

Provision of Legal Assistance to Witness in Criminal Proceedings: Specifics and Problematic Issues

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DOI: 10.32353/khrife.1.2025.05 UDC [343.12:347.965](477)

Received: 04.03.2025 / Reviewed: 17.03.2025 / Accepted for printing: 26.03.2025 /

Available online: 31.03.2025



This article purpose is to clarify specifics of determining legal status of a lawyer involved in providing legal assistance to a witness in criminal proceedings, to outline the problematic issues of his practical activity. General scientific methods were applied (analysis and synthesis, system analysis, logical-structural, generalization, comparative law one, etc.). It was found that legal status of lawyer involved in providing legal assistance to a witness remains undefined by law to this day, as is the legal status of defense attorney and representative of a person in criminal proceedings that creates basis for scientific controversy, in particular regarding the issue of defining powers of lawyer during practical activity. It was found that scientists define such activities and the powers of a lawyer differently. Under legislation of Ukraine, lawyer engaged to provide legal assistance to a witness does not provide either protection or representation, so this form of activity should be understood as another type of advocacy: lawyer does not acquire a derivative procedural status from the witness, that is, does not have his rights. At the same time, the lawyer prevents the violation of the witness's rights, is a guarantor of inadmissibility of arbitrariness or abuse of authority by representatives of security forces, ensures realization of the witness's procedural interests, his right to freedom from self-incrimination, preventing prosecution of knowingly innocent person and application of methods of psychological pressure, falsification or fabrication of individual information, things and documents, etc. Thus,

This article is translation of the original Ukrainian content, which source is available at the link: <https://khrife-journal.org/index.php/journal> (translated by Andriy Bublikov). The author acknowledges translation as corresponding to the original.

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the engaged lawyer contributes to implementation of many tasks, but his basic function is to ensure protection of witness's procedural interests and the realization of his rights. It is substantiated that involved lawyer has rights based on the general principles of criminal proceedings and guarantees that apply to him as a participant in the procedural action, as well as the powers guaranteed to him by the Law of Ukraine: On the Bar and Legal Practice. Despite supporting position on normative consolidation of the legal status of a lawyer involved in providing legal assistance to a witness, expediency of introducing such an entity as a legal consultant to the witness (legal attorney / procedural legal advisor) into criminal proceedings is refuted, since this contradicts constitutional rights.

Keywords: criminal proceedings; lawyer; legal aid; witness; right to defense; legal status.

Research Problem Formulation

One of inalienable rights of modern man is the right to protection. This cornerstone principle is enshrined in legislation of most democratic States that is a natural result of democratization and humanization of criminal justice field strengthening legal guarantees in terms of protecting the rights and legitimate interests of all its participants and ensuring fair and impartial justice for each person.

Traditionally, the right to protection is identified with the right of the suspect to use all available methods of legal protection of himself and defend his own legal position: namely, protection strategy. The right to protection is provided for in Article 59 of the Constitution of Ukraine: "Everyone has the right to professional legal assistance. In cases provided by law, this assistance is provided free of charge. Everyone is free to choose a defender of their rights"¹.

In order to implement this constitutional guarantee, the Law of Ukraine: *On the Bar and Legal Practice* (hereinafter referred to as *Law on the Bar*) defines powers and legal principles of the activities of the self-governing human rights institute of the Bar is the provision subject of professional legal assistance².

At the current stage of the state development, the issue of reforming the Bar has long been a pressing one. This is primarily due to the course of European integration chosen by Ukraine and introduction of European values, which will undoubtedly affect the reform of criminal justice system, lead to changes in a number of provisions of criminal procedure legislation, etc. At the same time, balanced opinions on the need to reform the Bar as one of the key components of the legal system of Ukraine have been voiced by academic community and human rights organizations for quite some time. Strengthening the Bar plays an important role in

1 Конституція України : Закон України від 28.06.1996 р. № 254к/96-ВР (зі змін. та допов.). URL: <https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text> (date accessed: 05.02.2025).

2 Про адвокатуру та адвокатську діяльність : Закон України від 05.07.2012 р. № 5076-VI (зі змін. та допов.). URL: <https://zakon.rada.gov.ua/laws/show/5076-17#Text> (date accessed: 05.02.2025).

the process of democratization of society, as lawyers are the main participants in ensuring fair trial and providing legal aid ³.

Analysis of judicial practice, media content and social networks shows that the level of public trust in lawyers currently is quite low, sometimes even lower than in representatives of pre-trial investigation bodies and judges ⁴. In the conditions of the legal regime of martial law, issue of functioning of the Bar institution has become significantly aggravated (in particular, in the field of protection of the rights of citizens) and is becoming a powerful catalyst in realizing the urgent need to develop concept of reform of this institution as soon as possible ⁵.

Obviously, during armed conflict, realization of everyone's right to defense is significantly complicated, since both constitutional level and basic legislation provide for mechanisms that imply restrictions on certain human and civil rights and freedoms. Among numerous consequences of this state of affairs, it is the issue of improving mechanisms for providing legal assistance to witnesses in criminal proceedings that attracts our attention: this institution of criminal procedure is one of the basic ones, as it is related to ensuring rights of a person who, in practice, often

acquires the status of suspect that leads to legally significant consequences for a particular person. The current legislation is the least clear on the rights of witnesses (in particular, the right to legal aid), so we believe that this issue requires immediate attention from both legal practitioners and academic community.

Conceptually recognizing the need to reform institution of advocacy and legislation in Ukrainian society, which constitutes the legal basis of advocacy ⁶, as well as unconditionally sharing axiomatic nature of the thesis that it is the advocacy system that guarantees implementation of the principles of the rule of law in a democratic State ⁷, we consider it necessary to outline basic guidelines in the context of increasing the legal protection of witnesses in criminal proceedings. First of all, we will focus on the analysis of organizational and legal framework for providing legal assistance to witnesses in criminal proceedings.

Article Purpose

Find out the legal status peculiarities of a lawyer involved in providing legal assistance to a witness in criminal proceedings and to analyze problematic issues of his/her practice.

- 3 Маркович Х. М. Права і свободи людини в умовах воєнного стану: фокус пріоритетів. *Аналітично-порівняльне правознавство*. 2023. № 4. С. 95—99. DOI: [10.24144/2788-6018.2023.04.13](https://doi.org/10.24144/2788-6018.2023.04.13) (date accessed: 05.02.2025).
- 4 Пошиванюк Т. Проблеми забезпечення права на захист під час війни. *Публічне право*. 2024. № 3 (55). С. 5—12. DOI: [10.32782/2306-9082/2024-55-1](https://doi.org/10.32782/2306-9082/2024-55-1) (date accessed: 05.02.2025).
- 5 Коломойцев М. М. Сучасні виклики в захисті підозрюваного під час воєнного стану. *Вісник Луганського навчально-наукового інституту ім. Е. О. Дідоренка*. 2024. Вип. 3 (107). С. 97—105. DOI: [10.32782/2786-9156.107.3.97-105](https://doi.org/10.32782/2786-9156.107.3.97-105) (date accessed: 05.02.2025).
- 6 Inshyn M., Shchokin R., Semenets-Orlova I., Kravchenko O., Barsuk M. The Role of Attorney's Request as a Communication Instrument in Advocacy. *Journal of Forensic Science and Medicine*. 2024. No. 10 (1). Pp. 34—41. DOI: [10.4103/jfsm.jfsm_114_22](https://doi.org/10.4103/jfsm.jfsm_114_22) (date accessed: 05.02.2025).
- 7 Oliinyk O., Bilan Y., Mishchuk H., Akimov O., Vasa L. The Impact of Migration of Highly Skilled Workers on the Country's Competitiveness and Economic Growth. *Montenegrin Journal of Economics*. 2021. Vol. 17. No. 3. Pp. 7—19. URL: <https://ep3.nuwm.edu.ua/20736/> (date accessed: 05.02.2025).

Research Methods

A set of general scientific methods (analysis and synthesis, generalization, logical-structural approach, etc.) was applied. This made possible to conceptually assess typical approaches to determining essence of legal assistance provided by a lawyer involved by a witness and the limits of his legal status. Systematization of scientific provisions within the framework of the studied issues, highlighted in the scientific literature recently, made possible to identify certain differences between approaches of scientists. The author formulated his own opinion on the determination of the legal status of a lawyer involved in providing legal assistance to a witness in criminal proceedings, outlined certain

problematic issues of his practice (in particular, in terms of rights and powers).

Analysis of Essential Researches and Publications

Functions of the Bar, as well as the issues of correlation between such legal concepts as *legal aid* and *defense function*, were studied by I. Hloviuk ⁸, V. Merkulova ⁹, V. Tertyshnyk ¹⁰, etc.

The provision of legal aid as a type of advocacy became the subject of monographs by V. Karpenko ¹¹, O. Martovytska ¹², K. Stoyanov ¹³, et al.

Systematic analysis of the provisions of the criminal procedural legislation in the context of determining components of the legal status of a lawyer providing legal assistance to witness was carried out by V. Zaborovskiy ¹⁴, T. Korcheva ¹⁵,

- 8 Гловюк І. В. Кримінально-процесуальні функції: теоретико-методологічні засади і практика реалізації : автореф. дис. ... д-ра юрид. наук. Одеса, 2016. 42 с. URL: <http://hdl.handle.net/11300/3320> (date accessed: 05.02.2025).
- 9 Меркулова В. О. Функції адвокатури та відновне правосуддя: проблеми співвідношення. *Південноукраїнський правничий часопис*. 2023. № 3. С. 96—101. DOI: 10.32850/sulj.2023.3.16 (date accessed: 05.02.2025).
- 10 Тertiшник В. М. Правнича допомога та функція захисту в кримінальному процесі: гармонізація доктрини. *Правова позиція*. 2017. № 2 (19). С. 128—137. URL: http://nbuv.gov.ua/UJRN/vamsup_2017_2_18 (date accessed: 05.02.2025).
- 11 Карпенко В. М. Право свідка на професійну правничу допомогу у кримінальному провадженні : дис. ... д-ра філос. Київ, 2022. 263 с. URL: <https://elar.navs.edu.ua/server/api/core/bitstreams/8a7880e7-d70e-498e-8026-faea06ca934b/content> (date accessed: 05.02.2025).
- 12 Мартовицька О. В., Юхно О. О. Проблеми професійної правничої допомоги : теорія і практика : монографія. 2-ге вид., перероб. і допов. Харків, 2024. 420 с. URL: <https://dspace.univd.edu.ua/server/api/core/bitstreams/87e1cb06-f938-451b-bad4-03c57304399a/content> (date accessed: 05.02.2025) ; Мартовицька О. В. Реалізація правової допомоги на стадії досудового розслідування : автореф. дис. ... канд. юрид. наук. Харків, 2014. 22 с. URL: <https://dspace.univd.edu.ua/server/api/core/bitstreams/1c26417b-87d4-4f7e-8d05-0ddd1c0c7b4f/content> (date accessed: 05.02.2025) ; Її ж. Повноваження захисника при наданні правничої допомоги іншим учасниками кримінального провадження. *Європейські перспективи*. 2020. № 3. С. 102—109. DOI: 10.32782/EP.2020.3.15 (date accessed: 05.02.2025).
- 13 Стоянов К. С. Захисник та представник як учасники кримінального провадження у досудовому розслідуванні : монографія. Одеса, 2024. 263 с.
- 14 Заборовський В. В. Правовий статус адвоката свідка. *Науковий вісник Ужгородського національного університету. Серія: Право*. 2016. Вип. 36. Т. 2. С. 169—173. URL: http://nbuv.gov.ua/UJRN/nvuzhpr_2016_36%282%29__43 (date accessed: 05.02.2025).
- 15 Корчева Т. В. Надання професійної правничої допомоги свідку у кримінальному провадженні як вид адвокатської діяльності. *Порівняльно-аналітичне право*. 2018. № 1. С. 316—320. URL: <https://dspace.nlu.edu.ua/handle/123456789/15683> (date accessed: 05.02.2025).

O. Panchuk ¹⁶, S. Rokun ¹⁷, O. Skriabin ¹⁸, O. Chepel and A. Habrelian ¹⁹, et al.

S. Rokun proposed to resolve the issue of legal regulation of the status of lawyer involved as a witness representative by supplementing and amending certain provisions of criminal procedural legislation. T. Korcheva expanded this idea: she formulated proposals for improving the provisions of Criminal Procedural Code of Ukraine and the Law on Advocacy. One of these is the position on statement of clause 2, Part 1, Article 66 of the Criminal Procedural Code in the following wording: "Use during criminal proceedings the professional legal assistance of a lawyer; representative whose authority to participate in criminal proceedings is confirmed by the documents provided for in article 50 of this Code, if the witness representative is a person who has the right to be a defense attorney in criminal proceedings" ²⁰.

Some procedural aspects of providing legal assistance to a witness are disclosed

in the research papers by O. Kuchynska and Yu. Tsyhaniuk ²¹, O. Baik ²² et al.

Attention of scholars to the issues of providing legal aid to witness in criminal proceedings demonstrates their relevance. At the same time, the analysis of legal provisions demonstrates a certain controversy of certain provisions within this issue. We believe that these issues will remain a priority in scientific research, given development of international standards in the field of human rights protection, their implementation in the national practice of law enforcement agencies, as well as socio-political changes and dynamic development of society that emphasizes the relevance of the issues raised.

Main Content Presentation

The constitutional provisions guarantee the right of every person to defend themselves personally and, if necessary to seek professional legal assistance ²³. A person

- 16 Панчук О. В. Захист прав свідка у кримінальному процесі України. *Адвокат*. 2012. № 2. С. 46—48. URL: http://nbuv.gov.ua/UJRN/adv_2012_2_9 (date accessed: 05.02.2025).
- 17 Рокунь С. В. Проблеми визначення правового статусу особи, яка надає правову допомогу свідку в кримінальному провадженні. *Актуальні проблеми вітчизняної юриспруденції*. 2017. Вип. 5. С. 157—158. URL: http://apnl.dnu.in.ua/5_2017/38.pdf (date accessed: 05.02.2025).
- 18 Скрябін О. М. Захисник в кримінальному процесі: нормативно-правове дослідження : автореф. дис. ... д-ра юрид. наук. Запоріжжя, 2017. 39 с. URL: http://virtuni.education.zp.ua/info_cpu/sites/default/files/AREF_skrabin_0.pdf (date accessed: 05.02.2025).
- 19 Чепель О., Габрелян А. Адвокат свідка: проблематика правового статусу. *Collection of Scientific Papers «SCIENTIA»* (Helsinki, Finland; Jan 26, 2024). 2024. С. 131—136. URL: <https://previous.scientia.report/index.php/archive/article/view/1530> (date accessed: 05.02.2025).
- 20 Корчева Т. В. Зазнач. твір. URL: <https://dspace.nlu.edu.ua/handle/123456789/15683> (date accessed: 05.02.2025).
- 21 Кучинська О. П., Циганюк Ю. В. Проблемні питання правового регулювання участі адвоката у кримінальному провадженні для надання професійної правничої допомоги учасникам такого провадження. *Аналітично-порівняльне правознавство*. 2024. № 1. С. 598—603. DOI: [10.24144/2788-6018.2024.01.105](https://doi.org/10.24144/2788-6018.2024.01.105) (date accessed: 05.02.2025).
- 22 Баїк О. І. Адвокат як процесуальний представник особи у кримінальному провадженні. *Наукові інновації та передові технології. Серія: Право*. 2024. № 3 (31). С. 506—516. DOI: [10.52058/2786-5274-2024-3\(31\)-506-516](https://doi.org/10.52058/2786-5274-2024-3(31)-506-516) (date accessed: 05.02.2025).
- 23 Конституція України URL: <https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text> (date accessed: 02.02.2025).

who has acquired the witness status in criminal proceedings is no exception to this rule. Witness is recognized as one of the participants in criminal proceedings, who can only be an individual who knows or may know the circumstances relating to a criminal offense and is subject to proof during investigation and who is summoned to testify ²⁴. It is immediately noticeable that the legislator has enshrined the possibility of acquiring the status of witness by a person summoned to testify, but in law enforcement practice, witnesses are involved not only in interrogations: witnesses participate in examinations, investigative experiments, identification and even sampling for examination.

The legislator chose the same approach with the restriction of the legal capacity of the witness while determining the rights and obligations of witness (Article 66 of the Criminal Procedural Code of Ukraine) ²⁵, that in our opinion, negatively affects the determination of the legal boundaries of interaction of the prosecution with such a participant in criminal proceedings during the pre-trial investigation.

The legal guarantee of the possibility for a witness to engage a lawyer is provided for in clause 2 of part 1 of Article 66 of the Criminal Procedural Code of Ukraine, according to which a witness has the right to “use legal assistance of a lawyer whose powers are confirmed in accordance with the provisions of Article 50 of this Code” ²⁶, i.e. whose information is entered by the regional bar council in the Unified Register of Advocates of Ukraine and whose

activities have not been suspended or terminated by the bar council of the region to which he or she belongs. At the same time, at the time of involvement in a procedural action with his or her client, the advocate must provide a certificate of the right to practice law, warrant, an agreement with a defense counsel or a power of attorney from a body (institution) authorized by law to provide free legal aid.

Textual analysis of the content of Articles 65–67 of the Criminal Procedure Code that defines the boundaries of the legal status of a witness, makes possible to generalize that witness has the right to:

- know for which criminal proceedings he is involved and in connection with what;
- use legal assistance in all procedural actions in which he is invited to participate;
- for security in accordance with the Law of Ukraine: *On Ensuring Security of the Persons who Participate in Criminal Legal Proceedings*;
- get acquainted with the protocol of interrogation and file a request for amendments, additions and remarks to it, as well as personally make such additions and remarks;
- if necessary, use notes and documents;
- reimbursement of costs associated with the call for testimony ²⁷.

The problem with current Criminal Procedural Code of Ukraine lies not only in limited interpretation of legal status of person involved as a witness in criminal proceedings, but in the lack of regulatory

24 Кримінальний процесуальний кодекс України від 13.04.2012 р. № 4651-VI (зі змін та допов.). URL: <https://zakon.rada.gov.ua/laws/show/4651-17#Text> (date accessed: 02.02.2025).

25 Там само.

26 Там само.

27 Там само.

consolidation of the legal status of lawyer whom the witness has engaged to provide legal assistance.

In scientific literature, some scholars propose to consider the witness's lawyer as an independent participant in criminal proceedings. V. Zaborovskiy justifies this thesis by saying that the interests of the witness are significantly different from the interests of the parties and other participants in criminal proceedings, who are represented or defended by lawyers, because the witness has no legal interest in the results of the case. The scholar defines a witness as a person who performs an auxiliary function, contributing to the implementation of full, comprehensive and fair justice in criminal proceedings. In the researcher's opinion, this contradicts the possibility of considering the witness's lawyer as his representative in criminal proceedings²⁸. The author's position has some support in scientific community, but there are also diametrically opposed ones.

For example, I. Hloviuk believes that if witness is covertly criminally prosecuted (for example, before the moment of reporting suspicion, if person is questioned as a witness if there are grounds to believe that he or she can have committed a criminal offense, but the evidence for reporting suspicion is insufficient, or if investigator intentionally delays reporting suspicion), witness actually performs the function of protection from criminal prosecution. The scholar concludes that if witness has a personal interest in criminal proceed-

ings, one can speak of contractual form of representation of his or her interests, when the witness's lawyer is his or her representative²⁹.

O. Shylo rightly focused not on the interest of the person in the criminal proceedings, but in availability of legitimate interests related to the conduct of proceedings. In particular, *"a witness who has fallen ill has an interest in being questioned at his place of residence; his legitimate interest is also manifested in the desire to ensure his own safety and the safety of close relatives in connection with participation in the proceedings. <...> The legitimate interest of persons in whose residence or other property an investigative action is being carried out is that their private life data should not be disclosed"*³⁰. Therefore, it is inappropriate to rely exclusively on the interest of a person in the results of the criminal proceedings as the main characteristic that determines his request for legal assistance. A person engages a lawyer to protect his or her legitimate procedural interests, to prevent arbitrariness on the part of security forces representatives and to hold a knowingly innocent person accountable, prevent the violation of a person's right to freedom from self-incrimination, to prevent the use of prohibited methods of psychological pressure, falsification or fabrication of certain information, things and documents. Therefore, engaging a lawyer to provide legal assistance to a witness contributes to implementation of many tasks, but the basic function of his or her

28 Заборовський В. В. Зазнач. твір. С. 170–171. URL: http://nbuv.gov.ua/UJRN/nvuzhpr_2016_36%282%29__43 (date accessed: 05.02.2025).

29 Гловюк І. В. Зазнач. твір. С. 17. URL: <http://hdl.handle.net/11300/3320> (date accessed: 05.02.2025).

30 Шилю О. Г. Теоретико-прикладні основи реалізації конституційного права людини і громадянина на судовий захист у досудовому провадженні в кримінальному процесі України : монографія. Харків, 2011. С. 137–138. URI: <https://dspace.nlu.edu.ua/jspui/handle/123456789/19837> (date accessed: 05.02.2025).

participation is to ensure the protection of witness's procedural interests and the exercise of his or her legal rights.

As for essence of the assistance provided by involved lawyer to a witness in criminal proceedings, not everything is clear either. In particular, R. Yemelianov notes that *“lawyer who provides legal assistance to a victim, civil plaintiff, civil defendant, witness, third party, in respect of whose property the issue of arrest is being resolved, is a representative who carries out representation, which is a different type of legal activity from defense and has no procedural relationship to ensuring the right to defense for the suspect. Just as a lawyer who protects a suspect, defense attorney should not have any relationship to providing legal assistance to a victim, civil plaintiff, civil defendant, witness. Lawyer is a natural person who carries out legal activities in accordance with the Law on the Bar, defense attorney and a representative are different subjects of criminal proceedings who by carrying out procedural activities and entering into procedural relations, provide legal assistance to other participants in criminal proceedings”*³¹. Therefore, the author to some extent identifies the witness with the victim, civil plaintiff and some other participants in criminal proceedings.

In our opinion, while resolving the issue of the essence of the services provided by the engaged lawyer to the witness, one should rely on provisions of the Law on the Bar, according to Article 1 of which the activity of a lawyer consists in the protection, representation and provision of other types of legal assistance to the client³².

Protection is related to ensuring protection of the rights, freedoms and legitimate interests of a person: in criminal proceedings in the aspect of representing suspect interests, accused, defendant, convicted, acquitted person; in respect of whom the application of compulsory medical or educational measures is envisaged or the issue of their application is being resolved in criminal proceedings; person in respect of whom the issue of extradition to a foreign State is being considered; who is being held administratively liable during the case consideration of administrative offense.

Representation is a form of advocacy aimed at ensuring the realization of the rights and fulfillment of the obligations of the client in civil, commercial, administrative and constitutional proceedings, as well as in cooperation with state bodies, individuals and legal entities. It includes protection of rights and obligations of the victim during consideration of cases of administrative offenses, ensuring interests of the victim, civil plaintiff and civil defendant in criminal proceedings³³.

Therefore, the legislator did not mention the witness among the participants in criminal proceedings.

Other types of legal aid are provision of legal information, consultations and explanations on legal issues, legal support of the client's activities, as well as preparation of applications, complaints, procedural and other documents of a legal nature are aimed at ensuring implementation of the client's rights, freedoms and legitimate interests, preventing their

31 Ємельянов Р. О. Правове регулювання участі адвоката — представника потерпілого в кримінальному провадженні. *Європейські перспективи*. 2020. № 3. С. 128. DOI: 10.32782/EP.2020.3.18 (date accessed: 05.02.2025).

32 Про адвокатуру ... URL: <https://zakon.rada.gov.ua/laws/show/5076-17#Text> (date accessed: 05.02.2025).

33 Там само.

violation and facilitating their restoration in case of violation. Therefore, providing legal aid to a witness is another type of legal aid, which consists in ensuring the implementation of the client's rights, freedoms and legitimate interests, preventing their violation and facilitating their restoration in case of violation³⁴. In addition, in subclause 4, clause 1, Article 19 of the Law on Advocacy, the type of legal activity is called "*providing legal aid to a witness in criminal proceedings*"³⁵. Therefore, as in the Code of Criminal Procedure, in the aforementioned Law this type of activity is separated from defense and representation.

Another important aspect of the issue under study is the legal status of the lawyer involved by the witness to ensure his interests, prevent their violation and restore them (if necessary). While solving this issue, scientists are most often guided by the approach of legislator allowing the defender and the representative of the person in criminal proceedings to use the rights guaranteed to the suspect and the victim, respectively, thus, the principle of analogy. For example, V. Karpenko came to the conclusion that the procedural powers of a witness and a witness's lawyer can be classified into two following groups:

- 1) *witness rights that he exercises directly during interrogation or other procedural actions*. The rights of the witness's lawyer in this case are conditioned by guaranteeing the proper exercise of rights by the witness himself during the procedural action. This group includes those that ensure the proper conduct of investigative (search) and

other procedural actions with witness participation among which:

- right to be present during investigative (search) and other procedural actions with involvement of a person who is provided with legal assistance;
- explain to the witness his right to refuse to testify about himself, close relatives and family members, as well as about information that is not subject to disclosure;
- with the permission of investigator, detective or prosecutor to ask witness questions and make comments.

These rights of a lawyer contribute to the proper exercise of the rights of a witness provided for by law, in particular the right to refuse to testify about himself, close relatives and family members, as well as the right to testify in his native or other language in which he freely operates³⁶;

- 2) *rights of witness which implementation can be entrusted to a lawyer* (these rights are exercised by a lawyer in the form of representation of the interests of a witness):
 - receive information about the reasons for summoning witness and the criminal proceedings in which the witness is being questioned;
 - object to illegal actions of the investigator, detective, inquirer or prosecutor and demand that objections be recorded in the relevant protocol;
 - get acquainted with protocols of investigative (search) and other proce-

34 Про адвокатуру URL: <https://zakon.rada.gov.ua/laws/show/5076-17#Text> (date accessed: 05.02.2025).

35 Там само.

36 Карпенко В. М. Зазнач. твір. URL: <https://elar.navs.edu.ua/server/api/core/bitstreams/8a7880e7-d70e-498e-8026-faea06ca934b/content> (date accessed: 05.02.2025).

cedural actions carried out with witness participation, as well as submit a petition for amendments, additions and comments to;

- challenge interpreter involved in the witness interrogation;
- initiate application of security measures to the witness and submit other petitions provided for by law;
- make written statements, complaints, petitions and other legal documents on behalf of the witness;
- challenge decisions, actions or omissions of the investigator, detective, inquirer, prosecutor, investigating judge or court in the witness interests³⁷.

In our opinion, this approach is too overburdened with various powers, which are not even always derived from the status of a lawyer. In particular, the *obligation to explain to the witness his right to refuse to testify about himself, close relatives and family members, as well as regarding information that is not subject to disclosure*, current legislation completely imposes on the subject who conducts the interrogation or other verbal investigative (search) action. If we proceed from this position, it is more appropriate to mention provisions of the Law on the Bar that provide for lawyer rights.

O. Chepel and A. Habrelian propose to distinguish the following among the rights of the lawyer involved by the witness:

- “1) *Have a meeting with a witness before the first interrogation in compliance*

with the conditions that ensure confidentiality of communication;

- 2) *provide brief consultations to the witness during interrogation and other procedural actions;*
- 3) *ask, with the permission of investigator, prosecutor, investigating judge, court, questions to the participants of procedural actions;*
- 4) *make written statements, complaints, petitions and other legal documents on behalf of the witness;*
- 5) *appeal procedural decisions, actions or omissions of the investigator, prosecutor, investigating judge, court;*
- 6) *make written comments on correctness and completeness of the records in the protocol of interrogation and other procedural actions;*
- 7) *get acquainted with the materials of criminal proceedings that directly relate to the rights and legitimate interests of the witness”³⁸.*

Note that the list of persons who have the right to appeal procedural decisions, actions or omissions of the investigator, prosecutor, investigating judge, court is exceptional, as is the list of procedural decisions (actions, cases of inaction) that can be appealed. In particular, the definition of procedural decisions and actions (inaction) that can be appealed during the pre-trial investigation is contained in Art. 303 of Criminal Procedural Code of Ukraine³⁹. Textual content analysis of this article makes it possible to generalize that none of its provisions applies to the witness, and even more so to the person who provides him/her with legal assistance. In our opinion, the rights

37 Карпенко В. М. Зазнач. твір. С. 143–144. URL: <https://elar.navs.edu.ua/server/api/core/bitstreams/8a7880e7-d70e-498e-8026-faea06ca934b/content> (date accessed: 05.02.2025).

38 Чепель О., Габрелян А. Зазнач. твір. С. 135. URL: <https://previous.scientia.report/index.php/archive/article/view/1530> (date accessed: 05.02.2025).

39 Кримінальний процесуальний URL: <https://zakon.rada.gov.ua/laws/show/4651-17#Text> (date accessed: 02.02.2025).

of lawyer in this case are due to nature of procedural action where he is involved together with the witness, as well as provisions of the Law on the Bar.

Normative uncertainty of the legal status of a lawyer involved in providing legal assistance to a witness in criminal proceedings has led to the emergence of a number of scientific approaches to solving this issue. Thus, I. Dubivka proposes to supplement the current Criminal Procedure Code Article 66-1: *Lawyer who provides legal assistance to a witness with the following content:*

*"1. Lawyer who provides legal assistance to a witness is a person whose authority is confirmed in the manner prescribed by Article 50 of this Code. 2. The lawyer has the right to: 1) attend and participate in the conduct of investigative (search) and other procedural actions carried out with the participation of the witness; 2) get acquainted with the content of the protocols of investigative (search) actions carried out with the participation of the witness, make written comments; 3) draw up on behalf of the witness written statements, complaints, petitions and other documents of a legal nature; 4) file a petition for the application of security measures to the witness; 5) file complaints against the decisions, actions, inaction of the investigator, prosecutor concerning interests of the witness. 3. Lawyer may be invited by a witness or other persons at his request or in his interests"*⁴⁰.

In our opinion, such a proposal is quite acceptable and deserves support, since the consolidation of these provisions will primarily determine the limits of the powers of the involved lawyer. This legislative novelty should fundamentally change ex-

isting procedural practice for the better, given that currently submission of applications and motions by attorneys-at-law at the stage of providing legal aid to a witness in criminal proceedings is often accompanied by actions that have no procedural basis, do not contribute to improving the quality of investigative (search) actions and do not have positive results in ensuring the interests of the client. Such procedural behavior leads to a delay in the course of investigative (detective) and procedural actions, exhaustion of the participants in the proceedings and the creation of a false impression of quality of legal services provided to the client. This can lead to the loss of an important witness for the resolution of the case and realization of tasks of criminal proceedings, create the risk of bringing the witness to criminal liability for misleading the court or other authorized body (Article 384 of the Criminal Code of Ukraine)⁴¹, etc.

Other approaches arise and try to gain a foothold on this issue in scientific discourse. Thus, V. Karpenko proposes to supplement the current CPC Art. 67-2: *Legal Adviser to a Witness* that will contain a list of the rights and obligations of this person. Among the rights, the scientist defines the following:

"1) Be present during the investigative (search) and other procedural actions with witness participation;

2) explain to the witness his right to refuse to testify about himself, close relatives and family members, as well as about information that is not subject to disclosure;

3) with the permission of investigator, detective, inquirer or prosecutor, address questions and comments to the witness;

40 Дубівка І. В. Діяльність адвоката в стадії досудового розслідування : автореф. дис. ... канд. юрид. наук. Київ, 2017. С. 13—14. URL: <https://elar.navs.edu.ua/jspui/handle/123456789/1750> (date accessed: 05.02.2025).

41 Кримінальний кодекс України від 05.04.2001 р. № 2341-III (зі змін. та допов.). URL: <https://zakon.rada.gov.ua/laws/show/2341-14#Text> (date accessed: 05.05.2025).

4) *know in connection with what and in what criminal proceedings the witness was called;*

5) *object to illegal actions of the investigator, detective, inquirer or prosecutor and demand that objections be recorded in the relevant protocol;*

6) *get acquainted with the protocols of investigative (search) and other procedural actions carried out with witness participation, as well as submit a petition for amendments, additions and comments to;*

7) *challenge an interpreter who participates in the witness interrogation;*

8) *file a petition for application of security measures to a witness and submit other petitions provided for by this Code;*

9) *make written statements, complaints, petitions and other legal documents on behalf of the witness;*

10) *challenge decisions, actions or omissions of the investigator, detective, inquirer, prosecutor, investigating judge or court in the witness interests”⁴².*

While positively assessing the researcher's attempts, it should be noted that the implementation of such a proposal requires reforming not only the provisions of criminal procedure legislation, but the principles of the relevant Law on the Bar. It should be noted that this approach is based on V. Tertyshnyk's concept of introducing a legal counsel (procedural legal adviser) to the trial, person who provides professional legal assistance to a witness in criminal proceedings⁴³. At the same time, a textual analysis of the provisions formulated by the scholar makes it possible to note that the interpretation of the figure of a party to the process provid-

ing legal assistance to a witness has been expanded and this expansion contradicts even a number of constitutional principles. Thus, author notes, in particular, that a legal aid attorney may be not only a lawyer, but also his/her assistant, as well as another legal professional for whom there are no statutory grounds for disqualification from participation in a case⁴⁴. Thus, introduction of this concept requires fundamental changes that, in our opinion, will not justify the efforts expended on.

We believe that engaged counsel has rights that are based on the general principles of criminal proceedings and apply to all participants in such proceedings, to all parties thereto and guarantee compliance with the criminal procedural form. Such an advocate has guarantees that apply to him or her as a participant in the procedural action where he or she participates together with the witness. In particular, this concerns the right to be aware of the reasons for and in connection with the criminal proceedings in which the procedural action to which he or she is involved is being conducted, as well as the rights that he or she may exercise while participating in procedural actions: familiarize himself or herself with the protocols of investigative (search) and other procedural actions conducted with his or her participation, file motions for amendments, additions and comments to these protocols, and to challenge the interpreter. In addition, advocate has the powers guaranteed by the Law on the Bar, lawyer's professional rights (Article 20), including:

“1) submit advocate requests, including requests for copies of documents, to the State

42 Карпенко В. М. Зазнач. твір. С. 155—156. URL: <https://elar.navs.edu.ua/server/api/core/bitstreams/8a7880e7-d70e-498e-8026-faea06ca934b/content> (date accessed: 05.02.2025).

43 Тertiшник В. М. Зазнач. твір. С. 134. URL: http://nbuv.gov.ua/UJRN/vamsup_2017_2_18 (date accessed: 05.02.2025).

44 Там само. С. 134—135.

authorities, local self-government bodies, their officials and employees, enterprises, institutions, organizations, public associations, as well as to individuals (with the consent of such individuals);

<...>

4) prepare applications, complaints, petitions and other legal documents and submit them in accordance with the procedure established by law;

<...>

8) use technical means, including for copying case materials where the advocate provides defense, representation or other types of legal aid, to record procedural actions in which he or she participates, as well as the course of the court session in the manner prescribed by law”⁴⁵.

Conclusions

Legal status of a lawyer involved in providing legal assistance to a witness remains legally undefined, as well as the legal status of a lawyer and a representative of person in criminal proceedings. This causes some controversy in scientific literature and creates problems in practice. Scientists define differently both the type of advocacy that he implements in interaction with a witness and his powers.

Based on the analysis of regulatory provisions of the criminal procedure legislation and the Law on the Bar, it is determined that an attorney engaged to provide legal assistance to a witness does not provide either defense or representation, so this form of activity should be understood as another type of attorney's activity. This means that lawyer does not acquire a derivative procedural status from the witness, i.e. does not have the rights of the witness. At the same time, the lawyer

prevents violations of the witness's rights, guarantees inadmissibility of arbitrariness or abuse of power by representatives of the security forces, ensures the realization of procedural interests of the witness, his or her right to freedom from self-incrimination, prevention of bringing knowingly innocent to justice and the use of methods of psychological pressure, falsification or fabrication of certain information, things and documents, etc. Thus, the lawyer involved contributes to realization of many tasks, but his basic function is to ensure the protection of procedural interests of the witness and exercise of his rights.

It is substantiated that involved lawyer has rights that are based on the general principles of criminal proceedings, and guarantees that apply to him as a participant in the procedural action, as well as the powers guaranteed to him by Law on the Bar. Despite the support of the position on normative consolidation of the legal status of the lawyer involved in the provision of legal assistance to the witness, expediency of introducing legal adviser to the witness (legal attorney / procedural counsel) into criminal proceedings has been refuted, as this is contrary to constitutional rights.

Надання правничої допомоги свідкові у кримінальному провадженні: особливості та проблемні питання

Микола Коломойцев

Мета статті — з'ясувати особливості визначення правового статусу адвоката, залученого для надання правничої допомоги свідкові у кримінальному провадженні, окреслити проблемні питання його практичної діяльності. Застосовано загальнонаукові методи (аналіз і синтез, системного аналізу, логіко-структур-

⁴⁵ Про адвокатуру ... URL: <https://zakon.rada.gov.ua/laws/show/5076-17#Text> (date accessed: 05.02.2025).

ний, узагальнення, порівняльно-правовий тощо). З'ясовано, що правовий статус адвоката, залученого для надання правничої допомоги свідкові, до сьогодні залишається нормативно не визначеним, як і правовий статус захисника та представника особи у кримінальному провадженні, що створює підґрунтя для наукової полеміки, зокрема щодо проблеми окреслення повноважень адвоката під час здійснення практичної діяльності. З'ясовано, що науковці по-різному визначають таку діяльність і повноваження адвоката. За законодавством України адвокат, залучений для надання правничої допомоги свідкові, не здійснює ані захисту, ані представництва, тож таку форму діяльності слід розуміти як інший вид адвокатської діяльності: адвокат не набуває похідного процесуального статусу від свідка, тобто не має його прав. Водночас адвокат унеможливує порушення прав свідка, є гарантом недопустимості свавілля або перевищення повноважень з боку представників сил безпеки, забезпечує реалізацію процесуальних інтересів свідка, його право на свободу від самовикриття, недопущення притягнення завідомо невинного до відповідальності й застосування методів психологічного тиску, фальсифікування або фабрикивання окремих відомостей, речей і документів тощо. Отже, залучений адвокат сприяє реалізації багатьох завдань, але його базова функція полягає в забезпеченні захисту процесуальних інтересів свідка й реалізації його прав. Обґрунтовано, що залучений адвокат має права, які базуються на загальних засадах кримінального провадження, і гарантії, що поширюються на нього як на учасника процесуальної дії, а також повноваження, гарантовані йому Законом України «Про адвокатуру та адвокатську діяльність». Попри підтримку позиції щодо нормативного закріплення правового статусу адвоката, залученого для надання правничої допомоги свідкові, спростова-

но доцільність введення до кримінального провадження такого суб'єкта, як правничий консультант свідка (правничий повірений / процесуальний юрисконсульт), оскільки це суперечить конституційним правам.

Ключові слова: кримінальне провадження; адвокат; правнича допомога; свідок; право на захист; правовий статус.

Financing

This research did not receive any specific grant from funding institutions in the public, commercial or non-commercial sectors.

Disclaimer

Founders had no role in the research design, data collection and analysis, decision to publish or manuscript preparation.

Participants

The author has contributed solely to intellectual discussion underlying this document, case law research, writing and editing, and assumes responsibility for its content and interpretation.

Declaration of Competing Interest

Author declares no conflict of interest.

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