

<https://doi.org/10.31489/2023L4/112-121>

UDC 347.921(574)

S. Zhamburbayeva

Karaganda University of the name of academician E.A. Buketov, Karaganda, Kazakhstan
(E-mail: sabisha_zh@mail.ru)

Agreement on legal assistance: legal regulation of the “success fee” in the Republic of Kazakhstan

The article is devoted to the study of the current legal regulation of the contract for the provision of legal assistance in the Republic of Kazakhstan, namely, the prohibition of the legislator on contracts that make the amount of payment for legal assistance provided by advocates dependent on the outcome of the case or the success of advocacy, also referred to as “success fees”, or contracts under which the lawyer receives part of the awarded amount. The paper draws attention to the difference between the regulation of the procedure for concluding paid contracts by advocates / lawyers and legal consultants, despite the fact that these subjects are equally admitted by the legislator to representation in civil proceedings. The author conducted a study and analysis of the opinions of various authors in order to understand the possible reasons for such a categorical point of view of the legislator in relation to the “success fee”, a comparative analysis is carried out between the norms of the Anglo-Saxon and Romano-Germanic systems of law in relation to this type of payment for services and remuneration, and also assesses the risk of the principal's refusal to fulfill his duty to payment for services rendered by a representative after receiving the desired positive result. In order to improve the Law “On Advocacy and Legal Assistance”, the author summarizes the need to introduce appropriate positive changes.

Keywords: civil procedural law, civil proceedings, contractual representation, representation on behalf, legal assistance, judicial procedural representation, lawyer, legal consultant, legal aid contract, success fee, remuneration of a representative.

Introduction

According to paragraph 3 of Article 13 of the Constitution of the Republic of Kazakhstan, everyone has the right to receive qualified legal assistance [1]. Ensuring this constitutional right to judicial protection is impossible without creating real conditions for the provision of qualified legal assistance, which in turn involves working out algorithms for paying the remuneration of a representative.

Payment of legal aid is a necessary condition for its implementation and proper functioning. Taking into account the fact that the institution of representation in the civil process is a procedural legal relationship, has internal and external sides and, accordingly, is subject to the rules of substantive and procedural regulation, it is impossible to ignore private-legal relations for the payment of lawyer services, as well as the possibility of encouragement for a quality result, especially when it comes to initially a hopeless case.

At the moment, based on the register provided by the Ministry of Justice, there are 12243 [2] active legal consultants, of which there were 7247 people during the first registration in the register of the authorized body in 2019. It is impossible to deny that the establishment by the legislator of the institute of these subjects admitted to legal practice in civil proceedings has had a significant impact on competitiveness, as a result of which it is possible to observe different costs of services provided by advocates and legal consultants.

In fact, there may be cases when a meager amount is taken for civil cases, which in their duration can reach more than one month. Thus, the contractor hardly receives a “salary” equal to the minimum standard established by the country, taking into account the total costs necessary for life, as well as for the very implementation of the representative's activities, including payment for premises, insurance, etc.

We suggest that you pay attention to the fact that a considerable part of the population of our country cannot afford qualified legal assistance, even despite the significant size of the claims against opponents. However, even in this scenario, any participant in litigation is interested in his representative acting most effectively, and often clients of lawyers are ready to encourage the achievement of the desired result financially, having received benefits in kind.

In this regard, in some countries, as in many legal systems, the regulatory structure “success fee” is used, which allows not only to postpone the payment of legal aid at the last moment of making the necessary decision by the jurisdictional authority, but also to give it a conditional character – depending on this result.

The position that exists in the modern Republic of Kazakhstan regarding the success fee is positive only with respect to legal consultants, but is strict and categorical with respect to lawyers, which in general is not only unfair, but also does not meet the socio-economic situation of the country.

Methods and materials

The methodological basis of the research was made up of general scientific methods of cognition, including both analysis and synthesis in order to decompose and combine the phenomenon under consideration into its component parts and into a single whole, induction and deduction – for the implementation of analytical reasoning from the general to the particular, analogy, consisting in the identity of the contract on legal assistance with other types of contract for the provision of services, etc. Along with general scientific methods of cognition, special legal methods were used, which made it possible to determine and clarify the special legal characteristics of the object of research. In particular, the formal legal method was used to establish definitions and to accurately follow the content of the conceptual and legal apparatus within the framework of analysis, a comparative legal method to establish links with international practical and scientific embodiments of the studied problems in this institute of civil procedural law.

In the process of writing the article, regulatory legal acts of the Republic of Kazakhstan were analyzed — the Constitution of the Republic of Kazakhstan, the Civil Procedure Code of the Republic of Kazakhstan, the Law of the Republic of Kazakhstan “On Advocacy and Legal Assistance”, as well as regulatory legal acts of foreign countries regulating the activities of representatives in relation to awarding a well-deserved award to a contractor under a contract for the provision of legal assistance.

The scientific and theoretical provisions of the “success fee” are studied in the works of the following authors: A. I. Bychkov, G. P. Chernyshev, A. G. Karapetov, N.S. Ermakova, A.N. Knyazev, G. A. Gadzhiev, V.A. Shvain, G. Kritzer, D.N. Azarov, etc.

Results and their discussion

The payment procedure and the amount of remuneration of the entity providing legal assistance regulated by Article 15 of the Law of the Republic of Kazakhstan “On Advocacy and Legal Assistance” [3] are determined by agreement of the parties.

According to Article 17 of the Law, legal assistance on a reimbursable basis is provided on the basis of a written contract for the provision of legal assistance, unless otherwise established by this Law and the laws of the Republic of Kazakhstan [3]. At the same time, in practice, other types of contracts may be concluded between the representative and the principal, including a civil law contract (GPH), a contract of assignment, etc.

The Basic Law regulating the activities of persons offering professional legal assistance has an article in its content that briefly indicates the main aspects of the content of the contract we are interested in. Thus, Article 47, under the essential terms of the contract establishing the relationship between the lawyer and the principal, implies:

1) indication of the surname, first name and patronymic (if any) of the lawyer or the name of the law firm that accepted the execution of the order as a defender or representative. According to the contract concluded between the law firm and the person who applied for legal assistance, the execution of the order as a defender or representative is accepted by a lawyer appointed by the law firm;

2) an indication of the form of organization of advocacy and the bar association, of which the lawyer who accepted the assignment is a member;

- 3) the subject of the order;
- 4) the amount and procedure for payment of legal assistance provided and reimbursement of lawyer's expenses related to defense and representation, as well as conducting conciliation procedures;
- 5) the procedure and conditions for termination of the contract [3].

However, the conditions quoted above, as you can see, relate only to lawyers, which is much more broadly prescribed than when it comes to other subjects of this activity, namely in relation to legal consultants. In this aspect, there is a brief reservation in article 76, which establishes that a legal consultant on his own behalf enters into a written contract for the provision of legal assistance with the person who applied to him. In the case of legal assistance provided by a legal consultant acting on the basis of an employment contract with a legal entity, a written contract for the provision of legal assistance to the client is concluded by a legal entity [3].

Thus, it can be concluded that the legal consultant, despite the conclusion of the same contract, is given more freedom in the process of determining the terms of the contract concluded between him and the client than the lawyer. Of course, we can talk about an analogy that can be applied to the emergence and settlement of such an agreement, but, nevertheless, the absence of a separate article in relation to legal consultants is a catchy omission on the part of the legislator. In particular, taking into account the fact that both those and other professional subjects in this field of activity are able to implement the constitutional right of citizens and legal entities to provide qualified legal assistance.

At the moment, neither the legislator, nor the Republican Bar Association, nor the Republican College of Legal Consultants have developed methodological recommendations for assessing the cost of legal services for the representation and protection of the interests of citizens and legal entities. Due to the lack of full regulation of the issue of payment assessment, entities providing legal assistance regulated by Article 15 of the Law of the Republic of Kazakhstan "On Advocacy and Legal Assistance" are guided by an internal assessment of their services, relying on existing practical experience and depending on the complexity of the client's request, at the same time abstractly providing for such important aspects in contracts as additional expenses during the resolution of a legal problem, etc.

At the same time, an increasing variety of billing options can be observed in foreign countries. There are many different forms of alternative payment mechanisms that lawyers engaged in private practice can turn to. Fixed-fee billing is the most popular approach to alternative payment mechanisms, but it's not the only option: contingency charges, reverse contingency fees, fixed fees, hybrid or mixed fees, success fees.

One of the less common, but still useful payment methods is the payment for "success". At first glance, the payment for success is very similar to the payment for unforeseen expenses. However, they have unique features – and advantages – that set them apart from other options.

The reward for success is a kind of alternative remuneration agreement in which the contractor under the contract for the provision of legal assistance provides his services in exchange for a percentage of the amount awarded to the client as a result of a court decision or settlement of the case. The commission is paid only in case of a successful outcome, but customers may need to pay expenses depending on what expenses are included in the original agreement.

Historically, the solution to the issue of remuneration for the work of a representative lies in the ethical and legal plane. According to legal historians, it was proposed and used in the law of Ancient Rome: court speakers and patrons of that time could count as a reward from their client only on an honorary gift (fee). For many years, the ethics of the client-lawyer relationship was in the contractual sphere, then in civil law [4; 23].

In the process of considering and discussing issues related to this type of payment for the provision of legal services, the following questions naturally arise: Should the amount of the fee depend on the case won? And how to evaluate the maximum work done by a lawyer in case of losing the case? What is the amount of gratitude measured in the case of a positive solution to the problem? The answers to these questions are still being sought by legal scholars, but most opinions boil down to the fact that it depends on various aspects: from life to professional. The amount of the fee may be affected by the volume and complexity of the work, the length of time required to complete it, the qualifications of the representative, the degree of urgency of the assignment. Early determination of the legal and factual complexity of the case, as well as the upcoming amount of labor, involves solving ethical issues and often subjective forecasting. Providing legal assistance in a case, a lawyer cannot guarantee the result, since it depends on the decision of the jurisdictional authority. In addition, even in relatively simple categories of cases, the subject of the claim often consists of claims, the final amount of which depends on the discretion of the court (compensation for moral or reputational dam-

age, an excessively large amount of contractual penalty, etc.). The existence of such requirements, largely independent of the will of the parties to the legal relationship of the representation, raises the question of determining the amount of remuneration taking into account this aleatory factor [5; 178].

No less debatable is the question of which criterion of court costs to attribute the success fee. The question of the legal nature of the "success fee", according to A.I. Bychkov, should be solved based on the nature of the services provided, namely, to recognize such services as court costs [6; 183].

In general, paying attention to the opinions of the authors, let's consider their opinions regarding this type of remuneration in general. As with all controversial issues, there are different points of view: both positive and negative regarding the functioning of such an institution.

G.P. Chernyshev notes that, firstly, an additional payment for the successful completion of the case by a lawyer to his remuneration for the legal services rendered will be a motivation for better provision of legal services. Secondly, the "success fee" is a guarantee of the availability of justice, which is expressed in the fact that in case of insufficient funds to pay an advance for legal support of the case, the parties may provide in the agreement on the provision of legal services a condition on the dependence of the fee on the result of the lawyer's activities. Thirdly, the inclusion of a provision on the "success fee" contributes to the effective distribution of risks between the legal service provider and the principal [7; 28].

A.G. Karapetov draws attention to the fact that the prohibition of the "success fee" will be at odds with the principle of freedom of contract, according to which the parties to the contract at their discretion determine the terms of the contract, if they do not contradict the requirements of the law and other legal acts [8; 819].

N.S. Ermakova in her research notes that the consolidation of the so-called "success fee" in the legislation will have a positive impact on work, as it will motivate them to work better. In addition, the "success fee" is considered by the author as an additional condition for ensuring the availability of justice. For example, if there is a lack of money to pay for services at a fixed cost, the parties can agree that the payment of the work will depend on the outcome of the case [9; 207].

According to A.N. Knyazev, if you become a participant in a risky operation that only partially depends on the professionalism of a specialist, and to a greater extent depends on other circumstances, then this activity turns into an entrepreneurial one, which is incompatible with his special status as a human rights defender [10; 100].

At the same time, in contrast to the above opinions, G. A. Hajiyeu believes that if the amount of remuneration for the provision of legal services depends on the successful outcome of the case in favor of the principal, the lawyer will strive to win the case "at any cost", including using illegal methods [11; 71].

I support the previous author, V.A. Schwein believes that setting the amount of remuneration depending on the outcome of the case is unacceptable. The author points out that the consolidation of such a principle in the contract will become a condition for the lawyer to use any methods and means to win the case, including illegal ones [9; 207].

G. Kritzer came to the conclusion that lawyers who work for the fee under study actually act as gatekeepers sorting out a significant number of potential clients on the grounds that their claims have no basis [12; 700; 13; 23].

D.N. Azarov believes that the existence of a condition on the fee for success can negatively affect the relationship between the client and the lawyer. The principal, due to the connection of the representative's remuneration with the outcome of the trial, may begin to abuse this provision: if the case is not resolved in his favor, he may refuse to pay the fee both for the professional's time spent and for the work done [6; 183]. According to the author, "the conditionality of the lawyer's remuneration from a positive result may lead to abuse on the part of the principal, expressed in the refusal to pay for the work done, since the case was not resolved in his favor. As a result, the effort and time spent by the lawyer are not compensated in any way".

In the context of this point of view, we believe that a compromise between the two positions can be considered an acceptable solution to the issue of the "success fee". Namely, remuneration should be paid for the legal services actually rendered, but at the same time, the parties to the contract may stipulate the payment of a "success fee" as a bonus, which is successfully practiced in various fields of activity [9; 27].

The analysis of various legal systems of the world shows that there are several approaches to the issue of "success fee", which are based on different principles of its regulation.

The Anglo-Saxon system of law is mainly characterized by the resolution of the "success fee", with the exception of certain categories of cases (criminal and family), and regulation is characterized by the principle of "what is allowed is not prohibited" [14; 268]. The most typical example is the United Kingdom, when, as

an alternative, the client can conclude an agreement to pay for the time spent by the lawyer based on his hourly rate, subject to the payment of an additional bonus – a “success fee” for a positive outcome of the case for the client. However, we note that in this country, where lawyers largely play the role of assistants to judges and depend heavily on them, until the end of the last century, such remuneration was not accepted precisely for the reason that a lawyer seeking victory at any cost could compromise his reputation as a representative of the court. Among other frequently mentioned disadvantages of this system, the “unhealthy excitement” that it introduces into the proceedings, the tendency to increase the amount of claims in the hope of getting a large sum, as well as the fact that the costs of the winning party for the services of a representative can be a heavy burden on the loser are often indicated. Therefore, it is logical that in legal systems where the losing party must fully reimburse the winner for legal costs, the “success fee” takes root with difficulty [15; 175].

In Australia, it is allowed to pay an additional fee to a lawyer in the event of a positive outcome of the case for the plaintiff, which should not exceed 25% of the amount of the usual fee fixed by the agreement. However, it is prohibited to set such a fee as a percentage of the compensation received by the client.

In Canada, this principle of remuneration is implemented only if the agreement that provides for its payment is approved by the court [16; 21].

In the state of Hawaii, the USA, as well as other states, it is allowed to make transactions under the suspensive condition of remuneration paid if the lawyer achieves a favorable result for the client. Special requirements are imposed on the content of such transactions. In particular, the condition on the success fee must be put into written form; it must contain an indication of the method of determining the amount of remuneration, the procedure for paying judicial, organizational and other expenses, and other costs of the client. In several states of America, it is prohibited to conclude agreements with the condition of a success fee, but these restrictions apply only in certain circumstances. As an example, we can cite the provisions of the ethical codes of such states as Alaska, Idaho, Illinois and others, where it is prohibited to include a condition on the success fee in the agreement on the provision of legal services to the accused in a criminal case, as well as in the provision of legal assistance to family members, provided that the payment of remuneration for services is made dependent on the preservation of marriage or the amount of alimony paid for the maintenance of a spouse (in all the listed codes, the rule is set in norm 1.5.d). Norm 2-200 and the provisions of the fourth chapter of the Rules of Professional Conduct of California Lawyers, oddly enough, do not impose special requirements on, although it contains rules on determining the excess of the fee. At the same time, chapter 4, entitled “Financial relations with the client”, separately provides for a rule on gifts coming from clients. This rule boils down to the prohibition to encourage the client to give substantial gifts or make testamentary refusals in favor of the lawyer, unless the client is a member of the lawyer's family [17].

If we talk about the countries of continental law (Austria, Belgium, Bulgaria, Great Britain, Germany, Greece, Denmark, Spain, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Finland, France and Switzerland), then, despite the presence of a number of However, the application of the success fee is treated quite positively.

Initially, in Germany, fees of this kind were completely prohibited, but later the Constitutional Court recognized the ban as disproportionate and unconstitutional, as a result of which the use of such fees was strengthened. A similar situation is observed in Spain, but the cancellation of the ban was influenced by another direction, namely the Law “On Competition”. The Supreme Court ruled that such a ban has a negative impact on competition, since the lawyer and his client cannot freely set the amount of the fee for the provision of legal services, and thus indirectly contributes to the establishment of a minimum fee rate. Italian legislation allows for the regulation of a lawyer's fee by an agreement between a lawyer and a client, and in its absence – in accordance with a fixed tariff system. The “success fee” in Italy is a percentage of the compensation or compensation received in the case. If the case is lost, the lawyer does not receive payment for his services, but the client undertakes to pay the costs to the winning party. Until 2015, fees were used in both criminal and civil cases in South Korea, but then the Supreme Court of South Korea ruled that agreements on the “success fee” for representation in criminal cases were invalidated as contrary to public policy. The Court considered that establishing a connection between a conditional fee in criminal cases and the results of an investigation or trial in order to obtain financial compensation is contrary to morality and public order [16; 21].

Thus, having analyzed the system of functioning of the remuneration system at the expense of the “success fee” institute, we believe that paying for success is a good option for clients who prefer predictable costs and deadlines and have clear goals. The reward structure for success is most often used for litigation, but can

be effectively applied in other areas of practice. In addition, such a fee can also act as a kind of “encouragement” or “performance reward” for persons providing legal assistance. In accordance with this condition in the contract, customers can pay a clear amount for the services of a representative in advance, but agree to an additional fee if the legal issue is successfully resolved for them.

On the one hand, a “success fee” can be beneficial by helping to encourage you to work harder to achieve a successful result in any case that a legal entity faces. In addition, this kind of remuneration can make services available to a wider range of clients who otherwise would not have the capital necessary to obtain legal services.

On the other hand, the representative knows in advance that any specific agreement is always fraught with risks, and success fees are no exception. The risks may be significantly higher, but the benefits may be the same. In this case, the person who provides the legal service should carefully weigh the chances of winning in a particular case, the number of hours required to complete the work, and the likelihood that the case may take months or even years to complete, which will cost them more than the fee they originally agreed with the client.

In the context of this risk, let us pay attention to the article “Introduction of the success fee into Russian legislation”, written by A.A. Maslov, who cited the curve of the client's “direct” gratitude to his representative in civil proceedings [18; 128] (Fig.).

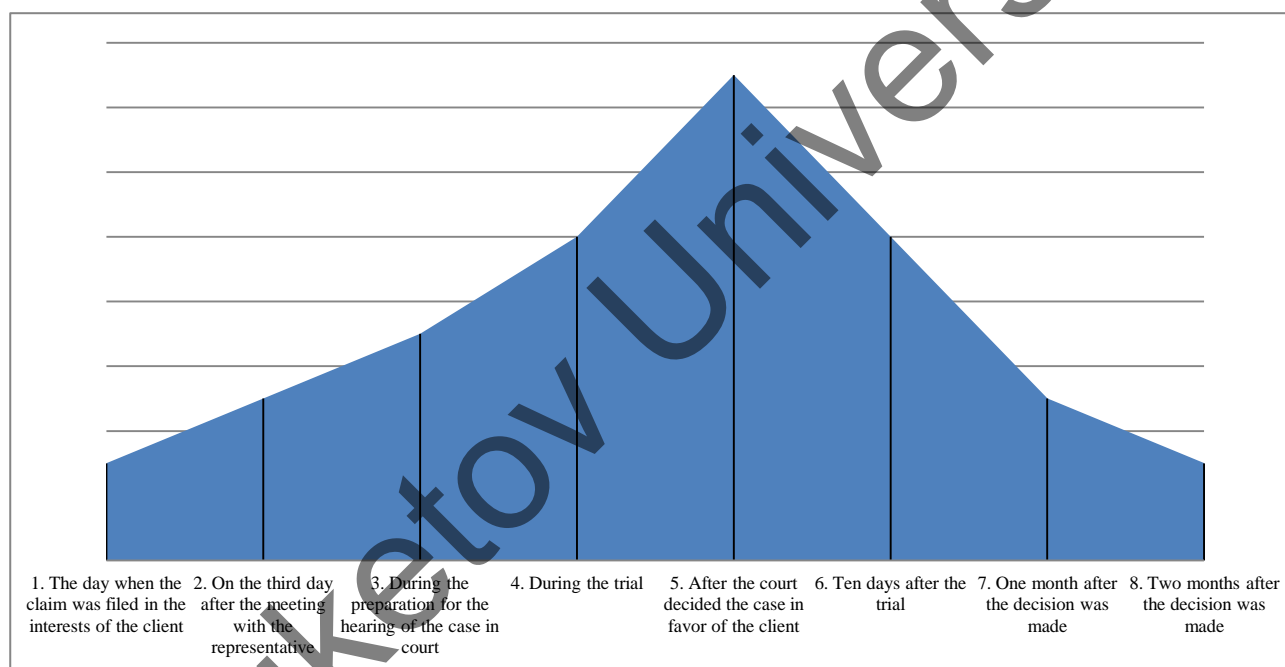


Fig. The curve of the “direct” gratitude of the client to his representative

The author reproduced the situation on a legal entity engaged in the sale of vegetable products, namely tomatoes, as a result of which the company suffered losses.

So, the first thought that arises in the subject is related to filing a lawsuit when the client thinks about his disadvantage and reproaches himself for negligent attitude in checking products that he was obliged to check before direct implementation. After analyzing the situation, an idea is illustrated on the third day, after a meeting with his representative, when the client thinks only in a negative direction, which can lead up to the bankruptcy of a legal entity. In the process of preparing the case for the trial, the principal is amazed by the resourcefulness of his representative, who not only thoroughly laid out all the issues, but also analyzed all the documents in detail, pointing out the shortcomings in the business process. During the trial, the client is amazed at the work that the representative has done and is still doing. The peak of delight is at the so-called fifth stage, which implies the successful resolution of the case and the moment when the client thinks only about what a wonderful specialist in the field of law he turned to, and he has no doubts about whether it was worth contacting anyone for help at all. With the subsequent stage, the enthusiasm goes down, as a result of which the winning side no longer takes into account the work that has been done and believes that the situation would have led to a win in any case. The extreme stage, according to the author, comes after two

months, when the categorical nature of the business entity reaches the point that he is outraged by the need to make a payment, and also illustrates his general doubts about the need for a lawsuit that only wasted his personal time.

There is no doubt that in this case, when it comes exclusively to the success fee without paying the principal amount for the work, there may be a need for a new trial, but already between a former client and a legal representative.

Conclusions

If we summarize the results of our research, we can say that there are enough topical issues in the topic under discussion that require attention and regulation by the legislator.

The “success fee” stimulates work and creates additional interest in the outcome of the case for the entity providing legal assistance. Often the client is ready to pay for legal services only if there is a result, which automatically implies mutually beneficial cooperation between the customer and the contractor. The “success fee” can also be considered as a way to make qualified legal assistance available to citizens who are unable to pay for fruitless work. In practice, there are widely known cases when unscrupulous specialists take on knowingly losing cases and deliberately delay litigation by resorting to various kinds of tricks. At the same time, they assure their client of the extraordinary complexity of the tasks they perform and the inevitable successful outcome of the case, thereby “pumping” money out of their client. Using the “success fee” as a method of paying a lawyer in this example will make such a long-term, fruitless cooperation for the principal unprofitable, first of all, for the contractor, even if this form of remuneration will be as a supplement.

The ban on remuneration in excess of the contract amount is an acute problem in the legal system of the Republic of Kazakhstan and remains one of the most controversial and discussed. The categorical point of view of the legislator regarding the application of the success fee is, on the one hand, quite justified, given the provisions that we have described above, and, in addition, in this way, the civil process proceeds according to established principles, excluding possible abuse of their duties by representatives when they seek to achieve a positive result at any cost. However, at the same time, regardless of the type of court proceedings, a professional representative providing qualified legal assistance must ensure the most effective protection of the interests of his client, therefore the level of professionalism should not change depending on the amount and order of payment of remuneration, which can only serve as an additional incentive and motivation for providing high-quality legal assistance.

The same point of view is held in the process of regulating the activities of a professional representative in many foreign countries. On this basis, it is advisable to revise article 47 of the Law “On Advocacy and Legal Assistance” and allow the parties to the contract for the provision of legal assistance to include a condition on the fee for success, if they agree on such remuneration. Among other things, the ban on receiving the “success fee” provided for, obviously, did not affect the legal consultant, which is completely unfair to the Institute of advocacy, which, unlike the first institute, has been functioning for a long time and ensures the implementation of paragraph 3 of Article 13 of the Constitution of the Republic of Kazakhstan.

According to the author of the study, the removal of the ban on contracts that make the amount of payment for legal assistance provided by lawyers dependent on the outcome of the case or the success of advocacy, or contracts under which a lawyer receives a portion of the amount awarded, will have a positive impact on the professional activities of lawyers, which is important for the modernization of the legislation of our country.

References

- 1 Конституция Республики Казахстан. — [Электронный ресурс]. — Режим доступа: https://online.zakon.kz/Document/?doc_id=1005029&mode=p&page=1.
- 2 Автоматизированная информационная система органов исполнительного производства. Министерство юстиции Республики Казахстан. — [Электронный ресурс]. — Режим доступа: <https://aisoip.adilet.gov.kz/useful-info/legal-advisers?lang=ru&ysclid=ln8ol6vqxe508958913>.
- 3 Закон Республики Казахстан «Об адвокатской деятельности и юридической помощи». — [Электронный ресурс]. — Режим доступа: https://online.zakon.kz/Document/?doc_id=33024087.
- 4 Багреева Е.Г. «Гонорар успеха»: правовая и этическая природа / Е.Г. Багреева, С.В. Петухов // Евразийская адвокатура. — 2019. — № 6 (43). — С. 23–25.

- 5 Трезубов Е.С. «Гонорар успеха»: старая песня на новый лад / Е.С. Трезубов, М.А. Розе // Вестн. Кемеров. гос. ун-та. Сер. Гуманитарные и общественные науки. — 2020. — № 2 (14). — С. 177–185.
- 6 Степанова Д.Н. К вопросу о правовом регулировании гонорара успеха / Д.Н. Степанова, Н.А. Емелина // Электрон. науч. журн. «Наука. Общество. Государство». — 2020. — Т. 8. № 3 (31). — С. 180–186.
- 7 Павлова Г.Г. «Гонорар успеха» в деятельности юриста и адвоката / Г.Г. Павлова, А.Р. Хадеева // Правопорядок: история, теория, практика. — 2019. — № 4 (23). — С. 27–33.
- 8 Карапетов А.Г. Договорное и обязательственное право (Общая часть). Постат. коммент. к ст. 307–453 Гражданского кодекса Российской Федерации / отв. ред. А.Г. Карапетов. — М.: Статут, 2017. — 1120 с.
- 9 Лошкарев А.В. «Гонорар успеха» адвоката: теория и актуальные проблемы правоприменения / А.В. Лошкарев, А.И. Ширяева // Междунар. журн. гуманитар. и естеств. наук. — 2021. — № 3–1. — С. 207–210.
- 10 Князев А.Н. Гонорар успеха в договоре оказания юридической помощи / А.Н. Князев // Корпоративное управление и инновационное развитие экономики Севера // Вестн. Науч.-исслед. центра корпоративного права, управления и венчурного инвестирования Сыктывкар. гос. ун-та. — 2007. — № 2. — С. 97–103.
- 11 Варфоломеев Б.В. «Гонорар успеха» в профессиональной деятельности юриста / Б.В. Варфоломеев // Скиф. — 2020. — № 5–2 (45). — С. 70–73.
- 12 Князев Д.В. Оплата юридических услуг в гражданском процессе США: гонорар успеха, американское правило и их влияние на судебную нагрузку / Д.В. Князев // Вестн. СПб. гос. ун-та. Сер. 14. Право. — 2021. — № 3. — С. 693–711.
- 13 Kritzer Н.М. Contingency fee lawyers as gatekeepers in the civil justice system / Н.М. Kritzer // Judicature. — 1997. — P. 22–29.
- 14 Ярошевская А.М. Договор о предоставлении юридических услуг: правовое регулирование «гонорара успеха» в России и опыт данного института в зарубежных странах / А.М. Ярошевская, З.Р. Бахриева // Уч. зап. Крым. федерал. ун-та им. В.И. Вернадского. Юридические науки. — 2018. — № 2. — С. 262–270.
- 15 Верещагин А. «Гонорар успеха» перед лицом конституционного правосудия / А. Верещагин // Сравнительное конституционное обозрение. — 2007. — №1 (58). — С. 173–178.
- 16 Войтов И.В. «Гонорар успеха» в России и зарубежных странах: специфика правового регулирования / И.В. Войтов, Р.А. Чеботарев // Урал. журн. прав. исслед. — 2021. — № 4 (17). — С. 19–27.
- 17 Орешин Е.В. Этико-правовое регулирование взаимоотношений адвоката и клиента в США / Е.В. Орешин // Вопросы современной юриспруденции. — 2013. — № 29. — [Электронный ресурс]. — Режим доступа: <https://cyberleninka.ru/article/n/etiko-pravovoe-regulirovanie-vzaimootnosheniy-advokata-i-klienta-v-ssha?ysclid=lnan45yyno196229861>
- 18 Маслов А.А. Ведение гонорара успеха в российское законодательство с 2017 года / А.А. Маслов // Вестн. Нижегород. ун-та им. Н.И. Лобачевского. — Право. — 2018. — № 3. — С. 127–132.

С. Жамбурбаева

Заң көмегін көрсету туралы шарт: Қазақстан Республикасында «табыс ақысын» құқықтық реттеу

Мақала Қазақстан Республикасында заң көмегін көрсету туралы шарттың қолданыстағы құқықтық реттелуін зерделеуге арналған, атап айтқанда заң шығарушының шарттарға тыйым салуы, істің нәтижесіне немесе адвокаттық қызметтің сәттілігіне байланысты адвокаттар көрсететін заң көмегіне ақы төлеу мөлшері, сондай-ақ адвокат белгіленген соманың бір бөлігін алуда жасалатын немесе «табыс ақысы» деп аталатын шарттар да қарастырылған. Жұмыста заң шығарушы осы субъектілерді азаматтық сот ісін жүргізуде өкілдік еткенге дейін бірдей жол бергеніне қарамастан, адвокаттар мен заң кеңесшілерінің өтеулі шарттар жасасу тәртібін регламенттеу арасындағы айырмашылыққа назар аударылған. Автор әр түрлі авторлардың пікірлерін зерттеп, талдап, заң шығарушының «табыс ақысына» қатысты осындай категориялық көзқарасының мүмкін себептерін түсіну үшін, қызмет пен сыйақыны төлеудің осы түріне қатысты ағылшын-саксон және роман-герман құқық жүйелерінің нормалары арасында салыстырмалы талдау жүргізген, сондай-ақ, сенім білдірушінің қажетті оң нәтиже алғаннан кейін өкіл көрсеткен қызметтерге ақы төлеу жөніндегі өз міндетін орындаудан бас тарту тәуекелі бағаланған. Жүргізілген талдау негізінде оны жетілдіру мақсатында «Адвокаттық қызмет және заң көмегі туралы» Заңға тиісті оң өзгерістер енгізу қажеттілігі тұжырымдалған.

Кілт сөздер: азаматтық іс жүргізу құқығы, азаматтық сот ісін жүргізу, шарттық өкілдік, тапсырма бойынша өкілдік, заң көмегі, сот ісін жүргізу өкілдігі, адвокат, заң консультанты, заң көмегін көрсету шарты, табыс алымы, өкілдің сыйақысы.

Договор об оказании юридической помощи: правовое регулирование «гонорара успеха» в Республике Казахстан

Статья посвящена изучению действующего правового регулирования договора об оказании юридической помощи в Республике Казахстан, а именно запрету законодателя на договоры, ставящие размер оплаты юридической помощи, оказываемой адвокатами, в зависимость от исхода дела или успеха адвокатской деятельности, также именуемые «гонорарами успеха», или договоры, по которым адвокат получает часть от присужденной суммы. Автор обращает внимание на различие между регламентированием порядка заключения возмездных договоров адвокатами и юридическими консультантами, несмотря на то, что данные субъекты одинаково допущены законодателем до представительства в гражданском судопроизводстве. Кроме того, автором проанализированы мнения различных авторов, чтобы понять возможные причины столь категоричной точки зрения законодателя в отношении «гонорара успеха», проведен сравнительный анализ между нормами англосаксонской и романо-германской систем права в отношении данного вида оплаты услуг и вознаграждения, а также оценен риск отказа доверителя от выполнения своей обязанности по оплате оказанных услуг представителем после получения желаемого позитивного результата. На основании проведенного анализа резюмирована необходимость внесения соответствующих позитивных изменений в Закон РК «Об адвокатской деятельности и юридической помощи» с целью его усовершенствования.

Ключевые слова: гражданское процессуальное право, гражданское судопроизводство, договорное представительство, представительство по поручению, юридическая помощь, судебное-процессуальное представительство, адвокат, юридический консультант, договор оказания юридической помощи, «гонорар успеха», вознаграждение представителя.

References:

- 1 Konstitutsiia Respubliki Kazakhstan [Constitution of the Republic of Kazakhstan]. (n.d.). online.zakon.kz. Retrieved from https://online.zakon.kz/Document/?doc_id=1005029&mode=p&page=1 [in Russian].
- 2 Avtomatizirovannaiia informatsionnaia sistema organov ispolnitelnogo proizvodstva. Ministerstvo yustitsii Respubliki Kazakhstan [Automated information system of enforcement bodies. Ministry of Justice of the Republic of Kazakhstan]. (n.d.). aisoip.adilet.gov.kz. Retrieved from <https://aisoip.adilet.gov.kz/useful-info/legal-advisers?lang=ru&ysclid=ln8o16vqxe508958913> [in Russian].
- 3 Zakon Respubliki Kazakhstan «Ob advokatskoi deiatel'nosti i yuridicheskoi pomoshchi» [The Law of the Republic of Kazakhstan “On advocacy and legal assistance”]. (n.d.). online.zakon.kz. Retrieved from https://online.zakon.kz/Document/?doc_id=33024087 [in Russian].
- 4 Bagreeva, E.G., & Petukhov, S.V. (2019). «Gonorar uspekha»: pravovaia i eticheskaia priroda [“Success Fee”: legal and ethical nature]. *Evraziiskaia advokatura — Eurasian Advocacy*, 6 (43), 23–25 [in Russian].
- 5 Trezubov, E.S., & Roze, M.A. (2020). «Gonorar uspekha»: staraia pesnia na novyi lad [“Success Fee”: an old song in a new way]. *Vestnik Kemerovskogo gosudarstvennogo universiteta. Seriya Gumanitarnye i obshchestvennye nauki — Bulletin of Kemerovo State University. Series: Humanities and Social Sciences*, 2 (14), 177–185 [in Russian].
- 6 Stepanova, D.N., & Emelina, N.A. (2020). K voprosu o pravovom regulirovanii gonorara uspekha [“Success Fee”: an old song in a new way]. *Elektronnyi nauchnyi zhurnal «Nauka. Obshchestvo. Gosudarstvo» — Electronic scientific journal “Science. Society. The State”*, Vol. 8, 3 (31), 180–186 [in Russian].
- 7 Pavlova, G.G., & Hadeeva, A.R. (2019). «Gonorar uspekha» v deiatel'nosti yurista i advokata [“Success fee” in the activities of a lawyer]. *Pravoprikladok: istoriia, teoriia, praktika — Law and order: history, theory, practice*, 4 (23), 27–33 [in Russian].
- 8 Karapetov, A.G. (2017). Dogovornoe i obiiazatel'stvennoe pravo (Obshchaia chast). Postateinyi kommentarii k statiam 307–453 Grazhdanskogo kodeksa Rossiiskoi Federatsii [Contract and obligation law (general part). Article-by-article commentary to Articles 307-453 of the Civil Code of the Russian Federation]. Moscow: Statut [in Russian].
- 9 Loshkarev, A.V., & Shiryayeva, A.I. (2021). «Gonorar uspekha» advokata: teoriia i aktualnye problemy pravoprimereniia [Lawyer's “Success Fee”: theory and actual problems of law enforcement]. *Mezhdunarodnyi zhurnal gumanitarnykh i estestvennykh nauk — International Journal of Humanities and Natural Sciences*, 3–1, 207–210 [in Russian].
- 10 Knyazev, A.N. (2007). Gonorar uspekha v dogovore okazaniia yuridicheskoi pomoshchi [Success fee in the legal aid contract]. *Korporativnoe upravlenie i innovatsionnoe razvitie ekonomiki Severa: Vestnik Nauchno-issledovatel'skogo tsentra korporativnogo prava, upravleniia i venchurnogo investirovaniia Syktyvkar'skogo gosudarstvennogo universiteta — Corporate Governance and Innovative Development of the Economy of the North: Bulletin of the Research Center of Corporate Law, Management and Venture Investment of Syktyvkar State University*, 2, 97–103 [in Russian].
- 11 Varfolomeev, B.V. (2020). «Gonorar uspekha» v professionalnoi deiatel'nosti yurista [“Success fee” in the professional activity of a lawyer]. *Skif — Skif*, 5–2 (45), 70–73 [in Russian].

12 Knyazev, D.V. (2021). Oplata yuridicheskikh uslug v grazhdanskom protsesse SShA: gonorar uspekha, amerikanskoe pravilo i ikh vliianie na sudebnuiu nagruzku [Payment for legal services in US civil proceedings: the success fee, the American rule and their impact on the judicial burden]. *Vestnik Sankt-Peterburgskogo universiteta. Seriya 14. Pravo — Bulletin of Saint Petersburg University. Series 14. Law*, 3, 693–711 [in Russian].

13 Kritzer, H.M. (1997). Contingency fee lawyers as gatekeepers in the civil justice system. *Judicature*, 22-29.

14 Yaroshevskaya, A.M., & Bahrieva, Z.R. (2018). Dogovor o predostavlenii yuridicheskikh uslug: pravovoe regulirovanie «gonorara uspekha» v Rossii i opyt dannogo instituta v zarubezhnykh stranakh [Agreement on the provision of legal services: legal regulation of the “success fee” in Russia and the experience of this institute in foreign countries]. *Uchenye zapiski Krymskogo federalnogo universiteta imeni V.I. Vernadskogo. Yuridicheskie nauki — Scientific notes of the V.I. Vernadsky Crimean Federal University. Juridical sciences*, 2, 262–270 [in Russian].

15 Vereshchagin, A. (2007). «Gonorar uspekha» pered litsom konstitutsionnogo pravosudiia [“Success Fee” in the face of constitutional justice]. *Sravnitelnoe konstitutsionnoe obozrenie — Comparative Constitutional Review*, 1 (58), 173–178 [in Russian].

16 Voitov, I.V., & Chebotarev, R.A. (2021). «Gonorar uspekha» v Rossii i zarubezhnykh stranakh: spetsifika pravovogo regulirovaniia [“Success fee” in Russia and foreign countries: specifics of legal regulation]. *Uralskii zhurnal pravovykh issledovaniy — Ural Journal of Legal Research*, 4 (17), 19–27 [in Russian].

17 Oreshin, E.V. (2013). Etiko-pravovoe regulirovanie vzaimootnoshenii advokata i klienta v SShA [Ethical and legal regulation of lawyer-client relations in the USA]. *Voprosy sovremennoi yurisprudentsii — Issues of modern jurisprudence*, 29. Retrieved from <https://cyberleninka.ru/article/n/etiko-pravovoe-regulirovanie-vzaimootnosheniy-advokata-i-klienta-v-ssha?ysclid=lnan45yyno196229861> [in Russian].

18 Maslov, A.A. (2018). Vedenie gonorara uspekha v rossiiskoe zakonodatelstvo s 2017 goda [Maintaining the success fee in Russian legislation since 2017]. *Vestnik Nizhegorodskogo universiteta imeni N.I. Lobachevskogo. Pravo — Bulletin of the Nizhny Novgorod University named after N.I. Lobachevsky, Law*, 3, 127–132 [in Russian].