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LEGAL COUNSELING AS AN ESSENTIAL PART OF ATTORNEY PRACTICE

Abstract. The article studies the approach defining counseling, establishes its connection with allied concepts of legal consultancy and legal advice, analyzes the structure and models of counseling. The author considers amendments to The Rules of Legal Ethics based on comparative legal analysis of the Model Rules of Professional Conduct of American Bar Association. The research relies on analytical, logical-semantic, hermeneutic, and comparative **research methods. Results.** The author analyses counseling as a distinct type of advocacy, defines legal consultancy, counseling, counseling structure, legal advice as legal notions, emphasizes counseling stages. The essence of counseling models is analyzed, indicating the role of a lawyer in each of them. An essential part of this research paper is the Model Rules of Professional Conduct of American Bar Association analysis. **Conclusions.** Counseling is an integral and vital part of attorney practice characterized by the following features: 1) performed on a professional basis; 2) conducted through direct communication of the attorney with the client; 3) may be carried out both ex-ante and ex-post. Counseling is a comprehensive attorney practice, which consists of finding and presenting to the client possible solutions to his legal problem, the consequences of choosing one of them, as well as determining the legal position and proper remedies. The consultation process results in providing comprehensive and professional advice on the client's legal issue. The concept of counseling structure may be defined as the sequence of actions of an attorney to determine the client's legal issue and formulate proposals for its solution. There are the following models of counseling: "traditional", client-centered model, and collaborative decision-making model. The author proposes to amend Art. 8 of the Rules of Legal Ethics with provisions on the requirements for counseling, namely that lawyers shall comply with the client's requirements for the means to achieve the representation or defense purpose.

Key words: legal consultancy, counseling, legal advice, counseling structure, models of counseling.

1. Introduction

Most empirical studies, the object of which is the implementation of legal practice, deal with the participation of an attorney in the trial, defense tactics, challenging aspects of the attorney's interaction with the court, other public authorities, local self-government, etc. Much less scholarly research discusses legal counseling. According to para. 1, p. 1 of Article 19 of the Law of Ukraine "On the Bar and Practice of Law", one of the key aspects of legal practice entails giving legal information, advice, and clarifications on legal issues. In addition, scientists, incl. S. O. Ivanytskyi, consider the provision of legal advice and explanations as one of the tasks of the bar, as the institute as a whole (Ivanytskyi, 2017, p. 148).

Counseling is rightly deemed to be the beginning of the attorney's interaction with the client because in requesting legal assistance,

the person primarily intends to receive advice to determine a subsequent algorithm of actions. Following an outcome of the initial consultation, the person decides on his representation or defense by a specific attorney.

Relationship in the "attorney-client" system is based on effective communication. At the same time, legal counseling is a fundamental element, so the quality of provided pieces of advice and their effective use are of paramount importance for achieving the goals of such relationship.

In this context, it is worth agreeing with L. V. Slyva's opinion: legal practice requires not only proficient knowledge of law rules but also good communication skills, the ability to qualitatively build communication with the client to accomplish the goal of the relevant activity – the protection of the rule of law (Slyva, 2020, p. 21).

2. Correlation of counseling with related concepts

The professional literature on the relevant subject matter contains the concepts of “legal consultancy”, “counseling”, “legal advice”, which indicates their different content. In this regard, it seems expedient to analyze the essence of each of the above concepts separately.

S. D. Husariev defines legal consultancy as the professional activity of lawyers specializing in different law branches; their main function is the legal support of various forms and methods of activity of the organizational structure that employs a legal adviser (Husariev, 2008, p.386).

L. V. Slyva considers legal consultancy as a systematic professional activity of an attorney, which combines a set of actions aimed at solving the client’s legal problem through explanations, recommendations, drafting of procedural documents (Slyva, 2016, p. 81).

According to K. Yu. Surovova, legal consultancy is the transfer of specific legal data to the client at his initiative or at the initiative of the attorney, which involves informing the client about legal norms and counselling, during which the attorney explains how to deal with the client’s legal problem on their basis (Surovova, 2015, p.54-55).

It is worth mentioning that in defining the concept of legal consultancy through informing and counseling, it is said that although these two components differ in structure, they are equal and interrelated elements in the system of legal counseling. Thus, the structure of informing comprises two stages: the attorney’s actions to transfer information and the client’s actions to receive it. Instead, counseling is supplemented by another stage – acceptance of instructions. Before giving legal advice, an attorney shall listen to clients and get at the heart of the problem. The subsequent flow of information from the attorney to the client structurally coincides with similar actions within informing. However, the difference between counseling and informing is in the targeted nature of the latter, given the specific life situation and the presentation of clear recommendations for choosing legal remedies to address the problem (Surovova, 2015, p.55).

It goes without saying that an attorney conducts counseling professionally since it is the professional nature of legal assistance that determines the special place of the bar in the mechanism of providing it to citizens, which is fixed in Art. 131² of the Constitution of Ukraine (Shandula, 2017, p. 166).

Thus, it is advisable to distinguish the following essential features of legal consultancy: (1) is a type of legal practice; (2) is carried out on a professional basis; (3) is complex, because

it can be realized through explanations, possible options for addressing the legal problem of clients, drafting the necessary legal documents, that is, it contains both an informative and an advisory component. Consequently, consultancy is the professional activity of an attorney, which implies informing and advising clients on law rules, the regulatory scope of which extends to the legal relationship to which they are parties, rendering them intelligibly, and formulating a proposal for solving a legal problem.

Counseling is defined in professional literature as the direct interaction between an attorney and a client (principal) to provide the latter with qualified legal assistance (Slyva, 2020, p.27). That kind of approach does not outline the main specific features of counseling in comparison with other types of legal assistance. As a result, it does not allow distinguishing it from other types of legal practice.

R. S. Redmount believes that legal counseling is that group of particular attitudes, skills, and strategies that a lawyer utilizes to help individual clients to meet specific needs and resolve specific problems. (Redmount, 2008, p.181). It is worthwhile stressing that the client’s protection or representation is not considered in this context. This means that the lawyer presents possible options for solving a specific legal problem or agreeing on an algorithm of actions under individual circumstances.

It seems reasonable that when advising the client, the lawyer should both suggest ways to deal with the legal problem and make sure that the client gets them straight (Zeikan, Safulko, 2013, p.26).

The author emphasizes that counseling can be ex-ante, that is, before the client commits legally significant actions, and ex-post, that is, after them. The considerable difference between them is that ex-ante counseling can steer the client on the right legal course, and ex-post counseling excludes the beforementioned but affects the client’s subsequent conduct (Shavell, 1998, p. 1).

Thus, counseling has the following characteristics: (1) it is a set of actions aimed at solving a specific legal problem of the client; (2) it is carried out through the communication between the client and the attorney, not defense or representation in judicial and other public authorities. Therefore, it is advisable to regard legal consultancy as the attorney’s comprehensive activity, which involves finding and presenting the client with possible solutions to his legal problem, ensuing consequences, and determining the legal position and defensive means.

L. V. Slyva proposes to define legal advice as an outcome of the attorney’s communication with the client, which is to find options for

a legal solution to the client's problems, explain potential consequences, and formulate a further action strategy (Slyva, 2016, p.81)

S. Chavell has a similar position and understands legal advice as specific information, which an attorney gives a client, about the essence of legal rules, the possibility and extent of punishment for their violation, the course of the trial, etc. (Shavell, 1998, p. 1).

The above positions truly convey the essence of legal advice, which can be regarded as an outcome of counseling, which includes the provision of specific legal information on the legal problem and the set of measures necessary to solve it.

Therefore, "legal consultancy", "legal counseling" and "legal advice" are interrelated concepts and illustrate the movement from general to specific. Consultancy comprises a counseling process that results in comprehensive and professional advice.

3. Structure of counseling

The structure of counseling is the sequence of actions of the attorney to determine the client's legal problem and formulate proposals for its solution.

Given the frequency of counseling, it is expedient to distinguish between one-step and multi-step counseling (Slyva, 2020, p. 35). One-step counseling is a one-time interaction of the client with the attorney, which means communication about legal norms and their clarification, and multi-step counseling includes comprehensive systemic communication, which generates a sequence of actions to solve a specific legal problem of the client.

It should be noted that under one-step counseling, the content of the concepts of "legal advice" and "legal counseling" coincides.

According to Y. Zeikan and S. Safulko, legal counseling consists of the following stages: (1) establishing the client's requirements; (2) interviewing; (3) summarizing the information received from the client; (4) specifying options for solving the problem (Zeikan, Sarsfulka, 2013, pp.27-28). That kind of presentation of counseling stages seems incomplete because the result, which means the final determination of the legal position and the way of its defense, is decisive for any process that legal counseling undoubtedly is.

L. V. Slyva puts forward a more complex structure and marks eight stages, as follows: (1) preparatory; (2) interviewing; (3) preliminary assessment of facts of the case; (4) obtaining information and its further analysis; (5) analysis of the facts of the case; (6) analysis of the regulatory framework of the case: material and procedural qualification of the case; (7) formation of a legal position in the case, analy-

sis of its pros and cons; (8) legal advice (Slyva, 2020, p. 36-37).

The above structure of counseling has some drawbacks – the duplication of individual stages of counseling. In particular, it concerns the stages of analysis of the information acquired and analysis of the circumstances of the case. It seems inappropriate to single out two different stages that have the same purpose – assessment of the circumstances of the case.

Based on the analyzed approaches to the structure of counseling and taking into account their shortcomings, it is expedient to present the following structure of counseling: (1) obtaining facts while interviewing the client to identify the legal problem; (2) obtaining details (incl. by sending lawyer requests); (3) interpreting the problem using legal terminology; (4) finding and clarifying alternatives to solve the legal problem; (5) determining, together with the client, the procedure for solving the problem.

4. Counseling models

When advising clients, attorneys should consider the essence of the legal problem, whether the client is an individual or a legal entity, and the time of counseling, i.e., its implementation in the course of initial counseling or the ongoing fulfilment of the terms of the legal aid agreement. It makes sense to highlight three models of counseling: (1) the traditional or "authoritarian" model, (2) the client-oriented model, (3) the collaborative decision-making model (McGinnis, 2018, p. 279). It is recommended to examine each of the models in more detail.

– Traditional model

This model entails that when a lawyer advises a client, the client is expected to shift responsibility for the outcome onto the lawyer to exercise complete control over solving legal problems (McGinnis, 2018, p. 279). At the same time, the client's role is passive and is limited to sharing information on the case with the lawyer. Remarkably, the literature describes this model as "lawyer-oriented", "paternalistic", or "model of best interest" (Cochran, DiPippa, Peters, 1999, p. 9). It should be noted that Art. 8 of the Rules of Professional Conduct states that "subject to observance of the principle of legality, an attorney must in his/her professional activity act on the basis of the dominance of clients' interests". At the same time, neither the mentioned article nor further indicates whether the attorney is obliged to discuss his/her actions with the client, or whether he/she is obliged to consult with the client on taking specific measures (2017).

Regardless of the words chosen for its designation, this model is strongly criticized for

several reasons. First, the emphasis on the lawyer's control over counseling relations does not respect the dignity of clients as individuals who must be able to address all issues affecting their lives and make moral choices about them (McGinnis, 2018, pp. 279–280). Second, because clients are likely to have the best understanding of their needs, values, and interests, legal counseling using the traditional model creates a greater risk of making decisions and achieving outcomes that are not consistent with those values and interests (McGinnis, 2018, pp. 279–280). Thirdly, the active involvement of the client, who is recognized as a victim in criminal proceedings, in the counseling and decision-making process contributes to better legal results for the client (McGinnis, 2018, pp. 279–280).

In addition, it seems obvious that clients themselves should determine the purpose of legal assistance, which requires lawyers to consult with clients on the means to an end. Therefore, the implementation of legal counseling under the traditional model poses risks of failed expectations about its results.

– *Client-centric model*

According to this model, the client's position is decisive; it has the following characteristics: (1) perception of the lawyer exclusively as an expert who assists clients in determining legal problems; (2) active involvement of the client in the discussion of possible solutions, including consideration of the consequences arising from each available option; (3) consulting based on clients' values and providing relevant advice, given non-legal aspects, i.e., moral compulsions. N. S. Nelson believes that one of the possible methods of counseling related to this model holds that lawyers should avoid asking their clients "why?" as they may perceive it as skepticism or obtrusiveness. Alternatively, they should ask questions beginning with "what?". For example, "What do you think it was? What made them do it?" instead of "Why do you think they did it?" (Nelson, 1996, p. 30). The relevant method of communication of the lawyer with clients illustrates that the lawyer needs to use not only knowledge of jurisprudence but also psychology, sociology, etc.

When counselling following the client-centric model, lawyers should maintain the appearance of neutrality and refrain from providing direct advice to their clients (Cochran, DiPippa, Peters, 1999).

– *Collaborative decision-making model*

This model allows clients to control the process of solving a legal problem and concurrently rely on the reasonable recommendations of lawyers who structure the process and hence provide advice that the decisions made are legiti-

mate and effective (Cochran, DiPippa, Peters, 1999, p. 6).

Supporters of this model recognize that its effectiveness requires significant commitments and efforts of lawyers, who must be "trusted advisers, moral advisers, servants, and managers of decision making" (Cochran, DiPippa, Peters, 1999, p. 9).

Of the three main models, counseling based on the collaborative model takes the most resources of both the lawyer and the client. Interaction in this model stipulates some degree of mutual engagement and cooperation, which may prove challenging in practice but will have the best prospects for achieving mutual satisfaction in the consulting relationship for counsel and client (Cochran, DiPippa, Peters, 1999). Collaboration is most effective when lawyers care about creating and maintaining trust in their relationships with clients.

In the collaborative model, the lawyer is to: 1) identify the client's own preferences of how to deal with the legal problem; 2) outline the (legal) options that are realistic for the client; 3) inform the client about the pros and cons and the conditions of employing various options; 4) elicit the client's preference for this or that legal option; 5) devise an "action" plan, together with the client, of implementing the option chosen by the latter.

5. Challenging aspects of counseling

The rules of professional conduct clearly establish the principles of legal practice and define the general features of the lawyer's interaction with the client, public authorities, etc. At the same time, there are no specific provisions for giving legal advice by a lawyer.

However, the American Bar Association's Model Rules of Professional Conduct are worded differently, and individual provisions strongly affect the counseling process. First, Rule 1.2 of the Model Rules deals with representation and states that a lawyer shall abide by a client's decisions concerning the objectives of representation as to the purpose of representation and consult with the client as to the means by which that purpose will be achieved.

Secondly, Rule 1.4 sets out requirements for lawyers to communicate with the client, including the duty to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Thirdly, Rule 2.1, entitled "Advisor", consolidates that in representing a client, a lawyer shall exercise independent professional judgment and render candid advice. It is further specified that in rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and politi-

ical factors, that may be relevant to the client's situation.

Thus, the Rules are designed to ensure that lawyers provide their clients with adequate and complete information to assist them in their decision-making.

Based on the analysis of the Model Rules of Professional Conduct and foreign professional literature, it seems expedient to supplement Art. 8 of the Rules of Legal Ethics as follows: "A lawyer shall consult independently and professionally, properly explain the essence of legal norms to the extent necessary for the client to make informed decisions. A lawyer shall consult with the client on the means of achieving the purpose of the representation or defense". Therefore, the predominant position of counseling among the types of legal practice is rendered. In addition, the principle of "preference for the client's interests" requires his involvement in the decision-making process.

6. Conclusions

As you can see from the analyzed literature, the proposed approaches to understanding counseling do not fully convey its specific features as a component of legal practice. Considering the above comments, the author suggests defining counseling as a complex activity of a lawyer, which involves finding and presenting the client with possible solutions to his legal problem and consequences arising from each available option.

The analysis of professional literature, incl. the opinions of Y. Zeikan, S. Safulka, and L. V. Slyva, allows structuring counseling as follows: (1) obtaining facts during the interview with the client to identify

the legal problem; (2) acquiring additional data (incl. by sending lawyer requests); (3) interpreting the problem using legal terminology; (4) searching for and explaining alternatives to solve the legal problem; (5) identifying, together with the client, the procedure for solving the problem. At the same time, the structure of counseling should be considered as a sequence of actions of the lawyer to determine the client's legal problem and formulate proposals for its solution.

Anglo-American doctrine regards counseling models as types of interaction in the "lawyer-client" system, the main of which are (1) traditional, the essence of which is the lawyer's absolute control over the process and choice of legal remedies solving the client's legal problem; (2) client-oriented: the lawyer acts as an advisor, and the client makes all final decisions by relying on the lawyer's professional advice; (3) the collaborative decision-making model, under which the purpose and means of solving the legal problem are a subject of collective discussion and actions of the lawyer and the client.

As part of this study, the author proposes to supplement Art. 8 of the Rules of Legal Ethics with the provisions on counseling, as follows: "A lawyer shall consult independently and professionally, properly explain the essence of legal norms to the extent reasonably necessary to permit the client to make informed decisions. A lawyer shall consult with the client on the means of achieving the purpose of representation or defense". Such changes seem necessary in view of the priority position of counseling among other types of legal practice.

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КОНСУЛЬТУВАННЯ ЯК СКЛАДОВА ПРАКТИЧНОЇ АДВОКАТСЬКОЇ ДІЯЛЬНОСТІ

Анотація. *Метою* статті є узагальнення підходів до визначення поняття «консультування», його співвідношення із такими суміжними поняттями, як «консультативна діяльність» та «консультація», аналіз його структури та моделей консультування, а також внесення пропозиції внесення змін до Правил адвокатської етики на підставі порівняльно-правового аналізу положень про консультування у законодавстві США. **Методи.** У даній статті були використані аналітичний, логіко-семантичний, герменевтичний та компаративістський. **Результати.** У статті продовжується дослідження консультування як окремого виду адвокатської діяльності. Наведено поняття консультування, визначено поняття структури консультування та узагальнено підходи до визначення його етапів. Проаналізовано сутність моделей консультування із зазначенням ролі адвоката у кожній з них. Важливою частиною даної статті є аналіз положень Типових правил професійної поведінки Асоціації адвокатів США та формулювання на його підставі пропозиції внесення змін до Правил адвокатської етики, що стосуються консультування адвокатом. **Висновки.** Консультуванням доцільно вважати комплексну діяльність адвоката, що полягає у процесі пошуку та представленні клієнту можливих шляхів вирішення його правової проблеми, наслідків, що впливають з вибору одного з них, а також визначення правової позиції та способів її відстоювання. Констатовано, що результатом процесу консультування є надання вичерпної та професійної консультації щодо правової проблеми клієнта. Визначено поняття структури консультування як послідовності дій адвоката щодо визначення правової проблеми клієнта та формулювання пропозицій щодо її вирішення. Проаналізовано такі моделі консультування: «традиційна», клієнто-орієнтована, та модель спільного прийняття рішень. Запропоновано внести зміни ст. 8 Правил адвокатської етики, додавши положення про вимоги щодо здійснення консультування, а саме, що адвокати повинні дотримуватися вимог клієнта щодо засобів досягнення мети представництва або захисту.

Ключові слова: консультаційна діяльність, консультування, консультація, структура консультування, модель консул.

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