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The nature of the power of attorney and the role of ethical considerations in it

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Received date: 2021/09/20 Revised date: 2021/10/30

Accepted date: 2021/12/24

Abstract

Background: Jurisprudence is a science whose basis is moral and the word of any legal institution, especially the power of attorney is based on representation and permission of a person is based on morality. It is shown in the history of civilization, history and the evolution of peoples and nations that there have always been people have taken on the task of defending and realizing the right for another and in another name, where the person did not have the help and ability. Therefore, in according to this ethical issue, attorney representation is considered irreplaceable and permissible.

Conclusion: The attorney representation is usually known through two faces, which both of them are based on ethics and its continuity is also based on ethics. Its main face is the "attorney representation" that is the subject of the civil law, whose general rules are defined in terms of definition and conditions of its conclusion and its effects in this law. The other face is "judicial representation of attorney" which is mainly viewed with the same principles of civil advocacy. Advocacy, as well as close to civil advocacy contains a special nature of independent contractual representation influenced by the help of the people and the defense of the oppressed as a matter of ethics under the guise of observing the interests of the client.

34

35 **Keywords:** Litigation, Ethical considerations, Civil advocacy, representation, Professional
36 ethics.

37

38 **Introduction**

39 The nature of advocacy has been discussed under the title of representation due to impact of its
40 moral aspect, and investigated in the Iranian legal system as like French law on advocacy.
41 Article 656 of the Civil law does not have the capacity to fully include judicial representation.
42 Although in accordance with Article 664 of the Civil law and analyzed the advocacy with this
43 article of the law. However, it is necessary that the advocacy under the domination of traditional
44 Iranian law is reinvestigated. Regardless of the title of advocacy in the judiciary based on the
45 people assistance as an ethical aspect, in principle, what other legal institution comply with this
46 institution? For this reason, before stating the legal nature of the advocacy, the characteristics
47 is stating and analyzing in order to determine the legal nature of this representation and the
48 obtained results from it.

49 **Analysis of the contract of legal representation in terms of professional ethics by** 50 **examining its characteristics**

51 **Structure and analysis of litigation**

52 There is no definition for this type of attorney in the Advocacy Law. So, it is necessary to refer
53 to the Civil law as a general law in order to review and analyze this representation. Article 646
54 of the Civil law on the representation of the judiciary states: "The lawyer in the trial is not the
55 lawyer in the receipt unless the evidence indicates it, and also the lawyer in obtaining the right
56 will not be the lawyer in the lawsuit." According to the power of attorney contract, the lawyer
57 is obliged to perform the actions of the client's rights on the client's account as a substitute,
58 according to the authority granted by the client according to Article 656 (1). The lawyer is also
59 committed to the client's interests in all its aspects based on ethical aspects, including fidelity,
60 confidentiality and loyalty. On the other hand, in accordance with the rule of respect for the
61 actions of individuals as a moral matter pay the lawyer's wage. However, the basis of advocacy
62 is based on assistance as a moral matter that the wage is not considered as a principles of the
63 advocacy representation.

64 **Implicit ethical conditions in the advocacy representation**

65 In the attorney representation, we talked about the independence of the lawyer within the limits
66 of the granted advocacy. But in the context of the advocacy and the representation on implicit
67 conditions, its ethical content is very much manifested, which is nowadays called "professional
68 ethics". Its source is the moral obligation of the lawyer as an oath, which contains the
69 observance of ethics such as honesty and trustworthiness, non-revenge and defense of the right.
70 The ethical aspects related to our subject refer to the relationship between the lawyer and the
71 client and the lawyer with the litigant and the lawyer with the society, which is the most
72 important aspect of professional ethics related to the relationship between the lawyer and the
73 client.

74 **Considering the client's interest as an ethical aspect of advocacy**

75 A lawyer is not only obliged to comply with legal rules, but also has to comply with the moral
76 requirements in performing his professional duties and even in his personal affairs. The lawyer
77 is the deputy and trustee of the client and therefore must observe the client's interest in
78 performing the power of attorney. Article 667 BC states this duty of the lawyer with the
79 following words: "The lawyer must observe the interest of the client in his possessions and
80 actions ..." The basis of the power of attorney is the client's assistance and assistance, the effect
81 of which is to create a duty and obligation on the trust. And is an associate lawyer who, due to
82 the client's trust in the lawyer, is given permission to take over the client's affairs, which
83 requires observing the client's interests, and this is limited to the lawyer not considering his
84 interests and decisions based on the client's economy. Limits and powers granted (2).

85 Therefore, the client leaves the manner of performing the power of attorney to the trustee,
86 professionalism and care, and in a way to observe the client's interest, which is in his favor (3).
87 But the purpose of expediency is to gain benefit and repel loss in the opinion of most, in other
88 words, whatever is good and good, benefit and comfort of the client, and the criterion for
89 determining the client's expediency is to observe the ethical aspect of the client's trust in
90 obeying the client's general instructions. In order to be in its favor. Therefore, the principles
91 and principles of religion, ethics, national traditions, social etiquette and decency and training
92 related to the profession of advocacy, its moral and social aspect and the observance of the
93 rules and duties and advocacy systems constitute its legal and nature aspect (4).

94 **Observance of honesty duty as an ethical aspect of advocacy**

95 The legal nature of power of attorney is also a trust contract and as a result, the foundations of
96 its conclusion are trust and confidence between the lawyer and the client. In this regard, the
97 civil law makes the lawyer the deputy client, which is a very high honor and the lawyer's action
98 is the client's action. A heavy duty called fiduciary duty is entrusted to the lawyer as an ethical
99 aspect of the power of attorney that affects its nature, the absence of which can shake the
100 foundations of the power of attorney. Responsibility for loss and any violation and defect is
101 that the fault goes back to the same non-observance of fiduciary duty, so fiduciary duty as a
102 moral aspect has a fundamental role in the nature of litigation and from this point of view all
103 judicial documents are notified to the lawyer by judicial courts. Its philosophy is the client's
104 trust in the lawyer. On the other hand, according to the Code of Civil Procedure, a lawyer is
105 prohibited from accepting a lawyer in a case that overshadows the aspect of loyalty and
106 trustworthiness (5).

107 **Protecting the client's secrets as an ethical aspect of advocacy**

108 Although this aspect of the power of attorney may not be considered in concluding the power
109 of attorney, but as its moral aspect, it is considered in the form of implicit conditions and thus
110 the lawyer must keep the client's secrets, which is doubly important in the power of attorney,
111 because The client raises some of his personal issues that his closest family members may not
112 be aware of, and the requirement of advocacy is based on the same ethical basis, and the lack
113 of sufficient information on the part of the client also disrupts the practice of advocacy. It is
114 undesirable in the process and performance of power of attorney, as Article 30 of the Law on
115 Power of Attorney, approved in 1315, stipulates that the lawyer must keep secrets that are
116 known through the client's power of attorney, as well as secrets related to the client's dignity
117 and credit. According to Article 81 of the By-Laws of the Independence of the Bar Association
118 approved in 1334, in case of non-preservation of secrets in a way that overshadows the honor,

119 dignity and credibility of the client, regardless of the relevant damages, is subject to
120 disciplinary sanctions and criminal liability. According to Article 648 of the Penal Code, it is
121 opened, and in fact the validity of the power of attorney This raises the question of the basis of
122 advocacy as an ethical aspect that affects the nature of advocacy.

123 **The legal nature of the contract of power of attorney**

124 **Representation of justice and lease of persons**

125 First, we examine whether the contract of a lawyer can be an example of a lease for individuals?
126 Then we explain the consequences of this perception of the legal nature of the contract of
127 representation.

128 **Civil power of attorney contract and litigation contract**

129 There is a theory of unity of civil representation and litigation with the same traditional view,
130 without a doubt, the motivation of individuals in choosing a lawyer is to defend their interests,
131 and since defense is not part of the rights of personality and the possibility of full transfer of
132 this right to others. Part of it to another without the possibility of restoring that freedom is in
133 defense and is not considered a personal matter is right, therefore the right to freedom to dismiss
134 the lawyer in the power of attorney is one of its main figures and on this basis the litigation
135 contract is the same as the civil contract (16).

136 Article 664 BC refers to the lawyer in the trial, derived from traditional jurisprudence and view,
137 and legal writings also implicitly consider the power of attorney to be subject to the rules of
138 power of attorney in the general sense and the rules of civil law, although certain figures are
139 considered. Has been. The power of attorney is one in many respects, and in appearance and
140 origin it is the same as representation and permission (17), but at the same time they are
141 different in some cases, some of which can be mentioned:

142 -1The relationship of a lawyer in a civil power of attorney contract is a private relationship
143 between a lawyer and a client and is in the realm of private law, but the power of attorney while
144 having a private relationship has a general legal basis and has many rules and the relationship
145 between a lawyer and a client and the court. Third parties, which are examples of case law and
146 are based on general principles and principles of procedure.

147 -2It is inherent in the discussion of the license of the power of attorney to communicate with
148 the right of defense and guarantee a fair trial based on trust in the expertise and profession of
149 the person and it can never be irrevocable and the condition of non-termination is based on
150 formation and conclusion This contract is in conflict.

151 3- Another important issue is that the lawyer is obliged to follow the client's orders, but in the
152 representation of the judiciary, there are some rules that the lawyer is required by the
153 government and the law to carry out those legal instructions, especially in discussions of
154 subpoenas. It has more and in any case, many of the results of the lawyer's action will be
155 returned to the client even without permission.

156

157 **Representation of the judiciary with the nature of an independent contractual** 158 **representative**

159 According to the services that the lawyer provides to the clients in different situations, in this
160 respect, it has a dual nature, including the lease of individuals and representation. The provision
161 of legal services by a lawyer is called representation, but if the lawyer's service is a material
162 matter, it is called service rent.

163 The services of a lawyer are thus divided into two parts, and this contract has a separate nature
164 in each case. The services of a lawyer in the mentioned tariff are considered in two forms, each
165 contract is formed with a separate nature and the part where the lawyer's job is legal actions or
166 legal possessions and acts on behalf of the client and its result and effects to the client. Returns
167 in this case, the acts are representative in nature, such as a lawyer filing a lawsuit against a
168 person or persons on behalf of his client and by obtaining representation from him, or settles
169 with a third party on a matter in the name and account of the client, At the same time, the effects
170 of the said acts are returned to the client, but when the action is performed by the lawyer,
171 written and oral defense that the lawyer performs in order to clarify the issue and prove the
172 legitimacy of his client or in the discussion of filing a lawsuit is a material matter. And the
173 work of a lawyer has the nature of renting services.

174 If the contract between the lawyer and the client is a set of legal and material services in
175 planning, pursuing and responding to the lawsuit, the result of these relations between the
176 lawyer and the client is subject to a lease and power of attorney contract, which is referred to
177 as a mixed theory (18).

178 And each of the lawyer's actions must be matched with each of the rental and agency
179 institutions, and the resulting effects will be considered on the basis of each of these, and this
180 assumption will be considered as long as there is no conflict. Violation of any of the obligations
181 according to the type of action in the form of the nature of the lease and power of attorney is
182 required to compensate, and in case of conflict between these two legal and material relations,
183 if it is related to public order, the provisions of the dominant contract must be implemented and
184 distinguished. The type of action is the nature of the lease of the persons or the power of
185 attorney is the responsibility of the court, which according to the conditions and circumstances
186 related to each contract and custom governing it, the legal or material nature of the act is
187 recognized.

188 This theory has major drawbacks. Among other things, the distinction and recognition of the
189 dominance of a legal entity over material or vice versa does not have a specific criterion and
190 amount, and by referring to custom, no specific criterion or amount can be found for it, so this
191 has caused severe differences and disorders in attorney-client relations. And overshadow the
192 nature of the judicial system.

193 In some legal systems, such as Belgium, according to Article 1787 of the Civil Code, the
194 provision of services is evaluated by institutions. The similarity in this regard is the comparison
195 of the lawyer's independence in performing his duties and the lack of the element of compliance
196 in the relationship between the lawyer and the client.

197 Taking into account the special provisions in the profession of advocacy, the first legal texts
198 concerning this profession were formally considered in the French legal profession in 1810 and
199 1830 (20), in itself, indicates that the provisions of the law Civil law does not cover all relations
200 related to advocacy in lawsuits and the adoption of new regulations indicates a special nature
201 for this legal institution. Due to the independence of the lawyer's work, some supervision and

202 controls are exercised over the legal profession by the government. And determines the client,
203 the will and intention of the parties is in concluding this contract and as soon as this contract is
204 concluded, the duties of the lawyer and the client are established and each of them is obliged
205 to fulfill their obligations according to the special rules and conditions related to litigation.

206 In civil representation, a trust relationship occurs when one person (lawyer) realizes the
207 interests of another person (client) and the agent must act on behalf of the client and be
208 supervised by the client, in the examination of power of attorney, doubts in granting
209 representation and representation There is no litigation in the power of attorney, and of course,
210 the client, referring to the litigation lawyer, assigns the representation of the lawsuit or defense
211 of the lawsuits to the lawyer by granting representation in addition to the attorney's fee. It is
212 common, for example, for the client to simply state that the lawyer should try to minimize the
213 client's financial loss; in short, the client's instructions can be very specific; the client first
214 informs the defense attorney; Partnership with the client's instructions creates a lawyer-client
215 relationship, and one of the client's inherent rights is to end the relationship, even if the lawyer
216 does not agree with the termination, so it is obvious that the client's general instructions are
217 welcome (20).

218 If the client's orders are at the same time legal and are done in regulating the type of lawsuit
219 and the manner of defense of the specialized guidance lawyer, these instructions are also in the
220 form of the client's general instructions that the lawyer has independence in doing the client's
221 work according to his professional expertise. The client also has the right to terminate and
222 terminate the relationship with the lawyer, and at the same time the client's right to end the
223 relationship is always evaluated and preferred. And it reserves the right to respect the
224 relationship between the client and the lawyer so that the client terminates the relationship
225 whenever he loses his faith in his lawyer. And by depriving the litigant of trust, a good
226 relationship will not be established between the litigant and the client, so the client can in no
227 way be forced to accept representation by the litigant.

228 According to Article 256 of the Law on Advocacy, the client is not responsible for the actions
229 of their lawyer, which is related to a professional and professional matter, and in this regard
230 they do not deal with the lawyer-client relationship and the courts apply the traditional concepts
231 related to advocacy. They do not, and they treat it very conservatively.

232 The courts, therefore, have no inclination to apply the provisions of civil law in the traditional
233 way, and in litigation, the lawyer's professional responsibility is to limit or sometimes
234 completely eliminate the client's responsibility for the lawyer's actions in terms of his
235 professional work. The American Law of Attorneys (RLGL) states; The lawyer's action is
236 considered to be the client's action if the client has explicitly authorized this action or later
237 approved the lawyer's action, or if this action is required by the lawyer in accordance with the
238 law or the relevant court (20).

239 Therefore, the special conditions of representation in litigation are usually concluded in spite
240 of the intention and will of the parties in concluding the representation contract and from the
241 point of view of the Code of Civil Procedure, the lawyer is not only a representative and lawyer
242 on behalf of the client but also in independence. Has the power of attorney and in practice,
243 according to the law, all judicial correspondence and notifications must be notified to the
244 lawyer and if not notified to the client and not informed by the lawyer, the hearing will not be
245 legally recognized, all these rules indicate that the lawyer The judiciary is independent of

246 contractual representation. The same title of representation due to the client's permission and
247 trust in the lawyer in terms of fidelity, observance of the client's interests, protection of the
248 client's secrets and the principle of fidelity, which are all ethical aspects of advocacy that lies
249 in the independence of the lawyer. It is not and the basis of advocacy is influenced by its moral
250 aspects, which play an essential role in the nature of advocacy.

251

252 **Conclusion**

253 The formation of the nature of judicial representation requires that while granting
254 representation on behalf of the client, the lawyer has independence in performing legal actions
255 and draws his/her organizational activity plan based on legal thinking and reasoning.
256 Instructions are provided to the lawyer that these instructions are considered very general, so
257 that the client may simply state that the lawyer should try to minimize the client's financial
258 harm. In other words, these instructions can be very specific. Participating in the practice of
259 advocacy with the client's instructions builds the client-client relationship. These client
260 instructions may at times be specialized, but these specialized instructions for the lawyer is
261 considered general. Therefore, the consequences of the defect in performing the representation
262 may be the responsibility of the lawyer, because the reason for referring and granting
263 representation in the form of litigation, and trust in the lawyer as its moral aspect and expertise
264 in performing the subject of representation. So, the responsibility arising from the performance
265 of attorney in terms of drawing the plan and the form of the lawsuit in the form of a petition or
266 complaint or defending it will be the responsibility of the lawyer. The above structure makes it
267 possible for the lawyer, while being a representative and being considered as a contractual
268 representative, to have independence in the manner of performing the representation, such as
269 the treatment contract between the doctor and the patient. But the observance of the client's
270 expediency as its moral aspect exists in the independence of the lawyer.

271 The vast majority of the authors considered the condition without dismissal of the attorney to
272 be correct according to Article 679 BC. Accordingly, if the condition without dismissal of the
273 attorney is stipulated during the necessary contract, it is one of the reasons for the impossibility
274 of terminating it by the client, assuming the unitary nature of the civil power of attorney and
275 lawsuits in case of condition without dismissal.

276 Furthermore, if we believe in the independence of the lawyer in the matter of representation
277 and in case of condition without dismissal in this type of attorney, the client's freedom in
278 exercising his opinion will be overshadowed in case of lack of trust in the lawyer because on
279 the one hand he will not have the right to express a definite opinion and direct involvement to
280 draw a legal method in defense, and on the other hand he will lose his right to dismiss with this
281 condition without dismissal. As for the client's presence and participation in the hearing and
282 self-defense in the desired and personal manner, and on the other hand, the defense of the
283 lawyer in another way based on the irrevocable power of attorney is against the principles of
284 trial and general judicial order. On the other hand, the relationship between the lawyer and the
285 client is in conflict with the moral aspect, and this condition without dismissal overshadows
286 the basic moral rights of the client.

287 Therefore, in the opinion of the condition without dismissal in the representation of the
288 judiciary, due to the contradiction with the essence and necessity of the nature of this type of

289 contract with its ethical considerations is not corrected and in this respect it is different from
290 civil representation.

291 **Ethical considerations**

292 Ethical issues such as plagiarism, informed consent, multiple publication, etc. have been
293 considered in the present study.

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