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**THE INSTITUTE OF REPRESENTATION
IN THE CIVIL PROCESS OF RUSSIA:
TRENDS AND DEVELOPMENT PROSPECTS**

Summary

Art. 48 of the Constitution of the Russian Federation guarantees everyone the right to qualified legal assistance. The question of the means and methods it should be provided with has been debated between lawyers for a long time. A number of scientists talk about the need for legislative consolidation of the 'advocate monopoly'. Others consider it appropriate to license the legal services market. These disputes remain relevant today. However, in 2019, Russia has undergone a reform of procedural law, which lawyers have called a 'process revolution.' Many rules of procedural codes have undergone major changes.

In particular, as a result of the reform, the requirements for persons who may act as representatives in civil matters have been substantially changed.

In the framework of this article, an attempt is made to analyse the reform of the institution of representation. Based on a systematic analysis of procedural legislation and law enforcement practice, the author comes to the conclusion that legislative consolidation of the need for higher legal education for representatives can be called one of the positive aspects of the reform.

This article provides an analysis of the development trends of the institution of representation in the historical aspect. The author concludes that it is maintaining logical and

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consistent movement along the path of becoming an 'advocate monopoly' in Russia. It seems that subject to its competent and phased introduction, as well as the reform of the corps of the bar itself, not only by increasing its number but above all by increasing the professionalism of its members, it can and should become an effective tool in the civil process.

Keywords: civil procedure, representation, professional legal assistance, higher legal education

Current trends in the development of the institution of representation in the civil process of Russia

The discussion on the feasibility of establishing professional representation has been conducted in Russia for many years. The need for a professional qualification in relation to procedural representatives in the arbitration process was also discussed by V.F. Yakovlev and A.A. Ivanov. The comprehensive concept of professional representation in the Russian civil process was developed in 2004 in the doctoral dissertation by E.V. Tarlo.¹

If we analyse the ways of reforming the legislation in relation to the issue under consideration, it should be remembered that the first attempt to establish an 'advocate monopoly' in the arbitration process was made in the Arbitration Procedure Code of the Russian Federation in 2002. The legislator limited the list of possible representatives of the organisation: such could be its head and employees, or advocates. Interestingly, such restrictions concerned organisations, while the right to choose a representative in relation to individual entrepreneurs was not limited in any way.

However, already in 2004 this rule was declared unconstitutional. In the literature, the legal position of the Constitutional Court is assessed differently. Many scientists believe that, within the framework of this decision, the court recognised as unacceptable the existence of restrictions on subjects of representation in general. Such an interpretation does not seem completely objective. An analysis of the judgment allows us to conclude that the Constitutional Court does

¹ See more: E.G. Tarlo, *Problemy professional'nogo predstavitel'stva v sudoproizvodstve Rossii* [Problems of professional representation in the legal proceedings of Russia], avtoref.dis. ... d-ra jurid. nauk. M., 2004.

not speak about the ‘unconstitutionality’ of the ‘advocate monopoly’ as such but only about a violation of Art. 19 of the Constitution of the Russian Federation in connection with discrimination of subjects depending on the method of organising entrepreneurial activity: restrictions apply only to organisations and only to the arbitration process.

Thus, the legislative consolidation of the complex restrictions on the right to choose a representative for all participants in the civil process is unlikely to be in any conflict with the Constitution of the Russian Federation.

In recent years, the discussion about the need for an ‘advocate monopoly’ in Russia has become more visible. After approval of the state ‘Justice’ programme,² taking into account the consolidation of the provisions on the need for a twofold increase in the lawyer corps, the prospect of introducing a single lawyer’s status for all players in the legal services market seemed quite real. However, the further development of events went in a slightly different direction. The deadlines for submitting to the Government of the Russian Federation the Federal Law on Professional Legal Aid, aimed at optimising the procedure for admission to the lawyer profession and standardising the market for professional legal assistance, have been repeatedly postponed.

On 24 October 2017, the Ministry of Justice published the Concept of Regulation of the Legal Services Market (Professional Legal Aid Market)³ for general discussion. This Concept suggested the following stages of reforming the institution of representation:

1. 2018 – the introduction of access to the institution by lawyers of commercial legal forms.
2. 2019 – adoption of regulations on a simplified procedure for joining the bar.
3. 2020–2022 – admission to the legal profession of persons interested in this.
4. from 1 January 2023, judicial representation in all instances and in all types of cases can only be carried out by lawyers.

² See more: Postanovlenie Pravitel’sstva RF ot 15.04.2014, No. 312 ‘Ob utverzhdenii gosudarstvennoj programmy Rossijskoj Federacii “Yusticiya”’ [Decree of the Government of the Russian Federation of 15 April 2014, No. 312 ‘On approval of the state programme of the Russian Federation “Justice”’].

³ Proekt Rasporyazheniya Pravitel’sstva RF ‘Konceptsiya regulirovaniya rynka professional’noj yuridicheskoy pomoshchi’, podgotovlen Minyustom Rossii [The draft Government Order of the Russian Federation ‘The Concept of Regulation of the Professional Legal Aid Market’, prepared by the Ministry of Justice of Russia].

The proposed reform method has been actively criticised by the legal community. In particular, the possibility of obtaining the status of a lawyer in a simplified manner was assessed extremely negatively, since such an approach nullifies the proclaimed goal of the reform – ensuring the right to qualified legal assistance.

The adoption of the Federal Law of 28 November 2018, No. 451, suspended the active discussion that unfolded around the ways of reforming the institution of representation, establishing not professional, but educational qualifications in relation to the subjects of representation.

It seems that the legislative consolidation of the need for higher legal education for representatives can be called one of the positive aspects of the reform. A similar approach has already been tested under the Code of Administrative Procedure of the Russian Federation and demonstrated its viability and effectiveness. In the context of the discussion about reform of the legal services market and the advisability of the ‘advocate monopoly’ in the civil process, the establishment of an educational qualification seems to be a less radical measure. This approach obviously does not entail restrictions on the principles of dispositiveness and accessibility of judicial protection, or mean the need for a sharp increase in the body of lawyers, nor is it likely to lead to a significant increase in the cost of legal services. At the same time, it seems that the requirement for higher legal education among representatives will contribute to the realisation of the right to qualified legal assistance guaranteed by Art. 48 of the Constitution of the Russian Federation.

It seems logical and reasonable that the norms on an academic degree in a legal speciality appear as an alternative to higher legal education.

It should be noted that if in the arbitration and administrative process the requirement for a legal education extends to all levels of the judicial system, then according to the new version of Art. 49 of the Civil Procedure Code of the Russian Federation, the requirement of higher legal education or degree in a legal speciality does not apply to cases considered by district courts. Thus, in accordance with the new provisions of the procedural legislation of the Russian Federation, a representative who does not have higher legal education will no longer be able to be a representative in courts above the district level, in particular in courts of appeal and cassation. If we apply these rules to the average case relating to the jurisdiction of the district court, then we get a rather strange situation. A representative who does not have higher legal education in a civil case that was

examined at the first instance in a district court will no longer be able to be a representative in the same case when considering an appeal. Taking into account the old Russian proverb ‘they don’t change horses at the crossing,’ it is not clear why the principal who chose the representative and thanks to this representative won the case in the court of the first instance should suddenly be required to change this representative in case of an appeal against the decision.

So, the final version of Art. 49 Code of Civil Procedure of the Russian Federation raises a number of quite logical questions:

1. Why does the educational qualification impede the exercise of the right to judicial protection at the level of access to the court of first instance but does not prevent it at the level of the court of appeal and cassation?
2. Why does the educational qualification impede the exercise of the right to judicial protection in the framework of the civil process but not interfere in the framework of the arbitration process, as well as in the consideration of administrative cases under the rules of the CAS of the Russian Federation?
3. What is the ratio of these restrictions in the civil process with the idea of unification of the civil and arbitration process?
4. Finally, an equally important issue is the need to guarantee not only the right to judicial protection but also the right to qualified legal assistance. Obviously one of the standards for the provision of qualified legal assistance is that a representative has a legal education. So, why does this standard begin to be respected only from the appeal court?

Based on the foregoing, the approach chosen by the legislator cannot be considered successful. Moreover, returning to the decision of the Constitutional Court, an analysis of which was given at the beginning of the article, it seems that such selective restrictions on a representative in the civil process can again be recognised as certain discrimination, which is in contradiction with the constitutional provisions of the Russian Federation.

The new edition of the procedural law contains a number of well-founded exceptions to the requirement that a representative has higher legal education. In particular, the need to comply with educational qualifications does not apply to:

- patent attorneys for disputes related to the legal protection of the results of intellectual activity and means of individualisation,
- arbitration managers in the performance of their duties in a bankruptcy case,
- trade unions, their organisations, associations representing in court the interests of persons who are members of trade unions in disputes related to the

violation or contest of rights, freedoms and legitimate interests in the field of labour (service) relations and other relations directly related to them.

The specified list is not exhaustive, other cases may be provided for by federal law.

It should be noted that the new version of the law leaves unresolved the issue of the possibility of technical actions (for example, submitting and receiving documents in court) by persons who do not have a legal education. A literal interpretation of the law suggests that this is not possible. However, it is obvious that such an approach will create many unnecessary difficulties in practice.

In the original version of the bill for such purposes, it was supposed to introduce a new figure into the civil process – the ‘attorney.’ It can be assumed that the idea has roots in the French doctrine where the division of legal aid providers into lawyers and attorneys existed until 31 December 1971. The expediency of the emergence of the status of ‘attorney’ in the Russian civil process was subjected to extensive criticism from the legal community. As rightly noted by V.P. Kudryavtseva, ‘it is not clear what material legal relations serve as the content of the attorney’s introduced procedural status and why the existing procedural figures are not suitable’.⁴ In addition, a number of questions were also raised by the normative regulation of the new procedural figure. In particular, having empowered the attorney with the authority to receive judicial notices and calls, the legislator did not make corresponding changes to the relevant articles on the proper notification of persons involved in the case. Subject to extensive discussion and amendments to the second reading, these provisions were deleted.

Summing up, we note that the proposed way of reforming the institution of representation as a whole can be a good basis for the establishment of the ‘advocate monopoly’ in Russian Federation. It seems that subject to its competent and phased introduction, as well as the reform of the corps of the bar itself, not only by increasing its number but above all by increasing the professionalism of its members, it can become an effective tool in the civil process.

⁴ V.P. Kudryavtseva, *Status poverennogo v grazhdanskom i administrativnom sudoproizvodstve* [V.P. Kudryavtseva, *Attorney status in civil and administrative proceedings*] “Arbitrazhnyj i grazhdanskij process” 2017, No. 12, p. 23.

The expenses of representative services in the civil process in Russia

As already noted, the introduction of the ‘advocate monopoly’ in the Russian civil process can lead to a significant increase in the cost of paying for the services of a representative. In this regard, it seems necessary to analyse the mechanism of formation of these costs and methods for their compensation.

A lawyer’s fee is one of the essential conditions of a legal aid agreement. Today, most common in the Russian Federation is the system of fixed tariffs for the provision of legal services, as well as a mixed-fee payment system: fixed-fee rates for each authority plus the total fee in the form of a percentage of the collected funds (‘success fee’).

The practice of including the conditions of the ‘success fee’ has been widespread in Russia for a long time. However, in 1999, the Supreme Arbitration Court of the Russian Federation spoke out negatively about the possibility of classifying the ‘success fee’ as legal costs.⁵ At the same time, the Supreme Arbitration Court did not indicate that the condition of the contract for the provision of legal services, making the amount of the payment for services dependent on the court decision to be taken in the future, should it be recognised as invalid (void), contrary to the requirement of the law. The information letter only notes that the contractor’s claim for remuneration is not subject to satisfaction if the plaintiff substantiates this claim by the condition of the contract, making the amount of payment for services dependent on the decision of the court or state body that will be adopted in the future.

Accordingly, if the obligation to pay the ‘success fee’ is fulfilled voluntarily, then it is valid. If it is not voluntarily executed, then it cannot be claimed through the court. Later, when considering the admissibility of such practice in Russia, the Constitutional Court came to the conclusion that lawyers are forbidden to conclude agreements containing a condition about a fee, the size of which

⁵ See more: *Informacionnoe pis'mo Prezidiuma Vysshego Arbitrazhnogo Suda RF ot 29.09.1999, No. 48 ‘O nekotoryh voprosah sudebnoj praktiki, vznikayushchih pri rassmotrenii sporov, svyazannyh s dogovorami na okazanie pravovyh uslug’* [Information Letter No. 48 of the Presidium of the Supreme Arbitration Court of the Russian Federation dated 29 September 1999 ‘On Certain Issues of Judicial Practice Arising in the Consideration of Disputes Relating to Legal Services Agreements’].

depends on a future court decision.⁶ The court found that in this case, not only are the actions of the performer subject to payment but also the specific result for the achievement of which the corresponding contract is concluded, namely, the court ruling in favour of the applicant. Meanwhile, a court decision cannot be the object of anyone's civil rights (Article 128 of the Civil Code of the Russian Federation) or the subject of any civil law agreement (Article 432 of the Civil Code of the Russian Federation).

At present, an approach that can be considered relatively established in judicial practice is one in which, when a customer refuses to pay a fee, the courts do not recognise the right to enforce the contract.

The 'success fee' paid in most cases is not recoverable from the losing party in order to reimburse legal expenses since this contingent consideration does not imply that the representatives take any additional actions, provide additional services, or otherwise provide another consideration within the framework of the legal aid contract, so it is essentially that this reward is a kind of bonus for representatives. The amount of the specified premium depends on the agreement reached by the parties to the legal services agreement. The result of such an agreement between the client and the representative ('success fee') cannot be recovered as legal costs from the procedural opponent of the client, which is not a party to this agreement.

Moreover in a number of precedents, if the amount was paid by the customer voluntarily, the courts satisfy the demand for its return as unjust enrichment.

However, in some judicial acts, the opposite approach is also encountered. So, in 2012, the Moscow Arbitration Court recovered from a defendant expenses for the services of the representative of the plaintiff in the amount of USD 121,264.09 and RUB 28,880,657.79. It is interesting that the remuneration for the lawyers in this case consisted of two parts: a fixed fee for representing the interests of the client in the relevant instance and a percentage of the amount recovered in favour of the plaintiff. To justify the admissibility and reasonable-

⁶ Postanovlenie Konstitucionnogo Suda RF ot 23.01.2007 No. 1-P 'Po delu o proverke konstitucionnosti polozhenij punkta 1 stat'i 779 i punkta 1 stat'i 781 Grazhdanskogo kodeksa Rossijskoj Federacii v svyazi s zhalobami obshchestva s ogranichennoj otvetstvennost'yu 'Agentstvo korporativnoj bezopasnosti' i grazhdanina V.V. Makeeva' [Decree of the Constitutional Court of the Russian Federation of 23 January 2007, No. 1-P 'On the case on the verification of the constitutionality of the provisions of paragraph 1 of Article 779 and paragraph 1 of Article 781 of the Civil Code of the Russian Federation in connection with complaints of the limited liability company 'Corporate Security Agency and V.V. Makeev].

ness of such a ‘success fee’ the court made the following calculation. It established the total number of hours spent by lawyers to provide services to their client in the framework of the case. The court multiplied the resulting figure by the hourly wage rates set by the relevant law office. At the same time, the amount of ‘mixed’ remuneration only slightly exceeded the amount of the fee that lawyers would have received if fixed hourly rates were applied.

The above arguments allowed the arbitral tribunal to recover the claimed ‘success fee’ in full. It should be noted that in a subsequent court of appeal, the amount recovered was reduced to USD 46,264.09 and RUB 28,880,657.79. However, the fact of the possibility of collecting a ‘success fee’ by the courts of higher instances was not refuted.

The possibility of collecting a certain percentage of the principal’s economic effect as a lawyer’s fee is also seen in a number of other judicial acts of arbitration practice. In accordance with art. 100 Code of Civil Procedure of the Russian Federation, part 2 of art. 110 Code of Arbitration Procedure of the Russian Federation, art. 112 of the Code of Administrative Procedure of the Russian Federation, the costs of paying for the services of a representative incurred by a person in whose favour the judicial act was passed are recovered by the court from another person participating in the case, within reasonable limits. Procedural law provides two ways of reimbursing the costs of representative services:

- simplified procedure, when the issue of recovering such expenses is resolved simultaneously with the court decision and the corresponding conclusion is included in the final court decision,
- general procedure, when this issue is decided in a separate court session, the results are documented in a separate judicial act.

After the adoption of the final judicial act in the case, the person participating in the case is entitled to apply to the court with a statement on the issue of legal costs incurred in connection with consideration of the case, the reimbursement of which was not announced during its consideration. The term for handling such a statement is three months.

When considering the application on the issue of legal costs, the court also resolves the distribution of legal costs associated with the consideration of this application. With this in mind, the relevant application filed after a ruling on the issue of legal costs is not subject to acceptance for production and consideration by the court. The procedural legislation does not provide for payment by the state

duty of an application for reimbursement of expenses for the services of a representative since it is not an independent claim.

In order to recover costs for the representative's services from the opposite side, the court must establish a set of legal facts.

The first comprises the presence and amount of real costs for the payment of representative services. To confirm the existence of expenses incurred to pay for services and their amounts, the winning party may submit:

- a contract for the provision of legal services or a contract of commission,
- acts on the provision of legal services (performance of work),
- invoices for payment of legal services rendered (work performed),
- payment orders with a note from the bank on the transfer of funds to pay for the representative's services (work), an extract from the bank confirming the write-off or crediting of the payment amount under the contract and other duly executed documents confirming the payment of funds.

Controversial in judicial practice is the question of the possibility of confirming the costs of paying for a representative's services with a handwritten receipt. Obviously, in relation to a lawyer, this method of fixing the receipt of funds is not permissible, since in accordance with part 6 of art. 25 of the Federal Law On Lawyers 'Activity and Advocacy in the Russian Federation' 'the remuneration paid to the advocate by the principal is subject to obligatory payment to the cashier of the lawyer's workplace'. However, in the case of the provision of legal services by persons who do not have the status of a lawyer, a handwritten receipt from a representative may be recognised by the court as an appropriate document confirming the transfer of money.

The requirement of cash for court expenses is well-established both in procedural science and in judicial practice. However, there is an alternative point of view, according to which the reality of court costs is determined through the inevitability and the onset of all conditions for their payment. Moreover, the fact of spending money does not matter. This approach is followed, in particular, by the European Court of Human Rights (ECtHR). So, in one of the decisions, the arguments of the Russian Federation that the legal costs of the representative do not meet the reality criterion and are probabilistic in the future were rejected because all the conditions for the payment of the representative's remuneration provided for in the agreement have come about. According to the ECtHR, a respectable and law-abiding citizen will necessarily pay remuneration to his representative, as required by the contract, and accordingly, to discuss the likeli-

hood of paying remuneration means to question the integrity of the citizen, which is unacceptable.

The second one comprises the objections of the losing party against the amount claimed for reimbursement of the services of a representative, or the apparent excessiveness of such expenses.

The Constitutional Court of the Russian Federation has repeatedly spoken out on the inadmissibility of arbitrary reduction of reimbursement of expenses for the services of a representative. The issuance of a reasoned decision to change the amount recovered in reimbursement of the relevant costs is permissible only if the other party raises objections and presents evidence of the excessiveness of the costs recovered from it. However, in accordance with para. 11 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of 21 June 2016, if the amount of the legal costs claimed for compensation is clearly unreasonable (excessive), the court has the right to reduce the amount of compensated legal costs on its own initiative. The literature notes that the court's right to discretion to reduce the cost of legal expenses at its discretion is an exception to the general principle of adversarial and equal rights, in fact, entrusting the court with the role of investigator and attorney of the losing party. It seems that the exercise of this authority should not be generally accepted. Essentially, we should only talk about cases where the person from whom the compensation of legal costs is recovered cannot present his objections for physical or intellectual reasons.⁷

The third comprises the reasonableness of the cost of paying for the services of a representative. Obviously the category of 'rationality' is a value concept. In resolving this issue, the court should consider a number of criteria. The main ones are indicated in para. 3 of the Resolution of the Plenum of the Supreme Court of the Russian Federation dated 21 January 2016, No. 1, 'On some issues of the application of legislation on reimbursement of costs associated with the consideration of the case', as well as the information letter of the Presidium of the Supreme Arbitration Court of the Russian Federation of 13 August 2004, No. 82, 'On some issues of the application of the Arbitration Procedure Code of the Russian Federation'. In particular, they should include the number of claims, the amounts of the claims, the complexity of the case, the total services provided

⁷ See more.: E.S. Razd'yakonov, I.N. Tarasov, S.A. Halatov, *Aktual'nye voprosy vozmeshcheniya sudebnyh izderzhok: kommentarij k Postanovleniyu Plenuma Verhovnogo Suda RF* [E.S. Razdyakonov, I.N. Tarasov, S.A. Khalatov, *Actual issues of reimbursement of legal costs: commentary on the Resolution of the Plenum of the Supreme Court of the Russian Federation*], "Vestnik ekonomicheskogo pravosudiya Rossijskoj Federacii" 2016, No. 4.

by the representative, the time required to prepare the procedural documents, the duration of the case, and other circumstances.

The reasonableness of the legal costs of paying for the services of a representative cannot be justified by the fame of the representative of the person participating in the case.

It should be noted that the representative's expenses necessary for the fulfilment of his obligation to provide legal services, for example, expenses for acquaintance with the case materials, for the use of the internet, for mobile communications, for sending documents, are not subject to additional compensation by the other party to the dispute, since according to rule 309.2 of the Civil Code of the Russian Federation, such expenses, as a general rule, are included in the price of the services provided.

So, the analysis has shown that the consistent development of the institution of representation in the Russian civil process is on the path to becoming an 'advocate monopoly'. Of course, this may cause an increase in the cost of representative services. However, the professionalism of the representative is a prerequisite for victory in court. And in this case, all expenses incurred can be recovered from the losing side.

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