

## ADVOCATES' FEE AND METHODS OF CALCULATING IT

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**Reviewers:** Lisowski, Peter, Czestochowa, Poland, Palinchak, M, Ukraine

### **Abstract**

The article reveals the essence of fee (remuneration) for the legal assistance provided by an advocate (the remuneration institution). First of all, the legal nature of an advocate's fee is examined, its amount and payment are determined. The position being argued is that modern domestic legislation does not sufficiently regulate an advocate's remuneration (honorarium), actually entrenching the provision according to which an advocate and a client independently determine the terms of an agreement on granting legal assistance, including

those related to remuneration calculation and payment.

To fulfil this aim there have been employed the methods which are typical of legal science. The study was conducted using the dialectic method of inquiring legal reality which provided an opportunity to analyze the multifaceted nature of the institution of remuneration for an advocate's legal assistance (fees) in terms of the mechanism of emerging and resolving contradictions that exist in modern civil society and at the present stage of establishing the state based on the rule of law. The overall structure of the research was formed with the help of the

system-structural method, this contributed to the comprehensive solving of the tasks set by the author. The formal-dogmatic method, which is one of the main methods involved in this work, enabled with the help of clarification and interpretation of the content of legal acts to first of all explore the essence of various ways of calculating the amount of an advocate's fee.

According to the substantiated conclusion, the main methods of calculating an advocate's fee amount are (the hourly pay; the fixed amount of money; «success fee»; subscription service; a combined system (for example, when the advocate and the client arrange the fixed fee, and they also envisage the possibility to pay a certain additional percentage (in particular, of the value of a lawsuit)).

**Key words:** advocate; legal assistance; advocate's fee; remuneration; calculation of advocates' fee amount.

Introduction and the problem statement. A comprehensive study of an advocate's legal status, particularly, in terms of distinguishing between the notions of «legal assistance» and «legal services» provided us with an opportunity to come to the conclusion that the practice of law is an independent professional activity which by its nature is not entrepreneurial activity and is deprived of the commercial component [1, p. 135]. Based on this, the issues of an advocate's fee for his / her professional activity, that is its legal nature, the procedure for determining its

amount and payment, remain pressing. The topicality of the study lies in the fact that we adhere to the narrow approach in relation to a range of entities provided with legal aid. This approach enables us to assert the existence of appropriate conditions for the implementation of the right to professional legal assistance, taking into account, in particular, the establishment of significant qualification and other requirements for candidates who wish to gain the status of an advocate, as well as enshrining the special status of an advocate whose realization is carried out on the basis of independence and professionalism [2]. Equally important in this regard is the institution of the advocate's remuneration, which is a certain guarantee for both the advocate and the client in terms of the proper implementation of the constitutional right to provide legal assistance.

The review of the main scientific publications. The legal nature of the advocate's fee (an honorarium for an advocate's legal assistance), including the methods of its calculation, have been the subject of research conducted by a number of scholars. Some results of such studies were approved in the works of Ye. V. Vas'kovs'kyi, T. B. Vil'chuk, N. V. Holubieva, V. M. Ivakin, O. O. Kyiashko, R. Kniper, O. M. Kniazev, R. H. Mel'nychenko, I. Sydorova, D. M. Sokolova, S. V. Troitskyi and others.

The aim of this paper is to reveal the legal nature and methods of calculating the

remuneration for an advocate's professional activities (honorarium). The main tasks set by the authors are: to study the legal nature of remuneration for the provision of legal assistance; to define the essence of the notion «fees» (honoraria) of advocates; to analyze the basic ways of determining an advocate's fee for providing legal assistance.

Results and discussion. Studying the specifics of the fee (honorarium) as an advocate's remuneration, R. H. Mel'nychenko points to the duality of its legal nature, and the issue of perceiving the fee is that economic and charitable discourses are antagonistic discourses, they cannot exist simultaneously in the same phenomenon, however, from ancient times until today advocates have been unsuccessfully trying to combine the incompatible things (an honorarium, translated from Latin as a gift, and therefore it turns out that an advocate receives a payment for his / her work (economic discourse) and at the same time does not receive it (charity discourse)) [3, p. 23].

This all determines the peculiarity of the legal nature of the fee (honorarium) as an advocate's remuneration for conducting professional activities. This perception of the essence of an advocate's fee further confirms our assertion according to which the specifics of the legal profession as an institution of civil society is manifested in the dualistic character of its legal nature that can be traced in the organic combination of public and private interests in the

conduct of the affairs of the legal profession in general and an advocate's activities in particular, and they must be of equal, mutually restraining nature. The essence of private and public interests in an advocate's professional activities consists in the fact that an advocate while upholding the rights, freedoms and legitimate interests of his / her client, at the same time acts in the interests of the whole society (state), law in general, fulfilling the constitutional obligations, related to providing professional legal aid, which have been imposed on him / her [4, p. 67].

The term «honorarium» comes from the Latin language meaning a reward for a service (yet the word «honorarum» means honorary, for the sake of respect, such which happens in honor of a certain person, a honoratus (-ae) – people who are respected, honorable people who occupy high positions, high-ranking officials) [5, p. 286]. Based on this, in the explanatory dictionaries, the notion of «a fee» is perceived as a monetary reward for work performed under an agreement, etc. with a writer, an artist, a lawyer, a doctor and so on. [6, p. 281].

As for the Ukrainian legislation, unfortunately, it does not contain the proper legal regulation of this institution, and in the relevant special Law of Ukraine «On the Bar and Practice of Law» [7] only its one article is devoted to it. Thus, Art. 30 of the Law states that the fee (honorarium) is a form of an advocate's remuneration for protection, representation and

other types of legal assistance provided to the client, and the procedure for calculating it (the fixed amount, hourly rate), the grounds for changing the fee amount, payment procedure, return conditions, etc. are determined in a legal assistance agreement. In addition, this article envisages that in the process of calculating the fee amount several points are taken into account, namely: the complexity of the case, the advocate's qualifications and experience, the client's financial situation and other significant circumstances, as well as the fact that the fee must be reasonable and the time spent by the advocate is counted. The issues of the nature of the advocate's fee are explained in the Rules of Advocates' Ethics in a somewhat broader way (Articles 27-31) [8].

Proceeding from the principle of freedom to contract, the legislator reinforces the provision according to which the advocate and the client independently determine the terms of the agreement on the provision of legal assistance [9], including those related to the procedure for calculating and paying fees. Given the multifaceted nature of advocates' activities, in particular, with regard to providing free-of-charge legal aid by them, the procedure for paying for services can be regulated not only with the

help of the agreement between the advocate and the client, but also using the Methodology for calculating the amount of remuneration for advocates who provide free secondary legal aid [10], which envisages the single tariff system for determining the amount of such remuneration.

Investigating various payment systems linked to a professional advocate's services, O. V. Vas'kovs'kyi pointed out that the fee can: 1) be unconditionally prohibited (absolute gratuitousness); 2) be paid by the government as a payment on a permanent basis; 3) be considered as a voluntary gift provided by the client in line with his / her capabilities (relative gratuitousness); 4) be determined by the monetary equivalent which the advocate receives from the client for the service provided [11, p. 82].

As for the Ukrainian legislator, in Art. 30 of the above-mentioned Law (similar is the provision of Article 28 of the Rules of Advocates' Ethics), the possible procedure for calculating the advocate's fee (the fixed amount, hourly rate) is envisaged. It should be admitted that advocates use other methods of calculating the amount of the fee while conducting their activities. Thus, O. O. Kyiashko notes that there are several forms of measuring the cost of advocate's services, namely: hourly rate, the

fixed fee, subscription service and «success fee» [12, p. 66]. O. M. Kniyazev's position is similar and he has somewhat expanded those forms, stressing that the agreement of the parties may determine the following forms (systems) of payment: one-time-only payment of a fixed amount of money; hourly pay; hourly (by the day) pay; monthly pay; based on the accomplished work; payment based on the final result, etc. [13, p. 105].

To ensure the completeness of our study we consider it necessary to reveal the general features of the most common ways of calculating the amount of an advocate's fee. So, one of them is the hourly pay, which is considered by I. Sydorova as the most adequate way to evaluate the advocate's activities. She points out that the use of the hourly pay as a way of calculating the fee amount involves invoicing the client along with a description of the work performed, indicating the amount of time spent [14]. The application of this method is common in many foreign countries, in particular in the USA and a number of countries in Western Europe, where it is most widely used among all other methods of calculating the amount of an advocate's fee.

According to O. M. Kniyazev, the hourly pay is used by advocates in cases of consulting, participating in negotiations, preparing information on the legislation, acquainting with case materials, and also in other situations when the volume of work can be more or less calculated in hours. Additionally, the scholar

underlines that the daily fee is less common than the hourly fee and, as a rule, is used in cases where an advocate is involved in the legal or economic and legal audit, whose peculiarity is its continuity (from start to finish for one client) [13, p. 106]. If the advocate and the client have agreed to use the hourly-based payment system, the legal assistance agreement should provide information on the calculation of the cost within such payment system, which should reflect the price per hour for a certain type of service and the time spent on: participating in court hearings (must be confirmed by the chronometric protocol of the court session [ 15]); carrying out certain procedural actions outside the court session; the familiarization with the case materials in court, etc. and this information can be included, in particular, in the certificate of acceptance-delivery of services [16].

One more of the main ways of calculating the amount of the advocate's fee is to set it as the fixed amount of money (both with and without reference to the price of the lawsuit). This method is usually employed by advocates while providing assistance that does not necessitate a significant period of time and consists in carrying out certain predetermined actions. The application of the fixed amount of an advocate's fees was typical at the previous stages of development of the bar. Indeed, V. M. Ivakin notes that during the Roman Empire, the remuneration of 10% was considered moderate since it took several years to deal with the cases,

they passed through numerous authorities, a lot of work was wasted, and payment had to be waited for a very long time, so advocates could not limit themselves to a small fee. The scholar notes that this state of affairs existed at the time of the judicial reform of 1864, but in July, 1868 the fee rate scales for high court advocates were approved, which also provided for a decrease in the percentage of remuneration as the price of the lawsuit increased (receiving a fee of more than 10 percent was possible only in exceptional situations, when the case was especially complicated or when an advocate was made responsible for all expenses related to processing the case) [17, p. 264]. The application of the fixed fee is well known in many countries of the world. In her scientific research V. R. Diukina emphasizes that the characteristic feature of German law is the tariffication for advocates' services [18, p. 84]. On May 5, 2004 a special act «On the Remuneration of Advocates» («Rechtsanwaltsvergütungsgesetz») was adopted in the Republic of Germany. Annex 1 to this act contains a considerable list of such remuneration rates depending on the type of advocacy activity [19]. Some scholars view the existence of such tariffs as a prerequisite for facilitating access to courts and ensuring the application of laws in the judicial process in Germany [20, p. 129].

Less common ways of determining the amount of an advocate's fees but the ones which are used in an advocate's practice are the so-called «success fee» as well as subscription

services. The peculiarity of «success fee» is that the payment of an advocate's assistance depends on the achievement of the result expected by a client. The payment for the specific result the client pursues is quite common in the Anglo-Saxon legal system (in particular, in the United States and England) and is restricted (or even prohibited) in some foreign countries. What concerns the application of «success fee» by Ukrainian advocates, at present such a possibility is quite controversial, given, in particular, the decision of the Supreme Court dated 12 June 2018 in case № 462/9002/14 [21]. In view of the above-mentioned, we believe that the legal nature of «success fee» as well as the possibility of its employment by domestic advocates as a way of calculating the amount of their remuneration requires more detailed research which will be carried out by us in the future.

As for the method of calculating an advocate's fee such as subscription service, it is usually used by law firms when there is a significant and / or long-term (permanent) need to provide legal aid to the client. The client pays for the provided aid on a regular basis (usually monthly) and the fee amount is predetermined. This method features positive aspects (the client knows the amount of cost and the advocate respectively – his fee amount in advance), however, it is essentially fiduciary (T. B. Vil'chyk underscores that it is unknown beforehand what amount of an advocate's assistance the customer will need and to what

extent the paid subscription fee will actually cover the cost of the accomplished work [20, p. 120]).

One of the ways of determining the amount of an advocate's fee is to use the combined system. An example of using such a system is the case when the advocate and the client agree on the fixed amount of fee as well as the possibility of paying a certain percentage (particularly, of the price of the lawsuit) if the achieved result is the one expected by the client. The application of this method is acceptable in many foreign countries. Thus, in England these agreements stipulate that an advocate can be rewarded in addition to the usual fee if the case has been won, and the part which depends on the outcome of the case is called «the percentage increase» (this additional fee may not exceed 100% of the usual fee) [23, p. 249].

Studying the issue of calculating the amount of an advocate's fee, it is necessary to draw attention to the fact that neither the minimum nor the maximum fee amounts have been established in Ukrainian legislation, there are no indicative amounts of an advocate's fees at all. The domestic legislator is limited only to establishing certain criteria, which must be taken into account when determining the amount of the fee, in order to ensure the future possibility of the client's proper compensation of the costs of legal assistance in the respective legal proceedings, and this has repeatedly been the subject of our studies [24-28]. We question the feasibility of the

normatively fixed existence of the minimum and maximum fee rates, since, as V. S. Troitskyi rightly notes, such orienting points lead to the comparison of prices for the aid provided by advocates who have not been compared and whose qualifications and experience are different. In his opinion, the minimum fee rate guides a person, who has the intention to defend his / her rights in court, in regards to contacting those representatives who are ready to provide such assistance at a very low price and in the smallest amount, without even explaining the scope of such assistance, and, thus, such guidance clearly reduces the constitutional guarantees related to providing judicial protection [29, p.121].

From our perspective, it will be advantageous to determine the approximate (recommended) rates of advocates' fees which are approved by regional councils of advocates (for instance, the decision of the Council of Advocates of Chernihiv region №5 7 dated 16 February 2018 [30] and the decision of the extended meeting of the Council of Advocates of Kharkiv region № 17 dated 21 March 2018 approved the recommendations on the application of the recommended rates of advocates' fees [31]). It should be admitted that the Council of Advocates of Ukraine with its decision № 66 dated 26 June 2019 «On the indicative amount of advocates' fees for representing the interests of a state body and local government in courts» addressed the

Ministry of Finance in its letter on the further planning of expenditures from the state and local budgets 2020 for representing public authorities and local governments by advocates in courts of all levels and the introduction of indicative fee amounts and hourly rates for legal services in view of budget requests [32]. We fully share N. Yu. Holubieva's position who notes that in a particular case the price can vary greatly, based on many factors characterizing this case, that is why the average costs of legal services will always be only indicative [33]. In our opinion, these can be guidelines for both the client while appointing an advocate who will provide legal assistance and the court while determining the amount of compensation of costs for professional legal assistance.

Generally, when determining the fee amount two points should be taken into account, firstly, it should ensure an advocate's foundation for his / her financial well-being, and secondly, the financial relationship between the client and the advocate must comply with legal ethics [34, p. 141]. In our view, the second component is no less important than the first one. An advocate must not forget that in his profession there is a combination of private and public interests, and he must act on the grounds of professionalism and absolute independence [35]. Therefore, the provision of Art. 27 of the Rules of Advocates' Ethics is positive since it reveals the essence of compliance with the principle of integrity while executing a client's order. This provision also

states that, regardless of the fee amount, the advocate must pay reasonable attention to each order to ensure its successful implementation and must employ all reasonably necessary and legal means which are available to him / her to provide effective professional legal assistance to the client, his / her protection or representation.

**Conclusions.** Based on the principle of freedom to conclude agreements, including those on the provision of legal assistance, an advocate and a client independently determine the procedure for calculating and paying the fee. An advocate in his / her practice applies, in particular, such methods of calculating the fee amount: the hourly rate of pay; the fixed monetary amount; «success fee»; subscription service; a combined system (for instance, when an advocate and a client agree on the fixed fee and also provide for the possibility of paying a certain additional percentage (particularly, of the price of the lawsuit)).

Each of the methods for calculating the amount of an avocate's fee has both its positive and negative aspects, therefore, its choice depends on a specific situation and is carried out by an advocate and a client on the basis of a preliminary clarification of preferences for each of the parties at the time of concluding the legal assistance agreement. But regardless of the fee amount and the method of calculating it the advocate must act on the basis of professionalism and absolute independence (being independent of the client as well) remembering that he / she



must pay reasonable attention to each order despite the amount of the stipulated fee to ensure its successful implementation.

We question the usefulness of the existence of the minimum and maximum rates of advocates' fees, and at the same time we consider it to be a good point to determine the approximate (recommended) rates (should be approved by the councils of advocates in the regions) which can be a kind of guidance for the client while choosing an advocate who will provide legal aid to him / her, and the court while determining the amount of compensation for the costs of professional legal assistance.

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