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# Algorithm for Introducing the Appointed Defense Lawyer into the Criminal Process: how to Avoid a "Double Defense" Situation

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Abstract

*Introduction:* the right to receive qualified legal assistance is enshrined in Article 48 of the Constitution of the Russian Federation. It is the right of everyone who is subject to criminal prosecution, regardless of the financial situation of the person. In the system of criminal law and criminal procedural relations, this right is imperative, and violation of this right entails negative consequences for the results of the criminal case investigation and its consideration on the merits. At the same time, in practice, situations occur when a lawyer participating in the process, for one reason or another, disrupts the production of pre-planned investigative actions or court hearings, thereby delaying the investigation and consideration of the criminal case on the merits. In this situation, the investigation and the court can appoint another defense attorney despite objections of a defendant and his/her lawyer, thereby giving rise to a "double defense situation". At the same time, the legal community recognizes the participation of an appointed defense lawyer in the "double defense" situation as a violation of the Code of Professional Ethics of a Lawyer. In this article, the author continues the previously started research on this topic, and, taking into account the established disciplinary practice, proposes an algorithm of actions that will allow the lawyer to act within the framework established by the criminal procedure legislation and internal corporate regulatory legal acts in order to avoid possible violations, including preventing the emergence of a "double defense situation". *Purpose:* to continue the study of controversial issues arising at the current stage of the implementation of the constitutional right to defense in criminal proceedings, affecting the problems of interaction between the defense lawyer and the defendant and other lawyers participating in the case, and to propose an algorithm of actions for lawyers entering into criminal proceedings by appointment of the inquiry officer, investigator or court in order to avoid possible violations of the Code of Professional Ethics of a Lawyer and the situation of "double defense". The task of the study is to develop an algorithm for the entry of a appointed lawyer into criminal proceedings in order to prevent violation of the right to defense of a person brought to criminal liability and, at the same time, to prevent violations of internal corporate regulatory legal acts and avoid the emergence of a situation of "double defense". Methods: general dialectical method of cognition of socio-legal phenomena, general scientific research methods (analysis and synthesis,

deduction and induction, system-structural and others), private scientific methods of cognition (logical-formal and system analysis). The *results* of the study are both theoretical and applied in nature and have elements of scientific novelty. The author studies issues of entry of an appointed defense lawyer into criminal proceedings, proposes an algorithm of the lawyer's actions in order to avoid possible violations and emergence of "a double defense situation". At the same time, the author suggests considering "double defense" not as an institution of criminal procedural law, but as a significant violation of the norms of advocacy in criminal proceedings. *Conclusion:* discussion of the identified problems will draw attention of the scientific community and the legislator to the development of solutions to eliminate the identified gaps in the implementation of defense in criminal proceedings and will protect appointed defense lawyers from possible violation and subsequent accusation of violating internal corporate regulatory legal acts and creating "a double defense" situation.

K e y w o r d s : criminal proceedings; lawyer; defendant; entering into a case; "double defense"; algorithm.

5.1.4. Criminal law sciences.

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*Introduction*

Within the framework of criminal procedure, a defendant either concludes an agreement with a chosen lawyer or gets an appointed defense lawyer in accordance with articles 50–51 of the Criminal Procedural Code of the Russian Federation.

Criminal procedural relations are of a public nature and are aimed at protecting the interests of society from criminal encroachments, protecting victims from crime, restoring their rights and legitimate interests, and assigning fair punishment to those guilty of committing a crime. Accordingly, a lawyer, while defending a criminal case, does not act as a fighter against the law enforcement system, but exercises his/her powers to defend a person brought to criminal liability while taking into account the interests of other participants in the process, including the victim, as well as the interests of society. There should be no interpersonal conflict between a lawyer and an investigator or judge. A lawyer trying to achieve any positive result in the interests of the client mustn't violate norms and rules established by the Criminal Procedural Code of the Russian Federation and internal corporate regulatory legal acts. Based on this, it can be argued that the lawyer's abuse of the right in criminal proceedings contradicts the nature of advocacy as an institution of civil society.

*Methodology.*

*T*he methodological basis of the research is comprised of the universal dialectical method of cognition of socio-legal phenomena, general scientific research methods (analysis and synthesis, deduction and induction, system-structural, etc.). In addition, private scientific methods of cognition, such as logical-formal and system analysis, are used.

Results and their discussion. Nowadays, quite a lot of attention in the legal environment is paid to a phenomenon of "double defense" or subsidiary defense, as some authors call it (the author considers the term "double defense" to be more correct, and therefore it is used in the paper) [1–5]. There is still no common understanding and interpretation of this phenomenon. Despite the fact that "double defense" itself is a rather complex phenomenon consisting of various elements, nevertheless it cannot be attributed to the institutions of criminal procedure law, as some authors believe [6]. At the same time, there is no doubt that the situation of "double defense" should be considered as a significant violation of the right to defense, and at the same time as a violation of mandatory internal corporate regulatory legal acts regulating activities of the bar [7].

On September 27, 2013, the Russian Federal Bar Association adopted a decision "On double defense" indicating the need to bring perpetra-

tors to strict disciplinary liability (the said decision refers to lawyers who entered into criminal proceedings on the appointment of an investigator and participated in the investigation and consideration of a criminal case while the person brought to criminal responsibility had his/her own lawyer). However, it should be noted that the decision in question did not contain any recommendations for lawyers on how to act correctly in the current situation.

"Double defense" or participation of a stand-in lawyer in criminal proceedings is the subject of consideration by the Constitutional Court of the Russian Federation, which states, among other things, that the right to free choice of a defender excludes the imposition of a lawyer on a person brought to criminal liability against his will.

At the same time, it should be recognized that often the occurrence of a situation of "double defense" is a forced way for the investigator and the court to respond to the prevailing situation during the investigation and consideration of a criminal case on the merits, including abuse of the right by lawyers involved in the case [8–9]. For example, the investigator agrees with the lawyer on the dates on which certain investigative actions will be performed, including those related to the involvement of other persons (victim, witnesses, etc.). But, despite the fact that the participants are notified in advance of the upcoming investigative action and arrive to participate in it, the lawyer does not arrive, referring to work pressure and the need to participate in investigative actions of another investigator in another criminal case or by being engaged in court proceedings, thus disrupting proceedings. It is possible to explain somehow when the disruption of pre-planned investigative and judicial actions occurs due to the work pressure of a lawyer (disruption for good faith reasons). But sometimes a disruption occurs due to the abuse of law by a lawyer (a breakdown for an unfair reason).

And, when pre-planned investigative actions or judicial proceedings are disrupted, the investigator or the judge, trying to avoid delay and violation of deadlines, send application to the law chambers of subjects of the region for participation in the case of an appointed defense lawyer. In this regard, most often, lawyers who enter into a criminal case on the appointment of an investigator or the court and do not adequately assess the current situation find themselves in a situation of "double defense" [10–11].

Sometimes, in order to avoid the control of managers of the applications of law chambers, the investigator or the judge distort the name of the person brought to criminal responsibility [12].

Needless to say, the situation of "double defense" almost always generates a conflict between the lawyer involved in the case by agreement and his /her defendant and the lawyer who entered the case by appointment.

If an appointed defense lawyer enters the case, the following algorithm of actions is proposed to avoid violations of the requirements of the Code of Professional Ethics of a Lawyer and the Standard for the Lawyer's Defense in Criminal Proceedings, including those that fall under the situation of "double defense":

– having received an order from the application manager to take part in criminal proceedings, a defense lawyer should contact the initiator of the application and arrive at the law enforcement agency no later than two hours after receiving the application;

– a defense lawyer should find out information about the person to defend and compare it with the data contained in the application. He/she should pay special attention to the correctness of presented personal data of the defendant, since the information provided by the initiator in the notification must be complete and reliable. The unreliability or absence of information about the case number, data about the person in need of legal assistance and other information necessary to assess the presence or absence of obstacles to accepting the order are unconditional grounds for the lawyer's refusal to enter the case [13];

– a defense lawyer should study case materials. In this case, the situation can develop in two ways.

Variant 1:

– if a lawyer enters into the case at the stage of initiation of a criminal case, then, as a rule, the list of materials available to a lawyer is insignificant – a decision to initiate a criminal case, a protocol of detention, an explanation (the materials may contain a confession and a petition addressed to the investigator for the selection of a preventive measure in the form of a subscription on not leaving, description of the crime committed and an indication of a confession of guilt and remorse for the crime committed;

– a defense lawyer should talk to the defendant. It should be noted that a conversation is one of the most important elements of communication between a defendant and a defender and can

lay the foundation for future interaction and trust. A conversation should begin with a presentation: a lawyer introduces him/herself and briefly provides information about him/herself.

After the presentation and the story, a lawyer should find out when a defendant was actually detained, whether illegal methods of influence were applied to him. If a defendant has traces of physical violence, a lawyer should immediately inform the investigator about this, if necessary, call for emergency medical care, and encourage a defendant to contact the appropriate law enforcement agency. If a defendant refuses to call for emergency medical care and contact the appropriate law enforcement agency, a lawyer should record the refusal in writing.

Then a lawyer invites a defendant to discuss the case and based on his/her experience, knowledge, including knowledge of investigative and judicial practice, and analysis of available information forecasts development of the investigation in the case or possible development and resolution of the situation in court [14, pp. 34–41]. The use of the situational approach and the forensic modeling method in this case seems the most appropriate [15–16].

Forecasting the course and results of the investigation, a lawyer should not complicate the situation thereby intimidating a defendant, but he/she also should not simplify it by bringing unreasonable hopes, including hints at resolving the situation through illegal actions.

After that, a defense lawyer should discuss possible behavior patterns with a defendant in relation to criminal prosecution: admission of guilt in the incriminated crime in full (including a possible application for a pre-trial cooperation agreement), admission of guilt in part, complete non-admission of guilt. A lawyer should also explain possible consequences of the behavior pattern chosen by a defendant. The final decision on the choice of a behavior pattern should be made by a defendant.

Variant 2, if, upon entering the case, an appointed defense lawyer finds out that another lawyer has previously participated in the case:

– in order to avoid a situation of "double defense", a lawyer is obliged to ask a defendant whether he/she has a defense lawyer by agreement or by appointment who has entered the case earlier.

Having found out from the defendant, to whom the lawyer is appointed at the request of the investigator or the court, that he has an agreement with another lawyer to carry out the defense or another lawyer is already involved in the case by appointment, the lawyer should do the following:

– to find out from the investigator, the court or the defendant information about another lawyer;

– to ask the investigator or the court the reason for his/her absence;

– if possible, to contact him/her independently, find out reasons for his/her absence (illness, business trip, not being notified about detention of the defendant, not being allowed into the premises of the investigative committee or the police, etc.), and inform about his entry into the case, since, in accordance with Paragraph 7 of the Standard for the Lawyer's Defense in Criminal Proceedings, a lawyer when entering into a case involving other lawyers is obliged to notify them of his/her participation.

If a lawyer by agreement or who has previously participated in the case by appointment cannot immediately appear in a law enforcement agency or court, the lawyer who has re-entered the case should find out the possibility of his/her participation in the investigation or trial and the position taken by the lawyer who has previously participated in the case. If a lawyer who has previously participated in the case has the opportunity to arrive at a law enforcement agency or court in a short time, the lawyer who has re-entered the case by appointment is obliged to submit in writing a petition stating the impossibility of his/her participation in the defense, indicating the reason, i.e., actually recuse him/herself from the case (this term will be further used due to its simplicity). Besides, he/she also should recuse him/herself if a lawyer who has previously participated in the case cannot arrive at a law enforcement agency or court in a sufficiently short period of time, but objects to the participation of a newly appointed lawyer in the case. This behavior corresponds to the positions developed by the legal community. So, in particular, the position of the Moscow Bar Association is as follows: "When a lawyer appointed by a defender establishes the fact that the same person has a defender by agreement is obliged to immediately take all actions provided for by law and the above-mentioned explanations of the Council of the Moscow Bar Association to terminate his participation in the case, support the defendant's statement on termination of legal services and submit his own similar statement. In case the inquirer, investigator or court refuse or evade such a decision, the lawyer must leave the

place of procedural actions after making appropriate statements" [12].

If it is not possible to contact a lawyer who previously participated in the case, or for some reason he/she cannot arrive in the near future to participate in investigative actions, the decision on the participation or non-participation in the case of the newly joined lawyer is assigned to the defendant. If the defendant agrees on his/her participation in writing, the newly appointed lawyer is entitled to participate in the investigative actions. In this case, there is no situation of "double defense". If the defendant objects to the participation of a newly appointed lawyer in the case, then he/she must state it in writing, and the appointed lawyer must recuse him/herself in writing. If, in accordance with Part 2 of Article 50 of the Criminal Procedural Code of the Russian Federation, the investigator or the court rejected to terminate legal services of the appointed lawyer, the lawyer is obliged to take part in the investigative action or in the trial, but he must once again reflect the client's statement on termination of legal services and his recusal in the protocol of the investigative action or the protocol of the trial. This will not cause a "double defense" situation.

If the appointed lawyer is invited to participate in investigative actions, the duration of which is measured in hours (24 hours, 48 hours, etc.) or in a small number of days, and the defender who has previously participated in the case cannot, for various reasons, take part in the production of these investigative actions, participation in the investigative actions of the appointed lawyer will not contain any elements of "double defense", even if the defender who has previously participated in the case expresses his/her disagreement with the entry into the case of an appointed lawyer and the defendant refuses from legal services of the appointed lawyer. As previously noted in the review of the disciplinary practice of the Moscow Bar Association, "... the 24-hour period for the appearance of an invited defender from the moment of arrest of a suspect or detention of a suspect or the accused is specific both because of its conciseness and stricter rules for appointing a defender (without offering to invite another defender to replace the one who has not appeared). The situation in which the suspect finds him/herself in the first hours after arrest completely excludes abuse of the right on his/her part" [13].

Once again, we draw attention to the fact that the criminal process is public in nature and not only the interests of the person brought to criminal liability are subject to protection, but also the interests of the victim and society [17].

If the lawyer involved in the case having been notified of the investigative action in advance does not appear for any reason to participate in its production and the person being prosecuted within 5 days as established by Part 3 of Article 50 of the Criminal Procedural Code of the Russian Federation, does not get another lawyer, the appointed lawyer is entitled, after the expiration of the 5-day period, to take part in the production of investigative actions, including in the absence of the consent of the defender who has previously participated in the case and the absence of the consent of the defendant. In this case, there is also no "double defense" situation.

There is no "double defense" situation if the appointed lawyer who has previously participated in the preliminary investigation stage takes part in the trial stage despite the fact that another lawyer is appointed by the court.

There is no "double protection" if the investigator or the court issues a ruling on the abuse of the right by a lawyer who has previously participated in the case and appoints another lawyer to participate in investigative actions.

The lawyer's abuse of his/her rights must be confirmed by the issuance of an appropriate decision by the investigator or the court, which must be lawful, justified and motivated. At the same time, the appointed lawyer who enters into a case on the basis of the ruling on abuse of law by a lawyer who has previously participated in the case is obliged to contact a lawyer who has previously participated in the case in order to inform him/her about entering into the case, as well as about the existence of the ruling on abuse of law. There is no "double defense" situation in the actions of the appointed lawyer until the decision on abuse of law is canceled for one reason or another, including because of illegality and unreasonableness. A similar position is taken by G.M. Reznik [18].

If the appointed lawyer enters into the case as a result of the investigator or court's ruling on the dismissal of a lawyer by agreement or appointment, he/she must also contact the dismissed lawyer and notify him/her of the entry into the case, in accordance with Paragraph 7 of the Standard for the Lawyer's Defense in Criminal Proceedings. In this case, there is also no elements of "double defense" until the said decision is overturned, even if the defendant

and the dismissed lawyer object to the participation of the appointed lawyer.

In both cases, the appointed lawyer entering into a case is obliged to obtain a procedural act, which establishes the fact of abuse of the right by a lawyer previously involved in the defense of a person brought to criminal liability and his/her withdrawal from further participation in the case.

At the same time, the obligation to evaluate the arguments set out in the decision on abuse of the right by a lawyer and his dismissal, as well as to challenge the legality and validity of these decisions, is not imposed on the appointed lawyer.

*Conclusion*

The situation of "double defense" that sometimes arises in practice contradicts requirements of mandatory internal corporate normative legal acts of the bar community, negatively affects the relationship within the law firm [19, pp. 24–31], creates a conflict situation among the law community, and thereby prevents realization of the right to defense guaranteed by the Constitution of the Russian Federation [20–21]. But, at the same time, quite often the situation of "double defense" arises due to the fault of the lawyer, who, trying to achieve a change in the investigative situation in favor of their client, follow the path of abuse of law, which is unacceptable, since, as indicated in Article 6 of the Criminal Procedural Code of the Russian Federation, the criminal process protects not only the rights of a person brought to criminal liability, but also the rights and legitimate interests of persons, both individuals and legal entities, victims of crime, as well as society [19, pp. 395–398]. Following the algorithm proposed by the author, the appointed lawyer entering into criminal proceedings will be able to protect the rights and interests of the defendant at a high professional level and avoid a "double defense" situation.

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