part 1 of Article 294 of the CPC of Ukraine)	A cassation complaint may be filed within twenty days after the decision (ruling) of the Court of Appeals has come into force (part 1 of Article 325 of the CPC of Ukraine)

## b) Criminal Procedure

To protect their rights in terms of criminal justice, individuals or their authorized representatives have the right, guaranteed by Article 94 of the Criminal Procedure Code of Ukraine (hereinafter – CrPC of Ukraine), to file oral or written statements or reports of crimes. An oral statement is entered into the protocol and is signed by the plaintiff and an official who took the statement. A written statement should necessarily be signed by the individual on whose behalf it is filed. At the same time, the plaintiff is warned of the responsibility for false reporting and a record of this warning is made in the protocol.

According to Article 97 of the CrPC of Ukraine, a prosecutor, an investigator, an inquiry agency, or a judge must accept statements and reports of intended or committed crimes, including in the cases that are not in their jurisdiction. With regard to statements or reports of crimes, within three days, a prosecutor, an investigator, an inquiry agency, or a judge must adopt one of the following decisions:

1. *to initiate criminal proceedings*. A prosecutor, an investigator, an inquiry agency, or a judge must adopt a decision to initiate criminal proceedings given sufficient grounds and evidence;

2. *specified in Article 94 of the Code.* Article 236-7 of the CrPC of Ukraine makes provisions for the right to appeal in court the decision to initiate criminal proceedings;

3. *to refuse to initiate criminal proceedings.* Article 236-1 of the CrPC of Ukraine guarantees the right to appeal in court the decision to refuse to initiate criminal proceedings;

4. *to forward the statement or the report to proper authorities.*

If a statement or a report of a crime on the basis of which criminal proceedings are to be initiated requires verification, the verification is conducted by a prosecutor, an investigator, or an inquiry agency within a period of time that does not exceed ten days by collecting testimonies of individual citizens or officials or requesting required documents (such as, for instance, primary medical documentation).

After a case has been opened, an investigator conducts a pre-trial investigation which results in drafting an indictment or a decision to close the case pursuant to Article 212 of the CrPC of Ukraine. The decision of the investigative body, the investigator, or the prosecutor to close a criminal case may be appealed by the individual whose interests are at stake or his/her representative on the basis of Article 236-5 of the CrPC of Ukraine.

In the absence of grounds for initiating criminal proceedings, a prosecutor, an investigator, an inquiry agency, or a judge can make a decision to refuse to initiate criminal proceedings and inform all the interested individuals, enterprises, institutions, and organizations of this decision (Article 99 of the CrPC of Ukraine). However, if the results of the investigation indicate that the individual in question has committed an administrative or a disciplinary offense, the official who carried out the investigation has the right to submit a statement to appropriate authorities to take punitive measures required by law.

A trial in the court of first instance is carried out in accordance with the standard criminal procedure set out in chapter 3 of the CrPC of Ukraine.

In determining the criminal content of the actions of an individual, medical examination and conclusions of an expert constitute an important and often the main source of evidence in medical hearings, contrary to Article 67 of the CrPC of Ukraine (“Evaluation of Evidence”). Without forensic findings, judicial mechanisms of protection of human rights in the health sector often remain ineffective. Without clarifying the nature and degree of damage to the health of an individual, which is the prerogative of experts, medical criminal proceedings are simply meaningless (this issue is examined in more detail in section 8.4.1).

In conducting hearings, especially medical hearings, it is important to observe a set timeline. Delays in carrying out proceedings usually adversely affect efficiency and timeliness of protecting the rights of patients. Unfortunately, in law enforcement practice, the timeline set by the law is subject to different interpretations, especially when it comes to medical cases. According to the Letter of the Supreme Court of Ukraine of January 25, 2006 and paragraph 36 of the Resolution of the Plenary Assembly of the Supreme Court of Ukraine “On Application of the Norms of Civil Procedure Laws in Hearings at the Court of First Instance” of June 12, 2009 No. 2, the criteria used to establish a reasonable timeline for hearings are common to all categories of cases (civil, criminal, commercial, administrative). These include the complexity of a case, plaintiff’s conduct and court procedure. The state is usually responsible for delaying proceedings when there is evidence of the following: irregular scheduling of court hearings; scheduling of court hearings with large intervals in between; delays in the transfer or forwarding of a case from one court to another; failure to discipline the parties in the case, witnesses, experts; repeated referral of the case for additional investigation or a new trial.

There are no provisions made for a hearing’s timeline in case of criminal proceedings. It is only stated that hearings in each case must be continuous, except for pauses (Article 257 of the CrPC of Ukraine). At the same time, the legislators clearly identify the following deadlines:

1. deadline for preliminary hearings (Article 241 of the CrPC of Ukraine): preliminary hearings must be scheduled to commence within ten days, and if the case is complex, no later than within thirty days, from the date of court filing;
2. trial deadline (Article 256 of the CrPC of Ukraine): a trial must be scheduled to commence within ten days, and if the case is complex, no later than within twenty days, from the date of preliminary hearings.

Special attention should be paid to the issue of civil lawsuits in criminal cases subject to Article 28 of the CrPC of Ukraine:

1. Civil action complaints may be filed both during pretrial investigation and inquiry and during hearings, but not during the trial itself. A refusal to initiate civil proceedings deprives the plaintiff of the right to present the same claim as part of a criminal case. An individual who did not present a civil action claim in a criminal lawsuit as well as an individual whose civil action claim was not reviewed may present this claim in a civil lawsuit.
2. Simultaneous review by the court of a criminal case and a civil action suit contributes to full, thorough, and impartial investigation of circumstances, more rapid compensation for caused damage, helps the victim to justify the grounds and the amount of the civil lawsuit compensation, allows for significant

procedural savings by eliminating duplication of the work of courts which is inevitable when criminal and civil lawsuits are tried separately.

3. A civil action claim in a criminal case which involves inadequate medical assistance must be filed against a health care institution with the culprit/accused acting as a third party that does not represent independent interests on the side of the defense (even though the analysis of court practice gives reasons to assert that law enforcement in this context is not uniform, and therefore, the courts often face civil action claims in criminal cases which are filed against the culprit/accused). When a criminal case is initiated against a health care professional who has his/her own medical practice, the medical practitioner accused of a crime acts as a defendant in the civil action suit.

4. When considering a civil action claim in a criminal case on issues not regulated by the CrPC of Ukraine, the court may be guided by relevant provisions of the CPC of Ukraine (paragraph 5 of the Resolution of the Plenary Assembly of the Supreme Court of Ukraine of March 31, 1989 No. 3).

### Remember!

*Article 112 of the CrPC of Ukraine "Criminality" of April 19, 2007 was amended whereby pre-trial investigations of crimes defined in Article 140 of the Criminal Code of Ukraine ("Inadequate Carrying Out of Professional Duties by Medical or Pharmaceutical Employees") are conducted by internal affairs agencies (police), this being also in accordance with Article 139 of the Criminal Code of Ukraine ("Failure to Provide Medical Assistance to a Patient by a Health Care Employee").*

## JUDICIAL METHODS OF PROTECTION OF HUMAN RIGHTS IN TERMS OF CRIMINAL JUSTICE

Right to file statements or reports of crimes with pre-trial inquiry  
or investigation agencies

Form of filing: oral  
or written (part 1 of  
Article 95 of the CrPC  
of Ukraine)

Oral statements are  
registered in the protocol  
signed by the plaintiff  
and the official who took  
the statement (part 2 of  
Article 95 of the CrPC of  
Ukraine)

Written statements must  
be signed by the  
individual filing the  
statement (part 3  
of Article 95 of the CrPC  
of Ukraine)





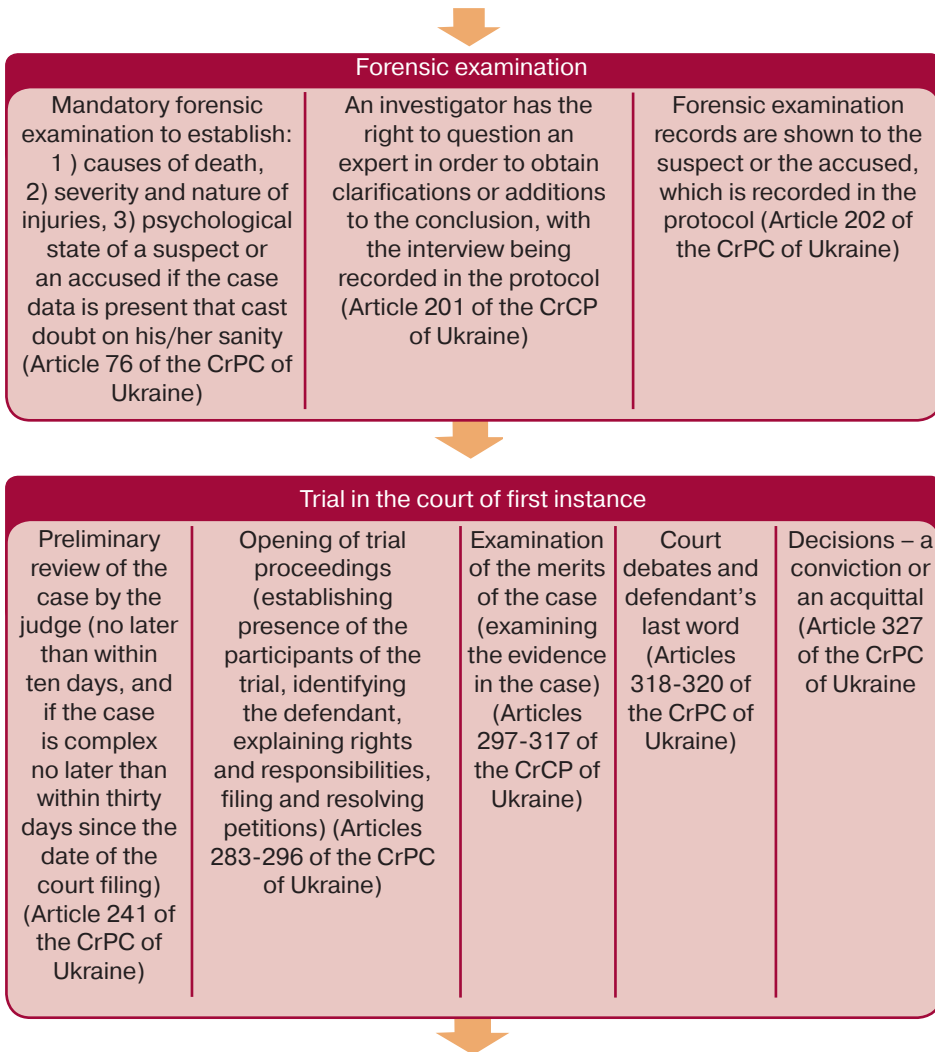
Decisions of pre-trial inquiry or investigation agencies			
<p>“Medical crimes” are in the jurisdiction of agencies of internal affairs (police) (Article 112 of the CrPC of Ukraine)</p>	<p>Preliminary inquiry is carried out before a criminal case is opened within a timeline that does not exceed ten days by gathering testimonies of individual citizens or officials or requesting necessary documents (part 4 of Article 97 of the CrPC of Ukraine)</p>	<p>Expert forensic medical examination is appointed and conducted prior to opening a criminal case as part of preliminary inquiry</p>	<p>After the review of a statement or a report of a crime, one of the following decisions is adopted within three days:</p> <ol style="list-style-type: none"> <li>1 ) to initiate criminal proceedings;</li> <li>2 ) to refuse to initiate criminal proceedings;</li> <li>3 ) to forward the statement of the report to relevant authorities (part 2 of Article 97 of the CrPC of Ukraine)</li> </ol>



Initiation of criminal proceedings		
<p>Pre-trial investigation (within two months from the date a criminal case is opened) (Article 120 of the CrPC of Ukraine)</p>	<p>Preparation of an indictment or a decision to close the criminal case (Articles 212, 223 of the CrPC of Ukraine)</p>	<p>Decision of an investigator to close the criminal case may be challenged by contacting the prosecutor within seven days after the receipt of a written notice or a copy of the decision to close the case (part 1 of Article 215 of the CrPC of Ukraine)</p>









Civil action suit in a criminal case		
<p>Civil action suit may be brought forward during the preliminary inquiry and pre-trial investigation or during an inquest, but before the trial (part 3 of Article 28 of the CrPC of Ukraine)</p>	<p>If the defendant is acquitted due to lack of proof of his/her participation in the crime or due to the absence of the fact of a crime, the court denies a civil action suit (part 2 of Article 328 of the CrPC of Ukraine)</p>	<p>If the defendant is acquitted due to lack of criminal intent in his/her actions, the court does not examine the civil action suit (part 3 of Article 328 of the CrPC of Ukraine)</p>



Appeal of a court decision	
<p>An appeal of the verdict, decision or ruling of the court of first instance may be filed within fifteen days from the date of its proclamation (part 3 of Article 349 of the CrPC of Ukraine). An appeal of the verdict, decision or ruling stops it from coming into force and prevents its implementation (part 1 of Article 354 of the CrPC of Ukraine)</p>	<p>Cassation complaint against court decisions:</p> <ul style="list-style-type: none"> <li>a ) cassation complaints against verdicts and resolutions of the Court of Appeals (part 1 of Article 383 of the CrPC of Ukraine) may be filed within one month since the proclamation of the sentence, decision, or resolution that is contested (part 1 of Article 386 of the CrPC of Ukraine). Filing a complaint against this type of court decision stops it from coming into force (part 1 of Article 389 of the CrPC of Ukraine).</li> <li>b ) cassation complaints against verdicts of local courts, resolutions (decisions) of these courts in cases involving the use of coercive measures ... of medical nature ... (part 2 of Article 386 of the CrPC of Ukraine) may be filed within three months of the latter coming into force (part 2 of Article 386 of the CrPC of Ukraine). Complaints against such court decisions stop them from coming into force (part 2 of Article 389 of the CrPC of Ukraine)</li> </ul>

### c) Administrative Procedure

Administrative justice is one of the methods of judicial protection of human rights, including in the health sector. This method of protection is one of the most effective ways to make state governmental bodies, local authorities, their officials and employees, or other executive entities that carry out managerial functions in accordance with law, including delegated powers, take certain actions or refrain from them, thus avoiding lengthy and ineffective correspondence and appeals. In addition, this method of protection can influence the effectiveness of other methods of protection of human rights in the health sector (such as administrative methods). In particular, a patient/medical worker dissatisfied with the results of his/her appeal or inaction of the representatives of the Department of Health may either file an administrative lawsuit in court or appeal to a higher authority.

This method of protection in the health sector is used when a patient/ medical worker – a plaintiff in the case – challenges unlawful decisions, actions or inaction of state governmental bodies or local authorities in charge of health care, their employees or officials (for example, Health Departments of Regional State Administration, Ministry of Health, Health Departments of City Councils or other subjects when carrying out his state and administrative functions due to the legislation, including executing of his delegated authority). Great attention is to be paid to latter segment that comes within “sphere of appeal.” Head doctors and other persons who are health care officials belong to other subjects carrying out state and administrative functions. In law enforcement practice there is no clarity in the context of the second group of persons, that is a part of a normative definition of the term “subject of power” (article 3 of the Code of Administrative Proceedings of Ukraine), in particular as regards type of proceedings, connected with appeal of their decisions, actions or inaction. From the analysis of several legal acts, we come to a conclusion that, for example, actions of the health care institution head doctor will be appealed against in administrative court proceedings. According to subchapter 1 paragraph “a” of article 32 of the Law of Ukraine “On Local Self-government,” one of the powers of country and town councils’ executive bodies is administration of health care institutions. Bodies of local self-government delegate this power to communal health care institutions, whose constituent documents contain essentially the same provisions that administration of a health care institution is carried out by the head doctor. Therefore the head doctor is delegated administrative authority under the law. Besides this, according to the Reference Book of Qualification Characteristics of Workers Professions, Issue 78, approved by Order of Ministry of Health of Ukraine of March 29, 2002 No. 117, the head doctor has the task and is obliged to carry out the administration of a medical and prophylactic institution according to current legislation of Ukraine and legal acts that define the activity of health care enterprises, institutions and organizations.

**Remember!**

*The specificity of proof in administrative proceedings lies in the fact that in the cases of unlawfulness of decisions, actions or inaction of the entities with executive power, the responsibility to prove the legality of these decisions, actions or inaction lies with the defendant when an administrative complaint is filed. In other words, administrative proceedings rest on the presumption of guilt of an entity with executive powers.*

A complaint aimed to protect rights, freedoms, and legitimate interests of an individual must be filed with the administrative court within a year from the day when the individual discovered or should have discovered the violation of his/her rights, freedoms and legitimate interests (part 2 of Article 99 of the Administrative Procedure Code of Ukraine (hereinafter – APC of Ukraine)).

Administrative complaints are filed with administrative courts in a written form by plaintiffs or their representatives in compliance with the norms laid out in part 3 of Article 105 of the APC of Ukraine. A written statement of claims may be made by completing the claim form provided by courts. If a complaint is filed by a representative, then it should indicate the name of the representative, his mailing address, as well as the telephone number and the e-mail address, if any. The complaint should be accompanied by the power of attorney or other documents that confirm the powers of the representative.

According to the requirements of part 1 of Article 122 of the APC of Ukraine, administrative cases should be tried and resolved within a reasonable timeline but not later than within two months after the opening of the proceedings. Judicial decisions in administrative proceedings have the format of a resolution, as provided in part 1 of Article 158 of the APC of Ukraine.

## JUDICIAL METHODS OF PROTECTION OF HUMAN RIGHTS IN TERMS OF ADMINISTRATIVE JUSTICE

Right to protect one's rights, freedoms and legitimate interests in the domain of public legal relations

(part 4 of Article 55 of the Constitution of Ukraine, Article 6 of the APC of Ukraine, paragraph "l" of Articles 6, 8 of the Law of Ukraine "Principles of Ukrainian Health Care Legislation")



Preparation of administrative action suit

An administrative action/ suit is filed with the administrative court in the format of a written statement of claims in compliance with legislative norms (Articles 105, 106 of the APC of Ukraine). A written statement of claims may be prepared by completing the claim form provided by the court (part 2 of Article 105 of the APC of Ukraine)



Filing a claim with the administrative court

A suit may be filed: 1) at the location of the respondent (part 1 of Article 19 of the APC of Ukraine), 2) at the place of residence (sojourn, location) of the plaintiff (part 2 of Article 19 of the APC of Ukraine)





Trial in the court of first instance			
Opening of the proceedings (the judge must decide whether to open the proceedings not later than the next day after the receipt of the statement of claims by the administrative court or the expiration of the deadline for removing shortcomings in the statement of claims that was left dormant but not later than the next day after the court receives information about the place of residence (sojourn) of the individual, in accordance with the procedure prescribed in part 3 of Article 107 of the APC of Ukraine)	Preparation of the case for trial (Article 110 of the APC of Ukraine)	Pre-trial (within a reasonable timeline) (part 1 of Article 111 of the APC of Ukraine)	Trial (within a reasonable timeline but not later than two months since the opening of the proceedings) (Article 122 of the APC of Ukraine): consideration of merits (Article 135 of the APC of Ukraine); debates (Article 152 of the APC of Ukraine); court decisions (Article 160 of the APC of Ukraine)



Appeal of a court decision	
Appeal of the court decision (within ten days of its declaration) (part 2 of Article 186 of the APC of Ukraine)	Cassation complaint against the court decision (within twenty days after the decision of the Court of Appeals comes into force) (part 2 of Article 212 of the APC of Ukraine)

## d) The Constitutional Court

The Constitutional Court of Ukraine is the sole body of constitutional justice in Ukraine. It decides on the conformity of laws and other legal acts with the Constitution of Ukraine and provides official interpretation of the Constitution and the laws of Ukraine (Article 147 of the Constitution of Ukraine).

A constitutional appeal and a constitutional petition are the forms of appeal to the Constitutional Court of Ukraine (Article 38 of the Law of Ukraine “On the Constitutional Court of Ukraine”). However, when dealing with the procedures for protecting legitimate rights and freedoms of citizens in the health sector in terms of constitutional justice, one should consider only a constitutional petition.

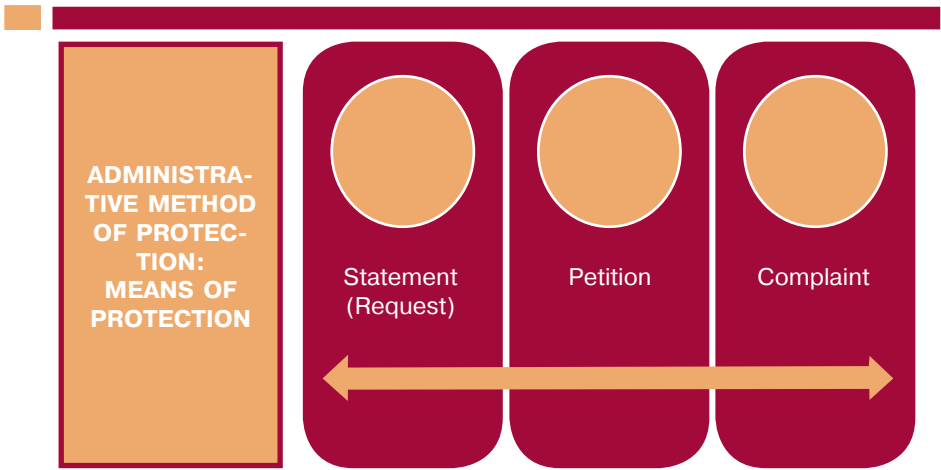
A constitutional petition is a written request addressed to the Constitutional Court of Ukraine regarding the need for official interpretation of the Constitution and the laws of Ukraine to ensure realization or protection of constitutional rights and freedoms of individuals, citizens, as well as legal entities (part 1 of Article 42 of the Law of Ukraine “On the Constitutional Court of Ukraine”). A constitutional petition may be filed by a citizen of Ukraine, a foreigner, a stateless person, or a legal entity (part 1 of Article 42 of the Law of Ukraine “On the Constitutional Court of Ukraine”). In the health sector, there already exists a precedent of the Constitutional Court of Ukraine adopting a decision regarding the constitutional petition of a citizen - the case of K. H. Ustymenko of October 10, 1997 (Decision of the Constitutional Court of Ukraine in the case of official interpretation of Articles 3, 23, 31, 47, 48 of the Law of Ukraine “On Information” and Article 12 of the Law of Ukraine “On Procuracy”).

### 8.2.2 Out of Court Methods of Protection

#### a) Administrative Method of Protection of Human Rights in the Health Sector

This method of protection of human rights consists of an appeal to an official with a higher authority (an official at a health care institution) or an administrative body with a higher authority (relevant Department of Health, Ministry of Health) in the health sector, utilizing various means of protection.

## MEANS OF PROTECTION OF RIGHTS OF SUBJECTS OF MEDICAL LEGAL RELATIONS



## ADMINISTRATIVE METHOD OF PROTECTION: CONTACTING HEALTH CARE AUTHORITIES AND THEIR OFFICIALS



Contacting executive authorities in the health sector is subject to hierarchical ordering: from city departments of health of local state administration to the Ministry of Health of Ukraine.

The grounds for contacting these bodies include the following: violations of law, denial of rights, infliction of damage to health, establishing the facts of such violations, etc.



**Remember!**

*Contacting the head of a health care institution is not a prerequisite for submitting a complaint to a relevant administrative body with higher authority within the hierarchical structure of executive power or local authorities.*

Contacting the department of health of the local state administration or city council may be made in person during an appointment or in a written form by submitting an appropriate request to ensure the exercise of one's rights guaranteed by law or a complaint about the violation of one's legal rights by individual medical employees. Submission of such a request or a complaint, in accordance with Article 9 of the Law of Ukraine "On Citizens' Requests," requires the authority that received the request/complaint to review thoroughly and, objectively all the evidence and claims presented in the complaint or the request and, on the basis of this review, to decide on annulling or modifying the contested decision in cases where this decision violates the law or other regulatory legal acts; to implement immediate measures to stop unlawful actions; to identify and eliminate the causes and conditions that contributed to the violation; to restore the violated right; to ensure implementation of the decisions made in connection with the request or the complaint; following the procedure established by law, to take action to compensate the individual for material damage if it was caused by the infringement on his/her rights or legitimate interests; or to establish the liability of individuals responsible for the violation. The citizen is informed of the results of the review, in writing, thus allowing the him/her to appeal the decisions to the higher authorities or in court in case he/she disagrees with them. In addition, if the complaint or the request is deemed to be unfounded, the citizen is informed of the procedure for appealing the decision.

A requirement to forward all complaints and requests to appropriate authorities and agencies (within no more than five days) while informing the individual of this in writing constitutes a positive aspect of this method of protection of human rights in the health sector (Article 7 of the Law of Ukraine "On Citizens' Requests"). Thus, even if the citizen did not have sufficient information about the procedure for contesting unlawful actions or illegal decisions that violated his/her rights or did not appeal to an appropriate authority, the complaint will still be reviewed and, on the basis of this review, appropriate decisions will be taken. In reviewing complaints related to the damage to somebody's health, the departments of health of local state administrations set up medical commissions composed of medical practitioners with relevant expertise who, on the basis of the review of the complaints, issue appropriate reports that identify the breach in the provision of health care, and/or misconduct of medical staff, or judge the complaints to be unfounded and unjustified. These reports may be challenged in case of disagreement and often constitute important pieces of evidence for appealing improper actions of medical professionals to higher authorities or in court.

The main components of a complaint include the following: its factual (descriptive) part where the author presents the facts, arranges them in a particular order, informs the competent authority of these facts, requests these facts to be reviewed and assessed; negative evaluation of certain actions, inaction, decisions by the supplicant; a request or a demand to eliminate specific violations of rights and legitimate interests or obstacles; a demand to punish the official responsible for unlawful actions (although this latter element may be absent).

A complaint is not just a “letter” to which one may either respond or ignore it, but a statement that imposes on the recipient a number of statutory duties and requires a review process which is subject to legislatively defined procedures.

### Remember!

*In order to receive a timely and effective response to a complaint, one should follow the following recommendations: 1) the complaint should be substantiated; 2) it should be submitted in a timely manner; 3) any type of complaint is more effective in a written form; 4) a complaint should be sent to an appropriate authority or official either by mail – in this case, one should remember to send it by registered mail or certified mail, including an optional declaration of the content of the letter – or it can be delivered in person or by an authorized individual. In the latter case it is better to insist on registering the content of the incoming complaint and not opt out of its registration; 5) one should not assume that filing a complaint can harm the patient.*

A complaint against the actions or decisions of state governmental bodies, local authorities, enterprises, institutions, organizations, public associations, media, or officials should be submitted to higher authorities or officials in the order of regular subordination. This does not deprive the citizen of the right to file the complaint also in court in accordance with current legislation or to file the complaint in court directly in the absence of an appropriate higher authority to which the complaint may be submitted or in case of disagreement with the decision of such an authority.

A citizen may file a complaint in person or through an authorized representative. A complaint on behalf of a minor or a disabled individual is filed by their legal representatives. Under the current legislation, the latter include parents, guardians, and trustees of the individual or representatives of those agencies and organizations that have custody or care of the individual (Article 32 of the Criminal Procedure Code of Ukraine).

The complaint contains as attachments all the decisions or copies of the decisions made in response to earlier appeals of the individual and other documents necessary for the complaint to be reviewed which the individual has in his/her possession. These documents are returned to the individual after the review.

A complaint against the decision that is contested may be submitted to the higher authority or official within one year since its adoption but not later than one month since the citizen was informed of the decision. Complaints filed in violation of these deadlines are not reviewed. The deadline missed for legitimate reasons may be extended by the authority or the official that is reviewing the complaint.

The decision of the higher state authority that reviewed the complaint with which the citizen disagrees may be appealed in court within the period of time stipulated in the legislation of Ukraine.

### Remember!

*Requests and complaints are reviewed and resolved within a period of time that does not exceed one month from the date of their receipt, and those that do not require additional examination are reviewed without delay but no later than within fifteen days from the date of their receipt. If within one month, the issues addressed in the request/complaint cannot be resolved, the head of a given authority, enterprise, institution, organization or his/her deputy sets the timeline required for the review of the request/complaint and informs the individual who filed the request/complaint of this timeline. Nonetheless, the new timeline set to review the issues raised in the request/complaint may not exceed forty-five days.*

In response to a written substantiated request of a citizen, the review period may be reduced from the term established by law.

Governmental bodies, local authorities, enterprises, institutions and organizations irrespective of their form of ownership, public associations, and officials review requests/complaints free of charge.

### Remember!

*In accordance with part 2 of Article 8 of the Law of Ukraine “On Citizens’ Requests,” the same body does not review repeated requests/complaints received from the same citizen regarding the same issues when these issues were resolved upon the review of the first request/complaint.*

The reviewer of a complaint adopts one of the followings decisions on the basis of the results of the administrative review:

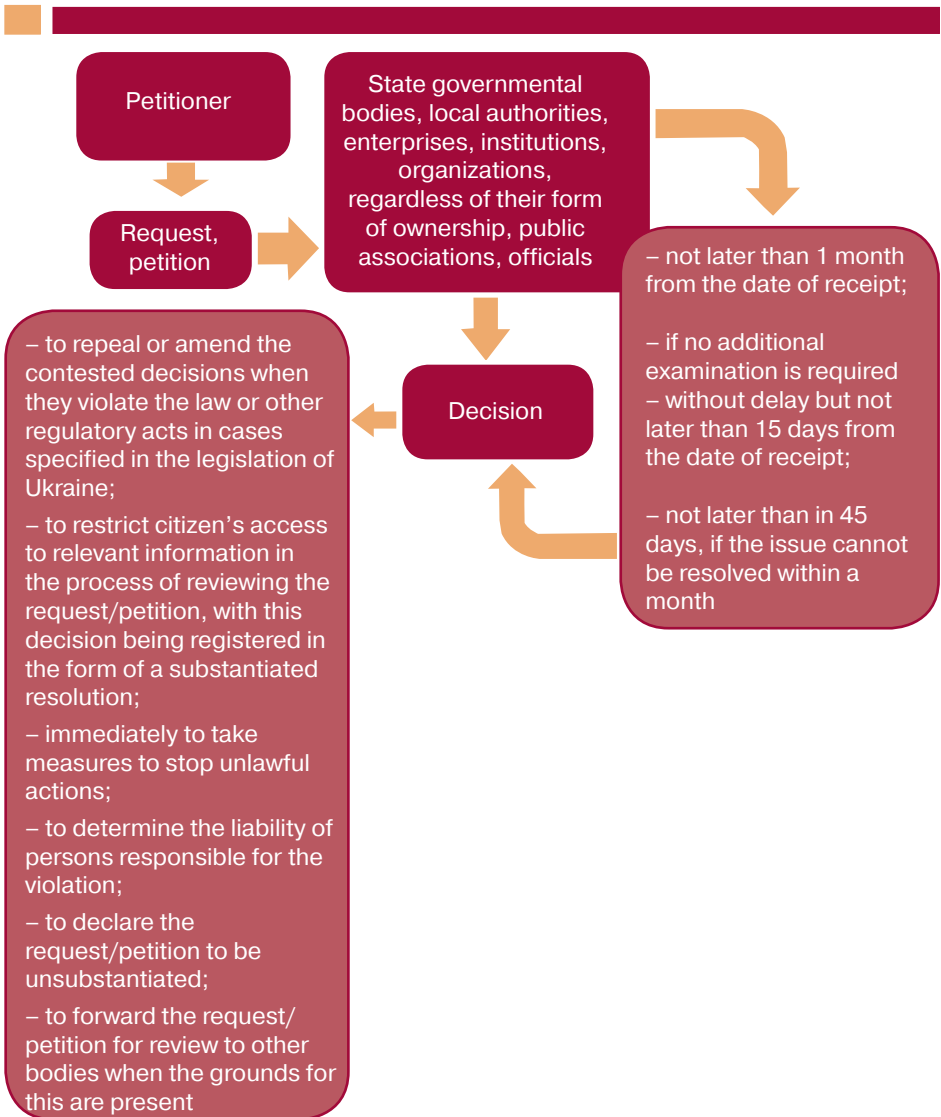
to repeal or amend the contested decisions when they do not comply with the laws or other regulations in cases stipulated in the legislation of Ukraine; or

to explain the procedure for appealing this decision in the event that the request or the complaint is recognized as unsubstantiated.

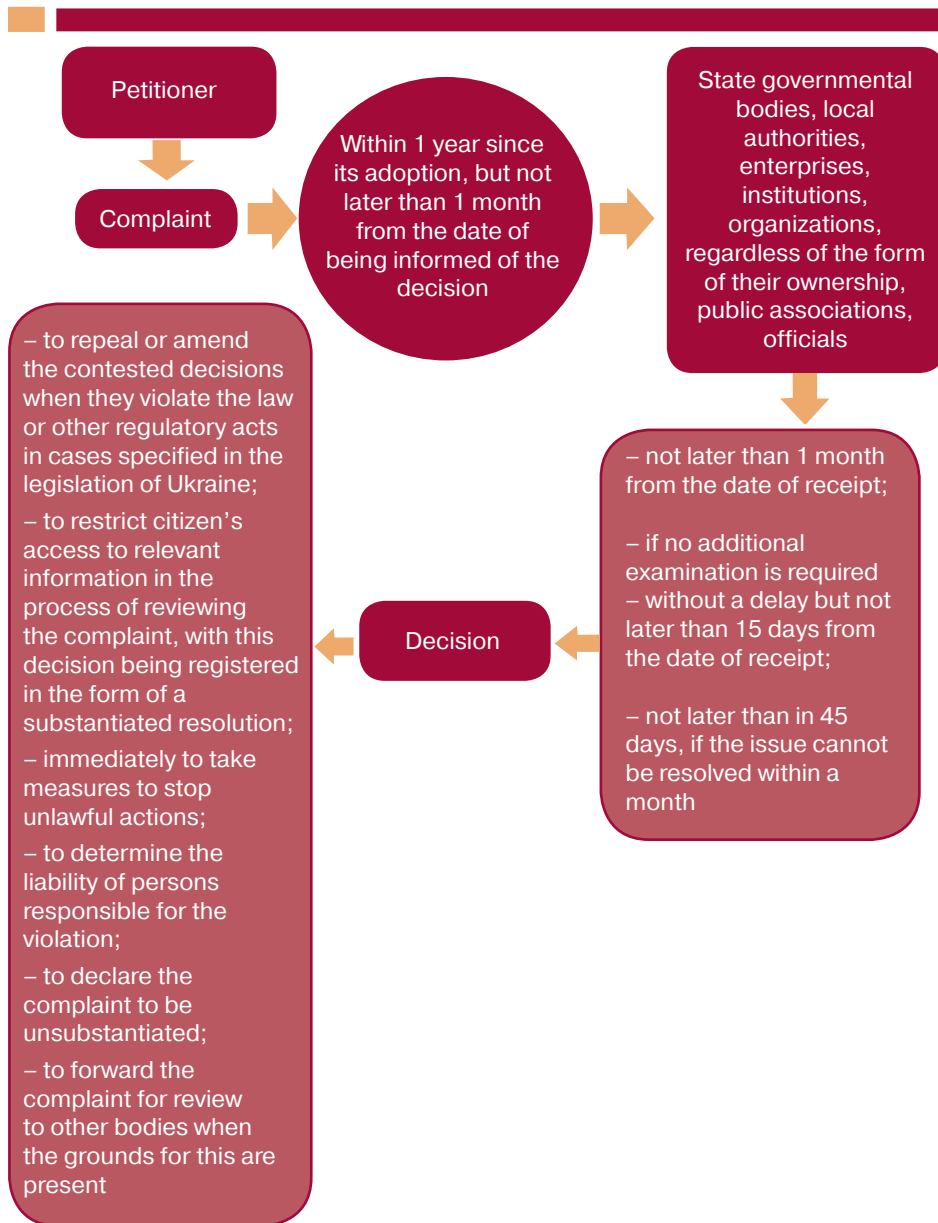
In addition, an authorized entity decides within the boundaries of its authority on the liability of individuals responsible for the violation.

In case of disagreement with the decision regarding the complaint, the citizen may appeal the decision to higher authorities or in court. Review of such appeals and adoption of decisions regarding them take place following a standard procedure.

### ADMINISTRATIVE METHOD OF PROTECTION: PROTECTION MECHANISM



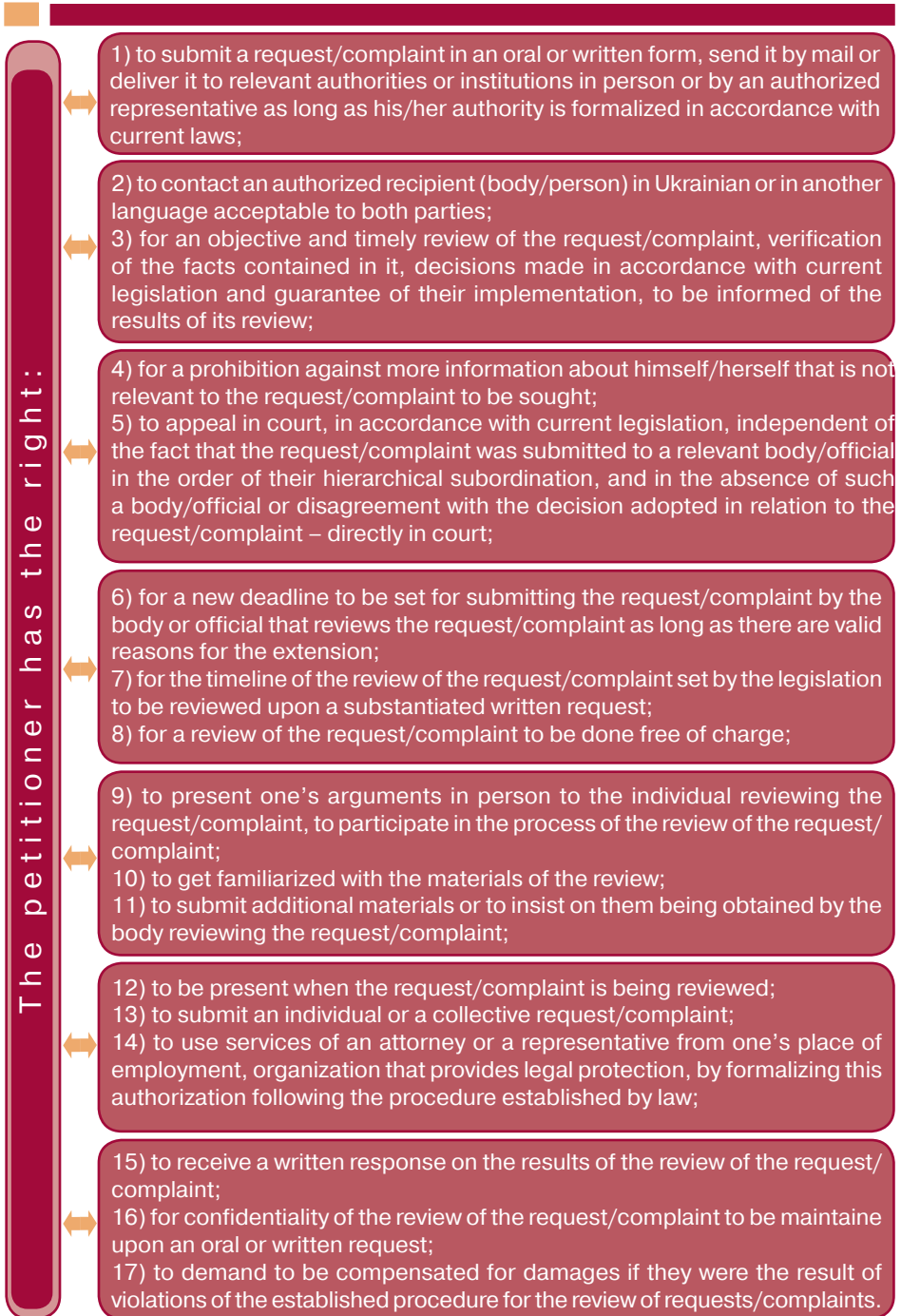
## ADMINISTRATIVE METHOD OF PROTECTION: PROTECTION MECHANISM



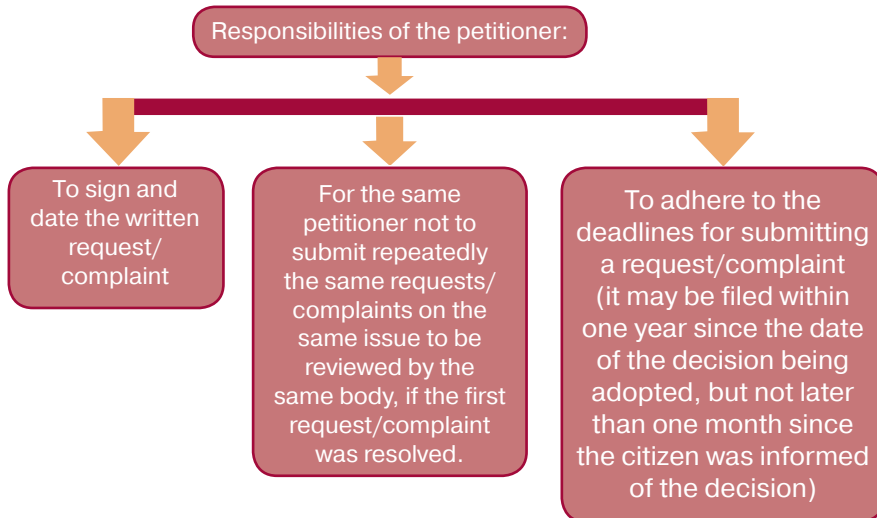
### Remember!

*The Law of Ukraine “On Citizens’ Requests” establishes a number of rights of a citizen who submitted a complaint to state governmental bodies, local authorities, enterprises, institutions, organizations regardless of their form of ownership, public associations, mass media, and officials (Article 18).*

## ADMINISTRATIVE METHOD OF PROTECTION: LEGAL RIGHTS OF THE PETITIONER



### ADMINISTRATIVE METHOD OF PROTECTION: LEGAL RESPONSIBILITIES OF THE PETITIONER



#### b) Contacting the Procuracy

Another method of protection of human rights in the health sector is contacting the Procuracy. According to paragraph 9 of section 15 of the “Transitional Provisions” of the Constitution of Ukraine and Article 19 of the Law of Ukraine “On Procuracy” of November 5, 1991, the Procuracy of Ukraine oversees upholding and implementation of laws by executive bodies, local authorities, their officials and employees, including in the health sector.

According to Article 12 of the Law of Ukraine “On Procuracy,” a prosecutor reviews requests and complaints regarding violations of citizens’ rights. A decision adopted by the prosecutor may be appealed either to the prosecutor with a higher authority or in court. After a decision regarding a complaint has been made by the Prosecutor General of Ukraine, review of the complaint by the offices of Procuracy is terminated. Hence, the process of contacting various offices of Procuracy is subject to territorial and subordination principles.

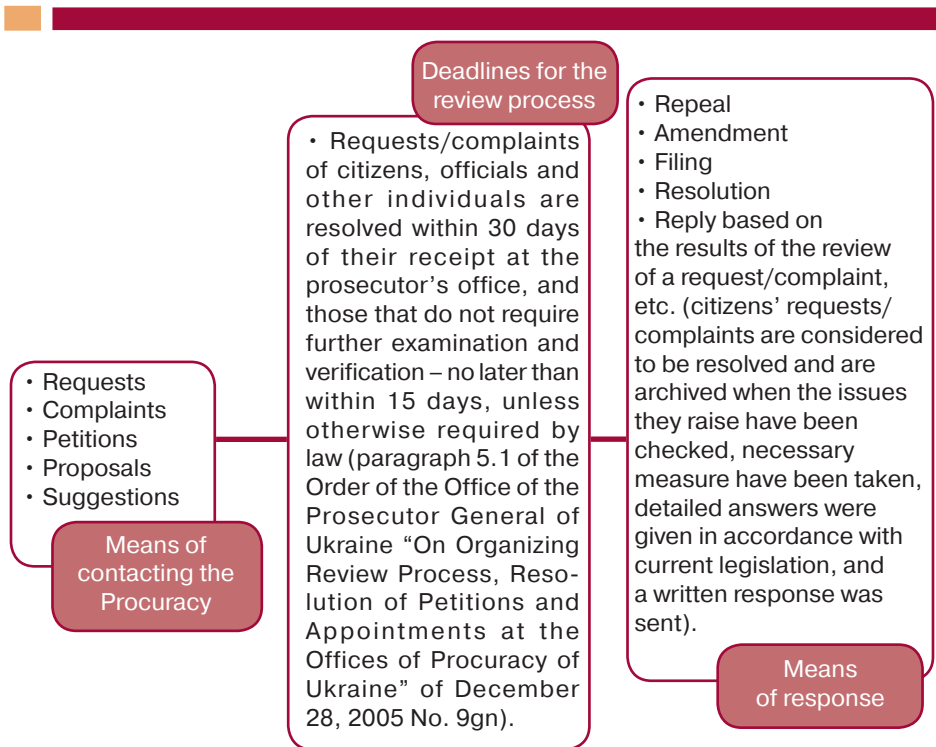
#### **Remember!**

*A procedure for dealing with citizens’ requests by the Procuracy is set in the Instructions on How to Review and Resolve Petitions and Conduct Appearances at the Offices of Procuracy of Ukraine approved by the Order of the Prosecutor General of Ukraine of December 28, 2005 No. 9gn (with amendments of February 28, 2011).*

In the process of review initiated upon a citizen’s request, the prosecutor has the right to demand the heads of departments of health and offices of local health care administration to conduct inspections, audits of subordinate and subsidiary medical institutions and other organizations regardless of their form of ownership, as well as to assign experts to conduct inspections, internal and external inquiries. If the inquiry conducted upon a citizen’s request or complaint reveals violations of the law, the prosecutor or his deputy, in accordance with Article 20 of the Law of Ukraine “On Procuracy,” has the right within the boundaries of their jurisdiction:

1. to initiate criminal proceedings following the procedure established by law, (pre-trial investigations in medical cases are conducted by internal affairs agencies), disciplinary or administrative action, to submit materials for review to public associations;
2. to issue regulations on the removal of apparent violations of the law;
3. to request governmental bodies, public associations, and officials to remove violations of the law and conditions that contributed to them;
4. to file complaints in court regarding the protection of rights and legitimate interests of citizens, the state, enterprises and other legal entities.

### CONTACTING THE PROCURACY





**Remember!**

*Procuracy does not replace internal management and control mechanisms and does not intervene in business activity when the latter does not violate current laws. Upon a written request, the prosecutor has the right of access to documents and materials required for conducting a review, including those that contain confidential information. In addition, he/she may demand in writing necessary documents and materials to be submitted to the office of the prosecutor for examination.*

**c) Contacting Agencies of Internal Affairs (Police)**

Contacting agencies of internal affairs with relevant statements of crimes against life and health of citizens are a rare phenomenon since prior to the amendments to part 2 of Article 112 of the Criminal Procedure Code of Ukraine the cases of this type were in the jurisdiction of Procuracy.

In accordance with Articles 94 and 95 of the Criminal Procedure Code of Ukraine, contacting an internal affairs agency with a statement of a crime entails adoption of one of the following decisions no later than within three days:

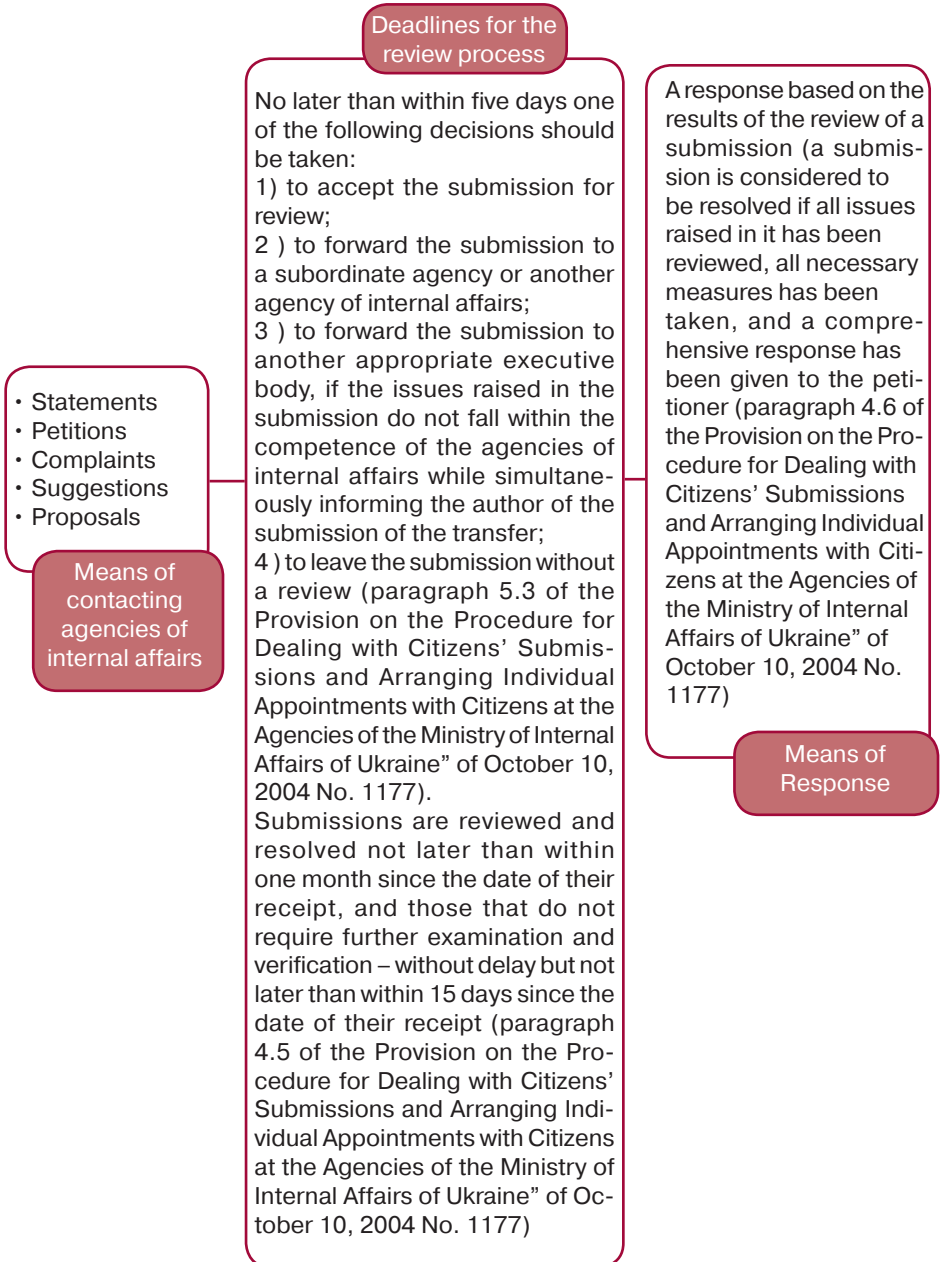
- 1) to initiate criminal proceedings;
- 2) to refuse to initiate criminal proceedings;
- 3) to forward the statement or the report to an appropriate authority.

When there is a need to verify a statement or a report of a crime prior to opening a case, the verification is carried out within a period of time that does not exceed 10 days by means of collecting testimonies of individual citizens or officials or requesting necessary documents (paragraph 4.2 of the Order of the Ministry of Internal Affairs of Ukraine “On the Procedure for Admitting, Registering, and Examining Statements and Reports of Committed or Intended Crimes by Agencies and Departments of Internal Affairs of Ukraine” of April 14, 2004 No. 400).

**Remember!**

*A procedure for dealing with citizens' statements is set in the Order of the Ministry of Internal Affairs of Ukraine “On Approval of the Procedure for Dealing with Citizens' Submissions and Arranging Individual Appointments with Citizens at the Agencies of the Ministry of Internal Affairs of Ukraine” of October 10, 2004 No. 1177.*

## CONTACTING AGENCIES OF INTERNAL AFFAIRS (POLICE)



According to Article 99 of the Criminal Procedure Code of Ukraine, in the absence of grounds for opening a criminal case, an inquiry agency adopts a decision to refuse to initiate criminal proceedings and informs interested individuals and enterprises, institutions or organizations of this decision. When criminal case is

opened, an investigator conducts a pre-trial investigation with the aim of either proving or disproving the guilt of the individuals against whom a complaint has been filed. For this purpose, the investigator conducts all necessary inquiries and collects evidence.

In practice, during a pre-trial investigation in medical cases, investigators very often undertake an investigative action known as a seizure of evidence; namely, a seizure of primary medical records. According to Article 178 of the Criminal Procedure Code of Ukraine, a seizure of evidence is carried out when there is accurate information that objects or documents relevant to the case are in possession of a certain individual or are kept at a certain location. Officials and citizens have no right to refuse to present or hand over the documents or copies of the documents or other items requested by the investigator during a seizure. Except in urgent cases, a seizure should be made during daytime.

Before a seizure, an investigator presents to the individuals that occupy the premises or a representative of the enterprise, institution, or organization where the seizure is carried out the warrant and invites them to hand over the objects or documents specified in the warrant. In case of a refusal to fulfill the request, the investigator conducts the seizure by force. During the seizure, only the objects and documents relevant to the case may be removed. The investigator must show all the documents and objects to be seized to the witnesses and other individuals present and register all the seized items in the protocol of the seizure or an appendix to it, listing their name, number of items, size, weight, material from which they are made, and identifying marks. Whenever necessary, the seized objects and documents should be packaged and sealed on site.

**Remember!**

*A seizure is conducted on the basis of a substantiated decision of the investigator in the presence of two witnesses and an individual that occupies the premises. A seizure conducted on the premises occupied by an enterprise, an institution, or an organization is conducted in the presence of their representatives.*

**Remember!**

*An investigator fills out a protocol of the seizure in two copies. The protocol of a seizure records all statements and comments of those present during the seizure which have been made in response to the actions of the investigator. Both copies of the protocol and the list of items seized are signed by the individual whose objects or documents have been seized and the invited individuals present at the seizure. The second copy of the protocol of the seizure and the second copy of the list of items are given to the individual whose objects and documents have been seized. When a seizure is conducted at an enterprise, an institution, or an organization, the second copy of the protocol and the second copy of the list of items are given to the representative of the enterprise, the institution, or the organization.*

In cases when a forensic examination is necessary, the investigator issues a detailed statement in which he/she specifies the following: the grounds for the forensic examination, the name of the examiner or the name of the institution whose examiners have been elected to conduct the examination; the issues regarding which the examiner should provide an expert opinion; the items to be examined; and the list of documents presented to the examiner(s) for review. According to Article 212 of the Criminal Procedure Code of Ukraine, a pre-trial investigation is concluded by issuing an indictment or a resolution about closing the case. The resolution to close the case may be appealed in court.

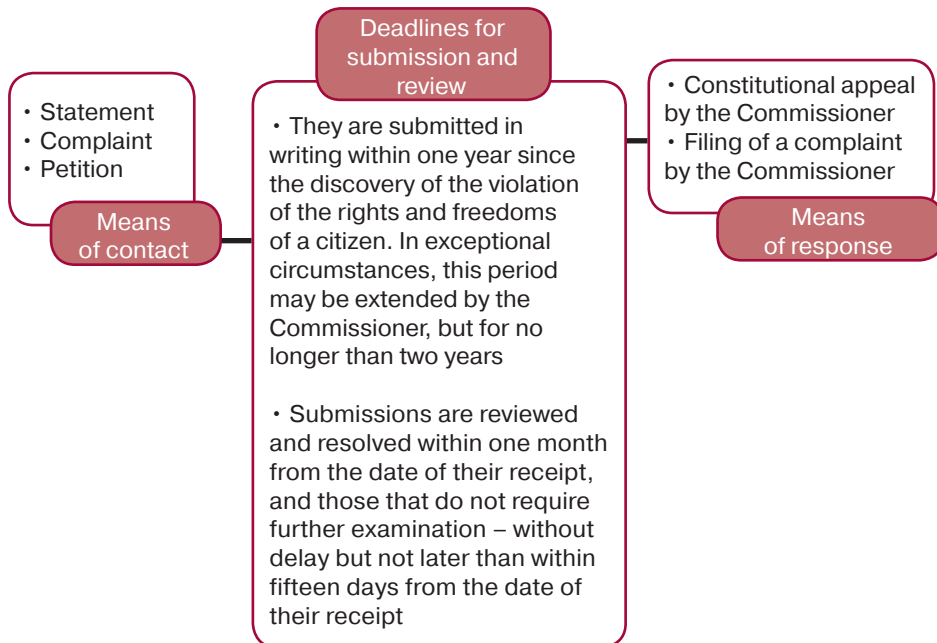
It is characteristic of this method of protection of human rights in the health sector that all the necessary actions aimed at bringing the individual guilty of a crime to justice are performed by agencies of internal affairs while the petitioner does not participate in this process, except when he/she appeals against instances of inaction on the part of the employees of the agencies of internal affairs during pre-trial investigation into a criminal case, or their procedural documents, which person considers to be illegal.

#### **d) Contacting the Commissioner of Verkhovna Rada of Ukraine on Human Rights**

Parliamentary oversight over upholding of constitutional rights and freedoms of citizens and protection of the rights of each individual on the territory of Ukraine and within the areas under its jurisdiction is carried out on permanent basis by the Commissioner of Verkhovna Rada of Ukraine on Human Rights.

The purpose of the parliamentary oversight carried out by the Commissioner is: 1) to protect the rights and freedoms of citizens proclaimed in the Constitution of Ukraine, laws of Ukraine, and international treaties signed by Ukraine, 2) to ensure upholding of and respect for human rights and freedoms of citizens by the authorities, 3) to prevent violation of human rights and freedoms of citizens or to facilitate their restoration (Article 3 of the Law of Ukraine “On the Commissioner of Verkhovna Rada of Ukraine on Human Rights”).

## CONTACTING THE COMMISSIONER OF VERKHOVNA RADA OF UKRAINE ON HUMAN RIGHTS



### Remember!

*The Commissioner does not review those submissions that are being examined in court and stops already-initiated proceedings if the individual concerned has filed a lawsuit, a statement or a complaint in court*

The complaints of the Commissioner are filed with state governmental bodies, local authorities, public associations, enterprises, institutions and organizations regardless of their form of ownership for their officials and employees to take appropriate actions within one month in order to eliminate violations of human rights and freedoms of human beings and citizens.

The Commissioner on Human Rights focuses in particular on the issue of mental health, given the specificity of psychiatric care. As the analysis of historical sources testifies, in 1960s and in the first half of 1980s, in the Soviet Union, there were multiple cases of serious human rights abuses, including those related to abuse in the field of psychiatric care. Due to the abuses that occurred during this period, the Association of Psychiatrists of the USSR was excluded from the World Psychiatric Association and was restored in this organization only in 1989. According to Article 151 of the Criminal Code of Ukraine of April 5, 2001, unlawful placement of an individual in a psychiatric institution, in other words, admitting into a psychiatric institution an unquestionably mentally healthy individual, is considered to be a crime.

Examples of violations of this type include the following two cases. In July 1998, the court of Zaliznychnyi District of Kyiv examined the complaint of Ms. L. Artamonova against V. Kravchuk, a doctor at the emergency department of the Central District Hospital of Zaliznychnyi district of Kyiv, who in 1996 deliberately assigned to the plaintiff a wrong diagnosis of psychopathy. This caused much suffering to the woman: for a long time she was considered insane by others because a certificate with the diagnosis was sent to 17 addresses. In Kharkiv, O. Popov, the head of one of the departments of a psychiatric hospital, was brought to justice. According to the results of the investigation, for three years O. Popov unlawfully and forcibly kept Ms. Z. Akopian in the hospital, having assigned to her the diagnosis of schizophrenia. Subsequent repeated examinations of the patient did not find that the patient suffered from this illness. The case of Ms. Z. Akopian was under special control of the Special Committee on Abuse of the World Psychiatric Association<sup>1</sup>.

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<sup>1</sup> Karpachova, N. I. *Sostoyanie soblyudeniya i zashchity prav i svobod cheloveka v Ukraine: Pervyy ezhegodnyy doklad Upolnomochennogo Verokhovnoy Rady Ukrainy po pravam cheloveka.* (Compliance with and Protection of Human Rights and Freedoms in Ukraine: First Annual Report of the Commissioner of Verkhovna Rada of Ukraine on Human Rights.) Translated from Ukrainian. Kharkov: Konsum, 2002. pp. 196-198.

## 8.3 NON-JURISDICTIONAL METHODS OF PROTECTION OF HUMAN RIGHTS IN THE HEALTH SECTOR

In this guide, only one non-jurisdictional method of protection is examined: namely, mediation in the health sector. Mediation is one of the most common in the world alternative approaches to resolving conflicts which aims at achieving a “win-win” result.

The domain of health care is extremely emotionally charged, especially when it comes to the origin of a conflict, its “gradual escalation” from a moral and deontological plane to a legal plane. The health care industry often is riddled with pain, suffering, patients’ fears, distrust of people in “white coats”, emotions of relatives, on the one hand, and on the other hand, with a sense of professional responsibility, human and professional virtues of medical staff. Medical staff and patients and/or their family members usually constitute key figures in a health care conflict. Practical value of mediation in the health sector can be most clearly demonstrated through restorative justice (mediation in criminal cases). As the analysis of legal practice in this domain testifies, medical practitioners are usually held criminally liability under Article 140 of the Criminal Code of Ukraine (“Inadequate Carrying out of Professional Duties by Medical or Pharmaceutical Employees”).

### Remember!

*If the parties elect to resort to mediation as a method of protection of their rights, the lawyer should utilize the mechanism identified in Article 46 of the Criminal Code of Ukraine which makes provisions for the procedure of exemption from criminal responsibility in connection with reconciliation between the offender and the victim.*

Reconciliation between an individual who committed the crime and the victim constitutes the grounds for applying the provisions of Article 46 of the Criminal Code of Ukraine, with the fact of reconciliation being recorded in the protocol of the case, using, for instance, the format of the victim’s motion to exempt the individual who committed the crime from criminal responsibility or, in the least, lack of objection to such an exemption

**Remember!**

*Key preconditions for an exemption from criminal responsibility are: 1) an accused individual committed a crime for the first time, 2) a committed criminal act is of low severity (a punishment for this crime is imprisonment for a term that does not exceed two years or another more lenient form of punishment) or a crime of moderate severity committed due to carelessness (a punishment for this crime is imprisonment for a term that does not exceed five years) and 3) an individual who committed the crime compensates for or eliminates the damage caused.*

Crimes referred to in part 1 of Article 140 of the Criminal Code of Ukraine are of low severity and crimes referred to in part 2 of this article are crimes of moderate severity committed due to carelessness. Article 46 of the Criminal Code of Ukraine makes provisions that offenders accused of these types of crimes are eligible for a mediation procedure, thus removing any obstacles for reaching a resolution if the health care worker has sincerely repented and reconciled with the victim, compensated for the damage caused, and committed the crime for the first time. Attorney(s) are assigned the task of facilitating with the resolution of the conflict between the parties of a medical relationship through the process of mediation, including the task of preparing an official reconciliation and reparation agreement.

**Remember!**

*An attorney has the right to consult with both parties, if this consultation is conducted in the interests of both sides and aims at reaching an agreement between them. Under no circumstances can an attorney act as a mediator in the process of mediation if he/she previously acted as a defense attorney of one of the parties, or acted in defense of one party after a failed mediation process in which he/she acted as a mediator.*

A mediator is required to be professionally trained, to respect honor and dignity of clients, to maintain confidentiality and neutrality, and to ensure balance of power (capacity) of the sides. According to Articles 7.1 and 8 of the Criminal Procedure Code of Ukraine, when the conditions specified in Article 46 of the Criminal Code of Ukraine are met, the court rules to close the case.

While calling attention to mediation in civil proceedings, we would like to emphasize that a reconciliation agreement is resorted to in this case. A reconciliation agreement may be put together either independent of court proceedings, under the provisions of the Civil Code of Ukraine, or in the process of utilizing one's right to a judicial method of protection. In the latter case, a reconciliation agreement may be put together after the proceedings in the case have been opened: it can be approved at the opening of the proceedings (Article 130 of the Civil Procedure Code of Ukraine) and at the stage when the case is examined (Articles 174, 175 of the Civil Procedure Code of Ukraine).



When enforcement proceedings have been opened, the parties may still enter into a reconciliation agreement that closes the enforcement proceedings and is recognized by the court (part 3 of Article 11.1 of the Law of Ukraine “On Enforcement Proceedings”).

### Remember!

*Initiation of court proceedings does not prevent the parties involved from contacting each other with the goal of putting together a reconciliation agreement independent of court proceedings.*

Terms of a reconciliation agreement may not conflict with the interests of other persons involved in the case, including the third party (in medical cases – a health care employee). The Court should create conditions for all the interested parties to review the draft of the reconciliation agreement so that they have an opportunity to express their views on its approval by the court.

### Remember!

*Consent of the plaintiffs (co-plaintiffs) and defendants (co-defendants), as well as third parties who have their own independent demands with the terms of the reconciliation agreement, is confirmed by their personal signatures or signatures of their representatives (a representative must be vested by the represented party with special authority to sign the agreement). Third parties who do not have independent demands confirm that they have no objections against the approval of the reconciliation agreement by the court, which is recorded in the minutes of the trial.*

In essence, a reconciliation agreement serves as a means of dispute settlement on the basis of mutual concessions and may affect only the rights and obligations of the parties involved and the claim

### Remember!

*A reconciliation agreement may be put together and approved by both the court of first instance and the courts of appeals and cassation.*

A reconciliation agreement and its recognition by the court is the reason for closing the proceedings, which is reflected in the court ruling (part 4 of Article 205 of the Civil Procedure Code of Ukraine). When the case proceedings are closed, court proceedings regarding the same dispute between the same parties regarding the same issue and on the same grounds may not be reopened (part 3 of Article 206 of the Civil Procedure Code of Ukraine).

## 8.4 FORENSIC EXAMINATION AND AUTOPSY

### 8.4.1 FORENSIC EXAMINATION

Forensic examination plays an important role in cases of human rights protection in the health sector. Without forensic examination, legal mechanisms of protection of human rights in the health sector are often ineffective, while criminal medical cases are generally not viable without establishing the nature and extent of damage to health, which constitutes the responsibility of forensic experts.

General regulation of forensic work is carried out by the Law of Ukraine “On Forensic Examination” of February 25, 1994. The most common types of forensic examination carried out to protect human rights in the health sector are medical forensic examination and psychiatric forensic examination. Psychological forensic examination is used less frequently but plays an important role in establishing the extent of moral damage. According to Article 7 of the Law of Ukraine “On Forensic Examination,” forensic activities that are part of a criminal, medical, or psychiatric forensic examination are carried out exclusively by specialized governmental agencies, while forensic work in general may be carried out by forensic experts who are not employees of these institutions.

Under the provisions of Article 10 of the Law of Ukraine “On Forensic Examination,” individuals who possess the knowledge necessary to reach a conclusion regarding the issues under inquiry may act as forensic experts; however, forensic experts from specialized governmental agencies are also required to have relevant higher education, be qualified as specialists, have relevant professional training, and be qualified as forensic experts with specific specialization. All certified forensic experts are entered into the State Register of Certified Forensic Experts which is maintained, in accordance with Article 9 of the Law of Ukraine “On Forensic Examination,” by the Ministry of Justice of Ukraine.

#### Remember!

*In accordance with paragraph 1.5 of the Instructions on Forensic Examinations approved by the Order of the Ministry of Justice of Ukraine of January 17, 1995 No. 6, professors and lecturers of Departments of Forensic Medicine, health care professionals, and professionals from other agencies can participate in a forensic examination as forensic experts without further approval by the individual that authorized the forensic examination.*

According to Article 71 of the Law of Ukraine “Principles of Ukrainian Health Care Legislation”, medical and psychiatric forensic examinations are authorized by an individual who conducts the inquiry, an investigator, a prosecutor, or a court following the procedure set in Articles 143-150 of the Civil Procedure Code of

Ukraine, Articles 75-77 of the Criminal Procedure Code of Ukraine, and Articles 81-85 of the Administrative Procedure Code of Ukraine. The grounds and the procedure for authorizing a forensic examination under the Civil Procedure Code of Ukraine, the Criminal Procedure Code of Ukraine, and the Administrative Procedure Code of Ukraine are practically the same.

### Remember!

*A procedural document (a resolution or a ruling) that authorizes a forensic examination and is prepared by an authorized individual (or an agency) constitutes grounds for conducting a forensic examination.*

### Remember!

*In criminal cases, initiation of criminal proceedings constitutes a mandatory precondition for authorizing a forensic examination (paragraphs 5 and 6 of the Resolution of the Plenary Assembly of the Supreme Court of Ukraine "On Forensic Examination in Criminal and Civil Cases" of May 30, 1997 No. 8).*

### Remember!

*It is unacceptable to authorize a forensic examination when specialized knowledge is not required to clarify the circumstances in question or to address to a forensic expert legal questions that are the sole competence of the court (in particular, questions regarding an individual's guilt, liability, or ability to stand trial) (paragraph 2 of the Resolution of the Plenary Assembly of the Supreme Court of Ukraine "On Forensic Examination in Criminal and Civil Cases" of May 30, 1997 No. 8).*

Article 76 of the Criminal Procedure Code of Ukraine makes provisions for cases that require obligatory authorization of forensic examination: to establish the cause of death, to establish the nature and severity of bodily injuries. According to Article 145 of the Civil Procedure Code of Ukraine, a forensic examination is mandatory when requested by both parties. A forensic examination is also mandatory when requested by at least one side if the case requires establishing the nature and extent of damage to health or mental state of an individual.

Current legislation of Ukraine defines the following types of forensic examination:

1. A commission forensic examination is carried out by at least two experts with the same specialization.
2. A comprehensive forensic examination is carried out by at least two experts with different specializations or sub-specializations.

3. A supplementary forensic examination is authorized when the conclusion of an expert has been found incomplete or unclear and is carried out either by the same expert or by (an)other expert(s).

### Remember!

*According to Article 75 of the Criminal Procedure Code of Ukraine or Article 150 of the Civil Procedure Code of Ukraine, a supplementary forensic examination is authorized when the findings of the primary forensic examination (that is a forensic examination during which the object is examined for the first time) have been reviewed and it has been established that an ambiguity or incompleteness of the conclusion cannot be removed by questioning the expert. The conclusion is considered incomplete when the expert did not examine all the items or did not give comprehensive answers to the questions asked. The conclusion is considered unclear when it is not precisely stated or is generic, non-specific (paragraph 10 of the Resolution of the Plenary Assembly of the Supreme Court of Ukraine “On Forensic Examination in Criminal and Civil Cases” of May 30, 1997 No. 8).*

4. Re-examination is authorized when the conclusion of the expert is recognized as unsubstantiated or that it contradicts other case materials or raises doubts as to its accuracy and is entrusted to be carried out to (an)other expert(s).

### Remember!

*Participation of several experts is mandatory for conducting forensic examinations in criminal cases against medical practitioners on professional offences (paragraph 2.4 of the Instructions on Conducting Forensic Examinations approved by the Order of the Ministry of Justice of Ukraine of January 17, 1995 No. 6).*

A forensic examination results in a written conclusion of the forensic expert or forensic expert commission which is attached to case materials. If necessary, forensic experts who conducted the examination may be required to appear in court to provide explanations of specific issues.

Forensic examinations in most cases are carried out by a network of governmental forensic agencies (part 2 of Article 7 of the Law of Ukraine “On Forensic Examination”). Non-governmental forensic agencies are essentially deprived of the right to conduct independent forensic examinations by Article 7 of the Law of Ukraine “On Forensic Examination.”

The issue of payment for forensic examinations is also of great practical importance.

**Remember!**

*When addressing the issue of payment for forensic examinations one should be aware that, according to Article 15 of the Law of Ukraine “On Forensic Examination” and the Resolution of the Cabinet of Ministers of Ukraine “On Approval of the Instructions on the Procedure for and the Amount of Reimbursement and Compensation to Individuals Invited by Inquiry Agencies, Pretrial Investigation Agencies, Procuracy, Courts or Authorities that Oversee Cases of Administrative Violations, and Payments to Governmental Research Institutions on Forensic Examination for Expert and Specialized Services Provided by Their Employees” of July 1, 1996 No. 710, forensic examinations in criminal cases are conducted by specialized research institutions of the Ministry of Justice of Ukraine and Ministry of Health of Ukraine on the basis of contracts between these institutions and inquiry agencies, pretrial investigation agencies, or courts are paid from the funds allocated for this purpose in the state and local budgets. The final payment is made after a requested forensic examination is completed.*

Payment for forensic examinations in civil cases is made by the party that filed the motion. According to Article 79 of the Civil Procedure Code of Ukraine, costs associated with testimonies of witnesses, services of experts and translators and forensic examinations belong to the expenses associated with the proceedings and constitute legal expenses. The party in whose favor the court awards the decision is compensated for the documented legal expenses by the other party on the basis of the decision of the court; that is, the party that filed the motion to authorize a forensic examination in the case, provided that the court decides in its favor, is entitled to a reimbursement for expenses incurred in connection with the examination. If the examination was authorized upon the motion of both sides or on the court’s initiative, the costs are shared equally by both sides. In case the party (parties) refuse(s) to cover the costs of a forensic examination, the court tries the case on the basis of already-available evidence.

Article 13 of the Law of Ukraine “On Forensic Examination” treats studies of the issues of interest to individuals and legal entities performed by forensic experts on the basis of a contract as the right of forensic experts (paragraph 6). Instructions on Appointing and Performing Forensic Examinations and Scientific and Methodological Guidelines on Preparing and Authorizing Forensic Examinations and Studies by Forensic Experts approved by the Order of the Ministry of Justice of Ukraine of November 3, 1998 No. 705/3145 define the procedure for studies performed by forensic experts. Paragraph 1.3 of this Order states that under current legislation one may utilize studies that require specialized knowledge and use methods of criminology and forensic science performed by forensic experts upon the request of the law enforcement agencies (including in order to resolve the issues related to the initiation of administrative or criminal proceedings), officials of the State Tax Administration of Ukraine, State Customs Service of Ukraine, State Executive Service or upon the request of lawyers, the defense, and individuals who defend their own interests and their representatives, notaries, banks, insurance companies, and other legal entities and individuals. The results of the studies

performed by forensic experts are provided in the format of a written conclusion of forensic experts in accordance with the legislation of Ukraine.

### **Remember!**

*The studies by forensic experts are performed on the basis of a written statement (letter) of the individual or legal entity that requests the study with an obligatory indication of the aspects of the study, a list of issues to be resolved, as well as the items provided. Studies by forensic experts, their progress and results are presented in the conclusions of the experts that list their specialization.*

The conclusion of a study performed by a specialist is similar in structure and content to the conclusion of a study performed by a forensic expert except that: a) an individual who performed the study is listed as a specialist and not an expert; b) the introductory part of the conclusion states who requested the institution or the specialist to perform the study and when the request was made; and c) a statement that acknowledges the liability of the individual who performed the study for knowingly providing false conclusions is omitted.

### **8.4.2 AUTOPSY**

An autopsy is an important type of medical forensic examination. An autopsy protocol often constitutes a medical record that can challenge the accuracy, timeliness, adequacy and completeness of medical assistance provided and can supply grounds for initiating criminal proceedings etc. Thus, according to Article 72 of the Law of Ukraine “Principles of Ukrainian Health Care Legislation,” an autopsy is performed in order to determine the causes and manner of death of the patient.

### **Remember!**

*A mandatory autopsy is performed when the death is suspected not to be due to natural causes (it therefore constitutes part of a forensic investigation or examination) and also when the death of an individual occurred at a health care institution.*

An autopsy is not required to be performed (part 3 of Article 72 of the Law of Ukraine “Principles of Ukrainian Health Care Legislation”):

1. for the following reasons: a) availability of written statements of close relatives; b) availability of a documented expressed wish of the deceased (according to paragraph 1 of part 1 of Article 6 of the Law of Ukraine “On Burial and Funeral Matters” of July 10, 2003, “all citizens have the right to have one’s body buried and to express one’s will as to the proper handling of the body after death, which for instance may be done in the form of a permission or a prohibition to perform an autopsy.”);

2. under the following conditions: a) absence of suspicion that the death was not due to natural causes; b) religious and other serious reasons.

If the death occurred as a result of external factors (trauma, asphyxia, under the influence of extreme temperatures, electrical current, poisoning, etc.), after an artificial abortion performed outside of a medical institution, death at work, sudden death of children during their first year of life and other individuals who were not under medical supervision, in case of unidentified deceased, as well as when there is a suspicion of death to be not due to natural causes, an autopsy is performed by a forensic expert who issues a medical death certificate (paragraph 2.3 of the Instructions on Filling Out and Issuing Medical Death Certificates (Form N106 /o) of August 8, 2006 No. 545).

The procedure for performing an autopsy is defined by the Ministry of Health of Ukraine in the Order of the Ministry of Health of Ukraine “On Development and Improvement of Autopsy Services in Ukraine” of May 12, 1992 No. 81. According to this legal act, bodies of deceased patients of medical institutions are generally subject to autopsy. The chief of staff of a medical institution or the head of an autopsy bureau has the right to cancel an autopsy only in exceptional cases. An autopsy is cancelled upon written instructions from the chief of staff of a medical institution or the head of an autopsy bureau which appear in a hospital file of a patient indicating the reasons for cancelling the autopsy. Disputes concerning an autopsy are resolved by the chief coroner of a region (a city). An urgent autopsy is allowed to be performed immediately after the doctors of a medical institution establish the fact of death; a planned autopsy is performed upon presenting the hospital file or the outpatient file of a deceased with instructions from the chief of staff of the medical institution or his deputy to perform an autopsy. Medical records of the deceased from various hospitals are delivered to an autopsy bureau (department) together with the corpse of the deceased. Medical hospital files of patients who died in the second half of the previous day must be forwarded to the autopsy bureau or the autopsy department of a hospital no later than by 9 am. Medical hospital files with the autopsy results are forwarded to the medical archive of the hospital within 5-7 days after the autopsy. The files may be retained for a longer period of time only with a special permission from the hospital administration.

An autopsy may not be cancelled when: a) a patient dies within 24 hours of being admitted to a hospital, b) medical forensic investigation is required, c) infectious diseases are involved or suspected, d) there was no definitive diagnosis established when the patient was alive (regardless of the period of stay in a hospital), e) a patient died in a health care facility after diagnostic procedures, a medical intervention, during or after surgery or blood transfusion, when individual intolerance to certain medications was overlooked, etc. The corpse of a deceased who has not been identified is sent for an autopsy by the order of the chief of staff of a medical institution.

## 8.5 APPENDIX 1

### SAMPLES OF PROCEDURAL DOCUMENTS

#### Information Administrator: Ministry of Health of Ukraine

<b>Requestor</b>	<i>(Last name, first name and patronymic- for physical persons, name</i>
	<i>of an organization, last name, first name and patronymic of a</i>
	<i>representative – for legal entities and public unions, that have no</i>
	<i>status of a legal entity post address or email, phone number)</i>

#### Request for information

According to the law of Ukraine “On Access to Public Information” please provide the following \_\_\_\_\_

*(general description of an information, or type, name,*

*props or content of the document)*

Please provide the following information in term established by the law *(indicate what is necessary):*

to post address	<i>(zip code, region, district, place, street,</i>
	<i>house, flat)</i>
to email	
by fax	
by phone	

\_\_\_\_\_  
*(date)*

\_\_\_\_\_  
*(signature)*



## ATTORNEY'S REQUEST TO OBTAIN NECESSARY MEDICAL INFORMATION

### ATTORNEY IVAN I. IVANOV

Certificate of the right of attorney No. 5  
issued on November 11, 2001  
by the Qualification and Disciplinary Commission at the Bar of city L.  
79000, city L., street D. 24/7, tel.: 222-22-22

Registration No. \_\_\_ of \_\_\_\_\_ 2011

To: Mr. Petrov, P. P.  
Regional Pathology Bureau of  
Region Kh.  
City Kh., Street \_\_\_\_\_

### ATTORNEY'S REQUEST

#### Dear Mr. Petrov:

In accordance with current legislation of Ukraine, while performing my duty to provide legal assistance to Sidor S. Sidorov, who protects his interests as the heir at the death of his father Sidor I. Sidorov, and in order to ascertain the actual circumstances of death of Mr. S.I. Sidorov and to establish objective evidence in the case,

under Part 4 of Article 285 of the Civil Code of Ukraine, Part 5 of Article 39 of the Law of Ukraine "Principles of Ukrainian Health Care Legislation" ("in case of the death of a patient, members of his/her family or other individuals authorized by them have the right to be present when the causes of his/her death are examined and to get acquainted with the conclusions regarding the causes of death as well as have the right to challenged these conclusions in court), Articles 1, 15, 20 of the Law of Ukraine "On Citizens' Requests", part 3 of Article 6 of the Law of Ukraine "On the Bar" (to request and receive documents or their copies from enterprises, institutions, organizations"), paragraph 9 of the Decree of the President of Ukraine "On Some Measures to Improve the Level of Advocacy" –

#### I request

to provide me, within the timeframe and in the scope provided for by the above listed legal acts, with copies of documents that contain the results of the investigation into the cause of death and findings as to the fact of death of S. I. Sidorov, including the autopsy protocol, for examination.

Enclosure: Agreement on legal assistance of December 10, 2010

Date:

Sincerely,

Attorney I. I. Ivanov

**Note:** According to Part 1 of Article 20 of the Law of Ukraine "On Citizens' Requests", requests that do not require additional examination are reviewed and resolved immediately but not later than within fifteen days from the date of their receipt.

## 8.6 APPENDIX 2

### INTERNATIONAL LEGAL CONTROL MECHANISMS

No.	Name	Address	Contact
1.	World Health Organization	Avenue Appia, 20 1211 Geneva 27 Switzerland	Web: <a href="http://www.who.int">http://www.who.int</a>
2.	International Labour Organization	Office Relations Branch 4 rue des Morillons, CH-1211, Geneva 22, Switzerland	Tel: +41.22.799.7732 Fax: +41.22.799.8944 E-mail: <a href="mailto:RELOFF@ilo.org">RELOFF@ilo.org</a>
3.	Human Rights Committee	OHCHR-UNOG CH 1211 Geneva 10 Switzerland Palais Wilson 52 rue des Pâquis CH-1201 Geneva, Switzerland.	Tel: +41 22 917 9249 Fax: +41 22 917 9006 E-mail: <a href="mailto:pgillibert@ohchr.org">pgillibert@ohchr.org</a> Web: <a href="http://www.unhchr.ch/html/menu2/6/hrc.htm">www.unhchr.ch/html/menu2/6/hrc.htm</a>
4.	Committee on Economic, Social and Cultural Rights	Office 1-025, Palais Wilson, Palais des Nations, 8-14 Avenue de la Paix, 1211 Geneva 10, Switzerland	Tel: +41 22 917 9321 Fax: +41 22 917 9046 E-mail: <a href="mailto:wlee@ohchr.org">wlee@ohchr.org</a> Web: <a href="http://www.unhchr.ch/html/menu2/6/cescr.htm">www.unhchr.ch/html/menu2/6/cescr.htm</a>
5.	Committee on the Elimination of Racial Discrimination	Office of the United Nations High Commissioner for Human Rights Palais des Nations CH-1211 Geneva 10, Switzerland	Tel: +41.22.917.93.09, Fax: +41.22.917.90.22 E-mail: <a href="mailto:nprouvez@ohchr.org">nprouvez@ohchr.org</a>
6.	Committee on the Elimination of Discrimination against Women	2 UN Plaza, DC2 – 12th Floor, New York, NY, 10017 USA	Tel: +1 (212) 963-8070, Fax: +1 (212) 963-3463 E-mail: <a href="mailto:changt@un.org">changt@un.org</a> Web: <a href="http://www.un.org/womenwatch/daw/cedaw/cedaw38/NGOnote.pdf">http://www.un.org/womenwatch/daw/cedaw/cedaw38/NGOnote.pdf</a>

No.	Name	Address	Contact
7.	Committee on the Rights of the Child	8-14 Avenue de la Paix, CH 1211 Geneva 10, Switzerland	Tel: +41 22 917 9000 Fax: +41 22 917 9022 E-mail: mandrijasevic@ohchr.org Web: www.ohchr.org/english/bodies/crc/index.htm
8.	Office of the High Commissioner for Human Rights	Office of the United Nations High Commissioner for Human Rights Palais des Nations CH-1211 Geneva 10, Switzerland Palais des Nations CH-1211 Geneva 10, Switzerland	Web: <a href="http://www2.ohchr.org">http://www2.ohchr.org</a>
9.	Office of the Commissioner for Human Rights	Council of Europe, Avenue de l'Europe F-67075 Strasbourg Cedex France	Tel: +33/ (0)3.88.41.35.38 Fax: +33/ (0)3.90.21.50.53 E-mail: press.commissioner@coe.int Web: <a href="http://www.coe.int/minorities">www.coe.int/minorities</a>
10.	The European Court of Human Rights	The Registrar, European Court of Human Rights, Council of Europe, F-67075 Strasbourg Cedex, FRANCE	Web: <a href="http://www.echr.coe.int/echr">http://www.echr.coe.int/echr</a>
11.	The Patients Association	PO Box 935 Harrow, Middlesex HA1 3YJ Great Britain	Web: <a href="http://www.patients-association.org.uk">http://www.patients-association.org.uk</a>
12.	Human Civil Liberties Association	125 Broad Street New York, NY 10004, USA	Web: <a href="http://www.tasz.hu">http://www.tasz.hu</a>

No.	Name	Address	Contact
13.	Human Rights Watch	Human Rights Watch 350 Fifth Avenue, 34th Floor New York, NY 10118-3299 USA  350 Fifth Avenue, 34th floor New York, NY 10118-3299 USA	Web: <a href="http://www.hrw.org">http://www.hrw.org</a>
14.	Amnesty International	1 Easton Street London WC1X 0DW, Great Britain	Web: <a href="http://amnesty.org.ua">http://amnesty.org.ua</a>
15.	UNAIDS	UNAIDS Secretariat 20, Avenue Appia CH-1211 Geneva 27 Switzerland	
16.	Physicians for Human Rights	2 Arrow Street, Suite 301 Cambridge, MA 02138 USA	Web: <a href="http://physiciansforhumanrights.org">http://physiciansforhumanrights.org</a>
17.	European Public Health Alliance	rue de Trives 49-51, B-1040 Brussels Belgium	Web: <a href="http://www.epha.org">http://www.epha.org</a> Web: <a href="http://www.unaids.org">http://www.unaids.org</a>

## 8.7 APPENDIX 3

### NATIONAL LEGAL CONTROL MECHANISMS

#### Governmental Bodies of Ukraine

No.	Name	Address	Contact
1.	Public Health Committee at Verkhovna Rada of Ukraine	Bulvar Lesi Ukrainky 1, Room 529, Kyiv, Ukraine	Tel.: 286-83-94, Email: droz@ rada.gov.ua Web: <a href="http://www.who.int">http://www.who.int</a>
2.	Commissioner of Verkhovna Rada of Ukraine on Human Rights	vul. Instytutska 21/8, Kyiv, 01008 Ukraine	Tel: +38-044-253-2203: Email: omb@ombudsman.gov.ua
3.	State Inspection on the Protection of Consumers' Rights	vul. Gorkogo 174 Kyiv-150, 03680 Ukraine	Tel: (044) 226-29-71; Fax: 528-56-00; Web: <a href="http://www.dssu.gov.ua">http://www.dssu.gov.ua</a>
4.	Ministry of Health of Ukraine	vul. Hrushevskoho 7, Kyiv, 01021 Ukraine	Tel: 226-22-05, Fax: 226-22-05 Email: moz@moz.gov.ua
5.	Ministry of Internal Affairs of Ukraine	vul. Akademika Bohomoltsia 10, Kyiv, 01024 Ukraine	Tel: (044)256-0333 Fax: (044)256-1633 Web: <a href="http://mvs.gov.ua/">http://mvs.gov.ua/</a>
6.	Ministry of Justice of Ukraine	vul. Horodetskoho 13 Kyiv, 01001 Ukraine	Tel: (044) 278-37-23 Web: <a href="http://www.minjust.gov.ua/">http://www.minjust.gov.ua/</a>
7.	Supreme Council of Justice of Ukraine	vul. Artema 89 Kyiv-50, 04050 Ukraine	Tel: (044)238-68-67 Fax: (044)238-68-66 Web: <a href="http://www.vru.gov.ua/">http://www.vru.gov.ua/</a>
8.	General Prosecutor of Ukraine	vul. Riznytska 13/15 Kyiv, Ukraine	Tel: (044) 280-10-20 Web: <a href="http://www.gp.gov.ua/">http://www.gp.gov.ua/</a>
9.	Central Bureau of Forensic Medical Examination	vul. Oranzhereina 9 Kyiv, 04112 Ukraine	Tel: (044) 456-60-98

No.	Name	Address	Contact
10.	Constitutional Court of Ukraine	vul. Zhylianska 14 Kyiv, 01033 Ukraine	Tel: (044) 238-10-11 Web: <a href="http://www.ccu.gov.ua/">http://www.ccu.gov.ua/</a>
11.	The Supreme Court of Ukraine	vul. P. Orlyka 4a Kyiv, 01024 Ukraine	Tel: (044)253-33-13 Web: <a href="http://www.scourt.gov.ua">http://www.scourt.gov.ua</a>
12.	Supreme Specialized Court of Ukraine on Civil and Criminal Affairs	vul. P. Orlyka 4a Kyiv, 01024 Ukraine	Tel: (044)253-11-41 Web: <a href="http://www.scourt.gov.ua/">http://www.scourt.gov.ua/</a>

### Civic Associations

No.	Name	Address	Contact
1.	Ukrainian National NGO "Foundation for Medical Law and Bioethics of Ukraine"	vul. Rybna 3, Office 19 Lviv, 79008 Ukraine	Tel: (032) 728001 Web: <a href="http://www.medicallaw.org.ua">http://www.medicallaw.org.ua</a>
2.	Ukrainian National Narcological Association	prov. Demiivskiy 5-a Kyiv, Ukraine	Tel: (044) 264-26-93
3.	Ukrainian National Medical Associations	vul. Tolstogo 7 Kyiv, Ukraine	Tel: (044) 475-43-94, 225-03-19, 510-43-94
4.	Ukrainian National NGO "Medical Law Association"	vul. Mayakovskogo 9, Apt. 50 Donetsk, Ukraine	
5.	Ukrainian National NGO "Ukrainian Medical Law Association"	vul. Saksahanskoho 75 Kyiv, Ukraine	umpa-info@ukr.net.
6.	Ukrainian National Council on Patients' Rights and Safety	vul. L. Pervomaiskoho 9a, Apt. 5 Kyiv, 01133 Ukraine	Tel: (044) 235-65-87, (067) 448-12-41
7.	Ukrainian National Association of Palliative Care	vul. Yaroslaviv Val 30a Kyiv, 01000 Ukraine	Web: <a href="http://www.palliative.com.ua/">http://www.palliative.com.ua/</a>

No.	Name	Address	Contact
8.	International Renaissance Foundation	vul. Artema 46, Kyiv, 04053 Ukraine	Web: <a href="http://www.irf.kief.ua">http://www.irf.kief.ua</a>
9.	International Network of Charitable Organizations Engaged in Supporting Community Development, Social Activities and Helping People	vul. Ozarkevycha 4, Lviv, 79016 Ukraine  vul. Kostiantynivska 22/17, Kyiv, 04071 Ukraine	Web: <a href="http://caritas-ua.org">http://caritas-ua.org</a>
10.	International HIV/AIDS Alliance in Ukraine	vul. Dymytrova 5, korpus 10A, 9th Floor, Kyiv, 03680 Ukraine	Tel: (+380 44) 490-5485, 490-5486, 490-5487, 490-5488 Fax: (+380 44) 490-5489
11.	Association of NGOs “Ukrainian National Association for Patients Rights «Health of the Nation»”	vul. Vyshhorodska, 36-b Kyiv, 04114 Ukraine	Tel: (044) 332-21-87 Web: <a href="http://pacient.com.ua/">http://pacient.com.ua/</a>
12.	Kharkiv Human Rights Group	Office of KhHRG (Legal Advice) vul. Ivanova 27, Apt. 4, Kharkiv, 61002 Ukraine  Office of KhHRG PO Box 10397 Kharkiv-2, 61002 Ukraine  PO Box 10430, Kharkiv-2, 61002 Ukraine	Tel: (057) 700 62 81 Tel/ Fax: (057) 700 67 72 Web: <a href="http://www.khpg.org">http://www.khpg.org</a>
13.	NGO “Institute for Legal Research and Strategies”	vul. Ivanova 27 Kharkiv, 61002 Ukraine	Tel/ Fax: (057) 700-67-71
14.	Red Cross Society of Ukraine, National Committee	vul. Pushkinska 30 Kyiv, 01004 Ukraine	Web: <a href="http://www.redcross.org.ua">http://www.redcross.org.ua</a>

No.	Name	Address	Contact
15.	Ukrainian Helsinki Human Rights Union	vul. Olehivska 36, Room 309 (3rd floor), Kyiv, 04071 Ukraine	Web: <a href="http://helsinki.org.ua">http://helsinki.org.ua</a>
16.	Ukrainian National NGO "Ukrainian League for Promoting Palliative and Hospice Care"		Web: <a href="http://lesyabratsyun@gmail.com">http://lesyabratsyun@gmail.com</a>
17.	MSI Project "Access to Legal Awareness in Ukraine «The Rule of Law»"	vul. Gorkogo 11, Office 3 Kyiv, 01004 Ukraine	Web: <a href="http://otropan@lep-msi.org.ua">http://otropan@lep-msi.org.ua</a>
18.	Vinniza Law Enforcement Group	21050, Vinniza, vul. Kozytskoho 54/1. Ukraine.	Tel.: (067)2846450 Fax.: (0432) 670504 Web: <a href="http://vpg@ukr.net">http://vpg@ukr.net</a>
19.	Southern Ukrainian Centre for Human Rights in Patient Care		Tel.: (0512) 670334 Fax. (0512) 478789
20.	International Public Organization International Association "Health of Society"	03049, Kiev, Vul. Kurska, 13-g, room, 65, Ukraine	Tel/Fax: (044) 242-13-59 Web: <a href="http://associomed@ukr.net">http://associomed@ukr.net</a>



## 8.8 APPENDIX 4

### RECOMMENDED LITERATURE

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10. Волков В., Дешко Л. Господарська діяльність всфері охорони здоров’я як предмет державного регулювання (Business activities in the health sector as a target of state regulation). / Матеріали итоговой научной конференции Донецкого национального университета за период 2003–2004 г.г. Правоведение / Отв. ред. В.Д. Волков. – Донецк: ДонНУ, 2005. – С. 65–68.
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# Glossary of Terms

## Related to Human Rights in Patient Care

### International Terms

#### A

##### **Acceptability**

One of four criteria set out by the Committee on Economic, Social and Cultural Rights by which to evaluate the right to the highest-attainable standard of health. “Acceptability” means that all health facilities, goods, and services must be respectful of medical ethics, culturally appropriate, and sensitive to gender and lifecycle requirements, and must also be designed to respect confidentiality and improve the health status of those concerned (Committee on Economic, Social and Cultural Rights, General Comment 14). See also “Accessibility,” “Availability,” and “Quality.”

## Accessibility

One of four criteria set out by Committee on Economic, Social and Cultural Rights by which to evaluate the right to the highest-attainable standard of health. “Accessibility” means that health facilities, goods, and services have to be accessible to everyone, without discrimination. Accessibility has four overlapping dimensions: nondiscrimination, physical accessibility, economic feasibility (affordability), and information accessibility (Committee on Economic, Social and Cultural Rights, General Comment 14). See also “Acceptability,” “Availability,” and “Quality.”

## Accession

Acceptance by a nonsignatory state of the opportunity to become a party to a treaty and to be legally bound by it, achieved by depositing an “instrument of accession.” Accession has the same legal effect as ratification, but unlike ratification, it is a one-step process. *Actio Popularis* (public action) Legal action brought by any member of a community in vindication of a public interest.

## Adoption

Formal act by which negotiating parties establish the form and content of a treaty. The treaty is adopted through a specific act that expresses the will of the states and the international organizations that are participating in the negotiation of that treaty, for example, by voting on the text, initialing, signing, etc. Adoption may also be the mechanism used to establish the form and content of amendments to a treaty or to regulations under a treaty.

Treaties that are negotiated within an international organization are usually adopted by resolution of the representative organ of that organization. For example, treaties negotiated under the auspices of the United Nations or any of its bodies are adopted by a resolution of the General Assembly of the United Nations.

## Adoption Theory

Theory maintaining that international law becomes an automatic part of domestic law following treaty accession or ratification, without further domestication.

*Amicus Curiae* (Friend of the Court) Legal document filed with the court by a third party, generally advocating a particular legal position or interpretation. (The plural form is “*amici curiae*.”)

## Ambulatory Care

Medical care provided on an outpatient basis, including diagnosis, observation, treatment, and rehabilitation.



## Availability

One of four criteria set out by Committee on Economic, Social and Cultural Rights by which to evaluate the right to the highest-attainable standard of health. “Availability” means that functioning public health and health care facilities, goods and services, and programs must be available in sufficient quantity—including the underlying determinants of health, such as safe drinking water, adequate sanitation facilities, clinics and health-related buildings, trained medical personnel, and essential drugs (Committee on Economic, Social and Cultural Rights, General Comment 14). See also “Acceptability,” “Accessibility,” and “Quality.”

# B

## Basic Needs

Used largely in the development of community to refer to basic health services, education, housing, and other goods that are necessary for a person to live.

## Bioethics

Refers to “the broad terrain of the moral problems of the life sciences, ordinarily taken to encompass medicine, biology, and some important aspects of the environmental, population and social sciences. The traditional domain of medical ethics would be included in this array, accompanied now by many other topics and problems.” (Encyclopedia of Bioethics, Warren T. Reich, editor-in-chief, New York: Simon & Schuster Macmillan, 1995, page 250)

## Biomedicine

The term unifies fields of clinical medicine and research for health purposes. Broadly it is also defined as the application of the principles of the natural sciences, especially biology and physiology, to clinical medicine.

## C

**Concluding Observations**

Recommendations by a treaty's enforcement mechanism on the actions that a state should take in ensuring compliance with the treaty's obligations. Concluding observations generally follow both submission of a state's country report and a constructive dialogue with state representatives.

**Country Report**

State's report to the enforcement mechanism of a particular treaty on the progress that it has made in implementing it.

**Convention**

Term used interchangeably with "treaty," but can also have the specific meaning of a treaty binding a broad number of nations. Conventions are normally open for participation to the international community as a whole or a large number of states. Usually, instruments negotiated under the auspices of an international organization are entitled conventions, as are instruments adopted by an organ of an international organization.

**Customary International Law**

One of the sources of international law, consisting of rules of law derived from the consistent conduct of states, acting with the belief that the law requires them to act that way. It follows that customary international law can be discerned by states' widespread repetition of similar international acts over time (state practice). These acts must occur out of a sense of obligation and must be taken by a significant number of states and not be rejected by a significant number of states. A particular category of customary international law, *jus cogens*, refers to a principle of international law that is so fundamental that no state may opt out by way of treaty or otherwise. Examples might include prohibitions against slavery, against genocide, and against torture and crimes against humanity. Other examples of customary international law include the principle of non-refoulement and, debatably, the right to humanitarian intervention.

# D

## **De Facto (in fact, in reality)**

Situation or condition that exists that may not be explicitly expressed by law. For example, a law that is neutral on paper may be enforced in a discriminatory manner based on social or cultural contexts.

## **De Jure (by right, lawful)**

Situation or condition that is based on a matter of law, such as those detailed in ratified treaties.

## **Declaration**

An interpretive declaration by a state as to its understanding of some matter covered by a treaty or its interpretation of a particular provision. Unlike reservations, declarations merely clarify a state's position and do not purport to exclude or modify the legal effect of a treaty.

## **Dignity**

Quality of being worthy, honored, or esteemed. Human rights are based on inherent human dignity and aim to protect and promote it.

## **Discrimination**

Practical distinction between persons on the basis of race, sex, religion, political opinions, national or social origin, minority status, or personal antipathy.

## **Domestication**

Process by which an international treaty is incorporated into domestic legislation.

## **Dual Loyalty**

Role conflict between professional duties to a patient and to obligations—express or implied, real or perceived—to the interests of a third party, such as an employer, insurer, or the state.

## E

### **Entry into Force**

Moment in time in which a treaty becomes legally binding on the parties to the treaty. The provisions of the treaty determine its entry into force, which may occur, for example, on a date specified in the treaty or a date on which a specified number of ratifications, approvals, acceptances, or accessions have been deposited with the depositary.

### **Essential Medicines**

Medicines that satisfy the priority health care needs of the population. Essential medicines are intended to be available at all times in adequate amounts, in the appropriate dosage forms, with assured quality, and at a price the individual and the community can afford.

### **Exhaustion of Domestic Remedies**

Condition required before submission of a complaint on behalf of a victim to any regional or international tribunal—in other words, all available procedures must first be used to seek protection from future human rights violations and to obtain justice for past abuses. There are limited exceptions to the requirement that domestic remedies be exhausted: for example, remedies may be unavailable, ineffective (as in a sham proceeding), or unreasonably delayed.

## G

### **General Comments/Recommendations**

Interpretive texts issued by a treaty's enforcement mechanism on the content of particular rights. Although these comments/recommendations are not legally binding, they are widely regarded as authoritative and have significant legal weight.

# H

## **Health**

State of complete physical, mental, and social well-being, rather than merely the absence of disease or infirmity (World Health Organization).

## **Health Care**

1. Prevention, treatment, and management of illness and the preservation of mental and physical wellbeing through the services offered by the medical, nursing, and allied health professions. This definition and similar definitions are also sometimes given for “patient care.” The World Health Organization states that “health care” embraces all the goods and services designed to promote health, including preventive, curative, and palliative interventions, whether directed to individuals or populations.
2. Any type of services provided by professionals or paraprofessionals with an impact on health status (European Observatory on Health Systems and Policy).
3. Medical, nursing, or allied services dispensed by health care providers and health care establishments (Declaration on the Promotion of Patients’ Rights in Europe, World Health Organization, 1994). See also “Patient Care.”

## **Health Care Establishment**

Any health care facility, such as a hospital, nursing home, or establishment for disabled persons (Declaration on the Promotion of Patients’ Rights in Europe, World Health Organization, 1994).

## **Health Care Providers**

Physicians, nurses, dentists, or other health professionals (Declaration on the Promotion of Patients’ Rights in Europe, World Health Organization, 1994).

## **Health Care System**

The organized provision of health care services.

## Human Rights

Entitlements, freedoms, and privileges that adhere to all human beings, regardless of jurisdiction or other factors such as ethnicity, nationality, religion, or sex.

Human rights are universal legal guarantees that protect individuals and groups from interference with fundamental freedoms and human dignity. As defined in The United Nations System and Human Rights:

Guidelines and Information for the Resident Coordinator System (United Nations, Administrative Committee on Coordination, 2000), some of the most important characteristics of human rights are that they:

- are guaranteed by international standards;
- are legally protected;
- focus on the dignity of human beings;
- oblige states and state actors;
- cannot be waived or taken away;
- are interdependent and interrelated;
- are universal.

## Human Rights Indicators

Criteria used to measure compliance with international human rights standards.

Human Rights in Patient Care Concept that refers to the application of basic human rights principles to all stakeholders in the delivery of health care services, including patients and health care providers. The concept is complementary to bioethics but also provides a set of universally accepted norms and procedures for making conclusions about abuses within health care settings and for providing remedies. It uses standards contained in the international human rights framework, which are often mirrored in regional treaties and national constitutions. Human rights in patient care differs from patients' rights, which codify particular rights that are relevant only to patients. It draws on concepts, such as dual loyalty, in which health care providers have simultaneous and often conflicting obligations to their patients and to the state. See also "Dual Loyalty."

## **Interdependent/Indivisible**

Term used to describe the relationship between civil and political rights and economic and social rights.

Interdependence and indivisibility mean that one set of rights does not take precedence over the other, and that guaranteeing each set of rights is contingent upon guaranteeing the other.

## **Indirect Discrimination**

Descriptive term for a situation in which the effect of certain imposed requirements, conditions, or practices has a disproportionately adverse impact on a particular group. Indirect discrimination generally occurs when a rule or condition that applies to everyone is met by a considerably smaller proportion of people from a particular group, the rule is to their disadvantage, and the rule cannot be justified on other grounds.

## **Individual Rights in Patient Care**

Rights that, when made operational, can be made enforceable on behalf of an individual patient. Individual rights in patient care are more readily expressed in absolute terms than are social rights in health care (Declaration on the Promotion of Patients' Rights in Europe, World Health Organization, 1994). See also "Social Rights in Health Care" and "Patients' Rights."

## **Informed Consent**

Legal condition in which a person can be said to agree to a course of action based upon an appreciation and understanding of the facts and implications. The individual needs to be in possession of relevant facts and the ability to reason in order for consent to be considered informed consent.

## **Informed Consent in the Health Care Context**

Process by which a patient participates in health care choices. The patient must be provided with adequate and understandable information on matters such as the treatment's purpose, alternative treatments, risks, and side effects.

## **Inpatient**

A patient whose care requires a stay in a hospital or hospice facility for at least one night.

## **International Human Rights Law**

Codification of the legal provisions governing human rights in various international and regional human rights instruments.

## **International Law**

Set of rules and legal instruments that are regarded and accepted as binding agreements between nations. International law is typically divided into public international law and private international law. Sources are (a) custom; (b) treaties; (c) general principles of law; and (d) judicial decisions and juristic writings (Article 38[1] [d] of the Statute of the International Court of Justice).

## **J**

### **Jus Cogens (Compelling Law)**

Peremptory principle of international law (for example, prohibition on torture) from which no derogation by treaty is permitted.

## **M**

### **Management of Quality**

A coordinated activity, which consists in control and direction of organization as regards quality. (Ministry of Health of Ukraine, Order “On Approval of a Single Terminological Dictionary (*Glossary*) on the issues of quality of medical care management” of July 20 2011 No. 427).



## **Maximum Available Resources**

Key provision in Article 2 of the International Covenant on Economic, Social and Cultural Rights, which obliges governments to devote the maximum amount of available government resources to realizing economic, social, and cultural rights.

## **Medical Intervention**

Any examination, treatment, or other act that has preventive, diagnostic, therapeutic, or rehabilitative aims and which is carried out by a physician or other health care provider (Declaration on the Promotion of Patients' Rights in Europe, World Health Organization, 1994).

## **Monitoring/Fact Finding/Investigation**

Terms often used interchangeably, generally intended to mean the tracking and/or gathering of information about government practices and actions related to human rights.

# **N**

## **Negative Rights**

Rights under which a state is obliged to refrain from unjustly interfering with a person and/or with their attempt to act.

## **Neglected Diseases**

Diseases affecting almost exclusively poor and powerless people in rural parts of low-income countries that generally receive less attention and fewer resources.

## O

### **Outpatient**

Patient receiving treatment without any overnight stays at a health care institution.

## P

### **Party**

State or other entity with treaty-making capacity that has expressed its consent to be bound by that treaty through an act of ratification, acceptance, approval, or accession, etc., and where that treaty has entered into force for that particular state or entity. The state or entity is bound by the treaty under international law (Article 2[1][g] of the Vienna Convention, 1969).

### **Patient**

1. User(s) of health care services, whether healthy or sick (Declaration on the Promotion of Patients' Rights in Europe, World Health Organization, 1994).
2. A person in contact with the health system, seeking attention for a health condition (European Observatory on Health Systems and Policies).

### **Patient Autonomy**

The right of patients to make decisions about their medical care. Although providers can educate and inform patients, they cannot make decisions for those patients.

### **Patient Care**

The services rendered by members of the health professions or by nonprofessionals under the supervision of health professionals for the benefit of the patient. See also "Health Care."

## **Patient-Centered Care**

Doctrine recognizing the provision of health care services as a partnership among health care providers, patients, and patients' families. Decisions about medical treatments must respect patients' desires, needs, preferences, and values.

## **Patient Confidentiality**

Doctrine that holds that the physician has the duty to maintain patient confidences. This is to allow patients to make full and frank disclosure to their physician, enabling appropriate treatment and diagnosis.

## **Patient Mobility**

Concept describing patient movement beyond their catchment area or area of residence to access health care; mobility can take place within the same country or between countries.

## **Patient Responsibility**

Doctrine recognizing the doctor-patient relationship as a partnership in which each side assumes certain obligations. Patients' responsibilities include communicating openly with the physician or provider, participating in decisions about diagnostic and treatment recommendations, and complying with the agreed-upon treatment program.

## **Patients' Rights**

1. Set of rights calling for the accountability of the government and the health care provider in the provision of quality health services. Patients' rights are associated with a movement that has emerged as the result of increasing concern about human rights abuses in health care settings, particularly in countries in which patients assume a greater share of health care costs and, therefore, demand respect for their rights as "consumers" of health care services.
2. Set of rights, responsibilities, and duties under which individuals seek and receive health care services (European Observatory on Health Systems and Policies).
3. That which physicians and the state owe to a patient simply due to his or her status as a human being.

## **Patient Safety**

Freedom from accidental injury due to medical care or medical errors (Institute of Medicine).

## **Positive Rights**

Rights under which a state is obliged to act for an individual's benefit.

## **Primary Health Care**

1. General health services that are available in a community, located near the places where people live and work.
2. First level of contact that individuals and families have with the health system.

## **Progressive Realization**

Requirement in Article 2 of the International Covenant on Economic, Social and Cultural Rights that governments move as expeditiously and effectively as possible toward the goal of realizing economic, social, and cultural rights and to ensure that there are no regressive developments.

## **Protocol**

Section in a treaty that clarifies terms, adds additional text as amendments, or establishes new obligations (such as quantitative targets for nations to achieve, for example).

## **Public Health**

Collective actions of a society to ensure conditions in which people can be healthy (Institute of Medicine).

## **Public International Law**

Body of laws that establish the framework and the criteria for identifying states as the principal actors in the international legal system. Public international law deals with the acquisition of territory, state immunity, and the legal responsibility of states in their conduct with each other. It is also concerned with the treatment of individuals within state boundaries, including human rights, the treatment of aliens, the rights of refugees, international crimes, and nationality. It further includes the maintenance of international peace and security, arms control, the pacific settlement of disputes, and the regulation of the use of force in international relations. Branches, therefore, include international human rights law, international humanitarian law, refugee law, and international criminal law.

# Q

## Quality

One of four criteria set out by Committee on Economic, Social, and Cultural Rights by which to evaluate the right to the highest-attainable standard of health. “Quality” means that health facilities, goods, and services must be scientifically and medically appropriate and of good quality—including skilled medical personnel, scientifically approved and unexpired drugs, and hospital equipment (Committee on Economic, Social and Cultural Rights, General Comment 14). See also “Acceptability,” “Accountability,” and “Availability.”

# R

## Ratification

Formal acceptance of the rights and obligations of a treaty. If a treaty has entered into force, the treaty thereafter becomes legally binding to parties that have ratified the treaty. Ratification requires two steps: (1) the execution of an instrument of ratification, acceptance, or approval by the head of state, head of government, or minister for foreign affairs, expressing the intent of the state to be bound by the relevant treaty; and (2) for multilateral treaties, the deposit of the instrument with the depositary; for bilateral treaties, the exchange of the instruments between parties.

## Reservation

Statement by which a state purports to exclude or alter the legal effect of certain provisions of a treaty in their application to that state. A reservation may enable a State to participate in a multilateral treaty in which it would otherwise be unable or unwilling to participate. States can make reservations to a treaty when they sign, ratify, accept, approve, or accede to it. When a state makes a reservation upon signing, it must confirm the reservation upon ratification, acceptance, or approval. Because the reservation purports to modify the legal obligations of a state, it must be signed by the head of state, head of government, or minister for foreign affairs. Reservations cannot be contrary to the object and purpose of the treaty. Some treaties prohibit reservations or only permit specified reservations.

## **Respect, Protect, and Fulfill**

Governments' obligations with respect to rights. **Respect:** Government must not act directly counter to the human rights standard. **Protect:** Government must act to stop others from violating the human rights standard. **Fulfill:** Government has an affirmative duty to take appropriate measures to ensure that the human rights standard is attained.

## **Right to Health**

Right to the enjoyment of a variety of facilities, goods, services, and conditions necessary for the realization of the highest-attainable standard of physical and mental health (Committee on Economic, Social and Cultural Rights, General Comment 14).

# S

## **Secondary Health Care**

General health services that are available in hospitals.

## **Social Rights in Health Care**

Category of rights that relate to the societal obligation undertaken or otherwise enforced by government and other public or private bodies to make a reasonable provision of health care for the whole population. These rights also relate to equal access to health care for all those living in a country or other geopolitical area and also to the elimination of unjustified discriminatory barriers, whether financial, geographical, cultural, social, or psychological. Social rights in health care are enjoyed collectively (Declaration on the Promotion of Patients' Rights in Europe, World Health Organization, 1994). See also "Individual Rights in Patient Care."

## **Self-Executing Treaty**

Treaty that does not require implementing legislation for its provisions to have effect in domestic law.

## Shadow Report

Independent NGO's submission to a treaty-enforcement mechanism in order to help the NGO assess a state's compliance with that treaty.

## Signatory

Party that has signed an agreement. A signatory to a treaty is not yet legally bound by the treaty; instead, a signatory agrees to an obligation not to defeat the object and purpose of the signed treaty. See also "Ratification."

## Special Rapporteurs

Individuals appointed by the Human Rights Council to investigate human rights violations and then present an annual report with recommendations for action. There are both country-specific and thematic special rapporteurs, including one investigating violations of the right to the highest-attainable standard of health.

# T

## Terminal Care

Care given to a patient when it is no longer possible to improve the fatal prognosis of his or her illness/condition with available treatment methods and also the care given at the approach of death (Declaration on the Promotion of Patients' Rights in Europe, World Health Organization, 1994).

## Tertiary Health Care

Specialized health services that are available in hospitals.

## Transformation Theory

Theory maintaining that international law only becomes part of domestic law after domestication and after the incorporation of treaty provisions into domestic legislation.

## **Treaty**

Formal agreement entered into by two or more nations, which is binding upon them. A bilateral treaty is a treaty between two parties. A multilateral treaty is a treaty between more than two parties.

# W

## **Working Groups**

Small committees appointed by the Human Rights Council to study a particular human rights issue. Working groups write to government officials concerning urgent cases and also help prevent future violations by developing clarifying criteria as to what constitutes a human rights violation.



# Country-specific Terms

## A

### Access to Medical Care

**1.** Free access to health care services, notwithstanding geographical, economical, social, cultural, organizational or language barriers (On Approval of a Unitary Glossary of Definitions (Glossary) on the Issues of Management of Medical Care Quality: Order of the Ministry of Health of Ukraine of July 20, 2011 No. 427. **2.** Is a multi-dimensional concept that includes a balance of many factors (personnel, finance, means of transportation, freedom of choice, civic literacy, population, quality and distribution of technical resources) within strict practical limits that are determined by the resources and capabilities of the state. Access to medical care is ensured by the following conditions: each individual has access to necessary medical care (i.e. no physical or temporary restrictions are present); there is maximum freedom of choice of the providers, a system of medical care and payment that meets diverse needs of the population; awareness, education and informedness of the population regarding all the elements of medical care; adequate participation of all the parties in the system development and management (*World Medical Assembly, Provision on the Access to Care (1988)*).

### Accreditation Certificate

Is a document issued by the accreditation body which officially confirms the capability of a specialized laboratory to provide reliable tests (studies) during a specified period of time (*Cabinet of Ministers of Ukraine, Resolution «Issue of Prevention and Protection of the Population from HIV Infection and AIDS» of December 18, 1998, No. 2026*).

### Accreditation

Is a procedure by which the Ministry of Health of Ukraine determines competence of an institution (an enterprise, an organizations, an agency) to carry out tests to meet the needs of public sanitary and hygiene inspections, to provide scientific substantiation of safety criteria and establish the conditions for the use of facilities under inspection, to prepare drafts of conclusions (*Ministry of Health of Ukraine, Order «On Approval of the Interim Procedure for Carrying Out Public Sanitary and Hygiene Inspections» of October 9, 2000 No. 247*).

## **Accredited Laboratory**

Is a laboratory which was accredited in accordance with an established procedure and is authorized by the state bodies to conduct laboratory tests (*Ministry of Health of Ukraine, Order «On the Procedure for Certification of Medicines» of October 30, 2002 No. 391*).

## **Acquired Immune Deficiency Syndrome (AIDS)**

*A stage of disease development, caused by HIV (HIV-infection), that is characterized by clinical demonstrations, caused by deep affections of the immune system of a person under the influence of HIV (Supreme Rada of Ukraine Law of Ukraine “On Resistance to diseases caused by Human immunodeficiency virus (HIV) and social and legal protection of persons living with HIV” of December 23, 2010 No. 2861- VI).*

## **Amnesty**

Is a full or partial exemption from criminal liability and punishment of certain categories of individuals convicted of a crime or against whom an inquiry agency has initiated criminal proceedings, pretrial investigation, or trial without conclusions having been reached or sentences regarding these individuals having gained legal force (*Verkhovna Rada of Ukraine, Law “On the Use of Amnesty in Ukraine” of October 1, 1996 No. 392/96*).

## **Analysis of Health Risks**

Is the process of obtaining information necessary to prevent adverse consequences to health and life. It includes stages of risk assessment, risk management and dissemination of information about the risk (*Ministry of Health of Ukraine, Order «On Approval of the Methodological Recommendations ‘Assessment of Health Risks to the Population from Air Pollution’” of April 13, 2007 No. 184*).

## **Anamnesis**

Is information about patient's health, development of a disease, living conditions, previous diseases, etc. which is accumulated to establish diagnosis and prognosis, to carry out treatment and prevention. This information is received by means of patient surveys, interviews with those who know him, and study of relevant information. Background anamnesis contains information about health of parents and other blood relatives, specificity of physical and mental development during different age periods, social origin, living conditions, social status and social activities of an individual.

## Anonymous Counseling and Testing

Are counseling and testing without individual's identifying information being revealed (passport details: full name, date of birth, place of residence, work or study, etc.) (*Ministry of Health of Ukraine, Order «On Improving Voluntary Counseling and Testing for HIV Infection» of August 19, 2005 No. 415*).

## B

### Bioethics

Is a complex science that aims to investigate and resolve moral, ethical, legal, social, economic and philosophical issues in health care; in particular, those related to providing medical assistance while ensuring human rights of subjects of medical relations.

## C

### Child

Is (1) a person under 18 years of age (the age of majority) as long as, according to the law applied to him/her, he/she does not acquire majority rights earlier (*Verkhovna Rada of Ukraine, Law "On Protection of Childhood" of April 26, 2001 No. 2402III*); (2) a person prior to reaching majority has a legal status of a child (*Verkhovna Rada of Ukraine, Family Code of January 10, 2002 No. 2947III*).

## Clinical Track of a Patient

Is a regulatory document of a regional and/or local level that aims to ensure provision of continuous, efficient and economically expedient medical care in the case of certain diseases and other pathological conditions in accordance with the Unified Clinical Health Care Protocol (UCHCP), ensures coordination and scheduling of technologies and methods of providing health care of multi– (inter) disciplinary nature, regulates registration of medical information and clinical audit, is approved by the chief of staff of the health care institution (*Ministry of Health of Ukraine, Academy of Medical Sciences Order «On Approval of the Uniform Methods for Developing Clinical Guidelines, Medical Standards, Uniform Clinical Protocols for Medical Assistance, Local Protocols for Medical Assistance (Clinical Tracks for Patients) on Evidencebased Medicine» of February 19, 2009 No. 102/18*) (in the wording of July, 20 2010, No. 594/71).

## Clinical Instruction

*A document, that contains systematized provisions as regards medical and medical-social care, worked out by using methodology of evidence-based medicine and on the grounds of approving its reliability and is aimed at helping a doctor and a patient when making a rational decision in different clinical situations. (Ministry of Health of Ukraine, Academy of Medical Sciences of Ukraine, Order “On Approval of Methodological Recommendations “Unified Methods of Working out Clinical Instructions, Medical Standards, Unified Clinical Protocols of Medical Care, Local Protocols of Medical Care (Clinical Routes of Patients) on the Grounds of Evidence-based Medicine) (Part one), of February 2, 2009 No. 102/18 (in the wording of July 20, 2010, No. 594/71)).*

## Clinical Protocol

*A unified document that determines the requirements to diagnostic, medical prophylactic and rehabilitation methods of medical care provision and their sequence. (Supreme Rada of Ukraine Law of Ukraine “Principles of Ukrainian Health Care Legislation).*

## Clinics

Are health care institutions that provide health care to people with certain types of diseases and conduct regular screenings of the population. Clinics may have an inpatient division. Clinics can be set up and function only if the number of outpatient physicians on their staff is not less than 5. (*Ministry of Health of Ukraine, Order “On Approval of the Register of Health Care Institutions, Medical and Pharmaceutical Positions for Junior Specialists with Pharmaceutical Education at Health Care Institutions” of October 28, 2002 No. 385).*

## **Close Relatives**

Are parents, wives, husbands, children, brothers and sisters, grandfathers, grandmothers, grandchildren (*Verkhovna Rada of Ukraine, Criminal Procedure Code of December 28, 1960*).

## **Confidentiality**

Is withholding the information that belongs to a sponsor or allows one to establish the identity of a participant in a trial from unauthorized individuals (*Ministry of Health of Ukraine, Order «On Approval of the Documents on Ensuring Quality of Medicines» of February 16, 2009 No. 95*).

## **Control Over Quality of Medical Care (Internal)**

A control that is conducted by way of expertise of whether medical care that was provided meets the requirements of state standards, clinical protocols by medical and consulting commissions, pathological and clinical conferences, doctors (self-control) and by the administration of health care institution (*Ministry of Health of Ukraine, Order “On Approval an Order of Control and Quality of Medical Care Management” of March 26, No. 189*).

## **Control Over Quality of Medical Care (External)**

Control over observance of state requirements to quality of medical care. External control over quality of medical care can be precautionary or current (*Ministry of Health of Ukraine, Order “On Approval an Order of Control and Quality of Medical Care Management” of March 26, No. 189*).

# D

## Diagnosis

Is (1) doctor's brief conclusion about the nature of an illness and a functional status of the patient, expressed in terms of modern medical science (designating an illness using the established disease classification and identifying individual characteristics of patient's organism) (*Ministry of Health of Ukraine, Order «On Approval of the Provision on Temporary Disability Examination» of April 9, 2008 No. 189*); (2) medical report on pathological state of health, on presence of the disease (injury) or on causes of death, which uses terms adopted by the established classification of diseases in accordance with the International Classification of Diseases, Eleventh Revision (ICDXI). Identification of the disease is a complex multifaceted process that involves a comprehensive examination of the patient, analysis of uncovered abnormalities in the functioning of the living organism, and signs (symptoms) of the disease. Diagnosis is formulated using established rules and has a clear structure.

## Disability Leave Certificate

Is a multifunctional document that forms grounds for a paid leave of absence from work due to disability of an insured individual in the event of temporary disability, pregnancy, and childbirth (*Ministry of Health of Ukraine, Ministry of Labor of Ukraine, Social Insurance Fund of Ukraine against Temporary Disability, Social Insurance Fund of Ukraine against Industrial Accidents and Occupational Diseases, Order "Instructions on the Procedure for Filling Out a Disability Leave Certificate" of November 3, 2004 No. 532 / 274/136os/1406*).

## Discharge Epicrisis (Discharge Report)

Is the last part of an inpatient file or a childbirth record, a brief conclusion written by a doctor about the progression of the disease, results of tests and treatment, state of the patient at the time of discharge from the hospital, prognosis, and advice on further treatment and rehabilitation (*Ministry of Health of Ukraine, Order "On the Organization of Inpatient Obstetric, Gynecological, and Neonatal Care in Ukraine" of December 29, 2003 No. 620*).

## Discrimination

Is any division, exclusion or preference which negates or violates equal rights (*UN General Assembly, Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (1992)*).

# E

## **Effectiveness**

The level of health improvement by medical interventions (including modern level of knowledge) under ordinary practical conditions. Circumstances, that define the differences between ordinary conditions of medical care provision and controlled medical investigations. They include collateral diseases, as a result of which it is impossible to foresee, whether a patient will observe treatment regimen, as well as differences in practice of providing medical care. (Ministry of Health of Ukraine, Order “On Approval of a Single Terminological Dictionary (Glossary) on the issues of quality of medical care management” of July 20 2011 No. 427).

## **Efficiency**

Achievement of a result that was planned by way of using minimum resources (Ministry of Health of Ukraine, Order “On Approval of a Single Terminological Dictionary (Glossary) on the issues of quality of medical care management” of July 20 2011 No. 427).

## **Epicrisis (Report)**

Is a mandatory informative part of an inpatient or outpatient file which is designed to share information between outpatient and inpatient facilities regarding diagnosis, progression of the disease, state of the patient at the time of referral (discharge), tests and treatment that have been carried out, medical recommendations for the patient.

## **Equal Access to Existing Types of Health Care Aimed to Satisfy Equal Needs**

Is equal rights and opportunities as to existing types of services for everyone, their fair distribution across the country based on health care needs, easy access to them in each geographical area as well as removal of all the obstacles to such an access.

## **Evaluation of Medical Care Quality**

Determination whether medical care that was provided meets current standards, expectations and needs of separate patients and groups of people. (Ministry of Health of Ukraine, Order “On Approval of a Single Terminological Dictionary (Glossary) on the issues of quality of medical care management” of July 20 2011 No. 427).

## Evidence-based Medicine

Is fair, accurate and conscious use of the best clinical research results for selecting a particular treatment for a patient (*Ministry of Health of Ukraine, Order «On Approval of the Uniform Methods for Developing Clinical Guidelines, Medical Standards, Uniform Clinical Protocols for Medical Assistance, Local Protocols for Medical Assistance (Clinical Tracks for Patients) on Evidencebased Medicine» of February 19, 2009 No. 102/18*).

## F

### Family Members

Are individuals who are married, live as one family but are not married to each other, their children, individuals under guardianship or care, are related directly or indirectly as long as they live together (*Verkhovna Rada of Ukraine, Law «On Prevention of Domestic Violence» of November 15, 2001 No. 2789III*).

### Forensic Examination

Is research conducted by experts on the basis of specialized knowledge of material objects, phenomena and processes that contain information about the circumstances of the case under investigation, pretrial inquiry or on trial (*Verkhovna Rada of Ukraine, Law «On Forensic Examination» of February 25, 1994 No. 4038XII*).

### Free of Charge Medical Assistance:

Is state and municipal health care facilities, medical assistance is provided to all citizens regardless of its extent without any prior, current or future payment for the provision of this assistance (*Constitutional Court of Ukraine, Decisions (the case of free health care) of May 29, 2002 No. 10rp/2002*).



# G

## **Geographical Accessibility of Health Services**

Is a fair distribution of relevant services within a particular state or in every village (*World Health Organization, Regional Office for Europe, Policy and Strategy to Ensure Fairness in Matters of Health (1992)*).

# H

## **Health Care at Home**

Is a system of provision of medical assistance (medical services) to persons who can not for reasons of health see a doctor in his/her office and patients who require hospitalization but who have not been hospitalized for a number of reasons. Health care at home can be organized centrally when a specialized subdivision is set up.

## **Health Care Institution**

Legal entity of any form of ownership and legal and organizational form or its separated division, which major tasks are providing medical care to the population on the grounds of a certain license and professional activity of medical (pharmaceutical) workers. (*Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 No. 2801XII*).

## **Health Insurance Contract**

Is an agreement between the insured (local government, enterprise, organization, institution, individuals who conduct business activities and private individuals) and insurance companies that provide health insurance and guarantee financing of comprehensive quality medical care or other medical services covered by the programs of mandatory and voluntary health insurance. A health insurance contract should include names of the parties, contract term, the number of individuals insured, the amount, terms and procedure for payment of insurance premiums, a list of medical services, voluntary or mandatory insurance program, responsibilities of the parties and other conditions.

## Health

Is a state of complete physical, mental and social wellbeing and not merely the absence of a disease or infirmity (*Verkhovna Rada of Ukraine, Law “Principles of Ukrainian Health Care Legislation” of November 19, 1992 No. 2801XII*).

## HIV Status

Is presence or absence of HIV infection established on the basis of laboratory test results (*Ministry of Health of Ukraine, Order “On Improving Voluntary Counseling and Testing for HIV Infection” of August 19, 2005 No. 415*).

## Hospital

Is a health care institution designed to provide inpatient medical care. A hospital that provides patients with inpatient health care within a single medical specialization is called a single specialization hospital and a hospital that provides patients with inpatient health care within several medical specializations is called a multiple specialization hospital. Single specialization hospitals are set up to provide medical assistance to the population of a certain restricted area (a city or a district), specialized hospitals are designed to provide specialized medical assistance on a higher regional level (republic, region, cities of Kyiv and Sevastopol). A hospital may have an outpatient division. A hospital that also functions as a seat of public health care administration of a district is called a central district hospital, of a city is called a central city hospital (*Ministry of Health of Ukraine, Order “On Approval of the Register of Health Care Institutions, Medical and Pharmaceutical Positions for Junior Specialists with Pharmaceutical Education at Health Care Institutions” of October 28, 2002 No. 385*).

## Human Rights in Health Care

Are fixed and guaranteed by the Constitution and laws of Ukraine; they are a set of interconnected and interdependent opportunities defined by international acts to use all measures aimed to preserve, develop or restore a state of complete physical, mental and social wellbeing and compensate for any health damage.



## **Iatrogenic Disease**

Is a new disease that arose either inadvertently or inevitably, or a pathological condition that is a direct consequence of medical intervention carried out in the course of diagnosis, treatment or prevention.

## **Illegal Medical Activities**

Are medical activities carried out without special permission by an individual who has no proper medical education (*Verkhovna Rada of Ukraine, Criminal Code of April 5, 2001 No. 2341III*).

## **Information on Risk**

Is sharing of information about risk and risk management between an individual responsible for decision making and other participants (*Ministry of Health of Ukraine, Order «On Approval of the Documents on Ensuring Quality of Medicines» of February 16, 2009 No. 95*).

## Informed Consent

Is (1) a decision to participate in a clinical trial that should be drawn up in writing, dated and signed; is made voluntarily after being properly informed of the nature of the trial, its significance, impact and risks; is properly executed and is made by an individual capable to give consent, or his/her legal representative; in exceptional cases, when the relevant individual is unable to write, he/she may give an oral consent in the presence of at least one witness (Ministry of Health of Ukraine, Order “On Approval of the Procedure for Clinical Trials of Medicines and Expert Examination of Clinical Trial Records and a Model Provision on Ethics Commission” of September 23, 2009 No. 690); (2) a procedure by which a subject voluntarily agrees to participate in a particular clinical trial after being acquainted with all the aspects of the study which may affect his/her decision. An informed consent is formalized by signing and dating the consent form (Ministry of Health of Ukraine, Order «On Approval of the Documents on Ensuring Quality of Medicines» of February 16, 2009 No. 95); (3) a decision to participate in a clinical trial made voluntarily after being properly informed of the nature of the clinical trial, its significance, impact and risks. The decision should be made in writing, dated and signed (Ministry of Health of Ukraine, Order « On Approval of the Procedure for Conducting Clinical Trials of Tissue and Cell Transplants and Expert Examination of Clinical Trial Records and on Amendments to the Procedure for Conducting Clinical Trials of Medicines and Expert Examination of Clinical Trial Records approved by the Ministry of Health of Ukraine on February 13, 2006 No. 66” of October 10, 2007 No. 630); (4) a decision to participate in a clinical trial which should be drawn up in writing, dated and signed; is made voluntarily after being properly informed of the nature of the clinical trial, its significance, impact and risks; is properly executed and is made by an individual capable to give consent, or his/her legal representative; in exceptional cases, when the relevant individual is unable to write, he/she may give an oral consent in the presence of at least one witness who certifies in writing the patient’s (volunteer’s) consent to participate in the clinical trial (State Inspectorate on Quality Control of Medicines at the Ministry of Health of Ukraine, Order «On Approval of the Regulations for Conducting Clinical Trials of Medical Equipment and Medicines and Model Provision on the Ethics Commission» of May 14, 2010 No. 56); (5) a consent obtained freely without threats and inappropriate motivation after the patient is provided with adequate and understandable information presented in the form and using the language that the patient is familiar with and which includes diagnostic evaluation, goal, method, likely duration and expected benefits of the proposed treatment, alternative treatments that include more sparing methods, possible physical pain or discomfort, danger and side effects of the proposed treatment (UN General Assembly, Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (1992)).

## L

**Legal Representatives**

Are parents, guardians, trustees of an individual or representatives of those agencies and organizations in whose custody or care the individual is. (*Verkhovna Rada of Ukraine, Criminal Procedure Code of December 28, 1960*).

**License for Medical Practice**

Is a government issued document which certifies the right of a licensee to carry out the type of medical activity, under the condition of fulfillment of qualification, organizational and other special requirements, established by licensing conditions. (*Ministry of Health Ukraine, Order “On Licensing Conditions for Conducting Business Activities in Medical Practice” of February 2, 2011 No. 49*).

## M

**Malpractice in Health Care**

Is improper carrying out of diagnosis and treatment of a patient, medical assistance management that caused or could cause adverse results of a medical intervention.

**Management of Quality**

A coordinated activity, which consists in control and direction of organization as regards quality. (*Ministry of Health of Ukraine, Order “On Approval of a Single Terminological Dictionary (Glossary) on the issues of quality of medical care management” of July 20 2011 No. 427*).

**Maternity Ward (Hospital)**

Is an independent health care institution that provides obstetric, gynecological, and neonatal inpatient care (*Ministry of Health of Ukraine, Order “On Organizing Inpatient Obstetric, Gynecological, and Neonatal Care in Ukraine” of December 29, 2003 No. 620*).

## Mediation

Is a clearly structured process of professional intervention focused on the task of resolving the conflict from the standpoint of nonconfrontation. Its goal is to leave the maximum possible control over decisionmaking to the parties involved in the conflict and simultaneously provide a third party—a mediator—with the power to govern the process of resolving the dispute.

## Medical Activities

Are activities aimed at providing citizens with therapeutic and prophylactic care and are regulated by the Law of Ukraine “Principles of Ukrainian Health Care Legislation,” other legislative acts on health care, regulatory acts of the Ministry of Health of Ukraine (*Ministry of Health of Ukraine, Order “On Granting Special Permission for Medical Practice in the Field of Alternative Medicine” of August 10, 2000 No. 195*).

## Medical Card

A list of medicines that are registered in Ukraine, including medicines, which efficiency had been proved, acceptable level of safety, which application is economically admissible (*Supreme Rada of Ukraine Law of Ukraine “Principles of Ukrainian Health Care Legislation of November, 19, 1992, No. 2801-XII*).

## Medical Care

**1.** Activity of professionally trained medical workers, aimed at prophylactic, diagnostics, treatment and rehabilitation as a result of diseases, injuries, poisonings, and pathological states as well as connected with pregnancy and childbirth. (*Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 No. 2801XII*). **2.** Type of activity that includes a complex of measures, aimed at treatment and curing of patients, that are in state that is dangerous for their life, health and capability and is carried out by professionally trained workers, who are entitled to do such job according to the legislation. (*Cabinet of Ministers of Ukraine, Resolution “On Approval of the Program Concerning Provision of State Guaranteed Free Medical Care to Population” of July 11, 2002, No. 955*).

## Medical and Social Evaluation

Is the process of determining on the basis of a comprehensive examination of all body systems of an individual the degree of the loss of health, the degree of the restrictions of daily activities caused by a persistent disorder of bodily functions, the level of disability, the cause and time of its onset, as well as setting forth recommendations as to a possible type of employment for the individual given his/her state of health, working conditions, need for outside care, appropriate types of rehabilitative resort treatment and social protection for the individual to achieve the most complete recovery of all functions of life. (*Verkhovna Rada of Ukraine, Law "On Rehabilitation of the Disabled in Ukraine" of October 6, 2005 No. 2961IV*).

## Medical Assistance

Is an activity which consists of a set of measures aimed at rehabilitation and treatment of patients who are in a state that at the time of medical assistance constitutes a threat to their life, health and functioning and which is provided by professionally trained practitioners who have a legal right to provide this type of assistance in accordance with the law (*Cabinet of Ministers of Ukraine, Resolution "On Approval of the Program for Providing Citizens with Guaranteed by the State Free Health Care" of July 11, 2002 No. 955*).

## Medical Centers

Are health care institutions (hospitals, maternity wards, etc.) that are part of a medical research institution or are subordinated to a medical research institution (*Ministry of Health of Ukraine, Order "On Approval of the Register of Health Care Institutions, Medical and Pharmaceutical Positions for Junior Specialists with Pharmaceutical Education at Health Care Institutions" of October 28, 2002 No. 385*).

## Medical Error

Is a flaw in the provision of health care associated with erroneous actions of medical personnel, which in the absence of signs of intentional or negligent crime are characterized as accidental errors.

## Medical Forensic Examination

Is a type of forensic examination. It is authorized by an inquiry agency, an investigator, a prosecutor or the court when the resolution of the issues in the case under consideration requires specialized knowledge in the field of medicine.

## Medical Information

Is (1) accurate and timely information about the state of patient's health, purpose of proposed studies and treatment, prognosis for a potential course of development of the disease, including presence of risk to life and health, provided in an accessible form (*Verkhovna Rada of Ukraine, Law "Principles of Ukrainian Health Care Legislation" of November 19, 1992 No. 2801XII*); (2) testimony to the state of person's health, his/her medical history, prognosis for a potential course of development of the disease, including presence of risk to life and health, which according to its legal status is confidential, i.e., a restricted information. A doctor must, at the request of a patient, his/her family members or legal representatives, provide them with this information fully and in an accessible form. In special cases when full information can harm the health of a patient, a physician may limit the extent of the revealed information. In this case, he/she informs family members or legal representatives of the patient, keeping personal interest of the patient in mind (*Constitutional Court of Ukraine, Decisions (the case of free health care) of May 29, 2002 No. 10rp/2002*); (3) presented in an accessible form, comprehensive information about the state of person's health, including medical facts about his/her state, information about potential risks and benefits of proposed and alternative methods of treatment, data on possible consequences in case of there is a refusal to undergo the treatment, information on diagnosis, prognosis and planned therapeutic measures (*European Consultation on the Rights of Patients, A Declaration on the Promotion of Patients' Rights in Europe (1994)*).

## Medical Intervention

Is the use of methods of diagnosis, prevention, or treatment that have impact on the state of human body which is permitted to be carried out only as long as it does not harm the health of a patient (*Verkhovna Rada of Ukraine, Law "Principles of Ukrainian Health Care Legislation" of November 19, 1992 No. 2801XII*).

## Medical Law

Is a complex area of law; a body of laws which regulate social relations that arise in the process of providing medical assistance that is used for diagnostic, preventive, curative, rehabilitative and restorative purpose to ensure human right to health.

## Medical Malpractice

Is a physician's failure to provide medical treatment required by the state of a patient given the standards of treatment or lack of skill, negligence in providing assistance to a patient, which are a direct cause of harm to the patient (*World Medical Assembly, Statement on Medical Malpractice (1992)*).



## Medical Practice

Is an activity associated with a set of special measures aimed at promoting better health, raising sanitary awareness, preventing diseases and disability, establishing diagnosis, providing assistance to individuals with acute and chronic diseases, and rehabilitation of the sick and the disabled which is carried out by individuals who have specialized education (*State Committee of Ukraine on Regulatory Policy and Entrepreneurship, Ministry of Health Ukraine, Order "On Licensing Conditions for Conducting Business Activities in Medical Practice" of February 16, 2001 No. 38/63*).

## Medical Secret

Is all the information obtained in the course of providing medical assistance which is not to be disclosed except as required by law, which became known to medical workers and others in connection with their professional or official duties or public activity.

## Medical Service

Activity of health care institutions or physical persons-entrepreneurs, who are registered and obtained a license in order established by the law, in the sphere of health care, that is not necessary limited by the health care. (*Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 No. 2801XII*).

## Medicines

Are substances or mixtures of natural, synthetic, or biotechnological origin which are used to prevent pregnancy and diseases, establish a diagnosis and treat human diseases or change the state and functions of the body. Medicines include active substances, readymade medicines, homeopathic preparations, substances used to detect pathogens and to combat pathogens or parasites, medical cosmetic preparations, and pharmaceutical additives to food (*Verkhovna Rada of Ukraine, Law "On Medicines" of April 4, 1996 No. 123/96*).

## Minor

Is a child under 14 years of age (*Verkhovna Rada of Ukraine, Family Code of January 10, 2002 No. 2947; Verkhovna Rada of Ukraine, Civil Code of January 16, 2003 No. 435IV*).

## **Moral Damages**

Are nonproprietary losses due to moral or physical suffering or other negative effects inflicted on an individual or a legal entity by unlawful actions or inaction of other individuals (*Plenary Assembly of the Supreme Court of Ukraine, Resolution «On Judicial Practice in Cases of Compensation for Moral (Nonproprietary) Damage» of March 31, 1995 No. 4*).

## **N**

### **Narcological Forensic Examination**

Is a type of psychiatric forensic examination. It clarifies only those issues that relate to alcoholism and drug addiction.

## **O**

### **Outpatient Visits**

Are visits to a clinic or an outpatient center which may have a variety of goals: to undergo medical diagnostic procedures, consultations, screenings or prophylactic examinations, to address health related social issues, etc.. Outpatient visits may be either first time or repeat visits (regarding the same disease within one year). Health care institutions carry out special registration of outpatient visits and their analysis.

# P

## Pain

Is a constituent part of suffering of a terminally ill patient, which may have different effects on the life of the latter – from a feeling of discomfort to a feeling of destructive devastation (*World Medical Assembly, Statement on the Care of Patients with Severe Chronic Pain in Terminal Illness (1990)*).

## Patient

Physical person, who applied for medical care and/or who is provided such care (*Principles of Ukrainian Health Care Legislation: Law of Ukraine of November 19, 1992 No. 2801XII*).

## Pharmacy

Is a health care institution whose primary purpose is to provide the population, health care establishments, enterprises, institutions and organizations with medicines and medical devices (*Ministry of Health of Ukraine, Order «On Approval of the Register of Health Care Institutions, Medical and Pharmaceutical Positions for Junior Specialists with Pharmaceutical Education at Health Care Institutions» of October 28, 2002 No. 385*).

## Preventive Vaccination

Is injection of medical immunobiological preparations into a human organism to create specific immunity to infectious diseases (*Verkhovna Rada of Ukraine, Law “On Protection of the Population from Infectious Diseases” of April 6, 2000 No. 1645III*).

## Primary Medical Records

Are original documents, data, and records (for example, medical records, patients' files, laboratory records, memos, diaries of medical trial participants or questionnaires, transplant protocols, print outs of equipment data, verified and certified copies or transcripts of phonograms, photographic negatives, microfilms or magnetic medium, xrays, administrative documents, notes, etc.) (*Ministry of Health of Ukraine, Order «On Approval of the Procedure for Conducting Clinical Trials of Tissue and Cell Transplants and Expert Examination of Clinical Trial Records and on Amendments to the Procedure for Conducting Clinical Trials of Medicines and Expert Examination of Clinical Trial Records approved by the Ministry of Health of Ukraine on February 13, 2006 No. 66” of October 10, 2007 No. 630*).

## Professional risk

The level of probability of health injury taking into consideration the gravity of consequences as a result of unfavorable influence of working environment factors and labor process. The evaluation of professional risk is conducted by taking into consideration the exposure value of the latter, health status indicators and indicators of disability of workers. (*Ministry of Health of Ukraine, Order “On Approval of Hygienic Classification of Labor in Terms of Harmfulness and Danger of Working Environments Factors the Difficulty and Intensity of Labor Process” of December 27, 2001 No. 528.*)

## Professional diseases

Diseases, the appearance of which basically depends on the influence of unfavorable factors of working environment and labor process. (*Ministry of Health of Ukraine, Order “On Approval of Hygienic Classification of Labor in Terms of Harmfulness and Danger of Working Environments Factors the Difficulty and Intensity of Labor Process” of December 27, 2001 No. 528.*)

## Patient

Physical person, who applied for medical care or who is provided such care (*Verkhovna Rada of Ukraine, Law “Principles of Ukrainian Health Care Legislation” of November 19, 1992 No. 2801XII*).

## Psychiatric Care

Is a set of special measures aimed at monitoring mental health of people on the grounds and in the manner prescribed by law, at prevention, diagnosis of mental disorders, treatment, supervision, care and medical and social rehabilitation of individuals who suffer from mental disorders (*Verkhovna Rada of Ukraine, Law “On Psychiatric Care” of February 22, 2000 No. 1489III*).

## Psychiatric Forensic Examination

Is a type of forensic examination. It determines mental state of suspects in order for the examiners and the investigators to decide whether they may carry out their investigation; whether the suspects and the accused suffer from mental disabilities that prevent them from being able to carry out their own defense; mental state of the accused, defendants and their ability to comprehend their actions and control them during the time when they allegedly committed the crime and during other periods of time that are of interest to the investigation and trial; degree of danger that individuals to be recognized as non compos mentis pose to the public and the possibility of applying to them medical measures sanctioned by law; mental state of individuals to be recognized as compos mentis at the time of the crime who suc-

cumbed to mental illness after having committed the crime and therefore can not take part in the investigation or the litigation as well as presence of medical grounds for applying to them medical measures sanctioned by law; mental state of witnesses and their ability to perceive, remember and reproduce correctly circumstances relevant to the case; mental state of victims and their ability to perceive, remember, reproduce adequately circumstances of the crime committed against them and to exercise resistance (to establish presence of helplessness); degree of severity of mental disorders of victims and their causal relation to the circumstances of the crime (to establish damage to health); mental state of plaintiffs, defendants, other witnesses in civil proceedings, their ability to comprehend the importance of their actions and control them during the period of time that interests the court.

## **Psychological Forensic Examination**

Is a type of forensic examination which is carried out to address the issues that arise in the course of investigation and court proceedings and require specialized knowledge in the field of psychology.

## Q

### **Quality of Medical Care**

Is a proper (according to standards, clinical protocols) realization of all measures, which are safe, rational and accepted from the point of view of costs, which are used in this society and influence the mortality, morbidity and invalidity. (Ministry of Health of Ukraine, Order “On Approving the Order of Carrying out a Control and Management over Quality of Medical Services” of March 26, 2009 No. 189).

### **Quality of Medical Care Indicator**

Qualitative and quantitative indicator, for which there is evidence or a consensus as regards its direct influence on medical care quality; shall be defined retrospectively. (Ministry of Health of Ukraine, Academy of Medical Sciences of Ukraine, Order “On Approval of Methodological Recommendations “Unified Methods of Working out Clinical Instructions, Medical Standards, Unified Clinical Protocols of Medical Care, Local Protocols of Medical Care (Clinical Routes of Patients) on the Grounds of Evidence-based Medicine) (Part one), of February 2, 2009 No. 102/18 (in the wording of July 20, 2010, No. 594/71)).

## S

**Safe Working Conditions**

Are conditions under which the impact of harmful and hazardous working environment on employees is eliminated or does not exceed the level established by hygiene standards (*Ministry of Health of Ukraine, Order «On Approval of Hygiene Classification of Working Conditions in Accordance with Indicators of Harmfulness and Hazardousness of Working Environment, Strenuousness and Intensity of Labor Process» of December 27, 2001 No. 528*).

**Safety of a Medical Product**

Is a property of a medical product based on comparative assessment of benefits from its use and potential harm that may be caused to a patient using this medical product (*Ministry of Health of Ukraine, Order «On Approval of the Procedure for Examining Medical Product Registration Documentation Submitted for State Registration (Re-registration) and for Examining Amendments to Registration Documentation during the Period of Validity of Registration Certificate» of August 26, 2005 No. 426 (in the reading of September 25, 2008 No. 543)*).

**Safety Requirements for Health and Life of an Individual**

Are criteria, indicators, maximum permissible limits, sanitary and epidemiological norms, rules, regulations, etc. developed on the basis of medical science (medical safety requirements for health and life of an individual), the development, justification, control and supervision of which are the sole prerogative of medical professional expertise (*Verkhovna Rada of Ukraine, Law «On Ensuring Sanitary and Epidemiological Welfare of the Population» of February 24, 1994 No. 4004XII*).

**Side Effects**

Are any adverse reactions due to pharmacological properties of medicines that are observed only when the medicine is used in recommended doses (*Ministry of Health of Ukraine, Order «On Approval of the Procedure for Banning (Suspending) and Recalling Medicines and Renewal of Their Circulation in Ukraine» of December 12, 2001 No. 497*).

**Social Health Care Services**

Are advice on prevention of the development of possible physical disorders in an individual, maintenance and protection of his/her health, prevention, treatment and rehabilitation measures, labor therapy (*Verkhovna Rada of Ukraine, Law «On Social Services» of June 19, 2003 No. 966IV*).

## State of Health

Is a combination of anthropometric, clinical, physiological, biochemical parameters that determine the presence or absence of disease or disability, which are endowed with legal value by the law.

## State Registration of a Medical Product

Is a procedure performed in accordance with current legislation to permit medical use of a medical product (*Ministry of Health of Ukraine, Order «On Approval of the Procedure for Examining Medical Product Registration Documentation Submitted for State Registration (Reregistration) and for Examining Amendments to Registration Documentation during the Period of Validity of Registration Certificate» of August 26, 2005 No. 426 (in the reading of September 25, 2008 No. 543)*).

## System of Health Care Institutions

A complex of health care institutions, ensuring the needs of population in the sphere medical care on a certain territory. (*Supreme Rada of Ukraine Law of Ukraine “Principles of Ukrainian Health Care Legislation of November 19, 1992, No. 2801-XII*).

## Standard of Medical Care (Medical Standard)

*A complex of rules and standards as well as indicators of quality of medical care of certain type provision, that are worked out by way of taking into account the level of medical science and practice development. (Supreme Rada of Ukraine Law of Ukraine “Principles of Ukrainian Health Care Legislation)*

# T

## Table of Material and Technical Equipment

A document, that determines a minimum list of equipment, machinery necessary for equipping a certain type of health care institution, its sub division, and to secure activity of physical persons – entrepreneurs, that carry out commercial activity in sphere of medical practice in certain specialty (*Supreme Rada of Ukraine Law of Ukraine “Principles of Ukrainian Health Care Legislation)*).

## Traditional Medicine

Is (1) methods of healing, prevention, diagnosis and treatment based on the experience of many generations of people, reflected in national traditions which do not require state registration (*Verkhovna Rada of Ukraine, Law “Principles of Ukrainian Health Care Legislation” of November 19, 1992 No. 2801XII*); (2) a sum of all the knowledge and practical methods used for diagnosis, prevention and elimination of disruptions in physical and mental balance that rely solely on practical experience and observation and are passed from generation to generation both in oral and written forms (*Ministry of Health of Ukraine, Order “On Granting Special Permission for Medical Practice in the Field of Alternative Medicine” of August 10, 2000 No. 195*).

## Tuberculosis

Is an infectious disease caused by mycobacterium tuberculosis which is characterized by periodic exacerbation, relapse, and remission; it affects mainly the poorest, socially disadvantaged groups of population (refugees, migrants, individuals residing in institutions of penitentiary system, individuals without permanent residence, alcoholics, drug addicts, etc.); it causes high levels of temporary or lasting disability, requires longterm comprehensive treatment and rehabilitation of patients. Negative socioeconomic consequences of tuberculosis gave reason to classify the disease as socially dangerous (*Verkhovna Rada of Ukraine, Law “On Combating Tuberculosis” of July 5, 2001 No. 2586III*).

# U

## Underage Person

Is a child between fourteen and eighteen years of age, endowed with incomplete civil capacity (*Verkhovna Rada of Ukraine, Family Code of January 10, 2002 No. 2947*; *Verkhovna Rada of Ukraine, Civil Code of January 16, 2003 No. 435IV*).



## V

### **Voluntary Drug Addiction Treatment**

Is drug addiction treatment that is carried out on the basis of consent of a patient or his/her legal representative (*Verkhovna Rada of Ukraine, Law “On Measures against Illicit Trafficking of Narcotic Drugs, Psychotropic Substances and Precursors as well as Their Abuse” of February 15, 1995 No. 62/95*).

## W

### **WHO**

World Health Organization (*Cabinet of Ministers of Ukraine, Resolution “On Approval of the ‘Rules of Sanitary Protection of the Territory of Ukraine’” of April 24, 1999 No. 696*).