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PROFESSIONAL REPRESENTATION OF A LAWYER IN CIVIL PROCEDURE: QUESTIONS OF REFORMATION

This article highlights some issues of representation of a lawyer as a representative in civil proceedings, the problems of possible modernization of the Bar activity in civil proceedings are characterized and researched. The estimation of the proposed changes to the Constitution of Ukraine concerning the representation of a lawyer in civil proceedings is given. The author studied the views of scientists on specific issues of representation in civil proceedings.

Keywords: professional representation of a lawyer in the civil procedure; lawyer; legal aid; civil proceedings.

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Профессиональное представительство адвоката в гражданском процессе: вопросы реформирования

В статье освещаются отдельные вопросы представительства адвоката как представителя в гражданском процессе, исследуются проблемы возможной модернизации деятельности адвокатуры в гражданском судопроизводстве. Дается оценка предлагаемых изменений в Конституцию Украины, касающихся представительства адвоката в гражданском процессе. Автором изучены мнения ученых по отдельным вопросам в гражданском процессе.

Ключевые слова: профессиональное представительство адвоката в гражданском процессе; адвокат; правовая помощь; гражданское судопроизводство.

Introduction. The draft law «On Amendments to the Constitution of Ukraine (on justice)» [1] proposed introducing a number of amendments to the Constitution of Ukraine concerning support of the Bar activity in Ukraine in the provision of legal aid under the new rules, set out in the draft. These changes

effectively monopolize the Bar activity on the legal aid the market, leveling the right to freely choose a representative in court.

Recent research and publications analysis. Analysis of recent research and publications indicates that the proposed amendments to the Constitution of Ukraine on the participation of a lawyer in provision of legal assistance have been the subject of scientific debate on the pages of the legal literature.

Much attention to research specific issues of representation was paid by such scholars as V. V. Komarov, N. Yu. Sakara, H. O. Svitlychna, and others. In some cases, procedural status of the representative was viewed through a set of rights and duties of the latter, which are elements of the civil procedural legal personality [2, p. 36, 37]. Along with this, N. Yu. Sakara, for example, considers civil procedural representation and legal aid as part of access to justice [3, p. 40].

It is correctly mentioned in legal literature that procedural representation is part of legal relationship, under which a person contributes to the protection of the rights, freedoms and interests of another person and (or) carries out of the procedural actions within his powers on his behalf [4, p. 341].

H. O. Svitlychna believes that further development and improvement of the institute of procedural representation, ensuring its effectiveness requires a comprehensive, comparative study of the problems of representation in different types of proceedings. This will allow defining the general principles of representation in court and justifying certain features of legal regulation of participation in various judicial proceedings [5, p. 111]. In another article the mentioned author argues that the institution of procedural representation as one of the lawful form of legal aid is becoming more significant in provision of free access to justice and its effectiveness, and respecting the adversary principles and equality of persons in civil proceedings [6, p. 34].

H. O. Svitlychna also draws attention on pages of legal literature that in order to ensure effective protection of the rights, freedoms and interests of individuals and businesses, the Civil Procedural Code of Ukraine introduces model of civil proceedings in accordance with European standards of the judiciary, which caused some changes in the legal regulation of some institutions of civil procedural law, in particular the representation [7, p. 38].

N. Yu. Sakara correctly thinks that institute of legal representation is the best mechanism for legal aid in civil proceedings in the context of access to justice as legal representative simultaneously provides legal aid and performs certain procedural actions in the name and on behalf of individuals [3, p. 233].

Paper objective is scientific analysis of the draft law dated 25.11.2015 «On Amendments to the Constitution of Ukraine (on justice)» [1] regarding professional representation of a lawyer in civil proceedings.

Paper main body. In addition to the legislative regulation of lawyer's activity in provision of legal assistance in civil procedure by the Law of Ukraine «On the Bar and Lawyer's activity» [8], Council for Judicial Reform proposed amendments to the Constitution of Ukraine concerning representation.

The main novelty that can be adopted to regulate the lawyer's activity is a proposal to introduce a new Article 131-2 to the Constitution of Ukraine, which envisages the activity of the Bar to provide professional legal aid in Ukraine. This article specifies provisions the fact that only a lawyer can represent another other person in court. It is defined that the law can specify exceptions to representation in court on labor disputes, disputes regarding the protection of social rights, on elections and referendums, in minor disputes, and for representation of minors or under aged and persons found incompetent by a court or whose capacity is limited [1].

Attention should be paid to the proposal to amend the Transitional Provisions of the Constitution of Ukraine [9]. We speak about supplement to the content of the Transitional Provisions with part 16-1 regarding entry into force of the proposed draft law «On Amendments to the Constitution of Ukraine (on justice)». Paragraph 11 of the proposed part 16-1 contains provisions that representation in accordance with paragraph 3 part 1 of Article 131-1 and Article 131-2 of the Constitution is conducted only by prosecutors or lawyers in the Supreme Court and courts of cassation from 1 January 2017; the appellate courts – from 1 January 2018; the courts of first instance – from 1 January 2019 [1].

Next novelties are provided further in the text of the draft law:

1) representation of state and local government bodies in court is performed only by prosecutors or lawyers from 1 January 2020.

2) representation in court proceedings initiated prior to the entry of the Law of Ukraine «On Amendments to the Constitution of Ukraine (on justice)» into force, is carried out according to the rules that were valid before its entry into force – before the final judgments of the relevant cases, that cannot be appealed [1].

Implementation of the reform of legal aid in the wording of the draft law of 25.11.2015 will severely limit, according to the author's opinion, the right of persons to obtain legal aid. In addition, the adoption of this law can cause further problems.

Firstly, a person will have limited access to free choice of subject, who will provide legal aid. According to the draft law, representation in court will be conducted exclusively by a lawyer, contrary to the position of the Constitutional Court of Ukraine [11] on the freedom to choose the defender of one's rights. In our view, the proposed provisions greatly restrict the rights of the concerned person to choose a representative freely.

Secondly, people who need legal aid may have financial difficulties. People will have to apply for this aid exclusively to a lawyer, which in turn will have a significant cost equivalent. In this respect, idea of N. Yu. Sakara should be mentioned, who notes that the requirement of access to justice will be observed only when there is an efficient system of legal aid, especially to persons with low income [7, p. 40]. In our opinion, if it is impossible to ensure payment by a concerned person for provision of professional legal aid by a lawyer, that person should apply for legal aid under the Law of Ukraine «On free legal aid» [10].

In this regard it is important to note that the Constitutional Court of Ukraine in case number 13- пп/2000 of 16 November 2000 on the constitutional application of the citizen G. I. Soldatov concerning 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 Code of Ukraine on Administrative Offences (right to free choice of defense counsel) states that there are following types of legal aid:

1) state bodies of Ukraine, whose competence is provision of legal aid (Ministry of Justice of Ukraine, Ministry of Labour and Social Policy of Ukraine, notaries, etc.);

2) the Bar of Ukraine as specially authorized, professional non-governmental human rights institution, one of the functions of which is to protect the individual from accusation and provision of legal aid while deciding cases in courts and other state bodies (p. 2, Article 59 of the Constitution of Ukraine);

3) business entities that provide legal aid to clients in accordance with the legislation of Ukraine;

4) public associations for exercising and protection of their rights and freedoms (p. 1, Article 36 of the Constitution of Ukraine) [11].

Taking into account the mentioned above it is believed that the provisions of the draft law «On Amendments to the Constitution of Ukraine (on justice)» contradict to the Constitutional Court positions set above. Provisions of the draft law are not consistent with the current legal provisions concerning the right to free choice of representatives. In the case of the adoption of these amendments to the Constitution there will be a need to change the legal regulation of civil procedural representation. The current contents of p. 1, Art. 40 of the Civil Procedure Code of Ukraine stipulates that a court representative may be a lawyer or other person who has attained the age of eighteen, has civil procedural capacity and is duly certified by the authority for representation in court, other than those specified in article 41 of this Code.

Conclusions of the research. Analysis of the draft law, presented in this scientific article, which provides for amendments to the Constitution concerning justice in the part of provision of legal aid, cannot be the final decision on the feasibility of its implementation. At the same time, the proposals made in it are the author's position, which aims at discussion the draft law.

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Професійне представництво адвоката у цивільному процесі: питання реформування

Проектом Закону України «Про внесення змін до Конституції (щодо правосуддя)» передбачається внесення низки змін до Конституції України, які стосуються надання правової допомоги. Цим законопроектом нівелюється право на вільний вибір представника в суді. Отож дослідження пропонуваніх змін є актуальним.

У статті проаналізовано Закон України «Про адвокатуру та адвокатську діяльність». Звернуто увагу на норми законопроекту стосовно надання правової допомоги, а також розглянуто співвідношення змісту з позиціями Конституційного Суду України, які викладені ним у рішенні № 13-рп/2000 від 16.11.2000 р. На думку автора, запропоновані зміни суперечать позиції Конституційного Суду України.

Прийняття вказаного законопроекту буде порушувати право заінтересованих осіб на вільний вибір особи, яка буде надавати правову допомогу, а також спричинить виникнення матеріальних складнощів у осіб, які потребують такої допомоги.

Тим не менш, у разі прийняття пропонуваніх змін до Конституції України правова допомога у формі процесуального представництва буде більш кваліфікованою.

Ключові слова: професійне представництво адвоката у цивільному процесі; адвокат; правова допомога; цивільне судочинство.

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