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DOI <https://doi.org/10.32849/2663-5313/2023.6.19>**Oleksandr Prykhodko,***Doctor of Philosophy in Law, Attorney-at-Law, 2/4, Volodymyr Vernadskyi Street, Dnipro, Ukraine, postal code 49000, prykhodko.alex84@gmail.com***ORCID:** orcid.org/0009-0000-6892-9412Prykhodko, Oleksandr (2023). Legal understanding of functions of the bar in Ukraine. *Entrepreneurship, Economy and Law*, 6, 102–107, doi <https://doi.org/10.32849/2663-5313/2023.6.19>

LEGAL UNDERSTANDING OF FUNCTIONS OF THE BAR IN UKRAINE

Abstract. Purpose. The purpose of the article is to define the differences between the concepts of "tasks" and "functions" of an attorney-at-law in administrative proceedings and identify and analyse the main ones. **Results.** The article examines the concepts of "task" and "function" of an attorney-at-law in administrative proceedings which are interrelated. In other words, the function arises when specifying the task and is a qualitative characteristic of a particular phenomenon. In addition, the article analyses the essence and determines the role and place of the Bar in the system of existing law enforcement bodies of Ukraine. It is determined that the main social mission and the main goal of the Bar is to protect human rights. This statement should be fundamental in solving the problem of the full functioning of this very important legal institution. Unlike other human rights bodies of civil society, attorneys-at-law are necessarily involved in the performance of the functions of the state and state institutions. It is necessary to regard the specific features of this field as a fundamentally important and, of course, necessary condition, since without the participation of an attorney, the investigation and justice process will be ineffective. In addition, the main functions of an attorney include restorative, preventive and protective. **Conclusions.** It is concluded that the attorney-at-law as a representative of the administrative procedure is a procedural person who performs legal actions on his or her own behalf and in the interests of the person who has concluded a legal services agreement with him or her, within the limits of the powers granted to him or her, in order to protect the rights, freedoms and legitimate interests of the person he or she represents. The term "task of an attorney-at-law in administrative proceedings" should be understood as a specific, clearly planned scope of work performed by lawyers in the course of administrative proceedings to protect clients, represent their interests or provide other legal services necessary for resolving administrative cases. It is determined that the concepts of "tasks" and "functions" of an attorney-at-law in administrative proceedings are interrelated. In other words, the function arises in the process of specifying the task and is a qualitative characteristic of a particular phenomenon. For the purpose of professional problem solving in administrative proceedings, the attorney-at-law is vested with the relevant functions, which are the main areas of his or her activities in defence, representation and provision of other legal support to the client in administrative cases. The list of functions of the attorney-at-law is not exhaustive. The restorative, preventive and protective functions are the basis of the attorney's activity in the field of administrative proceedings.

Key words: attorney-at-law; legal support; the bar; practice of law.

1. Introduction

The formation of civil society in Ukraine and the development of the rule of law is impossible without raising the level of legal culture and legal awareness of the population of our country, but in any civilised society that is at the peak of its economic, political, social and legal development, the issue of obtaining qualified legal support is always relevant.

Legal actors participating in various types of legal relations often have a real or potential need for qualified legal support. In this regard, the current stage of development of civil society and the rule of law requires the state to establish both legal and practical guarantees

of state protection of human rights and freedoms at the regulatory and legal level. The Constitution of Ukraine guarantees everyone the right to legal support and the right to free choice of human rights defenders. The Bar of Ukraine can ensure the actual implementation of the content of this provision at the current stage of development of the Ukrainian state.

The Bar of Ukraine is an autonomous body separated from the system of state institutions, whose main purpose is to provide qualified legal services to citizens and organisations. The fact that this profession in our country is separated from the system of state institutions shows the relative autonomy and independence

of such an entity, considering its professional characteristics. Based on this, the possibility of counteracting public structures and officials in the judicial proceedings is obvious. The exclusion of the Bar from the system of state bodies deprives officials and civil servants of the opportunity to influence the professional activities of attorneys, which is one of the factors that ensure the effective performance of their functions and tasks by the Bar and attorneys in administrative proceedings.

A number of scholars have studied the specific features of the Bar organisation in Ukraine, the tasks and functions of an attorney-at-law in the administrative process, namely: Baimuratov M., Bandurka S., Buromenskyi M., Vilchuk T., Halunko V., Holubieva N., Hordieiev V., Husarev S., Karpachova N., Kyivets O., Komziuk A., Nazarov I., Nikitchenko V., Podoliak A., Safulko S., Sviatotska V., Siomina V., Tatsii L., Khotynets P., and others. However, their research is fragmentary, without an exhaustive and holistic description of the essence and content of such elements.

The purpose of the article is to define the differences between the concepts of "tasks" and "functions" of an attorney-at-law in administrative proceedings, and also to identify and analyse the main ones.

2. The concept and functions of the Bar in Ukraine

To protect the rights, freedoms and legitimate interests of the population, the state has created many ways and means, the main of which is judicial protection. However, even in such cases, citizens do not have sufficient knowledge of jurisprudence to go to court to protect their violated rights, and therefore the legislator, through representatives and lawyers, ensures the right of all persons to represent and defend their interests in court.

According to Art. 59 of the Basic Law, "Everyone shall have the right to legal services. Such services shall be rendered free of charge in cases stipulated by law. Everyone shall be free to choose the defender of his rights" (Constitution of Ukraine, 1996). A similar provision is enshrined in parts 1, 2, 3 of the Code of Administrative Procedure of Ukraine (hereinafter - the CAP of Ukraine), which stipulates that "1. Participants in a case have the right to legal services. 2. Representation in court, as a type of legal services, shall be carried out exclusively by an attorney-at-law (professional legal services), except in cases established by law. 3. Submissions and procedures for the provision of free legal services are determined by the law governing the provision of free legal services" (The Code of Ukraine on Administrative Offences, 1984). However, today there

are still many questions regarding the functions of attorneys in administrative courts.

Following the definition of its etymology, the term "advocate" from the Latin "advocatus" is translated as "legal adviser", "court defender" (Zaborovskyi, 2017). In our subjective opinion, an "advocate (attorney)" is a kind of legal consultant who provides professional legal services, which can be explained in two aspects - his/her legal status and functional purpose. In other words, the involvement of an attorney in a court proceeding as a full participant and the provision of legal services determines his or her functional affiliation. Moreover, the volitional legal action of an attorney-at-law, which provokes his or her active procedural activity, depending on specific legal relations, is the main prerequisite for the attorney-at-law's involvement in legal practice.

In his dissertation research, P. Khotynets concludes that the concept of "attorney-at-law status" covers: a) rights and duties of an attorney-at-law; b) liability of an attorney-at-law; c) guarantees of the attorney-at-law's activities (Khotynets, 2002). On the other hand, the "legal status" should also include the requirements that entitle a person to practice law.

In general, the institute of procedural representation by attorneys-at-law is of great importance, since it ensures the effective exercise of procedural rights and obligations of the parties concerned. Therefore, we will examine in detail the concept of tasks and functions of a representative attorney-at-law in administrative proceedings and identify their specific features.

Pursuant to the provisions of part 1 of Article 56 of the Code of Administrative Offences of Ukraine, the legislator provides an exhaustive list of participants in administrative proceedings through representatives (The Code of Ukraine on Administrative Offences, 1984). According to Article 57 of the Code of Administrative Procedure of Ukraine, a court representative may be a lawyer or a legal representative (The Code of Ukraine on Administrative Offences, 1984).

The attorney-at-law representing the interests of his or her client in administrative proceedings takes an active part in the court proceedings, the purpose of which is to achieve the best legal result for his or her client. The attorney as a representative is entitled to apply to the court on behalf of the person whom he or she represents and to defend his or her interests. However, a person who enjoys the right to legal services of an attorney shall not be deprived of the right to defend his or her rights, freedoms and legitimate interests independently.

Representation in court requires an attorney-

at-law to be professional and have the appropriate qualifications to provide legal services. This is defined in Article 7 of the Rules of Professional Conduct: "In his or her professional activity an attorney (law office or law firm) must use all knowledge and professional skills for the proper defense and representation of the rights and lawful interests of individuals and legal entities, comply with the applicable legislation of Ukraine and promote the strengthening and practical implementation of the principles of the rule of law and legality. An attorney shall not give advice to a client, which is knowingly aimed at facilitating the commission of offenses, or otherwise intentionally facilitate their commission by his or her client or other persons. In his or her professional activity an attorney shall not resort to the means and methods that contradict the applicable legislation or these Rules" (Rules of Professional Conduct, 2017).

This suggests that the understanding of the institute of representation is set out in two approaches: legal relations in which a person performs procedural actions on behalf of another person within the limits of his/her authority; performance of procedural actions by a person who is vested with certain powers on behalf of another person in order to realise the latter's interests.

It should be noted that the powers of an attorney are certified by a warrant, an order of a body or organisation authorised by law to provide free legal services, or a legal services agreement. An excerpt from the agreement shall be attached to the warrant, which shall specify the powers of the attorney as a representative or restrictions on the right to perform certain procedural actions with the certification of the excerpt by the signatures of the parties in accordance with the Law of Ukraine "On the Bar and Practice of Law" (Law of Ukraine On The Bar and Practice of Law, 2012).

It should be noted that until the attorney applies to the court or is involved in the proceedings by the administrative court, his or her responsibility is not subject to the provisions of the Code of Administrative Procedure of Ukraine and is transferred to the level of the Qualification and Disciplinary Commission of the Bar. The participation of attorneys-at-law in administrative proceedings is determined by the mutual will of the attorney-at-law and the parties, third parties or other representative (attorney) who has the right to delegate the case, which is implemented by concluding an oral or written agreement on the provision of legal services. The latter is concluded in duplicate and certified by both parties. An excerpt from such an agreement, which clearly sets out the rights of attorneys, is a mandatory

appendix to the warrant in court proceedings. The application may also contain recommendations on restricting the rights of representatives to perform certain procedural actions in administrative proceedings. To sum up, it should be noted that an attorney-at-law, as a representative in administrative proceedings, is a procedural person who, on behalf and in the interests of a person, performs legal actions to protect the rights, freedoms and legitimate interests of the person he or she represents, who has previously concluded a legal services agreement with him or her. As a result, after the conclusion of the relevant agreement, an attorney is authorised to provide the following legal services: providing legal information; providing explanations and advice; drafting complaints and applications, as well as other documents related to the administrative procedure (Rules of Professional Conduct, 2017).

3. Tasks of the Bar in Ukraine

According to the explanatory dictionary of the modern Ukrainian language, the definition of "task" should be understood as "a certain amount of work, business, etc. planned for execution; an instruction, order to perform a certain task; a goal to be pursued; something that is to be done" (Busel, 2005). Therefore, the definition of "attorney's task in administrative proceedings" should be understood as a specific, clearly planned scope of work performed by an attorney in the course of administrative proceedings to protect the client, represent the interests or provide other legal services necessary for the resolution of administrative proceedings. The tasks set out in the provisions of the Code of Administrative Court Procedure of Ukraine are generally important for both legal representatives and attorneys. In addition, a large explanatory dictionary of the modern Ukrainian language defines the concept of "function" as: "a phenomenon that depends on another phenomenon, is a form of its manifestation and changes in accordance with its changes; the work of someone, something, duty, range of activity of someone, something" (Busel, 2005). The definition of the functions of an attorney in administrative proceedings should be understood as the main activity of an attorney to provide defence, representation and other legal services to clients in administrative cases.

This means that lawyers are provided with the appropriate functions to professionally solve tasks in administrative proceedings. In addition, the concepts of "task" and "functions" of an attorney-at-law in administrative proceedings which are interrelated. In other words, the function arises in the process of specifying the task and is a qualitative characteristic of a particular phenomenon.

We believe that in practice, the main functions of attorneys in administrative proceedings include the following: representative, restorative and advisory.

We propose to consider and analyse each of them in more detail. L. Tatsii believes that the function of an attorney as a representative in administrative proceedings is aimed at establishing relations between the client and state authorities or other persons. Based on her research, the author argues that the functions of an attorney should include representative and advisory ones. However, other scholars propose to expand this list to include restorative, preventive and protective functions. (Tatsii, 2008).

The representative function of the attorney-at-law is defined by parts 1, 2 of Article 56 of the CAP of Ukraine, which provides for the possibility of the parties to engage an attorney-at-law to participate in administrative proceedings (The Code of Ukraine on Administrative Offences, 1984). First, this provision stipulates that an attorney may be a natural person with administrative and procedural competence, and second, an attorney is a person who represents the interests of others in an administrative court on the basis of a warrant and provides legal services in accordance with the law.

It seems that it is impossible to distinguish between the representative and defence functions of attorneys, since the latter is a special subject of civil, commercial, criminal and administrative proceedings, which performs its only function in court and, by providing legal support, contributes to the protection of legitimate human rights and freedoms. In the course of administrative proceedings, an advocate, on the one hand, provides legal assistance to his or her client, and, on the other hand, contributes to the protection of legitimate human rights and interests.

The following are the characteristics of an attorney as a representative in administrative proceedings: an attorney always represents a person with whom he or she has entered into an agreement for the provision of legal services; an attorney may represent a person in administrative proceedings for a fee or free of charge; an attorney, in the course of his or her activities in administrative proceedings, is governed by the provisions of the Law of Ukraine "On the Bar and Practice of Law", the Code of Administrative Procedure of Ukraine, and the Rules of Professional Conduct; an attorney is vested with the powers of the person whose interests he or she represents in an administrative case; legal consequences for the person represented by the attorney arise as a result of the legal guidance and procedural actions of the attorney within the scope of his or her powers; the attor-

ney may enter into the administrative proceedings at any stage of the case consideration; the participation of the attorney in the administrative proceedings does not deprive the interested person of the possibility to replace his or her defender at any stage of the administrative case consideration.

The main legal regulations governing the administrative and procedural status of attorneys are the Code of Administrative Procedure of Ukraine and the Law of Ukraine "On the Bar and Practice of Law". However, the CAP of Ukraine defines only a list of general tasks of administrative procedures (part 1 of Article 2), the provisions of which clearly reveal the content of the restorative function, namely: protection of rights, freedoms and interests of individuals, rights and interests of legal entities in the field of public relations from violations by public authorities (state authorities, local self-government bodies, their officials and employees, other entities in the exercise of their administrative functions on the basis of legislation, including in the exercise of delegated, including the exercise of delegated powers) through fair, impartial and timely consideration of administrative cases (The Code of Ukraine on Administrative Offences, 1984). With this in mind, we agree with the opinion of T. Vilchyk, who argues that "the restorative function is the dominant function of the legal profession, which is to restore the violated rights and legitimate interests of citizens" (Vilchyk, 2019).

There is no consensus among the authors on the definition of the concept of advisory activity. The opinion of S. Husariev, who defines advisory activities as professional activities of lawyers who are specialists in various branches of law, whose main function is legal support of various forms and methods of activity of organisational structures that use legal services of legal advisers, is quite accurate (Husariev, Tykhomyrov, 2005). Other scholars define the concept of advisory activity by stating that it includes oral explanations and expert preparation of various written materials at the request of law enforcement bodies, legal entities or individuals. However, despite the different approaches to the definition of the concept of advisory activity, all scholars agree that it is one of the types of professional activities.

According to A. Podoliak, the Bar is a unique legal phenomenon that has a single organisation performing a state (public law) function, and is not a state body, but, on the contrary, maintains independence from the state (Nikitchenko, 2011).

It seems that the Bar should strive to become a general bar, i.e. a bar that is not focused on anything other than the performance of general func-

tions. According to V. Nikitchenko, this can only really exist if the following conditions are met:

1) existence of the subject matter of judicial protection - private interests that are so broad that they conflict with other private interests or with the public interest;

2) the existence of the bearers of these interests, persons who are ready to defend their interests and can only defend them in court (Podoliak, 2009).

The Bar should become one of the most powerful institutions of self-regulation in civil society. By granting freedom to professional attorneys and encouraging their activities, the state "unties its hands", as most of the state's affairs are transferred to this independent institution. Just as an attorney provides assistance to a person in case of an emergency, the state should use the power granted to it only in case of an emergency when the whole society is in serious danger. The independence of professional lawyers from the state is an important principle of this human rights institution and should be a prerequisite for a person to trust in the protection of his or her rights. It is from this perspective that the Bar as a legal institution is not the property of the state and its individual bodies. The profession of attorney-at-law is not a carrier of authority, but the power of thought, the power of knowledge about relevant socially significant actions of individuals, groups, organisations and even the state.

In addition to private interests, the interests of the entire society are protected when attorneys provide qualified legal services, which are mainly expressed in the establishment of the rule of law, timely cessation of human rights violations, restoration and prevention of such violations in the future. Therefore, legal services provided by attorneys-at-law are recognised as one of the most important guarantees of human rights protection, and their implementation is ensured by the mechanism of cooperation between the state and civil society.

As the Bar is an institution of civil society, its status implies not only a certain distance from the state authorities, but also the recognition of the need to consolidate the bar to provide effective and socially necessary influence on state law enforcement bodies and, most importantly, on national legal policy. With regard to the issue of a court representative, it should be emphasised that the participation of attorneys should be provided not only in court, but also at the stage of protecting the client's interests, for example, in correspondence aimed at resolving the dispute out of court.

Since the judgement enforcement procedure is important, it is necessary to focus on establishing cooperation with the enforcement services entrusted by the state with the function

of enforcing judgements and other executive documents. In the current situation of a transparent market economy and fierce competition, it is becoming increasingly difficult for business entities to comply with the rules of anti-competitive cooperative behaviour, including the prevention or restriction of monopoly, the development of reasonable and legal methods of fair and competitive struggle, and the prevention of signs of unfairness. Therefore, the provision of quality services in certain fields, such as antitrust and competition, requires a high level of attorneys' expertise. This suggests that the list of functions of an attorney is not exhaustive. The restorative, preventive and protective functions are the basis of the attorney's activity in the field of administrative proceedings.

4. Conclusions

Therefore, the attorney-at-law as a representative of the administrative procedure is a procedural person who performs legal actions on his or her own behalf and in the interests of the person who has concluded a legal services agreement with him or her, within the limits of the powers granted to him or her, in order to protect the rights, freedoms and legitimate interests of the person he or she represents. The term "task of an attorney-at-law in administrative proceedings" should be understood as a specific, clearly planned scope of work performed by lawyers in the course of administrative proceedings to protect clients, represent their interests or provide other legal services necessary for resolving administrative cases. It is determined that the concepts of "tasks" and "functions" of an attorney-at-law in administrative proceedings are interrelated. In other words, the function arises in the process of specifying the task and is a qualitative characteristic of a particular phenomenon.

For the purpose of professional problem solving in administrative proceedings, the attorney-at-law is vested with the relevant functions, which are the main areas of their activities in defence, representation and provision of other legal support to the client in administrative cases. The list of functions of the attorney-at-law is not exhaustive. The restorative, preventive and protective functions are the basis of the attorney's activity in the field of administrative proceedings.

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ПРАВОВЕ РОЗУМІННЯ ФУНКЦІЙ ІНСТИТУТУ АДВОКАТУРИ В УКРАЇНІ

Анотація. *Метою* статті є визначення відмінностей між поняттями «завдання» і «функції» адвоката в адміністративному судочинстві, а також виокремити та проаналізувати основні з них. **Результати.** У статті розглянуто поняття «завдання» і «функції» адвоката в адміністративному судочинстві, які є взаємопов'язаними. Іншими словами, функція виникає в процесі конкретизації завдання і є якісною характеристикою конкретного явища. Окрім цього у статті проаналізовано суть, визначено роль і місце інституту адвокатури в системі діючих правоохоронних органів України. Визначено, що головною соціальною місією, основною метою адвокатури є захист прав людини. Це твердження має бути основоположним у вирішенні проблеми повноцінного функціонування цього дуже важливого правового інституту. На відміну від інших правозахисних органів громадянського суспільства, адвокати обов'язково беруть участь у здійсненні функцій держави і державних інститутів. Необхідно враховувати особливості цієї сфери як принципово важливу і, безумовно, необхідну умову, оскільки без участі адвоката процес розслідування і правосуддя буде не дієвим. Окрім цього, до основних функцій адвоката слід віднести відновлювальну, превентивну та охоронну. **Висновки.** Зроблено висновок, що адвокат як представник адміністративного процесу - це процесуальна особа, яка здійснює юридичні дії від свого імені і в інтересах особи, яка уклала з ним угоду про правову допомогу, в рамках наданих йому повноважень, з метою для захисту прав, свобод і законних інтересів особи, яку він представляє. Під терміном «завдання адвоката в адміністративному судочинстві» слід розуміти конкретний, чітко спланований обсяг роботи, виконуваної юристами в ході адміністративного провадження для захисту клієнтів, представлення інтересів або надання іншої юридичної допомоги, необхідної для вирішення адміністративних справ. Визначено, що поняття «завдання» і «функції» адвоката в адміністративному судочинстві взаємопов'язані. Іншими словами, функція виникає в процесі конкретизації завдання і є якісною характеристикою конкретного явища. Для професійного вирішення проблем в адміністративному судочинстві адвокат наділяється відповідними функціями, які є основними напрямками здійснюваної ним діяльності щодо захисту, представництва та надання іншої юридичної допомоги клієнту в адміністративних справах. Перелік функцій адвоката не є вичерпним. Відновлювальна, превентивна та охоронна функції становлять основу діяльності адвоката у сфері адміністративного судочинства.

Ключові слова: адвокат; правнича допомога; адвокатура; адвокатська діяльність.

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