THE ROLE OF THE ATTORNEY WITHIN THE LEGAL DEBATE DURING A CRIMINAL TRIAL

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Abstract

The attorney, during the criminal trial, endeavours to help his client in any way possible, by utilising a most complex legal arsenal so as to win the debate between the accusation and the defence. The criminal trial often involves very high stakes for the parties involved, which may incur some difficulties in maintaining a normal dialogue until its completion. Thus, the lawyer must step in to facilitate this dialogue, in helping the judge to determine the relevant issues which require a most thorough analysis, so as to ensure that the client receives a fair trial. In fulfilling this objective, he must concentrate his speech on only the key issues and present only relevant conclusions. Failure to do so may result in a dismissal of all his arguments, instead of merely the non pertinent ones. The risk is evident and proper measures need to be taken, in order to minimise it, so that ultimately the judge may grasp the situation accordingly. The aim of the article is to shed some light on the issue at hand, by establishing some good practices which may significantly aid in expressing the viewpoint of the accused to the court in the manner which best fits the needs of the client.

Keywords: *Attorney's Role Criminal Trial Duty Power of Attorney.*

1. Introduction

1.1. What matter does the paper cover?

The paper deals with the many problems which may arise in practice due to the fact that the legal debate during a criminal trial presents more challenges for all parties involved.

It shall focus on outlining several usefuls courses of action for the attorney, in circumventing the most common impediments which may prevent him from exercising his duties to the best of his abilities.

1.2. Why is the studied matter important?

The studied matter is very important given the fact that judicial errors can sometimes be made in the context of an improper legal debate. It thus falls on the attorney to utilise the best means available in order to facilitate the exchange of opinions between himself and the judge in order to prevent any potential problems. The paper shall offer an analysis of the main legal texts applicable and try to establish some useful guidelines to properly employ them.

1.3. How does the author intend to answer to this matter?

Upon a thorough analysis of the legal applicable texts and the views of well renowed legal authors, it is hoped that certain good practices may be identified.

Thus. the recipients of the message may receive potential solutions to the problems which may arise from contradictions between the laws which regulate the procedure.

1.4. What is the relation between the paper and the already existent specialized literature?

The paper shall endeavour to add to the perspectives on the matter at hand expressed in the specialised literature. The authors whose opinions will be integrated in the paper are well known and have managed to offer interesting views regarding the issue. Thus the task of improving on their perspective is that much more daunting. Nonetheless, the article is to establish some useful observations regarding the challenges of ensuring that the rights of the client are respected without infringing upon any legal texts, including the Statute of the lawyer.

2. The legal applicable texts and opinions of some proeminent legal authors

2.1. The Criminal Procedural Code

Firstly, our national Criminal Procedural Code[1] outlines the legal framework regarding the role of the lawer during the debate int the criminal case in: **Article no. 88** -" *The lawyer **assists or represents**, in the criminal proceedings, the parties or the main procedural subjects, **according to the law***. "-; **Article no. 92** - "*…During the preliminary and trial proceedings, the lawyer has the right to **consult the case files**, assist the defendant, **exercise his procedural rights, make complaints, requests, memos, exceptions and objections**… The attorney of the suspect or defendant has the right to benefit from the time and facilities necessary to prepare and carry out an effective defense.*"-; **Article no. 109** -" *… The suspect or defendant has the right to **consult with the lawyer***

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[1] Law no. 135/2010 regarding the Criminal Procedure Code, published in the Official Gazette of Romania no. 486 of July 16, 2010.

***both before and during the hearing**, and the judiciary may, when he considers it necessary, allow him to use his own notes and personal writings…* "; **Article no. 129** -"*… The principal procedural subjects, their parties and their lawyers may **address questions to the witness interviewed under para. (1)**…* "-; **Article no. 378** -" *…The defendant is allowed to express everything he knows about the act for which he was sent to trial, then the prosecutor, the injured party, the civil party, the civilly responsible party, the other defendants, **as well as their lawyers and the defendant's lawyer who is being heard**…*"; **Article no. 388 -** " The debates and the order in which the word is given *(1) At the end of the judicial inquiry the debates shall be debated with the following order: the prosecutor, the injured party, the civil party, the civil responsible party and the defendant(2) The President may also **grant the word in reply.** (3) The **duration of the conclusions** of the prosecutor, the parties, the injured person and their attorneys **may be limited**....* "-

2.2. Law no. 51/1995 Published the Official Gazette of Romania no. 98 of 7 February 2011

The analisys shall also focus on the the lawyer's rights and obligation, as stated in the provisions of his statute, as established by Parlament.

Key aspects fall under article **Article no. 2** -" … In the exercise of his profession, the lawyer is independent **and is subject only to the law, the statute of the profession and the code of ethics**… In the exercise of the right of defense, the lawyer has the right and the duty to enforce the free access to justice for a fair trial **which is to last a reasonable amount of time**. "-; **Article no. 39** -" … The lawyer shall not be liable for the oral or written claims, in the appropriate form and in compliance with the provisions of paragraph (2) before the courts, …if they are done **in compliance with professional deontology rules**… It is not a disciplinary misdemeanor nor can any other legal form of legal liability be attributed to the **lawyer's legal opinions, the exercise of rights, the fulfillment of the obligations provided by law, and the use of legal means to prepare and effectively defend the legitimate** freedoms, rights and interests of his clients. "-; **Article no. 86** -" The lawyer shall be **liable to disciplinary action for failure to comply with the provisions of the present law or statutes**, for failure to comply with binding decisions adopted by the governing bodies of the Bar or the Union and for any acts committed in connection with the profession or outside the profession which are detrimental to the honor and the prestige of the profession, the body of lawyers or the institution.... "-.

2.3. High Court of Cassation and Justice case law

Finnaly, the High Court of Cassation and Justice[2] has expressed in its Appeal in the interest of the law no. 15 of 21 September 2015 formulated by the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice regarding the unitary interpretation and application of the provisions of art. 348 of the Criminal Code, in the case of exercising activities specific to the profession of lawyer by persons who are not part of the forms of professional organization recognized by Law no. 51/1995 that " *in interpreting and applying the provisions of art. 348 of the Criminal Code states: "The act of a person exercising activities specific to the profession of lawyer within entities not belonging to the forms of professional organization recognized by Law no. 51/1995 on the organization and pursuit of the profession of lawyer, republished, as subsequently amended and supplemented, **constitutes the offense of exercising a profession without right or activities provided by art. 348 Criminal Code***."

2.4. The opinion of the legal authors

Adrian Tony Neacșu[3] has expressed his reservations concerning the emphasis on the style of speech instead of on the need for the lawyer to focus on merely conveying the relevant facts of the case and his view on the applicability of the legal texts. His role is not to win a speech contest, but to use the allotted time as efficiently as possible and express as much useful insight as he can.

Some other authors[4] have expressed the idea that " The right to defense is a judicial function exclusively for the lawyer, of crucial importance in achieving impartial justice and a fair trial, **even though this judicial function is not currently expressly regulated in the Code of Criminal Procedure.** ".

Indeed, as it has been pointed out, there are some aspects which may not have been properly and expressly emphasized in the Code of Criminal Procedure, but this is an opportunity to lay the steps for proper relations between the accused and the state with the aid of the attorney.

In the treaty written under the coordination of the late Vintilă Dongoroz[5], the main guideline which is to be followed by the lawyer, consists in doing all that he can in order to aid the party he represents, within the limits of the law and the powers that have been granted to him. In order to achieve this, he may exercise the right to come into contact with the accused, and should

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[2] Decision no. 15 of 21 September 2015 of the High Court of Cassation and Justice

[3] Neacșu, Adrian Toni, (2014), „*Convinge judecătorul.Tehnica și arta convingerii instanței*"[Convince the judge. The technique and art of persuading the court], București: Wolters Kluwer, pp. 255-256

[4] RADU, Casandra (2016), *„ Consilieri juridici vs. avocați. Avocați pentru avocați și avocați în apărarea consilierilor juridici* "[Legal advisers vs. Lawyers. Lawyers for lawyers and lawyers for legal advisers], juridice.ro. https://www.juridice.ro/417931/consilieri-juridici-vs-avocati-avocati-pentru-avocati-si-avocati-in-apararea-consilierilor-juridici.html

[5] Dongoroz, Vintilă, coordonator, "*Explicatiile teoretice ale Codului de procedura penala roman. Editia 2. Volumul V,* "[Theoretical explanations of the Romanian Criminal Procedural Code], București: Ch Beck, pp. 94

the accused request it, the right becomes an obligation for the lawyer[6].

Some rights of the accused may be exercised only personnaly, such as the refusal to make any statements, or to have the last statement in the trial[7].

However, it is important to note that in the last example, exercising his duties may mean interrupting his own client when he may incriminate himself.

Mihail Udroiu[8] has also analysed the difficult role of attorney. He considers that the presence of the lawyer during the proocedings is a guarantee of the right to a fair trial, protected by article 6 of the Europeean Convention on Human Rights and also article 3. In cases in which the court appointed attorney is incapable of mounting a proper defence, the defendant may solicit his replacement or that he be jointed by yet another counsellor[9].

3. The interpretations of the author

Firstly, in regards to article **88** of the Criminal Procedural Code, it is crucial to note that the most important obligation of the attorney is to obey the law. No matter how useful for the client would be to invoke certain articles, make unfounded requests to the court, solicit certain witnesses to be heard, despite the evident impossibility in this respect, the primary obligation for the lawyer is to act in full accordance with our legislation.

Indeed, there have been cases in which the lawyer has requested the court to solicit the point of view of the Constitutional Court of Romania in regards to certain legal provisions which may be relevant to the final solution.

Given the fact that once our laws made it mandatory for the court to suspend the entire proceedings until a point of view was presented by the Constitutional Court of Romania on the specific matter at hand, some defendants have greatly benefited from the statute of limitations in their cases, with the court ending the case with an acquittal.

This course of action of postponing the case as often as possible may provide the party with significant advantages - memory loss for witnesses for the prosecution- but it should be noted that it is also in complete defiance of Article 88 and also article 2 of Law no. 51/1995: " *In the exercise of the right of defense, the lawyer has the right and the duty to enforce the free access to justice for a fair trial* ***which is to last a reasonable amount of time***.". Thus, there are certain conflicting issues which stem from the provisions previously indicated, given the necessity for the lawyer to walk a very fine line in terms of avoidind potential infringements.

As to article **92** of the Criminal Procedural Code, it is paramount to note the fact that the attorney should always struggle to receive the needed time in order to mount a most proper defence. There will be cases with an enormous amount of paperwork. He should strive to use the technology available in his favour. High quality fotographs should be taken of the key aspects of these cases, combined with Optical Character Recognition technology aimed at turning the photos into editable text. Thus, sifting through the mountains of information in high complexity cases should prove more feasible.

In regards to Article no. **109,** he should conduct a careful analysis of the aspects which may be revealed during the hearing of the defendant. He has to always be ready to interrupt his client's testimony, should it become damaging for the defence. When the evidence is clearly leading to a guilty verdict, he should seize the opportunity to solicit the applicability of Article no. 375 of the Criminal Procedural Code. He ought to address the proper questions to his client and lead the client into focusing on the key issues during the actual testimony, without any potential deviations. The client, during the stage of the testimony when he freely expresses his point of view, should be guided by the lawyer in order to prove the positive and determined facts, the positive undetermined facts and the negative determined facts. The outcome of the efforts should result in conveying to the court that he is innocent or that he never was near the crime scene.

Article no. **129** of the Civil Procedural Code is equally important in this respect. Here, the role of the lawyer is to address as many control questions as possible to the witnesses in order to establish whether or not they were actually at the time of the crime and have also properly perceived the events. This can be done in a very simple manner, like asking what sort of garment was the defendant wearing at the key moment and presenting survellaince pictures from the local bank which may depict a very different picture. His duty is to challenge the credibility of the witness when his testimony is damaging for the defence but also to enforce the testimony of the defence witnesses in order to convince the court. Of great importance is to constantly corroborate in his mind all the evidence presented before the court in order to gain a proper insight on the needed course of action.

Article no. **378** of Criminal Procedural Code should be interpreted in the sense that the main objective of the defence counsel is to focus on the alibi of the defendant. He should always strive to provide a most compelling alibi, no matter how circumstantial the

[6] Dongoroz, Vintilă, coordonator, "*Explicatiile teoretice ale Codului de procedura penala roman. Editia 2. Volumul V*, "[Theoretical explanations of the Romanian Criminal Procedural Code], București: Ch Beck, pp. 352

[7] Dongoroz, Vintilă, coordonator, "*Explicatiile teoretice ale Codului de procedura penala roman. Editia 2. Volumul V*, "[Theoretical explanations of the Romanian Criminal Procedural Code], București: Ch Beck, pp. 353

[8] Udroiu, Mihail, „ *Procedură penală. Partea generală. Ediția 3*" "[Criminal Procedure. General Aspects. Third Edition], București, 2016, Ch Beck, pp. 48

[9] Udroiu, Mihail, „ *Procedură penală. Partea generală. Ediția 3*" "[Criminal Procedure. General Aspects. Third Edition], București, 2016, Ch Beck, pp. 790

accusatory evidence is or how poorly the case is being handled by the prosecutor. It is not a question of an infringement to the right to be considered innocent until proven guilty, but coming forward before the court is also useful. A proper collaboration during the trial may lead to a more mild sentence, should the unexpected occur and a conviction be passed.

In regards to Article no. **388** of the Criminal Procedural Code there should be noted that in this stage of the trial lies the pinnacle of the defence efforts. The defence speech should be as pertinent as possible. Little time should be allotted for emotional arguments. It is highly likely that the judge is usually impervious to such attempts. Instead, ample efforts should be directed into the facts of the case and why the prosecutor has failed to unequivocally prove the guilt of the accused. Should the facts be clear, the focus should be on the interpretation of the legal texts, in addressing the necessity for the court to apply only those relevant to the case. After these stages, the punishment and other legal measures that are to be taken shall mandatory complete the list of obligations for the lawyer. No other aspects should be addressed, such as offering irrelevant examples. The speech can be completed by the supportive case law, in order to aid the judge in maintaining a unitary judicial practice.

Relevant to this article is the strategy employed by some attorneys to bombard the court with conclusions, exceptions, requests, recusations, many of which failing to address relevant matters. This option is very dangerous for the client, since the judge, after trying to select the most pertinent aspects, may fail to notice some of them, due to the overwhelming amount of inapplicable information to the case in particular. This practice is very damaging to the cause of the defendant and the reputation that usually accompanies the lawyer can in no way usefully serve future clients.

As to Article no. **2** of Law no. 51 of June 7, 1995 it is imperative to readdress the issue of artificialy prolonging the length of the trial by means of procedural or substancial law based strategies. Indeed, the fact that the client can benefit from the statute of limitations for his crime is a clear indication of fulfilling the duty of providing a most useful defence. However, so is falsifying evidence to serve one's needs and witness tampering. These means can never justify the end. The counsellor is obligated to abide by the legal provisions and his legal statute. Clients shall always come and go, but committing a crime to serve their interests or damagind one's reputation can never be a valid course of action.

Article no. 39 can be viewed as a safeguard for the lawyer, free to emit his opinion on the matter at hand. However, evident difficulties may arise from its interpretation. This freedom can lead to dissservices for the client. As previously indicated, there are cases in which the lawyer expresses his opinion over the course of multiple pages and during very long debates. Indeed, the court is able to limit such interventions, but these practises should be discouraged. In the instances when the opinion of the lawyer is severely irrelevant and also the length of the arguments is unreasoanable, certain measures should be undertaken in order to limit this type of practice. Over the long run, its effects are severely damaging for a large number of clients who receive defences which span over dozens of pages but out of which extremely little actually aids their cause.

Another aspect of interest is that of the obligation to ensure all that he can do to allow for a trial which lasts a reasonable amount of time. In the examples previously mentioned, the length of the proceedings is unorganically altered, in violation of article 2 of Law no. 51 of June 7, 1995.

Article no. **86** of Law no. 51 of June 7, 1995 thus becomes applicable in this particular case, since the attorney, in attempting to provide a most complex defence, fails to respect article no. 2. Indeed, the solution of disciplinary action should be employed with the utmost consideration, but in some cases in which the mannor of the proceedings has reached a very alarming level, in ensuring the right to fair tiral for future clients, the practice should receive due attention and proper sanctions. A proper fulfilment of his role can never allow for any deviation of the main goal of offering a most pertinent opinion for the judge and not bombarding him with useless information.

4. Conclusions

4.1. Summary of the main outcomes

It is evident that the more rules and regulations exist, the easier it is for the counsellor to be in situations where they contradict. The main focus of the article was to identify the ones which may seem more problematic.

As for the aspects which derive from the interpretation of the Criminal Procedural Code, it is important to point out that any requests made during the trial should be as pertinent as possible. The legislation has been modified, soliciting the opinion of the Constitutional Court of Romania no longer attracts a mandatory suspension of all proceedings. But that does not mean that there could be some judges who could interpret the law in such that a way that they see no impediment in suspending. So, requesting the suspension could mean an act of defence, in accordance with Article no. 39, but in violation of Article no. 2 of Law no. 51/1995.

Mounting a proper defence may sometimes mean advising the client not to offer testimony. The importance of knowing when to proceed in this manner and when to employ Article no. 375 of the Criminal Procedural Code cannot be stressed enough. The flair of the lawyer is revealed most often in the way in which he choose which legal battles to engage in. Refusal to capitulate may seem very heroic, but his role in the debate can sometimes mean that embracing defeat is the most useful option for the client.

In regards to witness testimony, the lawyer should always prepare several control questions which may

help the court decide on the credibility of the person who is being questioned. He should always ask the witness whether or not he is sure of what he has expressed. Any waverings are always beneficial for the accused.

He should always focus on the alibi and how the facts of the case relate to the facts presented by the defendant since any uncorroborated pieces of evidence cannot justify the conviction.

Every single time a reasonable amount of doubt can be prooven, every single time some key aspects do not relate to one another, it is mandatory for the court to interpret the evidence in the favour of the defendant. It is here the role of the attorney is of the utmost importance, since most cases are not clear. The court cannot proceed to imprison a person if it is not certain of the evidence presented before itself. Indeed the lawyer should sometimes avoid creating too much doubt since the judge may overwhelmed by too much stimuli and overview some key aspects regarding the defence.

Thus it is of great importance that the ending speech for the accused be as shortest possible and it should also integrate all that is useful in viewing the case from the perspective of the defendant. Failure to refrain oneself from providing the judge with too much unnecessary information may be extremely detrimental to the client. In the long term a significant number of individuals could pay a far too high cost for this error in strategy. It is better to be clear in making one's point, especially in cases where the stakes are so high.

Finally, artificially prolonging the duration of the trial can never be a winning strategy. It can also be very stressful for the client to wait years and years to receive a solution from the court. In preventing this, the lawyer should always endeavour to respect the provisions of Article 2 of law number 51/1995 in regards to a reasonable duration the the trial.

4.2. The expected impact of the research outcomes

The article shall hopefully facilitate an improved communication between the lawyer and the court, in ensuring a proper defence of the fundamental rights of the accused. It is hoped that it shall inspire new research regarding the matter at hand in establishing even more correct courses of action in the interpretation and application of the articles previously analysed.

4.3. Suggestions for further research work.

New research could offer a multidisciplinary approach on the subject, by utilising aspects of Psychology and Philosophy in order to present a more complex perspective.

It could also establish *de lege ferenda* proposals in modifying the content of some of the articles analysed above in order to avoid potential contradictions between the legal texts so that the role of the attorney be simplified.

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