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A lawyer in criminal process: problems and tendencies

Abstract: It is considered a status and system of participation of a lawyer in pre-trial criminal production, analyzed the problems, given proposals to change and add the criminal-procedural legislation.

It is studied structural elements of a system of defense from criminal prosecution; it is made comparative analysis of appropriate norms of the CPC of Azerbaijan, Georgia, Russian Federation and Estonia.

Keywords: a lawyer; defender; criminal process; defense of the rights; criminal prosecution; pre-trial production; judicial supervision.

The Bar is the important legal institute of any state, which protects fundamental rights of the citizens and their associations. Assurance of each citizen in his prosperity, peace, success of vital activity depends, in the great extent, on how this legal institute legally protected, provided and organized.

The main purpose of the Bar as a phenomenon is to provide socially significant legal services to whole society and its members in protection of the rights and freedoms of a citizen and legal entities. A lawyer protects the law and people from arbitrariness and consequently his activity responds as the interests of a specific citizen or organization so publically-legal interests of the state and society.

Unfortunately, in Azerbaijan it has been paid attention on significance of the Bar only for the past ten years when considerably improved and strengthened its legal base; with entering of the new Criminal Procedure Code in 2000 it has heightened a potential of the defense as criminal-procedural activity.

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In addition, a number of problems have not still resolved; the development's directions determined not clear; existing gaps and contradictions of the criminal-procedural legislation make it difficult and in some cases exclude a proper fulfillment of the declared goals and tasks of the court proceedings.

According to article 7.0.27 of the CPC of Azerbaijan Republic (hereinafter CPC), a defense is procedural activity, which is implemented for purposes of refutation or mitigation of an accusation initiated against an individual who is suspected in committing (provided by the criminal law) deed, protections of his rights and freedoms, and reinstatement of violated rights and freedoms of a person who is illegally prosecuted. In compliance with article 7.0.28 of the CPC, a suspected or accused person, their defender and civil plaintiff are the defense party (17, p. 9).

The right to defense is guaranteed by the Constitution and CPC, international agreements, the participant of which Azerbaijan Republic are.

According to article 61 f the Constitution, "… everybody has the right to getting of qualified legal assistance. In stipulated in the law cases the state legal assistance is provided by the state free of charges. In case of his detention, arrest, bringing an accusation in committing of crime by the competent state bodies, everyone has the right to use assistance of a defender". (6, p. 16).

According to paragraphs "b" and "c" of the part 3, article 6 "European Convention on protection of the rights and fundamental freedoms", everyone accused in committing of criminal crime has the right to have sufficient time and opportunities to protect himself; to defense himself personally or through a defender chosen by himself, or in the interests of the justice to use the state legal assistance if he/she does not have enough funds to pay a lawyer's service (2, p. 167).

Article 19 says that during of criminal prosecution an inquirer, investigator, prosecutor or the court are obliged to provide the right of a victim, suspected or accused persons to have qualified legal assistance, which includes an opportunity to use by the legal assistance of a defender before detention, custody or before his first interrogation as accused person or bringing accusation; to get clarification of his rights; to have enough time and opportunities to prepare his defense; carry out his

defense personally or through a defender chosen by himself or use the state legal assistance if he/she does not have enough funds to pay lawyer's services (17, p. 18).

Thus, it might conditionally consider that the system of protection from criminal prosecution consists on interlinked elements including the main principles and terms of the criminal proceedings, participation of a defender and representatives, personal defense and ensuring the rights.

The Law of Azerbaijan Republic "On lawyers and lawyer's activity" does not contain a definition of notion "lawyer", but it says that lawyer's activity is independent legal institute, which professionally carries out an activity on legal protection (art. 1); the tasks of which are protection of the rights, freedoms and interests of physical persons and legal entities and providing them with high quality legal assistance (art. 3) (1, p. 1-3).

According to article 92 of the CPC, as a defender in criminal process might be participated only the lawyer who has the right to fulfill the lawyer's activity in Azerbaijan Republic. From point of view of others and ours, it is not right since, from one side, it monopolizes this activity, and from other one, contradicts to the international documents and limits the right to defense (8, p. 75).

The CPC of Russian Federation permits the lawyers as defenders without indication of their membership, and in some cases - together with a lawyer on resolution of the court is allowed as a defender participation of one of the close relatives of an accused person or other individual if a charged man is petitioned about it (5, p. 140); it seems more right. It is necessary to note that the CPC of Azerbaijan (being effective till 2000) (art. 57) envisaged the same order of defense (19, p. 37).

In compliance with article 2 of the Federal Law "On lawyer's activity and the Bar in Russian Federation", a lawyer is an individual who obtained in established with the law order a status of the lawyer and the right to performance lawyer's activity. The lawyers of a foreign state are enable to provide a legal assistance on the territory of the RF after their registration by the federal body of justice of the executive authorities (23, p. 2).

In compliance with article of 42 of the CPC of Estonia, a defender in criminal process can be: a) a lawyer and with permission of a head of criminal production

others individuals who are corresponded to appropriate requirements on education, which is established for the contracted representatives; the powers of which in criminal process are followed from signed contract with client (contracted defender), or b) appointed lawyer who is appointed by an investigated body, prosecutor's office or on petition of the court by the Bar Association of Estonia (appointed defender) (22, p. 23).

The CPC of Georgia says that with consent of the Ministry of Justice the foreign lawyers can be permitted as the defenders (20, p. 37). According to article 92.2 of the CPC of Azerbaijan, a suspected or accused person may have few defenders and non-participation one of them in production of procedural actions, during of which participation of a defender is obligatory, cannot be the basis for recognize these actions illegal (17, p. 94).

Participation of a defender in criminal process should be provided at the following cases: if a suspected or accused person demand his participation; if a suspected or accused individual is unable to carry out his right to defense himself due to his dumbness, blindness, deafness or serious problems of speech, eyesight, hearing, because of long serious illness, and also mentally retarded, and others problems; if sharpness of mental illness or contemporary psychical problems are found during production on criminal case; if suspected or accused individual does not possesses with language, on which is producing criminal proceedings; if suspected or accused individual does not come to age; if accused person is serviceman; if suspected or accused individual is charged in committing of special grave crime; if suspected or accused person is forcedly placed in special hospital (psychiatric hospital); if suspected or accused individual is detained or arrested excepting the cases of refusal from defender's assistance; if criminal prosecution is carried out on expired time to call to criminal responsibility; if it is existed contradiction between legal interests of the accused persons and one of them has a defender; if accused person committed crime in state of derange; if suspected or accused is not legal capable (17, p. 94-95).

During implementation of their powers in process of pre-trial production, a lawyer has the right to know the core of suspicion or accusation; meet alone and

confidentially to speak with the client without limitation of number and duration of conversations; with permission of the investigation to take part in investigation or other procedural actions produced with participation of the client; inform to suspected or accused person his rights and take attention on the law violation made by the body carrying out investigated or other procedural action.

In the course of pre-trial production a defender has the right to collect and present the proofs and materials to be attached to the criminal case to a body producing of the criminal process; to submit rejections and petitions; to object to actions of a body carrying out criminal process, and require attaching this objection to the record of investigative or other procedural action; to be familiarized with the records of investigative or other procedural actions made with his and the client participation; to submit the remarks regarding fullness and correctness of the notes in the records of investigative or other procedural actions carried out with his action; being participated in investigated or other procedural action, to demand taking down the circumstances in appropriate record, which should be noted; to arrange the measures on collection of the evidences for clarifications issues linked with performance of a protection of a suspected or accused person (17, p. 97-98).

In addition, a defender has the right to be familiarized with resolution of the body carrying out criminal process about setting of examination and conclusion of an expert, with materials, which are submitted to the court by the body carrying out criminal process for confirmation of the legality and substantiation of the detention, arrest and taking into custody of a client; to be familiarized with materials of a case and take copies of necessary documents relating to a client when preliminary investigation is completed or production on criminal case is cancelled; to obtain information from a body carrying out criminal process about resolutions touching his rights and legal interests, and on his request to receive copies of these resolutions on choice of the measure coercion, production of the investigative or other measures of procedural compulsion, bringing to justice as accused, calling accusation, and also verdict of guilty, suit statement. The defender has the right to appeal against the actions and resolutions of an inquirer, investigator or prosecutor; to be denied on any complaint except the complaint on verdict of guilty; behalf on name and instruction

of the client to come out upon reconciliation of suspected or accused person with a victim, and also to be used by other rights provided in the CPC (17, p. 94).

The right to choice of a defender is concluded in that a suspected or accused on his own discretion determines of a lawyer to whom is entrusted protection of his interests. The Human Rights Committee defined that the right to choice of a defender (the right to protection) was violated when the court had limited of the right to choice only with two appointed lawyers (12, p. 110).

The right to choice of a defender can be limited if a lawyer violates professional ethics, is an object of criminal prosecution or refuse to fulfill procedural actions. Thus, the European Commission did not see the violations of the European Convention when the lawyers chosen by the suspected persons had been forbidden participating in protection as they had suspected at the same criminal deeds that detained (12, p. 110). In addition, suspected or accused does not have unlimited right to choice of a lawyer when epy state pay these expenses (2, p. 11-14).

According to the principle 8 of the Basic principles participation of the lawyers, the principle 18 of the Code of principles and rules of the Common minimal rules, deprived freedoms individuals should be provided with sufficient time and terms for meetings and confidential conversations to the lawyers in person, on telephone or in written. These meetings or telephone conversations might be carried out within visibility but not hearing for other people (10, p. 47, 54, 99).

According to the principle 8 of the Basic principles participation of the lawyers, when appointed lawyer protects interests of a person, the authorities should monitor in that he (lawyer) would have experience and competency appropriate to the character of crime. The Committee on Human Rights recognized that if appointed lawyer works inefficiency, the authorities should make him fulfill his duties in proper way or remove him (7, p. 76).

According to common comments of the Committee on Human Rights, the lawyers will have “in compliance with established professional norms and their judgements to have an opportunity to give advice and represent their clients without any restrictions, influence, pressure or improper intervention from anybody”. According to the principle 18 of the Basic principles participation of the lawyers, the

authorities should follow for that the lawyers do not identify with their clients and the cases of these clients for what they protect their (10, p. 50).

Thus, the system of a lawyer's participation in pre-trial criminal proceedings consists on consultations of a client, participation in procedural actions, gathering of the proofs, submission of the petitions and appeals to the actions of prosecution party and the court, which are touched the rights and interests of a defense party.

Let's consider elements of the system and try to define how they correlate each other and with other provisions of the law and whether they provide declared goals and tasks.

Consultations of a client by the lawyer are a clarification of the law provisions, evaluation of the evidences, and development of behaviour tactics during production of investigative actions the main of which is an interrogation. Before interrogation a lawyer and his client think for what volume and kind of information the latter will pass to an investigation, and the main should it full of partially correspond reality. According to explanatory dictionaries, under deception, lie is understood the deliberate distortion and concealment of the truth, untruth, false imagination etc. (9, p. 282, 367, 378).

Article 15 of the CPC says that during criminal prosecution is forbidden to obtain evidence by the way of deception and application of other illegal actions, violating the rights of interrogated individuals. Consequently, a deception is related by the law to illegal actions. But, the lawyer (defender) does not carry out criminal prosecution. According to article 38 of the CPC, this duty is entrusted to an inquirer, investigator and prosecutor (17, p. 27).

Production of interrogation and other investigative actions are prerogative of the inquirer, investigator and prosecutor, and a lawyer only takes part in these actions in form of submission of questions and objections. Information which is passed on with the lawyer to other participants of process is not evidences since according to article 126.1 of the CPC the testimonies are recognized verbal and written data received from suspected, accused, victim and witnesses by the body carrying out criminal process. According to article 7.0.5 of the CPC, the bodies carrying out criminal process are the bodies of inquiry, investigation, prosecutor's office and the courts in

production of which is a criminal case or other materials connected with criminal prosecution (17, p. 7).

Thus, the analysis of procedural side of the problem is allowed asserting that procedural (legal) bans of a deception do not exist for the lawyer. According to the law, suspected and accused persons do not bear any responsibility for giving deliberately false testimonies, excepting cases deliberately false denunciation (15, p. 249). In number cases, content of their testimonies is formed with participation of a lawyer who voluntarily or involuntarily has to take part in their correctness. To this precede a determination of general position of defense, which can be varied in the following types: a) full denial; b) partially recognition and c) full recognition of accusation.

We are speaking just about varying as on a certain stages of process full denial of accusation will be able to pass to partial recognition; a full recognition – into partial or full denial etc. Accordingly this will be changed a content of the testimonies or happen refusal on giving ones.

According to article 91.5.17 of the CPC, an accused person has the right to admit himself accused or not to, i.e. he determines his position of defense, but in the most cases a lawyer takes direct participation in that (17, p. 87).

As rule, experienced lawyer does not force his opinion upon a client, and analyzing in general features possible consequences, offers him to be determined with defense position.

In cases, it is more or less clear when refusal from giving testimonies or full recognition of accusation is chosen as a form of protection. It is difficult upon full or partially denial of accusation through giving the testimonies. In these situations the lawyer may know or not about guilt of a client, believe truthfulness or not to his testimonies, but he is obliged to participate in their formation otherwise the client may refuse on his services.

Loss of clients and professional credibility and as result a financial insolvency is sufficient but not the main circumstance about dispute on the right to a lawyer on a lie.

It seems that deprivation of a lawyer to use a deception, as an integral element of the criminalistical tactics, is eviscerated a core of protection. It is justly noted in juridical science that there is not in criminalistical tactics of the technique, recommendation, combination etc. in the basis of which would not be deception and lie. “History of the criminalistical tactics of technique (especially in the soviet period) is characterized with unsuccessful attempts to find a moral justification of admissibility of a lie and deception, or camouflage of their synonym that in any course was doomed to failure, as they were into the vicious circle of the Jesuit concepts and provisions” (14, p. 94).

At the same time, it is necessary to note that as justly said M.S. Strogovich, a deception and lie, presenting especially in the form of an ingenious, do not cease to be so, opposite they are becoming to be a more qualified and amoral (13, p. 20).

Resuming stated, it may assert that the criminalistical tactics is an integral part of the protection, and a deception – a compound part of the criminalistical tactics. Depending on his moral qualities a lawyer defines the limits and forms of its using; application of which are allowed to assert about tactical abilities, but not a mendacity and immorality.

Made analysis of the norms of the law and practice are showed that the rights of a lawyer to participate in investigative or other procedural actions, which are producing with participation of a suspected or accused person, in the CPC are not regulated properly. This eliminates its proper using.

So, article 232.2 of the CPC “Interrogation of a suspected” says that in the cases stipulated in the article 92.3 of the CPC, during interrogation of a suspected individual an investigator is obliged in advance to provide a participation of a defender. The same provisions are contained article 233 “Interrogation of an accused”, article 235 “Confrontation”, article 236 “Inspection”, article 239 “Identification of a person”, article 240 “Identification of the items”, article 244 “The individuals presenting during performance of a search or seizure”, article 251 “An order of imposing an arrest of the property” and others (17, p. 239, 240, 242, 244, 248, 252, 259).

But, an order of informing of a lawyer in respect of forthcoming production of investigative action is not stipulated by the CPC. As rule, the lawyers are notified through a letter or telephone, sometimes with sms. Sent letter can be delayed on the way and it will exclude timely participation of a lawyer in production of an investigative action. As to telephone, it cannot be make up a record on notifying of a lawyer that also will exclude implementation of the latter his rights (3, p. 107).

In connection with stated, it is necessary to supplement the CPC with provisions regulating an order of notification of a lawyer, and also to change the provisions, which are related of a defender replacing.

So, according to article 92.15 of the CPC, "… an inquirer, investigator or prosecutor have to demand from the head of the lawyer's office of the appropriate territory to replacing of a defender with other one … if chosen as defender a lawyer does not come to visit with suspected or accused person during six hours after his/her detention; and if a defender during long time (not more than five days in each case) does not come for participation in investigative or other procedural actions, production of which are provided by the criminal process, and the body carrying out them cannot postpone producing of these actions" (17, p. 97).

Meantime, according to article 232.1 of the CPC, an interrogation of a suspected person should be made immediately of his detention, and nobody will be waited five days a lawyer in order to produce inspection, search or other investigative action (17, p. 239).

In our opinion, the main is concluded in that a participation of a lawyer in the investigative actions is come to passive observation and the right to demand supplements and amendments to the record, but not ask for questions to interrogated, identified individuals, participants of the testimonies examination, investigative experiment and others.

It is true, article 235.4 of the CPC says that "… individuals who are invited on confrontation, with permission of an investigator can participate in an interrogation and ask questions each other" (17, p. 242), but this provision is not correct, it is interpreted differently. In connection with this, it is necessary to specify in the law the right of a lawyer to ask questions to the individuals to interrogations

(confrontation, experiment and check of testimonies) of which he is admitted. It is necessary to specify that the general rules of interrogation are extended on a lawyer, and then we have real, but not declared opportunity of a defender participation in gathering of the proofs.

And now the CPC contains mutually exclusive provisions, according to which a lawyer (defender) has the right to collect evidences (art. 92.9.9 of the CPC); collection of the evidences carry out through interrogation, confrontation, search, seizure, examination, presenting for recognition and other procedural actions, which are produced by an inquirer, investigator, prosecutor and the court, but not by a lawyer (art. 143.1 of the CPC); inadmissible to accept as the proofs information, documents and things received during production of investigative actions by the persons, who do not have the right for their implementation (art. 125.2.5 of the CPC) (17, p. 93, 157, 144).

The main structure element of the system of a lawyer participation in pre-trial criminal proceedings is appeal in order of the court supervision of the actions and decisions of the party of accusation and court, which are touched the rights and interests of the defense party.

The court does not carry out permanent supervision (control) over the pre-trial production on all stages of passing, and it only interferes upon receiving separate petitions, presentations and appeals of other participants of process on separate issues of court proceedings.

Obviously, understanding insolvency of statements about lasting in time systematical control (supervision), the Russian lawmaker attributed this court activity to the procedure of the appeals and petitions consideration (21, p. 56-58) and obtaining permission to produce investigative actions (art. 165 of the CPC of RF) (21, p. 14-15) that it seems more right as on a core so on a content.

The CPC of Georgia also attributes this activity to the appeals (chapter 30). Part 4 of article 242 of the CPC of Georgia causing "white" envy of the lawyers from many countries reads: “An appeal may be submitted at any actions or decisions of an inquirer, investigator or prosecutor, which, on opinion of a complainant, are illegal and unfounded. Might be appealed: violations of the right of accused person to

defense and the rights of a victim, other violations of the law during inquiry and preliminary investigation, unfounded deviation of the petitions and rejections, refusal in satisfaction of demand on production of an investigative actions, violation of procedural terms, application of the measures of procedural coercion, using of inadmissible ways of investigation and inadmissible proofs, refusal in initiation of criminal case, suspending of production on a case, and other actions or decisions of the investigative bodies, limiting the rights, freedoms and legal interests of process participants" (20, p. 101-102).

In addition, according to article 243 of the CPC Georgia, "…restricting constitutional rights and freedoms of a man decisions (orders, resolutions) of a judge passed by him in connection with production of investigative actions and operational-searching measures during inquiry and preliminary investigation, and also in connection of taking a person into custody and application in respect of him other measures of procedural coercion or their changing are not appealed" (20, p. 102).

According to article 230 of the CPC of Estonia, "… in case of contesting the actions of an investigative body or prosecutor's office, which violated the rights of an individual, and dissent of a person with resolution of State prosecutor' office he has right to submit a complaint to the judge of preliminary investigation of a district court, in activity region of which had passed this decision or committed contested procedural action" (22, p. 123).

According to article 136 of the CPC of Estonia, prosecutor's office and a detained person with his defender may appeal a decision on taking into custody, about refusal in taking into custody, extension a terms of custody in an order established by chapter 15 of the CPC (Production on settlement of a complaint on the decision) (22, p. 67).

Article 137 of the CPC of Estonia stipulates a juridical control for groundless of taking into custody (22, p. 67).

Undoubtedly, that including of the section in the part of juridical supervision in new CPC of Azerbaijan (effective since 01.09.2000) is a factor that positively affects on significance of criminal-procedural legislation (art. 1 of the CPC), performance of the tasks and achievement of the goals of criminal court proceedings.

Nevertheless, analysis of the norm of the CPC, regulating implementation of the juridical supervision shows that they are not perfected, contradict each other, contain collisions, have declarative nature etc.; this is normally for the most part of innovations, which are not approved with practice. It is sadness, as in this case a fate of people is a criterion of the truth.

Taking active part in development of the first commentary to the new CPC of Azerbaijan, the German scientist Professor d-r Austin Baler stated in introduction to the edition that all scientific clarifications and critical notes on it have a purpose to make the work and solve declared in it tasks (4, p. 3-5).

Following to an advice of the famous scholar, we try to define the provisions of juridical supervision, which create obstacles to fulfill the tasks of criminal proceedings under observance its principles and conditions.

According to article 442 of the CPC, juridical supervision in frame of his powers is carried out by the appropriate court of the first instance on a place of forced production of investigative actions, application of a measure of procedural coercion or implementation operational-searching measures.

In order of performance of juridical supervision a judge considers in person:

- petitions and submissions on forced production of the investigative actions, application of the measure of procedural coercion or implementation of operational-searching measures, restricting the rights to freedom, inviolability of home, personal inviolability, privacy (including privacy of family life, correspondence, telephone calls and other information), and also state, professional or commerce privacy;

- petitions on procedural actions or decisions of a body, carrying out criminal process.

Issues, which are related to the sphere of juridical supervision and their realization order, are determined with the articles 443-454 of the CPC (17, p. 437-438).

Article 449 of the CPC “Appeal to court of the procedural actions or decisions of a body, carrying out criminal process” reads that in the court carrying out juridical supervision might be appealed procedural actions and decisions of the representatives of a body of criminal process in connection with refusal to accept a statement about

crime (439.3.1); detention and arrest (449.3.2); violation the rights of detained person (449.3.3); using of torture or other cruel treatment with an individual taking into custody (449.3.4); refusal in initiation of criminal case, suspending of production on criminal case or cessation of a case production (449.3.5); forced conducting of investigative action, using of the measure of procedural coercion or implementation operational-searching measure without decision of the court (449.3.6); removal a defender of accused (suspected) person from criminal process (449.3.7) (17, p. 446-447).

Under relatively clearness of the provisions stipulated in the articles 449.3.1, 449.3.3, 449.3.4, 449.3.5, 449.3.6, and 449.3.7 of the CPC (in spite of they contain a lot of the tricky questions) is not understandable what a lawmaker means under the actions and decisions in connection of detention, taking into custody. Whether here are included only organizational and administrative issues or procedural ones; whether means all rights of arrested person or only those connected with the conditions in custody etc.

In case article 449.3.2 of the CPC means all rights of the detained and arrested, i.e. suspected and accused individuals stipulated with the articles 90 and 91 of the CPC then it should be written. Then, what does article 449.3.3 of the CPC (about violation the rights of detained) need for?

In 2013 four times the court of Sabail district of Baku returned without consideration the complaints of a defender of an accused Dadashev (taken into custody) on refusal of the investigator to attach to the case the proofs collected by the lawyer, motivating his decision with absence in article 449.3 of the CPC appropriate provisions.

At the same time, the court of Narimanov district of Baku recognized the legitimate similar actions of an investigator, which refused to attach to case materials, which were presented by the lawyer of arrested Piraliyev.

As we see, there is not unified opinion among the judges, carrying out juridical supervision, in respect of article 449 of the CPC, which naturally creates disorder in the actions and decisions of the law users.

By the way, according to article 451 of the CPC, upon results of examination of the legality of the procedural actions or decisions of a body, carrying out criminal process, the judge makes one of the two decisions: on recognition appealed action or decision as legal or on recognition of it illegal, subjected to cancellation (17, p. 448).

Consequently, decisions of the Sabail court of Baku about returning of the complaints to the complainants were illegal on a few parameters but the Appeal Court of Baku had not taken at such "trivia" attention.

It should be noted that due to lack of concreteness of the law norms, under decisions of a body of criminal process many judges are understood only written resolutions; upon absence of which they are refused considering the appeals or recognized the decisions of investigators as legal.

Thus, Narimanov court of Baku in one course did not consider the appeal of arrested Piraliyev on non-admission of a defender to the process and the second one – recognized the same actions of an investigator as legal in connection of absence of written decision about removal from the process a defender of accused Mahmudov.

There are a lot similar collisions of the legislation on considering issue in order to assert that the law does not provide a participation of a lawyer in criminal process and fulfillment by him his duties on protection of the rights and interests of people.

The first and effective step to eliminate this situation would be providing the defense party with the right to appeal any actions of the prosecution party and the court, which, on opinion of a complainant, are illegal or unfounded.

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