

Guarantees of professional activity of defense attorney in criminal proceedings

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DOI: 10.32353/khrife.2.2025.09

UDC [343.12:347.965](477)

Received: 15.05.2025 / Reviewed: 22.05.2025 / Accepted for print 25.06.2025 /

Available online: 30.06.2025



This article purpose is to determine legal status content of the defense attorney of the suspect (accused) in criminal proceedings, to characterize the guarantees of his professional activity. For implementing the set goal, a set of general scientific methods was applied (analysis and synthesis, generalization, logical-structural approach, etc.). It was investigated that the guarantees of the professional activity of the lawyer (defense attorney) in criminal proceedings are represented by a set of international legal and national provisions that determine his rights and obligations in the event of his defense of the suspect (accused / defendant / convicted). The sources of the aforementioned guarantees are the Constitution, the Criminal Procedure Code, the Law “Law of Ukraine: On the Bar and Legal Practice”, and subordinate regulatory legal acts of Ukraine. The outlined legal guarantees determine the powers of the defense attorney in ensuring the right to defense and fair justice, they are used when obtaining evidence, to substantiate the legal position, to appeal procedural decisions, etc. The system of legal guarantees of the defense attorney in criminal proceedings is presented in the form of: 1) constitutional and criminal law provisions that provide grounds for criminal liability for violation of the right to defense, as well as for any illegal influence on its activities (Articles 397-400 of the Criminal Code of Ukraine); 2) general guarantees stipulated by the Law of Ukraine “Law of Ukraine: On the Bar and Legal Practice”, international legal acts and the practice of the European Court of Human Rights;

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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3) criminal procedural guarantees that give the defense attorney the right to represent the interests of the client, participate in procedural measures, submit motions, complaints, etc.; 4) special guarantees that determine the competence of the defense attorney in resolving narrowly defined issues (for example, initiating a forensic examination based on contractual relations).

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

Research Problem Formulation

Constitution of Ukraine stipulates that every person can independently choose defense attorney (and therefore a representative) of his rights¹. For implementing such goals and tasks, the State has ensured activities of the bar. It is this non-governmental institution that provides professional representation and protection of a person in court, state authorities, etc.

Under the legal regime of martial law, requests for legal aid have increased quantitatively. This is due to the purpose of obtaining consulting assistance and protection from criminal prosecution, as well as availability of requests from citizens for their representation as victims and witnesses in criminal proceedings, etc.

Professional activities of participants in legal relations are regulated by law, therefore, during its practical implementation, it is important to strictly adhere to certain legal principles. In order to implement the tasks assigned to the bar,

the State has developed and implemented a number of guarantees for professional activities of lawyers.

In a broad sense, a guarantee should be understood as a guarantee of something, a guarantee of something; conditions that ensure the success of something². In modern Ukrainian legal science, there is still no agreed-upon vision on the classification of guarantees for implementation of human and civil rights and freedoms. Researchers most often distinguish between general and special guarantees. By general guarantees, scientists usually understand a set of objective conditions and subjective factors that contribute to effective implementation of rights and freedoms, prevent their restriction or violation and ensure an appropriate level of protection. At the same time, special (legal) guarantees in the scientific literature are defined as a set of legal instruments that implement, protect and restore violated human rights. They contain procedural and material means that provide legal protection and eliminate violations³.

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/254%D0%BA/96-%D0%B2%D1%80#Text> (date accessed: 24.04.2025).

2 Гарантія / Академічний тлумачний словник української мови. в 11 т. / за ред. І. К. Білодіда. Київ, 1970—1980. Т. 2 : Г—Ж ; ред. тому: П. П. Доценко, Л. А. Юрчук. 1971. С. 29. URL: <https://sum.in.ua/s/Gharantija> (date accessed: 24.04.2025).

3 Байрачна Л. К., Барабаш Ю. Г., Веніславський Ф. В. та ін. Конституційне право України : підручник / за ред. В. П. Колісника, Ю. Г. Барабаша. Харків, 2008. С. 132. URL: https://library.nlu.edu.ua/POLN_TEXT/KNIGI_2009_2/KONST_PR_2008.pdf (date accessed: 24.04.2025) ; Остапенко В. В. Гарантії суб'єктивних прав і свобод як елемент правового статусу

As for professional guarantees of activity, they are mostly outlined in special profile laws. For example, professional guarantees of lawyers are defined in the Law of Ukraine: *On the Bar and Legal Practice*⁴. At the same time, the question remains relevant as to whether the scope of procedural guarantees of a lawyer who has acquired the status of a defense attorney in criminal proceedings changes, and how, whether the general guarantees of a lawyer in criminal proceedings are limited, etc.

Such attention to the outlined issues is due to a significant shortcoming of the current criminal procedural legislation, which does not contain a separate norm that would define the rights and obligations of a defense attorney in criminal proceedings, guarantees of his participation in criminal proceedings.

We believe that in order to ensure a person's right to defense, provide legal assistance to a person who may potentially acquire the status of a suspect in criminal proceedings during the consideration of the case in court (consideration of criminal case on the merits) and represent the person in this regard in other State bodies in Ukraine, it is necessary to clarify the guarantees of a defense attorney in criminal proceedings.

Article Purpose

Determining content of the legal guarantees of activities of defense attorney of the

suspect (accused) in criminal proceedings as a component of the legal (procedural) status of this participant in criminal proceedings.

Research Methods

In order to achieve the goal, a set of general scientific methods was applied (analysis and synthesis, generalization, logical-structural approach, etc.). General scientific and special methods provided a consistent analysis of the guarantees of the professional activity of a lawyer (defense attorney) in criminal proceedings. The methods of analysis and synthesis made it possible to distinguish legal positions relating to different types of procedural guarantees (constitutional, criminal law, procedural, special), and logically combine them into a single systemic model of legal regulation of advocacy. Thanks to the generalization of the provisions of the current national legislation (Constitution, Criminal Procedural Code of Ukraine), Law of Ukraine: *On the Bar and Legal Practice*, other regulatory legal acts of Ukraine)⁵, as well as the norms of international law and the practice of the European Court of Human Rights (hereinafter referred to as ECtHR), a holistic vision of the legal status of a defense attorney in criminal proceedings was formed. The use of a systemic and structural approach contributed to the classification of guar-

людини і громадянина. *Теорія і практика правознавства*. 2018. Вип. 1 (13). С. 2. DOI: [10.21564/2225-6555.2018.13.127019](https://doi.org/10.21564/2225-6555.2018.13.127019) (date accessed: 24.04.2025).

4 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: 24.04.2025).

5 Конституція України URL: <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text> (date accessed: 24.04.2025) ; 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: 02.05.2025) ; Про адвокатуру URL: <https://zakon.rada.gov.ua/laws/show/5076-17#Text> (date accessed: 24.04.2025).

antees of defense attorney's activities by content, sources of regulation, and scope of implementation, which helped to clearly distinguish between general and special guarantees, as well as to clarify their significance for the implementation of the right to defense.

Dialectical method has come in handy in studying development of regulatory regulation of the institution of protection in criminal proceedings, analyzing the dynamics of legislative changes and their impact on law enforcement practice.

Methods of formal and logical analysis (deduction, induction, analogy) became the basis for the author's conclusions regarding the effectiveness of the existing guarantees and for substantiating the areas for their improvement. The combination of the methods applied made it possible to highlight in a structured manner the guarantees of the advocate's activities in criminal proceedings, to outline the main problems of exercising his/her powers and to identify promising areas for their regulatory improvement with due regard

for the rule of law and ensuring real equality of the parties.

Analysis of Essential Researches and Publications

Defense attorney in criminal proceedings is subject to all legal guarantees of the advocate provided by the law: *On the Bar and Legal Practice* ⁶. At the same time, the defense function in criminal proceedings is exercised taking into account a number of sectoral – criminal procedural – principles defined by the criminal procedure law. Therefore, scholars continue to study these issues: either on the basis of an interdisciplinary approach or taking into account the sectoral principle.

Thus, in a broad sense, the legal guarantees of the advocate's activity are analyzed in the works of V. Zaborovskiy⁷, V. Merkulova⁸, S. Savyska⁹ et al.

Criminal procedural guarantees of defense attorney are disclosed in research papers by A. Katkova¹⁰, V. Erokhin and O. Yukhno¹¹, A. Khytra and I. Tataryn¹²,

6 Про адвокатуру ... URL: <https://zakon.rada.gov.ua/laws/show/5076-17#Text> (date accessed: 24.04.2025).

7 Заборовський В. В. Правовий статус адвоката в умовах становлення незалежної адвокатури України : монографія. Ужгород, 2017. 900 с. URI: <https://dspace.uzhnu.edu.ua/jspui/handle/lib/20342> (date accessed: 24.04.2025).

8 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: 24.04.2025).

9 Савицька С. Л. Кримінально-процесуальні гарантії діяльності адвоката : дис. ... канд. юрид. наук. Київ, 2013. 199 с.

10 Каткова А. Г. Гарантії здійснення адвокатської діяльності у кримінальному провадженні: проблемні питання. *Процесуальні та криміналістичні аспекти досудового розслідування* : мат.-ли Міжнар. наук.-практ. конф. (Одеса, 14.04.2016). Одеса, 2016. С. 63–65. URL: <https://surl.li/hgtfft> (date accessed: 24.04.2025).

11 Єрохін В. В., Юхно О. О. Захисник як учасник кримінального провадження : монографія / за заг. ред. О. О. Юхна. Харків, 2018. 240 с. URL: <https://core.ac.uk/reader/333963660> (date accessed: 24.04.2025).

12 Хитра А., Татарин І. Правові гарантії участі захисника у кримінальному провадженні. *Polish journal of science*. 2022. № 47. Vol. 2. С. 38–42. URL: <https://www.calameo.com/read/00598514271b5b1a06241> (date accessed: 24.04.2025).

O. Starenkyi¹³ and others. The authors focus their attention on various aspects of this issue. For example, V. Yusupov and K. Yusupova note that the liability for any illegal influence on the work of a defense attorney provided for in Articles 397-400 of the Criminal Code of Ukraine¹⁴ is a guarantee of the lawyer's activity. At the same time, scholars note the systematic closure of such proceedings and the lack of real practice of bringing guilty persons to criminal liability for illegal interference in legal practice. Therefore, the authors emphasize the importance of identifying all aspects of the subject of evidence by pre-trial investigation bodies in order to fully collect, analyze, and evaluate evidence, which will ultimately contribute to an effective, objective, and impartial investigation¹⁵.

V. Honcharenko chose the guarantees of professional activity of foreign lawyers in Ukraine as the subject of his research and noted the low popularity of the institute of foreign lawyer in Ukraine¹⁶. He explains this trend by a number of restrictions imposed on lawyers of foreign countries who plan to carry out professional activity in Ukraine. Given the limitations of foreign citizens in protecting their pro-

fessional rights, the scientist emphasizes that Art. 61 of the Law: *On the Bar and Legal Practice*¹⁷ needs to be supplemented with a provision of the following content: "Protection of professional rights and obligations of a lawyer of a foreign country, as well as ensuring guarantees of his legal activity is carried out by the bodies of self-government of lawyers within the limits of their competence on a par with lawyers of Ukraine"¹⁸.

It seems that correlation of the legal guarantees of a defense attorney as an attorney that are a component of the legal status of this participant in legal relations, should be correlated as general (professional guarantees of lawyer) and separate (guarantees of the defense attorney), but it should be clarified whether this correlation is observed in practical activities.

Textual analysis of research paper allows us to summarize several typical problematic issues that negatively affect the normalization of the legal status of defense attorneys in criminal proceedings. *Firstly*, this is inconsistency of national legal guarantees of defense attorney activities with international normative principles of activity. *Secondly*, this is the inconsistency of the professional status of foreign lawyers and national ones. *Thirdly*, this is the pres-

- 13 Старенький О. С. Щодо визначення поняття та видів кримінальних процесуальних гарантій захисника як суб'єкта доказування у досудовому розслідуванні. *Вісник кримінального судочинства*. 2016. № 4. С. 62–72. URL: https://vkslaw.knu.ua/images/verstka/4_2016_Starenkyi.pdf (date accessed: 24.04.2025).
- 14 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: 24.04.2025).
- 15 Юсупов В. В., Юсупова К. О. Гарантії професійної діяльності захисника як предмет злочинного посягання при вчиненні втручання в діяльність захисника чи представника особи. *Юридичний науковий електронний журнал*. 2023. № 8. С. 446–450. DOI: 10.32782/2524-0374/2023-8/104 (date accessed: 24.04.2025).
- 16 Гончаренко В. С. Гарантії професійної діяльності іноземних адвокатів в Україні. *Вісник кримінального судочинства*. 2018. № 4. С. 119–127. URL: <https://vkslaw.com.ua/index.php/journal/article/download/325/296/> (date accessed: 24.04.2025).
- 17 Про адвокатуру ... URL: <https://zakon.rada.gov.ua/laws/show/5076-17#Text> (date accessed: 24.04.2025).
- 18 Гончаренко В. С. Зазнач. твір. С. 126. URL: <https://vkslaw.com.ua/index.php/journal/article/download/325/296/> (date accessed: 24.04.2025).

ence of conflicts in the provisions of the Criminal Procedural Code of Ukraine¹⁹ and the Law *on the Bar and Legal Practice*²⁰.

We are convinced that the issues raised are relevant and require resolution and regulation at the legislative level, because in criminal proceedings, due legal procedure should be applied to each participant in criminal proceedings and to each legal dispute, and only then will the principles of equality of parties, the rule of law, etc. be ensured.

Main Content Presentation

Professional independence, dignity and rights of a lawyer are protected at the level of the Constitution of Ukraine, special legislation, as well as other legal acts. At the same time, Art. 23 of Law of Ukraine: *On the Bar and Legal Practice* defines the following key guarantees of the legal status of a lawyer:

- 1) any interference with the professional activities of a lawyer is prohibited; authorities and other persons have no right to influence or interfere with the implementation of the legal functions of a lawyer;
- 2) information constituting professional secrecy is inviolable; it is prohibited to demand its disclosure from lawyers, their assistants, trainees or employees. These persons

cannot be questioned about confidential information without the written consent of the client. Importance of ensuring the confidentiality of the activities of a lawyer (in particular, a defense attorney) was also emphasized by the ECtHR in the case of *Niemietz v. Germany* (1992). In this decision, the ECtHR noted that a search of a lawyer's office, which leads to the disclosure of professional information to third parties (except for the lawyer and his client), violates Art. 8 of the European Convention on Human Rights (right to respect for private and family life, home and correspondence)²¹.

- 3) conducting procedural actions against a lawyer requires a special procedure, any operational-search or investigative (search) actions that can be conducted exclusively with the permission of the court, are carried out on the basis of a court decision initiated by high-ranking prosecutors;
- 4) documents related to professional activities of lawyer shall not be subject to inspection, seizure or disclosure, except in cases provided for by law;
- 5) lawyers have equal rights in legal proceedings that implies adherence to the principles of equality,

19 Кримінальний процесуальний кодекс URL: <https://zakon.rada.gov.ua/laws/show/4651-17#Text> (date accessed: 02.05.2025).

20 Савицька С. Л. Зазнач. твір ; Каткова А. Г. Зазнач. твір. URL: <https://surl.li/hgtfft> (date accessed: 24.04.2025) ; Про адвокатуру URL: <https://zakon.rada.gov.ua/laws/show/5076-17#Text> (date accessed: 24.04.2025).

21 European Convention on Human Rights. As amended by Protocols Nos. 11, 14 and 15. Supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16. European Court of Human Rights ; Council of Europe. URL: https://www.echr.coe.int/documents/convention_eng.pdf (date accessed: 13.05.2025) ; Case of *Niemietz v. Germany*. Appl. No. 13710/88. Judgm. of 16 Dec 1992 / European Court of Human Rights. URL: <https://hudoc.echr.coe.int/eng?i=001-57887> (date accessed: 13.05.2025).

- adversarial proceedings, and freedom to prove a legal position;
- 6) life, health, reputation and property of lawyer and his family are protected by law, and any infringement entails the prescribed criminal or other legal liability;
 - 7) safety of lawyer during participation in criminal proceedings is guaranteed by law, in particular with the application of special protective measures;
 - 8) it is prohibited to involve a lawyer in secret cooperation with law enforcement agencies if such interaction can violate the principle of confidentiality or lead to the disclosure of attorney-client privilege;
 - 9) personal communication between a lawyer and a client is private, and any interference with it is unacceptable;
 - 10) legal positions expressed by an attorney cannot be the basis for a prosecutorial appeal, court decisions, or other response aimed at exerting pressure or influence on lawyer;
 - 11) lawyer's legal position is protected from third-party interference, even if it conflicts with the interests of prosecution or another opponent in the case;
 - 12) relevant regional bar council must be immediately informed of the detention of a lawyer or the imposition of a preventive measure against him/her;
 - 13) reporting of suspicion to a lawyer is possible only from certain categories of prosecutors, in particular the Prosecutor General or his deputies or the prosecutor of the Autonomous Republic of Crimea, the region, the city of Kyiv and the city of Sevastopol;
 - 14) holding a lawyer criminally or otherwise liable in connection with his professional activities is inadmissible, except in cases clearly defined by law;
 - 15) professional activities of a lawyer, including public statements or statements in the interests of a client, cannot be recognized as grounds for legal liability unless the lawyer's ethics are violated;
 - 16) it is prohibited to identify lawyer with the person he represents a lawyer is not responsible for the actions or beliefs of his client;
 - 17) disciplinary proceedings against a lawyer are carried out according to a specially defined procedure that guarantees compliance with his professional rights²².
- Despite thorough consolidation of general guarantees of the professional activity of lawyers, it is worth noting that criminal procedural activity is always characterized by a certain conflict of interests of the prosecution and the defense. In order to realize procedural curiosity, each of the parties resorts to implementation of procedural and non-procedural actions aimed at making a procedural decision that would correspond to its legal position and satisfy its procedural curiosity.
- In the context of studying the compliance of the guarantees of the procedural activities of a defense lawyer in criminal proceedings with international legal guarantees, we should note that the international community pays close attention to this issue. Thus, in accordance with the Basic Provisions on the Role of Lawyers,

22 Про адвокатуру ... URL: <https://zakon.rada.gov.ua/laws/show/5076-17#Text> (date accessed: 24.04.2025).

adopted at the 8th UN Congress on Crime Prevention and Criminal Justice, lawyer has the right to:

- 1) timely and unhindered access to information, documents and case materials;
- 2) confidentiality in protecting the content of consultations and communications between the lawyer and the client;
- 3) protection, if there is a threat to the safety of the lawyer due to his professional activities, etc.;
- 4) freely move and consult clients within the state and abroad, etc.²³.

In addition, in 1990, International Bar Association adopted the standards of legal practice, the International Principles of Conduct for Lawyers, with the aim of ensuring the independence of the legal profession, protecting the rights of lawyers and creating universal standards of professional ethics²⁴. According to them, State authorities should guarantee to every lawyer:

- 1) independence from state bodies, political pressure or external influence, and interference in the professional activities of a lawyer by any party is unacceptable;
- 2) freedom in choosing clients (lawyer has the right to freely accept or refuse cases, except in cases where such refusal is contrary to the law or rules of professional ethics);

- 3) confidentiality (all information received by a lawyer in connection with the performance of his duties is a professional secret, and its violation is a gross violation of ethical norms);
- 4) loyalty to the client, i.e. the lawyer should act in the interests of the client, not contradict the law and moral principles, and the detection of a conflict of interest is grounds for refusing to participate in the case;
- 5) ensuring ethical standards (a lawyer is obliged to adhere to high moral and ethical principles regardless of the jurisdiction in which he practices);
- 6) self-government of bar institutions (activities of lawyers are ensured by independent bodies of bar self-government, which determine the rules of internal procedure and ensure their compliance);
- 7) protection from prosecution for actions committed within the scope of professional activity, if they do not contradict the law²⁵.

The principles outlined above are enshrined in Recommendation R (2000) 21 of the Committee of Ministers of the Council of Europe, and although this document is not binding, it defines the standards to which Council of Europe member states, including Ukraine should strive to guarantee the independence and effectiveness of legal profession²⁶.

23 Basic Principles on the Role of Lawyers : Ad. 07 Sept 1990 by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba / United Nations Human Rights : web. URL: <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-role-lawyers> (date accessed: 13.05.2025).

24 IBA Standards for the Independence of the Legal Profession. Ad. 1990. URL: <https://www.ibanet.org/MediaHandler?id=F68BBBA5-FD1F-426F-9AA5-48D26B5E72E7> (date accessed: 13.05.2025).

25 Ibid.

26 Рекомендація R (2000) 21 Комітету Міністрів державам-членам про свободу професійної діяльності адвокатів : ухвал. Ком. Мін-в Ради Європи на 727-му засід. заст. мін-в 25.10.2000 р. URL: https://supreme.court.gov.ua/userfiles/R_2000_21_2000_10_25.pdf (date accessed: 13.05.2025).

In context of criminal proceedings, the scientific literature proposes to define criminal procedural guarantees of the defense attorney's activities in criminal proceedings as a subject of evidence at the stage of pre-trial investigation and to group them into several groups. O. Starenkyi thoroughly approached this issue and proposed to classify the guarantees of defense attorney's activities according to the following criteria:

- 1) by source of legal regulation:
 - *international ones* provided for by international legal acts;
 - *national ones* enshrined in the legislation of Ukraine;
- 2) according to the content of legal status of defense attorney:
 - aimed at ensuring the implementation of the procedural rights of defense attorney as a participant in evidence;
 - that guarantee possibility of proper performance of procedural duties by the defense attorney within the limits of his powers of proof;
- 3) by stages of exercising the right to prove:
 - act during collection of evidence by defense attorney;
 - ensure use of collected evidence to form a legal position for the defense;
- 4) by the method of obtaining evidence:
 - used in the case of the participation of a defender in search and operational actions
 - act during his participation in covert investigative (search) actions;
 - regulate retrieval of documents;
 - relate to receiving things and documents;
- ensure that participants in proceedings or other persons are interviewed;
- implemented when forensic expert is involved at initiative of defense attorney;
- 5) by the intended purpose of the procedural action:
 - ensure that defense attorney collects evidence;
 - allow to verify the reliability of the evidence obtained
- 6) by nature of evidence with which the defense attorney works:
 - related to receipt and use of physical evidence;
 - related to documents;
 - regarding expert conclusions;
 - cover testimony of individuals;
- 7) by entity that ensures exercise of the right to evidence:
 - prosecutor;
 - head of the pre-trial investigation body;
 - investigator;
 - detective;
 - examining magistrate;
 - representative of the regional bar association ²⁷.

Regarding guarantees of the defense attorney's participation in in investigative actions and covert investigative actions during the pre-trial investigation, scientific literature identifies the following among them:

- 1) right of a lawyer to apply to examining magistrate with a request to conduct a (re)trial;
- 2) opportunity to provide the suspect with brief legal advice during such actions, both on his own initiative and at the request of the client;

27 Старенький О. С. Кримінальні процесуальні гарантії захисника як суб'єкта доказування у досудовому розслідуванні : автореф. дис. ... канд. юрид. наук. Київ, 2016. 20 с.

- 3) obligation of investigator or prosecutor to ensure the participation of a defense attorney if a search is conducted in a premises at the request of a person present there;
 - 4) clear requirements for execution of investigative actions protocol (indicating the date, start and end time, information about attachments, recording an explanation of the rights and obligations of participants in the action);
 - 5) inadmissibility of using as evidence materials obtained with significant violations of the procedure for conducting investigative actions;
 - 6) right of defense attorney to initiate the conduct of a (re)trial by submitting a corresponding motion to the examining magistrate;
 - 7) obligation of examining magistrate to obtain from the lawyer a written undertaking not to disclose the fact of conducting cover investigative actions, if the lawyer initiated these actions;
 - 8) guarantees regarding the lawyer's familiarization with the results of the cover investigative action carried out on his initiative;
 - 8) declassification of motions, procedural decisions, and other documents related to cover investigative actions upon completion of such actions or until the materials are disclosed to the other party.
- Regarding other procedural actions within the pre-trial investigation, the guarantees of the participation of defense attorney as a subject of evidence include:
- 1) right of an attorney to request documents (originals or certified copies), except for those containing state or official secrets, by submitting an attorney's request in accordance with the Law: *On the Bar and Legal Practice*;
 - 2) right to make a request not only to institutions and organizations, but to individuals;
 - 3) legal liability for unjustified refusal to respond to a lawyer's request;
 - 4) right of the defense attorney to draw up a report on the receipt of things and documents both with the consent of the participants in the proceedings or other persons and in cases of their direct discovery;
 - 5) legislative regulation of the procedure for storing material evidence by a lawyer;
 - 6) possibility of obtaining temporary access to things and documents, in particular those containing information that constitutes State secret;
 - 7) right to draw up a report on the seizure of documents and things during the implementation of temporary access and liability for unjustified failure to provide such access to the lawyer;
 - 8) regulatory recognition of the institution of private detective (investigation) activities as an additional method of collecting evidence;
 - 9) granting the status of evidence to explanations received by the lawyer from participants in the proceedings or other persons with their consent;
 - 10) establishing procedure for questioning by the defense attorney of participants in the proceedings or other persons, including the right to draw up a corresponding protocol;
 - 11) obligation of the investigator and prosecutor to notify the defense attorney about involvement of forensic expert;
 - 12) providing the lawyer with time to formulate questions to forensic expert;

- 13) obligation to provide the lawyer with a certified copy of the expert's conclusion no later than three days after its receipt;
- 14) right of defense attorney to receive samples for examination with the consent of the person or to identify them independently, with the mandatory preparation of a protocol;
- 15) legally established right to engage an expert to conduct an additional or repeated examination ²⁸.

While highly appreciating the scientist's attempt to thoroughly detail activities of a defense attorney in criminal proceedings, we must emphasize a certain inconsistency of certain positions with current law enforcement practice. First of all, this concerns the procedure for appointing expert opinions and familiarizing oneself with them. Current Criminal Procedural Code of Ukraine does not provide for the obligation of the investigator and prosecutor to notify the defense attorney about the involvement of forensic expert, to provide the attorney with time to formulate expert tasks and a certified copy of the expert's conclusion. There is also no separate right for the defense attorney to involve forensic expert to conduct an additional or repeated expert examination. Defense attorney certainly has the right to initiate an expert examination, but he ex-

ercises it on the basis of his own initiative and in the order of contractual relations with a forensic institution or a forensic expert who is not an employee of a state forensic science institution.

To date, institution of private detective (investigative) activity as an additional method of collecting evidence has not been recognized by law. All actions initiated by defense attorney in the aspect of collecting evidence are carried out in accordance with the procedure stipulated in P. 2 of Art. 93 of Criminal Procedural Code of Ukraine ²⁹ and the provisions of the Law: *On the Bar and Legal Practice* ³⁰.

We consider the position on "legislative regulation of the procedure for storing material evidence by a lawyer" to be purely declarative, since in accordance with P. 2 of Art. 100 of the Criminal Procedural Code of Ukraine, although the parties to criminal proceedings are obliged to store the material evidence or documents provided to them in a condition suitable for use, legislator has only thoroughly approached the determination of the procedure for storing material evidence by the prosecution ³¹.

It should be noted that all the outlined guarantees are a generalization of legal provisions scattered throughout the Criminal Procedural Code of Ukraine of Ukraine, as well as the result of a comparison of the legal principle according to which a de-

28 Старенький О. С. Кримінальні процесуальні гарантії ...

29 Кримінальний процесуальний кодекс ... URL: <https://zakon.rada.gov.ua/laws/show/4651-17#Text> (date accessed: 02.05.2025).

30 Савицька С. Л. Знач. твір ; Каткова А. Г. Знач. твір. URL: <https://sur1.li/hgtftt> (date accessed: 24.04.2025) ; Про адвокатуру ... URL: <https://zakon.rada.gov.ua/laws/show/5076-17#Text> (date accessed: 24.04.2025).

31 Кримінальний процесуальний кодекс ... URL: <https://zakon.rada.gov.ua/laws/show/4651-17#Text> (date accessed: 02.05.2025) ; Порядок зберігання речових доказів стороною обвинувачення, їх реалізації, технологічної переробки, знищення, здійснення витрат, пов'язаних з їх зберіганням і пересиланням, схоронності тимчасово вилученого майна під час кримінального провадження : затв. постанов. КМУ від 19.11.2012 р. № 1104 (зі змін. та допов.). URL: <https://zakon.rada.gov.ua/laws/show/1104-2012-%D0%BF#n19> (date accessed: 13.05.2025).

fense attorney has the rights of the person he represents, with the exception of those that he can exercise personally (Art. 46 of Criminal Procedural Code of Ukraine ³²). At the same time, the procedural rights of defense attorney and his client are not identical, since the defense attorney acts as an independent participant in criminal proceedings, endowed with separate rights and obligations that determine the specifics of his legal status. These powers form separate procedural legal relations both with the client and with other participants in criminal procedure.

General principles of the participation of a defense attorney in criminal proceedings are outlined in Art. 46 of Criminal Procedural Code of Ukraine, which regulates his procedural functions ³³. At the same time, P. 1 of this same article somewhat limits the provision of legal aid: a lawyer does not have the right to represent a person if this contradicts the interests of the person to whom he provides or has previously provided assistance ³⁴. However, it is not specified what interests are meant, which leaves this issue open to interpretation in each specific case. In addition, the legal status of a defense attorney is based on the interests of the client, the implementation of which is the main purpose of his participation in criminal proceedings ³⁵.

Despite the fact that the legislator guaranteed the right of the defense attorney to participate in investigative actions with the participation of the suspect, it should be emphasized that this participant has procedural dependence. For example, the participation of the defense attorney in an

investigative experiment is often accompanied by a number of restrictions that reduce the effectiveness of the exercise of his procedural powers. One of the key restrictions is defense attorney's lack of the right to influence the method or procedure for conducting an investigative experiment, procedure for conducting experiments and tests. Authority to determine the methodology and sequence of such actions belongs entirely to the investigator that can lead to ignoring circumstances important to the defense. This, in turn, creates the risk of a one-sided interpretation of events that does not take into account the position of the suspect or accused. Another problem area is recording of the results of a crime scene reconstruction. In case of violation of the documentation procedure or due to technical errors, the content of obtained data can be distorted. Although the defense attorney has the right to be present during such investigative actions, he does not influence the recording process, as this is carried out exclusively by the pre-trial investigation body.

Often, defense attorney faces time constraints. Notification of an investigative experiment may be received late or within a reasonable time, which does not leave him or her enough time to familiarize himself or herself with the case materials, prepare a legal position, or submit motions. This significantly reduces the quality of the procedural representation of the client's interests. In addition, there is a risk of limiting the defense attorney's access to experts necessary to conduct an alternative analysis of the circumstances or the results

32 Кримінальний процесуальний кодекс ... URL: <https://zakon.rada.gov.ua/laws/show/4651-17#Text> (date accessed: 02.05.2025).

33 Там само.

34 Там само.

35 Хитра А., Татарин І. Знач. твір. URL: <https://www.calameo.com/read/00598514271b-5b1a06241> (date accessed: 24.04.2025).

of the experiment. The investigator may refuse to grant a motion to involve another expert, citing the fact that a corresponding study has already been conducted previously or that the available evidence is sufficient. This deprives the defense party of opportunity to substantiate its legal position through additional forensic research³⁶.

Thus, although the current criminal procedural legislation provides guarantees for the participation of a defense attorney in the conduct of the cover investigative actions, their implementation in the conditions of the above-mentioned restrictions is often formal or insufficient. Such circumstances require a critical rethinking of the current norms and the practice of their application (in order to strengthen the procedural balance between the prosecution and the defense).

Conclusions

Guarantees of professional activity of a lawyer (defense attorney) in criminal proceedings are represented by a set of international legal and national provisions that determine his rights and obligations in the event of his defense of a suspect (accused / defendant / convicted). The sources of the outlined guarantees are Constitution, Criminal Procedural Code of Ukraine, On the Bar and Legal Practice and subordinate regulatory legal acts of Ukraine. Outlined legal guarantees determine the powers of the defense attorney in ensuring the right to defense and fair justice, they are used when obtaining evidence, substantiate the legal position and appeal procedural decisions, etc.

System of legal guarantees for defense attorney in criminal proceedings is presented as follows:

- 1) constitutional and criminal law provisions that provide grounds for criminal liability for violation of the right to defense, as well as for any unlawful influence on its activities (Articles 397-400 of the Criminal Code of Ukraine);
- 2) general guarantees stipulated by the Law of Ukraine: *On the Bar and Legal Practice*, international legal acts and the practice of the ECtHR;
- 3) criminal procedural guarantees that give the defense attorney the right to represent the interests of the defendant, participate in procedural measures, submit petitions, complaints, etc.;
- 4) special guarantees that determine the competence of the defense attorney in resolving narrowly defined issues (for example, initiating a forensic examination based on contractual relations).

Taking into account a number of limitations in ensuring full protection of the suspect (accused/defendant/convicted), we believe that the prospects for further research should consist in identifying proven algorithms for improving both the system of legal provisions regulating relevant legal relations and law enforcement practice in general.

Гарантії професійної діяльності захисника у кримінальному провадженні

Микола Коломойцев

Мета статті — визначити зміст правового статусу захисника підозрюва-

36 Ухов В. Р. Правові гарантії та обмеження діяльності захисника на етапі проведення слідчих експериментів. *Теоретичні питання юриспруденції і проблеми правозастосування: виклики XXI століття: тези доп. учасн. VIII Всеукр. наук.-практ. конф.* (Харків, 24.11.2023). Харків, 2023. С. 153—154. URL: https://library.pp-ss.pro/index.php/ndippsn_20231124/article/view/ukhov/pdf (date accessed: 02.05.2025).

ного (обвинуваченого) у кримінальному провадженні, схарактеризувати гарантії його професійної діяльності. Для реалізації поставленої мети застосовано комплекс загальнонаукових методів (аналіз і синтез, узагальнення, логіко-структурний підхід тощо). Досліджено, що гарантії професійної діяльності адвоката (захисника) у кримінальному провадженні представлені комплексом міжнародно-правових і національних положень, що визначають його права й обов'язки в разі здійснення ним захисту підозрюваного (обвинуваченого / підсудного / засудженого). Джерелами згаданих гарантій є Конституція, Кримінальний процесуальний кодекс, Закон "Про адвокатуру та адвокатську діяльність", підзаконні нормативно-правові акти України. Окреслені правові гарантії визначають повноваження захисника у забезпеченні права на захист і справедливе правосуддя, ними послугуються під час отримання доказів, для обґрунтування правової позиції, оскарження процесуальних рішень тощо. Систему правових гарантій захисника у кримінальному провадженні представлено у вигляді: 1) конституційних і кримінально-правових положень, що передбачають підстави для кримінальної відповідальності за порушення права на захист, а також за будь-який незаконний вплив на його діяльність (ст. 397–400 Кримінального кодексу України); 2) загальних гарантій, обумовлених Законом України "Про адвокатуру та адвокатську діяльність", міжнародно-правовими актами і практикою Європейського суду з прав людини; 3) кримінальних процесуальних гарантій, що надають захисникові право представляти інтереси підзахисного, брати участь у процесуальних заходах, звертатися з клопотаннями, скаргами тощо; 4) спеціальних гарантій, що визначають компетенцію захисника у розв'язанні вузькогалузевих питань (наприклад, ініціюванні проведення судової

експертизи на підставі договірних відносин).

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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