

ГРАЖДАНСКОЕ ПРАВО И ПРОЦЕСС

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SOLICITOR IN CIVIL PROCESS OF UKRAINE: LOOK AT THE PROBLEM

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SUMMARY

The scientific article investigates the relevant issues of solicitor's participation in civil process of Ukraine. Civil procedural rights and obligations of a solicitor as a representative in a civil case are defined, correlation of civil procedural status of a solicitor and other contractual representatives is analysed. A number of recommendations for improving the civil procedural legislation of Ukraine in a relevant context are developed.

Key words: solicitor, representative, civil procedural status, civil procedural rights, civil procedural obligations.

АНОТАЦІЯ

Наукова стаття присвячена дослідженню актуальних проблем участі адвоката у цивільному процесі України. Визначено цивільні процесуальні права та обов'язки адвоката як представника в цивільній справі, проаналізовано співвідношення цивільного процесуального статусу адвоката та інших договірних представників. Розроблено низку рекомендацій щодо удосконалення цивільного процесуального законодавства України у відповідному контексті.

Ключові слова: адвокат, представник, цивільний процесуальний статус, цивільні процесуальні права, цивільні процесуальні обов'язки.

Introduction. Sometimes individuals do not wish or cannot personally participate in the civil proceedings. In this case, they are entitled to authorize other persons – representatives to perform legal proceedings on their behalf. In cases set by law legislator can also empower the representative. Legal entities generally always realize their procedural rights and perform their obligations in court through their representatives. Thus, the purpose of the procedural representation is rendering to a person assistance in performing his right to protect his rights, freedoms and interests, ensuring more full and effective implementation of civil procedural rights granted to a person and carrying out of civil procedural obligations imposed to this person.

Part 1 art. 40 of Civil procedural code of Ukraine (hereinafter – CPC of Ukraine) contains the statutory rule under which other persons who reached 18 years old and have civil procedural capacity can have a solicitor as a representative in a court.

Therefore, within this scientific exploration we will focus on some problematic aspects of participation of a solicitor in a civil process that caused by special legal nature of this person.

Reform of the civil procedural legislation of Ukraine, which also resulted in a reform of the institute of advocacy, causes uncertainty in understanding the relevant legislative provisions. And as a result there problems raised with their usage in practice and scientific discussions in the science of civil procedural law. Although some aspects of participation of a solicitor in a civil process have been researched in the works of well-known scientists (Yu. Bilousov, A. Vlasov, S. Vasiliev, V. Komarov, V. Kravchuk, I. Pavlunyk, O. Svyatotskyi, A. Selivanov, V. Tertysnikov, O. Uhrynovskaya, E. Fursa, S. Fursa, Yu. Chervonyi, M. Stephan, V. Yarkov), today problems still remain unresolved. Among them is the civil procedural status of a solicitor as a representative in civil process.

The purpose of the article. The investigation of problematic aspects of civil procedural status of a solicitor as a representative in civil process and the development of scientifically based proposals for improvement of the legislation of Ukraine in a relevant context was set as a purpose of this article.

In general, as rightly noted by S. Fursa and E. Fursa, procedural performance of a solicitor in a civil case is carried out in accordance with the CPC of Ukraine, so it could be possible not to isolate participation of a solicitor in a civil proceeding if this activity would have clear approaches and limits [11, p. 54].

Indeed, a solicitor involved in civil cases as a representative of parties, third parties, applicants, other interested persons, state bodies and persons who legally have the right to protect the rights, freedoms and interests of others, and thus has both general and special civil procedural legal status arising under or in connection with his civil procedural legal subjectivity. And if a general civil procedural status of a solicitor as a representative is formed with those general civil procedural rights, obligations and interests vested to each persons involved in the cases, his special civil procedural status is a set of special civil procedural rights, obligations and interest, which solicitor as a representative is vested separately, individually. Let us consider the special civil procedural status of a solicitor as representative in details and try to determine those «borders», which should define the procedural activities of a solicitor in civil process.

According to item 1 part 1 art. 1 of the Law of Ukraine «On Legal Practice and Advocacy» (hereinafter – the Law) solicitor is a person who carries out legal practice on the grounds and in the order provided by law.

Item 2 part 1 art. 1 of the Law contains definition of legal practice – it is an independent professional activity of a

solicitor in order to provide legal defence, representation and other types of legal assistance to the client. Thus, according to the item 9 part 1 art. 1 of the Law, representation is a form of legal practice which is to ensure the rights and obligations of the clients, in particular, in civil proceedings.

CPC of Ukraine contains a similar provision, namely: in accordance with parts 1–2 art. 26, part 1 art. 40, part 1 art. 44 of the CPC of Ukraine, a solicitor in a civil process is a representative and belongs to the classification group of persons involved in the case.

The combined analysis of these legal provisions allows to make a conclusion that a solicitor, which is involved in a civil case, acquires the civil procedural status of contractual representative. Within this status a solicitor ensures the implementation of rights and obligations of the person whose interests he represents.

Thus his fundamental right is performing on behalf of the person he represents, all procedural actions that this person is entitled to perform.

It should be noted that the solicitor as a representative of a party, third person, state body or a person, who legally have the right to protect the rights, freedoms and interests of others, etc., participating in the proceedings is entitled to perform, on behalf of the person he represents, only procedural actions that this person has the right to perform, but he does not have the special subjective civil procedural rights of this person. On the basis of legal norm listed in the part 1 art. 44 of CPC of Ukraine, the civil procedure law authorizes the solicitor as a procedural representative to take on behalf of the person he represents all procedural actions that this person has the right to take. This person, in his turn, is the subject of subjective civil procedural rights; the implementation of these rights is mediated by appropriate procedural actions of his solicitor acting as a representative.

Herewith the distinction between a subject of subjective civil procedural right and a person who is authorized to perform his legal realization (a solicitor as procedural representative) is in the following:

a) the subject of the subjective civil procedural law disposes of benefits under this law, at his own discretion, and a solicitor – under and within the appropriate empowerment;

b) the actions of the subject of subjective civil procedural law create legal consequences for his own, as well as the actions of his solicitor entail legal consequences only for the person represented;

c) the subject of subjective civil procedural law may terminate the corresponding empowerment of the solicitor as his procedural representative at any time. However, the subjective civil procedural right of the subject is inalienable.

For example, a solicitor, as a representative of a plaintiff, who has the appropriate authorities, may take on behalf of the plaintiff the procedural action such as renunciation of a claim. Renunciation of a claim done by a solicitor entails procedural consequences which are the closing of the proceedings. This makes the repeated appeal to the court for the dispute between the same parties on the same subject and on the same reasons impossible for the plaintiff as a subject of a relevant subjective civil procedural right. In this case the plaintiff at any time can recall the empowerment of the procedural representative to reject the claim and commit the procedural action alone or refrain from committing.

Of particular note is the volume of the procedural actions, which a solicitor as a representative on behalf of a person he represents, can perform. However, before we start analysis

of this issue we would like to emphasize further the special approach of legislators toward those documents which certify authority of a solicitor as a representative in civil process. Thus, unlike other representatives, the empowerment of a solicitor can also be certified with a warrant, an order of the authorized body (institution), authorized by law to provide free legal assistance, or a contract. The order to be necessarily attached with an extract from the contract, which shall list the empowerments of a solicitor as a representative or restrictions of his rights to commit certain procedural action. The extract to be signed by the contracting parties (part 4 art. 42 of CPC of Ukraine).

Let's go back to the empowerments of a solicitor in civil process. In accordance with the parts 1, 2 art. 44 of CPC of Ukraine a representative who has the authority to conduct the case in a court may commit on behalf of a person he represents all procedural actions that this person has a right to perform unless certain restrictions are set in the power of attorney issued to the representative.

One can agree with V. Puchynskyi that vesting a representative of a court case with the rights and duties which are identical to those which the party has is classic situation in the countries of Anglo-Saxon legal system [9, p. 38]. However we will make the following remark on this: as it was already mentioned, a solicitor as a procedural representative does not have civil procedural rights and obligations of the party, he has the right to take on behalf of the person he represents only procedural actions that the person is entitled to perform.

Despite of the legal regulation of the volume of the procedural actions, which a solicitor is entitled to perform, this aspect still remains a subject of a scientific debate. The opinions of scientists dealing with proceedings on this subject can be divided into two groups.

The first group consists of the opinions of the following scientists (I. Il'yinska and L. Lesnytska [6, p. 21] and also Ya. Rosenberg [10, p. 103]), who shared the legislator's opinion concerning the necessity to empower the representative of civil process with the right to commit procedural actions in a scope that a person he represents has the right to perform.

According to the opinion of other scientists, a procedural representative shall be given with such scope of authorities, which should allow him to conduct representation of another person in civil process, but at the same time these authorities have to limit the possibility to determine the outcome of further development of the case [5, p. 10].

For example, N. Chechina and D. Chechot not denying the independent status of the procedural rights of the representative [12, p. 14] propose to limit him in exercising the right to appeal against decisions [1, p. 122].

Some scientists, referring to the position that «the party vested with substantive rights should determine the answers to these questions» propose to exclude from a number of the procedural actions, which the representative is entitled to perform in civil process, those actions aimed at: settlement of the voluntary agreement, change of the grounds or the subject of the claim, increase or decrease of the size of the claim or renunciation of a claim, recognition of the claim in a whole or partial [2, p. 7].

We believe that providing a procedural representative as well as a solicitor, acting in this civil procedural status, with a special subjective civil procedural right to perform on behalf of the person he represents all procedural actions that this person has the right to perform, covers fully an objective of the institute of civil process. So, having the power to commit

on behalf of the person he represents all procedural actions that the person has the right to perform, a solicitor as a procedural representative contributes more effectively to the person he represents in the exercising of his right to protect his rights, freedoms and interests. In this way, it is ensured fuller and more effective realization of civil procedural rights vested to the person and performance of obligations charged to the person including those during civil process. It is for purpose the CPC of Ukraine among the means of proving foresees the one such as explanations of the representatives of the parties and third persons, questioned as witnesses. And among a number of general civil procedural subjective rights there is the right to give written and oral explanations to the court.

In addition, the person represented, can always limit a solicitor as a representative in commissioning of certain procedural actions either by specifying this in the power of attorney issued to him (part 2 art. 44 of CPC of Ukraine), or by submitting a written application to a court or by making an oral statement during court hearing (part 4 art. 44 of CPC of Ukraine).

Also the position of the legislator regarding consolidation of the empowerments of a representative in the civil process is fully consistent with the principle of discretionary of civil proceedings, since it fully ensures the ability of the person involved in the case and using the assistance of representative (willing to attract the representative to participate in a civil case) to manage his rights on the subject of the dispute in his sole discretion. With this the protection of the interests of the persons, who have the legal representatives, is carried out. In civil procedural legislation certain cases of non-recognition of renunciation of a claim by a court, renunciation of a claim by the plaintiff, recognition of the claim (part 5 art. 174 of CPC of Ukraine), non-recognition of the voluntary agreement (part 6 art. 175 of CPC of Ukraine) are stipulated, if certain actions are performed by a legal representative, if they are contrary to the interests of the people he represents.

Taking into account the above mentioned, we consider as inappropriate to limit the scope of the procedural actions that a representative is entitled to perform in civil procedural status including a status of a solicitor acting on behalf of a person he represents, by legal exclusion of any of these actions from a number of them.

Thus, a solicitor as a representative who has the authority to conduct the case in a court, according to part 1 art. 44 of CPC of Ukraine may perform on behalf of the person he represents all procedural actions that this person has a right to perform. However, the relevant regulation, as already noted, does not mean that a person he represents cannot limit the power of the procedural representative.

The legislator does not specify the nature and quantity of such limitations, allowing limiting the powers of a solicitor as a representative on the performance of any actions. Therefore, if a person wants to limit the right of his solicitor in commissioning certain procedural activities, he should state this in the power of attorney issued or the parties should specify this in the contract for legal assistance.

The certain attention should be drawn to the issue of exceeding of the powers by a solicitor as a procedural representative. As follows from the art. 241 of Civil Code of Ukraine, if a representative takes a procedural action that goes beyond his powers, than this action will have legal consequences for the person represented only in the case when this person approves committed procedural action. Further approval of the procedural action taken by the representative while exceeding

his powers granted to him by a person represented, creates, modifies and terminates the rights and obligations of this person from the moment of the commission of this action.

Meanwhile, since the person can vest the solicitor as a representative with the empowerments via the contract (part 4 art. 42 of the CPC of Ukraine), the rules set out in the parts 2, 4 art. 44 of CPC of Ukraine, as it seen, should be extended to such cases. Meaning that a person wishing to limit the powers of his representative can specify this in the contract concluded with this representative. This position is also shared by the Plenum of the Supreme Court of Ukraine (item 9 of the Resolution of the Plenum of the Supreme Court of Ukraine of 12 June 2009 year № 2 «On the application of the rules of civil procedure law in proceedings in the first-instance court»).

Therefore it is reasonable to amend the part 2 art. 44 of the CPC of Ukraine, by adding after the words «in the power of attorney issued to him» the words «or in the contract» and also adding to the part 4 of the same article after the phrase «limitation of the powers of the representative by the letter of attorney» the phrase «by a warrant or a contract».

Moreover, according to part 4 art. 44 of CPC of Ukraine, the power of a solicitor as a representative can be also limited by: a) the submission of a written application to the court, which must be added to the case; b) the oral statement during the hearing, which is noted in the case book.

At the same time we stress: since a solicitor as a representative is a person who is involved in the case, we believe he is in any case vested with the general civil procedural legal status, meaning that he has general civil procedural rights and obligations stipulated in art. 27 of CPC of Ukraine. For this reason the person represented, cannot limit him in carrying out those procedural action which make the content of these rights. The representative can be only limit in exercising of those procedural actions, which make the content of special civil procedural rights, in particular those provided in art. 31 of the CPC of Ukraine.

If we analyse the CPC of Ukraine and the Law on subject of the rights that a solicitor is given while performing representation in civil process, one may find out that these legislative acts empower a solicitor with some different scope of legal authorities.

As we have already noted, since solicitor belongs to the classification of persons involved in the case, he is vested with general procedural rights and obligations like all other members of civil process. In addition, pursuant to the provisions of the CPC of Ukraine he has the special civil procedural right – the right to perform on behalf of the person he represents all procedural activities that the person has the right to perform.

At the same time, the Law provides a solicitor with a wider scope of authorities while his representation and imposes additional obligations on him.

In particular, as follows from part 1 art. 20 of the Law, a solicitor shall have the following special rights: apply with legal requests, including those to obtain copies of documents, to the state government, local authorities, their officers and employees, enterprises, institutions, organizations, public unions and associations, and also to individuals (with the consent of such individuals) (art. 1); collect information about facts that can be used as evidence, in a legal way to request, receive and withdraw objects, documents, copies, get acquainted with them and interview persons with their consent (art. 7); use technical means, including the ones to copy materials of the case, in which the solicitor provides or performs other legal assistance, record procedural actions in which he is involved as

well as the progress of court hearing in the manner prescribed by law (art. 8); certify copies of documents related to the cases he is involved, unless the law stipulates another mandatory way to certify copies of the documents (art. 9); receive written conclusions of experts on matters which require specialized knowledge (art. 10); use other rights provided by law (art. 11).

It should be noted that the special rights of a solicitor mentioned above, mostly associated with evidentiary activity, and provide to a subject of civil procedural proceedings a broad scope of judicial authority in this area.

Along with the rights, based on his special material and legal status, the law imposes on a solicitor special obligations, such as: keep oath of solicitor of Ukraine and rules of legal ethics; on request of the client to provide a report on the implementation of the agreement on legal assistance; promptly inform the client on a conflict of interest; improve their skills; implement the decisions of the legal profession; protect the personal data of individuals, which he owns, according to the legislation on protection of personal data; perform other obligations provided by law and contract for legal assistance (items 1, 3 art. 21 of the Law).

It should be noted that a solicitor is endowed with these respective rights and obligations regardless to the type of civil proceedings in which he participates while representing another person.

Thus, it can be stated that a solicitor while taking part in a civil case in legal status of contractual representative, based on his special material and legal status, has a broad scope of procedural rights in the field of evidence and a wide range of obligations related to the interests of the person he represents, in the course of civil proceedings.

In connection with the fact that solicitor is endowed with the broader legal status than other contracted representatives, the discussion is regularly raised in scientific literature about whether or not to allow to the case and provide with the civil procedural status of representative those individuals who do not have expertise in law. Some scientists state that taking into account the interests of citizens they have to be guaranteed with certain level of competence of legal assistance in court, in this case they have to be secured with the mandatory rule of operating through solicitors (rule of solicitors' monopoly) at least for courts of certain level or certain categories of cases, and expand the list of persons who may not act as representatives in court [4, p. 108, 110]. For example it is recommended to reform in this way the advocacy in Russia, in particular, to establish standards for «consultants non-solicitors» that would be as close as possible to the regulation of the legal performance of solicitors [7, p. 13].

Other scientists think that generally appropriate professional qualifications (such as weight categories for athletes) must be established for representatives of the cases, for example, especially important civil cases, and it is needed to take into account that only the most experienced specialists, and not solicitors with low qualifications, are eligible to apply to a higher court (the Supreme Court of Ukraine) [3, p. 1–2].

In addition, mandatory participation of solicitors in some categories of civil cases is provided by legislation of some countries. Thus, according to item 2 § 78 of the Civil Procedural Code of Germany, the spouses must be represented in courts for family matters by solicitors who are admitted to the district court or court of the land.

However, the questions arise: can it be considered appropriate if only solicitors perform the function of procedural representative and whether it can ensure the appropriate level

of legal assistance in court? In our opinion – no. For a number of reasons.

Firstly, the introduction of relevant norm would fully contradict one of the basic principles of civil proceedings – principle of optionality, according to which individuals involved in the case, dispose their rights on the subject of argument at their own discretion and thus have right to choose which way to exercise their civil procedural rights and fulfil their civil procedural obligations.

Secondly, a representative in civil process – is a person who, above all, empowered with subjective civil procedural right to undertake procedural actions in the court in interests and on behalf of the person he represents, and not to provide qualified legal assistance to the person he represents. Of course, protection of the interests of the relevant person in this case is also possible, but it should be kept in mind that the protective function plays a supporting role in procedural representation, which main purpose is assisting a person in exercising of his civil procedural rights and fulfilment of civil procedural obligations.

Thirdly, not all persons involved in the case have financial possibility to ensure representation of their interests in court by solicitors, whose services, as a general rule, are paid.

Fourth, it is not always that a person having a certificate on legal practice can ensure an appropriate level of legal assistance in court (due to lack of education, personal qualities, age, etc.). Among the legal community there are many professionals who, not being solicitors, effectively perform representative functions in court.

So, again, let us ask a rhetorical question: whether to limit the range of procedural representatives exclusively to solicitors? We stick to the position of appropriateness of admission as representatives in the case both solicitors and other persons who meet the requirements of the law. We emphasize: this way is selected by legislator by providing this normative rule in part 1 art. 40 of CPC of Ukraine.

While researching the participation of solicitor in civil process of Ukraine, let us pay attention to the problem of the multiplicity of these entities during consideration and decision in civil cases.

According to § 84 of the Civil Procedure Code of Germany, a few authorized persons have the right to represent one side together or individually. Although the Ukrainian legislator uses the singular form of the word «representative», in our view, a person cannot be limited in number of solicitors who represent his interests.

We agree with the I. Pavlunyk who believes that, while considering the issue of multiplicity of representatives on the side of one person, one must take into account the following: a) several representatives from the side of particular person while simultaneously participating in the proceeding must agree among themselves their legal position in the case; b) any contradictions between them during proceeding are unacceptable; c) any procedural actions of one of the representatives within his authorities should be seen as those committed with the consent of other members, acting on the same side; d) the trustee may split the procedural actions between several representatives, identifying those actions that each of them is entitled to perform [8, p. 9].

The problematic aspect of the institution of multiplicity of solicitors as procedural representatives is the way of legalizing their authorities. Of course, it should be guided by the general rules of art. 42 of the CPC of Ukraine. Solicitors as contracted procedural representatives are usually assessed to the case on the

basis of attorney issued by a person involved in the case. But the questions arise: can the authorities of all solicitors in case of their multiplicity be certified with one letter of attorney? Whether it is appropriate to issue a separate letter of attorney to each of them and to provide the right to act independently of each other?

In our opinion in certain cases is not feasible to issue one letter of attorney to several solicitors on behalf of one trustee due to the following.

First of all, we should not forget that the grounds and procedures for termination of representation by proxy shall be determined in accordance with the civil legislation of Ukraine. For example, part 1 art. 250 of Civil code of Ukraine provides the representative with the right to deny those actions, identified by letter of attorney, which entails the termination of representation by proxy (item 3 part 1 art. 248 of Civil code of Ukraine). In this case, according to part 3 of art. 248 of Civil code of Ukraine, the representative shall immediately return the letter of attorney. This automatically entails termination of representation by proxy in respect of other solicitors. This seems to be inconvenient because of the need for further reissue of the letter of authority or certificate of solicitors' power of those who remained, using the procedure, specified in art. 42 of the CPC of Ukraine. The same applies to other grounds for termination of representation by proxy for one of few representatives (revocation of the letter of attorney by the person who issued it, recognition of disability of a person to whose name the letter of attorney was issued, etc.).

Also, while certifying authority of solicitors, in case of their multiplicity, special attention to be paid to one thing: it is advisable that each letter of attorney contains statement that «the most important» legal proceedings on behalf of the trustee, such as the recognition of the claim, conclusion of the amicable agreement, etc., can be implemented by solicitors only with their mutual consent. In this case, the position of the person represented, will be more secure.

Bearing this in mind, we consider as appropriate to fix in the civil procedural legislation of Ukraine the normative rule, according to which in case of certifying of multiple representatives with the letter of attorney each of them should receive a separate document with clearly defined scope of the procedural actions, he is entitled to perform, and indicating the number of actions that can be committed by procedural representatives only upon their mutual consent. The same algorithm can also be applied when authorities of a solicitor as a representative are certified with an agreement.

As a result we suggest to add the art. 42 of the CPC of Ukraine with additional part with the following content: «When authorities of representatives, in case of their multiplicity, are certified with the letter of attorney or an agreement, each of them should receive a separate document with clearly defined scope of authorities and specified number of actions that can be committed by representatives only on the basis of their mutual consent».

Conclusions. Thus, within this article we considered some problematic aspects of participation of a solicitor in a civil process of Ukraine. The major scientific achievements can be summarized with the following provisions:

1) it is inappropriate to limit the scope of the procedural actions, that the representative is entitled to perform in civil procedural status including a status of a solicitor acting on behalf of a person he represents, by legal exclusion of any of these actions from a number of them;

2) since a person may empower a solicitor, as a contracted procedural representative, along with a power of attorney also

with a contract (part 4 art. 42 CPC of Ukraine), the rules set in parts 2, 4 of art. 44 of CPC Ukraine, should be extended to such cases as well. Therefore, it is appropriate to amend the part 2 art. 44 of the CPC of Ukraine, adding to the words «in the power of attorney issued to him» the words «or in the contract» and in part 4 of the same article adding the wording «by a warrant or a contract» after the phrase «limitation of the powers of the representative by the letter of attorney»;

3) based on the fact that a solicitor as a representative is a person involved in the case, he in any case has the general civil procedural legal status. For this reason the person being represented, cannot limit him in performance of the procedural actions which are the content of these rights;

4) based on the part 1 of art. 40 of CPC of Ukraine it is necessary to allow to participate in a case contractual representatives of any persons including those who do not have judicial education however meet the requirements specified by law;

5) aiming at the improvement of civil procedural legislation of Ukraine in a context of legal regulation of the method of arrangement of the authorities of the solicitors and other contractual representatives in case of their multiplicity we suggest to add the art. 42 of CPC of Ukraine with additional part with the following content: «When authorities of representatives, in case of their multiplicity, are certified with the letter of attorney or an agreement, each of them should receive a separate document with clearly defined scope of authorities and specified number of actions that can be committed by representatives only on the basis of their mutual consent».

All other problems which arise from participation of a solicitor in civil process of Ukraine including the detailed investigation of the peculiarities of such participation in different types of civil proceedings are above scope of research of this article and provide possibilities for further scientific explorations.

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