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Conceptual basis of lawyer investigation

Abstract: Lawyer investigation is a criminal procedure activity a person who performs functions of defence of individuals and legal entities in pre-trial and court productions after signing of an agreement with client. This activity includes collection and examination of data, documents and objects in order to use them as evidence that aimed to ensure legal rights and interests of clients.

Concept of lawyer investigation is a system of knowledge on a core, subject, functions, objectives, goals, legal basis, principles, participants, bounds, acts and general conditions its production.

Keywords: lawyer investigation; defence; function; principles; participants; subject.

Research made and analysis of their results allow asserting that a concept of lawyer investigation is a system of knowledge on a core, subject, functions, objectives, goals, legal basis, principles, participants, bounds, acts and general conditions its production.

In our standpoint, lawyer investigation is criminal procedure activity of a lawyer who defends individual and legal entities in pre-trial and court productions after signing of an agreement with client. This activity includes collection and examination of data, documents and objects in order to use them as evidence that aimed to ensure legal rights and interests of clients.

However, there is no common opinion in legal literature concerning to the system of lawyer investigation, its structural elements and their core.

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So, E.G. Martynchik, as a subject of lawyer investigation, considers a set of circumstances of criminal case which have legal significance and should be established proceed from the interests or requirements of a client or grantor and in the frames provided by a law [8, p. 111].

According to him, a subject of lawyer investigation is determined on the basis of circumstances that are subject to be proved on criminal case, and the bounds of investigation – on the basis of subjective assessment of the facts by a lawyer, on his/her inner conviction [8, p. 112].

It seems that above stated assertions are incorrect and incomplete.

In our point of view, lawyer investigation may also begin before institution of criminal case, at stage of pre-investigation examination of a statement, when there are no participants of criminal process in meaning of a Code of Criminal Procedure (further, CCP), and there are only individuals and legal entities and their representatives.

Concerning lawyer's tasks, A.M. Larin and Yu.F. Lubshev pointed out that they are proving of circumstances, which justify of accused and mitigate his/her responsibility [5, p. 18; 7, p. 682].

In standpoint of S.N. Gavrilov, main duty of lawyers is to ensure of rights of individuals and legal entities for obtaining of qualified legal aid and representation of their legal interests in state, public bodies and institutions [4, p. 12].

However, there are also other tasks for lawyer-representative during lawyer investigation. They are clarification, establishing and examination of a set of circumstances and evidence that necessary to provide a client with qualified legal aid and protect his/her rights and legal interests.

Speaking on the functions of lawyer investigation, we may schematically distinguished: providing qualified legal aid through consultations, advice to collect and represent evidences; proving circumstances and collection of evidences that have significance for performance of protection or representation on criminal case;



elimination of the gaps of enquiry or preliminary investigation in order to prevent or disclose an investigative mistake; full or partly refutation of accusation; make measures to restore violated rights and interests of a client etc.

As for the goals of lawyer investigation, A.D. Boikov and N.I. Kapinus point out that advocacy serves to protection of rights of man and citizen [2, p. 11].

It seems that common and sub-goals of lawyer activity are fully related also to lawyer investigation, at production of which a lawyer may seek to reach the both all goals, which delineate by a law, and some of them. Choice of a goal of lawyer investigation is determined by circumstances of concrete instruction, interests of a client or grantor, circumstances of a case, and also procedural opportunities of a lawyer.

Determining the goals of lawyer investigation, it seems necessity to say one of them; this is an establishing of truth on criminal case. In relating to this goal of lawyer investigation in science of criminal process, scientists believed that from one side, through a defence is established the truth, it is born in clash of contrary judgements – prosecution and defence parties, and in other side, prosecutor and defender have common goal – establishing the truth [13, p. 5-6].

However, not excluding the truth as a goal of proving, it is necessary to note that in number of cases the interests of a client contradict the interests of the truth, since a counsel has no right to expose a client.

In this connection, it appears necessity to consider an issue on right a lawyer to deception in various its manifestations.

Article 15 of the CCP of Azerbaijan Republic categorically asserts that in course of criminal prosecution a lie forbidden.

However, a lawyer-defender does not participate in criminal prosecution.

Legal literature solves an ambiguously this matter. So, N.N. Polyansky in his work “True and lie in criminal process” says that a defender has no such right, defender “is obliges to provide a court those arguments that support the reliability



of evidence, as if he would not be himself in doubt of their reliability” [11, p. 61]. M.Yu. Barschevsky makes slightly soft this position, asserting that: “Defender says not all true, but – the true” [1, p. 100].

A.A. Levy indicates the following: “Certainly, in compliance with generally recognized moral notions a lie is not admissible, but there is also a notion ‘a lie in name of salvation’”. There are also certain provisions of professional ethics that sometimes admit a lie. So, nobody will reproach a doctor that he hides from a patient that he does not have long to live, and says that he will recover. Although a doctor knows that there are no any hopes to live and a sick man will die soon. In a war a deception of an enemy is recommended and encouraged [6, p. 41].

R.S. Belkin in his last book “Criminalistics: problems of this day” indicated: “At last, it is time to recognise openly that a state also acknowledges admissibility of a lie in law enforcement sphere, it legitimized operational searching activity, which based mostly on disinformation, deception as a mean of detection and disclosure of crimes. Deception of a person who counters an operational officer is not considered to be amoral; not using deception it is impossible to infiltrate a criminal group, to catch a bribe-taker, the extortioner” [3, p. 114].

In this connection, it seems interesting assertion of N.P. Khaydukov, who writes “If it appears contradiction between separate values in procedure tactical situation and it is impossible to save the both at achieving of socially significant goal then it would be reasonable and morally justified such tactical solution, which directed to saving the most significant value in this situation: the same like when absolutely necessary such legal action, to which caused harm to less benefit in purpose to prevent much one... . If at using of techniques and means of impact between separate values appeared contradiction and it is impossible to save the both in order to achieve procedurally and tactically significant goal then it would be reasonable and morally justified moral compromise, i.e. such tactical solution, which directed to saving the most significant value in this situation” [15, p. 64-65].



“Conditions of deception admissibility are very narrow and rather cruel, but principally it should be recognised admissible” – concludes R.S. Belkin, and we should be agreed with him [3, p. 114].

However, this way is solved an issue on admissibility of a lie in actions of an investigator, and it is more complicated a solution in respect of lawyer-defender’s actions. So, A.A. Levy writes: “Let’s image the situation, when two witnesses confirm alibi of accused, and a defender knows that testimonies of the witnesses are false and his client is blame. It is generally accepted that a defender has no right to recognise the client as guilty, when the latter denies it. However whether the defender may refer to testimonies of the witnesses, on falsity of which he is aware, i.e. may he use a lie? It is obvious that he cannot do this. He should bypass this matter somehow and not recognizing his client guilty, not refer to testimonies of these perjurers” [6, p. 43].

It is difficult to be agreed with this assertion as in our opinion it eviscerates a core of defence. It seems that it is admissible a deception at performance of defence the both in form of non-disclosure that or other information and providing obviously false data, which should be accompanied with number of conditions.

As it known, under deception, lie is understood intentional misrepresentation or concealment of the truth, untruth, false presentation etc. [10, pp. 282, 367, 378].

Article 15 of the CCP says that during criminal prosecution it is forbidden to obtain the testimonies through the both deception and application of other illegal actions that violate the rights of interrogated persons. Thus, according to law, deception is considered to be illegal action.

However, lawyer (defender) does not conduct criminal prosecution. According to Article 38 of the CCP, this duty imposed in an inquiry officer, investigator and prosecutor.

In addition, production of interrogation, confrontation, on-site check of testimonies and other investigative actions are also a prerogative of an inquiry officer, investigator and prosecutor as according to appropriate provisions of the



CCP (Articles 232, 233, 235, 236, 238, 239, 260 and others), defender does not just participate in them.

Information transmitted by a defender at participation in investigative actions to other its participants is not testimonies as according to Article 126.1 of the CCP, the testimonies are recognised verbal and written data that received from suspected, accused, victim and witnesses by a body carrying out criminal process. According to Article 7.0.5 of the CCP, the bodies carrying out criminal process are the bodies of inquiry, investigation, prosecutor's office and courts, in production of which is criminal case or other materials associated with criminal prosecution.

This is one side of a matter – procedural, analysis of which allows asserting that it there are no existed procedural (legal) bans of deception for defender.

As it known, suspected and accused persons do not bear criminal responsibility for providing obviously false testimonies, except the cases of false denunciation. In some cases, a content of their testimonies is formulated with participation of a defender, who has consciously or unconsciously to take part in their correction. This is preceded by determination of common defense position, which may be varied in the following forms: a) full denial; b) partly recognition; and c) full recognition of accusation.

We are talking about varying as in a certain stages of the process a full denial of accusation may transform into partly recognition; full recognition – into partly or full denial etc. Accordingly to this will be changed a content of testimonies or happen a failure of giving testimonies.

According to Article 91.5.17 of the CCP, accused has the right to recognise or not recognise his guilty, i.e. he determines himself a position of protection, but in some cases a lawyer takes direct part in this.

As rule, an experienced lawyer does not impose his opinion on a client, and after joint analyzing everything pro and con and he explains in common features possible consequences, and offers a client to determine his defence position.



Everything more or less clear when as a form of protection is chosen a failure to giving testimonies or full recognition of accusation. More complicated matter when through giving testimonies is chosen full or partly denial of accusation. In these situations lawyer can know or cannot about guilty of his client, believe or not to believe in truthfulness of his testimony, but he is obliged to participate in their formulation.

The loss of clientele and professional authority, again entailing material insolvency, is an essential, but not the main circumstance in a dispute about defender's right to lie.

In our standpoint, as it noted above, deprivation of a defender of the means of criminalistical tactics, an integral part of which is a deception, makes vapid an essence of the defence.

It is rightly noted in legal literature that there was no and not in criminalistical tactics a technique, recommendation, combination etc., in the basis of which would not be deception and lie. "History of criminalistical tactics, especially its soviet period, is characterised by unsuccessful attempts to find a moral justification of admissibility of a lie and deception or camouflaging synonyms that in any case was doomed to failure as it was in a vicious circle of the Jesuits notions and provisions" [14, p. 94].

In addition, it is necessary to note that as rightly wrote M.S. Strogovich, a deception and lie presenting in especially tricky form become more qualified and amoral [12, p. 20].

Summarizing above stated, we may assert that criminalistical tactics is a component of the defence, and a deception – a component of criminalistical tactics. Bounds and forms its using by a defender depend on his/her moral qualities, applying of which will allow asserting on tactical abilities, but not mendacity and amorality.



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