

Додаток Д. Формат зведеної таблиці інформаційно-аналітичної системи щодо кількості проваджень, у яких не призначено прокурорів із прив'язкою до місяця й року реєстрації провадження в СРДР

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PRACTICAL PROBLEMS OF ATTORNEY'S REQUEST USAGE

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In the article was made a study of practical problems usage of attorney's request as a necessary component of advocacy. The study of disadvantages in the usage of attorney's request is impossible without studying its legal nature.

The authors have received considerable attention to the analysis of the current legislation in circle of realization the right of lawyer to appeal to public authorities or private enterprises with attorney's request. Attention is paid to the problems with which faces lawyer in his professional activities. Its determined necessity of reformation of the existing legislative system in order to facilitate lawyers' right to receive necessary information for the effective rendering of legal services.

Key words: attorney, information, attorney's request, legal aid, counsel warrant.

ПРАКТИЧЕСКИЕ ПРОБЛЕМЫ ПРИМЕНЕНИЯ АДВОКАТСКОГО ЗАПРОСА

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В статье было произведено исследование практических проблем применения адвокатского запроса как необходимой составляющей адвокатской деятельности. Исследование недостатков при применении адвокатского запроса невозможно без изучения его правовой природы.

Авторы уделили значительное внимание анализу действующего законодательства, регулирующего сферу применения, реализации права адвоката на обращение в органы государственной власти или предприятий частной формы собственности с адвокатским запросом. Уделяется внимание проблемам, с которыми сталкивается адвокат при осуществлении профессиональной деятельности. Обоснована целесообразность внесения изменений в действующие законодательные акты в целях содействия адвокатам в праве на получение информации, необходимой для эффективного предоставления юридических услуг.

Ключевые слова: адвокат, информация, адвокатский запрос, правовая помощь, ордер адвоката.

ПРАКТИЧНІ ПРОБЛЕМИ ЗАСТОСУВАННЯ АДВОКАТСЬКОГО ЗАПИТУ

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У статті було проведено дослідження практичних проблем застосування адвокатського запиту як складової адвокатської діяльності. Дослідження недоліків під час застосування адвокатського запиту є неможливим без вивчення його правової природи.

Автори приділили значну увагу аналізу чинного законодавства, яке регулює сферу застосування, реалізації права адвоката на звернення до органів державної влади чи підприємств приватної форми власності з адвокатським запитом. Приділяється увага проблемам, із якими стикається адвокат під час здійснення професійної діяльності. Обґрунтовано доцільність внесення змін до чинних законодавчих актів із метою сприяння адвокатам у праві на отримання інформації, необхідної для ефективного надання юридичних послуг.

Так, проблеми, які виникали в адвокатів з отриманням інформації за допомогою адвокатського запиту, привертати увагу багатьох вітчизняних учених, у поле зору яких потрапляли лише окремі недоліки законодавчої конструкції норм, які гарантували право на отримання запитуваної адвокатом інформації. Однак, на жаль, увесь комплекс прогалин та проблем, із якими стикаються адвокати на практиці під час використання такого засобу, як адвокатський запит, залишається не достатньо дослідженим.

Авторами на підставі викладеного матеріалу встановлено, що основними проблемами й недоліками під час практичного використання адвокатських запитів є такі: ігнорування запитів; порушення строків розгляду; надання інформації, яка не стосується запиту; відписка з посиланням на те, що інформація є конфіденційною; вимагання копії договору про надання юридичних послуг; вимагання плати за надання інформації; зловживання адвокатами правом на адвокатський запит, зокрема у своїх інтересах або без укладення договору про надання правової допомоги.

Аналіз законодавства та праць науковців дозволив авторам виокремити основні практичні проблеми, пов'язані з реалізацією адвокатом права на адвокатський запит, та запропонувати шляхи вдосконалення законодавства для усунення прогалин, недоліків і причин, які сприяють порушенню цього права.

У статті автори наголошують на тому, що створення професійного адвокатського корпусу в Україні є неможливим без забезпечення гарантій реалізації права на адвокатський запит. Доцільним вбачається й посилення заходів відповідальності та процедури притягнення до відповідальності осіб, які порушують право адвоката на отримання інформації.

Звернено увагу на те, що запровадження наведених пропозицій обов'язково зумовить більш сумлінне ставлення до адвокатських запитів, що у свою чергу сприятиме підвищенню рівня довіри населення до правової сфери України та слугуватиме черговим кроком в інтеграційних процесах нашої держави на сучасному етапі розвитку.

Ключові слова: адвокат, інформація, адвокатський запит, правова допомога, ордер адвоката.

One of the most important for a lawyer as a representative of a person is attorney's request, without which is complicate or even impossible to provide qualified legal assistance. Formation of proper and acceptable evidence is a major factor to obtain a positive result in case, with use of attorney's request.

The problem of providing professional legal aid by lawyers, in particular for the realization of the right to request is relevant and always has been the subject of many studies of modern scientists. Among the scientists who have studied some aspects of this problem are V.B. Aver'yanov, A.V. Ivantsova, V.M. Khabibulin, L.A. Podosynnikova, I.M. Sopilko, J.A. Tikhomirov and others. Thus, the problems studied in the works of these scientists show only some drawbacks of our legal system. However,

unfortunately, the whole complex of gaps and problems faced by lawyers in practice connected with usage of attorney's request is not sufficiently investigated.

The above leads to the purpose of article – through the analysis of legislative and scientific literature define the legal nature of attorney's request, explore practical aspects of usage of this right, including the filing of the procedure, terms of receiving a response to a request and analyze the conditions, gaps and problems that complicate the realization of their legal right.

Advocacy is based on the certificate of advocacy, issuing the qualification commission of advocates. The License to Practice Law gives the right to exercise individual or collective law practice by combining in associations or bar associations.

One of the most important for a lawyer as a representative of a person is the right of attorney's request, without which greatly hampered or even impossible to provide qualified legal assistance.

According to the Law "On the Bar and Legal Practice" Advocacy is an independent professional activity advocate for the implementation of security missions and to provide other types of legal aid clients [1].

These types of advocacy relating to all of Advocates of Ukraine, however, organizational forms of advocacy under the new law "On Advocacy and advocacy" in accordance with art. 4 is an individual advocate activity or organizational and legal forms or law offices of the Bar Association [1].

According to art.14, 15 of the Law "On the Bar and Legal Practice" law office and bar association is a legal entity operating under the statute. In addition, state registration law offices and lawyers' association carried out in the manner prescribed by the Law of Ukraine "On State Registration of Legal Entities and individuals – entrepreneurs" with the specifications provided by the Law.

The features of the registration law offices and lawyers' association are:

- 1) founder of the Law Office is a lawyer;
- 2) the founders of the Bar Association has two or more lawyers;
- 3) the name of the law office must contain the name of the founder lawyer;
- 4) the establishment, reorganization or liquidation of the bar association of lawyers counsel informs the region.

According to art.24 of the Law of Ukraine "On the Bar and Legal Practice", lawyer request – written appeal counsel to the state government, local government, their officers and employees of enterprises, institutions and organizations regardless of ownership and subordination, associations for provision information, copies of necessary documents for the lawyer to provide legal assistance to clients [1].

Positive moment in the Law of Ukraine "On the Bar and Legal Practice" is the fact of establishing the term to give necessary information. Thus, the public authority or private entities should within five working days of receipt of the request to provide relevant information to the lawyer, copies of documents, in addition except information with restricted access and copies of documents that contain information with restricted access.

However, in practice lawyer often confront with violations of his right to receive information with use of attorney's request. Major violations engaged in providing individual responses to the lawyers' request is:

- 1) requesting a copy of the contract for legal assistance;
- 2) respond that the information is confidential;
- 3) violation of the terms to respond;
- 4) give information that doesn't apply to the request;
- 5) ignoring the request;
- 6) respond that information can't be given with reference to the protection of personal information;
- 7) receive an answer with caution that it's pay information.

For the purpose of understanding the practical problems associated with these disorders is necessary to use method of analysis. So, when lawyer submits attorney's request he can receive written demand to add a copy of the contract for legal assistance. These is a direct violation of the requirements of the Law "On the Bar

and Legal Practice” because lawyer should add certified copies of the certificate of right to advocacy, counsel warrant or trust of agency (agencies) authorized to provide free legal aid to his attorney’s request. Require other documents prohibited [1].

The most of scientists and lawyers had thoughts about the hollowness of such claims and the inability to provide copies of such agreements [2, p. 163]. Provide copies of such lawyer “would be a direct violation of the rules of protection of confidentiality on his part” [3, p. 41].

Another aspect that complicates the realization of lawyers right of attorney’s request is establishing in law restrictions on the provision of information with restricted access and copies of documents that contain information with restricted access (include confidential information). According to art.21 of the Law of Ukraine “On information” [4] information with restricted access is confidential, secret and proprietary information.

Ignoring and violating the terms of the consideration of requests is a major practical problem faced by lawyers. Compliance with the consideration of the request is important because it allows lawyer to get the necessary information at the right time. However, ignoring and abuse of the terms of consideration of attorney’s request negatively affect on the resolution of the case, which causes negative consequences primarily for client. However, eliminating this problem is existence of administrative and criminal responsibility for these actions.

Give information that doesn’t apply to the request is a significant problem in lawyer’s practical activity. Thus, given the requirements of the law that the violation doesn’t entail liability due lawyer received a response to your request within the prescribed period. However, it would introduce liability for information not related to the request as received information contains practical use for a lawyer.

Recently became popular reference to the fact that getting information is a paid service. This response disagree with Law of Ukraine “On the Bar and Legal Practice Law of Ukraine” in which written that information is free of charge. In addition, the only exception is fact that amount of information is more than 10 pages, in which case the lawyer should offset the costs of making copies. There is although administrative and criminal responsibility for these actions.

It should focus on the fact that a lawyer may be responsible in case of abuse of the right of the attorney’s request or violations of law while using this right. Thus, lawyers send their requests, which contain information on the applicant are not untrue or lawyer sent requests just in his own interests, without contract for legal assistance.

According to the Law of Ukraine “On the Bar and Legal Practice” lawyer may be disciplined in order disciplinary proceedings. In turn, disciplinary proceedings is the process of consideration of a written complaint, which contains information about the presence of a lawyer’s actions evidence of the offense. Disciplinary proceedings against a lawyer carried qualification commission of advocacy at the workplace attorney referred to in the Unified Register of Advocates of Ukraine [1].

In accordance with the above law right to a qualification-disciplinary committee of the Bar of the application (complaint) about a lawyer who may be grounds for disciplinary action has everyone who has known facts such behavior.

It should be noted that the Law “On Advocacy and advocacy” determines the list of reasons that lead to prosecution lawyer disciplinary measures, namely committing of the offense, which in turn indicates one of the following counsel:

- 1) violation of incompatibility;
- 2) violation of the oath of Advocates of Ukraine;
- 3) violation of the rules of legal ethics;
- 4) disclosure of confidentiality and actions that led to its disclosure;
- 5) non-performance or improper performance of their professional duties;
- 6) non-enforcement of the legal profession;
- 7) breach of other obligations counsel provided by law [1].

The current law of Ukraine administrative and criminal liability for violation of the provision information on attorney's request.

Speaking about administrative responsibility should be noted that according to the art. 212-3 of Code of Ukraine on Administrative Offenses:

Unlawful refusal to provide information, untimely or incomplete provision of information, information that is untrue, in response to the attorney's request, the request of Qualification-Disciplinary Bar Commission, member of the House or the Law of Ukraine "On the Bar and Legal Practice" entails a fine on officials from twenty-five to fifty times the income (from 450 to 850 hryvnias) [5].

Protocols on administrative violations under art.212-3 Code of Ukraine on Administrative Offenses (violation of the right to information) in the part concerning violations of the right to information under the Law of Ukraine "On the Bar and Legal Practice" head up the Bar Council of the Autonomous Republic of Crimea, Kyiv and Sevastopol and/or authorized by the respective council member of Bar.

After receipt of the application respective council examines and verifies the submitted materials. Then he decides to make protocol or decide not to report on administrative offense.

Criminal liability of the Criminal Code of Ukraine. According to art. 397 of the Criminal Code of Ukraine:

1. Any interference with lawful activity of a defense attorney or legal agent, or violation of legal guaranties of their activity and professional secrets, – shall be punishable by a fine of 100 to 200 tax-free minimum incomes, or correctional labor for a term up to two years, or arrest for a term up to six months, or restraint of liberty for a term up to three years.
2. The same actions committed by a person through abuse of office, – shall be punishable by a fine of 300 to 500 tax-free minimum incomes, or restraint of liberty for a term up to three years, with the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years [6].

Law of Ukraine "On the Bar and Legal Practice" did not solve all the problems related to the full realization of the right to a lawyer of his request for the proper performance of the functions on lawyers to represent and protect the interests of its clients.

Analysis of legislation and scientific works allowed the authors to isolate the main practical problems associated with the realization of the right to an attorney's request the ways of improving legislation to address gaps and deficiencies and factors contributing to the violation of the law.

Bar Ukraine is an institution of civil society whose duty it is to protect the interests of all actors of civil society. However, for the effective functioning of the institution requires a clear resolution of his subjects, namely bodies that advocate government. This is evidenced by the presence of the needs of civil society in this institute, which needs to provide professional legal assistance to legal specialists, as most members of society unable to defend their interests in conflict with the state and others. Accordingly, the aspect of effective legal profession promotes activities lawyers, professionals, guaranteeing qualified to assist individuals and legal entities.

It should be noted that the above shows a clear hierarchy of the legal profession. The system of government advocates are well developed and allows you to perform tasks such bodies in accordance with the law. In addition, the law provides for binding decisions of the legal profession to fulfill all lawyers. This in turn suggests that the legal profession is not only enshrined in law, but also has effective safeguards the activity as non-enforcement of the legal profession entails legal liability, even including a denial of advocacy.

In addition, it is important to consolidate the Law "On the Bar and Legal Practice" foundations funding the legal profession and an exhaustive list of funding sources, which in turn provides sustainable operation of the entire system of government.

Advocate's request as part of a lawyer is an important part of civil society which seeks the protection of the interests of citizens. Given this improvement of legislation in this area will ensure effective implementation of the rights of lawyer.

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ЗАЛУЧЕННЯ ПОНЯТИХ ДО УЧАСТІ В ПРОВЕДЕННІ СЛІДЧИХ (РОЗШУКОВИХ) ТА ІНШИХ ПРОЦЕСУАЛЬНИХ ДІЙ

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У статті розглядається актуальне питання кримінального процесуального законодавства, а саме залучення понятих до участі в проведенні слідчих (розшукових) та інших процесуальних дій. Проаналізовано юридичну літературу, проведено порівняльний аналіз міжнародного законодавства щодо цієї проблематики та зроблено відповідні висновки й пропозиції.

Ключові слова: понятий, слідчі дії, розшукові дії, процесуальні дії, слідчий.

ПРИВЛЕЧЕНИЕ ПОНЯТЫХ К УЧАСТИЮ В ПРОВЕДЕНИИ СЛЕДСТВЕННЫХ (РОЗЫСКНЫХ) И ДРУГИХ ПРОЦЕССУАЛЬНЫХ ДЕЙСТВИЙ

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В статье рассматривается актуальный вопрос уголовного процессуального законодательства, а именно привлечение понятых к участию в проведении следственных (розыскных) и других процессуальных