# The attorney as a slave to the court. An e-mail trap for advocates

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The government wants to chain professional attorneys to their inboxes, and introduce online hearings and adjudication by a single judge as a rule. / *ShutterStock*

**Court letters sent by e-mail will be deemed served the day after they are sent. Time limits for filing e.g. an appeal will run even if the advocate does not read the document.**

The government wants to chain professional attorneys to their inboxes, and introduce online hearings and adjudication by a single judge as a rule. All because of the coronavirus.

When entering into civil litigation, advocates and legal advisors will have to provide an e-mail address. The day after a letter from the court is sent to the e-mail address provided, it will be deemed served. Regardless of whether the attorney received the message or not.

This caused an uproar among lawyers. Because if the advocate happens to be out of the office, e.g. on holiday, and the mailbox receives e.g. a decision, judgment or

order, the time limit for appeal or interlocutory appeal will already be running. – The shortest period for lodging an interlocutory appeal is three days. If there is no form of advance notice, advocates will become a kind of a slave group, unknown in civilised countries, without the right to leave, says advocate Monika Strus-Wołos. Maciej Gawroński, a legal advisor of Gawroński & Partners, asks how many people need to be employed in a law firm to ensure constant e-mail coverage and to exclude human error? – This is thoughtlessness, callousness and tsarist bureaucracy, he says in exasperation.

The Ministry of Justice explains that it is obvious to any e-mail user that e-mails reach the addressee almost in real time. – Accepting the fiction of delivery on the next working day is therefore logical.

But that is not all. The amendment to the Code of Civil Procedure also stipulates that for one year after the state of epidemic threat is lifted, online hearings and examination of cases in single-person panels are to be the rule. Both at the first and second instance. Today, if it is not possible to hold an online hearing, the presiding judge may order a closed hearing if none of the parties objects. Under the proposed solutions, no objection will be possible. According to experts, this deprives a party of its right to active participation in the proceedings. – We understand that there is a pandemic, but the justice system is for citizens, not for the courts. A citizen is a subject, not an object of the court proceedings, says Rafał Dębowski from the Supreme Bar Council.

There has been an uproar among the attorneys. The bill proposing an amendment to the Code of Civil Procedure introducing e-auctions of real estate as part of court enforcement also includes changes to the special Covid Act in the area of civil proceedings. For example, there is a proposal to add Article 15zzs9, according to which during the state of epidemic threat or a state of epidemic "and within one year after the last of them has been lifted", the first pleading filed by a professional attorney in civil cases should include a business e-mail address and telephone number.

There would be nothing unusual in this, were it not for the fact that according to paragraph 3 of the provision, "digital representations of pleadings, notices, summonses and rulings shall be deemed served on the next business day after they have been entered by the court into the electronic means of communication in such a way as to enable the addressee to become familiar with their contents". This means that the effect in the form of service takes place on the day after the letter is sent from the court, regardless of whether the advocate or legal advisor has read it or even acknowledged its receipt.

## Always ready

It may therefore turn out that while the attorney is out of the office, e.g. on holiday, a letter will be delivered to their mailbox, e.g. a decision, judgment or order, and the time limit for appeal or interlocutory appeal will already be running at that time.

– I would like to remind you that currently the shortest period for lodging an interlocutory appeal is not seven days but three. If there is no form of advance notice, advocates will become a kind of a slave group, unknown in civilised countries, without the right to leave. Someone will go e.g. to the Bieszczady mountains and will not receive e-mails, but the time limit will still be running because the court has sent a letter in the meantime", says advocate Monika Strus-Wołos, Ph, clearly outraged.

She explains that receiving a letter while being on holiday does not solve the problem either, because without access to the case file one cannot write, for example, an interlocutory appeal or an appeal.

– Do attorneys not have the right to leave, even for as short a time as a week? What about the right to rest specified in Article 66(2) of the Constitution, she asks rhetorically.

She stresses that substitution does not solve the problem, because the substitute attorney would have to be given access to the whole mailbox, which is incompatible with the right to privacy and attorney-client privilege. She adds that the proposed regulation is particularly dangerous for old-school advocates who are not always comfortable with the digital world.

As Maciej Sawiński, who runs his own law firm in Krakow, points out, such a provision would be fatal for one-person law firms.

– Moreover, at the end of the day, it is the participants in the proceedings who will lose out. So we are dealing with an attempt to speed up proceedings at the expense of the parties, believes the lawyer.

He adds that professional attorneys not only are not against the digitization of proceedings, but have been demanding it for years. – Here, however, it works one way, from the court to the attorney. I, responding to a letter from the court, will not be able to do it electronically, but by traditional mail, he emphasizes.

## Tsarist bureaucracy

– This is another inhumane change in civil procedure. How many people need to be employed in a law firm to ensure constant e-mail coverage and to exclude human error? This is thoughtlessness, callousness and tsarist bureaucracy, Maciej Gawroński, a legal advisor of Gawroński & Partners says in exasperation.

He adds that because he advises on a daily basis on issues related to technology, information security and business continuity, he knows what challenges the proposed change poses.

– The requirement to manage the business continuity chain, which is what we are dealing with here, is something that is imposed on large entities, for example under the law on the national cyber-security system, and not on law firms and individual lawyers. In civilised countries, it is forbidden to force people to use electronic means of communication after working hours. I know that e.g. advocates have irregular working hours, but does this mean that they can be treated as non-humans, adds Maciej Gawroński.

– It is as if a sadistic legislator arranged a new league of the rat race, this time turning it into a race for life. For what is missing a deadline? It is the prospect of drama for the lawyer and his family, and of course the client too, the expert says indignantly.

He is under no illusion that if such a provision is enacted, it will be circumvented anyway. – No professional attorney will be so foolish as to sign letters. They will be filed by the party, he stresses.

He adds that a party can grant a power of attorney for the duration of the hearing only. – From a risk management perspective, giving a permanent power of attorney to act before a court increases the risk of missing a deadline, says Maciej Gawroński.

## Mandatory e-mail

Another issue is that the wording of the provision suggests that providing the attorney's e-mail address in the first pleading is mandatory. This would mean that letters without this element will be returned in order to supplement formal deficiencies. On the other hand, the explanatory memorandum states that the attorney may provide the address if he or she wishes to communicate with the court in this manner.

– The attorney is obliged to provide an e-mail address, but it is clear that only if he or she has one. Hence, the statement "In the case of providing..." is realized, explain representatives of the Ministry of Justice.

So it may turn out that officially, all of a sudden, attorneys will not have any e-mail addresses.

## The Ministry explains

Interestingly, the recently enacted Act on electronic delivery (Journal of Laws 2020, item 2320) provides that letters sent by public entities in electronic form to special delivery boxes are delivered either upon acknowledgement of receipt by the attorney

or 14 days after the file is placed in the mailbox. Why has no analogous solution been applied now?

– It is obvious to any e-mail user that e-mails reach their addressee almost in real time (time calculated in seconds). Therefore, accepting the fiction of delivery on the next working day follows logically from this fact. It is as if a letter was collected at the post office. One must not create a situation in which the party's attorney is given additional time (as much as the suggested 14 days) to read the letter and draw up an appeal, which he does not have if the letter is left at the post office upon advice of delivery, because then he does not know the content of the letter sent. Confirmation of receipt of the letter would also depend only on the addressee's will, and this would be ineffective, explains the Ministry of Justice.

It is true that today an attorney using the court's information system can read the judgment and even the statement of reasons before it formally reaches him or her. This gives the attorney not two, but, for example, three or even four weeks to prepare the appeal. However, in the opinion of the attorneys, the current proposal is throwing out the baby with the bathwater.

opinion

## Closed hearings should be an exception

Adam Zwierzyński, Partner at Radzikowski, Szubielska i Wspólnicy

Introducing a rule that all hearings are to be held online is a mistake. It does not seem to be more risky to attend a hearing under the pandemic regime than to visit a supermarket, and no one locks them up. The court should be free to choose between a traditional hearing and a virtual one. Hearing a case in closed session should remain an exception.

The idea of abandoning collective adjudication by judges, which is particularly important in appeal proceedings, is also a mistake. The authors of the explanatory memorandum explain that there is no evidence that a judgment given by a single judge is less just than one given by a panel of three judges. Leaving aside the common knowledge that three heads are better than one, collective adjudication also serves to strengthen the guarantee of judicial impartiality. The same is true of the openness of the hearing, which the amendment intends to further restrict.

The idea of communicating with attorneys by e-mail is not bad (it already functions in commercial proceedings), but it should be an auxiliary channel, not the main one. I cannot imagine e-mail service of a judgment with effect equivalent to traditional service. Electronic mail does not provide the necessary certainty of the date of service (unlike, for example, the ePuap system). Everyone who has had a message fall into spam folder knows this. I am afraid that instead of speeding up proceedings, this idea will slow them down, because disputes will arise over the date of service of rulings, which will have to be resolved by experts.

## No objection

But that is not all. The amendment also stipulates that until one year after the last of the states of emergency has been lifted, online hearings and the examination of cases in single-person panels are to be the rule. Both at the first and second instance. Today, if it is not possible to hold an online hearing, the presiding judge may order a closed hearing if none of the parties raises an objection within seven days. Under the proposed solutions, it will not be possible to object to such a decision.

– I would like to believe that these proposals are the result of ignorance resulting from lack of consultation with professional participants in legal transactions, and not bad intentions, says Rafał Dębowski, secretary of the Supreme Bar Council.

He emphasizes that what is at issue here is a departure from the fundamental principle, which is the right of the party to active participation in the proceedings.

– We understand that there is a pandemic, but the justice system is for citizens, not for the courts. And the courts are not there to judge, but to resolve cases of specific persons with their participation, reminds Rafał Dębowski.

He admits that the introduction of such a rule in administrative proceedings may have accelerated the hearing of cases, but to the detriment of the essence of the administration of justice.

– Closed hearings deprive a party of the right to take a stance, the party has no chance of pointing out to the court e.g. that it has omitted some important circumstances or misunderstood the factual and legal situation, because it failed to notice that there is important evidence on the file, which presents the case in a completely different light. This is a departure from the essence of the administration of justice, in which the citizen is a subject, and not an object, of the court proceedings, says Rafał Dębowski.

He points out that a hearing with the participation of the parties is to be an exception and one will be able to order its holding "in special cases where there is no risk to health".

– Why should this be an exception also one year after the end of the state of epidemic threat, when the health risk will not be there, asks the expert.

He adds that the bill prepared in September 2020 was lying in a drawer during the second wave of the epidemic, while the courts operated without becoming a source of epidemic threat. –This proves that such a drastic restriction of constitutional human rights is not necessary, stresses the secretary of the Supreme Bar Council.

As the representatives of the Ministry of Justice explain, the development of the epidemic situation is so unpredictable that the author of the bill decided to include

in the Act a time buffer allowing for a clear determination that the epidemic threat, despite the state of epidemic threat having been lifted on the basis of an appropriate legal act, has in fact definitely ceased to exist. ©℗

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