The Impossibility of the Lawyer–Defendant to Provide Legal Assistance to Other Defendants in the Same Cause

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Abstract

The paper aims to analyze a circumstance which emerged in practice, according to which a lawyer – when he/she is a defendant in a criminal case – is forbidden to provide legal assistance to other co-defendants in the same case. This is the conclusion after corroborating the texts of criminal law, though there is no express interdiction stipulated in this matter. According to the provisions of article 6 in the Code of criminal procedure, the right to defence is guaranteed to the defendant, to the accused, and to all the other parties involved during the entire trial.

Introduction

No normative act forbids the suspected lawyer to exert his right to defend himself/herself and to benefit from all trial guaranties. If criminal proceedings are instituted against the lawyer, he/she does not lose the rights stipulated by the law. There is also no act restraining or conditioning a lawyer from exerting his/her profession after the institution of criminal proceedings against him, because this right is guaranteed by both the Romanian criminal law and by the European jurisprudence.

However, as regards the legal assistance provided to the other co-defendants (clients of the lawyer) – in order to ensure an effective, serious defence, with the purpose of discovering the legal truth –, the correct and principled decision would be for the other co-defendants to be legally assisted by another lawyer that the one who is a defendant in the same case. Under such circumstances, if within the same criminal case the lawyer is a co-defendant, like his/her clients, and their contact could be restricted according to the Romanian criminal law, the defence would lose its effectiveness and it would turn into lack of defence.

Keywords: lawyer – defendant; co-defendants – clients; law; legal assistance; criminal case; professional secrecy.

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Without any question, he/she is considered innocent until proven guilty and there is no law that forbids the lawyer from providing legal assistance to other parties in the same case where he/she is a defendant. Nevertheless, I believe that in this case, even if there is no conflict of interests with other subjects of the trial, the conclusion is still that such a thing is inadmissible, taking into account the governing principles based on the discovery of the legal truth in the matter.

Background

According to the provisions of art. 46 par. 2 of the Law No. 51/1995, “[a] lawyer may not be heard as a witness and may not provide information to any authority or person regarding a cause entrusted to him/her, unless he/she has the prior express and written consent of all his/her clients interested in the cause”. Par. 3 of the same article stipulates “[t]he witness’ capacity shall take precedence to that of lawyer as regards the actions and circumstances he/she became acquainted with before having become the defender or representative of any party involved in the cause”.

Furthermore, in agreement with the provisions of article 8 par.(2) and (3) within the Statute of Lawyer Profession, “a lawyer shall have the obligation to keep professional secrecy regarding any aspect of the cause assigned to him/her”; “under no circumstances may the lawyer be obliged to disclose the professional secrecy. The lawyer cannot be exempted from the duty of confidentiality, not even with the agreement of his/her client or of an authority or another person. It can only be waived where the lawyer is subject to criminal or disciplinary investigation, or if the lawyer’s fees are subject to litigation and confidentiality is waived exclusively for the lawyer’s defence”.

A person’s freedom as attribute of the human being is also violated or disregarded when a second person who obtained them because of his/her profession or function discloses information and data on the first. These social relations have been protected by incriminating the disclosure of professional secrecy. Taking into account the social reality in our country, the general opinion of the judicial literature is that the provisions of the text that refer to the terms function or profession concern both the public and the private spheres. When incriminating this deed, the legislator took into account only the functions which – through their nature or regulations – can be associated with overhearing confident matters and with disclosing secrets. In all the cases, law acknowledges these functions and professions. If someone contacts a person who exerts a profession unauthorized by the law and entrusts that person with a secret, the said secret does not fall under the provisions of the Criminal Code. The same goes for a person who exerts a profession illegally (illegitimate lawyers, for instance).

The new Criminal Code incriminates the disclosure of professional confidentiality in art. 227 of Chapter IX within Title I; it refers explicitly to data or information on the private life of a person, data or information included in the confidentiality provisions. However, it does not refer to general, undefined aspects (such as in the current criminal legislation), which the active subject has become aware of because of his/her profession or his/her function and which he/she discloses without any right to do so. For instance, I refer to relations such as between physician and patient, between lawyer and client, when a person who contacts another person professionally discloses to the latter various issues regarding his/her own person. In such cases, the person who seeks help – and who is persuaded of the discretion of the person who found out things about him/her given his/her profession or function – believes that there are sufficient guarantees for the secrecy, reason for which he/she shares the information. Unlike disclosing the secrets entrusted within private relationships – where indiscretion is only sanctioned by moral norms or perhaps civil law –, if a person reveals secrets entrusted to him/her because of his/her function or profession, then he/she falls under the social danger of infraction.

Hence, in rapport with the previous regulations, the offence of revealing professional secrets has been rephrased. It will only concern the elements that the person bound to keep secrecy became aware of with the consent of the person. This applies regardless of whether the information was communicated directly (for

instance, the data provided by the client to the lawyer, etc), or if the person learnt the information given the profession or function, with the client’s consent. The disclosure of other types of data (non-public information, professional secrets, etc) makes the subject of distinct indictments, included in the chapter concerning professional offences.

The data susceptible of disclosure can be constituted by information or reference concerning a person and which – by their nature, by the person’s will, or by a provision – represent a secret. The nondisclosure clause is total (it concerns all known data) and complete (it concerns all persons). It becomes an offence when the disclosure is unrightful, meaning illegal, or when there is no legal obligation to disclose those secrets. I refer here to those texts within the Criminal Code that stipulate the obligation to denounce certain offences (non-denunciating certain offences – art. 262 C. Code; failure to notify the judicial bodies – art. 263 C. Code, etc). In this case, the higher public interest is more important than the individual interest, because the actions against public interest are significant for the life of the community and because their disclosure brings more important public advantages than the prejudice brought to the victim. Such an interpretation is also supported by special justifying causes referring to the identification of an offence or to proving accessory to committing an offence. Hence, in the legislator’s view, in such a situation, general interest prevails over the individual one. In conclusion, one cannot invoke professional confidentiality for not having complied with the disclosure obligation. The above-mentioned provisions illustrate that professional confidentiality has a public character (par. 1) and that it can only be limited in cases labelled as exceptions, among which the situation where criminal proceedings are instituted against the lawyer. In the last case, professional confidentiality can no longer be invoked, which determines a certain state of incompatibility for the lawyer, as he/she can no longer provide legal assistance for the party concerning which attorney-client privilege does not apply anymore. Per a contrario, in the interpretation of paragraph 5 within the same article, allowing the lawyer who is a defendant in a cause to provide legal assistance would mean that the legal body creates a premise for the lawyer to commit a serious disciplinary deviation, which is inadmissible.

If, in this context, the lawyer–defendant invokes legal assistance contracts with other defendants, it is worth mentioning the provisions of art. 3.2. – Code of conduct for Lawyers in the European Union, according to which a lawyer may not advise, represent or act on behalf of two or more clients in the same matter if there is a conflict, or a significant risk of a conflict, between the interests of those clients. As stipulated in paragraph 2 (art. 3.2.2), a lawyer must cease to act for both clients when a conflict of interests arises between those clients and also whenever there is a risk of a breach of confidence or where his/her independence may be impaired.

As a corollary of the arguments presented, it is imperiously necessary for the lawyer who is also a defendant to refrain from providing legal assistance to the co-defendants in the same cause. He/she should not do this because his/her independence is impaired (obviously and understandably, the lawyer – also a defendant – will valorise to his/her own interests the defence of the co-defendants, which he/she would exert based on the legal assistance contract), and because there is a breach of confidence, given the institution of criminal proceedings against the lawyer. The same obligation results, beyond doubt, from the provisions of art. 2.7. within the Code of conduct for Lawyers in the European Union (assumed by the U.N.B.R. through decision No. 1486 of 27 October 2007). The provisions stipulate “subject to due observance of all rules of law and professional conduct, a lawyer must always act in the best interests of his/her client and must put those interests before his/her own interests or those of fellow members of the legal profession”. In the same sense, it is worth mentioning the provisions regarding the conflict of interests within the assistance and defence activity, stipulated by art. 115b of the Lawyer’s Statute. I quote: “the lawyer cannot advise a new client, if this may affect the confidentiality of information provided by a previous client, or if information held by the lawyer about the previous client provides an unjust advantage to the new client”. The choice of incriminating the conflict of interests is a response to the ever-growing signals from the civil society and the international bodies and institutions regarding the impact of the deeds committed by violating these particular rules of professional conduct. Regulations on the conflict of interests are also stipulated in the legislation of other members of the European Union (Austria, Belgium, Cyprus,
Finland, France, Lithuania, Poland, Spain, and Hungary). The Romanian legislation also had – prior to the 2006 moment (when the conflict of interests was included within the sphere of criminal illegalities for the first time) – norms regarding the conflict of interests, but they proved that there was no clear delimitation between incompatibility and conflict of interests. Though there is certain similarity between the two judicial bodies regarding the violated principles, the concrete manner of principle violation is different, which justifies the distinct regulation on the conflict of interests. The conflict of interests generates a state of incompatibility *lato sensu*, but, as regards the causes that determine the state of incompatibility, the conflict of interests is different because the determining factor is not necessarily a legal situation or an activity that is incompatible with the activity at work, but a personal interest of a patrimonial nature. This interest could influence him/her on objectively exerting his/hers attributions, according to the Constitution and to other normative acts. Taking into account the social consequences and the modification of public interest resulted from committing a conflict of interests, various normative acts were issued, as well as instruments meant to avoid the conflict of interests. The most important of them are as follows: restrictions concerning the involvement in other activities; main income statement; family income statement; personal wealth statement; family wealth statement; statement on receiving gifts; security and access to various types of data; statement of interests on contract management; statement of interests on decision-making. Also among the instruments, I mention the following: statement of interests on participating to the elaboration or counselling in special domains of public policy; the publication of wealth and interests statement; restrictions and control on the exercise of certain functions after the end of the work agreement; limitation and control of gifts and other types of benefits; recusing oneself and withdrawing the officials from those activities where decision-making would create a conflict of interests; restrictions regarding the possession of social parts within private companies for a person or his/her family; giving up various titles (shareholder, member in board committees, etc). (Dobrinoiu et al. 2012: 301)

Besides these instruments, meant to prevent and combat the conflict of interests, since 2006 (since the conflict of interests was incriminated) it is also worth mentioning another essential instrument: the criminal law, which sanctions this deed (Dobrinoiu et al. 2012: 301-302).

It is true that the lawyer–defendant can defend himself/herself (the other defendants have the same possibility), but under no circumstances can he/she defend the other co-defendants. The right of the defendant or of the accused to defend himself/herself during the trial is guaranteed regardless of whether legal assistance is mandatory or not, or whether a lawyer is of the choosing or ex officio for the matter. In the matters in which, because of complexity or special particularities, the court or the prosecutor considers that the defendant or the accused would not be able to defend himself, it is mandatory to name a lawyer ex officio, if no lawyer is chosen for the cause. This is compulsory; otherwise, it will be sanctioned with absolute nullity of the criminal proceedings acts elaborated under these circumstances (art. 197 par. 2 Code of criminal procedure referring to the violation of the right to defence).

The case of legal assistance – regulated by art. 171 par. (2) C. of crim. proc. – acknowledges the right of the defendant or of the accused (regardless of whether there are enough means to pay for the legal assistance of a chosen defender) to benefit from the legal assistance of a lawyer ex officio. The same way, though there is no express provision in the Code of criminal procedure, the prosecutor or the court has to take into account – depending on the particularities of each cause – that the defendant or the accused has to benefit from the time and facilities necessary to prepare the defence.

In the motivation of the decision No. XXVII/2007 (published in the Official Gazette No. 772 of 14 November 2007), the High Court of Cassation and Justice stated as follows, “The principle of legality, regulated in art. 2 par. 1 in the Code of criminal procedure, states that the criminal trial takes place both during the criminal investigation and the trial itself, according to the provisions of the law. As a natural consequence of applying this principle, the violation of such a requirement, meaning the failure to comply with or the vicious application of a procedural or trial-related act turns that act null, under the circumstances determined by art. 197 within the Code of criminal procedure”.
On the other hand, the violation of the legal provisions regarding the presentation of the criminal proceeding material does not lead to absolute nullity, as it is not stated among the strict and limitative cases included in art. 197 par.(2) in the C. of crim. proc. However, it concerns the sanction of relative nullity, mentioned in art. 197 par.(1) and (4) in the C. of crim. proc., if it brings a damage to the legitimate interests of the defendant or of the accused and if this damage can only be repaired by annulling the act through which the criminal proceedings were instituted.

In such a situation, the lawyer’s request would be an obstacle in the criminal proceedings, considering the observance of the provisions stipulated by art. 6 within the Code of criminal procedure. Such a thing would occur if the lawyer–defendant were arrested preventively, considering that the other co-defendants no longer benefit from the qualified defence for which they expressed their intention, with a special discussion regarding the provisions of art. 148 let. b) within the Code of criminal procedure.

In this situation, there would be no clearly delimited border between what should represent a “legal advice” or “the direct or indirect delay in finding out the truth by influencing one of the parties”. I mention again that attorney–client privilege no longer stands when criminal proceedings are instituted against the lawyer, reason for which the latter will not be able to invoke this principle.

Not least, in the same sense I also mention the alteration of the right to defence in case of the defendants assisted by the lawyer–defendant, as understood in art. 6 paragraph 3 let. b) and c) within the European Convention on Human Rights. The European court was persistent in appreciating that the right to defence is meant to emphasize on its special importance within a fair trial, specific to all democratic societies.

The right guaranteed by art. 6 par.3 let.b) is closely connected with the right guaranteed by art. 6 par.3 let.a) (to be informed of the nature of the accusation) and especially with the one guaranteed by art. 6 par.3 let.c) (the right to defend himself/herself in person or through legal assistance of his/her own choosing). The jurisprudence of the European Court is not very “rich” concerning the right guaranteed by art. 6 par.3 let.b), considering that the analysis on the violations of the aspects related to the observance of the right to defence is conducted mainly on the grounds of art. 6 par.3 let.c). The right guaranteed by art. 6 par.3 let.b) has a relative character. The limitation of this right is possible, but it can only be temporary and justified by the need to protect an important public interest, which includes a control of its proportionality.

The European Court analyzed the right to benefit from the facilities necessary to prepare the defence, especially in relation to the principle of equal weapons as regards the access to the file. The notion of “equal weapons”, as part of the right to a fair trial, involves the right of each party to be aware of all the items in the file, as well as the observations, the reports presented to the judge. The notion of equal weapons also means discussing all the aspects of a file before the judge in order to influence the decision of the court, within a contradictory procedure that would not place any of the parties in a disadvantaged position, in order to maintain the just balance between the parties. This means that the prosecutor should bring before the court all the evidence within the criminal proceeding file in the favour or against the accused.

The European Court assesses that the right to assistance by a chosen defender could be limited to a certain professional order; hence, the fact that the accused is denied the request to be represented by his relatives is not a violation of art. 6 par.3 let.c) (CEDO, decision of 20 January 2005, in the cause Mayzit v. Russia, par. 69-71; CEDO, decision of 13 July 2006, in the cause Popov v. Russia, par. 169-174).

The European Court guarantees, in art. 6 par.3 let.c), the right of the one charged with a criminal offence to benefit from legal assistance of his own choosing. This right does not guarantee legal assistance from the part of an unlimited number of lawyers. Hence, the European Commission decided that, by limiting the number of lawyers for the accused to three, the German authorities did not violate the person’s right to defence (European Commission, decision of 8 July 1978, in the cause Ensslin, Baader, Raspe v. Germany, par. 19 of the section “The law”). Unlike the situation where a lawyer ex officio exerts the defence of the accused, the State cannot be responsible for the guilt of the lawyer chosen to exert his profession ((Udroiu, M, Predescu, O 2008 : 718).
The right to the assistance of a defender involves the right of the accused to communicate freely with his/her lawyer in order to prepare the defence or for any other reason regarding the trial, and it is closely connected with the right of the accused to be granted all the facilities necessary to prepare the defence. The principle stated in the Convention consists in the incompatibility between the lawyer’s contacts with his/her client – the accused – and certain restrictions to the right to effective assistance from his/her part, guaranteed by art. 6, paragraph 3 let.c). If the lawyer himself/herself is a co-defendant in the same cause as his/her client, on one side, his/hers contacts may be restricted according to the Romanian laws of criminal proceedings; on the other side, the defence is not effective, but it equals a lack of defence, reason for which it violates the Convention.

On the other hand, in agreement with the legislation in effect, respectively the Law No. 51/1995, art. 36 pt.1 and art. 6 pt.3 within the Lawyer’s Statute, no State authority can restrict the right to defence of the person under investigation or limit or impose certain conditions in this sense.

The choice and hiring of a lawyer belong to the person investigated and nobody – according to the law – may limit this right, though criminal proceedings had been instituted against the chosen lawyer in the same cause. This is possible because there is no law to stipulate expressly that the lawyer may not represent and assist a person investigated with him/her within the same criminal cause. This means that, if the law does not forbid it, then this is permitted, and forbidding to the lawyer the right to assist to the elaboration of all documents related to the trial represents a violation of the right to defence, stipulated in the articles 171 and 172 within the Code of criminal procedure. If the State authority rejects the request of the lawyer chosen by one of the parties to represent and assist, this means that the said authority would practically censure this right, apparently without legal grounds, thus forcing the defendant to hire another defender.

**Purpose of Study**

If the defendant or the accused hires several lawyers to represent him/her, my opinion is that the absence of one of them is not sufficient for the cause to be delayed, except for when – considering the special complexity of the cause and the defence structuring by the chosen defenders – the presence of that defender is absolutely necessary. Actually, this applies to the situations where the conclusions of this lawyer cannot be replaced by those of the other defenders.

I believe that there should be a limitation (n express provision) of the number of lawyers that a defendant or accused can bring simultaneously before the court. In my opinion, it is advisable to elaborate an express provision stating that the right to defence is ensured even when only one of the defenders is present before the court. Finally, there should also be an express law provision prohibiting the right of the lawyer-defendant to provide legal assistance to other defendants in the same cause, considering the arguments I exposed in the background.

**Main argument**

Admitting a request of legal assistance for several co-defendants in the same matter where the lawyer, in his/her turn, is a defendant, would mean providing an advantage to the lawyer and discriminating the other defendants. Hence, the lawyer would acquire a double quality: both defendant and chosen defender of a defendant, which would fraudulently allow him/her to “control” the criminal cause both concerning the selective and seeming defence modality for each of the co-defendants whose interests he/she is obliged to defend, and “speculating” on the trial means in his/her own interest. In such a situation, the dangerous premise would appear to fraud certain legal provisions on the procedure of hearing persons during the criminal proceedings.

**Conclusions**

During the criminal proceedings, the legal bodies are obliged to ensure to the parties the full exercise of the trial-related rights, under the conditions stipulated by the law, and to manage the evidence necessary for the defence.

The legal bodies have the obligation to notice – immediately and before the hearing – the defendant or the accused of the deed he/she is investigated for, its legal framing, and to make sure that he/she has the possibility to prepare and present his/her defence. Furthermore, according to art. 6 within the European
convention on Human Rights, any accused person has the fundamental right for the time and facilities necessary to prepare his/her defence. He/she also has the right to defend himself/herself in person and through legal assistance of his/her own choosing or, if he/she has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

After analyzing all the provisions related to the criminal trial proceedings and to the European jurisprudence, it results that the right to defence is effective, not content-free. As for this particular circumstance, which makes the subject of the present study, the just thing would be to impose restrictions on the quality of defender of the defendant–lawyer, considering that criminal charges were brought against him/her in a criminal matter, in a criminal case where he/she legally assists several co-defendants. Obviously, if the charges brought against the lawyer and to the co-defendants are – at least partially – common, I believe that, even more, the quality of defendant prevails over that of defender. In my opinion, it does not matter that, for instance, the lawyer of the choosing closed a legal assistance agreement with the co-defendants before criminal charges having been brought against him/her. This happens because, in all situations of this type, damage is brought to the legitimate interests of the parties, guaranteed by the laws enumerated in the present study.

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