

ГРАЖДАНСКОЕ ПРАВО И ПРОЦЕСС

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ORGANIZATIONAL FORMS OF ADVOCACY RELATED TO THE CREATION OF A LEGAL ENTITY: SOME PROBLEM ASPECTS

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SUMMARY

The article analyzes some problematic aspects of the organizational forms of advocacy related to the creation of a legal entity – a law office and a lawyer association. In analyzing the issue of the state registration of these law societies as legal entities, it was concluded that the current model of their state registration is acceptable and convenient for lawyers. Attention is paid to the content of the model statutes of the law office and the lawyer association, and the view was supported that advocacy may be pursued in order to profit. It is concluded that the law office and lawyer association constitute independent organizational and legal forms of a legal entity. The bills, aimed at reforming the advocacy, are analyzed, suggestions are made regarding the improvement of their content.

Key words: organizational forms, advocacy, legal person, law office, lawyer association, statute.

ОРГАНІЗАЦІЙНІ ФОРМИ АДВОКАТСЬКОЇ ДІЯЛЬНОСТІ, ПОВ'ЯЗАНІ ЗІ СТВОРЕННЯМ ЮРИДИЧНОЇ ОСОБИ: ОКРЕМІ ПРОБЛЕМНІ АСПЕКТИ

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АНОТАЦІЯ

У статті аналізуються окремі проблемні аспекти організаційних форм адвокатської діяльності, пов'язаних зі створенням юридичної особи – адвокатського бюро та адвокатського об'єднання. Під час аналізу питання державної реєстрації зазначених адвокатських утворень як юридичних осіб зроблено висновок, що чинна сьогодні модель їх державної реєстрації є прийнятною та зручною для адвокатів. Звернуто увагу на зміст примірних статутів адвокатського бюро та адвокатського об'єднання, підтримано думку, що адвокатська діяльність може здійснюватися з метою одержання доходу. Зроблено висновок, що адвокатське бюро та адвокатське об'єднання становлять самостійні організаційно-правові форми юридичної особи. Аналізуються законопроекти, спрямовані на реформування адвокатури, внесено пропозиції щодо вдосконалення їх змісту.

Ключові слова: організаційні форми, адвокатська діяльність, юридична особа, адвокатське бюро, адвокатське об'єднання, статут.

Formulation of the problem. One of the varieties of existing organizational forms of advocacy is the ones that are associated with the creation of a legal entity. Such organizational forms are the law office and lawyer association. The peculiarities of these forms in science are often investigated jointly, which is due to the presence of many common features between them. For example, they are the issues of their State registration as legal entities, the purpose of their activity, the legal basis for the activity of their lawyers, above of all, the ability to engage in advocacy on the basis of an employment contract, taxation of income of these legal entities, etc. However, in our opinion, this approach is limited, although it has a certain right. Despite the fact that these forms do have many common features, they also have many difference at the same time, due to the fact that the law office is an individual form of advocacy, and the lawyer association is a collective one. Therefore, in our opinion, different approaches should be used to study these forms of advocacy. Both their common features and peculiar features of these forms can be investigated separately.

Study Status. Problematic aspects of organizational forms of advocacy related to the creation of a legal entity were studied in science by N.M. Bakaianova, V.M. Bogoslavets, I.V. Golovan, S.O. Ivanitsky, A.V. Ivantsov, K.A. Zatulko, M.E. Kiseliyov, K.G. Knigin, G.M. Yaroshevskaya and others.

However, many problems require a new scientific view in connection with the processes of reforming the bar, carried out within the framework of legal and judicial reform.

Therefore, the purpose and objective of the article are to characterize those common features that are inherent in the law office and the lawyer association as organizational forms of advocacy, to make proposals for the improvement of the legislation.

Presenting main content. Both the law office and the lawyer association have the status of a legal entity. In particular, based on the civil law characteristics of a legal entity, it means that they are organizations created and registered in accordance with the procedure established by law, empowered by civil law and may be plaintiffs and defendants in court (art. 80 of the Civil Code).

According to Articles 14, 15 of the Law "On Bar and Advocacy", state registration of a law office and a lawyer association is carried out in accordance with the procedure established by the Law of Ukraine "On State Registration of Legal Entities and Individual Entrepreneurs", taking into account peculiarities, provided by this Law. Similar provisions also contain bills elaborated for the purpose of reforming the lawyer [1; 2; 3].

However, the study of both the current Law "On Bar and Advocacy", as well as the provisions of the relevant bills, allows

us to conclude that the mentioned acts do not provide for any particular features of the state registration procedure of the law office and lawyer association. Of course, these acts determine their features as legal entities, which also determine certain aspects of their state registration (for example, require the existence of a statute as one of the constituent documents of a legal entity, stipulating the content of this statute, etc.), although, these features are not peculiarities of theregistrationprocess of these legal entities. Therefore, we believe that these rules should be formulated somewhat differently, otherwise they mislead the subjects of registration legal relations of the law office and lawyer association.

Therefore, nowadays legal entities undergo a single state registrationin the general procedure for registration of legal entities, and their registration is carried out by special state registrars of legal entities, individuals – entrepreneurs and public formations. In stead, for example, the previous Law on Advocacy foresees, in fact, the dual registration of organizational forms of legal activities – legal entities – their registrationas advocate formations was carried out by the Ministry of Justice of Ukraine in accordance with the Regulation on the procedure for registration of lawyer association approved by the Ukrainian Cabinet of Ministers from April, 27 1993 No. 302 [4], after which these entities were to be registered as legal entities by the relevant authority that registered the legal entities. In our opinion, it requires the clarification of which procedure tends to be more optimal.

We believe that each of these procedures either had or has its own positive aspects.

Furthermore, in the case of the state registration of lawyers' formations by the Ministry of Justice of Ukraine, the latter one approached the review of the statute of lawyer associations and the formation of its provisions in accordance with the requirements of the Law "On Advocacy" more closely. The formation of appropriate practices was not the only source because of it. Instead, according to the modern system of legal entities registration, this practice is not unique, as each of the registrars may have their own vision of the discussion of the law on advocacy, which regulates the peculiarities of organizational forms of advocacy. In practice, it forms different approaches to the solution of organizational issues of the same essence. The positive aspect of the modern procedure for registering legalentities is its simplicity in comparison with that carried out by the Ministry of Justice of Ukraine. In order to register these entities, the lawyer (founding lawyers) can simply contact the nearest notary or state registrar in the common district center, instead of considering how to file documents with the Ministry of Justice of Ukraine, located in Kyiv.

In our view, the current model of registration of legal entities with the status of a legal entity is acceptable, convenient for lawyers, and therefore should be preserved. The same problems caused by the diversity of practice, is more expedient to solve with the improvement of legal regulation of the provisions on the organizational forms of advocacy. Probably, it is precisely because of the multifaceted nature of the practice of describing the content of the articles of the statute of the lawyer's formations; the unity of practice on this issue is currently being sought by the National Association of Advocates of Ukraine (NAAU). The association has developed the model statutes of the law office [5] and the lawyer association [6], which outlined their own vision of the NAAU for solving certain aspects of the activities of these organizational forms of advocacy. This approach NAAU seems to be right, because it allows to partially eliminate the vacuum that exists in relation to outlining the features of the corresponding organizational forms of advocacy.

In studying the content of these charters, it is worth noting the unity of defining their main purpose for the law office and lawyer association. Thus, according to P. 2.1 of these charters,

the main purpose of the activity of the association and the office is to ensure the implementation of protection, representation and other types of legal assistance on a professional basis to Ukrainian citizens, foreign citizens, stateless persons, legal entities; receiving income, taking into account the limitations established by the current legislation and standards of legal ethics [5; 6]. The first provision makes no remarks in the aspect of advocacy. Indeed, ensuring the implementation of protection, representation and other types of legal assistance on a professional basis to citizens of Ukraine, foreign citizens, stateless persons, legal entities as a goal of the activity of lawyer societies corresponds generally to the functional foundations of the entire bar. Instead, the provision of income seems controversial, taking into account the limitations established by the current legislation and the standards of lawyer's ethics, as the purpose of the activity of law offices and lawyer associations.

It has been discussed the nature of the lawyer's activity by the scientists for a long time, whether it can have the purpose of obtaining a profit (to be entrepreneurial), as well as other legal activities for rendering legal services carried out by business entities, or it is exclusively non-entrepreneurial [7, p. 1; 8, p. 11; 9, p. 6]. For example, on this occasion, I.V. Golovan has noted that there is an opinion that advocacy and business legal practice should be distinguished, since entrepreneurial activity is aimed at profit making, and the activity of an advocate neither has the purpose of profit nor can be generally profit! Actually there is no unity in relation to the economic essence of advocacy [10, p. 32].

In our opinion, the scientific provisions regarding the impossibility of advocacy to profit from income are unjustified. Clearly from the point of view of civil society and the functions performed by the lawyer in it, the advocacy is a legal institution that ensures the proper protection and protection of the rights of individuals and legal entities, the state.

However, in our opinion, it does not mean that the lawyer or law societies (lawyer office and lawyer associations), that implement it, cannot pursue the purpose of profit. We believe that there is no reason for opposing the activities of the advocacy to implement the protection of rights and legitimate interests, representation or other types of legal assistance to the client on one side only and entrepreneurship. The functional basis of these activities lies entirely on a different front, reflecting characteristics that do not overlap.

The activity of the Advocacy Institute for the protection of rights and freedoms characterizes it from the point of view of belonging to a certain profession, while entrepreneurial and non-entrepreneurial characteristics of activity as profit-oriented or charitable one. Otherwise, it can be said that the doctor also does not carry out business activities, because his activities are aimed at protecting life, health, treatment of people from various diseases, and not profit one (but the operation of various medical clinics in the form of business associations does not raise any complaints); the builder does not carry out the entrepreneurial activity, because his activity is aimed at providing people with housing, not profit one (although there is a whole sphere of construction business and no complaints and objections in science does not cause it). It is necessary to realize that the lawyer is a representative of the profession, whereas the advocacy is a professional activity. Like any other professional activity, it is a source of income for the person who carries it out, and for a lawyer or lawyer association, it is precisely the purpose of their activity, since they usually do not engage in charity, carrying it out free of charge for the client. Taking into account the foregoing, we consider the position of G.M. Yaroshevskaya as unfounded, who points out the need of recognizing law associations as non-business partnerships [11, p. 484]. The nature of the lawyer associations' activities

involves the receipt of profits, which is not typical for non-business partnerships.

Therefore, the provisions of paragraphs 2.1 of the exemplary statutes of the law office and lawyer association regarding the income generation as the purpose of their activities are fully justified. Such provisions, which are already enshrined in the statutes of specific law firms and associations, give them the opportunity to clearly position themselves in relations with state authorities (first of all, tax authorities), contractors, and other entities as subjects for the purpose of receiving income, to take advantage of the benefits that tax laws can provide for business entities. However, in the case when these lawyer associations are considered mostly as non-profit in their activities, they may not specify their purpose in their statute, but then they obviously will have limited opportunities for earning and spending money.

In our opinion, designed one to reform the advocacy bills, do not include proper legal regulation of organizational forms of advocacy related to the creation of legal entities. Particular attention is paid to some of the provisions of the bills, which are set out in the relevant articles devoted to the law office and the lawyer association as organizational forms of advocacy, but their content is clearly procedural. Therefore, Part 8 of Art. 13 Law Office and Part 7 of Art. 14, "Lawyer Association" of the bill [1] include that the lawyer, who created the law office, and the lawyers, who are in labor relations with the law office, members of the Bar Association and the lawyers, who are in labor relations with the Bar Association, have the right to act in the interests of the client on the basis of the contract on the provision of legal assistance, concluded by the client in accordance with the law office or lawyer association.

However, we regard such provisions if not unlimited, at least as set out in the unsuccessful and non-relevant articles of these acts.

Of course, they leave out of legal cases of activities regulation in the interests of the client of those lawyers who have entered into civil contracts with the law office and the lawyer association. We believe that such lawyers also have the right to act in the interests of the client on the basis of an agreement on the provision of legal assistance, concluded by a client with a designated lawyer society.

In addition, these rules are superfluous, unnecessary, as well as those that carry a false semantic content. They only give rise to a discussion on the proper execution of the lawyer powers to carry out his activities in the interests of the client as the representation of his interests in a civil case. In particular, one such rule can conclude that a lawyer who is in labor relations or membership relations with an lawyer association only needs to provide a contract for the provision of legal assistance to represent the client's interests. However, it is clear that this is not the case. At the very least, such lawyer should also be confirmed before the third parties in the relationship with which he acts as a representative, the fact of his employment relationship with the lawyer association or the membership relationship. Only in such circumstances, the third party will not doubt the reasonableness of the representative office. In this regard, if, in order to confirm the authority of the lawyer for clients of the Bar Association, it is necessary to submit documents confirming the employment of a lawyer and a lawyer association, then according to these characteristics such cases do not differ significantly from those cases when the lawyer is in civil-law relations with the association. In the latter case, in addition to the contract between the client and the lawyer association the lawyer would also have to file a document attesting to his link with the association, namely, the contract between him and the lawyer association in the interests of the client. In general, in all of these cases, it would be worthwhile to confirm the powers of the lawyer by the warrant issued by the law office or lawyer

association. Attention is drawn to the fact that the law on the confirmation of the powers of a lawyer is functional in its content, the peculiarities of confirmation of the powers of the lawyer in his legal activity in the interests of the client towards the third parties are regulated by the procedural codes (CCP, CPC, CC, etc.), and the corresponding articles 13 and 14 of the bill on Bar and Advocacy [1] are exclusively those that regulate the peculiarities of organizational forms of advocacy, that is, they have an organizational orientation. Therefore, it is unlikely that they contain such procedural in their content of the situation.

The question also arises in science as to which of the existing organizational and legal forms of legal entities (economic entities) can be attributed to the lawyer association and law office and in which section of the Classifier of organizational and legal forms of management [12] to consolidate them.

Thus, V.M. Bogoslavets holds the view that lawyer associations are non-specific types of non-business associations [13, p. 5]. Having conducted a comparative analysis of the provisions of an exemplary statute of a lawyer association and the provisions of the law regarding the legal status of legal entities, M.E. Kiseliov and K.A. Zatulko have found that the lawyer association has both separate common features and distinctive features with a full partnership, a limited liability company and a production co-operative [14, p. 60–61]. The result of the study was the conclusion that, based on the legal status laid down in the Model Statute of the Lawyer Association, the Lawyer Association is closest to a limited liability company, and may therefore be classified in the section "Business Enterprises" of the Classifier of Organizational and Legal Forms of Administration [14, p. 61].

In our opinion, in spite of the proximity of lawyers to a limited liability company, they are not identified with them, with their significant differences, as evidenced by the lawyer association according to M.E. Kiseliov and K.A. Zatulko [14, p. 61]. They have the same significant differences in comparison with the producers' cooperative.

Eventually we believe that all organizational and legal forms of legal entities have quality as both common and separate attributes, and it is through these distinctive features that distinguish their individual types. Therefore, any proximity of the Lawyer Association and the Law Office or the Limited Liability Company, either to the cooperative, or to any other form of organization, does not at all mean that they are both legal and organizational forms of legal Individuals should be absorbed by other forms, if there are significant differences between them.

In this regard, in our view, the more correct is the position that the law office and lawyer association are independent organizational and legal forms of legal entities.

We cannot but agree with the thought of I.V. Golovan, who has noted that there is no reason to consider lawyer associations as partnerships or institutions, because the law office and lawyer association are separate institutional-legal forms [15]. As rightly N. M. Bakayanova has drawn attention, from the content of Article 83 of the Civil Code ("Organizational legal forms of legal entities"), it follows that legal entities can be created not only in the form of societies and institutions, but also in other forms established by law. In that regard, she considers the discussion on the assignment of lawyer associations or non-business partnerships, or to the institutions devoid of expediency [16, p. 232]. K.G. Knigin has also concluded that law offices and lawyer associations are specific types of legal entities, the existence of which is stipulated by the norms of Art.83 of the Civil Code, as other forms, established by law [17, p. 422].

In our opinion, the law office and lawyer association as organizational and legal forms of a legal entity (business entity) in the absence of clearly defined by law their features and the

wide variation in the use in practice of constituent documents of the features inherent in other organizational and legal forms, make up independent organizational and legal forms of a legal entity. For these reasons, we consider as correct assignment of law offices and lawyer associations in the classification of types of business entity to “other legal forms”. They are not covered by any of the forms mentioned in the previous sections of the Classifier of Organizational and Legal Forms.

Conclusions. Therefore, the carried out research makes it possible to draw the following conclusions: 1) The current model of state registration of a law office and a lawyer association is acceptable and convenient for lawyers; 2) Advocacy may be carried out in order to receive income, and therefore such a provision may be reflected in the statutes of these legal entities; 3) Attorneys and lawyer associations constitute independent organizational and legal forms of a legal entity; 4) Bills for advocacy reform contain certain disadvantages that must be eliminated.

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