TERMS OF THE CONTRACT FOR LEGAL SERVICES

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Summary

The article is devoted to investigation of the essential, natural and accidental terms of the contract for legal services. The subject matter of the contract which includes actions of factual and juridical character is the only objectively-essential term of the contract for legal services. The legal aid contract provided by licensed lawyer (advocate) covers both internal relations which are relations between the licensed lawyer (advocate) and the client, and external relations since according to the Ukrainian legislation, the legal aid contract is the basis for provision of legal services, including representation without additional power of attorney.

Key words: contract, legal services, legal aid, services provider, terms of the contract.

Аннотация

Статья посвящена исследованию существенных обычных и случайных условий договора об оказании правовых услуг. Предмет договора, который включает в себя действия фактического и юридического характера, является только объективно-существенным условием договора об оказании правовых услуг. Договор об оказании правовой помощи, предоставляемой адвокатом, предполагает как внутренние отношения между адвокатом и клиентом, так и внешние отношения, потому что, в соответствии с законодательством Украины, договор об оказании юридической помощи является основой для оказания юридических услуг, в том числе представительства без дополнительной доверенности.

Ключевые слова: договор, правовые услуги, юридическая помощь, субъект оказания услуг, условия договора.

It is commonly known that the contractual terms and conditions is a way of fixing mutual rights and obligations. As a rule, contractual terms and conditions are divided into three groups: essential, natural and accidental.

In this article the author aims to determine essential, natural and accidental terms of legal services contracts and their special kinds such as legal aid contract and entrepreneurial contracts for legal services.

The feature that joins the essential terms into one group does not cause much controversy. We talk about the terms that form the contract as a whole and their individual types (kinds) in particular. Accordingly, essential terms admittedly are the terms that are necessary and sufficient in order to consider a contract as concluded and capable of giving rise to rights and obligations of the parties [3, p. 295, 296].

As it is rightly noted in the legal literature, the selection of twofold essential terms logically follows from the classical concept of the nature of civil law contract. On the one hand, the contract as a legal fact should have a certain level of objective certainty if the parties to the agreement want by their actions to cause the desired legal effect. The objectively-essential terms must always be in sight, since through them in the contract the description of the qualitative and quantitative characteristics of the object of the contract is provided. On the other hand, the contract must reflect all the terms that are significant at least for one of the parties. These terms are called subjectively-material [4, p. 295, 195]. According to the Art.901 of the Civil Code of Ukraine [17], the subject matter of the contract is objectively-essential term of the contract for legal services. The actions of factual and juridical character are the subject matter of the studied contracts. Let us dwell on them. The actions of factual character that are the subject matter of the contract for legal services include consultation and information on legal issues both verbally and in writing. Drafting of applications, complaints, petitions and other documents aimed at the implementation, protection and defence of the rights and interests of the client are equivalent to consultations. It is indicated in the legal literature that under the consultation process it is necessary to consider any form of assistance concerning the content, process and structure of the task during which the consultant is not responsible for the performance of the task but helps those who is responsible for it [20, p. 3]. "We do consulting every time when we try to change or improve the situation, but do not directly manage the execution" [19, p. 1-18]. Most often the subject matter of the contract for legal services includes such juridical actions as representation of rights and interests of the clients in constitutional, civil, economic, administrative proceedings; during judicial trials in the intermediate court, international commercial arbitration (court) and other organs of dispute resolution; in the court enforcement action and during enforcement of sentence / decision; in the bodies of state authority, local governments and organizations, before private person and so on. The main feature of representation is actions of one person on behalf of another, which generates an immediate juridical outcome for the person who is represented. O.O. Krasavchykov in the structure of representation identifies three groups: 1.Internal relations are relations between the representative and the person represented. In implementation of thereof the representative is given mandate to act on behalf of the person that he / she represents. 2. External relations are relations between the representative and a third party in the process of concluding a contract or committing other legal action. 3. Legal connection between the person who is represented and a third party as a result of the implementation of the above mentioned internal and external relations of representation. All rights and obligations under this legal connection are acquired by the person represented, and the third party [16, p. 267].

The contract for legal services always covers the internal relations between the client and the provider. The legal aid contract provided by the licensed lawyer (advocate) concluded under the Law of Ukraine "On the Bar and licensed

legal practice" [5] is a kind of described agreements and covers both internal relations between the licensed lawyer (advocate) and the client, and external relations since according to legislation, the legal aid contract is the basis for provision of legal services, including representation without additional power of attorney (Part 1 of the Article 50 of the Criminal Procedural Code of Ukraine [12], Part 4 of the Article 42 of the Civil Procedural Code of Ukraine [18], Part 5 of the Article 58 of Administrative Legal Procedure Code of Ukraine [9]).

We believe that the legal norms on certification of the representative's authority by the contract should be made universal regarding all agreements studied. Such provisions would contribute to more effective and cheaper legal services delivery, as the need to prepare an additional document, namely, power of attorney, would be removed because the content is factually duplicated by the provider's responsibilities under the contract.

Defining the subject matter of the contract for legal services, the parties should agree on the quality of legal services to be provided. It should be said that quality is a set of properties of the product (and legal service is the product – the author) that determine its suitability for intended use by the client [13, p. 39]. The terms regarding the quality of legal services should be determined depending on the subject-matter of the contract. Subject matter as it has been mentioned, consists of factual and judicial actions. Accordingly, the quality requirements of such actions should be considered separately.

Written and verbal consultations have to conform to the law that regulates the respective legal relations, and if there are inconsistencies, gaps, contradictions in the legislation they have to reflect these problems and provide information about their possible solutions. If the client raises the question of how to achieve a particular legal result (win a case, etc.), the consultation should include a reference to court or administrative practice of hearing of similar cases (if any), as well as assessment of probability of achieving the goal set by the client. Nonetheless, even if the position of the client is fully consistent with legislation, the directions for hundred percent winning chance or achievement of other result and also informing the client that the provider shall ensure achievement of objectives under any conditions is a violation of the requirements for the quality of legal services.

The drafts of contracts worked out by the provider must comply with current legislation and establish for the client rights and benefits about which the lawyer was informed, in addition, they must not include conditions that would not meet the interests of the client, except the cases when it is determined by need of the client's activity. The draft contracts should not contain ambiguous language that would allow different interpretations of the literal meaning and, as a result, could be harmful to the client. In addition, the typographic errors that have caused distortions of important to the client contract conditions (such as bank details) must also be considered as violation of the quality of legal services.

Statements, complaints and other documents of legal nature should be addressed to the body or an official authorized to consider them. Also, these documents have to include the requirements or the information provided in the current legislation in compliance with its wording. Besides, they must contain the legal analysis of the situation and determine the position of the client from the point of view of legislation. Writing complaints and petitions with violation of the rules and procedures stipulated by the relevant acts that have caused denial of consideration of thereof or led to negative consequences for the client should be considered as violation of the requirements to quality of services. Referring in the complaint or statement to the legal provisions that call into question the position of the client or confirm the circumstances, the presence of which may worsen the client's situation should be considered as improper provision of services as well.

During conducting the pre-trial preparation of civil, commercial, administrative cases, which, in addition to analysing the current legislation, involves accumulating evidence, the lawyer must correctly identify the subject matter of proof and means of proof to be used in this case. Revealing deficiency of evidence, the provider must inform the client about the circumstances to be proved, as well as the evidence that must be used for presentation in the court. If the client does not have it, the provider must explain what the evidence is needed and how to get it, and if the contract for legal services provides for the respective responsibilities, then to take steps for independent accumulation of evidence. In addition, the pre-trial preparation of high quality should include a range of measures to prevent destruction of evidence or revealing evidence by the interested party, especially with regard to the circumstances proving of which is usually difficult (e.g., presence of information on an Internet site).

Examination of the foundation documents and other documents of legal entities should be conducted based on the requirements set by law at the time of registration, issuing or approval, and at the time of the examination, indicating the existing discrepancies and their possible implications for the normal functioning of the client, as well as ways to overcome them [2, p. 24-27].

As it is known, the juridical actions are independent and the sole object matter of the contract of agency. The structure of the contract of agency stipulates that the proxy is responsible to fulfil the order in accordance with the instructions of the mandator. This rule eliminates the need to regulate the quality of services of the proxy as her/ his main duty is strict adherence to the instructions of the mandator. But that is not fully consistent with the objective that sets the person seeking assistance of the lawyer to represent the person's interests in the court or before the other body.

Since the need for the provider's qualification in the field of law is the feature of legal services, the client is not interested for the lawyer to follow his/her instructions, but to use legal knowledge to achieve a certain result. The customer of legal services generally is unable to give the lawyer correct and clear guidance on handling the case or other services, because, as a rule, the client is not sufficiently aware of the merits. Nevertheless, in our opinion, if it is possible, the lawyer must every time ask the client for permission to retreat from the client's instructions, otherwise the execution of the contract will be considered as improper from the lawyer's side.

In our opinion, only a gross violation by the lawyer of conventional requirements that led to violation of the client's rights, such as, for example, non-appearance in

the court, omission of the term of limitation by plaintiff, filing a claim with violation of the requirements stipulated by law and so on, may be regarded as a low-quality execution of juridical actions which is a component of the subject matter of the contract for legal services.

As legal representation includes not only systematic and purposeful work on the case, but often creative elements, the requirements on quality of services must meet the level of the "average skilled" lawyer and cannot, for example, include the duty to expose the false witness by intelligently put questions or influence the emotions of the court in the way that they make a judgment about the innocence of the defendant. Qualitative execution of legal representation, depending on the conditions of the contract, should include a detailed legal analysis of the situation with taking into account the court practice, pre-trial preparation of the case that meets the criteria stated above, the timely completion of proceedings in accordance with established rules, personal participation of the representative in the trials, timely provision of the court with all necessary evidence, and, in case necessary, submission of the petition for caption or conservation of evidence, competent and consistent defence of the client's position in writing or verbally, participation in forensic debates and stating objections to the arguments put forward by the opposing party and so on [2, p. 23-28].

Although procedural legislation does not link the use of law by the court and referring to it by the persons involved in the case, and their representatives, the lawyer in any case, must refer to the regulations that justify the position of the client, otherwise the quality of the legal services should be considered as improper.

In contrast to "essential", "conventional" and "accidental" terms are distinguished only in the legal literature. Their absence in the contract does not affect its validity. Exceptionally doctrinal character of this division is one of the reasons of absence of unity in the concept of the classification criteria for natural terms and, respectively, accidental conditions and resulting consequences [3, p. 296].

Natural contractual terms are the terms that are reflected in the discretional or mandatory norm of law. They may be not included in the written text of the contract and do not affect the fact of recognition of contact concluded [14, p. 63]. One of the most "used" natural terms of the contract for legal services is the term concerning the contract price. However, if the parties did not agree on a price, the contract shall be considered as valid too. In such case will be applied the provisions of Part 4 of the Article 632 of the Civil Code of Ukraine according to which if the contract price is not set and cannot be determined on the basis of its terms, it will be determined in accordance with the regular prices prevailing for similar services at the time of conclusion of the contract.

In the world practice there are several ways to determine the price of contract for legal services. The first is hourly rate. According to this method of fee determination the lawyers record every hour of their time spent on the case of the client, issue an invoice, indicating the number of hours spent on the case, the services provided and the cost of these services. The invoice also contains all costs incurred by the lawyer.

The second method for determining the price of the contract for legal services is a fixed sum of money. This is a so-called "fixed price" – a system opposed to "hourly" – when the performer and the customer agree on the total fixed amount of remuneration. Many clients prefer this approach, because under such terms the clients know exactly how much they will have to pay. However, this approach may be unfair both for the lawyer and for the client: if the case appears to be more complicated than it seemed at first, the lawyer may be underpaid. On the other hand, if the case is solved easily, the client may overpay. Therefore, the parties should consider the possibility of such a risk. Although solid system of payment for legal services experienced criticism in the legal literature as not very appropriate method of payment for both the client and performer [1, p. 93], it continues to be widely used in practice.

In some countries, the groups or associations of lawyers establish a fixed minimum fees for certain types of cases. The main reason is to prevent unprincipled lawyers from setting too low or too high fees. In particular, some Belgian Bar Associations (e. g. Brussels) issued a requirement for a minimum fee rates for certain areas of legal practice that a lawyer cannot reduce [7, p. 23]. In Switzerland, the cantons set tariff rates in order to protect clients from excessively high fees of lawyers who abuse by their (clients) complex situation [8, p. 23, 24].

From our point of view, fixing the fees for the provision of legal services by the state or other entities is not reasonable, since it is a form of control over the personal independence of the lawyer and the restriction of the laws of the market economy. If legal services market allows doing without outside interference, the fees should be sufficient to adequately compensate the efforts of lawyers.

The third way is a conditional fee. According to this method, the contract price (fees) is paid to a lawyer only when it ends well for the client.

It should be said that in practice is widely used the combined method that contains some elements of the mentioned above. In particular, this method uses a combination of the hourly rate method and the tariff method; the hourly rate method with the conditional one and so on.

According to the contract for services free of charge the client has to reimburse the provider only all actual costs required for execution of the contract.

The terms regarding contractual time should be classified as the natural terms of the contract for legal services. These terms determine the time limits of the contract and the moments (periods) within these scopes when the obligations between the parties must be executed.

Accidental terms are those agreed by the parties and are the retreat from discretionary norms or aimed at addressing issues that generally are not regulated by law. Consequently, accidental terms can be detected by comparing them with the natural terms: if a condition is included in amendment to the contract or addition to the rules laid down in a legislative act, so, this term will be accidental in comparison with terms which are natural in agreements of this type. In particular, as we know, legal services may be of high quality and complete only if the provider has all documents relating to the case. Probably each practicing lawyer used to face the unpleasant situations when only during the court hearing would appear the documents the lawyer was not aware before. The clients often ignore the provider's requirements to provide all the evidence prior to the case study, sometimes intentionally [10, p. 79]. To

avoid confusion, detailed procedure for the receiving documents and other information can be defined in the contract. Such contract terms will be accidental because they are not provided by legislation. Also, the client's obligation to issue the power of attorney for representation of client's rights before the third parties can also be considered as an accidental term.

All the terms: essential, natural, and accidental after the conclusion of the contract are equally compulsory and must be kept by the parties.

In accordance with the Part 3 of the Art. 27 of the Law of Ukraine "On the Bar and the License Legal Practice", the legal aid contract are regulated by general requirements of the contract law. However, the price which is its essential condition and is defined by the term "honorarium" is a particularity of the legal aid contract. According to the Article 28 of the Law of Ukraine "On Advocacy and Licensed Legal Practice" honorarium is a form of the advocate's remuneration for defence, representation and other forms of legal aid provided to the client.

The terms about the amount, method of calculating and payment the actual costs associated with execution of contract also belong essential terms of the legal aid contract. The contract should define the types of future actual costs associated with the execution of its terms (payment of experts whose opinion is requested by the licensed lawyer (advocate), transport costs, payment for printing, copying and other technical work, translation and notarization of documents, telephone calls, etc.); order of their payment (advance, payment on delivery during a specified period, etc.), and can be defined their amount. If the necessity of bearing actual costs of some additional types or increase of their indicative amount earlier specified became clear right after the conclusion of the contract, the licensed lawyer (advocate) should promptly inform the client and obtain the client's consent to pay unstipulated costs. In legal literature, in our view, the need to set limits on admissible actual costs and method of their calculation was fairly emphasized [11, p. 51].

Natural terms of the legal aid contract are terms which follow from the Law of Ukraine "On the Bar and Licensed Legal Practice", Rules of Legal Ethics [15]. In particular, these include the terms arising from the provisions concerning professional responsibilities of the licensed lawyer (advocate) such as informing the client about the progress of execution of the legal aid contract (Art. 21 of the Law of Ukraine "On the Bar and Licensed Legal Practice"), informing the client about legal position in the case (Art. 18 of the Rules) and others. Some natural terms can arise from the advocate's rights established in legislation, such as the right to make advocate inquiry and so on. Terms of the protection of confidentiality should also be considered as natural terms of the contract for legal aid (Art. 22 of the Law of Ukraine "On the Bar and Licensed Legal Practice").

An example of the accidental terms (conditions) of the legal aid contract may be prohibition for the licensed lawyer (advocate) during the execution of contractual terms and conditions to represent anyone other than the client. The above mentioned condition is not provided by law, but there is no prohibition of the imposition of such an obligation on the licensed lawyer (advocate) in the contract.

As for the terms of entrepreneurial contract for legal services, the scope for their discretionary is unreasonably narrowed in the Economic Code of Ukraine. Upon the execution of the entrepreneurial contract, the parties are required in any case to agree the subject matter, price and currency of the contract, as opposed to the provisions of the Civil Code of Ukraine, under which only subject matter of the contract is an absolute objective-essential condition. Besides, the legislator diverged from the traditional understanding of the subject matter of the contract, and endowed it with a complex character. In particular, the subject matter of the contract should specify the name, quantity of services, as well as quality requirements. According to the Law of Ukraine "On Protection of Consumers' Rights" [6], the contracting parties must agree on quality, time, price and other conditions under which the service is provided. Although the aforementioned Law defines a number of components of the category of quality such as life-saving safety, the warranty period, falsification of products (services), etc., but it is very difficult to use them in the context of legal services. In our opinion, the provisions on the quantity and quality of legal services in the contract are important for the parties, but it is unsuitable to make them the preconditions of the validity of the contract. Legal uncertainty of the very terms "quality" and "quantity" of legal services causes difficulties for the implementation of mentioned legislation requirements, which in turn can undermine the stability of contractual relations in this area. In particular, such an excessive over-regulation could enable unfair counterparty to recognize the contract invalid and thus, evade responsibility and so on.

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ОБЩАЯ ХАРАКТЕРИСТИКА ПРЕСТУПНОСТИ И МЕРЫ ПРОТИВОДЕЙСТВИЯ ДАННОМУ ЯВЛЕНИЮ

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Summary

The concept of crime as a phenomenon in different categories is studied in the article; features characterizing the crime, as well as measures of counteraction this phenomenon are distinguished. The activity as law enforcement agencies as the state in the whole with respect to solving this problem is analyzed; the most significant problems in the sphere of crime counteraction are elucidated; the ways to solve these problems are offered. The author also suggests to take into account the experience of developed democratic countries in this area without copying their approach, but just use the most appropriate measures for our society considering the mentality of the population and the current legislation.

Key words: crime, crime counteraction, measures of counteraction, characteristics, society, safety.

Аннотация

В статье исследуется понятие преступности как явление в различных категориях, выделяются черты, характеризующие преступность, а также меры противодействия этому явлению. Анализируется деятельность как правоохранительных органов, так и государства в целом относительно решения указанной проблемы, освещены наиболее значимые проблемы, возникающие в сфере противодействия преступности, а также предлагаются пути решения этих проблем. Автор также предлагает учитывать опыт развитых демократических государств в данной сфере, однако не копировать их подход, а использовать наиболее приемлемые меры для нашего общества с учетом менталитета населения и действующего законодательства.

Ключевые слова: преступность, противодействие преступности, меры противодействия, характеристика, общество, безопасность.

Постановка проблемы. Украина в нынешнее время находится в глубоком системном кризисе, который охватил все стороны общественной жизни, но наиболее острым и значительным для общества стал кризис законности. Кризис законности выражается в массовом нарушении прав и свобод человека и гражданина, неуклонном росте преступности, особенно насильственной, проявлении экстремизма, терроризма, сепаратизма в отдельных регионах Украины. В течении 2014 г. в Едином реестре досудебных расследований зарегистрировано 1 137 436 уголовных правонарушений, из которых наибольшее число зарегистрировано в г. Киев (136 313), Днепропетровской (112 983), Донецкой (97 489) областях. От совершенных преступлений пострадало 393 532 личности, в том числе 7 341 ребенок, 12 207 погибло. Значительно возросло количество особо тяжких (с 13 776 до 25 872, или на 87,2%) уголовных правонарушений. Самая высокая динамика роста таких правонарушений – в Донецкой (с 1 278 до 9 112, или в 7,1 раза), Луганской (с 891 до 4 034, или в 4,5 раза), Днепропетровской (с 886 до 1 203, или на 35,8%), Кировоградской (с 263 до 356, или на 35,4%) областях. Почти в два с половиной раза возросло число очевидных умышленных убийств (4 920 против 2 042), прежде всего в г. Киев (с 83 до 417, или впятеро), Донецкой (с 294 до 2 377, или в 8,1 раза), Луганской (с 156 до 482, или более чем в три раза). В эту статистику не включены тысячи военных и гражданских лиц, погибших во время проведения антитеррористической операции в Донецкой и Луганской областях. В 2014 г. имело место возрастание количества умышленных тяжких телесных повреждений (3 132 против 3 026, или на 3,5%), почти на половину возросло их количество в г. Киев (с 134 до 197, или на 47%), в Харьковской (с 121 до 175, или на 44,6%), в Черниговской (с 21 до 29, или на 38,1%) областях. Более чем в четыре раза увеличилось количество преступлений против свободы, чести и достоинства личности (с 483 до 202, или в 4,6 раза). В семь раз возросло количество случаев незаконного лишения свободы или похищения человека (с 283 до 1 974). В Донецкой области их число в сорок раз более чем