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Fiduciary Activity of an Attorney-At-Law: Experience of the EU and the USA and Prospects for Implementation in Ukraine

Fiduciary Activity of an Attorney-At-Law: Experience of the EU and the USA and Prospects for Implementation in Ukraine

Abstract: The article deals with the concept of fiduciary activity of an attorney-at-law. The author analyzes foreign experience, in particular, the EU and the USA on fiduciary activity, and conducts a comparative legal analysis. The author examines the prospects for introducing such activities into national legislation on the advocacy. The author focuses on European legislation, in particular, the Common Code of Practice for Lawyers of the European Community. The author examines in detail the procedure for fiduciary activities in the EU and the USA, with special attention paid to the procedure for providing such activities by attorneys. The author emphasizes the advantages and disadvantages of fiduciary activities in foreign countries. The author examines the draft amendments to the national legislation on the Advocacy regarding the introduction of fiduciary activities. The author emphasizes that although the experience of foreign countries with regard to fiduciary activities is quite positive, one should not try to quickly and blindly implement European standards into national legislation, as this will take time. The author determines that a lawyer who manages client's funds in the course of performing professional duties in the territory of one of the Community States must comply with the rules for managing client's funds and maintaining financial records established by the competent authorities of the State of registration. The author of the article also establishes that the competent authorities of all Community countries have the right to control and confidentially examine the financial documents of an attorney-at-law on the client's funds placed at his disposal in order to identify cases of violation of the rules to be observed by the attorney-at-law and to impose sanctions on him in case of the above violations. The advocate, who manages the client's funds in the course of the performance of his or her professional duties in the territory of one of the Community states, shall comply with the rules for the management of client's funds and the maintenance of financial records established by the competent authorities of the state of registration.

Keywords: attorney-at-law, fiduciary activity, European Community, court, legislation

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Introduction

Fiduciary instruments originated and are widely used in the countries of Anglo-Saxon law. And despite the fact that the implementation of such instruments into the legal system of a country of the European continental legal system is characterized by some difficulties and peculiarities, a significant number of citizens of Ukraine and any other country are now users of these services.

Today, there is a lot of discussion around the issue of reforming the Ukrainian Advocacy. This is understandable, since all spheres of social relations which are steadily influenced by globalization processes should be improved and comply with the best international practices.

The purpose and objective of the article are to study and disclose the essence of new concepts such as fiduciary activity and escrow agent activity, to provide examples of their application in the EU and the USA and to introduce them in Ukraine.

The concept of "fiduciary activity"

The word "fiduciary" comes from the Latin "fiducialis" – reliable, "fiducia" – support, "fidere" – to trust. The concept of "fiduciary" originated in ancient Rome and meant an act based on trust: the transfer of property to another person under the guise of a sale with the right of recourse (Bytrin-Boka & Diachyk, 2017).

Fiduciary activity can be defined as a type of attorney's activity, which consists in receiving and managing property (cash, securities, currency values, etc.) on deposit or trust accounts on behalf and at the expense of the client, taking care of finances and property, their placement and management on behalf and at the expense of the client.

The concept of fiduciary duties in corporate relations is not new to Ukrainian law. Historically, it has been a part of the common law precedent system, and over the years it has spread and been reflected in the national legislation of many countries around the world (Bytrin-Boka, 2019).

The Romano-Germanic legal system has recopied this doctrine from Anglo-American law. Thus, despite the fact that the current corporate legislation of Ukraine does not contain the concept of "fiduciary duty", the doctrine of fiduciary duty has recently been increasingly applied in the court practice in the field of corporate legal relations. In particular, when determining the liability of a body or official of a legal entity to a legal entity.

Fiduciary transactions have special personal confidential relations between the parties, which define any transaction as fiduciary. Traditionally, special trust between the parties is associated with such a criterion as the right to unilaterally refuse to execute a transaction in the event of loss of fiduciary mediation between the parties, in particular in the relations of representation. However, if the parties have taken the opportunity to provide for the right to unilaterally refuse to perform the agreement, this does not make such an agreement a fiduciary agreement.

N. Bakayanova notes that the inclusion of mediation and fiduciary activities in the content of the practice of law is not theoretically justified. These types of activities should be considered as those that can be performed by attorneys-at-law along with the practice of law.

I. Venediktova compares fiduciary activity with trust relations, which provide for the delegation or exercise of powers of the owner by the manager of another's property under the conditions determined by a legal transaction or law (Venediktova, 2003).

Experience of fiduciary activities in the EU and the USA

The main legal act common to all EU member states regulating the fiduciary activities of an attorney is the General Code of Rules for Lawyers of the European Community (hereinafter – the Code) of October 1, 1988, clause 3.8. of which sets out the rules for the provision of financial services by an attorney.

According to the said Code, the client's funds must always be kept in an account with a bank or any other organization that allows the authorities to control the transfer of funds by the advocate to the account of funds placed at his or her disposal by the client, unless there is a direct or indirect order of the client to use the funds in any other way.

An important provision is that the documents on the account opened by the advocate for the storage of client's funds must contain an indication that this

operation was carried out by the advocate on behalf of the client or clients. The account or accounts opened by the advocate for the storage of client's funds shall be kept at all times in the amount equal to or exceeding the total amount of client's funds at the advocate's disposal.

All client funds must be paid to the client either at the client's request or on the terms and conditions determined by the client. Payments to any person from the client's funds made on behalf of the client, excluding

a) payments to or for the benefit of the client from the funds of another client and
b) payment of attorney's fees, shall be prohibited, except in cases provided for by law or upon the direct or indirect authorization of the client.

The advocate who disposes of client's funds in the course of the performance of his or her professional duties in the territory of one of the Community states shall comply with the rules for the disposal of client's funds and the maintenance of financial records established by the competent authorities of the state of registration.

The competent authorities of all countries of the Community have the right to control and confidentially examine the advocate's financial documents on the client's funds placed at his or her disposal in order to identify cases of violation of the rules to be observed by the advocate and to apply sanctions to him or her in case of the above violations.

The advocate who disposes of client's funds in the course of the performance of his or her professional duties in the territory of one of the Community states shall comply with the rules for the disposal of client's funds and the maintenance of financial records established by the competent authorities of the state of registration.

In addition, the advocate, who participates in the proceedings or provides services to the client in the territory of the host state, may, if there is an agreement between the relevant authorities of the state of registration and the host state, be guided in the exercise of professional activity by the rules in force in the territory of the host state, excluding similar rules in force in the territory of the state of registration. In this case, the advocate shall, if possible, inform clients that he or she is guided by the rules of the host state.

An analysis of the provisions of French fiduciary law reveals many common features in the legal regulation of relations arising from property management in France and Ukraine. However, the French legislator's approach has both advantages and disadvantages. The French fiduciary deserves special attention from the point of view of the possibility of improving Ukrainian legislation in the issue of legal regulation of trust property relations (Poltavs'kii, 2012).

In many cases, no profit is to be made from the relationship unless explicit consent is granted when the relationship begins. As an example, in the United Kingdom, fiduciaries cannot profit from their position, according to an English High Court ruling, *Keech vs. Sandford* (1726). If the principal provides consent, then the fiduciary can keep whatever benefit they have received; these benefits can be either monetary or defined more broadly as an "opportunity."

The experience of the United States is interesting in this regard, where fiduciary duty is a legal term that describes the relationship between two parties, obliging one party to act solely in the interests of the other. Fiduciary duties take a variety of forms according to the legal system, including, but not limited to, between a trustee and a beneficiary, a guardian and a ward, and a lawyer and a client.

The US Supreme Court states that a high level of trust must exist between an attorney and his or her client and that an attorney, in fulfilling his or her fiduciary duties, must act with fairness, loyalty and devotion to each client. Attorneys are liable for breach of their fiduciary duties to the client, and their misconduct may be subject to judicial review (Fursa & Bakayanova, 2014, p. 238).

While the term "suitability" was the standard for transactional accounts or brokerage accounts, the U.S. Department of Labor Fiduciary Rule proposed to toughen things up for brokers. Anyone with retirement money under management, who made recommendations or solicitations for an individual retirement account (IRA) or other tax-advantaged retirement accounts, would be considered a fiduciary required to adhere to that standard, rather than to the suitability standard that was otherwise in effect.

Subsequently, the implementation of all elements of the rule was pushed back to July 1, 2019. Before that could happen, the rule was vacated following a June 2018 decision by the Fifth U.S. Circuit Court.

Prospects for the introduction of fiduciary activity of an attorney-at-law in Ukraine

According to the draft Law of Ukraine "On the Advocacy and Practice of Law" dated 20.09.2018 No. 9055–2 (hereinafter – the Draft Law), it is proposed to define fiduciary activity as the activity of a lawyer, law office or law firm, which consists in managing the property (funds, securities, currency values, etc.) of a client on his/her behalf in connection with the provision of professional legal assistance to the client.

The Draft Law considers the management of the client's property on his behalf to be exclusively the provision of professional legal aid to the client. However, the authors have not substantiated how the provision of professional legal aid will be related to the business of managing the client's property, and this question remains open (Urazova, 2018).

There is still a lot of work to be done on this bill. The working group has been working on it for quite a long time. We had to finish this work, not in a forced, but in an urgent manner, because it can be continued indefinitely.

The fate of the legal framework for the organization and operation of the advocacy and the exercise of advocacy in Ukraine, to date, is one of the most significant issues of the legal light of the state, the answer to which is presented by the Draft Law of Ukraine "On Amendments to the Law of Ukraine on the Advocacy and Legal activity". If the Draft Law on the Advocacy, which is part of the judicial reform, is adopted, the defense in courts should become more professional, and lawyers will have more opportunities (Nekit, 2011).

Most often trust relations arise on the basis of transactions, a specific type of which is a contract of trust management of property. The design of the contract of trust management of property is based on the principles of freedom of contract, equality of parties, compensation of the contract, inadmissibility of arbitrary interference in private affairs, etc., which are common for civil contracts. In accordance with Article 1048 of the Civil Code of Ukraine under the contract of trust management of property is understood such a contract, under which one party (the founder of management) transfers to another party (trustee) for a certain period of time property in trust management, and the other party undertakes for a fee to perform in its own name management of this property in the interests of the founder of management or a person specified by him (beneficiary). Fiduciary transactions have special personal confidential relations between the parties, which define any transaction as fiduciary. Traditionally, special trust between the parties is associated with such a criterion as the right to unilaterally refuse to execute a transaction in the event of loss of fiduciary mediation between the parties, in particular, in a commission agreement.

In general terms, the purpose of a property trust management agreement is to obtain a corresponding effect from professional management of the entrusted property in the interests of the management founder without transferring to the trustee the right of ownership thereof by means of the latter's legal capacity to own, dispose and use this property.

Conclusions

As can be seen, along with positive points, there are also doubts. However, having analyzed the provisions of the draft law, we can say with certainty that it is indeed "pro-advocacy". No matter how much its provisions are criticized, most of them are still aimed at improving the advocate's activity, as well as strengthening the rights and guarantees of lawyers.

When reforming the institution of the Advocacy in Ukraine, it is necessary to use the legislative experience of the European Union. This need is due to the fact that the legislative framework for the provision of financial services by an attorney in the EU is of sufficient quality and regulates all the nuances of the attorney's fiduciary activities. Given that the Law of Ukraine "On the Advocacy and Practice of Law" does not list this type of advocacy, it is necessary to amend and detail the conditions and procedure for the exercise of fiduciary activities, taking into account the provisions reflected in clause 3.8. of the Common Code of Practice for Advocates of the European Community, so that this future rule could be actively used in practice.

This draft law aims to expand the professional rights and duties of advocates, the guarantees for the exercise of advocacy, and the types of such activities, which improves the procedure for admission to the profession and introduces changes to the system of advocates' self-governance bodies.

The fiduciary relationship between a lawyer and a client, according to the new law, the approval of which is awaited with bated breath by the entire legal community of Ukraine, is now conditioned not only by the fact that there is a relationship of trust between them, by virtue of which both parties assume that the other party acts reasonably and in good faith. The purpose of the lawyer in the execution of the agreement with the principal will be to provide legal assistance and to act in the interests of the principal in respect of the property of the other on his behalf, which will greatly expand the range of powers of the lawyer and will provide individuals with the opportunity to obtain qualified assistance in the with respect to the administration of their property.

In view of the fact that the agreement on rendering legal assistance is fiduciary, the possibility of refusal of an advocate from the accepted assignment in a civil case is of particular importance. In our opinion, such refusal is admissible only in exceptional cases, when an advocate is forced to stop performing the assignment due to objective reasons, for example, due to illness or identification of a conflict of interest.

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