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## THE CONCEPT OF BAR AND FUNDAMENTAL PRINCIPLES OF AN ADVOCATE'S ACTIVITY IN ROMAN LAW

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**Annotation.** *In Roman civil procedure legal representatives (cognitores, procuratores) functioned together with their different assistants (advocati, patroni, oratores) who had the right to participate in the procedure together with the party and not instead of it. This article aims to show the peculiarities of the legal status of advocates, patrons, rhetoricians and other assistants of the litigants in civil procedure, the concept of a bar, as a professional corporation, presumption of its origin and mission in ancient Rome, origins of state guaranteed legal aid and the institute of obligatory participation of the advocate in the procedure, the conditions of the agreement between the advocate and the client (mandatum), the peculiarities of the advocate's fees for legal services, the responsibility of the advocate for improper execution of duties and other issues.*

**Keywords:** *Roman law, Roman civil procedure, advocate, commission agreement, advocate's fee.*

## Introduction

The sign of Lithuanian Bar Association contains a Latin inscription „*Ad voco*“ that symbolically encouraged the authors of this article to look back at the roots of the Roman Bar and to examine the history of the bar and its mission in ancient Rome, the peculiarities of the status of the advocate and to distinguish what unifies and differentiates Roman *advocati* and a modern bar.

Nowadays when the term „advocate“ is being used, beside other functions of this profession we most often mean legal representation. The significance of this function of the lawyer was even more increased when a new Code of Civil Procedure of the Republic of Lithuania came into force in 2003, where Art. 56 defined the circle of persons who could be representatives in court under commission more strictly than the earlier enforced laws of civil procedure. Regarding the fact, the representatives of court under commission in the court proceedings usually are lawyers together with their assistants and this allows more effective functioning of the institute of legal representation, as well as provision of professional legal aid and concentrated judicial procedure.

However, let us go back to the law of ancient Rome and Roman law. What peculiarities did the Roman bar have? The most important issues of legal representation in Roman civil procedure are discussed in the publication dedicated to this institute,<sup>1</sup> however, no major attention was paid for the questions of the status of a lawyer. It is not accidental. Legal representatives (*cognitores, procuratores*) are restricted from their assistants (*advocati, patroni, oratores*) who had the right to participate in the procedure together with the litigant party but not instead of it.<sup>2</sup> The status of an advocate, as the assistant of a litigant but not a legal representative, is implied in the very word „advocacy“: *ad voco* – „call in an advisor“.

### 1. Advocates, Rhetoricians, Patrons and Jurists in Ancient Rome

The term *advocatus* in Roman law may be explained as a person whose job is to provide legal aid. Ulpian denotes that „*Advocatos accipere debemus omnes omino, qui causis agendis quoquo studio operatur* – all who are [properly] ready to take different [judicial] cases are obliged to be called advocates.<sup>3</sup> *Advocatus*, as an assistant of the party of the procedure, took part both in the civil and criminal procedures and his career was called *advocatio*. During the period of the Republic, the advocate who had suffi-

1 Jonaitis, M.; Žalėnienė, I. Kai kurie atstovavimo instituto reglamentavimo romėnų teisėje klausimai. [Jonaitis, M., Žalėnienė, I. Some Issues Regarding Legal Representation under Roman Law]. *Jurisprudencija*. 2008, 7 (109): 14-23.

2 Litewski, W. *Rzymski proces cywilny*. Zeszyty naukowe Uniwersytetu Jagiellońskiego. Nr. DCCCLVII. Warszawa, Kraków: Państwowe Wydawnictwo Naukowe, 1988, p. 42.

3 D.50.13.1.11. Дигесты Юстиниана. [Justinian's Digests]. Избранные фрагменты в переводе с примечаниями И. С. Перетерского. Ред. Скрипилева, Е. А. Москва: Издательство Наука, 1984.

cient practical knowledge of law and judicial proceedings was distinguished from the jurist (*iurisperitus*) having legal education.

As it was mentioned, the law enforced during the Republic did not establish a well-rounded category of legal assistants of litigation parties. One should distinguish advocates from the judicial speeches' makers – rhetoricians. It is connected with their separate functions. An advocate provided legal aid for the litigants during the preparation for the proceedings,<sup>4</sup> as well as during the hearing in the court. Meanwhile, rhetoricians – the second category of assistants of the litigants, took part only in the second stage of the process, i.e. in proceedings of the case as such (*apud iudicem*). Their aim was by judicial speeches and psychological impact to persuade the court that their clients' demands are legitimate. *Marcus Fabius Quintilian* in his rhetorical work *Institutio Oratoria* (written around A.D. 95) describes a rhetorician as *vir bonus, dicendi peritus*, i.e. a noble person experienced in rhetoric.<sup>5</sup> There are different opinions in literature explaining the relation between *advocatus* and *orator*. E.g., W. Forsyth claims that the term *orator* had a wider meaning in the Latin language than it has now. Everybody who used to talk publicly, to express themselves in public meetings and in judicial proceedings was considered an orator. Thus, considering this fact, every advocate was a rhetorician. J. Casinos Mora, revealing the peculiarities of the Roman Bar, underlines that in ancient Rome advocate was neither a post nor one of liberal professions, the basic function of which would be provision of legal aid. The provision of such aid, according to the aforementioned Catalan author, was integral *ars oratoria*, which following Greek example, was understood as the elocution and its technique, the instrument of suggestion and persuasion.<sup>6</sup> Cicero also uses the term rhetorician for those who are considered advocates nowadays. According to W. Forsyth, the fact that Cicero does not use the term *advocatus* reflects the greatest difference between modern and ancient bar. There was no strict distinction between an advocate and a person pursuing political career in Rome because when a person was taking part in the client's case in the court and demonstrating his eloquence, he gained popularity and influence in the society, which meant the most outright way to one or another position in a state service.<sup>7</sup>

In consideration of entanglements related to the terms *advocatus* and *orator* the earliest technical term used to describe those who were practicing in Roman courts could be *patroni causarum* or *patroni*. The origin of this term comes from one of the most unique Roman social and judicial institutes – the relationship between patronage and *clientela*. According to one of the investigators of Roman history B. G. Niebuhr, it

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4 It should be noted that arrangements of procedural documents was reg obligation of the so called tabelliones – professional document compilers and not advocates.

5 Quintilianus. *Inst. Orat.* 12.1.1.

6 Casinos Mora, J. *L'advocacia a Roma: Advocatus-Officium advocacionis-Collegia Advocatorum*. Revista internauta de práctica jurídica. 1999, No. 2. Also see Casinos Mora, J. *El concepto Romà d'advocat*. Revista internauta de práctica jurídica. 1999, No. 1.

7 Forsyth, W. *Hortensius the Advocate. An Historical Essay on the Office and Duties of an Advocate*. Jersey City: Frederick D. Linn & Company. 1882, p. 80.

is as difficult to reveal the origin of *clientela*<sup>8</sup> as the origin of Rome,<sup>9</sup> on the other hand, G. Niebuhr notes that the relationship of patronage and *clientela* contained the client's right to the protection provided by a patron: the latter had to assist the client in case of distress, as well as taking the case to the court to interpret secular and religious rulings. As the structure of the Roman society grew more complicated and intensified and as the civil circulation grew more complicated, both the necessity to apply for help on issues of interpretation and application of rulings was vital not only for the clients of the patron. It also became important for people who did not have any subordination relations with the patrician, who had certain legal knowledge and true-life experience. In this way, legal consultations and the expression of opinion on different legal issues in the length of time had turned into an occupation of some educated Romans. One of them was Tiberius Coruncanius – the first pleb *pontifex maximus*, who started providing free legal consultations at around B.C. 250.<sup>10</sup>

Gradually the position of a patron, who provided consultations and legal advice in different legal issues, assisted in conducting of cases in court, was rendered to a person who had certain legal knowledge and true-life experience, who assisted in conducting of a case of another person, yet who did not have any subordination or dependence relations between him and a litigant party.

It must be mentioned that at the very beginning the term *advocatus*, however, did not imply the person who assists in conducting of the case in the court. This concept of the term was formed later than during Cicero's lifetime. Until then advocates were more often mentioned while discussing the criminal procedure. *Advocatus* in this procedure meant a friend who would morally support and encourage an accused during hearings. This term is used in *leges XII tabularum* too. The authors of the reconstructions of legal texts claim that there were provisions on cases concerning the status of personal freedom *causa liberalis*: „*Advocati (Verginiae) – postulant, ut (Ap. Claudius) – lege ab ipso lata vindicias det secundum libertatem.*“<sup>11</sup>

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- 8 *Clientes* (clients) are de jure free people (not necessarily Roman citizens) who were factually subordinated to a patron (most often patrician). There has never been the catalogue of obligations arising from the relationship between *clientela* and *patronate*. *Clientes* were obliged to obey the patron (*obsequium*) and thus accompanied him in times of war, helped in the political activity of a patron. Meanwhile a patron was bound by *fides*, the obligation to protect and defend *cliens*. See Litewski, W. *Słownik encyklopedyczny prawa rzymskiego*. Kraków: Universitas, 1998, p. 40–41.
- 9 Niebuhr, B. G. *Lectures on the History of Rome, From the Earliest Times to the Fall of the Western Empire*. T. I. London: Taylor, Walton, Maberly, 1852, p. 277.
- 10 This event marks the beginning of the desecralisation of Roman law and the end of esoteric phase of Roman law development when the provisions of law were concealed from the society and known only to a constricted circle of subjects (they were the members of pontifical chamber) as well as the beginning of vulgarization of law (dispersal of law, its accessibility for everyone). On the other hand, the activity of Tiberius Coruncanius is considered as the method of law didactics *par excellence*. Basically, the method when the provisions of law are interpreted by a well known and experienced scientist had been the most important method of law didactics till the post-classical period when law schools were established in eastern Rome. Dębiński, A. *Prawo rzymskie. Kompendium*. Warszawa: Wydawnictwo Prawnicze LexisNexis, 2003, p. 58-59.
- 11 The extract of Roman history by Livy (Titus Livius) in the reconstruction of the text of Twelve Tables (*Ab urbe condita*) tells about legendary Verginia, who caused ungovernable desire to one of the creators (*decemviri*) of Twelve Tables – Appius Claudius. As he could not seduce Verginia, he took up treachery. As the

Usually the participation of *advocati* in hearings of criminal cases was related to especially significant cases when the accused person tried to gather round himself the biggest circle of friends and supporters. The participation of *advocati* was meant to achieve twofold aims. First, as they personally knew the accused or knew him as the member of the community, they tried to provide a very positive personal characteristic of the accused, emphasizing positive and moral traits. Second, the number of *advocati* also had a certain psychological influence on the court and its decision. For example, as Cicero was defending Lucius Cornelius Balbus – an influential person originating from a modern Spanish town (called Gades by Romans) who had been charged with the abuse of the rights of a Roman citizen – he showed himself to the crowd of inhabitants of Gades, who have the highest social status and who had come to prevent Balbo's sentence.<sup>12</sup> Thus, during the times of Cicero, *advocatus* was not a person who took up the case and made the speech (*patronus*), though later such person was called advocate. The concept of *advocati* in the period of Cicero included both the speaker on behalf of the accused in the court and everyone who supported him at a hearing.

Alongside *patroni causarum* and *advocati* in Rome, one should mention another especially important category of jurists – *iuris consulti* (*iurisperiti*). This category of lawyers is reasonably the most significant because they perform a very important function – legislative function, which is implemented by interpreting the rule of law.<sup>13</sup>

Roman literature reveals the view that the Roman lawyers of the highest rank (*iurisperiti*) who had legal education neither practiced legal representation nor provided assistance for litigants. The field of their activity was the interpretation of law, consultations, solution of legal issues, whereas the assistance in the procedure and, partly, legal representation was the prerogative of the jurists of the lower rank – advocates.<sup>14</sup> One must admit that the main function of *iuris consulti* was comprised of interpretation of the civil law rules and thus, implementation of its development and creation of new

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laws of the Twelve Tables were arranged *decemviri* had all political power in the state, thus Appius Claudius implemented civil jurisdiction. When Verginia's father and fiancé were at war, Appius Claudius persuaded his client Marcus Claudius to withhold her when passing the forum and to take her to the magistrate (i.e. Appius Claudius) claiming that she is his slave abducted from him in her childhood. Appius Claudius judging *causa liberalis* conferred Verginia as a slave and determined that she must be sent back to her master. It is a great shame for Verginia's father – a centurion. Thus he kills Verginia. *Advocati* mentioned in the fragment are not present advocates but friends and supporters who come to the court (magistrate) and loudly demand that Appius Claudius would keep to his own laws and would stop arbitrariness. It should be noted that the number of Verginia's *advocati* might have been plentiful because Verginia's father managed to find a lot of supporters from his troops and members of the society and the rebellion organized by him deposed the power of *decemviri*. Vėlyvis S.; Jonaitis M. *XII lentelių įstatymai ir jų komentaras*. [Vėlyvis, S.; Jonaitis, M. Laws of XII Tables and their Commentary]. Vilnius: Teisinės informacijos centras, 2007, p. 9-10, 64, 66, 69-70.

12 See M. Tvilli *Ciceronis Pro L. Cornelio Balbo Oratio* [interactive]. [accessed 2009-08-20]. <<http://www.thelatinlibrary.com/cicero/balbo.shtml>>.

13 Roman law is commonly called the law created by jurists. Many significant personalities of Roman science of law, e.g. Pomponio, Gaius, Papinian, as well as non-jurists, e.g., Cicero, speak about a legislative function implemented by jurisprudence. Pomponio denotes that the law created by the legal scientists is generally called *ius civile* (D.1.2.2.5; D.1.2.2.12), Gaius in *Institutiones* emphasizes that legal scientists could create law (*iura condere* – G. 1.7) and call them creators of law (*iuris conditores, iuris autores*).

14 Kolańczyk, K. *Prawo rzymskie*. Warszawa: Wydawnictwo Prawnicze LexisNexis, 2001, p. 51.

legal guidelines. People often visited *iuris consulti* to find out their opinion on one or another legal issue or to hear their interpretation of one or another rule of law. Cicero solemnly claims that a house of *iuris consultum* is undoubtedly the oracle for all citizens. (*Est enim sine dubio, domus iurisconsulti totius oraculum civitatis*).<sup>15</sup> Being aware that *iuris consultum* consents to answer legal questions and provides legal consultations, one could appeal with a personal matter (*de omni denique aut officio aut negotio*)<sup>16</sup> even in a public place. Sometimes *iuris consulti* were walking solemnly in the forum in order they could be requested for legal consultation. The most prominent authorities of Roman law actually were very eager to provide legal consultations and gradually made their careers in state service (*cursus honorum*). On the other hand, young Romans were prepared for an advocate practice in court under the supervision of *iuris consulti*. From the early morning they gathered in a house of *iuris consultum* (the most important place of the house with an upper light) and listened to legal advice that *iuris consultum* gave to those who came for a consultation.<sup>17</sup> Cicero adjoined the most significant lawyer of his time Scevola in this way, not leaving the jurist until he gained sufficient knowledge in legal matters. For the person who gained the needed knowledge the second step in preparation for the practice of an advocate was choosing one of the most prominent practitioners and listening to his public speeches. Thus the skills of judicial rhetoric were formed. The most important event in life of a young Roman was the so called entering of the forum. Seventeen years of age, a student took off a youth's dress (*praetexta*) and put on *toga virilis*, which symbolized manhood and physical and intellectual maturity. After that together with the escort of friends they went to the forum where a citizen of high status, usually a consul, formally introduced that person as a court practitioner. Afterwards, the person could immediately take up judicial cases.<sup>18</sup>

The separate category of advocates in Rome were the so called advocates of the emperor's treasury (*fiscus*), which at the time of the Dominate was the treasury of the Roman state (*aerarium populi Romani*). They were *advocati fisci*. These advocates had to represent and protect the interests of the treasury. Penalties were provided in cases of improper discharge: *Fisci advocatus poenam metuens caveat, ne fiscalia commoda occultet*.<sup>19</sup> The post of treasury advocates is interesting because it relates to the origins of the institute of an obligatory participation of an advocate in the procedure are related to it. According to Ulpian, cited by Justinian "Digests," if the treasury (*fiscus*) conducts the case regarding the status of a person (*status controversia*), i.e. for example, it is argued whether a person is free or a slave, the participation of a treasury advocate is obligatory. Ulpian underlines that emperor Marcus, who was appealed to with the problem what legal consequences arise if a court decision is passed without participation of a treasury

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15 Cicero. *De oratore*, 1.45.

16 Cicero. *Brutus*. 33.

17 Niebuhr, G. B., p. 18.

18 Forsyth, W., p. 85.

19 C.2.8.3.

advocate, responds in his rescript that such a decision is void, i.e. it does not cause any legal consequences and the case must be rejudicated.<sup>20</sup>

During the time of the empire, the prior divisions between *advocati* and *oratores*, *advocati* and *jurisperiti* had been vanishing. In the epoch of the Dominate, the assistants of the litigants in the procedure were called not only *advocati*, but also *juris periti*, *causidici*, *scholastici*, *togati*. As the cognitive (extraordinary) procedure started to develop, their status remained unchanged in comparison with the formulaic procedure. The most significant changes related to the period of the Dominate were as follows: firstly, the bar was not the one of liberal professions; instead, it was organized into a corporation as all professions. Inclusion in a corporation became *conditio sine qua non* if a person wanted to become a practitioner. Advocates were attributed to certain courts and their activity was supervised by officials of the emperor's administration. From the fourth century in the eastern part of Roman empire the number of people who had legal education or were studying law had been growing and from the year 460 legal education became a compulsory requirement (at least for advocates who were appointed to provide legal aid in the courts of higher instance).<sup>21</sup> It must also be emphasized that although the main function of an advocate – providing assistance for litigants before a lawsuit and during it – remained unchanged, they more often were appointed as legal representatives of parties (*procuratores*), who act not alongside a litigant but in the name of and instead of a litigant in the procedure.

The sources of Roman law reveal the high status of the Roman bar in the society and the significance of the profession of an advocate. In 469 A.D. the constitution of the emperor Leon solemnly affirmed that the people fighting in the Roman state are not only those who fight with swords and amour, but also advocates, who fight with their perfect speeches and keep the hope of the oppressed, their life and descendants. (*Nec enim solos nostro imperio militare credimus illos qui gladiis, clypeis et thoracibus nituntur, sed etiam advocatos: Militant namque causarum patroni, qui gloriosae vocis confisi munimine, laborantium spem, vitam et posteros defendunt*).<sup>22</sup> Meanwhile, the constitution of the emperor Anastasius in 506 A.D. provides that the profession of an advocate is worth praising and is necessary in peoples' life. (*Laudabile vitaeque hominum necessarium advocacionis officium*).<sup>23</sup> The impact of these descriptions of the profession of an advocate may be seen in the *Code of Professional Ethics for Lawyers of EU*. The preamble of this Code indicates that the role of a lawyer in the society, based on respect for a legal state, is special and that a lawyer has to serve the interests of equity as well as those whose rights and freedom his is entrusted to implement and protect.<sup>24</sup>

20 D.49.14.7: *Si fiscus alicui status controversiam faciat, fisci advocatus adesse debet. Quare si sine fisci advocato pronuntiatum sit, divus Marcus rescripsit nihil esse actum et ideo ex integro cognosci oportere.*

21 Litewski, W. *Rzymskie prawo prywatne*. Warszawa: Wydawnictwo Prawnicze LexisNexisTM, 2003, p. 102.

22 C. 2.7.14.

23 C. 2.7.23.

24 Code of Conduct for European Lawyers [interactive]. Council of Bars and Law Societies of Europe. Adopted in 1988, with the last amendments of May 2006. [accessed 2009-08-27]. <[http://www.ccbe.org/fileadmin/user\\_upload/NTCdocument/2006\\_code\\_enpdf1\\_1228293527.pdf](http://www.ccbe.org/fileadmin/user_upload/NTCdocument/2006_code_enpdf1_1228293527.pdf)>.

The importance of the advocate's profession in Rome is even more increased by the fact that a state guaranteed legal aid already existed under Roman law. W. Litewski notes that in the epoch of formulaic procedure, a special kind of postulate legal capacity was formed. It is the ability to lodge a plea to magistrates (*postulare*) in the first stage of the procedure *in iure*. Some people did not have postulate legal capacity. Ulpian's speech in Justinian's "Digests" indicates that postulate incapacity was conditioned by two bases: age and disability. People younger than 17, the deaf and the mute did not have such legal capacity. Referring to the latter condition it must be remembered that the form of an oral procedure prevailed in formulaic procedure. While interpreting such postulate incapacity Ulpian emphasizes that the deaf can be enabled *postulare* to lodge pleas to the praetor; however, his failure to understand the decisions of the praetor results in a dangerous situation: not hearing and thus not executing the prescriptions and obligations of the praetor, the deaf can be punished as disobeying (*contumax*).<sup>25</sup> In such cases, there is a necessity to appoint an advocate who would be capable of *postulare* for the disabled participant of the procedure. On the other hand, Ulpian claims that the appointment of legal aid provided by the state should not restrict itself to persons who do not have postulate legal capacity, and every socially less protected weaker party of judicial proceedings should have the opportunity to use the legal aid provided by the state. *Ait praetor: „Si non hebeunt advocatum, ego dabo.“ Nec solum his personis hanc humanitatem solet exhibere, verum etiam ei si quis alius sit, qui certis ex causis vel ambitione adversarii vel metu patronum non invenit.* The praetor says: „If he didn't have the advocate, I would appoint him. Not only for those persons must the praetor show benevolence but also for those who, for different reasons such as dishonest subterfuge of the other party or fear, cannot find the defender for themselves.“<sup>26</sup>

## 2. Conditions of an Agreement Between an Advocate and a Client (Mandatum) and the Question of an Advocate's Fee

The advocate-client relations were based on commission (*mandatum*). It must be stressed that at the very beginning the Roman *mandatum* was a strictly non-repayable (*mandatum nisi gratuitum nullum est*).<sup>27</sup> Therefore its object was non-repayable handling of the matters of the *mandator* performed by *mandatarius*. The fixing of the commissioner's reward meant the invalidity of the commission agreement. As the agreement was executed, the commissioner had the right to claim for the cover of the expenses, sustained while executing the commission. Thus, there was no possibility to demand the pay for advocate's services by lodging a claim and launching a judicial procedure. Non-repayment, as an obligatory feature of the commission agreement, was not the only reason. Another one was that there was an exceptional trust, originating from the feeling of duty and camaraderie (*amicitia*) between the advocate and a client. On the other hand,

25 D. 3.1.1.3

26 D.3.1.1.4

27 D.17.1.4; Inst. 3.27.1



it does not imply that the fee was not possible or strictly forbidden. It is clearly denied by the constitution of the emperor Anastasius of the year 506 A.D., which describes the profession of the lawyer as not only necessary and worth praising but which also mentions that the execution of such duties must be rewarded with the highest pay (*maxime principalibus praemis oportet remunerari*).<sup>28</sup>

Thus, the practice of the advocate's pay did exist and it had not even been forbidden by *lex Cincia de donis ac muneribus* of 204 B.C., which forbade gifts that exceeded the monetary sum established by law, the amount of which is not presently known.<sup>29</sup> It is important to note that the aforementioned law *Cincia de donis ac muneribus* must be attributed to the category of the so called *leges minus quam perfectae*. This means that the transaction made within the breach of the law was not valid *ipso iure*. On the contrary, the gifts on the basis of *lex Cincia* could not be cancelled. Moreover, the demand of a donee to exercise the agreement by judicial proceedings could be countered laying procedural retort – *exceptio legis Cinciae* only in the case when the donor had not exercised the agreement.

Two decisions of the Senate (*senatusconsulta*), which appeared at the beginning of the Principate period testify the existing practice of high rewards for the advocate practice: in 47 *senatusconsultum Claudianum* and in 55 *senatusconsultum de advocatationibus*. The latter restricted the right to demand the reward of no bigger fee than 10 000 sesterces and allowed to do it only after the proceedings. In addition, it was forbidden to pay the fee or to promise to pay it until the case was closed. In the *Annals* of Tacitus it is alluded that the Romans, as well as the other nations of the antique world, were very much involved into internecine legal arguments and discussing the motives of the decisions he mentions that in 47 A.D. senator Gaius Silius stated that if nobody paid for conducting of cases in court, there would be less of them, but as they do it, there are grounds for discords, accusations, malevolence and defamation.<sup>30</sup> Considering this, certain ethical principles of lawyers gradually formed in the rules of the empire period: the lawyers were more often induced to avoid unnecessary delay of arguments and not to provoke the parties. In 368, the constitution of the emperors Valentinian and Valens prescribes: *Ante omnia autem universi advocati ita praebeant patrocinia iurgantibus, ut non ultra quam litium poscit utilitas, in licentiam conviciandi et maledicendi temeritate prorumpant, agant, quod causa desiderat: temperent ab iniuria. (...) Nemo es industria potrahat iurgum. – All advocates must provide aid for the arguing parties in such a way that ungovernable arguments and defamations would be avoided more than it is needed for legal interest. They must conduct themselves as the case requires. Let them restrain themselves from the disrespect to another [party] (...) they also must not delay*

28 D.17.1.4; Inst. 3.27.1

29 *Lex Cincia* was passed by the plebeian meeting, *consilium plebis*, thus, this is a plebiscite. However, *lex Hortensia* published in 287 B.C. equated the status of plebiscites and laws (*leges*). As "Institutions" by Gaius denote, when *lex Hortensia* was published, plebiscites became compulsory not only for plebeians but for all citizens of Rome: (...) *sed postea lex Hortensia lata est, qua cautum est, ut plebiscita universum populum tenerent: Itaque eo modo legibus exaequata sunt* (G.1.3). Regarding this later legislations, published as plebiscites by a plebeian meeting, were called a general name - *lex*.

30 Tacitus. *The Annals of Imperial Rome*. Harmondsworth: Penguin Books, 1956, p. 233.

the argument on purpose.<sup>31</sup> On the other hand, the principle that the party may have more than one representative originates from Roman law: *nullus pluribus uti defensoribus prohibetur*.<sup>32</sup>

During the period of the empire, the right of the advocate to a certain reward for the legal aid come to recognition. However, the fee was not defined as a pay – „*merx*“, which was common to service lease agreements or contracts (*locatio – conductio operarum*, *locatio – conductio operis*), although not coordinated with the commission agreement– *mandatum*, but rather, as *honorarium* or *palmarium*.

It was still prohibited to pay *honorarium* in advance. In addition, *honorarium* did not depend on the outcome of the case. If there were disagreements between an advocate and a client about the size of *honorarium*, it was defined by court. According to Ulpian, as the judge defines the size of the fee, he must consider the nature of the case, the eloquence of the advocate and customary practice of the court where the case took place, as well as adjudge the fee which would be not bigger as it should be (*In honorariis advocatorum ita versari iudex debet, ut pro modo litis proque advocati facundia et fori consuetudina et iudicii, in quo erat acturarus, aestimationem adhibeat, dummodo licitum honorarium quantitas non egrediatur*).<sup>33</sup>

The errors of the advocate or fraud could not impair the client's position, i.e. to cause negative consequences to the client. It is denoted in the constitution passed by the emperors Dioclecian and Maximian in 294: „(...) *advocatorum error litigatoribus non noceat* (...) – (...) the error of the advocate may not affect the parties conducting the case.“<sup>34</sup> On the other hand, all pleas and other procedural actions performed by an advocate in court in presence of a party are considered as if the party itself performed it. (*Ea, quae advocati praesentibus his quorum causae aguntur adlegant, perinde habenda sunt, ac si ab ipsis dominis litium proferantur*).<sup>35</sup> Considering this and with reference to the principle *advocatorum error litigatoribus non noceat*, one could not appeal the emperor to recognize in his rescript the decision of the court as void if the litigant did not challenge the performed proceedings and pleas in the period of three days and did not use the right to appeal the decisions.<sup>36</sup>

The sources of Roman law also attest the existence of civil responsibility of an advocate for improper performance of the duties, avoidance of proper performance of the duties and fraudulence of a client (*praevaricatio*). The excerpt from the works of a lawyer Macer in Justinian “Digests” denotes that a case against the advocate who miscarried his duties and deceived the client is not public, i.e. it must not be judged by

31 C.2.6.6.1 and C.2.6.6.5

32 Wołodkiewicz, W. *Czy prawo rzymskie przestało istnieć?* Kraków: Zakamycze, 2003, p. 91-94.

33 D.50.13.1.10

34 C.2.9.3.

35 C.2.9.1.

36 C.2.9.: *Sententiis finita negotia rescriptis revocari non oportet. Nec enim quae constituta sunt, ut advocatorum error litigatoribus non noceat, tibi etiam opitulari possunt, cum te praesentem neque causae palam ex continenti, id est triduo proximo, contradixisse neque post sententiam appellationis remedio, si tibi haec displicebat, usam proponas.*

public criminal procedure irrespective of the fact that the advocate miscarried his duties in the case of public or private law.<sup>37</sup>

In addition, civil responsibility of the advocate existed alongside with disciplinary, which inter alia could be realized by suspending the advocate practice for a certain time. As the period elapsed, the advocate could continue his advocate's practice.<sup>38</sup>

## Conclusions

1. Legal representatives of the litigant (*cognitores, procuratores*) in Roman civil procedure were distinguished from their assistants (*advocati, patroni, oratores*) who had the right to participate together with the party but not instead of it.

2. The status of the advocate, as the assistant of the litigant but not the legal representative is implied in the very word „advocacy“: *ad voco* – „call in an advisor.“

3. Persons who were used to speak publicly in public meetings and during judicial proceedings were called rhetoricians.

4. In ancient Rome, the advocate at first was neither a post nor one of the liberal professions based on providing legal aid. The provision of such aid was an integral part of *ars oratoria*.

5. The earliest technical term used to describe everyone who practiced in Roman courts could be *patroni causarum* or just *patroni*. The origin of this term leads to one of the most unique social and legal Roman institutes – the legal relationship of *patronate* and *clientela*.

6. At the beginning the term *advocatus* did not mean the defendant in the criminal procedure or the person assisting to conduct a civil case in the court. Such meaning of the term formulates later than the period of Cicero. Until then advocates are mentioned when speaking about Roman criminal procedure where *advocatus* meant a friend who participated in the hearing and expressed his moral support and encouragement for the accused.

7. The sources of Roman law speak about high prestige of the Roman Bar in the society and importance of the profession of an advocate. The significance of this profession is even more increased by the fact that a state guaranteed legal aid existed in Roman law.

8. Relations between the advocate and the client were based on the contract of commission (*mandatum*). Roman *mandatum* was strictly non-repayable contract, thus there was no possibility to demand the payment for the service of an advocate by lodging a claim and launching a judicial procedure; however, it does not mean that one could not

37 D.47.15.3.2: *Quod si advocato praevaricationis crimen intendatur, publicum iudicium non est: nec interest, publico an privato iudicio praevaricatus dicatur.*

38 D.50.2.3.1: *Imperator enim Antoninus edicto proposito statuit, ut cuicumque aut quacumque causa ad tempus ordine vel advocacionibus vel quo alio officio fuisset interdictum, completo tempore nihilo minus fungi honore vel officio possit.*

pay the advocate at all or that it was prohibited. There was a prohibition to pay *honorarium* in advance. Moreover, honorarium did not depend on the outcome of the case.

9. The errors of an advocate or fraud could not impair the client's position, i.e. to cause negative legal consequences for the client. The sources of Roman law also claim the existence of civil responsibility of an advocate for improper performance of the duties, avoidance to perform duties or deception of a client (*praevaricatio*). Civil responsibility existed alongside with disciplinary, which *inter alia* could be realized by suspending advocate's practice for a certain time.

10. The origins of the institute of an obligatory participation of an advocate in a procedure could be detected in Roman law.

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## ADVOKATŪROS SAMPRATA IR PAGRINDINIAI ADVOKATO VEIKLOS PRINCIPAI ROMĖNŲ TEISĖJE

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**Santrauka.** Romėnų civiliniame procese, be šalių procesinių atstovų (*cognitores, procuratores*), taip pat veikė įvairūs jų pagalbininkai, padėjėjai (*advocati, patroni, oratores*), kurie turėjo teisę dalyvauti procese drauge su šalimi, bet ne vietoj jos. Šiame moksliniame straipsnyje kaip tik ir siekiama atskleisti advokatų, patronų, oratorių bei kitų proceso šalių pagalbininkų teisinio statuso ypatumus, advokatūros kaip profesinės korporacijos sampratą, atsiradimo prielaidas ir misiją senovės Romoje, valstybės garantuojamos teisinės pagalbos ir būtinojo advokato dalyvavimo procese instituto pradmenis, advokato ir kliento susitarimo (*mandatum*) sąlygas, advokato honoraro už klientui teikiamas paslaugas mokėjimo ypatumus, advokato atsakomybės už netinkamą pareigų atlikimą bei kitus klausimus.

Santykiai tarp advokato ir jo kliento antikinėje Romoje buvo įforminami pavedimo (*mandatum*) sutarties pagrindu. Romėniškoji *mandatum* buvo griežtai neatlygintinė sutartis, todėl reikalauti atlyginimo už advokato paslaugas procesine (teismo) tvarka pareiškiant ieškinį nebuvo galimybės, tačiau tai nereiškia, jog honoraro mokėjimas advokatui apskritai buvo negalimas ar griežtai draudžiamas. Galiojo draudimas mokėti honorarium iš anksto. Be to, honorarium nepriklausė nuo bylos baigties.

Advokato klaidos arba apgaulė negalėjo pakenkti, t. y. sukelti neigiamų teisinių pasekmių, klientui. Romėnų teisės šaltiniai taip pat patvirtina egzistavus civilinę advokato atsakomybę už netinkamą savo pareigų atlikimą, vengimą šias pareigas atlikti ar kliento apgaudinėjimą (*praevaricatio*). Be civilinės, egzistavo ir drausminė advokatų atsakomybė, kuri, be kita ko, galėjo būti realizuojama ir tam tikram laikui suspenduojant vertimąsi advokato praktika.

Romėnų teisėje aptinkami privalomojo advokato dalyvavimo procese instituto pradmenys.

**Reikšminiai žodžiai:** romėnų teisė, romėnų civilinis procesas, advokatas, pavedimo sutartis, honoraras.

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