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GUARANTEES OF ATTORNEY-CLIENT PRIVILEGE IN ENSURING HUMAN RIGHTS DURING INVESTIGATIVE (SEARCH) AND COVERT INVESTIGATIVE (SEARCH) ACTIONS BY THE SECURITY SERVICE OF UKRAINE

Abstract. Purpose. The purpose of the article is a comprehensive theoretical study of the guarantees of attorney-client privilege in ensuring human rights during investigative (search) and covert investigative (search) actions by the Security Service of Ukraine. **Results.** The article reveals the essence of the guarantees of attorney-client privilege in ensuring human rights during investigative (search) and covert investigative (search) actions by investigators of the Security Service of Ukraine. Scientific sources are reviewed in accordance with the chosen topic. It is emphasised that if it is necessary to conduct a search, the investigator, with the consent of the prosecutor, or the prosecutor shall file a relevant motion with the investigating judge that shall contain information on 1) the name of the criminal proceedings and its registration number; 2) a brief summary of the circumstances of the criminal offence in connection with the investigation of which the motion is filed; 3) legal classification of the criminal offence, indicating the article (part of the article) of the law of Ukraine on criminal liability; 4) the grounds for the search; 5) the person's dwelling or other property or part of the person's dwelling or other property where the search is planned; 6) the person who owns the dwelling or other property and the person in actual possession of it; 7) things, documents or persons to be found out. **Conclusions.** It is concluded that the guarantees of holders of attorney-client privilege during certain investigative (search) and covert investigative (search) actions by the SSU investigators include: inadmissibility of interrogation of the holders of the attorney-client privilege as witnesses; prohibition of inspection of things and documents, including those on electronic media containing information relating to the attorney-client privilege; exercise of departmental and judicial control, as well as prosecutorial supervision over the non-interference of pre-trial investigation bodies in the activities of defence counsel, as well as information and things constituting the attorney-client privilege; determination of the jurisdiction of the appellate court to exercise judicial control over the observance of the guarantees of attorney-client privilege during the pre-trial investigation; inadmissibility of rulings by the investigating judge or court on temporary access to things and documents, containing the attorney-client privilege; mandatory involvement of representatives of the bar self-government bodies in any procedural actions against the attorney; inadmissibility of evidence obtained in violation of the guarantees of the attorney-client privilege.

Key words: guarantees of attorney-client privilege, investigative (search) actions, covert investigative (search) actions, investigator of the Security Service of Ukraine, criminal procedure.

1. Introduction

The Constitution of Ukraine grants every citizen the right to professional legal

support. Its proper implementation is one of the key guarantees of observance of the rights and freedoms of citizens, promotes the rule

of law and the establishment of the legal state. One of the key elements of effective legal support is the attorney-client privilege.

Failure to comply with it negates the adversarial nature of the judicial process, impedes the effective implementation of investigative (search) and covert investigative (search) actions by SSU investigators, and turns a lawyer into an ordinary consultant, depriving a person who has sought legal support of the opportunity to effectively defend his or her rights and interests.

The following issues should be under focus: requirements for witnesses involved in the search of the attorney's home or office, the soundness of such investigative operations; the provision of additional guarantees in meeting the requirements of the legislation against money laundering. Only after these issues are resolved the establishment of an effective and human rights-oriented institution of the Bar in Ukraine is possible (Kucherenka, 2003).

The issues of legal and regulatory framework for guarantees of attorney-client privilege in ensuring human rights during investigative (search) and covert investigative (search) actions by the Security Service of Ukraine have been studied by T.V. Varfolomeeva, Yu.M. Hroshevyi, M.A. Pohoretskyi, O.V. Kaplina, S.M. Lohinova, O.H. Yanovska, and others. However, the dynamic changes in the current regulatory framework make the issue under study relevant and require further scientific developments in this field.

The purpose of the article is a comprehensive theoretical study of the guarantees of attorney-client privilege in ensuring human rights during investigative (search) and covert investigative (search) actions by the Security Service of Ukraine.

2. Regulatory framework for the institution of attorney-client privilege

One of the important guarantees of the attorney-client privilege in the course of investigative (search) actions by the SSU investigators is the prohibition of interrogation of an attorney, his or her assistant, trainee, or a person employed by the attorney, law firm, law office, as well as a person in respect of whom the right to practice law has been terminated or suspended, in relation to information that is an attorney-client privilege (Law of Ukraine "On the Bar and Practice of Law," Article 23, part 1, clause 2).

Currently, frequently SBU investigators summon for questioning attorneys (defence counsels), their assistants, trainees, persons employed by the attorney, law firm, or law office, and attempt to obtain information from them

that constitutes an attorney-client privilege (Vilchuk, 2015).

This is because there is an imperfection in the provisions of the criminal procedure legislation in force, as the CPC of Ukraine, Article 65, part 2, provides for the list of those who cannot be interrogated as a witness:

1) A defence counsel, representative of the victim, civil plaintiff, civil defendant, legal entity in respect of which the proceedings are being conducted, legal representative of the victim, civil plaintiff in criminal proceedings – on circumstances that they became aware of in connection with the performance of the functions of a representative or defence counsel;

2) Attorneys – on information that constitutes an attorney-client privilege (Criminal Procedure Code of Ukraine, 2012).

According to the Rules of Professional Conduct, Article 10, part 3, disclosure of information constituting the attorney-client privilege is prohibited under any circumstances, including unlawful attempts by the inquiry, investigation and court authorities to interrogate the attorney about the circumstances constituting the attorney-client privilege.

Following the CPC of Ukraine, Article 224, part 8, a person has the right not to answer questions about the circumstances that are directly prohibited by law (confession, medical confidentiality, professional secrecy of a defence counsel, secrecy of a conference room, etc.) or which may give rise to suspicion, accusation of committing a criminal offence by him/her, his/her close relatives or family members, as well as in relation to officials performing covert investigative (search) actions and persons who confidentially cooperate with pre-trial investigation authorities. In addition, the Criminal Procedure Code of Ukraine, Article 47, part 3, provides for that a defence counsel, without the consent of the suspect or accused, has no right to disclose information that he or she has become aware of in connection with participation in criminal proceedings and constitutes an attorney-client privilege or other legally protected secret (Criminal Procedure Code of Ukraine, 2012).

Therefore, certain inconsistencies exist between the provisions of the Law of Ukraine "On the Bar and Practice of Law," Article 23, part 1, clause 2, and the CPC of Ukraine, Article 65, part 2, clauses 1, 2, and the Rules of Professional Conduct, Article 10, part 3, accordingly this leads to the impossibility of ensuring effective mechanisms for the implementation of criminal procedural guarantees of the attorney-client privilege during interrogation as investigative (search) action.

It should be noted that the investigator and the prosecutor have the right to interro-

gate the attorney and other persons who are obliged to keep the attorney-client privilege as witnesses only if the person who entrusted the relevant information has released these persons from the obligation to keep the privilege (Law of Ukraine "On the Bar and Practice of Law," Article 23, part 1, clause 2). According to the Law of Ukraine "On the Bar and Practice of Law," Article 22, part 2, and the Rules of Professional Conduct, Article 10, part 4, information or documents may lose the status of attorney-client privilege upon a written request of the client (Law of Ukraine On the Bar and Practice of Law, 2012).

The next guarantee of the attorney-client privilege during investigative (search) actions is the prohibition of inspection, disclosure, demand or seizure of documents related to the practice of law (Law of Ukraine "On the Bar and Practice of Law," Article 23, part 1, clause 4). According to the CPC of Ukraine, Article 46, part 6, documents related to the performance of defence counsel's duties are not subject to inspection, seizure or disclosure by the investigator, prosecutor, investigating judge or court without his or her consent.

Thus, the regulatory framework for the institution of attorney-client privilege during the inspection is deficient, which in turn leads to access of investigators and employees of operational units to things and documents containing information constituting an attorney-client privilege (Law of Ukraine On the Bar and Practice of Law, 2012).

According to the Law of Ukraine "On the Bar and Practice of Law," Article 23, part 1, clause 3, investigative actions against an attorney, which may be carried out only with the permission of the court, are performed on the ground of a court decision made at the request of the Prosecutor General of Ukraine, his or her deputies, the prosecutor of the Autonomous Republic of Crimea, the region, the cities of Kyiv and Sevastopol. According to T.V. Varfolomeieva, the introduction of this provision will help stop "...the vicious practice of conducting searches in attorneys' offices and attorneys' homes..." (Varfolomeieva, 2012).

3. Criminal procedure guarantees of an attorney-client privilege during investigative (search) actions

With regards to the issue of search, it should be noted that a search is a type of investigative (search) action conducted on the basis of a ruling of an investigating judge (CPC of Ukraine, Article 234, part 2). According to the CPC of Ukraine, Article 234, part 2, if it is necessary to conduct a search, the investigator, with the consent of the prosecutor, or the prosecutor shall file a relevant motion with the investigat-

ing judge that shall contain information on 1) the name of the criminal proceedings and its registration number; 2) a brief summary of the circumstances of the criminal offence in connection with the investigation of which the motion is filed; 3) legal classification of the criminal offence, indicating the article (part of the article) of the law of Ukraine on criminal liability; 4) the grounds for the search; 5) the person's dwelling or other property or part of the person's dwelling or other property where the search is planned; 6) the person who owns the dwelling or other property and the person in actual possession of it; 7) things, documents or persons to be found out. (Law of Ukraine On the Bar and Practice of Law, 2012).

Investigating judges should pay special attention to documents and things that may be searched. After all, in accordance with the Law "On the Bar and Practice of Law," Article 23, part 2, in case of a search or inspection of the attorney's home or other property, premises where he or she carries out the practice of law, temporary access to the attorney's belongings and documents, the investigating judge or court in its decision shall specify the list of things and documents that are planned to be found, discovered or seized during the investigative action or application of measures to ensure criminal proceedings.

When studying the problematic issues of implementation of criminal procedure guarantees of an attorney-client privilege during investigative (search) actions by the SSU investigators, it should be noted that the greatest threat to the principle of confidentiality of the attorney's activity in pre-trial investigation is the conduct of covert investigative (search) actions by the SSU investigators, which are related to interference with private communication of the attorney (Pohoretskyi, Pohoretskyi, 2016).

For example, pursuant to Article 267 of the CPC of Ukraine, a ruling of the investigating judge is a ground for an action such as an inspection of publicly inaccessible places, housing or other property of a person. According to the CPC of Ukraine, Article 267, part 1, clause 5, the purpose of such an action may be to install technical means of audio and video control of a person.

However, such control is a type of interference with private communication. However, as we have already noted, it is prohibited to interfere with private communication between an attorney (defence counsel) and his/her client.

In this context, we advocate the opinion of S.L. Savytska that it is not possible to enter the premises where the attorney carries out his/

her practice of law, his/her home or other property in order to install technical means of audio and video control of a person (Savytska, 2013). In addition, the Law of Ukraine "On the Bar and Practice of Law," Article 23, part 1, clause 4, states that it is prohibited to inspect and seize documents related to the practice of law. Therefore, such entry is not allowed for the purpose of detecting and recording these documents, making copies of them. In other cases, provided for by the CPC of Ukraine, Article 267, part 1, the entry into the premises where the attorney carries out his or her practice of law, his or her home or other property is prohibited. Covert entry and examination may be carried out in order to: detect and record traces of a grave or exceptionally grave crime, things relevant to the pre-trial investigation; make copies or samples of these things; detect and seize samples for examination; identify wanted persons.

4. Conclusions

To sum up, we can conclude that the criminal guarantees of attorney-client privilege in pre-trial investigation in the course of certain investigative (search) and covert investiga-

tive (search) actions by investigators include: inadmissibility of interrogation of the holders of the attorney-client privilege as witnesses; prohibition of inspection of things and documents, including those on electronic media containing information relating to the attorney-client privilege; exercise of departmental and judicial control, as well as prosecutorial supervision over the non-interference of pre-trial investigation bodies in the activities of defence counsel, as well as information and things constituting the attorney-client privilege; determination of the jurisdiction of the appellate court to exercise judicial control over the observance of the guarantees of attorney-client privilege during the pre-trial investigation; inadmissibility of rulings by the investigating judge or court on temporary access to things and documents, containing the attorney-client privilege; mandatory involvement of representatives of the bar self-government bodies in any procedural actions against the attorney; inadmissibility of evidence obtained in violation of the guarantees of the attorney-client privilege.

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ГАРАНТІЇ АДВОКАТСЬКОЇ ТАЄМНИЦІ В ЗАБЕЗПЕЧЕННІ ПРАВ ЛЮДИНИ ПІД ЧАС ПРОВЕДЕННЯ СЛІДЧИХ (РОЗШУКОВИХ) ТА НЕГЛАСНИХ СЛІДЧИХ (РОЗШУКОВИХ) ДІЙ СЛУЖБОЮ БЕЗПЕКИ УКРАЇНИ

Анотація. Мета. Метою статті є всебічне теоретичне дослідження гарантій адвокатської таємниці в забезпеченні прав людини під час проведення слідчих (розшукових) та негласних слідчих (розшукових) дій Службою безпеки України. **Результати.** У статті розкрито сутність гарантій адвокатської таємниці в забезпеченні прав людини під час проведення слідчих (розшукових) та негласних слідчих (розшукових) дій слідчими Служби безпеки України. Зроблено аналіз наукових джерел відповідно до вибраного тематичного напрямку. Наголошено, що у разі необхідності провести обшук слідчий за погодженням з прокурором або прокурор звертається до слідчого судді з відповідним клопотанням, яке повинно містити відомості про: 1) найменування кримінального провадження та його реєстраційний номер; 2) короткий виклад обставин кримінального правопорушення, у зв'язку з розслідуванням якого подається клопотання; 3) правову кваліфікацію кримінального правопорушення із зазначенням статті (частини статті) закону України про кримінальну відповідальність; 4) підстави для обшуку; 5) житло чи інше володіння особи або частину житла чи іншого володіння особи, де планується проведення обшуку; 6) особу, якій належить житло чи інше володіння, та особу, у фактичному володінні якої воно перебуває; 7) речі, документи або осіб, що планується відшукати. **Висновки.** Зроблено висновки, що серед гарантій адвокатської таємниці під час проведення окремих слідчих (розшукових) та негласних слідчих (розшукових) дій слідчими СБУ є: недопустимість проведення допиту суб'єктів збереження адвокатської таємниці як свідків; заборона проведення огляду речей та документів, у тому числі на електронних носіях, що містять відомості, які стосуються адвокатської таємниці; здійснення відомчого та судового контролю, а також прокурорського нагляду за невтручанням органів досудового розслідування в діяльність захисника, а також щодо відомостей та речей, що становлять адвокатську таємницю; визначення юрисдикцією апеляційної судової інстанції здійснення судового контролю за дотриманням гарантій адвокатської таємниці під час досудового розслідування; недопустимість постановлення слідчим суддею, судом ухвал щодо проведення тимчасового доступу до речей і документів, що містять адвокатську таємницю; обов'язковість залучення представників органів адвокатського самоврядування під час проведення будь-яких процесуальних дій щодо адвоката; визнання недопустимими доказів, отриманих із порушенням гарантій адвокатської таємниці.

Ключові слова: гарантії адвокатської таємниці, слідчі (розшукові) дії, негласні слідчі (розшукові) дії, слідчий Служби безпеки України, кримінальний процес.

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