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The Abuse of Authority by a Professional Counsel in Civil Proceedings

The author discusses the problem of the abuse of authority by a professional counsel in civil proceedings. Such abuse should be specifically understood. The premises for the abuse of authority by a professional counsel embrace acting within the limits of authority set by the scope of the power of attorney, taking procedural steps against the real or hypothetical will of the principal provided that acting in accordance with his will does not violate the rules of professional conduct of the counsel. The lack of due diligence of a professional counsel in litigation is not a premise for the abuse of authority but due diligence affects his liability for damages. Abuse of authority is counsel's failure to maintain due diligence.

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1. Introduction

The issue of the abuse of authority by a professional counsel has not yet been widely discussed in the literature. Generally speaking, the doctrine statements related to the abuse of authority are laconic and largely concern substantive law. The aim of this article is to discuss the abuse of authority in civil litigation, and more precisely, abuse of authority by a professional counsel.

The subject matter hereof is a power of attorney. Therefore, the introductory remarks should indicate the manner in which the notion of legal representation in civil proceedings is understood. Namely, the power of attorney in civil law cases is a procedural relationship based on the will of the principal, arising at

the time of demonstrating the power of attorney in accordance with article 89 of the Act of 17 November 1964 – Code of Civil Procedure[1], the content of which is the authorization to perform procedural acts on behalf and to the benefit of the person represented[2].

2. The concept of a professional counsel in civil proceedings

In civil proceedings, there is an exclusive list of entities that can act as legal representatives. These entities are listed primarily in article 87 of the Code of Civil Procedure, as well as in article 87^{1} § 1, article 465 § 1 and 1^{1}, article 479^{29} § 3, article 479^{51}, article 479^{62}, article 479^{73}, article 479^{84} and article 691^{5} thereof. Moreover, it is assumed that the status of a legal representative in civil litigation can also be granted to a commercial proxy[3]. Counsels in civil proceedings embrace a group of the so-called professional counsels. The present article does not include a detailed analysis of the concept of a professional counsel in civil litigation, particularly the features of the professional nature of a power of attorney granted for the purposes of civil litigation. It can only be pointed out that what distinguishes professional representatives from all representatives in civil proceedings is the possibility of providing comprehensive legal assistance in the normative meaning[4]. For example, in article 6 section 1 of the Act on Legal Advisers dated 6 July 1982[5] it was indicated that the provision of legal assistance by a legal adviser consists in particular in providing legal advice and consultations, drawing up legal opinions, drafting legal acts and appearing before offices and courts as an counsel or defender.

1 Consolidated text: Journal of Laws of 2019, item 1460 with amendments.

2 See Paweł Widerski, *Pełnomocnictwo w prawie polskim* (Warszawa: Wolters Kluwer Polska, 2018), 86; see also Z. Krzemiński, *Adwokat w procesie cywilnym. Z wyboru i z urzędu* (Kraków: Kantor Wydawniczy „Zakamycze", 1999), 19; idem, *Pełnomocnik w sądowym postępowaniu cywilnym*, (Warszawa: Wydawnictwo Prawnicze, 1971), 38; Joanna Parafianowicz, „Commentary on article 92 of the Code of Civil Procedure, edge no. 2", [in:] *Kodeks postępowania cywilnego. Postępowanie procesowe. Komentarz*, ed. Olga Maria Piaskowska (Warszawa: Wolters Kluwer Polska, 2020), LEX.

3 See the resolution of the Supreme Court of 24 July 2013, III CZP 45/13, LEX no. 1350230.

4 See Zenon Klatka, „Pomoc prawna", [in:] *Zawód radcy prawnego. Historia zawodu i zasady jego wykonywania*, ed. Arkadiusz Bereza (Warszawa: Ośrodek Badań, Studiów i Legislacji Krajowej Rady Radców Prawnych, 2010), 44.

5 Consolidated text: Journal of Laws of 2020, item 75.

Therefore, in civil proceedings legal advisers (article 4 of the Act on Legal Advisers), advocates (article 4 section 1 of the Act of 26 May 1982 – Law on the Bar[6]) and foreign lawyers on the terms described in the Act on Legal Assistance Provided by Foreign Lawyers in the Republic of Poland dated 5 July 2002[7] (article 1 section 2 of this legeal act) are referred to as professional counsels. It should be assumed that patent agents also belong to the group of professional counsels, or they may be referred to as *quasi*-professional counsels in litigation[8]. Pursuant to legal regulations, the profession of a patent agents consists in providing assistance in industrial property matters (article 4 section 1 of the Act on Patent Agents of 11 April 2001[9]). As a result, the attribute of professional patent agents in civil proceedings is not comprehensive and has been limited to intellectual property matters (article 9 section 1 and 1a of the Act on Patent Agents, article 87 section 1 of the Code of Civil Procedure)[10].

3. The concept of abuse of authority

According to the semantic rules of the common language, the term "abuse" means: "conduct or act inconsistent with the accepted standards of conduct", "to use something beyond measure", "to use something improperly

6 Consolidated text: Journal of Laws of 2019, item 1513 with amendments.

7 Consolidated text: Journal of Laws of 2020, item 823.

8 The article lists professional counsels in a positive way, i.e. who is the professional counsel. Taking into account the fact that the regulations of civil procedure enumerate several dozen entities that can be counsels in civil proceedings, a negative way, i.e. who is not the professional cousnel, would require an analysis of all these entities. Firstly, it would significantly exceed the scope of the article. Secondly, the main thread of the article would be lost.

9 Consolidated text: Journal of Laws of 2019, item 1861 with amendments.

10 Before 1 July 2020, the material scope of representation of patent agent in civil proceedings was limited solely and exclusively to industrial property matters, and such cases were treated in a relatively broad manner. According to the Act amending the Code of Civil Procedure as well as certain other acts dated 13 February 2020, an amendment to the Code of Civil Procedure entered into force on 1 July 2020 extending the scope of powers of patent agent in civil proceedings, in connection with the introduction of the concept of intellectual property matter (article 479^{89} of the Code of Civil Procedure).

or to an excessive extent"[11]. As for the concept of the abuse of authority, it is understood in the doctrine in various ways. M. Pazdan writes that it may be a legal act performed by the proxyon behalf of the principal, bringing a legal benefit only to the proxy (e.g. proxy's debt suretyship agreement) or his relatives[12]. However, according to Przemysław Drapała, the structure of the abuse of authority covers cases of the representative acting in breach with good practice (article 5 of the Act of 23 April 1964 – Civil Code[13]), leading to gross violation of the interests of the person represented, as well as cases of the representative taking actions that bring benefit solely to him or his relatives[14]. By making a synthesizing comparison, it may be stated that the abuse of a power of attorney is perceived as a situation bearing the following common features:

a) the proxy acts within the authorization;
b) his action brings to the person represented losses instead of benefits;
c) the poxy acts against the actual or hypothetical will of the principal[15].

According to the author, the element in the form of a loss incurred by the principal affects only the liability of the proxy, and is not a premise for the abuse of authority itself. Thus, the mere act of the proxy acting against the will of the principal, regardless of the losses incurred by the principal, is reprehensible and constitutes the abuse of the power of attorney.

4. The abuse of authority by a professional counsel

The abuse of authority in civil proceedings cannot be understood in the same way as in substantive civil law, which becomes apparent mainly

11 See https://sjp.pwn.pl/slowniki/nadu%C5%BCy%C4%87.html. [accessed: 31.07.2020].

12 See Maksymilian Pazdan, „Przedstawicielstwo" [in:] *System Prawa Prywatnego. Tom 2. Prawo cywilne – część ogólna*, ed. Zbigniew Radwański, Adam Olejniczak (Warszawa: C. H. Beck, 2019), 627.

13 Consolidated text: Journal of Laws of 2019, item 1145 with amendments.

14 See Przemysław Drapała, „Odpowiedzialność odszkodowawcza pełnomocnika rzekomego," *Przegląd Prawa Handlowego*, no. 9 (2002): 36.

15 See Pazdan, „Przedstawicielstwo", 656; see also the judgement of the Supreme Court of 28 February 2018, II CSK 228/17, LEX no. 2486810; the judgment of the Court of Appeal in Kraków of 27 April 2015, I ACa 874/14, LEX no. 1761982; the judgment of the Court of Appeal in Białystok of 4 April 2010, I ACa 83/08, *Orzecznictwo Sądów Apelacji Białostockiej*, no. 2 (2010): 9 and subsequent articles; Krzysztof Żok, „Nadużycie umocowania przez pełnomocnika – glosa – I ACa 83/08" *Monitor Prawniczy*, no. 12 (2012): 654 and subsequent articles.

when it comes to a group of professional counsels. The understanding of the abuse of authority in civil litigation must be subject to certain adjustments dictated by the dynamics of civil proceedings. The first prerequisite for the abuse of authority by a professional legal cousel is, as in the case of a substantive proxy, acting within the limits of his power of attorney[16]. It is obvious that in both cases the power of attorney itself differs in terms of its material scope.

As far as the second prerequisite is concerned, with regard to professional counsels in litigation, the only condition for the abuse of authority is, as a rule, acting against the actual or hypothetical will of the principal. Taking into account the group of professional counsels in civil proceedings, it should be noted that these are entities performing professions of public trust that are bound by the rules of professional ethics. The authority of a representative may not include illegal actions, in this respect the act of granting a power of attorney is absolutely invalid (article 58 of the Civil Code). Therefore, a situation where the will of the principal would be to act through the counsel in a manner inconsistent with the positive law cannot be considered an abuse of authority as it is not possible to speak of acting within the limits of authority at all, and thus the first prerequisite is not fulfilled. However, it cannot be ruled out that the action of a professional counsel in accordance with the will of the principal would fall within the scope of the power of attorney, but would be contrary to the principles of ethics binding upon professional counsels[17]. In the author's opinion, when it comes to professional counsels in litigation, the second prerequisite for abuse of authority occurs when the counsel acts against the actual or hypothetical will of the principal provided that acting in compliance with this will does not violate the rules of professional ethics applicable to the counsel. In the case of a professional representative for the purpose of litigation, the norms of professional deontology take precedence over the will of the principal. This is confirmed by the collections of professional deontology. Pursuant to article 7 section 3 of the Code

16 Due to the fact that the professional counsel acts within the limit of his autorization, his procedural actions have procedural consequences. The abuse of authority by a professional counsel does not affect the procedural consequences of a professional counsel's actions. He is liable for the abuse of authority in legal realtionship between him and the principal.

17 Not every action under the law is ethical, some behavior complying with the norm and falling within the freedom of contract may be highly unethical; see the decision of the Higher Disciplinary Court of the Bar of 4 July 2009, WSD 2/09, Legalis.

of Ethics for Legal Advisers[18], a legal adviser shall not violate the principles of professional ethics and improperly perform professional duties in order to meet the expectations of the client or third parties. According to § 10 of the Code of Ethics for the Bar[19], an advocate may not justify his breach of the principles of ethics and the dignity of the profession by referring to the suggestions made by the client. Finally, according to § 10 section 1 of the Rules of Professional Conduct of the Patent Agent[20], a patent agent may not justify his infringement of the rules of conduct and the dignity of the profession by referring to instructions or orders received from the client or superior. The ethical boundaries of representation cannot be determined by the will of the client[21]. Stanisław Garlicki compares it to the situation of doctors who are always obliged to save human life. A professional representative in litigation must therefore also act *lege artis*. The author notes, however, that even a doctor is obliged to take into account the patient's will regarding, for example, blood transfusion, or consent or lack of consent to the operation, when performing certain activities[22]. In its decision of 10 January 2009, the Higher Disciplinary Court of the Bar clearly stated that: „The profession of an advocate is a profession of public trust. And this trust must be two-sided. An advocate is bound by the client's procedural position, but this does not mean that he has to act »as dictated by the client« and submit to his will in every respect. The client should respect the advocate, trust his professionalism and

18 The appendix to to the Resolution No. 3/2014 of the Extraordinary National Congress of Legal Advisers on the Code of Ethics for Legal Advisers of 22 November 2014.

19 The announcement of the Presidium of the Supreme Bar Council on the publication of the consolidated text of the Code of Ethics for the Bar and Dignity of the Profession (Code of Bar Ethics) of 27 February 27, 2018.

20 The Rules of Professional Ethics of the Patent Agent (consolidated text, containing the changes of 12 January 2011 introduced by the 7th Extraordinary National Congress of Patent Agents).

21 See Hubert Izdebski, Paweł Skuczyński, Sebastian Sykuna, „Pomoc Prawna", [in:] *System Prawa Administracyjnego. Tom 13. Etyka urzędnicza i etyka służby publicznej*, ed. Roman Hauser, Zygmunt Niewiadomski, Andrzej Wróbel (Warszawa: C. H. Beck, 2016), 532.

22 See Stanisław Garlicki, „Odpowiedzialność cywilna adwokatury za szkodę wyrządzoną przy udzielaniu pomocy prawnej" *Palestr*a, no. 9 (1967): 8.

professional integrity, and if for some reason he does not trust him, he should ask for the appointment of another counsel"[23].

In the context of the abuse of authority on the basis of a professional power of attorney, the will of the principal should be assessed individually in each situation, according to all the facts. Above all, this concerns the will expressed by the principal in an explicit manner, but also the will expressed implicitly. The principal represented by a professional counsel generally does not have legal expertise. Therefore, it seems that on the grounds of the order to protect client interests, which results from the rules of professional conduct of individual legal professions (article 8 of the Code of Ethics for Legal Advisers, § 6 of the Code of Ethics for the Bar, § 2 of the Rules of Professional Conduct of the Patent Agent) whose members may be professional legal representatives in civil law proceedings, it is possible to deduce the principle that the principal's hypothetical will is to strive for the best possible result of the proceedings. Similarly, among the tasks of an attorney-at-law in Polish civil proceedings Józef Filipowski mentions reliable, conscientious and fair representation of a party aimed at obtaining the most favorable decision therefor[24]. Thus, if nothing else results from the will of the principal which is expressed explicitly or implicitly through a specific behavior of the principal, it ought to be concluded that the principal has the will for a professional counsel to undertake such activities that will result in obtaining the most favorable resolution of the case. As a consequence, if the counsel fails to take such actions, then he acts against the will of the principal, which essentially constitutes the grounds for assuming that he commits an abuse of the power of attorney provided, undoubtedly, such act is within the limits of the authority granted to him.

The question arises as to whether favorable outcome of the case should be assessed in the light of objective or subjective criteria. The subjective concept is the proper one, since when evaluating the favorability of the result, individual and personal goals that the principal wishes to achieve must be taken into consideration, e.g. the principal may not want to win the case in the objective sense for moral reasons. Nevertheless, also in this respect one should be moderate and each case should be assessed individually. A professional representative may not seek to act according to the will of the client "at any cost", i.e. in breach of the law, applicable ethical rules, thus exposing the client to irreparable damage. Client interest is expressed in the goal that the client, being the principal of the professional representative in litigation,

23 See the decision of the Higher Disciplinary Court of the Bar of 10 January 2009, WSD 64/08, Legalis.

24 See Józef Filipowski, *Adwokat w procesie cywilnym* (Warszawa: Wydawnictwo Prawnicze, 1973), 39; see also Izdebski, Skuczyński, Sykuna, „Pomoc Prawna", 532.

wants to achieve in the proceedings. Hence, in striving to achieve it, the counsel acts in accordance with the interests of his client. Pursuant to point 2.7. of the Code of Conduct for European Lawyers[25], subject to proper observance of all legal provisions and principles of professional ethics, a lawyer shall always act in the best interest of his client and shall favor client interest over his own interest or the interests of other legal professionals[26].

Adopting the principle that the principal's hypothetical will is to obtain the most favorable result of the proceedings, which for the counsel means taking the most appropriate procedural actions aimed at achieving this goal, is particularly useful when the counsel cannot obtain an explicit position from his principal. Nonetheless, it is difficult to assess the situation when the principal expresses, in broad terms, the will to obtain an unfavorable resolution of the case, however it may also be the case that the principal wishes the counsel to take incorrect procedural actions being aware or unaware of the legal consequences arising therefrom. In such situation, bearing in mind the specific understanding of the abuse of authority on a procedural basis, it needs to be assumed that an abuse of authority will not take place if a professional counsel undertakes actions that are inconsistent with the will of the principal but in line with the principles of professional conduct.

For instance, legal advisers are subject to an information obligation, i.e. a legal adviser is obliged to provide the client, at his request, with information concerning the course of the case and its result, in particular related to the effects of the procedural steps taken (article 44 section 1 of the Code of Ethics for Legal Advisers), and shall also inform the client about the unreasonableness or unfounded nature of the appeal against the final decision in a given instance (article 44 section 3 of the Code of Ethics for Legal Advisers). In addition, there is an obligation to obtain consent. A legal adviser is obliged to obtain the client's consent to perform procedural steps including the filing of a claim, recognition of a claim, settling a claim, withdrawing a claim (article 44 section 2 of the Code of Ethics for Legal Advisers). If, despite providing the principal with all the required legal expertise, the principal still wishes the counsel to take an erroneous procedural action, the counsel who is a legal adviser should refuse to do so. According to article 26 section 1 of the Code of Ethics for Legal Advisers, a legal adviser may not provide legal assistance if the activities performed thereby violate or pose a significant threat to

25 The appendix to the Resolution No. 8/2010 of the 9th National Convention of Legal Advisers of 6 November 2010.

26 See also Paweł Skuczyński, „Nowy Kodeks etyki radcy prawnego – nowy model relacji z klientem?" *Monitor Prawniczy*, no. 12 (2015): 627-628.

the independence of such legal adviser[27]. He is obliged to resign from conducting the case, particularly to terminate the power of attorney granted to him by the client (article 26 section 2 of the Code of Ethics for Legal Advisers). This is a further specification of article 22 section 1 the Act on Legal Advisers, pursuant to which, a legal adviser may refuse to provide legal assistance if there are important reasons therefor. Such standpoint is confirmed by the jurisprudence. In the justification of the resolution of the Panel of Seven Judges of 21 September 2000 whose reasoning stipulated that an advocate appointed by the court to the benefit of a party may refuse to prepare a cassation if it is inadmissible or manifestly unfounded. The Supreme Court emphasized that an advocate shall not be guided solely and exclusively by the will of the party if it is in breach with the requirements of expert knowledge[28]. *Ergo*, in such situation, taking steps against the will of the principal by his counsel cannot be regarded as fulfilling the condition of abuse of authority, since acting in accordance with professional ethics relieves the counsel of the charge of abuse of authority. Moreover, if a professional legal representative acted in accordance with the will of the principal, but in a manner contrary to professional ethics, he would risk liability. According to Jerzy Neumann, an advocate cannot discharge himself of liability for actions that violate ethical and obligatory standards resulting from the principles of his profession. In particular, not only shall he not place burden of the responsibility for unethical conduct on the client, but he cannot even attempt to justify his own reprehensible behavior by the fact that such recommendations were given to him by the client[29]. Examples of the abuse of authority by a professional counsel are: recognition of a legal action or conclusion of a settlement against the client's will, lodging an appeal in the absence of a client's legal interest (*gravamen*) in appealing, failure to submit a motion as to evidence relevant to the resolution of the case, about which the counsel knew.

27 It follows from the principle of independence that a legal adviser shall not violate the rules of professional conduct or improperly perform professional duties in order to meet the expectations of the client or third parties, as clearly stipulated in article 7 section 3 of the Code of Ethics for Legal Advisers; see also Jarosław Sobutka, Commentary on article 7 of the Code of Ethics for Legal Advisers, edge no. 3, in *Kodeks Etyki Radcy Prawnego. Komentarz*, ed. Tomasz Scheffler (Warszawa: C. H. Beck, 2017), Legalis.

28 See the resolution of the Panel of Seven Judges of the Supreme Court of 21 September 2000, III CZP 14/00, LEX no. 41972.

29 See Jerzy Naumann, Commentary on article § 10 of the Code of Ethics for the Bar, edge no. 4, in *Zbiór Zasad Etyki Adwokackiej i Godności Zawodu. Komentarz*, Jerzy Naumann (Warszawa: C. H. Beck, 2020), Legalis.

5. Lack of due diligence by a professional counsel

In the case of legal advisers, pursuant to article 3 section 2 of the of the Law on Legal Advisers, a legal adviser performs his profession with due diligence that results from legal knowledge and the principles of ethics of his profession. The obligation of due diligence is set forth in article 12 section 1 of the Code of Ethics for Legal Advisers. Pursuant thereto, a legal counsel is obliged to perform professional activities conscientiously and with due diligence, taking into account the professional nature of the activity. As far as advocates are concerned, according to § 8 sentence 1 of the Code of Ethics for the Bar, an advocate should perform professional activities according to the best will and knowledge, with due honesty, diligence and zeal. As for patent agents, pursuant to article 3 section 3 of the Law on Patent Agents, a patent agents is obliged to practice the profession in compliance with the ethics of the patent agent and with due diligence. This is elaborated in § 3 of the Rules of Professional Conduct of the Patent Agent, according to which a patent agent should perform his professional activities to the best will and knowledge, with due diligence, at the same time maintaining appropriate moderation and dignity. In general, professional representatives in litigation are under obligation of due diligence, which is one of the fundamental duties towards the client as the principal[30]. Therefore, the question arises whether the lack of due diligence in legal representation of the principal by a professional counsel in litigation is a premise for the abuse of authority. According to Jarosław Sobutka, in terms of the profession of a legal adviser, a legal adviser providing legal assistance is required to be highly diligent and conscientious. Both case law and the doctrine provide a well-established position confirming that the professional nature of an activity is inseparably connected with an increased scope of requirements. It is justified both by the experience of a professional, the highest qualifications obtained thereby and his professional specialist knowledge[31].

Failure to exercise due diligence by a professional counsel in litigation while representing the principal is not a premise for the abuse of authority. Due diligence is an objective pattern of conduct for a professional counsel in proceedings which he shall observe when performing his professional activities[32]. According to the normative theory, fault constitutes negative

30 See Sławomir W. Ciupa, „Umowy o świadczenie pomocy prawnej", [in:] *Zawód radcy prawnego. Historia zawodu i zasady jego wykonywania*, ed. Arkadiusz Bereza (Warszawa: Ośrodek Badań, Studiów i Legislacji Krajowej Rady Radców Prawnych, 2010), 76.

31 See Sobutka, Commentary on article 12 of the Code of Ethics for Legal Advisers, edge no. 1.

32 As far as advocates are concerned, the jurisprudence indicates that the professional due diligence standard of an advocate (article 355 § 2 of the

assessment of the entirety of the perpetrator's conduct, consisting in the possibility of holding him liable based on the analysis of his mental state and the existing norm[33]. If an counsel acts in a manner that violates the standard of due diligence, he may be charged that conduct in the case was incorrect. Thus, counsel's due diligence has an impact on establishing the counsel's fault[34], and thereby constitutes a premise for the counsel's liability for damages[35], but not a premise for the abuse of authority. In the absence of specific regulations relating to professional counsels in terms of their liability for damages for improper performance of the obligation resulting from the mandate contract binding upon them and the principal, which includes the provision of legal assistance in the form of representation in court proceedings, the general principles of liability for damages for failure to perform contractual obligations provided for in article 471 and subsequent articles of the Civil Code, including article 472 in connection with art. 355 § 2 of the Civil Code. The said rules also apply to an ex officio representative, since by his appointment a legal relationship is established between him and the party represented, which is similar to the relationship between a legal representative

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Civil Code) covers his professionalism in the cases he undertakes. An advocate's professional diligence may be considered not to fall within this standard only if the opinion drawn up thereby or the manner of proceeding in a given case is clearly inconsistent with the applicable provisions or the generally approved statements of the doctrine, or with the established jurisprudence which he had been familiar with before taking the action; see the judgement of the Supreme Court of 15 March 2012, I CSK 330/11, LEX no.1217097.

33 See Piotr Machnikowski, Andrzej Śmieja, „Czyny niedozwolone", [in:] *System Prawa Prywatnego. Tom 6. Prawo zobowiązań – część ogólna*, ed. Adam Olejniczak (Warszawa: C. H. Beck, 2018), 441.

34 See Witold Borysiak, "Commentary on article 355 of the Civil Code, edge no. 17", [in:] *Kodeks cywilny. Komentarz*, ed. Konrad Osajda, Legalis 2020; Piotr Machnikowski, "Commentary on article 355 of the Civil Code, edge no. 2", [in:] *Kodeks cywilny. Komentarz*, ed. Edward Gniewek, Piotr Machnikowski (Warszawa: C. H. Beck 2019), Legalis; Adam Olejniczak, "Commentary on article 355 of the Civil Code, edge no. 2", [in:] *Kodeks cywilny. Komentarz. Tom III. Zobowiązania – część ogólna*, ed. Andrzej Kidyba (Warszawa: Wolters Kluwer Polska, 2014), LEX.

35 See Przemysław Drapała, „Pełnomocnik rzekomy jako *negotiorum gestor*" *Państwo i Prawo*, no. 5 (2013): 22.

„by choice" and his client[36]. According to article 472 of the Civil Code, if a specific provision of an act or a legal transaction does not stipulate otherwise, the debtor shall be held liable for failure to exercise due diligence. In its judgment of 2 December 2004, the Supreme Court indicated that an advocate and a legal counsellor are liable for damages suffered by the principal as a result of their own negligence and errors leading to the loss of the case whose outcome would be beneficial for the party if the counsel exercised due diligence. The principal may demand compensation, and the court adjudicating the case should assess due diligence required from the advocate and legal adviser, taking into account the professional nature of their activities[37].

However, a certain relationship can be found between due diligence and the abuse of authority. Namely, due to the fact that the abuse of authority by an counsel is regarded, as a rule, as acting against the will of the principal, it will constitute counsel's failure to maintain due diligence, thus constituting grounds for deeming his conduct as inappropriate (reprehensible). As is the case with the abuse of authority in general terms, also in the case of abuse of authority in civil proceedings by a professional counsel, suffering by the party represented a loss instead of benefit as a result of counsel's acting does not constitute a premise for the abuse of authority itself, but is a premise for the counsel's liability for damages.

The issue of due diligence of a professional counsel in litigation is related to the question of his fault. In line with the traditional views of the Polish civil law science, fault consists of two elements, i.e. objective element defined as unlawfulness, and subjective element sometimes referred to as fault in the strict sense[38].

36 See the judgement of the Supreme Court of 12 September 2018, II CSK 536/17, LEX no. 2565810; see also M. Kaczyński, *Pełnomocnik z urzędu w sądowym postępowaniu cywilnym* (Warszawa: C. H. Beck, 2014), 245 and subsequent articles.

37 See the judgement of the Supreme Court of 2 December 2004, V CK 297/04, LEX no. 222184; see also the judgement of the Supreme Court of 21 October 2004, V CK 61/04, LEX no. 124082; the judgement of the Supreme Court of 19 lutego 2014 r., V CSK 189/13, LEX no. 1436183.

38 See Zbigniew Banaszczyk, „Commentary on article 415 of the Civil Code, edge no. 21", [in:] *Kodeks cywilny. T. I. Komentarz. Art. 1–449[10]*, ed. Krzysztof Pietrzykowski (Warszawa: C. H. Beck, 2018), Legalis; Witold Czachórski, Adam Brzozowski, Marek Safjan, Elżbieta Skowrońska-Bocian, *Zobowiązania. Zarys wykładu* (Warszawa: LexisNexis, 2009), 251-216; Janina Dąbrowa, *Wina jako przesłanka odpowiedzialności cywilnej* (Wrocław: Zakład Narodowy im. Ossolińskich, 1968), 12; Wojciech Dubis, „Commentary on article 415 of the Civil Code,

As for the objective element of fault, i.e. unlawfulness, it needs to be stated that in the case of professional counsels in litigation, it is shaped in a peculiar way. This peculiarity is due to the fact that professional litigants are professionally involved in providing legal assistance. Hence, the objective element of fault is related to the obligations which result therefrom. On the basis of the profession of an advocate, Stanisław Garlicki presents a catalog of fundamental duties of this type, i.e. an advocate undertaking to provide legal assistance is obliged to:

a) become familiar with the facts of a given case as comprehensively as possible, both with favorable and unfavorable circumstances for his client;
b) read the evidence (documents, witness statements and others) provided to him by the client;
c) properly apply legal provisions and, in the case of various possibilities in this regard, apply those most beneficial for the client;
d) choose the right procedural tactics;
e) take appropriate measures in a timely manner and mode appropriate in a given case;
f) properly secure the documents received from the client;
g) inform the client about the course of his case on an ongoing basis[39].

edge no. 6", [in:] *Kodeks cywilny. Komentarz*, ed. Edward Gniewek, Piotr Machnikowski (Warszawa: C. H. Beck, 2019), Legalis; Tomasz Pajor, *Odpowiedzialność dłużnika za niewykonanie zobowiązania* (Warszawa: Państwowe Wydawnictwo Naukowe, 1982), 184 and subsequent articles; Monika Wałachowska, „Commentary on article 415 of the Civil Code, edge no. 12", [in:] *Kodeks cywilny. Komentarz. Tom III. Zobowiązania. Część ogólna (art. 353–534)*, ed. Magdalena Habdas, Mariusz Fras (Warszawa: Wolters Kluwer Polska, 2018), LEX. However, it should be added that according to another standpoint, unlawfulness is not a part of fault, but is its premise; see Joanna Kuźmicka-Sulikowska, *Zasady odpowiedzialności deliktowej w świetle nowych tendencji w ustawodawstwie polskim* (Warszawa: Wolters Kluwer Polska, 2011), 85-86; Zbigniew Radwański, Adam Olejniczak, *Prawo zobowiązań – część ogólna* (Warszawa: C. H. Beck, 2018), 205-206; Mariusz Zelek, „Commentary on article 415 of the Civil Code, edge no. 32", [in:] *Kodeks cywilny. Tom II. Komentarz. Art. 353-626*, ed. Maciej Gutowski (Warszawa: C. H. Beck, 2019), Legalis.

39 See Garlicki, „Odpowiedzialność cywilna" 6; see also Andrzej Zieliński, „Odpowiedzialność odszkodowawcza adwokata i zespołu adwokackiego" *Palestra*, no. 9 (1986): 15.

In terms of a professional power of attorney, the objective element of fault (unlawfulness[40]) is connected with the issue of "malpractice". In the event of a malpractice during legal representation by a professional counsel, the objective element of fault can be observed. Andrzej Zieliński believes that a malpractice of an advocate will take place when the following elements occur:

a) advocate's conduct (action or omission) inconsistent with applicable law;
b) advocate's fault;
c) negative effect suffered by the client[41].

Such viewpoint may raise some doubts as malpractice is objective in nature and it occurs regardless of the subjective attitude of an advocate (legal counsellor, patent agent) performing professional activities within the framework of legal representation (fault in the strict sense). The elements presented by Andrzeja Zielińskiego fit into the premises of liability for damages of a professional counsel rather than a malpractice. Stanisław Garlicki defines an advocate's malpractice as insufficient knowledge of the facts necessary in a given case and insufficient knowledge of the law[42]. Similarly, with regard to legal advisers, Zenon Klatka says that the person providing legal assistance is liable for ignorance of the applicable legal regulations and the latest case law[43].

The doctrine indicates that committing a malpractice justifies liability for damages in the case when the subjective element of fault occurs, i.e. when a professional counsel did not demonstrate due diligence[44]. Similarly, in the judgment of the Court of Appeal in Kraków of 8 November 2018, it was stated that: „An attorney-at-law, legal counsellor or advocate cannot be held responsible for the unfavorable outcome of the case for his client. His liability for damages may arise solely and exclusively from his errors proving failure to maintain due diligence, the consequences of which influenced the

40 It is unlawful to act contrary to the applicable legal order, which is understood as the orders and prohibitions resulting from the legal norm, as well as orders and prohibitions arising from moral norms, i.e. the principles of social coexistence (good manners); see the judgement of the Supreme Court of 21 May 2015, IV CSK 539/14, LEX no. 1682734.

41 See Zieliński, „Odpowiedzialność odszkodowawcza", 17.

42 See Garlicki, „Odpowiedzialność cywilna", 9.

43 See Zenon Klatka, *Ustawa o radcach prawnych. Komentarz* (Warszawa: C. H. Beck, 1999), 12.

44 See Garlicki, „Odpowiedzialność cywilna", 9-10; Zieliński, „Odpowiedzialność odszkodowawcza", 16.

final result of the case, which would have been different, if such errors had not been made thereby"[45].

As far as the subjective element of fault is concerned, the activity of professional counsels in civil proceedings is governed by article 355 § 2 of the Civil Code. In civil litigation, the maintenance of the generally required diligence in relations of a given type (article 355 § 1 of the Civil Code) is sufficient only in the case of certain categories of non-professional counsels[46]. Pursuant to article 355 § 2 of the Civil Code, due diligence of the debtor in the scope of his business activity is determined taking into account the professional nature of this activity. In the case of a professional litigation counsel, due diligence should be considered in terms of the professional nature of his activity. It is difficult to argue that representation in proceedings by an advocate, legal counsellor and patent agent is devoid of professional character[47]. According to Piotr Machnikowski, formal rules of conduct created by specific professional groups (sets of deontology rules, codes of ethics, etc.) are helpful in building a model of diligence for such groups[48]. As indicated in the case of a professional power of attorney, the latter premise of the abuse of authority is adjusted according to the principles of professional ethics. Therefore, even if a professional counsel acts against the will of the principal, but in compliance with the principles of professional conduct, neither the abuse of authority nor failure to exercise due diligence shall occur as the pattern of conduct for professionals that may act as professional counsels in civil proceedings is constructed on the basis of the principles of professional ethics.

In terms of a professional power of attorney, due diligence should be understood not so much as an increase in the standard of due diligence, but as the application of specialist criteria related to the specificity of the

45 See the judgment of the Court of Appeal in Kraków of 8 November 2018, I ACa 149/18, LEX no. 2600991.

46 As regards the profession of an advocate, the author points out that in the case of an attorney-at-law, due diligence cannot be reduced to diligence in the general sense. Therefore, a specific kind of diligence is required from advocates, which is related to specific obligations resulting from both the mandate contract with the client and the provisions of the law on the bar, i.e. professional diligence; see Lesław Galeński, „Uwagi o staranności adwokata-pełnomocnika w sprawach cywilnych" *Palestra*, no. 5-6 (1986): 5.

47 See Krystyna Stoga, „Radca prawny jako przedsiębiorca", [in:] *Zawód radcy prawnego. Historia zawodu i zasady jego wykonywania*, ed. Arkadiusz Bereza (Warszawa: Ośrodek Badań, Studiów i Legislacji Krajowej Rady Radców Prawnych, 2010), 91 and subsequent articles.

48 See Machnikowski, Commentary on article 355 of the Civil Code, edge no. 9.

profession[49]. Similarly, in its judgment of 15 March 2012 the Supreme Court indicated that article 355 § 2 of the Civil Code requires that debtor's due diligence in the scope of his business activity be determined taking into consideration the professional nature of this activity. This does not mean increased diligence of the entrepreneur compared to the average (general) diligence required in public turnover, but it means due professional diligence, the patterns of which are created immediately considering the professionalism of the entities they concern. The professionalism of an advocate presupposes having competence in the matters he undertakes, thus having knowledge in normative, theoretical and practical terms, especially through jurisprudence as well as taking into account sufficient professional and life experience[50]. Failure to maintain professionalism by an attorney-at-law may result in a charge of the lack of due diligence and, consequently, his liability for damages provided that the remaining conditions for being held liable for damages are met.

Professional diligence is a different type of diligence that takes into account a different dimension of performed activities, i.e. professional ones. However, the term "due" should always mean adapted to the acting person, the subject matter of the activity and the circumstances in which the activity takes place[51]. Likewise, due diligence of a professional counsel in civil proceedings should be interpreted in a flexible manner and be always related to a specific factual state. As a result, it must be concluded that the counsel fulfills the duty of due diligence if his actions undertaken in connection with the performance of the mandate can be assessed as professional diligence of an average counsel, i.e. such as may be required in a specific case to avoid damage[52].

6. Conclusion

Abuse of authority by a professional counsel in civil proceedings occurs when an counsel acts within the scope of the power of attorney against

49 See Zieliński, „Odpowiedzialność odszkodowawcza", 15; see also Mieczysław Sośniak, „Cywilnoprawna ocena staranności zawodowej" *Nowe Prawo*, no. 2 (1980): 23.

50 See the judgement of the Supreme Court of 15 March 2012, I CSK 330/11, LEX no. 1217097.

51 See Mieczysław Sośniak, *Należyta staranność* (Katowice: Uniwersytet Śląski, 1980), 190; see also Grzegorz Kozieł, „Commentary on article 355 of the Civil Code, edge no. 10", [in:] *Kodeks cywilny. Komentarz*, ed. Mariusz Załucki (Warszawa: C. H. Beck, 2019), Legalis.

52 See Zieliński, „Odpowiedzialność odszkodowawcza", 16.

the actual or hypothetical will of the principal[53]. However, in the case when the action of a professional counsel as per the actual or hypothetical will of the principal violates the rules of professional ethics applicable to the counsel, then his action against the will of the principal does not constitute a premise for abuse of authority, and thus no abuse of the authority can be observed.

Failure to maintain due diligence by a professional counsel in litigation during legal representation of the principal is not a premise for the abuse of authority. Due diligence is significant in the context of the liability for damages of a professional litigation counsel. It is a model of conduct for a professional counsel in civil proceedings, which the counsel should follow when performing professional activities. Due diligence of a professional counsel should be considered in terms of the professional nature of the activity (article 355 § 2 of the Civil Code). In the event of failure to comply with the standard of due diligence, the counsel may be charged with improper (reprehensible) conduct, which is important in the context of finding him at fault, and going even further, holding him liable. The relationship between the abuse of authority and due diligence of a professional counsel in litigation is such that, since the abuse of authority by the counsel is essentially an act against the will of the principal, then it shall constitute counsel's failure to maintain due diligence.

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53 In criminal proceedings, a defense counsel is not bound by the will of the accused and may effectively take legal actions against the accused's standpoint, but for his benefit; see Dariusz Święcki, *Czynności procesowe obrońcy i pełnomocnika w sprawach karnych* (Warszawa: LexisNexis, 2011), 21; see also the decision of the Supreme Court of 20 April 2011, II KZ 14/11, LEX no. 794845. Therefore, if this cousnel undertakes an action in the interest of the principal, but against his will, this does not constitute the abuse of authority in criminal proceedings. Thus, in criminal proceedings, the abuse of authority must be understood differently than in civil proceedings. Therefore the subject matter of this article does not go beyond civil proceedings.

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