

Artículo de reflexión**Legal aid in civil proceedings: who is responsible to decide the fee?**

Правнича допомога у цивільному процесі: хто вирішує питання оплати участі адвоката?

Asistencia jurídica en procedimientos civiles: ¿quién es responsable de decidir la tarifa?

Recibido: 8 de julio del 2019

Aceptado: 17 de agosto del 2019

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Undoubtedly, that high expenses and long terms are the most important problems of modern civil procedure, which are under the high demand of all the researchers. One of the integrative parts of the court expenses is the lawyers fee, which is almost always a result of his contract with client, but at the same time depends on court and the case result. The fee of a lawyer who pleads a case in court is generally recognized in the legal world. However, the national law and judicial practice of courts of different countries apply this institution in different ways. In particular, it goes about a question of the judicial practice in matters related to the payment for a lawyer's services in Ukraine.

Abstract

The **objective** of this paper is studying the most significant issues of the current reform related to the professional legal aid in court and is analyzing dedicated to the new way for case-law improvements finding.

Having **analyzing of this paper**, we should note, that we began with the constitutional provisions of the professional legal assistance investigation, as well as the procedure of their qualification; the second part is dedicated to the issues of free legal aid; in the third part we discuss the practical issues of the lawyers' fee, happened in Ukraine; and in the last, fourth part some concluding remarks were made on the ground of abovementioned.

According to **the brief results of the study**, we have concluded, that in the light of concept of a fair trial, the compulsory representation in courts proceedings in Ukraine is well grounded, but legal fee, as well as a lawyer's fee, should not limit the person, against whom the decision was given, through the high costs of legal assistance in court proceedings, therefore, the claim for these fees reimbursement should be considered as an additional claim in competitive proceedings.

Keywords: Judiciary, civil procedure, lawyer's fee, case law.

Анотація

Безсумнівно, що високі судові витрати та тривалі строки розгляду є найважливішими проблемами сучасного цивільного процесу, які користуються великим попитом в дослідників. Однією з невід'ємних складових судових витрат є оплата правничої допомоги, а саме гонорар адвоката, яка майже завжди є результатом його договору з клієнтом, але в той же час залежить від суду та результату справи. Гонорар адвоката, який розглядає справу в суді, загальновизнане явище у правовому світі. Однак національне законодавство та судова практика судів різних країн застосовують цю інституцію по-різному. Зокрема, у даному дослідженні йдеться про особливості правового регулювання участі адвокатів в цивільному процесі, надання безоплатної правової допомоги, а також про судову практику у питаннях, пов'язаних із оплатою гонорару адвоката в Україні.

Ключові слова: судова влада; цивільний процес; гонорар адвоката; безоплатна правова допомога; прецедентне право.

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Resumen

El objetivo de este documento es estudiar los problemas más importantes de la reforma actual relacionados con la asistencia jurídica profesional en los tribunales y está analizando dedicado a la nueva forma de encontrar mejoras en la jurisprudencia.

Una vez analizado este documento, debemos señalar que comenzamos con las disposiciones constitucionales de la investigación de asistencia legal profesional, así como el procedimiento de su calificación; la segunda parte está dedicada a los problemas de asistencia jurídica gratuita; en la tercera parte discutimos los problemas prácticos de los honorarios de los abogados, ocurridos en Ucrania; y en la última, cuarta parte, se hicieron algunas observaciones finales sobre la base de lo mencionado anteriormente.

Según los breves resultados del estudio, hemos concluido que, a la luz del concepto de un juicio justo, la representación obligatoria en los procesos judiciales en Ucrania está bien fundada, pero los honorarios legales, así como los honorarios de un abogado, deberían no limite a la persona, contra quien se le dio la decisión, a través de los altos costos de la asistencia legal en los procedimientos judiciales, por lo tanto, el reclamo por el reembolso de estos honorarios debe considerarse como un reclamo adicional en procedimientos competitivos.

Palabras clave: Poder judicial, procedimiento civil, honorarios de abogados, jurisprudencia.

Introduction

The foundation of the European Convention, on the basis of which a system of common European standards of justice is developing through the decisions of the European Court of Human Rights, is steadily strengthening over the years. At the same time, within the framework of national legislations, the European states are actively pursuing reforms, in particular, in the field of judicial systems and legal proceedings (these processes are shown in Figure 1 “Legislative and regulatory activity concerning justice systems in 2016. The 2017 EU Justice Scoreboard”, which demonstrates that today more than half of the member states is actively introducing legislative reforms in the area of legal proceedings, ADR, legal aid, court specialization, legal professionals, optimizing the judicial map and ICT development). The aspiration for legislative changes illustrates the pursuit to improve national legislation on the judiciary and legal proceedings, to increase the standards of availability and effectiveness of rights protection.

This trend has not left our country untouched, as Ukraine is making huge efforts to build a truly constitutional democratic state and gain membership in the EU. Ukraine is a member of the Council of Europe and stands firmly on the path to European integration. *The Association Agreement* (hereinafter – the Agreement) signed in 2014 testifies the desire for further movement towards the Community, in particular, approximation of legislation. The reforms taking place in the light of the European integration process reflect our aspirations and

comprehensively cover various areas of legal regulation. In particular, in 2015-2017 new legislation in the field of judicial system, legal proceedings and enforcement of judgments, was approved in Ukraine.

In the course of this reform, traditional approaches and institutions have been substantially updated, and new effective mechanisms have been introduced into national legislation. In particular, a three-instance court system, which includes general courts, appellate courts and the Supreme Court as a court of cassation, has again been established in Ukraine. This reform should contribute to a more efficient implementation of the judicial power. General and simplified procedures have been introduced in the sphere of civil procedure, which aims to simplify access and speed up the resolution of small claims. The institution of private executors has been introduced in the area of execution of court decisions, which is one of the weakest places in the Ukrainian rule of law. This novelty shall intensify and increase the level of court decisions` execution and provide for a real protection of the rights of citizens applying for enforcement of a court decision. But the most significant issues of the current reform related to the professional legal aid in court and our analysis dedicated to the new way for case-law improvements finding. In the first part of the paper the constitutional provisions of the professional legal assistance were investigated, as well as the procedure of their qualification; the second part is dedicated to the issues of free legal aid; in the third part we discuss the practical

issues of the lawyers' fee, happened in Ukraine; and in the last, forth part some concluding remarks were made on the ground of abovementioned.

Professional Legal Assistance as an Integral Part of the Litigation

The importance of professional providing of legal aid in judicial proceedings is no longer of consideration – with the improvements and development of judicial proceedings the access to justice may be reached only with the support of legal assistant, who really take care about it (Garth, B. G., Cappelletti, M., Trocker, N. 1985; Recommendation No. R (81); Recommendation No. R (84)). The only exception are small claims procedure and order for payment procedure (Regulation (EC) No. 861/2007; Voet, 2015; Silvestri, 2018), which are the most simplified and available for regular persons.

As a State of the Council of Europe, and taking in account the ECHR's case law, Ukraine takes all necessary measures to eliminate obstacles to access to justice, while developing a system of legal assistance, in particular, free legal aid and professional legal assistance in civil cases that are considered by the court.

For the first time, the right to legal assistance at the national level was secured in 1996 in Article 59 of the Constitution of Ukraine, where it was stated that everyone has the right to legal assistance, which, in cases provided for by law, is provided free of charge, and everyone is free to choose the lawyer. The activity of the advocacy was aimed at ensuring the right to protection from prosecution and providing legal assistance in dealing with cases in the courts and other state bodies in Ukraine.

Since then, the Laws “On Free Legal Aid” of June 2, 2011, “On the Advocacy and Advocacy Practice” of July 5, 2012, “On the Prosecutor's Office” of October 14, 2014, and others, which are intended to provide access to legal aid and provide a qualified protection of human rights, were adopted.

In civil procedural law, the right to legal assistance was stipulated only in 2004: the persons involved in the proceedings have the right to the said assistance (both paid and free) provided by lawyers or other specialists in the field of law (Article 12 of the Civil Procedure Code of Ukraine, hereinafter – CCP); in articles 38-44 the participation of a judicial representative in the case was settled; Article 45

establishes the possibility of applying to the courts by bodies and individuals for the protection of their rights, freedoms and interests; Article 56 states that legal aid may be provided by a person who is a specialist in the field of law and has such a right according to the law.

During the further development of the legal aid system and in compliance with the provisions of Article 24 of Association Agreements between Ukraine and the EU to deepen the development of judicial cooperation in civil matters, which should be based on the principles of legal certainty and the right to a fair trial, amendments have been made to national legislation.

Amendments were made to the Constitution of Ukraine in accordance with the provisions of the Strategy for the Reform of the Judiciary and Related Legal Institutions for 2015-2020: Article 59 stipulates that everyone has the right to professional legal assistance, which, in cases provided for by law, is provided free of charge. The prosecutor is deprived of the right to represent citizens in court (Article 131¹); and the representation of another person in court is exclusively assigned to a lawyer, but for exceptions specified by law (Article 131²) etc.

It is worth noting that a certain problem is the lack of a unified approach to understanding the essence of “legal aid”, in particular, in the Constitution of Ukraine it is referred to as “professional legal aid”, and in the CCP of Ukraine - as “legal aid” with the indication that “in cases established by law, legal aid is provided exclusively by a lawyer (professional legal assistance)” (Article 15).

Accordingly, the concept of “legal aid” is understood as professional assistance in realization of legal possibilities of the subject with the help of legal means with the purpose of elimination of the problem, in particular, by providing consultations, explanations, drawing up of lawsuits and appeals, certificates, applications, complaints, implementation of representations (both in courts and in other state bodies), protection from prosecution, etc. At the same time, the concept of “professional legal aid” is limited to the activities of a lawyer.

In accordance with the requirements of Article 59, 60 and 61 of the CCP of Ukraine a representative in a court may be a lawyer, legal representative, official of an authority or a person who is legally entitled to apply to court in the interests of certain subjects, as well as any individual, only in small claims. Thus, there is a

mandatory representation of the rights of persons by lawyers in civil proceedings in Ukraine, with the exception of only small claims in which any person can represent the interests of individuals (see Izarova, I., Fleiszar, R., Vebrate, V. 2019; Panych, 2019).

According to the Transitional Provisions of the Constitution of Ukraine, representation exclusively by prosecutors or lawyers in the Supreme Court and the courts of cassation is carried out from January 1, 2017; from January 1, 2018 – in courts of appellate instance; from January 1, 2019 – in courts of first instance. Currently, the draft of amendments to these provisions is discussed in Verkhovna Rada.

Professional representation means that the subject of legal assistance is the lawyer exclusively, that is, the person who satisfies the requirements of Article 6 of the Law of Ukraine “On Advocacy and Advocacy Activity”, in particular, has a complete higher legal education and has experience in the field of law of at least two years.

The requirements for a person who is eligible to a position of a lawyer are defined in the Law – a lawyer may be an individual who has a full higher legal education, knows a state language, has experience of work in the field of law of not less than two years, passed a qualification examination, passed an internship (except in cases established by this Law), swore an oath of the lawyer of Ukraine and received a certificate on the right to practice advocacy.

In accordance with the law, lawyers perform a representative activity, which is a kind of lawyer’s activity to ensure the implementation of the rights and obligations of the person in civil, economic, administrative and constitutional proceedings, in other state bodies, to individuals and legal entities, the rights of the victim during the consideration of cases of administrative offenses, as well as the rights of the victim, civil plaintiff, civil defendant in criminal proceedings. Among other types of legal assistance, such types of lawyers provide legal information, advice and legal clarification, legal support to the client’s activities, statements, complaints, procedural and other legal documents aimed at ensuring the realization of rights, freedoms and legitimate interests of the client, prevention of their violations, and also assistance in restoration of their rights in case of their violation.

The procedure for engaging in advocacy is defined by the Law of Ukraine “On Advocacy and Advocacy Practice”:

- 1) *The admission to the qualification examination* in accordance with Article 8, of the person who has expressed the desire to become a lawyer and meets the requirements of the first and the second paragraphs of Article 6 of this Law, by a qualification-disciplinary commission of the advocacy at the place of residence of such person.

The qualification exam is the certification of a person who has expressed a desire to become a lawyer and is to identify the theoretical knowledge in the field of law, the history of the advocacy, the lawyer’s ethics of the person who expressed the desire to become a lawyer, as well as to identify his practical skills and abilities in applying the law.

- 2) *Internship of the person who passed the exam*, and which meaning is in checking the readiness of the person who received the Certificate of Completion of the qualification examination, to carry out advocacy activity independently.

The internship is carried out within six months by the direction of the council of advocates of the region under the guidance of a lawyer, who may be a lawyer of Ukraine, who has at least five years` experience in advocacy. As a result of internship, the supervisor conducts a report on the evaluation of the internship and sends it to the council of advocates of the region.

- 3) *Issuance of the certificate on the right to engage in lawyer activity* and the oath.

According to the results of the internship, the council of advocates of the region makes decisions on:

- 1) Issuance of a certificate of the right to practice advocacy;
- 2) Continuation of probation for a period of one to three months.

A person who gives the oath of the lawyer of Ukraine, by the council of advocates of the region on the day of taking the oath is issued a certificate on the right to practice advocacy and a lawyer’s certificate of Ukraine free of charge, which are not limited by the age of the person and are indefinite.

Free Legal Aid as an Element of Access to Justice

Free legal aid is provided in accordance with the requirements of the Law of Ukraine “On Free Legal Aid”. It is legal aid guaranteed by the state, fully or partially provided at the expense of the State Budget of Ukraine, local budgets and other sources.

In accordance with the provisions of the Law, legal assistance is the provision of legal services aimed at ensuring the realization of human and civil rights and freedoms, the protection of these rights and freedoms, and their restoration in case of violation. Legal services are the provision of legal information, advice and legal clarification; making of applications, complaints, procedural and other documents of a legal nature; realization of representation of the interests of a person in courts, other state bodies, bodies of local self-government, to other persons; ensuring protection of the person from charges; assistance to individuals to ensure access to secondary legal aid and mediation.

The right to free legal aid is provided to citizens of Ukraine, foreigners, stateless persons, including refugees or persons in need of additional protection in the form of free primary legal aid in full, as well as the possibility for a certain category of persons to receive free secondary legal aid in cases stipulated by law.

Under the system of free legal aid, there is a Coordination Center for the provision of legal aid, as well as entities providing free primary legal aid and free secondary legal aid.

Free primary legal aid is a form of state guarantee, which is to inform the person about his rights and freedoms, the procedure for their implementation, restoration in case of their violation and the procedure for appealing against decisions, acts or omissions of state authorities, local self-government bodies, officials and officers.

Free primary legal aid includes the following types of legal services:

- 1) The provision of legal information;
- 2) Providing legal advice and explanations;
- 3) The submission of applications, complaints and other documents of a legal nature (except documents of a procedural nature);

- 4) Assistance in providing access to secondary legal aid and mediation.

The right to free primary legal aid under the Constitution of Ukraine and this Law is open to all persons under the jurisdiction of Ukraine.

Free secondary legal aid is a form of state guarantee, which is to create equal opportunities for access to justice.

Free secondary legal aid includes the following types of legal services:

- 1) Protection;
- 2) The representation of the interests of persons entitled to free secondary legal aid in courts, other state bodies, bodies of local self-government, and other persons;
- 3) The collection of documents of procedural nature.

The following categories of persons have the right to free secondary legal aid in accordance with this Law and other laws of Ukraine:

- 1) Persons under the jurisdiction of Ukraine if their average monthly income does not exceed two sizes of subsistence minimums calculated and approved by law for persons belonging to the main social and demographic groups of the population (this is approximately 100 euros), as well as persons with a disability who receive pensions or grants instead of pensions, at a rate not exceeding two subsistence minimums for the disabled (that is approximately 80 euros) – to all types of legal services provided by Article 13 of this Law;
- 2) Children, including orphans, children deprived of parental care, children in difficult living conditions, children who have suffered as a result of hostilities or armed conflict – to all types of legal services provided for in part two of Article 13 of this law;

2¹) Internally displaced persons – to all types of legal services envisaged by part two of Article 13 of this Law.

The right to free secondary legal aid is provided to the citizens of the states with which Ukraine has concluded the relevant international legal assistance agreements, the consent to be bound by which is given by the Verkhovna Rada of

Ukraine, as well as foreigners and stateless persons in accordance with international treaties to which Ukraine is a part of, if such treaties oblige participating States to grant free legal aid to certain categories of persons.

Subjects of the right to free secondary legal aid, specified in paragraphs 1, 2¹, 2², 8, 9, 12, 13 of part one of this article, are entitled to such assistance no more than six times during the budget year and not more than by six mandates/orders for the provision of free secondary legal aid issued by centers for the provision of free secondary legal aid at the same time.

The subjects of the provision of free secondary legal aid in Ukraine are:

- 1) Centers for the provision of free secondary legal aid;
- 2) Attorneys that are included in the Register of Attorneys who provide free secondary legal aid.

The Ministry of Justice of Ukraine establishes centers for the provision of free secondary legal aid in the regions (Republican (Autonomous Republic of Crimea), Oblast, Kyiv and Sevastopol city) and local (region, interregion, district in cities, city, city-region) centers for the provision of free secondary legal aid are territorial offices of the Coordination Centre for the provision of legal aid and are created taking into account the needs of the respective administrative-territorial unit and ensuring access of persons to free secondary legal aid.

Centers for the provision of free secondary legal aid are non-profit organizations, enjoy the rights of a legal entity, have their own forms, seal with their name, are financed from the State Budget of Ukraine, as well as other sources not prohibited by law.

The Lawyer's Fee in Ukraine: is there any limits for that?

As we mentioned in parts 1 and 2 of this study, a mandatory representation by a lawyer in the courts was being introduced in Ukraine legislation, at the same time an institute of free legal aid, which ensure individuals who are unable to pay the lawyer's fees access to court. Together, in our point of view, with the aim to solve the problem of access to justice in a comprehensive way, it is also necessary to introduce an institute for resolving the issues of legal costs paying, which has already been

partially implemented in the procedural legislation of Ukraine. In particular, in accordance with the requirements of Article 134, each party must submit to the court, with their first application, an approximate estimate of its legal costs; under Article 135, the court may freeze these costs; under Article 264 the court is required to apportion the costs of the parties and etc. But, as practice shows, while the updated legislation practical implementation, with the mandatory representation of a lawyer, the issue of legal costs should become an additional claim, which is considering by the court within the competitive process.

The case, chosen by us as an example, fits to all the necessary elements - a weak party that could be the subject of free legal aid but did not exercise this right and has participated in this case without a representative (until 2019 it was permitted by law according to the transitional provisions), and this party was therefore charged with abuse of procedural rights; the party, who claims damages for the abuse of procedural rights and his representative - an advocate. The paradox of this case shows us, that person who are not aware of the requirements of procedural law, can hardly know how to abuse the procedural rights, since they act not intentionally, but for another purpose, indirectly violating procedural rights. At the same time, they are responsible, in particular, for the costs of the other party, therefore, the participation without professional representative may bring quite negative consequences.

The very essence of the case is the following: the plaintiff appealed to the court with the specific purpose - to establish the fact of legal significance. In doing so, she violated the procedural requirements for the order of submission - filed an action within the action proceedings, but in accordance with the nature of the claims, such a case should be considered in another proceeding, so-called separate proceeding. By the order of the district court of March 5, 2018, this claim was left without consideration in accordance with the provisions of the CPC of Ukraine. The next day, March 06, 2018, the statement of the representative of the defendant, the advocate, was sent to court with the claim on making an additional decision in this case, in which to recover from the plaintiff in favor of the defendant the expenses incurred by him for professional legal aid in the total amount of 5000 UAH (178 EUR) as a result of the unjustified (abuse) acts of the plaintiff, referring to the fact that the representative of the defendant these claims were stated in court January 17,

2018 in the form of a written application, attached to the preliminary calculation of the amount and the receipt for the payment of professional legal aid, but the court did not resolve this decision when rendering the main judgment in this case.

It should be noted that statements of fact of legal significance, have no equivalent in monetary value, and the court fees for submitting such an application to court is UAH 384 (approximately EUR 14).

According to the provisions of the current procedural law, a court shall decide whether to divide the costs of the proceedings in proportion to the amount of the claim satisfied, but also to consider whether the costs involved in the case are justified and proportionate to the subject matter of the case, as well as to consider the behavior of the parties. The defendant has the right to make claims for compensation for the expenses incurred by him in connection with the case as a result of the unjustified acts of the plaintiff or abusing his rights in the event of leaving the claim without consideration (in accordance with the provisions of Article 44, Article 142, Part 3, Part 5, of the CPC of Ukraine).

In proposed case, in support of his claims, the representative of the defendant, the advocate, provided the court with a legal aid agreement dated 13.09.2017, according to which the lawyer provides the defendant with legal assistance in the case of the plaintiff's claim against the defendant on establishing the fact of legal significance, and a commitment to act.

On January 17, 2018, the advocate filed a motion with the court to close the case and leave without consideration of the separate claim, which also indicated the claim to the claimant of the recovering of UAH 5,000 (approximately EUR 179), confirming that he had received a receipt for the lawyer's specified amount. and the calculation of the amount of legal aid costs incurred by the defendant in connection with the consideration of this case.

The court has decided in his decision to leave the claim without consideration cause of the plaintiff's abuse of procedural rights, acting against the goal of civil litigation, but the question of recovering from the plaintiff in favor of the defendant the legal costs reported by his representative-advocate was not resolved, which requires an additional court order of these issues.

In doing so, the court considers the financial position of the plaintiff, who, while on child care leave until reaching the age of three, is currently restricted in the possibility of self-income, i.e. no income of her own. Also, the court did not take into account the cost of legal assistance in providing counsel before the trial, preparing for trial, gathering evidence, making written statements and petitions, since they do not include the determination of the lawyer's time spent on their execution and by the relevant term the commitments were not covered by the provisions of the current civil procedural law, and therefore have no retroactive effect on the increase of civil liability plaintiff in this part of the claims.

Accordingly, as a result of the case under investigation, the question arises as why a plaintiff has no representative, who would have provided her a professional legal assistance, that would not have such a negative results of court application. The next question is related to a service agreement between the defendant and his lawyer, concluded in 2017, with the aim the provide a legal assistance since 2018, because the proceeding in this case started only in 2018.

Conclusion Remarks

Supporting the abovementioned opinion, we want to conclude, that a legal assistance is of interest to one or a group of private persons, but the goal of the court procedure ensuring – in the light of ECtHR, which supports the idea of right to a professional legal aid: the Court reiterates that the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State, which regulation may vary in time and in place according to the needs and resources of the community and of individuals (p. 24). At the same time, the Court further reiterates that the requirement that an appellant be represented by a qualified lawyer before a court of cassation, such as the requirement applicable in the present case, cannot be seen in itself as contrary to Article 6. This requirement is clearly compatible with the characteristics of the Supreme Court as the highest court examining appeals on points of law and it is a common feature of the legal systems in several member States of the Council of Europe (p. 26) (Case *Kateryna Makarivna Moldavska v. Ukraine*).

Previously, ECtHR also suggest, that a person charged with a criminal offence who does not wish to defend himself in person must be able to

have recourse to legal assistance of his own choosing, however, this latter right cannot be considered to be absolute either and, consequently, the national courts may override that person's choice when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice; furthermore, the legal requirement for defense counsel to hold a law degree is not in violation of the above provision (p. 52) (Case Zagorodny v. Ukraine). At the same time, we should underline, that the legal fee, as well as a lawyer's fee, should not limit the debtor, the person, against whom the decision was given, through the high costs of legal assistance in court proceedings. The concept of cooperation between judge and parties will be the important essence of the court power, which gives him the necessary grounds for resolving the issues of the legal fee and distribution of legal expenses.

As a result, we would like to point out that professional representation in court in Ukraine is urgently needed, since there are many examples of such cases in which the parties experience the negative consequences of violating procedural law, and procedural law after reforms became extremely complex. As the example we have chosen, the issue of access to justice concerned only violations of the chosen procedure of applying to court, which led to abuse of procedural rights by a person clearly not aware of the provisions of the law. At the same time, the same example shows us that the issue of lawyer's fees should be considered as an additional claim and allow the other party to object to it.

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