

ABUSE OF SUBJECTIVE PROCEDURAL RIGHT TO ATTORNEY

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Abstract: In this paper the author deals with instances of abuse of procedural law in court proceedings. The basic thesis of the paper is the legal understanding, bringing under the legal norm the phenomenon that has been noted in practice but that has not been legally defined and that is the engagement of attorneys in court proceedings by persons who do not need an attorney, only to create additional costs that will be awarded to represented persons at the end of the proceedings. The author qualifies this procedural situation as an abuse of the subjective procedural right to attorney in court proceedings. Abuse is shown in civil, criminal and executive court proceedings by the method of modeling. The final part of the paper presents the consequences of abuse, the legal reaction of the court to the observed abuse.

Keywords: Court proceeding, attorney, abuse of right, abuse of procedural right.

INTRODUCTION

Before our courts, there is a shameless robbery of citizens who owe fees for utilities, vehicle parking services (Beta, 2016), for delivered gas (Ivanišević, 2012), water, electricity, and it is committed by public companies that provide utilities, parking services, or companies that distribute gas, water, electricity, which hire attorneys at law to sue the debtor citizens. Businesses are entitled to this. The creditor company has the right to hire an attorney in court proceedings for certain or all procedural actions. However, in this way, the costs of the procedure, which are reflected in the fee for the services of a lawyer, calculated according to the valid lawyer's tariff, are added to and charged to the amount of the basic debt that the debtor has to pay.

The phenomenon is decades-long, territorially comprehensive and massive (Beta, 2020). It has not been noticeable to that extent before, but with the declining standard of living and increased efficiency of debt collection by hiring public executors over the past decade it has become noticeable among the lay public, through appeals of consumer associations to stop the described practice (Danas Online, 2018; Insajder, 02/12/2019).

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This resulted in the fact that in some cities, the decisions of the city authorities forbade utility companies from their territories to hire attorneys in disputes against citizens-debtors (E.V.N., 2014; Todorović, 2017).

An interesting review of the phenomenon is the public address of the Protector of Citizens to the city authorities of Belgrade in December 2019, during which he asked them if they were familiar with the practice of Public Utility Company Infostan Technology to hire law firms for forced collection. On that occasion, the Protector of Citizens stated that the circumstance that the executive debtors of communal services, in addition to the costs of public executors, are additionally burdened by the costs of lawyers whose services are not necessary in specific cases “justifiably raises suspicion that this is an abuse of rights [...] deterioration of the already economically unenviable position of executive debtors of communal services” (Insajder, 10/12/2019).

It should be said that the Protector of Citizens was right. The described conduct of utility companies in the executive court proceedings is an abuse of rights, more precisely, an abuse of the subjective procedural right to an attorney.

THE RIGHT OF PARTICIPANTS IN THE PROCEDURE TO AN ATTORNEY

A participant in court proceedings has the right to an attorney. In civil proceedings, the parties may (have the right to) take action in person or through an attorney, who must be a lawyer.² Exceptionally [...] the attorney of a legal entity may be a law graduate who has passed the bar examination, who is permanently employed in that legal entity.³ In the criminal procedure law, this is said even more specifically: the aggrieved party,⁴ also aggrieved as a prosecutor,⁵ also a private prosecutor ⁶ *has the right to [...]* hire an attorney from the ranks of lawyers.

The right to an attorney is the right to legal aid. The purpose of the right to an attorney is to provide effective legal assistance to the right holder, the person represented in the procedure. Therefore, the purpose of the attorney, *his right duty* in court proceedings (civil, criminal) is to effectively provide legal assistance to a legally ignorant participant in the proceedings, realization and protection in the proceedings in the best faith of procedural and substantive interests of the represented person.

Furthermore, this means that the right to an attorney will be exercised, i.e. an attorney will be hired, by the person who needs such legal assistance, and that is a procedurally legally ignorant participant in the procedure. *A contrario*, the right to an attorney in the proceedings will not, i.e. should not be exercised by a participant in the proceedings who does not need such legal assistance; the category of such includes all legally educated persons who have the knowledge necessary to participate in court proceedings (law graduates, lawyers who have passed the bar examination).

² Article 85, paragraph 1, Law on Civil Precedure, Official Gazette of the Republic of Serbia, no. 72/2011, 49/2013 – OUS, 74/2013 – OUS, 55/2014.

³ Article 85, paragraph 2, Law on Civil Precedure.

⁴ Article 50, paragraph 1, point 3, Criminal Procedure Code, Official Gazette of the Republic of Serbia no. 72/2011, 101/2011, 121/2012, 32/2013, 45/3013 and 55/2014.

⁵ Article 58, paragraph 1, point 3, Criminal Procedure Code.

⁶ Article 64, paragraph 1, point 3, Criminal Procedure Code.



ON THE ABUSE OF SUBJECTIVE PROCEDURAL RIGHTS IN GENERAL

First of all, although abuses of procedural rights have been investigated for decades (Fischer, 2010), in procedural theory there is no generally accepted concept of procedural abuse, abuse of subjective procedural rights in court proceedings (Трубникова, 2015). As a consequence, comparatively legally speaking, there is no procedural law that would contain a normative definition of procedural abuse (Nicotra, 2008), that is, which regulates the limits of exercising subjective procedural rights (Fischer, 2010).

In theory, there are requirements and attempts to develop a general concept of abuse of procedural rights that would be applicable to all court proceedings. It is certain that a selection of characteristics of procedural abuses are extensible to court proceedings and that there seems to be a concept of abuse of procedural rights that has common characteristics in relation to all jurisdictions, but assumes inevitable specifics and adaptations within certain jurisdictions, in the function of different structure and subject of the procedure (Comelli, 2012).

According to the opinions expressed in theory (Scarpantoni, 2015; Nacul, 2014), but also in practice,⁷ the doctrine of procedural abuse is based on the general theory of abuse of rights, because the abuse of procedural rights is only a part of the abuse of rights in general, as a whole. According to the general theory, abuse of rights is an act that would – otherwise – represent the content of an authority, if – in a given case – it is not, as harmful (individual, diffuse or public interest), legally unrecognized or prohibited due to motive, action, manner or worthlessness, and therefore sanctioned (Vodinelić, 1997). In other words, abuse of rights is an action of the holder of the right that is allowed in abstracto, but in this particular case it is not because it is harmful to someone else's interest and because of the existence of one or more reasons that make it abuse. These reasons, the constituents of abuse are: chicanery, namely, when exercising the right, the holder of the right is guided by the intention to harm another; uselessness, namely, the right is exercised without any justified or any significant interest; lack of interest, namely, by exercising the right, an interest is realized that is disproportionately less valuable than the interest of another who is harmed in the process; counter-purpose, namely, the right is exercised in order to achieve an interest that is not in accordance with the purpose of the right; inappropriateness, namely, the right is exercised in a way that is unnecessarily burdensome for another; contradiction, namely, the right is exercised in a manner contrary to other holder of the right's behavior; immorality, namely, the exercise of rights is contrary to social morality; unfairness, namely, the exercise of rights is at odds with fairness (Vodinelić, 1997). These constituents are, in fact, types of abuse of rights, forms in which abuse of rights manifests itself in practice.

Abuse of rights is not a right, it is not an exercise of a right; it is a non-right, therefore it is not allowed. If it is committed, it should be sanctioned. If we accept this and apply it to the procedural legal relationship, we will try to determine the definition of abuse of subjective procedural rights in court proceedings, based on the material one. Abuse of rights in court proceedings (procedural abuse) could be defined as a *procedural action* (doing, not doing) of participants in the proceedings that could *in abstracto* correspond to the legal description of the procedural possibility that constitutes the content of procedural authority, if in a specific procedural situation it is not harmful (to an individual, diffuse or publicly protected interest), legally unrecognized or prohibited due to motive, action, manner or invalidity.

⁷ Cass. Pen., Sez. un., 29.9.2011. (dep. 10.1.2012), N. 155/12, point 15. of the reasoning of the judgment under the title: L'abuso del processo; the text of the judgement is available at: <http://www.penalecontemporaneo.it/upload/S.U.%20Rossi%20DPC.pdf>, accessed on 04.06.2016.



We come to a more difficult question: what are the constituents and forms of abuse of subjective procedural rights in court proceedings? In other words, what are the circumstances that turn an *otherwise* lawful procedural action - if there are any in *a specific case*, due to motive, action, manner of performance or insignificance - into a procedural abuse? Yet again, to put it differently, if the abuse of a right - any right - is a step outside, a departure of the holder of the right not from the form, but rather from *the essence of the right*, and the transition to non-right - to something that cannot and must not be done - what are the limits of the subjective procedural law that the holder of the right must not overstep or else he/she shall no longer be exercising the right, but rather abusing it?

In the first paragraph of this section, we stated that neither the legislator, nor the theory, except for rare partial opinions (Камышникова, 2011), have an answer to these questions.

In the explanation of the mentioned judgment of the Supreme Court of Cassation of Italy, Cass. Pen., Sez. un., 9/29/2011 (dep. 10.1.2012), the Court said that in qualifying whether a procedural action, in civil or criminal proceedings, is an abuse of procedural law, one should start from the general notion of abuse of rights as the use of rights for purposes, interests that are objectively different, harmful in relation to the interests for the realization of which the right is given by objective law. In other words, the target, the target purpose of the right is the limit of exercising subjective procedural rights. Subjective procedural rights are given to the participants in the procedure in order to use them in accordance with their purpose (Юдин, 2005), in order to actualize the interests for which those rights are intended. If the holder of the right by exercising procedural right seeks to achieve some other interest (legal or not protected by law) for which that right is not intended, then he is not exercising a subjective right, but an abuse of procedural right.

Therefore, in court proceedings, abuse of counter-targeted exercise of procedural rights is possible (as a *type of abuse of procedural rights*).

In previous presentations related to the theory of abuse of rights, we have stated that chicanery, harassing the exercise of rights, is a special type of abuse of rights. The exercise of a right is defined as chicanery if the right is exercised only to harm another participant (chicanery in the narrow sense), or primarily just to use chicanery as it is (chicanery in the broad sense) (Vodinelić, 1997).

The use of chicanery in exercising procedural right exists when the holder of a subjective procedural right exercises the right only or predominantly to harm another participant in the proceedings. A. V. Yudin (А. В. Юдин) believes that using chicanery in the course of exercising procedural rights is a type of procedural abuse that is characteristic of both civil and criminal proceedings. This type of procedural abuse is called *unfounded initiation of proceedings* (Юдин, 2006). Therefore, the use of chicanery in exercising procedural right always exists when a court procedure (litigation, criminal) is initiated and is conducted due to an action (e.g. civil offence of interference with the right to use a road, which from the criminal aspect manifests itself as a criminal offense of vigilantism) that has not been committed, when the event which is the subject of the procedure is fabricated, and the plaintiff conducts the procedure only for the reason of causing the greatest possible damage to the other party (defendant, the accused). The damage to the other party is manifested in the actual damage in the form of costs for hiring a lawyer (attorney, legal representative); in the fact that he was deprived of the salary he lost due to spending time in court instead of at work. Non-financial damage is manifested in mental suffering due to the fact that, although innocent, he is obliged to appear in court and defend himself from false accusations, to prove that the accusations are unfounded and false. The damage to the public interest is manifested in the unnecessary involvement of the judiciary: each initiation requires high costs.

This is just one typical example of chicanery in exercising procedural rights. Thus, we can say that in court proceedings it is possible to use chicanery when exercising procedural rights (as a *form of procedural abuse*).

We can conclude that there are procedural abuses, i.e. *types of procedural abuse* extendable to all court proceedings (litigation, criminal, administrative).

ABUSE OF THE SUBJECTIVE PROCEDURAL RIGHT TO AN ATTORNEY IN COURT PROCEEDINGS

Abuse of the subjective procedural right to an attorney implies conscious action of two executors: a participant in the procedure who possesses the professional knowledge necessary for the realization of his / her interests in the court procedure (represented person) and his / her attorney. Abuse is typical of civil proceedings. It is manifested in such a way that a plaintiff *who does not need professional legal assistance* (because he has the professional knowledge necessary to pursue his interests in court proceedings, i.e. a permanently employed law graduate with a bar examination) formally hires an attorney to perform certain or all procedural actions for the sake of obtaining effective legal assistance, but only with *the intention* of making the costs of the proceedings as high as possible with the formal presence of an attorney in the proceedings. The costs of the proceedings shall be awarded to him by the court at the expense of the other party.

For example, AA, who is a lawyer, sued another person for a well-founded, certain debt. AA wrote the lawsuit himself, but, in order to make the costs of the procedure as high as possible, he asked his colleague BB, also a lawyer, to put his facsimile on the lawsuit, so he faked that his attorney made and charged the lawsuit. At the same time, he issued a power of attorney to BB to represent him in the procedure, not because he needs professional legal assistance from a lawyer (of which lawyer BB is aware), but *in order to* make the costs of the procedure as high as possible. At each hearing before the court, plaintiff AA and his attorney BB appear together. Nevertheless, all procedural actions in the procedure are undertaken by AA, while the attorney BB is passively present in the courtroom. Each time BB, the attorney, appears in court costs a certain amount of money, and there is a presumption that AA paid for BB's representation service according to the applicable lawyer's tariff. At the end of the procedure, the court will oblige the defendant to pay the main debt to the plaintiff AA, who won the dispute, as well as the total costs of the procedure, i.e. those incurred by hiring an attorney. It can easily happen that these costs of the procedure exceed the value of the basic debt, due to which the lawsuit was filed in court, many times over.

Why is this considered to be a procedural abuse? From the aspect of form, the plaintiff's actions seem to be *the usual exercise of the right to an attorney*: the plaintiff has formally, based on the objective norm that gives him that right, hired an attorney, and the lawsuit contains a facsimile of the attorney. There is a power of attorney in the case file for representation by an attorney. However, in the specific case, *from the aspect of content*, the right was not exercised for the purpose for which it was intended (for obtaining professional legal assistance), but only *with the intention* to harm the other party, to harm it by incurring costs of the proceedings. Abuse is complete, total only if the attorney *consciously and passively participates* in its execution with the intention of harming another. Why passive? Simply, from the aspect of form, his presence in the procedure is perfect (there is his facsimile on the lawsuit, there is a power of attorney authorizing him to perform the right-duty of representation, he is present before the court), but *from the aspect of content* of performing the right-duty of representation *he does*



nothing. The described procedural situation is procedural abuse both from the aspect of the represented person and from the aspect of the attorney; their acts of abuse are complementary, that is, they commit abuse as co-perpetrators (Давидовић, 2019).

According to the manner, this is an example of using chicanery in the abuse of the procedural right to an attorney, because it is done with the intention of harming, damaging another party. From the aspect of the goal (Давидовић, 2019), i.e. what the perpetrators wanted to achieve through such an abuse, this is a procedural abuse which is used to obtain benefits for themselves and / or others.

Under the same conditions as in litigation, the abuse of the right to an attorney can be done in criminal proceedings. If a plaintiff (or injured party, or injured party as a plaintiff) is a person who has the professional knowledge to participate in court proceedings (lawyer, judge, public prosecutor, deputy public prosecutor, public attorney, deputy public attorney, prosecutor's associate, public attorney's associate, etc.) or a company that employs a law graduate with a bar examination, and the indictment or some other submission was allegedly made by a lawyer, and if, at each main trial hearing, in addition to the represented person, his attorney is present (passively present in courtrooms) – there is a great probability that in this particular case there is an abuse of the right to an attorney in court criminal proceedings.

The abuse of the procedural right to an attorney has its expansion, an explosion in the executive court procedure. Consequently, the same procedural abuse is committed in exactly the same way by public companies that perform utility services when in the executive court procedure – although they employ law graduates who are able to initiate the procedure and represent the interests of the company in it – they hire an attorney to make a proposal for execution. In fact, in all specific cases, the initial act (proposal for execution) is made in the legal department of the company, by the company's lawyers, yet at the same time supplied with a facsimile of the lawyer and thus claims to be made by an attorney (Protić, 2018); at the end of the motion for execution, the cost price of the composition of the motion made by the attorney is stated and is in accordance with the lawyer's tariff. This is done exclusively in order to create the illusion that the company has paid the attorney's fee for making a proposal for execution, i.e. that the company has to pay the costs of the procedure. In reality, neither the attorney made a motion for enforcement, nor did the company incur any costs arising from the proceedings. The company then submits a proposal for execution to the executor, who makes a decision on execution, collects from the debtor the main debt and the costs of the enforcement procedure and pays this money to the company. The company pays the amount collected for the costs of the enforcement procedure to the attorney. There are certain circumstances that assure us that the attorney then returns part of the money, usually in the amount of 50%, which he received from the company as compensation for the composition of the proposal for execution. This could be an official obligation according to the contract made between the attorney and the company when he got the job (Danas Online, 2018; E.V.N., 2014), or it could be an unofficial return of money to people who simply authorized him to represent the company (Todorović, T., (2017). Due to the massive occurrence of this abuse in the executive court proceedings, it is a source of great property benefit, both for lawyers and for utility companies, i.e. directors of these companies.

LEGAL REACTION TO THE ABUSE OF THE PROCEDURAL RIGHT TO AN ATTORNEY

The legal order has a negative attitude towards abuse of rights. Abuse of rights is not allowed. The prohibition of abuse of procedural rights in court proceedings is prescribed by the provision of the Law on Civil Procedure: “The court is obliged to prevent and punish any abuse of rights of the parties in the proceedings”,⁸ and the provision of the Criminal Procedure Code: “The court is obliged [...] to prevent any abuse of rights aimed at delaying the proceedings”.⁹

Whether there is an abuse of the procedural right to an attorney in each specific case should be decided by the court, *ex privato*, upon the objection of the other party or *ex officio*. Legal provisions relating to the prevention, disabling, and punishment of procedural abuses are *ius cogens*; the court must apply them in each particular case.

Assuming that the court noticed an abuse of procedural rights to an attorney during the proceedings, we believe that the court should determine the existence of abuse in a specific case by a special decision. The dictum of this decision should read: “It is established that NN and PP, his/her attorney, abused the procedural right to an attorney by the fact that NN hired PP as his/her attorney only to cause the costs of the procedure.” If in this procedural situation the court opts only for this declaration, then in criminal and civil proceedings this is a procedural decision on the minutes of the main trial/hearing, in respect of which the parties, i.e. the interested person has no right to a special appeal.

This is followed by the sanctioning of procedural abuse. The basic sanction of this procedural abuse consists in the fact that the court will deny legal recognition and protection of abuse by not recognizing the costs of the procedure incurred in the name of hiring an attorney to the represented person who committed the abuse. In other words, the court will not recognize or award the costs of the proceedings that the represented person allegedly had on the basis of hiring an attorney. In criminal and civil proceedings, this sanction will be contained in the reasoning of the verdict, in the part that refers to the reasoning of the decision on the costs of the procedure, with a reference to the procedural decision (from the minutes of the main trial/hearing) which determines the existence of abuse.

The Law on Civil Procedure prescribes the obligatory *general* punishment of perpetrators of procedural abuses¹⁰ by a fine.¹¹

The reasons of expediency and procedural legal technique speak in favor of the fact that, in civil proceedings, the court makes a decision on punishing procedural abuse together with the decision which determines its existence. Therefore, paragraph 1 of the decision should read: “It is established that AA and his attorney BB abused the procedural right to an attorney by hiring the attorney BB only to cause costs of the proceedings”; paragraph 2 of the decision should read: “AA is fined for the procedural abuse in the amount of 100,000 dinars, which he is obliged to pay in favor of budget funds within 15 days upon receiving the decision”; and paragraph 3 of the decision should read: “The attorney BB is fined for the procedural abuse in the amount of 100,000 dinars, which he is obliged to pay in favor of budget funds within 15 days upon receiving the decision.” This decision should be made by the court as a special one and its copy with the right to appeal should be delivered to the participants in the procedure.

8 Article 9, paragraph 2, Law on Civil Procedure.

9 Article 14, paragraph 1, Criminal Procedure Code.

10 Article 9, paragraph 2, Law on Civil Procedure.

11 Article 186, Criminal Procedure Code.



In the enforcement proceedings, the court (IPV board), deciding on the debtor's complaint, will primarily determine by the same decision (resolution) that the company AA and its attorney BB abused the (procedural) right to an attorney by hiring the attorney BB only to cause the costs of the proceedings; paragraph 2 will change the decision on execution of the public executor / court in the part of the decision on the costs of the enforcement proceedings by reducing it by the amount recognized to the creditor as compensation to the attorney for the composition of the proposal for execution; paragraph 3 of the decision should read as follows: "Company AA is fined for the procedural abuse in the amount of 200,000 dinars, which is obliged to pay in favor of budget funds within 8 days upon receiving the decision"; paragraph 4 of the decision would read: "BB is fined for the procedural abuse in the amount of 100,000 dinars, which he is obliged to pay in favor of budget funds within 8 days upon receiving of the decision." This decision must be made by the court as a separate one and its copy with the right to appeal should be delivered to the participants in the procedure

When it comes to the lawyer, there is another type of sanctioning procedural abuse. It is the filing of a disciplinary report against the lawyer for a procedural abuse. In addition to procedural laws, attorneys are explicitly prohibited from committing procedural abuses in court proceedings by law and bylaws governing the legal profession.¹² The performance of procedural abuse in court proceedings by an attorney is considered to be a violation of Rule 39.2. Code of Professional Ethics of Lawyers, which explicitly states that "a lawyer must not resort to procedural abuses ...", and that any "violation of the Code is the basis of disciplinary responsibility of a lawyer" (Rules 2.1, 2.3 and 2.5 of the Code). Therefore, in each specific case, whenever it is established that the attorney has committed procedural abuse, the court is obliged to submit the decision establishing this fact along with the disciplinary report to the Bar Association for the purpose of conducting disciplinary proceedings against the lawyer.

CONCLUSION

Abuse of the subjective procedural right to an attorney in court proceedings exists when a participant in a procedure who does not need an attorney (because he has the knowledge to act in the procedure, i.e. a permanently employed law graduate with a bar examination) formally hires an attorney solely to incur costs. The costs will be awarded to the represented person at the end of the proceedings. This procedural abuse implies the conscious participation of two persons participating in the procedure: the represented person who commits the abuse actively, by doing, and the attorney, who participates in the abuse passively, by not doing so. According to the manner, this is an example of using chicanery in the abuse of the procedural right to an attorney, because it is done with the intention of harming, damaging another party. From the aspect of the goal, i.e. what the perpetrators wanted to achieve through such an abuse, this is a procedural abuse which is used to obtain benefits for themselves and / or others.

This procedural abuse can be committed in any court proceeding. In practice, it is particularly common in the enforcement proceedings; it consists of public companies that provide utilities and lawyers, in such a way that the company, which as a creditor in the enforcement proceedings realizes its well-founded claim from the citizen – debtor, although it employs law graduates with a bar examination, hires an attorney to compile proposals for enforcement only in order to create the highest possi-

¹² Law on Advocacy (Official Gazette of the Republic of Serbia, nos. 31/2011 and 24/2012 – decision of the Constitutional Court), Statute of the Serbian Bar Association (Official Gazette of the Republic of Serbia, nos. 85/2011, 78/2012 and 86/2013) and Code of Professional Ethics of Lawyers (Official Gazette of the Republic of Serbia, no. 27/2012).



ble costs of the procedure, which the body of the procedure will recognize and collect from the debtor in his favor at the end of the procedure.

Abuse of rights is not allowed. It is the duty of the court to qualify and determine the existence of abuse and its perpetrators in each specific case, *ex privato* or *ex officio*, to sanction it by not acknowledging to the represented person the costs of the proceedings on the basis of representation by an attorney, and if the law prescribes – to fine the perpetrators, and, as a final point, inform the Bar Association about the procedural abuse in order to initiate disciplinary proceedings against the attorney for the committed abuse.

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