

## PROCEDURAL ORDER OF PROVIDING LEGAL AID TO THE WITNESS DURING CRIMINAL PROCEEDINGS

### ПРОЦЕСУАЛЬНИЙ ПОРЯДОК НАДАННЯ ПРАВОВОЇ ДОПОМОГИ СВІДКУ ПІД ЧАС КРИМІНАЛЬНОГО ПРОВАДЖЕННЯ

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In article the procedural order of providing legal aid to the witness is considered during criminal proceedings. The international practice of an order of rendering legal aid to the witness is analyzed during criminal proceedings. Problems and the directions of improvement of an order of rendering legal aid to the witness are defined during criminal proceedings.

**Key words:** legal aid, free legal aid, witness, lawyer (advocate), criminal proceedings, bodies of pre-judicial investigation.

У статті розглядається процесуальний порядок надання правової допомоги свідку під час кримінального провадження. Аналізується міжнародна практика порядку надання правової допомоги свідку під час кримінального провадження. Окреслюються проблеми та напрями порядку надання правової допомоги свідку під час кримінального провадження.

**Ключові слова:** правова допомога, безоплатна правова допомога, свідок, адвокат, кримінальне провадження, органи досудового розслідування.

В статье рассматривается процессуальный порядок предоставления правовой помощи свидетелю во время уголовного производства. Анализируется международная практика порядка оказания правовой помощи свидетелю во время уголовного производства. Определяются проблемы и направления порядка оказания правовой помощи свидетелю во время уголовного производства.

**Ключевые слова:** правовая помощь, бесплатная правовая помощь, свидетель, адвокат, уголовное производство, органы досудебного расследования.

**Statement of a problem.** The right for legal aid is the possibility of each person guaranteed by the state to receive such help in volume and the forms determined by her irrespective of the nature of legal relationship of the person with other legal entities. The constitutional court of Ukraine has noted that providing to everyone the rights for legal aid taking into account the p. 2 of Art. 3 of the Art. 59 of the Constitution of Ukraine assign to the state the corresponding obligations for providing the person of the right by means of appropriate level. Such duties cause need of definition for laws of Ukraine, other legal acts of an order, conditions and ways of providing this help.

**Analysis of the last researches and publications.** Question of providing legal aid by the lawyer to the witness were already an object of research of scientists such as V.I. Galagan, Yu.M. Denezhny, A.N. Drozdov, S. Goncharenko, A.V. Kaplin, N.S. Karpova, P. Kuchevsky, A.P. Kuchinskoy, S.M. Loginova, E.D. Lukyanchikov, V.T. Malyarenko, M.M. Mikheenko, V.T. Nora, M.A. Pogoretsky, V.A. Zolushka, M.S. Strogovich, and other scientists.

**Purpose of scientific research.** Objective of this research is determination of essence and contents of theoretical provisions and problems of law enforcement in the sphere of providing legal aid to the witness.

**Statement of the main material.** For the first time in the legislation the concept "legal aid" has been enshrined in the Law of Ukraine "On free legal aid" of June 2 2011 [1]. According to item 3 p. 1 of the Art. 1 of this Law, legal aid is considered as providing the legal ser-

vices aimed at providing realization of the rights and freedoms of the person and citizen, protection of these rights and freedoms, their restoration in case of violation.

Since September 30, 2009 in the witness the right for legal aid has appeared. In this regard, there was a need for a research of a question of an order of providing legal aid by the lawyer to the witness when carrying out procedural actions.

In particular, the procedural codes containing the instructions directed to realization of such right can lead however not all industry laws of Ukraine to restriction or narrowing of contents and volume of the right of everyone for legal aid. Besides, providing to everyone the rights for legal aid is not only a constitutional and legal obligation of the state, but also observance of the international legal obligations taken by Ukraine according to provisions of the Universal Declaration of Human Rights 1948, Conventions on protection of human rights and fundamental freedoms 1950, the International Covenant on Civil and Political Rights of 1966 and t. further. According to the Art. 64 of the Constitution of Ukraine, the constitutional right of everyone on legal aid can't be limited. According to the Basic Law, situation "everyone has the right for legal aid" (p. 1 Art. 59) is norm of direct action (the p. 3 of the Art. 8) and also under a condition if this right isn't provided by the relevant laws of Ukraine or other legal acts, the person can't be limited in his realization. It concerns including the right of the witness for receiving legal aid during interrogation in criminal trial and human rights in case of granting explanations

to them in public authorities. According to the Constitution of Ukraine, the person doesn't bear responsibility for refusal to give evidences or explanations concerning itself, family members or close relatives whose circle is defined by the law (p. 1 Art. 63) [2].

Thus, during interrogation in bodies of pre-judicial investigation and to persons when granting explanations in public authorities an opportunity to receive legal aid for protection against possible violation of the right not to give evidences or explanations concerning itself, family members or close relatives who can be used in criminal trial for the proof of charge of specified persons has to be provided to the witness.

It agrees in item 6 p. 1 of the Art. 1 of the Law of Ukraine "On legal profession and lawyer activity" and articles Codes of Criminal Procedure of Ukraine which define the status of the witness and an order of his interrogation, participation in other procedural actions it is possible to draw a conclusion that there are such types of providing legal aid to him the lawyer: 1) granting legal information, consultations and explanations on legal questions to the witness to an appearance on interrogation or for participation in other procedural actions. This type of legal aid includes: preliminary consultation of the person on matters of law, regulating the procedure of interrogation of the witness, carrying out other procedural actions; working off of tactics of protection of interests of the witness and statement of a legal position; psychological training of the witness for interrogation and modeling of conditions of carrying out investigative or other procedural action. During preliminary oral consultation the lawyer to formulate for the witness line of conduct during interrogation, to study documentation which at the witness; 2) providing legal aid to the witness during making indications by him to the investigator, the prosecutor, the investigative judge, court, participations in carrying out other procedural actions; 3) drawing up statements, complaints, the procedural and other documents of legal character aimed at providing realization of the rights and legitimate interests of the witness upon termination of interrogation and other procedural actions.

It should be noted that p. 1 Art. 59 of the Constitution of Ukraine doesn't contain restrictions concerning a circle of subjects of providing legal aid and requirements on their vocational training which have to be defined in laws of Ukraine, and it is provided in the p. 2 that for ensuring the right for protection against charge and providing legal aid at the solution of affairs in vessels and other public authorities in Ukraine the legal profession works [2].

The Code of Criminal Procedure of Ukraine obliges bodies of preliminary investigation to explain to the persons participating in business, their rights and to provide a possibility of implementation of these rights. Therefore in the criminal procedural law the witness of the right for legal aid should pay attention at the time of explanation. It agrees p. 1 Art. 68 of the Code of Criminal Procedure of Ukraine, any person about whom there are data that circumstance, relevant are known to him as a witness can be subpoenaed.

So, the procedural status of the witness the person gets from the moment of a call her for interrogation in the order established by the law. In turn, Art. 166 of the Code of Criminal Procedure of Ukraine provides such ways which it can be made a call of the witness for interrogation: agenda, telegram, telephone message. Scientists consider that in formal written notices the investigator should explain to the witness his right for legal aid [3, p. 23].

The most widespread way of a call is the agenda. Therefore scientists offer will supplement the Code of Criminal Procedure of Ukraine with the provision, in the agenda it has to be specified that the witness has the right to appear on interrogation on chosen at own will as the person in the status of the lawyer [3, p. 24]. Such situation will carry out positive moral impact on perception by the witness of the fact of a call.

The investigator has to carry out calls of witnesses so that in them there was time for the free choice of the representative, conclusion of agreement about providing legal aid and an appearance on interrogation. On arrival on interrogation the witness has to testify the signature in the protocol of interrogation on explanation to him the investigator of the right to legal aid. It is known that carrying out such investigative action as interrogation happens in four stages:

- 1) clarification of data on the personality interrogated, explanation of his rights and duties;
- 2) a showdown between the witness and other participants of process;
- 3) free story;
- 4) answers to questions of the investigator, prosecutor [4, p. 65–66].

If on interrogation of the witness there was a lawyer, then the additional stage – clarification of data about his powers is necessary. Before entering of corresponding changes into the Code of Criminal Procedure of Ukraine this issue needs to be resolved, applying analogy to the p. 3 of Art. 44 of the Code of Criminal Procedure of Ukraine. For confirmation of the powers on participation in business the lawyer, the member of lawyer association, has to provide the warrant of this association, and the lawyer who is engaged in lawyer activity individually – the agreement. The warrant sample, is provided by the lawyer for confirmation of the powers on representation or protection of interests of the client, is developed and introduced by the Highest qualification commission of legal profession according to an order of the President of Ukraine (item 2 of the Decree of the President of Ukraine of September 30, 1999 № 1240/99 "On some measures for increase in level of work of legal profession").

For performance of the powers on rendering legal aid and implementation of representation the lawyer uses the warrant approved by the Highest qualification commission of legal profession which is universal for conducting any affairs. At the same time the nature of business – criminal is specified in the first to a line; further a surname, the name, the client's middle name are entered; it is told below about establishment where the assignment, and in what stage is carried out. In the warrant date of his delivery also has to be specified.

The lawyer working individually, and in lawyer association – the head appends the sign and seal (personal or lawyer association).

Thus, the warrant for confirmation of powers is given by the lawyer or lawyer association for commission of actions which are a certain type of representation or protection of the client: including the warrant can be issued for representation of interests of the client in courts, bodies of pre-judicial investigation in criminal trial.

At the same time, it is provided in 44 Codes of Criminal Procedure of Ukraine that the lawyer who isn't a member of lawyer association confirms the powers of the defender on participation in affairs not with the warrant, but the agreement.

According to us, it breaks the principle of providing a lawyer secret and confidentiality. For this reason the provision "On the Warrant of the Lawyer" [5] which, according to lawyers, should be considered when forming criminal procedural rule about participation of the lawyer in interrogation of the witness was accepted the Highest qualification commission of legal profession.

By the general rule, the lawyer should be considered allowed to carrying out investigative (search) action from the moment of pronouncement of the relevant resolution by body of pre-judicial investigation. Such decree on the admission of the lawyer has to be issued in due time, that is until from which he has to start rendering legal aid to the witness during interrogation.

Legislative experience of other countries in this question deserves attention. In particular, in the Code of Criminal Procedure of some countries it is specified that the witness has the right to appear on interrogation with the lawyer. Also is defined that if the witness was on interrogation with the lawyer invited by him for rendering legal aid, then the lawyer is involved in interrogation and has the rights provided by the criminal pro-

cedural legislation. Upon termination of interrogation the lawyer has the right to make statements for violations of the rights and legitimate interests of the witness. The specified statements are subject to entering in the protocol of interrogation. So, it is possible to draw a conclusion that the lawyer at interrogation of the witness within rendering legal aid to him has the right to provide to the witness in the presence of the investigator short consultations, to ask questions to the person with the permission of the investigator, asks, to make written remarks concerning fixing in the protocol of investigative action. The investigator can take away the lawyer's questions, but is obliged to enter them in the protocol [6, p. 128].

**Conclusions.** The procedural order of involvement practically of all participants of criminal proceedings provides the procedure of explanation of their rights, duties and responsibility. At the same time the specified procedure has to precede procedural actions with the participant of criminal legal proceedings, for example, to the applicant his procedural laws right after the message is explained to them about the deeds criminal offense understood, are explained to the translator, the expert of the right just before the beginning of interrogation. In a case happens to the witness of explanation of the rights also just before the beginning of his interrogation.

So as a result we can note that it is necessary to provide in the Code of Criminal Procedure of Ukraine the rights of the lawyer when carrying out procedural actions are listed. Besides, in the corresponding norm of the Code of Criminal Procedure of Ukraine it has to be surely specified that absence of the lawyer interferes with conducting interrogation in determined by the investigator time. This question in the p. 2 of Art. 82 of the Code of Criminal Procedure of the Republic of Kazakhstan is quite so regulated [7, p. 329].

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