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ADJUDICATING ON THE REMUNERATION OF A COURT-APPOINTED ATTORNEY IN CIVIL PROCEEDINGS – COMMENTS *DE LEGE FERENDA*

ABSTRACT

The right to participate in court proceedings of a court-appointed attorney is an essential guarantee of ensuring the right to a fair trial for the less well-off. A vital element of the institution of *ex officio* representation is the issue of financing this part of the activity conducted by advocates and attorneys-at-law. From the procedural perspective, this issue primarily relates to the method of adjudicating on the remuneration and costs of a court-assigned attorney. In this area – despite slow changes consisting in abandoning the completely free-of-charge activities of the attorney performed as part of legal aid – there is still no consistent and comprehensive regulation. As has been described in this article, there are still situations where an attorney providing legal aid in civil proceedings may not receive any remuneration because the State Treasury is only subsidiarily liable for these costs. In addition, it takes years to obtain reimbursement of legal representation costs for unpaid legal aid. In this article, one of the issues related to legal representation in civil cases has been addressed; namely, the issue of adjudication by the court on this remuneration. The stimulus to take up this topic has been provided, inter alia, by a number of postulates for changes in this field. Recently, there have also been specific proposals put forward for changes in the legislative. Therefore, the subject of this paper is not only to diagnose the current state of law and jurisprudence with regard to adjudicating

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on the remuneration of an attorney assigned by the court but, above all, to refer to the proposed proposals and to put forward specific postulates for the future.

Keywords: civil proceedings, court-appointed attorney, remuneration of a court-appointed attorney, unpaid legal aid

I. Preliminary remarks

The right to participate in court proceedings of a court-appointed attorney is an essential guarantee of ensuring the right to a fair trial for the less well-off.[2] The existence of this institution is, therefore, fundamental in any democratic legal system, not only in criminal but also in civil matters. This institution has been known in Poland for a long time.[3] During the inter-war period, following the Austrian solutions, it was recognized along with the institution of exemption from court costs under the so-called "poor relief" (Poor Law),[4] i.e., measures serving to protect the impoverished people.[5] The formal linking of the *ex officio* power of attorney with the institution of exemption from court costs had lasted in civil cases in Poland as long as until 2010,[6] so, until the time when it was possible for a party to apply for a court-appointed attorney – regardless of whether the party had previously obtained an exemption from court fees.[7]

2 K. Flaga-Gieruszyńska, *Idea pomocy prawnej z urzędu w postępowaniu cywilnym* [*The idea of ex officio legal assistance in civil proceedings*], [in:] *Aequitas sequitur legem. Jubilee book on the occasion of the 75th birthday of Professor Andrzej Zieliński*, ed. K. Flaga-Gieruszyńska, Warsaw 2014, p. 55 in; A. Ploszka, *Publicznoprawny status jednostki skrajnie ubogiej* [*Public-law status of an extremely poor individual*], Warsaw 2019, p. 333.

3 Cf., inter alia: A. Balasits, *Act of August 1, 1895 on court proceedings in civil disputes (Civil Procedure)*, Lviv 1895, pp. 413–414; W. Godlewski, *Austrian civil procedural law*, Lviv 1900, pp. 172–174.

4 Cf. K. Apołłow, *Prawo ubogich w świetle doktryny i praktyki. Komentarz* [*Poor law in the light of doctrine and practice. A comment*], Warsaw–Krakow 1938, p. 85 et seq.

5 On the current use of this concept, cf. J. Koredczuk, "*Prawo ubogich", czyli rzecz o próbie pogodzenia interesu jednostki z interesem państwa* [*"Poor Law", that is, an attempt to reconcile the interests of the individual with the interests of the state*], [in:] *Podstawy materialne państwa. Zagadnienia prawno-historyczne* [*Material foundations of the state. Legal and historical issues*] ed. D. Bogacz, M. Tkaczuk, Szczecin 2006, pp. 651–660; T. Zembrzuski, *Przyznanie prawa ubogich w postępowaniu cywilnym* [*Granting the right to the poor in civil proceedings*], [in:] *Aurea praxis, aurea theoria. Memorial Book in honour of Professor Tadeusz Ereciński*, vol. 1, ed. K. Weitz, J. Gudowski, Warsaw 2011, pp. 777–809; R. Hauser, *Zwolnienie od kosztów sądowych – prawo ubogich* [*Exemption from court costs – the right of the poor*], [in:] *Państwo w służbie obywateli* [*A state at the service of citizens*], Jubilee Book of Professor Jerzy Świątkiewicz, ed. R. Hauser, L. Nawacki, Warsaw 2005, p. 209–215. The concept of the poor law originates from the German language, where it appeared, e.g., in Austrian law (*Armenrecht*), where already in the 70s of the last century it was replaced with the more modern term of 'judicial assistance' (*Verfahrenshilfe*), cf. Z. Krzemiński, [in:] Z. Czeszejko-Sochacki, Z. Krzeminski, *Adwokat z urzędu w postępowaniu sądowym* [*Ex officio attorney in court proceedings*], Warsaw 1975, p. 72.

6 The change was made by the Act of 17 December 2009 on amending the Act – Code of Civil Procedure and certain other acts (Dz.U. of 2010 No. 7, item 45).

7 Until 2010, the condition for obtaining the right to be granted an ex officio attorney was the prior exemption of the party from court costs. This was a solution criticized in the doctrine. Cf.: A. Zieliński, *The latest*

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A vital element of the institution of ex officio representation is the issue of financing this part of the activity conducted by advocates and attorneys-at-law. From the procedural perspective, this issue primarily relates to the method of adjudicating on the remuneration and costs of a court-assigned attorney. In this area – despite slow changes[8] consisting in abandoning the completely free-of-charge activities of the attorney performed as part of legal aid[9] – there is still no consistent and comprehensive regulation. As will be presented below, there are still situations where an attorney providing legal aid in civil proceedings may not receive any remuneration because the State Treasury is only subsidiarily liable for these costs. In addition, it takes years to obtain reimbursement of legal representation costs for unpaid legal aid. As we know, the remuneration rate of the court-appointed attorney is still debatable, not only in terms of their amount[10] but also due to their differentiation from the rates of fees in the event of representation of choice.[11] This results in the fact that the representation of parties by an ex officio attorney is in many cases not properly regulated and fairly remunerated. Thus, there should be no doubt that the public service performed by ex officio attorneys should be properly remunerated, because, as mentioned above, from the state's point of view, it is one of the essential elements of its functioning related to ensuring the right to a fair trial.[12]

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changes to the Code of Civil Procedure, "Monitor Prawniczy" 2010, No. 7, p. 370 et seq.; M. Sorysz, *Appointment of an ex officio attorney for the party and the obligations of an attorney in civil proceedings against the background of the amendment to the Code of Civil Procedure of December 17, 2009 – selected issues*, "Monitor Prawniczy" 2010, No. 12, pp. 660 et seq.; M. Mamiński, *Appointment of an ex officio attorney after the amendment of the CCP*, "Monitor Prawniczy" 2010, No. 15, p. 870 et seq.; M. Kaczyński, *Changes in legal aid in court civil proceedings introduced by the Act of December 17, 2009*, "Palestra" 2011, No. 7–8, p. 96 et seq.

8 As for the postulate of giving up free legal assistance and the need to cover these costs by the State Treasury, cf. Z. Krzemiński, [in:] Z. Czeszejko-Sochacki, Z. Krzeminski, *Advocate*…, p. 72.

9 It is worth recalling that in the inter-war period, as explained by the Supreme Bar Council, an ex officio attorney did not have the right to accept any remuneration from the party for whom the attorney was appointed ("an attorney may not even be exposed to the suspicion that s/he received a fee for defence ex officio", "Palestra" 1936, No. 10, p. 797).

10 Cf., inter alia: Ł. Supera, *Stawki mniejsze niż życie* [*Rates cheaper than life*], "Palestra" ["The Bar"] 2012, No. 7–8, p. 105 et seq.

11 In the judgement of the Constitutional Tribunal of 23/04/2020, SK 66/19, OTK-A 2020, No. 13 it was ruled that § 4 sec. 1 of the ordinance of the Minister of Justice of October 22, 2015 on covering by the State Treasury of the costs of unpaid legal aid granted by an *ex officio* advocate (Dz.U., item 1801) is inconsistent with Art. 64 sec. 2 in connection with Art. 31 sec. 3, Art. 32 sec. 1 second sentence and Art. 92 sec. 1 sentence 1 of the Constitution of the Republic of Poland. 2. The Tribunal found that the contested provision of the Regulation of 2015 "is inconsistent with the constitutional principle of protection of property rights, as it disproportionately narrows the statutory criteria for obtaining remuneration (violates the statutory authorization) – despite the legislator's being silent on this subject, it worsens the situation of advocates providing legal assistance *ex officio*". It also stated that "it does not see any constitutional values that the reviewed regulation was to serve". Moreover, in the opinion of the Tribunal, there are no rational arguments (not only constitutional ones) that would justify discriminatory treatment of attorneys depending on whether they act privately or were appointed *ex officio*". According to the Constitutional Tribunal, from the analysis of Art. 29 sec. 2 of the Law on the Bar, or the other provisions of this Act, it is not possible to derive a basis for the Minister of Justice to differentiate the remuneration of advocates in the regime of the 2015 regulation compared to the regulation on the activities of advocates on the linguistic or teleological grounds".

12 M. Lewandowski, *Problematyka bezpłatnej pomocy prawnej w RP na tle prawa do sądu* [*The issue of free legal assistance in the Republic of Poland in the light of the right to a fair trial*], "Monitor Prawniczy" 2009, No. 21, p. 1163; K. Flaga-Gieruszyńska, *Bezpłatna pomoc prawna jako instrument wspomagający*

In this study, one of the above-mentioned issues related to legal representation in civil cases will be addressed; namely, the issue of adjudication by the court on this remuneration. The stimulus to take up this topic was provided, inter alia, by a number of postulates for changes in this field. There have also been specific proposals for changes in the legislative area recently.[13] Therefore, the subject of this paper is not only to diagnose the current state of law and jurisprudence with regard to adjudicating on the remuneration of an attorney assigned by the court but, above all, to refer to the proposed proposals and to put forward specific postulates for the future.

II. Current legal status in the area of adjudicating on the remuneration of a court-appointed attorney in civil proceedings

The current legal regulation of adjudication on the costs of unpaid legal aid provided *ex officio* is quite laconic, with the provisions that constitute it scattered across various legal acts, which makes it difficult to analyse in practice. The basic, as it would seem, rule is that the costs of legal aid granted *ex officio* are borne by the State Treasury (Art. 29 sec. 1 of the Law on the Bar,[14] Art. 22^3 sec. 1 of the Act on Attorneys-at-Law,[15] Art. 13a sec. 1 of the Act on Patent Attorneys,[16] Art. 16 sec. 2 of the Civil Assistance Act[17]).

Nevertheless, the above obligation to finance the remuneration and costs of the attorney by the State Treasury, as it turns out, is not absolute at all, as it arises only in two clearly defined cases.

The first is the situation where the costs of unpaid legal aid are awarded by the adversary to the party for whom the attorney is appointed *ex officio*, but the enforcement of these costs is ineffective.

The second occurs when the party represented by a court-assigned advocate or attorney-at-law loses the case and is ordered to pay the costs of the trial, or there was no basis to charge another entity with these costs.[18]

realizację konstytucyjnej zasady prawa do sądu (na przykładzie spraw cywilnych [*Free legal aid as an instrument supporting the implementation of the constitutional principle of the right to a fair trial (based on the example of civil cases)*], [in:] *Wokół konstytucji i zdrowego rozsądku. Circum constitutionem rationemque sanam* [*Around the constitution and common sense*], works dedicated to Professor Tadeusz Smoliński, ed. J. Ciapała, A. Rost, Szczecin–Jarocin 2011, p. 367.

13 One of the last of these is a petition to launch a legislative initiative to amend the Act of November 17, 1964 – Code of Civil Procedure and the Act of June 6, 1997 – Code of Criminal Procedure, with regard to adjudication by the court on the costs of the trial (P10–15 / 21). The content of the petition is available at: https://www.senat.gov.pl/prace/petycje/wykaz-tematow-petycji/petycja,572.html (accessed 14 June 2022).

14 Act of May 26, 1982 – Law on the Bar.

15 Act on Attorneys-at-Law of July 6, 1982.

16 Act on Patent Attorneys of April 11, 2001 (i.e., Dz.U. of 2021 item 944 as amended).

17 The Act of 17 December 2004 on the right to assistance in proceedings in civil cases conducted in the Member States of the European Union and on the right to assistance for the purpose of amicable settlement of a dispute prior to the initiation of such proceedings (Dz.U. of 2005 No. 10 item 67 as amended).

18 H. Pietrzkowski, *Czynności procesowe zawodowego pełnomocnika w sprawach cywilnych* [*Procedural activities of a professional attorney in civil cases*], Warsaw 2020, pp. 493–494.

The above limitation of the State Treasury's liability for the costs of *ex officio* assistance results, firstly, from the clear wording of Art. 122 § 1 sentence 1 of the Code of Civil Procedure, according to which an advocate or attorney-at-law appointed *ex officio* has the right – excluding the party – to collect the amount due to them from the adversary, i.e., as remuneration and reimbursement of expenses awarded to that party. Secondly, detailed issues of settling these costs are included in the statutory acts.[19] Pursuant to § 6 of both ordinances concerning the costs of unpaid assistance provided in a civil case *ex officio*, in which the trial costs were charged to the adversary of the party using the assistance provided by a court-assigned attorney or attorney-at-law, the court awards the costs after proving the ineffectiveness of their enforcement.

Moreover, the attorney, in the application for awarding the costs of unpaid legal aid, granted *ex officio*, from the State Treasury, should include a statement that the requested costs were not paid in full or in part.[20] Otherwise, the court may dismiss the application as unfounded.[21]

The provisions of Art. 122 § 1 of the Code of Civil Procedure and § 6 of both regulations determine that in terms of the settlement and enforcement of the costs of unpaid legal aid granted *ex officio*, two situations may take place: first – when these costs are awarded by the adversary to the party for which the advocate or attorney-at-law was appointed, and second – when the costs are awarded directly from the State Treasury.

The consequence of this is that the regime for adjudicating on the costs of unpaid legal aid is currently very diverse in civil proceedings. There is no doubt in the doctrine and jurisprudence that in the first case, the costs of unpaid legal aid should be classified as a component of procedural costs (Art. 98 § 1 of the Code of Civil Procedure)[22] because they are awarded on the basis of the provisions defining the principles of settling the costs of the trial – from the adversary to the party for whom the advocate or attorney-at-law was appointed.

As for the second case of awarding the costs of legal aid granted *ex officio* directly from the State Treasury, in such a situation, these costs are not included in the costs of the trial[23]

19 Regulation of the Minister of Justice of 03 October 2016 on the State Treasury covering the costs of unpaid legal aid granted by a court-appointed attorney-at-law (i.e., Dz.U. of 2019 item 18) and Regulation of the Minister of Justice of 3 October 2016 on the State Treasury covering the costs of unpaid legal aid granted a court-appointed attorney-at-law (i.e., Dz.U. of 2019, item 68).

20 Cf. § 3 of both regulations.

21 Decision of the Supreme Court of October 14, 1998, II CKN 687/98, OSNC 1999, No. 3, item 63. However, R. Rynkun-Werner points to the non-uniform practice in *Adwokat z urzędu. Podstawowe zagadnienia prawne* [*Court-assigned advocate. Basic legal issues*], Warsaw 2011, p. 114.

22 M. Kaczyński, *Pełnomocnik z urzędu* [*Ex officio attorney*], Warsaw 2014, p. 230. According to Art. 98 § 1 of the Code of Civil Procedure, the costs of the trial include "costs necessary for the deliberate assertion of rights and deliberate defence". While pursuant to § 3 of this article, "the necessary costs of the trial of the party represented by an advocate include the remuneration, but not higher than the fees specified in separate regulations, and the expenses of one attorney, court costs, and costs of the party's personal appearance ordered by the court".

23 This applies both to the understanding of this concept under Art. 98 § 1 and Art. 394 §1 point 6 of the Code of Civil Procedure (according to the latter provision, a complaint may be lodged against the decision of the court of first instance, inter alia, against a decision the subject of which is: "Reimbursement of costs, determination of the rules for the parties to bear the costs of the trial, reimbursement of the fee, or ordering the court costs – if the party does not file an appeal on the merits of the case").

because it is not a reimbursement of costs owed to one of the parties.[24] In this case, the responsibility of the State Treasury is only of a subsidiary nature. It is emphasized, however, that the obligation of the State Treasury towards an *ex officio* attorney is of a public-law character here, related to the performance of legal representation by the attorney.[25]

The costs of unpaid legal aid include the fee determined in accordance with the provisions of both of the above-mentioned ordinances and the necessary and documented expenses of an advocate or attorney-at-law.[26]

According to the established view, if a party represented by an advocate or attorney-at-law appointed by the court won the trial, the costs of the trial (including remuneration) should be awarded by the court to the party itself, and not to the advocate or attorney-at-law.[27] This is due to the already indicated recognition of this remuneration to the costs of the process referred to in Art. 98 of the Code of Civil Procedure. An *ex officio* representative may only collect their remuneration in accordance with Art. 122 of the Code of Civil Procedure by obtaining an enforcement clause in their name, within the limits of the amount due to them.[28] Yet, the limit of the due remuneration of an advocate or attorney-at-law is the possibility of the adversary's deduction of the costs awarded to him/her from the party benefiting from legal aid (Art. 122 § 1 sentence 2 of the Code of Civil Procedure).

The enforcement of all unpaid legal aid costs due to the *ex officio* attorney results in the satisfaction of his/her claim against the State Treasury.[29] It should also be noted that both an attorney of choice and a court-assigned attorney do not have the right to collect costs from an entity other than the opposing party, in particular, they cannot apply for the collection of costs due to them from a witness, expert, representative, or statutory representative in connection with their blatant fault (Art. 110 sentence 1 of the Code of Civil Procedure). The above remark also applies to the reimbursement of costs

24 See, e.g., the Constitutional Tribunal Decision of 14 July 2010, V CZ 51/ 10, LEX No. 1375553.

25 Decision of the Supreme Court of November 17, 2009, III CZ 53/09, OSNC 2010/5, item 79, "SC Bulletin" 2010/2, item 11; see also the decision of the Supreme Court of May 25, 2010, I CZ 29/10, LEX No. 1308015, as well as Z. Krzemiński, [in:] Z. Czeszejko-Sochacki, Z. Krzeminski, *Advocate*…, p. 71.

26 R. Rynkun-Werner, *Advocate*…, p. 113.

27 This view was fully perpetuated by both the pre-war and the present judicature (see the judgement of the Supreme Court of August 19, 1938, CI 1162/37, PS 1939/1, item 42; the judgement of the Supreme Court of November 2, 1954, 2 CZ 248/54, "Państwo i Prawo" 1955/1, p. 150; decision of the Supreme Court of September 8, 1982, I CZ 83/82, "Palestra" 1985, No. 3–4, item 28; Resolution of the Supreme Court of March 1, 1989, III CZP 12/89, LEX No. 463039), although the doctrine has always indicated the need to award remuneration directly to the attorney, cf. K. Apollov, *Law*…, p. 90; B. Pogoda, *Uwagi do art. 121 k.p.c.* [*Comments to Art. 121 of the Code of Civil Procedure*], "Głos Sądownictwa" ["The judiciary voice"] 1938, No. 2, p. 142; M. Schroeder, *Wynagrodzenie adwokata ustanowionego dla strony zwolnionej od kosztów i wynagrodzenie obrońcy z urzędu: (uwagi «de lege ferenda»)* [*The remuneration of the advocate appointed for the party exempt from costs and the remuneration of the court-appointed attorney (comments de lege ferenda)*], "Palestra" 1958, No. 1, p. 61.

28 J. Jodłowski, *Czy adwokat strony ubogiej może sam egzekwować od przeciwnika sumę należną mu tytułem wynagrodzenia i zwrotu wydatków?* [*Can the advocate of the poor party alone enforce from the adversary the sum due to him in the form of remuneration and reimbursement of expenses?*], "Nowy Proces Cywilny" ["New Civil Procedure"] 1933, No. 12, p. 382; the judgement of the Supreme Court of 2 November 1954, 2 CZ 248/54, "Państwo i Prawo" 1955, No. 1, p. 150.

29 Decision of the Supreme Court of 18 May 2011, III CZ 25/11, LEX No. 864008.

by an intervening party, arising as a result of his/her negligent or obviously improper conduct.[30]

According to the case law of the Supreme Court, an appeal by a party to the proceedings in the part concerning the decision on the costs of legal aid granted *ex officio*, in the situation of awarding these costs to the attorney from the State Treasury, is inadmissible,[31] while the attorney appointed by the court is entitled to appeal against the decision of the court of first instance deciding on the costs incurred by the State Treasury of unpaid legal aid granted *ex officio*.[32] In other words, a party represented by an *ex officio* attorney may not challenge the decision of the court of first instance ruling on the remuneration of an attorney or attorney-at-law paid by the State Treasury. Nonetheless, this right is vested in the party's attorney because it is in his/her interest that the legal aid is properly accounted for.

III. Deficiencies in the current system of adjudicating on the costs of unpaid legal aid in civil proceedings

It is argued in the doctrine that for years there have been serious problems in paying the fee due for *ex officio* cases. Unfortunately, there are still situations where attorneys receive fees for cases that took place not just a few months ago, but even two years earlier.[33] Therefore, the postulate of public attorneys is that the courts pay them their remuneration on an ongoing basis, after the end of each stage of the proceedings.

Summarizing the current legal status and the practice of applying the law, it should be indicated that the system of adjudication and payment of remuneration to representatives of the *ex officio* attorney is dysfunctional and does require even urgent changes.

First of all, this system has been in effect for over 100 years in an essentially unchanged form[34] that was established in the inter-war period and resulted from the

30 Z. Krzeminski, *Pełnomocnik w sądowym postępowaniu cywilnym* [*Attorney in civil proceedings*], Warsaw 1971, p. 120.

31 Resolution of the Supreme Court of 25 June 2009, III CZP 36/09, OSNC 2010, No. 2, item 24, p. 36.

32 Resolution of the Supreme Court of 20 May 2011, III CZP 14/11, OSNC 2012, No. 1, item 2, p. 9; Resolution of the Supreme Court of 8.3.2012, III CZP 2/12, OSNC 2012, No. 10, item 115, p. 30; see A. Kobińska, *Zaskarżalność postanowienia o przyznaniu od Skarbu Państwa kosztów nieopłaconej pomocy prawnej udzielonej z urzędu oraz niedopuszczalność przyznania tych kosztów poniżej stawki minimalnej* [*Suitability of the decision on the award from the State Treasury of the costs of unpaid legal aid granted ex officio and inadmissibility of awarding these costs below the minimum rate*], "Palestra" 2013, No. 1–2, pp. 118–119; P. Rylski, *Dopuszczalność zażalenia na postanowienie w przedmiocie przyznania od Skarbu Państwa kosztów nieopłaconej pomocy prawnej udzielonej przez pełnomocnika z urzędu* [*Admissibility of a complaint against the decision on awarding the costs of unpaid legal aid from the State Treasury, granted by an ex officio attorney*], "Palestra" 2013, No. 1–2, pp. 133 et seq. Currently, the complaint against the decision on "reimbursement of the costs of unpaid legal aid" results directly from the wording of Art. 394^{1a} § 1 point 9 of the Code of Civil Procedure.

33 M. Kaczyński, *Attorney…*, p. 233.

34 The current provisions of the Code of Civil Procedure are based almost entirely on bills adopted in the 1920s. Above all, cf. S. Gołąb, *Projekt rozdziału polskiej procedury cywilnej o prawie ubogich z motywami*

assumption that legal aid provided ex officio was only an additional, free of charge, provision of the bar[35] performed apart from the basic activity. At that time, the only case of legal representation paid *ex officio* was when the obligation to reimburse the other party was ordered to reimburse costs.[36] The possibility of claiming real costs incurred by the court-appointed attorney (e.g., for travelling to court) from the state was even disputed.[37] Presently, this assumption is defective if we consider the public-law aspect of the activity of advocates and attorneys-at-law appointed for the party *ex officio*, emphasized in the jurisprudence of the Supreme Court. In such a case, a legal relationship is established between the State Treasury as the ordering party and the attorney as the contractor, who is entitled to receive remuneration for the services provided in each case. The party responsible for the payment of this benefit should, in the first place, be the State Treasury (the ordering party), and not the person who received legal aid or his/her opponent in the proceedings. Also, this liability should not be conditional or subsidiary.

Secondly, the basic rule of statutory rank that the costs of unpaid legal aid granted *ex officio* are borne by the State Treasury, expressed in Art. 29 sec. 1 of the Law on the Bar and Art. 22^3 sec. 1 of the Act on Attorneys-at-Law is not fully implemented, as it depends, in the event of awarding costs from the adversary of the party, on proving the ineffectiveness of the enforcement. The problem is that the modification of this statutory principle is now introduced by a sub-statutory act, which is the regulation,[38] despite the lack of grounds for this in the delegated legislation.[39]

Thirdly, the system assuming only subsidiary liability of the State Treasury towards an attorney for *ex officio* legal aid imposes additional obligations on attorneys that do

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[*Draft chapter of Polish civil procedure on the law of the poor with motives*], [in:] *Polska Procedura Cywilna. Projekty referentów z uzasadnieniem* [*Polish Civil Procedure. Drafts of clerks with justification*], vol. I, Warsaw 1928, p. 97–111. These drafts were based on even earlier regulations, in particular, § 70 of the Austrian ZPO (Zivilprozessordnung – Code of Civil Procedure) in force in southern Poland, cf. J. Windakiewicz, *Ustawa o postepowaniu sądowem w cywilnych sprawach spornych (Procedura cywilna)* [*Act on court proceedings in civil disputes (Civil Procedure)*], Warsaw 1925, p. 87.

35 K. Apollov, *Law…*, p. 87.

36 According to Art. 19 of the Ordinance of the President of the Republic of Poland of October 7, 1932, Law on the Bar System (Dz.U. No. 86, item 733) "legal assistance of an ex officio advocate is free unless the opposing party is reimbursed for the costs of the trial". A similar regulation was contained in Art. 78 sec. 2 of the Act of May 4, 1938, Law on the Bar System (Dz.U. No. 33, item 289). Pursuant to this provision, "legal assistance from an advocate appointed *ex officio* for a party who has been awarded the poor law is free for the poor party unless the other party has been charged with the costs of the trial".

37 Cf.: S. Grabowski, *What remuneration an advocate is entitled to when represents a poor party?*, "Czasopismo Adwokatów Polskich. Dział województw zachodnich" [„Journal of Polish Attorneys. Department of Western Provinces"] 1934, No. 7–8, p. 89.

38 The situation is different in the case of patent attorneys since the requirement to prove the ineffectiveness of enforcement in advance as a condition for the State Treasury's liability for the costs of unpaid legal aid provided *ex officio* results from Art. 13a sec. 3 of the Patent Attorneys Act.

39 According to Art. 29 sec. 2 of the Bar Law and Art. 22^3 sec. 2 of the Act on Attorneys-at-Law, the Minister of Justice will define, by way of a regulation, detailed rules of incurring the costs referred to in sec. 1, taking into account the method of determining these costs, the expenses constituting the basis for their determination and the maximum amount of fees for the aid granted. In this delegated legislation, it is not possible to limit or exclude the liability of the State Treasury referred to in Art. 29 sec. 1 of the Bar Law and Art. 22^3 sec. 1 of the Act on Attorneys-at-Law.

not fall under the obligation to provide legal aid to an indigent party. It is primarily about the obligation to claim the remuneration due to the attorney at the party's own expense from the adversary of the party who has been granted the right to legal aid (Art. 122 § 1 of the Code of Civil Procedure). This raises conflicts between the party that received assistance and the attorney because according to the jurisprudence, the remuneration due is awarded to the party, not the attorney. The party may, therefore, notify the attorney and collect the costs due to the attorney on its own, or collect these costs from the adversary on its own behalf.[40] Therefore, in the event of the enforcement of the benefit by the party itself or the provision of the benefit directly by the other party to the hands of the represented party, the court-assigned attorney is obliged, by way of recourse, to reclaim his/her remuneration directly from the party represented until that moment. This results in the necessity to initiate new proceedings between the current *ex officio* attorney and the represented party. Yet, in practice, this may mean that such remuneration will not be ultimately covered by anyone if the party has already disposed of the funds already obtained and is insolvent.

Fourthly, the law now provides that the opposing party may set off its own claims for litigation costs awarded from the party who has been granted legal aid against the remuneration due to the attorney (Art. 122 § 1 sentence 2 of the Code of Civil Procedure). In such a case, the attorney – despite the work performed – may not be paid the remuneration due to him/her at all or receive reimbursement of costs.

Fifthly, the current system differentiates the possibility of obtaining remuneration by an advocate or attorney-at-law appointed *ex officio* depending on the outcome of the proceedings and the court's decision as to the costs of the proceedings. If the represented party loses the trial and it is not possible to charge the other party or other entity with the costs of the trial, the right to remuneration due to the attorney is unconditional. It is awarded directly from the State Treasury. In the event of charging another entity with these costs, the above-mentioned obligation of prior demonstration of the enforcement ineffectiveness by the attorney arises. This causes many complications when attorneys formulate applications for reimbursement of legal aid costs.[41] In addition, when a person other than the other party has been charged, the attorney has no possibility at all to initiate enforcement proceedings – as only the party may enforce the costs, including the remuneration of the court-assigned attorney. This leads to an obvious paradox whereby, from the point of view of the possibility of obtaining remuneration for the *ex officio* attorney, it is more advantageous for the party s/he represents to lose the trial than to win it, because in the latter case, the attorney may not be remunerated at all. Such a system had historical justification in the fact that, at one time, an *ex officio* attorney could only

40 This threat was already noticed in the pre-war doctrine, and demands were made to amend the provisions by ordering the attorney's costs to be awarded directly to him/her, and not to the party being represented (cf. M. Piekarski, H. Vincenz, *Contribution to the discussion on the amendment to the CCP*, "Głos Sądownictwa" 1937, No. 4, p. 290; K. Apołłow, *Law…*, pp. 90–91).

41 Cf. J. Szczepański, *Wniosek o zwrot kosztów pomocy prawnej z urzędu – glosa do postanowienia Sądu Najwyższego z 18.09.2017 r. (V CSK 677/16)* [*Application for reimbursement of ex officio legal aid costs – gloss to the decision of the Supreme Court of September 18, 2017 (V CSK 677/16)*], "Palestra" ["The Bar"] 2019, No. 4, pp. 93 et seq.

obtain remuneration if s/he won. Therefore, such a system was motivating towards obtaining a favourable resolution, as it was automatically linked to the right to remuneration. Currently, in the event of a lost case, the remuneration is paid by the State Treasury, and the discussed regulation introduces a completely incomprehensible differentiation, which makes it difficult to talk about the equality of attorneys before the law.

Sixthly, the court decision on the remuneration of the *ex officio* attorney in a situation where they constitute the costs of the trial takes place only in the judgement concluding the case in the instance (Art. 108 § 1 sentence 1 of the Code of Civil Procedure).[42] As a result, the waiting period for the enforcement of the award decision is quite considerable, taking into account the possibility of challenging such a decision with an appeal, and then setting aside and referring the case for reconsideration.

IV. Proposals for legislative changes and their evaluation

In consideration of the above, despite the manner being quite timid, efforts are being made to change the above-mentioned legal status. One of the last of these is the already-mentioned petition concerning the undertaking of a legislative initiative to amend the Code of Civil Procedure and the Code of Criminal Procedure in the scope of adjudication by the court on the costs of the trial (P10–15/21). The initiative in question was submitted by the Supreme Bar Council, and its purpose is to detail and standardize the rules for adjudicating on the reimbursement of unpaid legal aid granted *ex officio* by an advocate or attorney-at-law in civil and criminal proceedings. The authors' assumption is that the proposed amendments will enable the advocate or attorney-at-law appointed by the court to receive due remuneration for the already provided legal assistance on an ongoing basis, without the need to wait many years for remuneration for procedural activities performed in the course of court proceedings.

Drawing attention briefly to the content of this proposal referring to the Code of Civil Procedure, we can see that it concerns the change of the wording of Art. 108 of the Code of Civil Procedure in Section I – "Reimbursement of trial costs" in Title V – "Trial costs", which regulates the principle of unification of adjudication on the costs of a civil trial.[43]

The basic way for the authors of the petition to achieve the assumed objective is to propose that the court should award the remuneration to the *ex officio* attorney in a separate decision to be issued after the final judgement in the case in the instance (the proposed

42 According to this provision, the court decides on costs in each judgement ending the case in a given instance.

43 According to Art. 108 of the Code of Civil Procedure, the court decides on costs in each judgement ending the case in a given instance. Nonetheless, the court may only decide on the rules of incurring the costs of the trial by the parties, leaving the detailed calculation to the court referendary; in this situation, after the ruling concluding the proceedings in the case becomes final, the court referendary in the court of first instance issues a decision in which s/he makes a detailed calculation of the costs to be borne by the parties (§ 1). The court of second instance – by setting aside the contested decision and referring the case to the court of first instance – leaves it to that court to decide on the costs of the appellate instance (§ 2).

wording of Art. 108 § 3, sentence 1 of the Code of Civil Procedure), owing to which a decision may become final and enforceable regardless of the further course of the case.

Secondly, the petitioners propose to regulate, in a special way, the rules of adjudicating on the remuneration of an *ex officio* attorney in the event of the revocation or dismissal by the court of an appointed attorney as well as in the event of the expiry of the appointment of an attorney as a result of the death of a party who has used legal aid. According to the draft, the court would adjudicate on such remuneration at the request of the attorney within 14 days from the date of submitting the application (proposed Art. 108 § 3 sentence 2 of the Code of Civil Procedure). In the view of the originator, this would not require waiting for the completion of the proceedings in the case.

Thirdly, in light of the proposal, the costs of unpaid legal aid granted *ex officio* in each case are borne by the State Treasury. This also applies to the circumstances in which the costs of the trial have been ordered by the opponent of the party availing of legal aid. In such a case, however, the court, ordering the reimbursement of the costs of unpaid legal aid provided *ex officio* to the State Treasury, would be obliged to award them from the State Treasury along with an order to pay the equivalent of these costs to the attorney appointed by the court (proposed Art. 108 § 5 of the Code of Civil Procedure).

V. Assessment of the proposed changes and own postulates

Proceeding to the evaluation of the submitted legislative proposal, it is necessary to fully share the conviction that there is a need for changes mentioned in the presented petition. Indeed, it seems essential. Nevertheless, it does not fully address all the flaws in the system of adjudicating on the costs of unpaid legal aid that have been noticed so far.

In particular, the most important postulate of the explicit introduction of the principle that the State Treasury bears the costs of unpaid legal aid granted *ex officio* in each case deserves support. It is a crucial and long-awaited change, which would finally be in line with the principles expressed in Art. 29 sec. 1 of the Bar Law and Art. 22[3] of the act on legal advisers. The attorney obtaining the remuneration and reimbursement of the necessary costs incurred for the assistance provided *ex officio* should be independent of the rules for adjudicating on costs in a specific process. This will eliminate cases where, due to the behaviour of the parties or third parties, an *ex officio* advocate or attorney-at-law may not be fully satisfied with the remuneration due to them or the costs incurred.

The proposal to separate the decision on awarding costs to the State Treasury, and the obligation to pay the equivalent of these costs by the State Treasury to the attorney, deserves approval. This solution will protect both the interest of the State Treasury to obtain reimbursement of the paid costs of unpaid legal aid granted *ex officio* and will also provide the attorney with a real possibility of obtaining remuneration and reimbursement of the necessary costs without undue delay. It will also ensure that the ex officio attorney will be released from the obligation to independently collect the sums due to him/her from the opponent of the party to whom s/he has provided legal representation.

Yet it seems that the proposed separation should go further, namely, in order to completely abandon the recognition of the costs of unpaid legal aid provided *ex officio* in the costs of the trial within the meaning of Art. 98 of the Code of Civil Procedure in a situation where the court orders their payment to the attorney. In such a case, they should always constitute court claims, as they result from the public law relationship between the State Treasury and the attorney.[44] They may be included in the costs of the trial incurred by the party only when the court, in a decision concluding the proceedings, awards their equivalent to the Treasury from the opposing party. This will enable the attorney to obtain the remuneration due and reimbursement of costs irrespective of the outcome of the case – which should become the rule.[45]

The above two proposals are fully consistent with the changes that have been taking place in other Western European countries for many years. They are also reminiscent of the evolution which the ruling on the remuneration of an *ex officio* attorney has undergone, e.g., in France.[46] It was only in 1972 that the legislator in that country finally broke with the principle of providing assistance by an *ex officio* lawyer for free (*a titre benevole*), introducing the obligation of the State Treasury to cover these costs on each occasion.[47] By launching the 1991 Act on Legal Aid,[48] and its subsequent amendments, this principle was improved due to significant delays in paying remuneration to attorneys. According to Art. 27 of the 1991 Act, an *ex officio* advocate receives remuneration and reimbursement of costs by way of a special flat-rate compensation (*une rétribution*). These sums are paid through the bar association, which receives a global subsidy from the Treasury for this purpose (Art. 27 of the 1991 Act). According to Art. 43 of this Act, in the event of awarding the costs of the trial from the party opposing the person who obtained *ex officio* legal aid, the court imposes an obligation on the latter to reimburse the State Treasury for the sums included in the costs of legal aid. In exceptional cases, the court may release a party from the obligation to reimburse these costs.

A similar situation has already been regulated since the 1970s[49] in Austrian law, where the self-governing Bar Association receives a general lump sum from the State Treasury to cover the costs of legal assistance provided ex officio.[50]

44 The public-law nature of the relationship that takes place between the *ex officio* attorney and the State Treasury paying him/her remuneration was also emphasized in the inter-war doctrine, cf. J. Hroboni, *O zapobieganiu błędom i rozbieżnościom orzecznictwa procesowego* [*On preventing errors and discrepancies in the case law*], "Polski Proces Cywilny" ["Polish Civil Procedure"] 1935, No. 17–18, p. 526.

45 This need has long been emphasized, cf. M. Schroeder, *Remuneration*…, p. 60.

46 In Polish doctrine, see K. Potrzobowski, *Zwalnianie od kosztów sądowych w sprawach cywilnych we Francji* [*Exemption from court costs in civil cases in France*], "Palestra" ["The Bar"] 1973, No. 2, pp. 109–110.

47 R. Perrot, *Institutions judiciaires*, Paris 2010, p. 77.

48 *Loi n° 91–647 du 10 juillet 1991 relative à l'aide juridique*.

49 The new regulations were in part the result of the jurisprudence of the Austrian Constitutional Court; cf. in the Polish doctrine of S. Mizer, *Sukces adwokatury austriackiej w walce o pełną odpłatność za usługi adwokackie świadczone na rzecz osób uznanych za ubogie* [*The success of the Austrian bar in the fight for full remuneration for lawyer services provided to people considered poor*], "Palestra" ["The Bar"] 1973, No. 3, pp. 100–101.

50 W. H. Rechberger, [in:] W.H. Rechberger, D.-A. Simotta, *Grundris des österreichischen Zivilproczessrechts*, Wien 2009, p. 228; A. Deixler-Hübner, T. Klicka, *Zivilverfahren*, Wien 2007, pp. 108–109. In Polish literature, cf. Z. Krzemiński, [in:] Z. Czeszejko-Sochacki, Z. Krzeminski, *Advocate*…, p. 72.

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As can be observed, the French and Austrian legislators many years ago departed from the principle of awarding the opposing party the reimbursement of unpaid legal aid costs, which exempts the attorney from the obligation to conduct enforcement proceedings. The proposed changes should, therefore, be fully endorsed.

Another interesting solution is the proposal that the reimbursement of unpaid *ex officio* legal aid should be ordered in a separate decision, which is issued after the decision closing the case in the instance. In the opinion of the petitioners, this will enable such a decision to become final irrespective of the decision concluding the case, and thus make it possible to pay the attorney's remuneration sooner.

It is worth pointing out, however, that currently the decision on remuneration of the attorney, included in the judgement, may also become final regardless of the decision concluding the proceedings if it is not appealed against by any of the parties. In practice, according to the settled case law of the Supreme Court, a party who was granted legal aid *ex officio* has no interest in appealing against the decision on the costs of legal aid. Therefore, if it brings an appeal against the decision concluding the proceedings in the case, this will not affect the validity of the decision on the costs of the *ex officio* attorney. Yet, it is possible to challenge this decision by the party opposed to the party benefiting from legal aid. This is due to the assumption that, currently, the costs of unpaid legal aid provided *ex officio* are included in the costs of the trial and the other party may file a lawsuit on their amount since they are to be ultimately borne by them.

The solution contained in the petition does not change this assumption, so the opposing party will still be able to challenge the decision (also issued separately) with regard to unpaid costs if it questions their amount. However, in the event of an appeal on the merits of the case, it should also appeal against the decision on costs, otherwise, it runs the risk that the court will charge it with the obligation to reimburse the costs to the State Treasury – also in the event that it wins the case in the second instance.

For the above reason, a better solution is the postulated explicit division of the decision on the costs of unpaid legal aid into two decisions. One, in which they are awarded by a separate decision to the attorney from the State Treasury (challengeable only by the attorney, and not by either party), and the other, where their equivalent is possibly awarded according to the outcome of the proceedings as part of the costs of the proceedings from the opposing party (challengeable by a party).

It is also worth highlighting that the dilatory circumstances in paying the attorney's costs also result from court practice, which, until the case is finally closed, does not refer final court judgements to be enforced in order to pay the due remuneration. In this regard, it is essential to propose a provision ordering the immediate payment of these costs to the attorney as soon as the provisions in this matter become final.

On the other hand, the solution that in the case of withdrawal or dismissal of an advocate or attorney-at-law appointed *ex officio* by the court, as well as in the case of termination of their appointment due to death of a party who received legal aid *ex officio*, the court, upon application of an advocate appointed *ex officio*, should decide on the reimbursement of the costs of unpaid legal aid provided *ex officio* within 14 days from the date of filing the application, deserves full approval. Waiting in such a case,

often for many years, for the issuance of a judgement terminating the proceedings is unfounded.

However, it would be advisable to extend the proposed regulation concerning the adjudication of the costs of a court-assigned attorney when it is still in progress. Since, as indicated, the costs due to the attorney from the State Treasury should no longer be the costs of the trial within the meaning of Art. 98 § 1 of the Code of Civil Procedure,[51] the principle of adjudicating on them after a final judgement has been given need not be absolute. It is possible that, in particularly justified cases, the court may rule on these costs or their part in the course of the proceedings. It should be proposed that the court could do it at the request of an advocate or attorney-at-law when it is justified by his or her particular interest, inter alia, in the event of termination of legal representation provided *ex officio* in the course of the proceedings. After all, it may also be justified by other reasons, e.g., the financial situation of the attorney or the need to incur a particularly high expense or the duration of the process being many years. In such a case, waiting for the end of the proceedings in a given instance could be particularly detrimental. This will enable the attorney to initiate incidental proceedings regarding the remuneration due or reimbursement of costs already during the proceedings and to obtain satisfaction at an earlier stage of the proceedings.

It should be noted, however, that the proposals contained in the petition, although agreeable to a large extent, are not synchronized with the other current solutions.

First of all, if these postulates were adopted, it would be necessary to repeal Art. 122 § 1 sentence 1 of the Code of Civil Procedure in the current wording, as leaving it in relation to the petition proposal would create an inconsistency. The proposal assumes that in any case the costs of the attorney are borne by the State Treasury, while the regulation of Art. 122 § 1 of the Code of Civil Procedure assumes that the attorney is to collect his/her own remuneration from the costs awarded to the party.

Secondly, it will be necessary to repeal § 6 of both regulations due to the elimination of subsidiarity of liability for the remuneration of the representative.

It should also be postulated so that the changes proposed here were included in Art. 108 of the Code of Civil Procedure. This erroneously petrifies the current state of affairs, according to which the remuneration of the costs of a court-assigned attorney is an element of the decision on the costs of the trial between the parties. The objective of the proposed amendments should be, as mentioned, to break with this link. Moreover, Art. 108 of the Code of Civil Procedure applies to the principle of uniformity of adjudication on costs, which is only slightly related to the scope of the presented change. Therefore, it is advisable that the above proposals be included in Art. 122 of the Code of Civil Procedure, which is traditionally devoted to the remuneration and costs of an *ex officio* attorney. This provision is included in a separate section II of the Code of Civil Procedure, entitled "Ex-officio legal assistance". This will allow the provisions of the proposed amendments to be read in the spirit of the provisions of this chapter and in accordance with the purpose of the proposed amendment.

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51 Cf. Resolution of the Supreme Court of 13 January 2017, III CZP 87/16, OSNC 2017/9, item 99, LEX No. 2186048.

In the light of the above, it needs to be proposed that Art. 122 of the Code of Civil Procedure should have the following wording:

> § 1. The costs of unpaid legal aid granted *ex officio* in each case shall be borne by the State Treasury.
>
> § 2. The reimbursement of the costs of unpaid legal aid granted ex officio shall be granted by the court in a separate decision, which it issues after issuing a decision concluding the proceedings in the case, subject to § 4.
>
> § 3. In a case in which the costs of a suit were incurred by the adversary to the party benefiting from legal aid provided by an attorney appointed ex officio, the Court shall award the reimbursement of the costs of unpaid legal aid provided ex officio from the adversary to that party to the State Treasury. In that event, an order for the payment of the equivalent of those costs from the funds of the State Treasury to the party's attorney *ad litem* shall be included in the order referred to in § 2.
>
> § 4. In cases justified by a legitimate interest of the advocate or attorney-at-law, and, in particular, in the case of withdrawal or dismissal of the ex officio advocate or attorney-at-law by the court, as well as in the case of expiration of the appointment of the advocate or attorney-at-law as a result of the death of the party who received legal assistance ex officio, the Court, upon application of the ex officio representative, shall decide on the reimbursement of the costs of unpaid legal assistance provided *ex officio*, or a part thereof, within 14 days from the date of filing the application.
>
> § 5. The application for awarding the costs of unpaid legal aid granted *ex officio* shall include a statement that the fee was not paid in full or in part.
>
> § 6. The costs of unpaid legal aid granted from the State Treasury shall be payable to the advocate or attorney-at-law immediately after the ruling in this matter becomes final, regardless of the further course of the proceedings.
>
> § 7. The provisions on enforcement of decisions concerning court fees shall apply to the enforcement of a decision awarding the costs of unpaid legal aid granted *ex officio* to the State Treasury from the opposing party.

In view of the perceived tardiness in implementing decisions on awarding costs due to an attorney appointed by the court, it is necessary to introduce Art. 122 § 6 of the Code of Civil Procedure, which orders immediate payment of these funds after the decision becomes final, regardless of the further course of the case. This is a reference to the current Art. 93 sec. 2 of the Act on Court Fees in Civil Cases,[52] which orders the payment of the amount due, inter alia, to a witness, expert, or interpreter. The current differentiation, due to the lack of appropriate regulations, is incomprehensible and harmful to public representatives.

The proposal contained in Article 122 § 7 of the Code of Civil Procedure will, in practice, make it easier for the State Treasury to enforce the costs awarded in its favour. According to the assumption of the proposal, Articles 119–125 of the Act on Court Fees in Civil Cases will apply to them, which provide for the enforcement of decisions in

52 The Act of July 28, 2005 on Act on Court Fees in Civil Cases (i.e., Dz.U. of 2020 item 755 as amended).

the area of court receivables. Currently, the concept of "court receivables" from Art. 119 of the Act on Court Fees in Civil Cases does not include the costs awarded to the State Treasury as reimbursement of the costs of legal aid provided *ex officio*. Meanwhile, in the jurisprudence of the Supreme Court, with regard to the issue of remuneration, the similar status of *ex officio* experts and attorneys in civil proceedings was repeatedly indicated.[53] It is, therefore, difficult to accept a situation in which only the former are granted the right to prompt payment of remuneration due.

VI. Alternative proposal as to the wording of Art. 122 of the Code of Civil Procedure

The proposed amendments, along with the proposed modifications, appear to best serve the presented objectives. However, should they not find acceptance, it is worth pointing out, regardless of this, the urgent need for changes in the content of Art. 122 of the Code of Civil Procedure.

As has already been mentioned, if the rule of unconditional liability of the State Treasury for the costs of unpaid legal aid provided *ex officio* is adopted, Art. 122 § 1 of the Code of Civil Procedure in its present wording should be repealed. Nevertheless, if the legislator did not decide to take such a step, the indicated provision still requires urgent changes.

If the subsidiary responsibility of the State Treasury for the costs of unpaid legal aid remains, it would be necessary to explicitly indicate in Art. 122 § 1 of the Code of Civil Procedure, that the court awards these costs from the opposing party in favour of the attorney. This is indispensable for the protection of an *ex officio* advocate or attorney-at-law. In practice, it would also reduce the problems with recovering the remuneration due to them. The party that obtained legal aid should not in any way be a beneficiary of the remuneration and costs incurred by the court-appointed attorney.

Secondly, the possibility, provided for in Article 122 § 2 of the Code of Civil Procedure, for the opposing party to deduct its own awarded costs from the costs due to the attorney, should be removed. The opposing party may not obtain benefits at the expense of the due remuneration of the *ex officio* attorney.

In this case, Art. 122 of the Code of Civil Procedure should read as follows:

> § 1. In the event of granting reimbursement of costs to the party for whom an advocate or attorney-at-law has been appointed ex officio, the remuneration and reimbursement of expenses due to the advocate or attorney-at-law shall be awarded to them.
>
> § 2. The receivables awarded to the advocate or attorney-at-law shall take precedence over the claims of third parties.

53 Cf., inter alia, the justification of the Supreme Court of 25 June 2009, III CZP 36/09, OSNC 2010, No. 2, item 24.

VII. Conclusions

In light of the above considerations, the need for urgent changes with regard to adjudication and payment of remuneration due to attorneys and reimbursement of costs due to them raises no doubts. Otherwise, the provision of services by attorneys appointed by the court *ex officio* will be a risky activity for those attorneys and, above all, will affect the quality of assistance provided to those who are entitled to it.

These changes should go in the direction consistent with European trends, i.e., the introduction of the full principle of State Treasury liability for these costs. This liability should be unconditional, and payment of the remuneration due to the attorneys and reimbursement of costs should be immediate. The state should take responsibility not only for granting a party the right to legal aid but also for the quality of the aid provided and should ensure that it is properly financed.

Secondly, the obligation to pay the costs due to the attorney from the State Treasury should cease to be treated as an element of the adjudication of the costs of the proceedings to be borne by the parties and should become a court liability, i.e., a liability of public law nature, which it in fact is. In such a case, it is the State Treasury, in the event that the opposing party is ordered to pay the costs of the proceedings, that is the entity that should collect the equivalent of the disbursed funds in accordance with the rules applicable to the reimbursement of court receivables. It also requires a return to the discussion on improving the receivables collection model.[54]

It should also be possible for the representative to request, in justified cases (e.g., a particularly long period of time before the end of the proceedings), a decision on the costs payable to him/her already during the proceedings. In particular, this should be the rule in the event of withdrawal or expiry of *ex officio* representation. Moreover, it is necessary to introduce a regulation requiring the immediate payment of the costs due to the *ex officio* attorney, as is currently the case with the receivables of witnesses, experts, or translators/interpreters.

54 Cf., inter alia: T. Zawiślak, *Egzekucja należności sądowych, jako warunek spójności systemu kosztów sądowych w sprawach cywilnych* [*Enforcement of court claims as a condition for the coherence of the system of court costs in civil cases*], [in:] *Nowe zasady w zakresie kosztów sądowych w postępowaniu cywilnym* [*New rules on court costs in civil proceedings*], ed. K. Markiewicz, Warsaw 2014, p. 27 et seq.

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