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Legal status and the bases of obligatory participation of lawyer-defender in cases of legislation in the Republic of Kazakhstan

In article advocateship is a voluntary professional organization of the citizens who are carrying out protection on pretrial investigation, inquiry, in criminal court judge in an order established by law, besides, carrying out representation of interests of claimants and respondents in civil cases were given. Advocateship is a public self-coping organization urged to provide a legal assistance to the population and organizations by consultation on legal questions, any drawing up documents and official papers on the basis of law.

Key words: lawyer, advocacy, legal status, defense attorney.

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**Қазақстан Республикасы заңнамасы бойынша
 адвокат-қорғаушының қатысу негіздері және құқықтық мәртебесі**

Мақалада адвокаттық қызметтің көптеген қырлары мен мәселелері қарастырылған және адвокаттың қылмыстық істер, азаматтық істер мен әкімшілік істерде қорғаушы болуы туралы оқыс ой-түйіндер жазылған. Адвокаттың мәртебі мен оның құқықтық мәртебесінің сауалдары зерттелген. Адвокат өзін-өзі басқара алатын қоғамдық ұйым болып табылады және адвокаттар заңға сүйене отырып, қоғамға кеңесін береді.

Түйін сөздер: адвокат, адвокаттық қызмет, құқықтық мәртебе, қорғаушы-адвокат.

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**Правовой статус и основы участия адвоката-защитника
 по законодательству Республики Казахстан**

В статье рассматривается адвокатская деятельность как добровольное профессиональное объединение граждан, осуществляющих в установленном законом порядке защиту на предварительном следствии, дознании, в суде по уголовным делам, кроме того, осуществляющих представительство интересов истцов и ответчиков по гражданским делам. Адвокатура является общественной самоуправляющейся организацией, призванной на основе закона оказывать населению и организациям юридическую помощь путем консультирования по правовым вопросам, составления разного рода документов и деловых бумаг.

Ключевые слова: адвокат, адвокатская деятельность, правовой статус, адвокат-защитник.

The jurisprudence has a certain recommendation concerning advocateship as a whole and a lawyer in particular have to strictly and rigorously guard the law and protect it from any encroachments as from the power and certain citizens for the sake of any purposes done by it [2].

According to RK Criminal Procedure Code a lawyer cannot refuse protection. It has no rights to

use the information to the detriment of a client, and also is directly obliged to use as much as possible owing to an unilaterality of function carried out by it the means, provided by law and ways for clarification of everything that justifies accused or softens its responsibility. Therefore it is necessary to raise an advocateship role, considering its functioning as an important condition of administration of law in exact

compliance with law. In other words, problems of activity of advocateship are considerably similar with functions of the government law enforcement agencies.

Therefore, the important place is taken by advocateship with its Collegium of Advocates – independent organization of professional lawyers among law enforcement agencies and organizations, urged to carry out a task of protection of legitimate rights and interests of physical and legal entities.

It is necessary to carry legal documents accepted by the supreme body of Collegium of Advocates and also the Charter of Collegium of Advocates and the Rule of professional ethics of lawyers to the sources of norms regulating lawyer activity [3]. The main objective of advocateship according to Art. 1 of chapter 1 of the Law on advocateship is providing a legal assistance to citizens and organizations.

The lawyer is obliged to use all means provided by law and ways of protection of the rights and legitimate interests of citizens and organizations which have asked it for help. But he has no the right to accept an assignment about providing a legal assistance in cases of public official participation, who is the relative of the lawyer in investigation or if the lawyer participated earlier in this case as a judge, investigator, a person making inquiry, prosecutor, eyewitness, expert, specialist, translator, witness. The lawyer has no right to disclose the data, reported to him by principal in connection with providing a legal assistance. The state secrets are protected data, which are the state and office secrets. Its distribution is limited to the state for the purpose of implementation of the effective military, economic, foreign policy, prospecting and other activity which is not conflicting to the standard norms of international law [6].

Professional protection is activities of the lawyer defender for implementation by lawful means and ways, in the order of function of protection established by the law accused, suspected, aiming at ensuring protection of their rights and interests, and also providing a legal assistance to them. Denial or charge mitigation, and also rehabilitation of the person which has illegally undergone criminal prosecution is an essence and issues of protection depending on features of criminal case [7].

The advocateship takes an important place in system of law enforcement agencies and organizations. It means that issues of activity of advocateship are considerably similar with functions of the government law enforcement agencies. However, it is not a law enforcement

agency since the lawyer has no powers on coercion behind observance of someone's rights, it acts on essentially other basis: he is a defender, i.e. he protects. Protection is necessary to prevent investigative and justice miscarriages of special types : criminal prosecutions, legends to court and condemnations innocent or condemnations guilty under the law providing responsibility for more serious crime, than actually to them perfect or purposes of excessively severe penalty, and also in other cases.

The law provides the following basis of the defender obligatory participation on criminal case. [8].

First of all, such basis is the petition for its suspect (accused) to have the defender. The institute of obligatory participation of the defender provides his participation, firstly, on will and a consent of the suspect accused.

Secondly, participation of the defender is obligatory if the suspected or accused did not reach the legal age. The minor is a person who did not reach eighteen years at the time of commission of a crime by it, and also a person accused of several crimes, one of which is made by him aged till eighteen years.

Thirdly, suspected or accused owing to the physical or mental defects cannot independently carry out the right of defense. In this case it is necessary to understand that this person, though conventionally responsibility suffers continuous or temporary disorder of the sincere activity, essential defect of the speech, sight, hearing or other heavy illnesses.

Fourthly, suspected or accused does not know language in which legal proceedings are conducted.

Fifthly, a person is accused of crime execution for which measure of punishment is imprisonment for the term of over ten years, lifelong imprisonment or capital punishment can be appointed.

Sixthly, accused is arrested as a measure of restraint applied or it is forcibly directed on stationary forensic-psychiatric examination.

Seventhly, there are contradictions (recognition of charge by one and contest by another; exposure by one defendant of another; the objections caused by nature of charge, brought to each of them, etc.) between interests of suspects or accused, one of which has the defender. It is explained by defendant whose interests contradict interests of other defendants passing with it on one deal and having defenders, put in unequal procedural situation.

Eighthly, the representative of the victim (the private accuser) participates in criminal proceeding

or the civil claimant. To observe of the principle of ensuring equality of the parties and competitiveness of participants of legal proceedings, and also comprehensive, full and objective investigation of facts of the case participation of the defender is obligatory.

Ninthly, when the state accuser participates in court in considered case. Participation of the prosecutor in judicial proceedings puts the defendant who does not have the defender, in unequal situation not only before court, but also before a professional lawyer. That's why, the law defined obligatory participation of the defender (lawyer) in these cases.

The V-tenth, accused is outside RK and evades from an appearance in bodies of pretrial investigation.

Therefore, obligatory participation of the defender in cases pursues the aim to strengthen protection of the rights and legitimate interests of the persons who need the above circumstances in additional guarantees. In the cases provided by the bases 2-4, 6 (at the compulsory direction accused for stationary forensic-psychiatric examination), refusal accused from the defender cannot be accepted by the body conducting criminal procedure. Violation of these requirements attracts obligatory carrying out additional investigation or sentence cancellation.

Finally, about the last basis when the defender is obliged to participate in criminal proceeding but which, unfortunately, did not find reflection in the current legislation. In practical activities of the bodies conducting criminal procedure, the affairs, materials which are brought by prosecutor often meet the investigator, judge or court to doubts in ability accused independently to carry out the right of defense. The basis for such doubt is manifestation from defendant party of the indifferent relation to cases, low level of intellectual development and education and other possible emergence of the circumstances having values for the cases, etc.

If in the presence of these bases the defender is not invited to the suspects accused, their lawful representatives, and also other persons on their assignment, the body conducting criminal procedure, is obliged to provide participation of the defender at the corresponding stage of process about which it takes out the resolution which is obligatory for members of Collegium of Advocates.

The lawyer has no right to refuse the assumed protection of the suspect or accused.

Refusal of the lawyer of the accepted assignment (except for its illness and other objective circumstances) on criminal case on which life was

to the reasons is a minor offense. Making decisions on impossibility of performance of an assignment, the lawyer is obliged to inform of it the person which has asked for the help, in advance, that he had opportunity to address to other lawyer.

If the lawyer sees the bases for the judgment appeal, and the client objects to it, it is necessary to receive written refusal of the condemned. This rule does not extend on minors and the persons suffering from physical and mental defects.

Thus, the lawyer (defender), giving accused legal help in implementation of its procedural laws, thereby promotes correct both to comprehensive consideration of the case and removal of a lawful, reasonable and fair sentence.

Additionally, the law provides the circumstances excluding participation of the lawyer as the defender. Defenders can be lawyers because only professional protection is urged to provide the qualified legal aid for an accused person.

In confirmation of his status the lawyer submits to the bodies conducting criminal procedure, documents on accessory of Collegium of Advocates, in necessary cases the warrant of legal consultation on the right of participation of the lawyer in the this case or equated to it on value the document (the solution of public association or its governing body on appointment of the defender).

At the same time, the law allows participation of the spouse (wife/husband), close relatives and lawful representatives of the suspect accused and the defendant, representatives of labor unions and other public associations, for members of these associations as the defenders.

According to RK Criminal Procedure Code, close relatives are parents, children, the adoptive parents adopted, full and not full brothers and sisters, the grandfather, the grandmother and grandsons.

Lawful representatives are parents, adoptive parents, trustees, trustees of the suspect accused, the victim, the civil claimant, and also representatives of the organizations and persons, on care or which dependence there is the suspect who was accused or injured.

The lawful representative is a person under guardianship or on which care there is a minor, or the person suffering from physical or mental defects who cannot independently protect the rights and legitimate interests. The lawful representative is an independent participant of criminal trial and is not connected with a position of the represented person and the defender. Participation in deals of the counsel for the accused does not attract discharge of the lawful representative.

As for investment of representatives of labor unions and other public associations by the right to be defenders, it can be explained with special trust from defendant side, a lack of lawyers in the certain regions of the Republic of Kazakhstan, and also that among the tasks of organization is a representation of interests and protection of their members.

The bases for elimination of the lawyer from participation in criminal proceeding as the defender are, if he:

- earlier participated in case as a judge, prosecutor, investigator, inquirer, court clerk, court usher, witness, expert, specialist, translator or eyewitness;

- consists in the related relations with public official who accepted or takes part in investigation or judicial review of the this case;

- provides or earlier gave legal help to the person having opposite interests with client or confidential person and is equal in the related relations with such persons ;

- has no right to be a defender or representative by law.

Existence of any of the listed circumstances obliges the lawyer to refuse conducting deals (i.e. he cannot become a defender).

If it it was not made, the issue of discharge from participation in proceeding of the defender is resolved by the body conducting criminal procedure.

The lawyer can be not informed at the time of assignment acceptance that his relative takes part in a legal investigation. Certainly, it is difficult to assume that any lawyer, concluding the agreement with the person whom has asked for a legal aid, is not interested in that who conducts an investigation of case. But sometimes pretrial investigation is carried investigative or investigative task force from the very beginning. If there is a public official (the investigator, the investigator) in its structure with whom the lawyer is in the family relations, this circumstance practically can emerge at conversation with the investigator, the head of group when the assignment is already accepted. In this case, in our opinion, it is necessary to eliminate the public official, instead of the defender from participation in cases (especially as the fundamental constitutional principle says «each accused has the right to use the help of the lawyer (defender)» – item 3 of Art. 16 of the Constitution of RK. [1]] .

Supplementing this provision of item 1 of Art. 72 of the Criminal Procedure Code of RK, directly specifies that «the defender is invited suspected or accused on an assignment or with the consent of

the suspect accused» though the law narrates on the contrary.

The lawyer cannot participate at the same time on one case as a defender, representative of the victim, civil claimant and civil respondent. The suspect (accused, the defendant) cannot declare branch to the lawyer who carries out his protection, and has the right only to refuse its help.

Branch as it takes place with the judge, the prosecutor, the investigator, the person making inquiry, and some other participants cannot be declared to the defender.

Accused and the suspect at any moment of proceeding has the right to refuse the defender, to invite other defender or to be protected independently. The exception makes in cases, if:

- the suspected or accused did not reach legal age;

- suspected or accused cannot independently carry out the right of defense owing to the physical or mental defects ;

- suspected or accused does not know language in which legal proceedings are conducted;

- the accused is forcibly directed on stationary forensic-psychiatric examination. Here refusal accused from the defender cannot be accepted by the body conducting criminal procedure.

Refusal of it can take place at any stage of process only at the initiative of accused (suspect) and in the presence of real possibility of participation of the lawyer in case.

Refusal of the defender has to be strictly voluntary, the initiative has to proceed from accused, and refusal has to to be expressed in a straight line and a certain form.

Accused and suspect have the rights to refuse the defender without giving motives of refusal. However, the person making inquiry, investigator, prosecutor and court have to take an interest in causes of failure, without being limited to formal refusal. Having found out, whether refusal is compelled, having explained to them that the defender can be appointed irrespective of existence of funds for payment of its work or absence of the lawyer. Refusal is made out in written form or reflected in the protocol of the corresponding investigative or judicial action.

Refusal of the defender is not reflected in procedural position of other participants of process and does not deprive of the accused and suspected right at any moment of proceeding again to invite the defender or to declare the petition for appointment of the defender.

Thus, according to above four bases, the lawyer is eliminated on preliminary investigation by the resolution of the investigator or the prosecutor, and in court – the resolution of the court considering case. The decision on elimination needs to be motivated and provided accused possibility of receiving a legal aid from other defender.

Elimination of the defender by investigator, prosecutor and court cannot be identified with refusal accused from the defender. Solution of such problems as existence or absence of internal belief (position) concerning actions of the client is of

interest; opportunity or need of development of an independent position on business; focus of interest of the client which the defender and many others is obliged to defend during the implementation.

At the same time quality of the legal help given in judicial production by lawyers, appointed the state, remains low because of of their congestion and low payment for provided services.

The state should make a lot of work to make Kazakhstan citizens feel the constitutional guarantees of the safety and protection within lawsuit.

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