

## The concept, value, and the procedural position of defense attorney at the preliminary investigation

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**Abstract.** In article on the basis of the analysis of the legislation of the RK and some foreign countries about lawyer activity and legal profession, provisions Constitution of RK Criminal Procedure Code and the Law of RK "About lawyer activity" and scientific literature author considers a question of a concept "the professional rights of the lawyer defender". The article examines the effectiveness of the exercise of advocate's powers, depending on procedural guarantees fixed in law. The author researches the meaning and the role of procedural position of the defense attorney and notes that the position should be developed for proper exercise of advocate's powers in criminal proceedings. The scientific-practice work analyses requirements of quality of professional defense in criminal cases. If still recently these requirements were of more part the internal norms of professional ethics of the lawyer's community, now there are the real legal imperatives. The article analyses the provisions of some Codes of Professional Ethics, opinions of some researchers, provisions of legislation, basic issues of ethic of representatives of advocacy, ways of negotiation of the existing problems.

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### Introduction

The international community attaches utmost importance to accessibility for people qualified legal assistance and, consequently, the effectiveness of institutions to provide such assistance. In accordance with subparagraph "c" section 3, art. 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms, every defendant has the right to "defend himself in person or through counsel selected, or if he has not sufficient means to pay for counsel, counsel must be provided free of charge to him" [1]. Specified international law generally reflected in section 3 art. 13 of the Constitution of the RK: "Everyone has right to receive qualified legal assistance. In the cases provided by law, legal assistance is provided free, thus the state has undertaken to ensure everyone who wants a high level of any type of legal assistance provided. It should be noted, moreover, not only in criminal proceedings, but also in any other sphere of activity where there is a need for such assistance.

In terms of ensuring effective implementation of this right now it is accepted to judge the democracy not only justice but also the whole political regime of a particular state [2, p. 26].

A similar honor, but at the same time incredibly difficult mission entrusted to the state attorney, because it is his work, according to section 1 art. 1 of the RK Law "About lawyer activity" is defined as a qualified legal assistance.

"The bar is the same ancient origin as the judicial title. (Advocatus, Latin, means "designed" that means designed to protect in judge, lead matters). Like the judge, the bar is a social position, which aims to protect the rights of a private person. But at a time when the judge protects those rights by virtue of their government, the lawyer can only help the fact that it is his knowledge of the laws of the customer and tries to give a favorable litigation for the last line" [3, p. 198].

Currently in the world there are about 4 million lawyers. This includes approximately 850 thousand lawyers from the United States, thousand - from the European Community, thousand - from India, thousand - from Brazil, and about 1500 thousand - from remaining part of the world. As a whole, excluding Japan, we can say that the more developed country, the greater number of lawyers it employs. In nowadays, in the western hemisphere the number of presenters of this profession has increased significantly. If in 1970 year only a few law firms had in the staff of 100 lawyers, now in the world are about 1 thousand mega firms. The volume of the sums on which legal services have been rendered has essentially increased also [4, p. 18].

In Russia, according to the Russian Ministry of Justice, lawyers in the registers of the Russian Federation was incorporated 58 872 lawyers organized in body, bureau and attorney offices [5, p. 2]. According to the Committee of registration service and legal assistance of the Ministry of Justice

of the Republic of Kazakhstan at the present time (2009y.), the license for advocate activity have 9 thousand 179 citizens of the RK. In fact, lawyers are only 3 thousand 795 persons or 41% [6].

Unfortunately, in Kazakhstan, the Bar and advocacy are not held in such respect, as in the developed countries of Western Europe and the United States. In these countries the bar -a highly prestigious institution, which enjoys great trust and influence. Suffice it to say that the judges of British House of Lords - barristers with 15 years experience staying in the bar. Advocacy - a way to master (referee). Each judge in the past was lawyer. Even the clothes of lawyers in court (robe and wigs) basically same with the judges, which emphasizes they belong to a single profession, equality and mutual respect. In the U.S. there are about 60% of the total numbers of lawyers around the world. The following data shows the socio-political role of attorney diploma holders in the United States. From 42 U.S. presidents, were lawyers; particularly lawyers by profession were Thomas Jefferson, Abraham Lincoln, FD Roosevelt, Truman G. Richard Nixon, Bill Clinton, and Barack Obama. Over 65% of senators and almost half of the members of the Representatives House of U.S. congress are lawyers. Holders of a lawyer diploma are half of the state governors and 40% of the diplomats. About 45% of those who have held since the 1960's senior positions in government, were lawyers, of the state apparatus were former lawyers [7, p. 235].

One of the most difficult and responsible types of legal assistance is provided to work as a defense lawyer in criminal proceedings because of the possibility of a substantial limitation and infringement of rights, freedoms and lawful interests of individuals.

According to section 1 art.70 Criminal Procedure Code, a defender - a person in a manner prescribed by law the rights and interests of suspects and defendants and provides them with legal assistance. It is appropriate to note the following: advocate - a person performing "protection". Giving a definition of the concept of defense counsel, the legislator is on the verge of violation of the rules of logic, called the "vicious circle". Meanwhile, we have what we have. As a defender attorney is involved. Attorney - a citizen of the Republic of Kazakhstan, which has a law degree, obtained a license to engage in advocacy, definitely must be a member of the Bar and provide legal assistance in a professional manner within the advocate activity, which regulates by the law of advocate activity (Section 1, Art. 7of the Law "On Advocacy"). With the assistance of counsel in criminal proceedings as a defense, without him, the protection of the suspect,

accused, convicted, acquitted may exercise his or her spouse(husband) or a close relative or guardian, trustee or representative of the organization, or in the care of dependents that are suspect, accused, defendant, convicted or acquitted. Foreign lawyers are permitted to participate in the proceedings as counsel, if it is an international treaty of the Republic of Kazakhstan with the appropriate State on a mutual basis, in the manner determined by law (Part 2 art. 70 CPC). In criminal proceedings, regardless of whether such alternative defense of legal education and practical work experience in the legal profession, participate in only together with a lawyer.

In part 3 art. 70 Code of Criminal Procedure states that a lawyer be allowed to participate in the case after being charged (when the person subject to an order to prosecute a defendant or in the court opened a criminal case of private prosecution, as well as drafted and approved by the head of a body of inquiry report charges) or recognizing a person suspects in accordance with part 1 art. 68 CPC suspects ( so, when against a person prosecuted in connection with suspicion of having committed a crime of which to him announced investigator, or carried out the detention or restraint applied to the charge), as well as any subsequent time of the criminal proceedings. In these parts provides a variety of criminal and procedural aspects of the situation, from which participates in the case defender. Bezlepkin B.T. relatively moments when it comes defense attorney, writes: "Their common sense consists in that it is in these moments in the case appears, or the accused or suspect. Can only be protect, for whom "attack" was, so anyone accused or suspected and officially announce about it. From this moment the inquiry officer, investigator, prosecutor, starts to make function of criminal prosecution and pretrial production becomes competitive nature" [8, p. 84]. We cannot agree with the opinion of this processing person. In our opinion, the meaning of the above regulations (Part 3. Art. 70, Part 1, art. 68 CPC), consists in that the right to receive legal assistance attorney- counsel is guaranteed to every person regardless of his formal procedural status, including from the recognition of detainees or suspects, if authorized body authority against that person action is taken, that really restricts the rights and personal inviolability, including freedom of movement.

Justice can only happen when heard all the arguments "for" and "against" the accused, the suspect, when by the latest guaranteed the opportunity to present their evidence, their explanations, etc. as suspect, the accused does not have the legal knowledge, is not able to fully withstand the representatives of the government

carrying out the investigation, prosecution, the prosecution, so far they need a professional advocate. Equality between the prosecution and the defense provided firstly and foremost by advocates. Withstand to accuser - a professional lawyer can only defender - a professional lawyer (attorney). Without a lawyer is impossible not only equal rights in criminal proceedings, but the most important realization of the constitutional principle of equality everyone in front of the law and judge, because this principle can be achieved only when the prosecution and defense - equal forces: good knowledge of the law, justice, professionalism, i.e. exactly what should be equally and may have only professional lawyers - prosecutor and attorney.

The role of defense attorney is one of the most discussed questions in modern Western countries legal system researches [9].

The US Model Rules of Professional Conduct define the role of the attorney as threefold: "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." [10]

Some scholars take the position that the criminal defense attorney has one role, zealously representing the client, within the bounds of the law, and assert that the role of the criminal defense attorney to protect the accused against the power of the government dictates the attorney's moral obligations [11].

For the profession of lawyer the moral foundations of his work have a special meaning. The lawyer is faced with human grief, resentment, moral injury and suffering, which requires from him not only compassion, but great moral effort. Beside, most lawyers want to make a career, a name which gives not only material but also a deep moral satisfaction. However, to gain a good name, reputation is not possible without observance of the moral and legal foundations of professional protection.

The famous French attorney of the nineteenth century Francois Etienne Mollo once wrote: "The profession of an attorney is not about how to write papers or speeches, also everyone should write correctly and clearly express thoughts, the essence of it in the spirit of moral principles, in human rights ideas. A real attorney must bring himself all his abilities as a sacrifice for the sake of other people, to become speaker in the name of oppressed innocence, to be happy on what can reach out to rescue the poor, and test with the moral satisfaction, which is more preferable than the biggest fees" [12, P. 263].

To attorney's ethics were devoted many works of prerevolutionary and modern lawyers, who are constantly emphasized the necessity of moral

impeccability of lawyer. Advocacy has been attacked more often due to the fact that lawyers are morally poor. After F.M. Dostoevsky some claim that the lawyer cannot avoid the falsehood. In other words, claims that attorney - is "doomed to unscrupulous people" [13]. On the one hand, he considered ethical and "kind" when the lawyer is using his talent and work to protect the poor, and he is friend of humanity. On the other hand, the bar seemed to FM Dostoevsky as "a kind of young school cunning mind and dried heart, school of perversion of common sense when necessary, fearless and with impunity, and constant and relentless." This dual perception remains to this day.

Here is, what about this president of the Federal Chamber of Advocates of Russia Elena Semenyako writes: "From the standpoint of ordinary consciousness, the notion of" ethics "and" morality "can hardly be used to counsel a person who has committed an immoral act, the more over a crime. However, this society undoubtedly needs lawyers...Especially in this duality lies feature principles which form ethical basis of the legal profession "[14, p. 13].

Rights of the Union of Lawyers of Kazakhstan president A.K. Tugela, who notes: "... no laws will not allow functioning normally for the Bar, if lawyers themselves do not work out a standards and rules of conduct." [15, p. 153].

Unfortunately, lawyers often do not really care about, to appear in the eyes of society perfect in the moral and legal terms. Thus, according to a survey conducted by Z.V.Makarova, the main lawyer competencies considered: general and legal culture - 54.4%, professional activity - 38.8% and good faith - 24%. Capacity for empathy, respect for human, respect for the dignity noted only 14.2% of lawyers. Students in the first three places among the professional qualities of a lawyer put the total legal culture - 81%, professional activity - 56% oratory - 31%. Therefore, neither the lawyers nor the students will work as lawyer not to consider the leading professional qualities for a lawyer -ethical [16, p. 87]. Unfortunately, we must conclude that morality is not in favor of lawyers, and lawyers in other specialties, too. From here the poor quality of law enforcement bodies work.

Criminal Procedure Act uses the term "invitation defender", ensuring the participation of defender" and "defender of appointment of defender." The invitation made by the suspect or accused person or his representative, at their discretion. Other persons may only invite counsel on behalf of or with the consent of the suspect or the accused. When the suspect or defendant is a minor, his order or consent to make a deal on the invitation of counsel require

receiving consent from their legal representative of the requirements of Part 1 art. 22 CC of RK. If it's find that person who committed the wrongful act is criminal, it was recognized as incapable, and then an invitation counsel or giving orders or consent is not an invitation to the exclusive right of the trustee (Part 2 art. 26 Civil Code). The invitation counsel must be made by written or oral petition of the suspect or the accused with the entry into the protocol of this petition corresponding investigative or remedial action.

Procedural activity of suspect or the accused defender is a form of criminal activity. In accordance with art.13 of the Constitution of the RK main content protection is to provide to the suspect and the accused qualified legal assistance. By literal meaning of this constitutional provision, the role of defense counsel in criminal proceedings should be limited to aid defendant in a legally competent exercise of their procedural rights and obligations. However, the criminal procedural activity of defender is not homogeneous. Its multidimensional nature is manifested in various activities of defense counsel to ensure the rights and lawful interests of the suspect or the accused, against whom chosen preventive punishment. The main among them are:

legal aid to the suspect or the accused;

participation of defender in proving;

Protection of rights and lawful interests of suspect or accused.

To the basis of this classification has put three main challenges standing in front of defender in a criminal trial. On them directly indicates the law, identifying the defender as a person engaged in the established order of the CPC rights and interests of suspects and defendants and providing legal assistance in criminal proceedings (Part 1 of Art. 72CPC); empowering the defender with authority to collect and submit the evidence required for legal aid, in procedure established by Part 3. Art.125 Criminal Procedure Code; attract specialist in accordance with art. 84 Code of Criminal Procedure, petitions and objections, etc.

Protecting rights of the accused or the suspect are allocated by us and as an independent objective, and as an activity because this (security rights) corresponds to the essence ensuring the rights of individual in criminal proceedings and, at the same time, do not fully coincide with the two other types of procedural tasks and activities of defender. Therefore constitutional guarantee of suspects and accused persons for obtaining qualified legal aid of lawyer must be construed as a requirement of active criminal procedure of defender activities aimed on providing legal aid to defendant, in proving of defender

participation, as well as to rights protection rights and interests of suspect or accused.

Qualified legal assistance is particularly important for the person against whom criminal proceedings are pending, at the initial stage of its participation in the process. By the time of trial the defendant already familiar with their rights, and has some experience using them on a preliminary investigation. In addition, competition and transparency of the judicial process allows him to see and hear how a similar law is implemented by other participants in criminal proceedings. Legal assistance provided by a defender, usually aimed at solving various problems of direct tasks and may appear in various activities: clarification of the suspect or the accused of his legal status in criminal proceedings; explaining the essence of having a place of suspicion or accusation; assistance in the preparation of his client requests, complaints and other procedural documents, etc. Of course, to specify the scope legal assistance to defender in each case beforehand is impossible. Its character depends on the features of the criminal case, type and category of crime in committing for suspects or accuses defendant, as well as its legal culture. One of them may need only to clarify the rights, others - in help for the preparation of procedural documents, and others - to explain them the procedural or substantive law, the fourth need help with a variety of issues.

Issues on which the accused (suspect) be necessary will get legal advice of defender, off course, may extend beyond these. We allocate them because in practice exactly they often constitute the content of the legal assistance of a defender to the suspect or defendant, against whom was chosen preventive punishment. For these same reasons, it seems appropriate to consider in detail the legal assistance of counsel for the accused or the suspect to his client within the most common forms of legal aid.

Main place in defender activities his client to explain his legal status takes an explanation to the suspect or accuser's rights and giving advice on their use. It is important for defendant to be informed with his rights, as well as on how much the suspect or the accused will remember, understand their meaning and will know how to implement them, depends largely on the success of providing his legal interests in criminal proceedings. The complexity of this process consists in, what to the suspect or accused in a relatively short period of time offers to remember and understand the importance of the full range of services provided to him.

One of the procedural guarantees successfully remembering by the suspect of his rights would be the duty of the investigator to give the suspect a copy of minutes explaining his rights, which contains their

list. However, in order to have been created real conditions of use as a suspect as well as the accused of his rights, little to know them, necessary to understand their value and able to apply correctly. Of course, all this could and should explain participants of criminal justice investigator, inspector and prosecutor. But this does not always reach the goal, because the person against to whom criminal proceedings going, often from feelings of prejudice do not trust the words of the person conducting the investigation. Therefore, an explanation for client the nature and procedure order of his rights is a priority for the defender, which should be implemented at the first contact with a suspect.

Promptly entered into the case defender is required to exercise his right to a meeting before the first interrogation of his client, considering the importance of investigative action to resolve the issue of acceptance, change or cancellation of preventive measures. The defender has to explain to his client, that the giving of explanations and evidence - it is always the right of client. According to paragraph 3 art.77 of the RK Constitution \_he is not obliged to testify against himself, his spouse and close relatives. Refusal of the suspect or accused to testify, as well as a deliberate falsehood is not grounds for the application to him measures of criminal or other liability. Therefore, his interrogation may take place under conditions that the suspect or the accused does not refuse to testify.

At the same time, defendant must know that his testimony is very important to safeguard against unlawful or unwarranted use of preventive measures. During the first interrogation, which will take place immediately after the arrest or the application of another preventive measure, the suspect first time exercises its right to testify. He may give information, that will convince an investigator in neediness for suspicion, entailing the abolition of restraint, or enable to change the chosen measure of restraint to less restrictive.

In the understanding the actual parties of crime the defendant usually does not have difficulties. Therefore, the problem lies in the the interpretation of defense of legal concepts, containing in the articles of criminal law, which can be applied in this case. At the same time defender, basing on a frank conversation with his client, must say to the last about the presence or absence in his act of crime structure. Knowledge of his the real situation contributes to make a choice the accused to the correct position of the case. "The lawyer is obliged to coordinate worked out position in the case with his client, which is a key factor in the successful defense" [16, p. 567]. But what is the position in the case? If you ask this question to the lawyers, each of

them defines the concept differently. They'll tell you this is: the result, which wants to achieve defender; the client version, developed (or supported) by lawyer; protection plan; the ratio of defense to accusation, brought against the defendant; defense evaluation of circumstances of the case, etc. In our view the position in the case should be viewed in terms of competitiveness. Suppose that, murder was committed. The defense or the prosecution has not seen the incident themselves. However, the procedural status obliges the parties to retroactively restore this objective reality, to explain it and give the proper legal assessment.

The position in the case - is actual legal picture of what happened from view point of and prosecution and protection. As a rule, in terms of the parties do not match and each side restore the picture differently, principle of competitiveness is to make your picture convincing to the judge. In our case, with the murder, the prosecution will argue that the crime is committed by K, and the defense will insist on the existence of an alibi of the accused K. The parties then will be engaged in support of its position and the refutation of the opposite. As a result, there will be new version. Positions will be close, and then move away from the truth. As a result in a competitive struggle court will decide, but how it was in fact probably will not know anybody and never. Through a purely practical understanding of positions on the case can be said that the position in the case - this is an explanation of what happened. In this regard, L.A. Voskobitov rights determines the position on the case, how defined view of the circumstances in the case due to procedural role and interests of certain parties. [17, p. 171].

The defender should not eliminate from the councils for questions of resources and the tactics of refuting accusation. We assume only that the recommendations may be made in such form which would help his client reach a decision independently of any matter that would prevent the possibility of suggestion to accuse others conclusions. Of course, this requires from the defender tact, sensitivity, account of psychological personality characteristics. Explanation to accused (suspect), the values of favorable and unfavorable circumstances for him is important because from their presence or absence depends on the choice measure. After learning a list of circumstances, taken into consideration at selection of preventive punishment, the accused may inform defender or submit himself to the investigator, for example, information characterizing positively his personality or point out the severe marital status or their painful condition and therefore motivate a request for cancellation or amendment of preventive punishment.

Explain to the suspect or accused his rights defender must do it after taking a criminal case. It seems that for defender necessary to inform defendant about their responsibilities. The defendant must know that his defender may act only by legal means and methods in accordance with the requirements of morality and professional ethics because any legitimate action of lawyer create rights and obligations to his client (the principal), but any wrongful acts - create rights and obligations for lawyer personally. The lawyer obliged to explain to accused or suspect that he has no rights to refuse from accepted case, no matter how small hope for a favorable outcome.

When the client is aware of the competence of his defense counsel, he may with more reason to judge about how fully the latest uses its rights for the protection. This, in turn, gives to the accused (suspect) the opportunity to refuse from defender who has not show enough activity.

The accused or suspect must obtain information from the defender of the rights and obligations of other participants of criminal proceedings involved in this process. This will allow the defendant to understand the procedural rules of investigation and in accordance with them will determine their course of conduct, to take certain actions.

Assistance in the preparation by his client requests, complaints and other procedural documents is important in the defender activities of suspect or the accused, against them was chosen preventive punishment. The point is that these parties in criminal proceedings are most affected on them restrictive impact measures on criminal procedure coercion. Therefore, the primary duty of their defender is to check the legality and validity of a preventive measure and the adoption of other procedural decisions of the investigator (the court). If by them will be found violations of the law in criminal proceedings, defender must inform the defendant and help him to make a complaint about unlawful or unfair proceedings or decision, including the application of preventive punishment.

The law does not provide a special form of procedural documents, by which the suspect or accused realizes their rights for application of requests, bringing complaints, etc. But the more logical and reasonable will be presented a request of the accused (suspect), it will be easier to understand law enforcement officer to whom it is addressed. However, many of the accused (suspects) even at high overall literacy is having difficulty experiencing difficulties in the preparation of such documents. This is no surprise when you consider overall low level of legal culture and the lack of relevant

experience. Therefore, for the accused (suspect) in such cases it is necessary legal aid lawyer.

It might give an impression that if the defender in the case, application, petition, complaint, etc. prepared by them on his own behalf and the accused (suspect) just endorsed to views of defender. So, really, it happens often. But sometimes there are situations in which a document can be made only on behalf of the defendant. For example, an advocate contrary to the opinion of accused (suspect), sees no grounds for statement of any application. In such cases, defender is not released from the duty to help his client to present his point of view, legally correct, clear and reasonably as possible.

If the defense is "pure" criminal procedure Institute, then Institute of representation - a mixed institution, including the elements of civil-law method of regulating social relations. It is expressed as follows: 1) if the lawyer - a representative of the victim, civil plaintiff and civil defendant, private prosecutor may at any time refuse to accept the request, but defender has no right to refuse from accepted protection of the accused; 2) if the differences in position between the representatives and represented could not be the case, then differences between the defender and the accused are allowed within certain limits, such as self-incrimination.

This way, on the representative and defender can and should be described as a different names of one concept - a lawyer, then, consequently, the legislator puts into each of them a different meaning and significance.

On the basis of foregoing it can be concluded that neither the CPC nor the Law of RK "On lawyer activity" is not identified, and distinguishes thoughts of the defender and representative, putting in each a different meaning and value in the same way as in the institutes of protection and representation.

In criminal procedure literature view on procedural status of the defense attorneys as on representative of the accused insisted M.S. Strogovich and many others [18, pp. 245-247]. It should be noted that the procedural status of the defense attorney as representative they are determined by the nature of his relationship with the accused. This means that a lawyer involved in the case in the interests of the accused upon his request or with his consent, and may be removed at any time, if the accused refuses from him, but if he did not refuse from the defender, neither the court nor the investigator has no rights to eliminate him from the process, as well as defender to refuse from defense. However, the relationship between defender and defendant are substantially different from the relations between representatives and represented in

the civil law and process. The most complete, these differences showed Y.I. Stetsovsky. They are as follows: 1) in the civil law and process a representative may change the represented, but in criminal proceedings defender does not replace the accused and operates along with him: 2) In civil proceedings the lawyer is not a party, he is only representative of the parties and does not act on his behalf, but on behalf of the principal. In criminal proceedings, defender acts on his behalf. He is not only representative of the accused, but also the side which realizing their rights with aims for providing legal assistance to the accused. 3) a representative in civil law at any time has a right to refuse from authorization issued to him. In criminal proceedings, a lawyer has no rights to refuse from accepted by him defense of the accused [19, pp. 34-35]. Therefore should not be, as considered parties of view to defender as to the representative of the accused, identified him with the representative in the civil law and process. In addition, for determining procedural provisions of the defender and has a value of his relationships with government agencies and their officials, the leading process. This means that the defense attorney has certain autonomy with respect to the defendant, therefore represents his rights and lawful interests in procedural relations with the person conducting the inquiry, the investigator, prosecutor and court, by using the legal resources and methods of protection.

Thus, we can highlight some key points on which the opinion defense attorney as a representative of the accused: 1) the procedural position of the defender as the representative defines in terms of the nature of his relationship with the accused and the state bodies and their officials, who is leading process, and 2) despite the fact that the nature of the relationship of counsel and the defendant allows first to be characterized as the Representative and, accordingly, to give this name to this view, it is not the basis for his identification with the representative in the civil law and process, since they carry different meanings and significance.

These key moments do not withstand criticism. First, the definition of the procedural position of defender as a representative through nature of his relationship with the accused and the state bodies and their officials, leading the process, as previously noted, does not fit the definition of procedural provisions, because such relationships are regulated by rules of professional lawyer ethics, not by criminal Procedure Law, which reflects only the rights and obligations of defense counsel. The basis of the procedural position of defense attorney should contain only the rights and obligations established by the Criminal Procedure Law. Search for other parties,

which would determine his position in the process, how correctly noticed, A.L. Rivlin, there are no bases and necessities [20, p. 45]. Secondly, the definition of defense attorneys as a representative differs from the representative of the civil law and process. And this follows not just from the above differences between them. Typically, proponents view on defense attorney as the representative defined him this way, because he expresses in his own person and protects the rights and lawful interests of his client. Such an interpretation of the term "representative" corresponds to its definition in ordinary, common usage, understanding as a person who represents someone else's interests, is someone else's views. And P.S. Elkind generally just admitted that the defender is determined as a representative only based on the common usage and banal understanding of the term, rather than its use in civil-law sense.

Consequently, in terms of interpretation rules: a) The term "representative" should be understood only in the civil-law sense; b) spread to counsel definition of the concept "representative" in ordinary its understanding is illegal.

If counsel cannot be defined neither in terms of interpretation rules, nor in terms of legislative technique, as a representative in ordinary its understanding, and the concept of a representative in the civil law sense is not applicable to it and this is generally accepted, then from this follows that the concept of defense is embedded another meaning and significance than in the concept of a representative.

So, view on defense attorney as a representative of the accused cannot be considered wealthy by two reasons: 1) definition of the procedural position of the defender as a representative from the nature of his relationship with the accused and the process leading government agencies and their officials do not fit into the definition of procedural position, since these relationships are regulated by the norms lawyer ethics rather than the criminal procedure law, as required by this definition, the term "representative" in the ordinary sense cannot be used against the defender neither in terms of legislative technique, nor in terms of interpretation rules.

Procedural position of defender as an independent participant in the process was determined by Reznik V.Y. and many others [21, p.18]. They justified their position by the following arguments: firstly, the defender granted by law with an impressive amount of rights, duties, allowing effectively carry out the protection ; secondly, he is entitled to present evidence; thirdly, defense attorney has full procedural equality with other participants of process in presenting evidences and participate in their study, the application requests on the court proceedings; fourthly, in the choice of tactical

procedural means and methods of protection the lawyer is independent, independent from will of the defendant and come out from the particular circumstances of the case and the law. This position fits into the definition of procedural provision of defense attorney over his or her rights and duties established by law, and therefore it has to be recognized correctly.

Thus, the procedural status of the defense attorney should be defined as an independent participant in the process.

About the independence of defense counsel in criminal proceedings allow to speak the following basic and fundamental propositions: 1) the authority for implying the protection conferred on him the Criminal Procedure Law, and the same law gives him the right to use anything not prohibited by the Code of Criminal Procedure means and methods of protection (Art. 74 CPC, etc.); 2) the lawyer is an independent legal adviser; 3) the lawyer obliged to be honest, reasonably and in good faith to protect the rights and legitimate interests of his client by all means not prohibited by law; 4) law and morality in the lawyers profession higher than the will of the principal. No suggestions, requests or instructions of the principal, directed to non-compliance or violation of the rules provided in this Code cannot be executed by lawyer.

But at the same above-mentioned provisions of the Code of Criminal Procedure, the Law of RK "About lawyer activity" and the lawyer laid the mechanism that limits the independence of defender not allowing him to treat the activity as a completely independent, no matter what (law, morality), and not from anybody (human and legitimate interests of the principal) is independent. This limit mechanism has found reflection in the subject matter of protection (rights and legitimate interests of the principal) and the limits of protection (defense counsel has the right to use anything not prohibited by the Code of Criminal Procedure means and methods of protection).

Based on the foregoing, the procedural position of defense attorneys may be defined as an independent participant of the process, endowed with the criminal procedure law, certain rights and responsibilities for the implementation of the rights and lawful interests of the accused by all means not prohibited by the CPC ways and means of protection.

In the German legal literature about the procedural status of the defender there is no consensus [22]. It is defined as representative of the accused, the accused helper, as a right defender, and as a body of criminal proceedings. Uses the greatest recognition and, in essence, is the dominant concept of legal counsel as a body of criminal proceedings. In

the guidelines clarification of the former German Reich Court, the Supreme Court and Constitutional Court of Germany defender directly called as body of criminal proceedings. Moreover, the definition of the defender as a body of criminal proceedings is enshrined in the regulations, in particular art.1 of the Federal position about the bar, Bar Association - a body of criminal proceedings." The origin of this concept is also associated with and the so-called legal professional organization (institution) - with court of honor for the lawyers.

Provision of protector the body of criminal proceedings should have been resolved, as the provision of prosecutor and the court in criminal procedural law. But it does not in any way not states about him as some kind body of criminal proceedings. Bodies of criminal proceedings - are government agencies. But the defenders never held a position of such agency and perform public tasks. Despite a thorough grounding critique, the legal status of defender interpreted and will be interpreted as a body of criminal proceedings in the German literature of the procedural and judicial practice, as the B.A. Filimonov pointed.

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#### **References**

1. Office of the High Commissioner for Human Rights in cooperation with the international organization of lawyers. Human Rights in the Administration of Justice: A Manual for Judges, Prosecutors and defense attorneys. The United Nations. New York and Geneva, Gutsenko, K.F., L.V. Golovko and B.A., Filimonov Criminal process of Western countries. Moscow: "Mirror -M", pp: 528.
2. Caves, V.V., The Institute Bar: theory of the basic concepts and principles. Moscow: Publishing house "Yurlitinform", pp: 312.
3. Advocacy: Training and practical guide, Moscow: The Statute, pp: 604.
4. Russian lawyer, Amanbayev, A.T., Improvement of the legal profession and notaries as human rights institutions. Modernization of the national legal system in the Concept of Legal Policy of the Republic of Kazakhstan from 2010 to 2020. Proceedings of the International Scientific Conference September 9, Astana, pp: 235.
5. William Burnham's legal system the United States, rd edition. Moscow: "New Justice", pp: 1216.



6. Bezlepkin, B.T., Directory of lawyers in the criminal process. Moscow: TC Welby, Univ Avenue, pp: 688.
7. Flowers, R.K., The Role of the Defense Attorney: Not Just an Advocate. Ohio State Journal of Criminal Law, Vol 7., pp: 674-679
8. Model Rules of Professional Conduct N.Y. State Bar Association, Perrin, L.T., The Perplexing Problem of Client Perjury, FORDHAM L. REV., Legal profession: Collected works of the French Bar. Comp. A. Polyakov. Statute, pp: 367.
9. Koblikov, A.S., Legal ethics. Moscow: Norma, pp:176.
10. Chop, N.I. and A.N. Chop, Legal Ethics. MH.: Stitch. wk., pp: 352.
11. Dostoevsky, F.M., Diary of a Writer. Complete set of works. Moscow: Eksmo, pp: 736.
12. Kony, A.F., Criminal procedure: moral principles. Moscow: Publishing House of SSU, pp: 150.
13. Semenyako, E.V., Morals and Dogma lawyer's professional legal ethics. Collected articles. Under the general. Moscow: Penguin Books, pp: 608.
14. Morals and Dogma lawyer's professional legal ethics. Collected articles, Moscow: Penguin Books, pp: 608.
15. Makarova, Z.V., Professional protection of suspects, accused persons. St. Petersburg.: Publisher Aslanova "Press Law Center, pp: 338.
16. Stetsovsky, Y.I., The Soviet legal profession. Moscow.
17. Stetsovsky, Y.I and G.B. Mirzoyev, Professional duty of a lawyer and his status. Moscow.
18. Rivlin, A.L., Organization of the legal profession in the USSR. Kiev: Highest School.
19. Elkind, P.S., The defendant's right to protection in the Soviet criminal procedure. L.
20. Thelegislative machinery. Scientific-practical allowance, Moscow: "Gorodets".

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