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Articles

Studia Iuridica Lublinensia vol. 33, 3, 2024
DOI: 10.17951/sil.2024.33.3.9-29

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Obligation to Keep Professional Secrecy vs. the Need (Possibility) to Disclose the Circumstances Covered by It by the Advocate/Attorney-at-Law

Obowiązek zachowania tajemnicy zawodowej a konieczność (możliwość) ujawnienia przez adwokata/radcę prawnego okoliczności nią objętych

ABSTRACT

Issues regarding the scope of professional secrecy and the obligation to keep it by the advocate or attorney-at-law are currently the subject of debate in the Polish legal community. This is due to both the fundamental importance of professional secrecy for the correct practice of the legal professions of advocate (Pol. *adwokat*) or attorney-at-law (Pol. *radca prawny*), as well as the inconsistency of the statutory provisions and the relationship of these provisions to the deontological regulations. The breach of the obligation of professional secrecy entails criminal and/or disciplinary liability. At this point, a problem arises concerning the disclosure of facts covered by professional secrecy by an advocate/attorney-at-law in the situation of a civil dispute with a former client or charges brought against the advocate/attorney-at-law in criminal or disciplinary proceedings for reasons related to the legal assistance previously provided. In such a situation, disclosure of information covered by professional secrecy – to the extent, of course, required by necessity – does not constitute a criminal offence (disciplinary offence) of an advocate/attorney-at-law due to the fact of acting under the state of necessity in order to save a higher-value good such as the right to court or the right of defence, respectively. Moving away from this complex construct and strengthening the standards of liability by striving for maximum definiteness of the prohibited act speak for making statutory amendments to indicate the specific behaviours of an advocate/attorney-at-law that do not constitute a breach

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of professional secrecy. Despite the ongoing work and accompanying analyses carried out in legal professional self-government organisations, none of them has so far decided to propose such a bold legislative change officially.

Keywords: professional secrecy; attorney-at-law; advocate; state of necessity; right to court; right of defence

INTRODUCTION

The starting point for the discussion is the scope of professional secrecy. In light of the statutory provisions, the advocate/attorney-at-law is obliged to keep in secret everything he or she has learned in connection with the provision of legal assistance.[1] Such a broadly defined substantive scope of professional secrecy entails certain consequences for the factual and legal assessment of situations in which an advocate/attorney-at-law may find himself or herself while deciding to disclose information covered by professional secrecy. The interpretation of the elements that define its boundaries must undoubtedly be supplemented by the rules of functional interpretation and systemic interpretation, as adopting only the directives of linguistic interpretation may lead to unreasonable conclusions and, consequently, unacceptable results in the qualification of the conduct of advocate/attorney-at-law.

Secrecy applies to "anything" that the advocate/attorney-at-law has "learned" in connection with the provision of legal assistance, regardless of the source of that information. Thus, professional secrecy does not cover only information provided to the lawyer directly by the client for the purpose of providing legal assistance to the client. This secrecy also covers documents and notes produced by the advocate/attorney-at-law relating to the case as well as the content of conversations and correspondence both with the client and with other people involved in conducting the case. This may also include information obtained by the lawyer by other means since it is the information learned "in connection" with providing legal assistance. It is the direction towards which the scope of professional secrecy has been clarified in the deontological provisions, which indicate that the secrecy to be kept by the advocate/attorney-at-law concerns information disclosed by the client or otherwise obtained in connection with the performance of professional activities (duties), regardless of the form and manner in which it was recorded.[2] According to the Code of Ethics for

[1] Article 3 (3) of the Act of 6 July 1982 on attorneys-at-law (consolidated text, Journal of Laws 2024, item 499), hereinafter: AAL; Article 6 (1) of the Act of 26 May 1982 – Law on Advocates (consolidated text, Journal of Laws 2022, item 1184, as amended), hereinafter: LoA.

[2] Article 15 (1) of the Code of Ethics for Attorneys-at-Law (consolidated text in the appendix to Resolution no. 884/XI/2023 of the Presidium of the National Bar Council of Attorneys-at-Law of 7 February 2023), hereinafter: CEAL; § 19 (1) to (3) of the Collection of Principles of Ethics for

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Attorneys-at-Law, this also applies to information disclosed to the attorney prior to undertaking professional activities, if it is apparent from the circumstances of the case that the disclosure was made for the purpose of providing legal assistance and was justified by the expectation that the attorney would provide it.[3]

The limits of professional secrecy have therefore not been defined by the content of information concerning the client or the case, but by the criterion of obtaining this information (regardless of the source) in connection with the provision of legal assistance.[4] This applies to information that can operate as evidence (i.e. facts in the broad sense of the word), including pieces of information that are easy to obtain, but not information that is public, well-known, publicly disclosed in the media by third parties, or privately obtained prior to the provision of legal assistance to a particular client.[5] Whether a piece of information is covered by professional secrecy is therefore determined by the relationship between the advocate/attorney-at-law and the client under which it was entrusted or in connection with which it was obtained. It may even concern the mere fact that legal advice has been sought, or that a power of attorney has been granted for the case, until the power of attorney is submitted to files of the case.[6]

On the other hand, information obtained by the advocate/attorney-at-law while acting in legal transactions in other capacities, the information not being related to the provision of legal assistance by the advocate/attorney-at-law, is not covered by professional secrecy.[7] According to the established view, professional secrecy also

Advocates and Dignity of the Profession (Code of Ethics for Advocates; consolidated text in the Communication of the Presidium of the Supreme Bar Council of 1 July 2021), hereinafter: CPEA.

[3] Article 15 (3) CEAL.

[4] Decision of the Supreme Court of 2 June 2011, SDI 13/11, OSNwSD 2011, item 210, p. 212; S. Podemski, *Adwokat – pełnomocnik, obrońca, doradca*, Warszawa 1977, pp. 21–22; Z. Klatka, *Wykonywanie zawodu radcy prawnego i adwokata*, Warszawa 2004, p. 65; L. Korczak, *Kilka uwag o zakresie przedmiotowym obowiązku zachowania tajemnicy zawodowej przez radców prawnych*, [in:] *Ochrona tajemnicy adwokackiej (radcy prawnego) a działania władzy*, Warszawa 2019, pp. 43–44; E. Kruk, *Obowiązek zachowania tajemnicy adwokackiej jako okoliczność uzasadniająca odmowę zeznań w trybie art. 180 § 2 k.p.k.*, "Studia Iuridica Lublinensia" 2017, vol. 26(4), p. 27, 30.

[5] Article 3 (5) AAL; Article 6 (3) LoA; M. Gutowski, *O granicach tajemnicy adwokackiej w prawie prywatnym*, "Palestra" 2019, no. 7–8, pp. 186–188; M. Safjan, *Prawo i medycyna*, Warszawa 1998, p. 116; S. Hoc, *Komentarz do art. 266*, [in:] *Kodeks karny. Komentarz*, ed. R.A. Stefański, Legalis 2023, margin no. 9; R. Hałas, *Komentarz do art. 266*, [in:] *Kodeks karny. Komentarz*, eds. A. Grześkowiak, K. Wiak, Legalis 2024, margin no. 8.

[6] J. Naumann, *Zbiór Zasad Etyki Adwokackiej i Godności Zawodu. Komentarz*, Legalis 2020, § 19, margin no. 33 and 34.

[7] Decision of the Court of Appeal in Katowice of 5 August 2015, II AKz 443/15, LEX no. 1809515; decision of the Court of Appeal in Krakow of 14 November 2017, II AKz 432/17, LEX no. 2402517.

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does not extend to the content of VAT invoices and other accounting documents issued by the advocate/attorney-at-law with the kind of legal services specified therein.[8]

In practice, professional secrecy should cover information that is "of actual confidential nature, whether arising from a statement by the client or from the substance of the matter".[9] Nevertheless, in view of the normative definition of the material scope of professional secrecy and differing degrees of sensitivity of clients in conflict situations, the advocate/attorney-at-law should approach this issue with caution, even when common sense suggests that certain information is not covered by secrecy.

OBLIGATION TO KEEP PROFESSIONAL SECRECY

The secrecy in question entails the duty to comply with it. It is a cornerstone of the professions of advocate/attorney-at-law, an element of the entire legal protection system and a prerequisite for the proper administration of justice in a democratic state ruled by law. Thus, respecting the obligation of professional secrecy and protecting it is in the public interest.[10]

The obligation to keep professional secrecy is a guarantee of confidentiality that allows a relationship of trust between the client and the advocate/attorney-at-law to be built.[11] The nature of this relationship creates in the client a legitimate expectation that his or her rights will be protected against threats or violations resulting from the disclosure of facts and circumstances covered by professional secrecy.[12] These include the constitutionally guaranteed right to privacy, the secrecy of correspondence and communication, and the protection of personal information related to the restriction on the ability to obtain, collect and share information about citizens. The

[8] J. Naumann, *op. cit.*, § 19, margin no. 56 and 57; P. Skuczyński (comp.), *Wybrane opinie Komisji Etyki i Tajemnicy Adwokackiej przy Okręgowej Radzie Adwokackiej w Warszawie 2018–2019*, Warszawa 2021, p. 10; J. Kurek, *Tajemnice zawodów prawniczych. Tajemnica adwokacka*, "Monitor Prawniczy" 2013, no. 23, p. 1280.

[9] D. Dudek, *Konstytucja i tajemnica adwokacka*, "Palestra" 2019, no. 7–8, p. 28.

[10] See, among others, decision of the Court of Appeal in Szczecin of 29 October 2013, II AKz 330/13, LEX no. 1451899.

[11] Judgment of the Constitutional Tribunal of 22 November 2004, SK 64/03, OTK-A 2004, no. 10, item 107; W. Wróbel, [in:] *Kodeks karny. Część szczególna*, vol. 2: *Komentarz do art. 117–277*, ed. A. Zoll, Warszawa 2013, p. 1481; decision of the Court of Appeal in Szczecin of 29 October 2013 II AKz 330/13, LEX no. 1451899.

[12] J. Giezek, *Tajemnica adwokacka – wartość względna czy absolutna? O nieujawnialności informacji objętych tajemnicą adwokacką*, [in:] *Etyka adwokacka a kontradyktoryjny proces karny*, eds. J. Giezek, P. Kardas, Warszawa 2015, p. 186; W. Marchwicki, *Przedmiotowy zakres tajemnicy adwokackiej. Czemu służy ochrona tajemnicy adwokackiej?*, [in:] *Ochrona tajemnicy adwokackiej…*, p. 81; P. Kardas, *O sposobach rozwiązywania kolizji norm i konfliktu dóbr w związku z tajemnicą adwokacką – tajemnica adwokacka w kontekście kolizji norm oraz konfliktu wartości*, "Palestra" 2019, no. 7–8, p. 122, 126.

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obligation of professional secrecy has an instrumental function in this respect, as there is no ground for proposing the thesis about the existence of a constitutional right to professional secrecy.[13]

Trust between the client and the advocate/attorney-at-law is indispensable for legal assistance to be provided properly. The advocate/attorney-at-law becomes the depositary of information entrusted on a confidential basis by the client, which the client would not give to anyone else, and the client trusts that the communication from the advocate/attorney-at-law will remain exclusively their own secret.[14] The confidentiality obligation safeguards the client's interest and protects the security of the information entrusted by the client. This obligation is also linked with the power (and the related obligation under the deontological provisions) of the advocate/attorney-at-law to behave in a certain way towards the authorities conducting the proceedings – by refusing to answer specific questions or refusing to produce a document concerning circumstances covered by professional secrecy.[15] This constitutes an obligation on the part of the advocate/attorney-at-law established in the interests of the client, and this duty should not be regarded as a privilege of the profession.[16]

Disclosure of information covered by professional secrecy is made at the client's request or with the consent of the client. There is the concept adopted in the case law of implied consent of the client to the disclosure of a secret if such disclosure is in the client's interest, the protection of which is the purpose of the

[13] Article 47, Article 49 and Article 51 (2) of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, no. 78, item 483, as amended), hereinafter: Polish Constitution. See also: D. Dudek, *op. cit.*, pp. 42–44; P. Kardas, *op. cit.*, pp. 125, 134–136; judgment of the Constitutional Tribunal of 22 November 2004, SK 64/03, OTK-A 2004, no. 10, item 107; judgment of the Constitutional Tribunal of 2 July 2007, K 41/05, OTK-A 2007, no. 7, item 72.

[14] J. Naumann, *op. cit.*, § 19, marginal no. 23; point 2.3.1 of the Code of Conduct for European Lawyers adopted at the plenary session of the Council of Bars and Law Societies of Europe (CCBE) on 28 October 1988 (as amended), hereinafter: CCEL. Despite being accepted for use by Resolution no. 8/2010 of the Ninth National Convention of Attorneys-at-Law of 6 November 2010, and Resolution no. 20/2014 of the Supreme Bar Council of 22 November 2014, it does not have the character of a binding act for attorneys-at-law and advocates, although the content of these resolutions indicates otherwise. For more detail on this topic, see T. Jaroszyński, *Kodeks Etyki Prawników Europejskich (CCBE) w polskim systemie prawa*, "Przegląd Prawa Konstytucyjnego" 2023, no. 1, p. 217 ff.

[15] Article 180 § 2 of the Act of 6 June 1997 – Criminal Procedure Code (consolidated text, Journal of Laws 2024, item 37), hereinafter: CPC; Article 83 § 2 of the Act of 14 June 1960 – Administrative Procedure Code (consolidated text, Journal of Laws 2024, item 572); Article 248 § 2 and Article 261 § 2 of the Act of 17 November 1964 – Civil Procedure Code (consolidated text, Journal of Laws 2023, item 1550, as amended); Article 196 § 2 of the Act of 29 August 1997 – Tax Ordinance (consolidated text, Journal of Laws 2023, item 2383, as amended); M. Skibińska, *Dowód z przesłuchania świadka – adwokata lub radcy prawnego – a problem tajemnicy zawodowej*, [in:] *Aktualne zagadnienia postępowania dowodowego i środków dowodowych w postępowaniu cywilnym*, "Acta Iuridica Lebusana" 2020, vol. 14, pp. 76–80.

[16] Article 9 CEAL indicates that keeping professional secrecy is also a right of the attorney-at-law. Likewise point 2.3.1 *in fine* CCEL.

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legal assistance provided by the advocate/attorney-at-law.[17] Such a situation cannot therefore be considered in terms of a breach of professional secrecy, unless the advocate/attorney-at-law does so against an express prohibition by the client.[18] Providing information by the advocate/attorney-at-law to the authority that runs the proceedings (and/or to the opposing party), which effectively leads to its disclosure, does not, in my view, lose its nature of being confidential vis-à-vis other actors and is still covered by the obligation of secrecy due to the nature of the lawyer-client relationship.[19]

A breach of the obligation of professional secrecy by an advocate/attorney-at-law is subject to criminal sanction and disciplinary sanction. It may also give rise to compensatory liability for to a client who has suffered damage as a result of such conduct by the advocate/attorney-at-law.

However, some situations may arise in connection with the performance of legal services, entailing the need[20] to disclose information covered by professional secrecy in order to exercise the subjective rights of the advocate/attorney-at-law, which, as a rule, does not have the client's consent and even goes against the client's interests. How should an advocate/attorney-at-law behave in such controversial situations? Underlying the answer to this question is the nature of the obligation of professional secrecy. The approach to professional secrecy as an absolute duty of the advocate/attorney-at-law is unfounded.[21] This obligation is a legally protected good, but this protection is not absolute. This results not only from the reference provisions contained in the Act on Attorneys-at-Law and the Law on Advocates

[17] Judgment of the Supreme Court of 20 December 2007, SDI 28/07, LEX no. 568835; Article 2 AAL; § 6 CPEA; L. Korczak, *Kilka uwag…*, p. 43.

[18] J. Naumann, *op. cit.*, § 19, margin no. 24 *in fine* and 50.

[19] Decision of the Supreme Court of 15 November 2012, SDI 32/12, LEX no. 1231613. A differing view: Z. Krzemiński, *Glosa do uchwały Prezydium NRA z dn. 3.VIII.1967 r.*, "Palestra" 1969, no. 4, p. 143.

[20] This study does not cover the advocate's/attorney's action related to disclosing professional secrecy as a matter of legal obligation. However, such a situation may give rise to disciplinary liability for breach of ethics, which is a separate and independent ground for disciplinary liability. In more detail on this topic, see R. Baszuk, *Tajemnica adwokacka. W poszukiwaniu kontratypów wyłączających bezprawność dyscyplinarną*, [w:] *Etyka adwokacka a kontradyktoryjny proces…*, pp. 309–312, 314–315.

[21] For more details on this topic, see J. Warylewski, *Tajemnica adwokacka i odpowiedzialność karna za jej naruszenie (ujawnienie)*, "Palestra" 2015, no. 5–6, pp. 10–11; E. Kruk, *op. cit.*, pp. 28–29; J. Giezek, *O granicach tajemnicy adwokackiej oraz zgodzie „dysponenta" na jej ujawnienie*, "Palestra" 2014, no. 9, p. 71; Ł. Chojniak, *Obowiązek zachowania tajemnicy adwokackiej a kolizja interesów adwokata i jego klienta*, [in:] *Etyka adwokacka a kontradyktoryjny proces…*, pp. 281–283. Differently: A. Malicki, *O dysponowaniu tajemnicą adwokacką oraz jej granicach – perspektywa adwokacka*, [in:] *Etyka adwokacka a kontradyktoryjny proces…*, pp. 221–222; J. Naumann, *op. cit.*, § 19, margin no. 26, 31–32.

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and the provisions of the Criminal Procedure Code,[22] but also from the possibility of a collision of legal goods, i.e. the obligation to keep professional secrecy and other good of higher value protected in the important public interest.

Any situation involving the disclosure of professional secrecy raises dilemmas for the advocate/attorney-at-law – not only because of the conflict of conscience he/she experiences, but also because of the exposure to criminal and/or disciplinary liability. These doubts are reinforced by the fact that the obligation to maintain professional secrecy cannot be limited in temporal terms, and thus continues even after the provision of legal assistance to the client.[23] Against this background, the possibility emerges of using the construction of a legal excuse excluding the unlawfulness of such conduct, both under the regime of criminal liability and disciplinary liability.

LEGAL EXCUSE RELATED TO THE EXERCISE OF THE RIGHT TO COURT

An advocate/attorney-at-law may sue his or her clients for payment of fees for legal services provided to them. When bringing an action, the advocate/attorney-at-law bases the claim on information concerning the extent and manner of the legal assistance provided. In such a situation, the problem of disclosure of information covered by professional secrecy related to the legal service provided may arise, and the provisions of the Civil Procedure Code do not provide for the possibility of exemption from professional secrecy. Information covered by professional secrecy constitutes client's secret, so the advocate/attorney-at-law cannot exempt himself or herself from the obligation of professional secrecy and freely dispose of the acquired knowledge for the purposes of the authority conducting the proceedings. This obligation is of a public nature and is therefore independent of the will of the advocate/attorney-at-law and the advocate/attorney-at-law is not the disposer of professional secrecy.[24]

In such a situation, the lawyer faces a dilemma whether to abandon one's claim against a client who has abused his or her trust and is behaving disloyally by failing

[22] Article 3 (6) AAL; Article 6 (4) LoA; Article 180 § 2 CPC.

[23] Article 3 (4) AAL; Article 6 (2) LoA; point 2.3.3 CCEL.

[24] D. Seroka, *Tajemnica zawodowa a wykorzystywanie informacji nią objętych przez radcę prawnego we własnej sprawie dyscyplinarnej*, [in:] *Tajemnica zawodowa radcy prawnego*, ed. R. Stankiewicz, Warszawa 2018, p. 164; A. Malicki, *op. cit.*, p. 217; decision of the Supreme Court of 15 November 2012, SDI 32/12, LEX no. 1231613; decision of the Court of Appeal in Krakow of 11 October 2016, I ACa 659/16; decision of the Court of Appeal in Wroclaw of 4 November 2010, II AKz 588/10, LEX no. 621274. In the context of notarial secrecy, see decision of the Supreme Court of 29 October 2014, SDI 28/14, LEX no. 1583232.

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to pay the agreed fee in the name of maintaining the confidentiality of information concerning the legal service provided.[25]

This is also accompanied by the fear of consequences, i.e. criminal liability and/or disciplinary liability. The initiation of such proceedings may take place at the request of the defendant, a previous client who, as an alleged aggrieved party, is in conflict with the advocate/attorney-at-law. This finally may result in an abandonment of the claim being sought. It should be noted that the content of the disclosed or used information covered by professional secrecy, as well as its gravity, are not relevant for the fulfilment of the criteria of the prohibited act under Article 266 of the Criminal Code, as it may also be trivial, secondary or insignificant information.[26] On the other hand, the conviction of an advocate/attorney-at-law for the offence of disclosure or use of information covered by professional secrecy may entail the application of an extremely harsh penal measure under Article 41 § 1 of the Criminal Code in the form of a ban on legal practice.

Once a civil dispute arises between the advocate/attorney-at-law and the former client, the existing relationship of trust disappears as it is linked to the provision of legal assistance. In view of this, the question arises as to whether the lawyer may in such a situation disclose information concerning the remuneration for the performance of specific legal assistance activities and to what extent such information is covered by professional secrecy.

This is permissible as long as the content of relevant documents (e.g. VAT invoice, bill, receipt, or hourly specification of assignments performed) is characterised by a high degree of generality in terms of specific types of work performed and does not encroach on the discretionary sphere associated with the provision of legal assistance. Such information contained in documents of the above-mentioned types is not covered by professional secrecy.

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[25] This issue has already been analysed in the light of the existing scholarly views, while taking into account the practical aspects and the axiological assessment of the behaviour of the lawyer providing legal assistance. See Ł. Błaszczak, *Problem ujawnienia tajemnicy zawodowej przez radców prawnych i adwokatów występujących w charakterze strony powodowej lub pozwanej w procesach cywilnych z udziałem swoich klientów*, [in:] *Wykonywanie zawodu radcy prawnego. 40-lecie samorządu radcowskiego. Przeszłość – teraźniejszość – przyszłość*, eds. K. Mularczyk, M. Pyrz, T. Scheffler, A. Zalesińska, Warszawa 2022, p. 188 ff.; Ł. Chojniak, *op. cit.*, pp. 291–292.

[26] Act of 6 June 1997 – Criminal Code (consolidated text, Journal of Laws 2024, item 17). For more details, see E. Plebanek, M. Rusinek, *Ujawnienie tajemnicy zawodowej w procesie karnym a odpowiedzialność karna*, "Czasopismo Prawa Karnego i Nauk Penalnych" 2007, no. 1, pp. 75–77; J. Warylewski, *op. cit.*, p. 8; Z. Krzemiński, *Etyka adwokacka. Teksty, orzecznictwo, komentarz*, Warszawa 2008, p. 80; Z. Krzemiński, *Problem tajemnicy zawodowej adwokata w świetle przepisów prawnych*, "Palestra" 1959, no. 10, p. 34. Where the disclosure of such information covered by professional secrecy poses a negligible threat to the legally protected interests of the client, such an act may not constitute an offence, due to the lack of social harmfulness of the act as referred to in Article 1 § 2 of the Criminal Code. See W. Wróbel, *op. cit.*, p. 1492; S. Hoc, *op. cit.*, marginal no. 9.

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The use of information covered by professional secrecy should be assessed differently. There is a view that there is no breach of professional secrecy at all in the situation of a dispute between an advocate/attorney-at-law and a former client. This view assumes relativisation of the nature of the same information depending on the role in which advocate/attorney-at-law is acting (which translates into a different relationship with the client) – either as a lawyer providing legal assistance or as a party to the contractual relationship.[27] I do not follow this view. Since the information is covered by professional secrecy, its disclosure and use in proceedings against a former client due to an existing obligation constitutes a breach of the obligation of professional secrecy, not to mention a breach of the prohibition on using the information in one's own or third party's interest.[28] Another issue is whether such conduct by the advocate/attorney-at-law entails the risk of criminal and/or disciplinary sanction.

The possibility of filing by the advocate/attorney-at-law a suit against a former client must be considered in the context of the exercise of one's subjective public right such as the right to a court. In such a situation there is no protection of the client's interest, due to the object of the claim. Of course, it is not the goal of the advocate/attorney-at-law who is a plaintiff to disclose and use information covered by professional secrecy before the court, but it is necessary to do so in order to prove his or her assertions concerning the factual basis of the claim.[29] Nevertheless, it is a behaviour that meets the criteria of a prohibited act and a disciplinary offence, as information covered by professional secrecy is disclosed and used by the advocate/attorney-at-law for a purpose other than running the case entrusted to him or her by the client.[30] The unlawfulness of such conduct may, however, be waived under other provisions of law.

The liability of the advocate/attorney-at-law for the disclosure or use of information covered by professional secrecy is waived when he or she acts under a statutory legal excuse – the state of necessity. The legal qualification of such conduct under Article 26 § 1 of the Criminal Code is justified by the condition of the social profitability of sacrificing one of the conflicting legal goods and the lack of any other possibility to protect a directly threatened good of higher value.[31] Acting with a legal excuse, the advocate/attorney-at-law sacrifices the good concerning the protection of professional secrecy while saving a good of higher value (according to the principle of proportionality in a state of necessity), namely the right to court. Such an act is

[27] T. Scheffler, *Spór klienta a tajemnica zawodowa*, "Radca Prawny" 2019, no. 186, p. 43.

[28] Article 16 CEAL.

[29] Ł. Błaszczak, *op. cit.*, pp. 200–201, 205.

[30] Judgment of the Supreme Court of 20 December 2007, SDI 28/07, LEX no. 568835.

[31] P. Daniluk, *Komentarz do art. 26*, [in:] *Kodeks karny. Komentarz*, ed. R.A. Stefański, Legalis 2023, margin no. 2, 4, 12, 18.

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therefore not a criminal offence, due to the realisation of the constitutional right to court, which is an elementary standard of a democratic state ruled by law, which cannot be limited by the obligation of professional secrecy. Otherwise, an advocate/attorney-at-law obliged to keep secrecy in a dispute with a former client would be deprived of the right to court and the right to a fair trial (due to the lack of implementation of the principle of equality of arms).[32] The right to court is reinforced and complemented by the guarantee provision of the Polish Constitution prohibiting the recourse to law by statutory regulations, and even more so by lower-tier acts (including bye-laws of legal profession self-government organisations).[33]

According to the construction adopted above, an advocate/attorney-at-law does not commit a disciplinary offence since the disciplinary proceedings (in this case, the qualification of the grounds for their initiation, not the right to court exercised in the context of the disciplinary proceedings), Article 26 § 1 of the Criminal Code.[34] This is in line with the previously developed (the regulation concerning the application *mutatis mutandis* of the provisions of Chapters I–III of the Criminal Code to disciplinary proceedings became effective on 25 December 2014[35]) view that an advocate/attorney-at-law may not be held disciplinarily liable for the conduct compliant with the authorisation (permission) under the law, even if such conduct formally violated the provisions contained in the deontological codes.[36]

An advocate/attorney-at-law who exercises the right to court in a case against a former client should minimise the extent of the information disclosed, limiting it to the fact that legal services were provided and the fee to be paid. This undoubtedly facilitates the proper performance of the obligations under the bye-laws issued by legal professional self-government organisations regarding the basis and principles of client billing (i.a. conclusion of a written contract and meticulous collection

[32] Article 45 (1) of the Polish Constitution; judgment of the Constitutional Tribunal of 14 June 1999, K 11/98, OTK ZU 1999, no. 5, item. 97; judgment of the Constitutional Tribunal of 18 December 2007, SK 54/05, OTK ZU 2007, no. 11A, item 158; A. Woroniecka, *Biznes w okowach tajemnicy zawodowej radcy prawnego*, "Przegląd Radcowski" 2020, no. 27, p. 31; Ł. Błaszczak, *op. cit.*, p. 201. See also K. Wiak, *Komentarz do art. 26*, [in:] *Kodeks karny. Komentarz*, eds. A. Grześkowiak, K. Wiak, Legalis 2024, margin no. 15.

[33] Article 77 (2) of the Polish Constitution; judgment of the Constitutional Tribunal of 16 March 1999, SK 19/98, OTK ZU 1999, no. 3, item 36; L. Garlicki, K. Wojtyczek, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, eds. L. Garlicki, M. Zubik, vol. 2, Warszawa 2016, pp. 858–859, 867–868; A. Woroniecka, *op. cit.*, pp. 30–31; Ł. Błaszczak, *op. cit.*, pp. 205–206.

[34] Article 74[1] AAL; Article 95n LoA; L. Korczak, [in:] *Kodeks Etyki Radcy Prawnego. Komentarz*, ed. T. Scheffler, Warszawa 2023, pp. 168–170. Cf. P. Sarnecki, [in:] *Konstytucja Rzeczypospolitej Polskiej…*, p. 235.

[35] Article 1 (35) and Article 2 (34) of the Act of 7 November 2014 amending the Act – Law on advocates and certain other acts (Journal of Laws 2014, item 1778).

[36] Resolution of the Constitutional Tribunal of 17 March 1993, W 16/92, OTK 1993, no. 1, item 16; judgment of the Supreme Court of 27 September 2012, SDI 24/12, LEX no. 1226771; R. Baszuk, *Tajemnica adwokacka…*, p. 312.

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of financial records).[37] An advocate/attorney-at-law acting in a state of necessity must ensure that information covered by secrecy is disclosed only within the limits required by the necessity, therefore with the least possible detriment to the good being sacrificed, without exceeding what is actually necessary to avert the negative consequences, for the realisation of the good being saved.[38] Otherwise, the limits of the state of necessity may be exceeded by unnecessarily sacrificing a legal good to an overly broad extent (e.g. as a result of disclosure of information of no legal relevance to the proceedings), which may expose the advocate/attorney-at-law to liability for failure to keep professional secrecy.

An advocate/attorney-at-law sued for damages due to legal assistance provided to the plaintiff is in the same situation. The plaintiff may be a previous client, a former litigation opponent bringing a personal injury action for violation of the limits of freedom of expression or an insurer who pursues a recourse claim. In order to successfully deny the plaintiff's allegations about lawyer's failure to exercise due diligence in the provision of legal assistance, the advocate/attorney-at-law must specify the circumstances based on information covered by professional secrecy. He or she then acts under the state of necessity, exercising his or her constitutional right to court and related right to a fair trial.

LEGAL EXCUSE RELATED TO THE EXERCISE OF THE RIGHT TO DEFENCE

The disclosure of confidential information by an advocate/attorney-at-law in the capacity of a suspect or accused person in criminal proceedings, or a person accused in disciplinary proceedings, should be assessed similarly, since he or she acts under the conditions of the state of necessity, exercising the right of defence.

The right of defence, forming part of the principle of a democratic state ruled by law, cannot be limited by the obligation of professional secrecy. It is exercised at all stages of criminal proceedings and, to the same extent, it is granted in similar repressive procedures (and thus also in disciplinary proceedings).[39]

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[37] § 50 CPEA; Article 36 (1) to (3) CEAL; § 8 (1) and (4) and § 10 (1) and (3) of the Regulations for the practice of the profession of advocate (Resolution no. 140/2023 of the Supreme Bar Council of 1 December 2023); § 19 (1) and (3) of the Regulations for the practice of the profession of attorney-at-law, annexed to Resolution No. 124/XI/2022 of the National Bar Council of Attorneys-at-Law of 3 December 2022 (consolidated text, Resolution no. 917/XI/2023 of the Presidium of the National Bar Council of Attorneys-at-Law of 8 March 2023).

[38] Ł. Błaszczak, *op. cit.*, pp. 208–209; P. Daniluk, *op. cit.*, margin no. 19; K. Wiak, *op. cit.*, margin no. 14.

[39] P. Sarnecki, *op. cit.*, p. 221, 228; L. Jamróz, *Konstytucyjne prawo do obrony przed sądem w RP*, [in:] *Konstytucyjno-ustawowa regulacja stosunków społecznych w Rzeczypospolitej Polskiej*

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The substantive aspect of the right of defence manifests itself as the right to undertake various measures to protect the interests of the suspect/accused person in criminal proceedings, including to provide explanations, to put forward arguments to rebut the accusation or to submit requests to consider evidence, which may also concern the legal assistance provided.[40] It should also be noted that the cases of inadmissible evidence set out in the Criminal Procedure Code relate only to witness testimony and not to the submission of explanations by the suspect/accused person. Thus, in the light of the criminal procedural regulations (which, in terms of the issue of professional secrecy, are a *lex specialis* to the Act on Attorneys-at-Law and the Law on Advocates), there is theoretically no protection of professional secrecy during hearing the suspect/accused.[41]

As regards the exposure to criminal liability for disclosure by an advocate/attorney-at-law of information covered by professional secrecy (this also applies to disciplinary liability for acting in breach of the law or ethical principles), it is possible to apply the legal excuse of the state of necessity (Article 26 § 1 of the Criminal Code), which excludes the criminal illegality of such conduct where the advocate/attorney-at-law is exercising his or her right of defence. Thus, the advocate/attorney-at-law does not commit a crime or disciplinary offence by sacrificing the good related to the protection of professional secrecy, while saving a good of a higher value, which is the right of defence.[42] In the legal system (also considering the criterion of place in the hierarchy of sources of generally applicable law), the right of defence enshrined in the Polish Constitution and international treaties ratified by Poland is definitely of a higher value than the statutory obligation of professional secrecy.[43]

Also in light of the well-established position of the judicature, the obligation of professional secrecy is not valid if the advocate, in connection with the legal assistance provided, is in the position of a suspect/accused in criminal proceedings or a defendant in disciplinary proceedings. This applies, i.a., to the situation "when the client has disclosed the content of the conversations or fragments thereof and has thus made it clear that he or she does not care to keep the conversations confidential

i Republice Białoruś, ed. J. Matwiejuk, Białystok 2009, p. 265, 272; judgment of the Constitutional Tribunal of 4 July 2002, P 12/01, OTK-A 2002, no. 4, item 50; judgment of the Constitutional Tribunal of 8 July 2003, P 10/02, OTK ZU 2003, no. 6A, item 62; judgment of the Constitutional Tribunal of 19 March 2007, K 47/05, OTK-A 2007, no. 3, item 27; judgment of the Constitutional Tribunal of 29 January 2013, SK 28/11, OTK-A 2013, no. 1, item 5.

[40] Article 42 (2) of the Polish Constitution; Articles 175 and 176 CCP.

[41] M. Cieślak, *Glosa do uchwały SN z dnia 29 listopada 1962 r., VI KO 61/62*, "Państwo i Prawo" 1963, no. 7, p. 172; E. Plebanek, M. Rusinek, *op. cit.*, p. 85, 87.

[42] J. Warylewski, *op. cit.*, p. 14; A. Malicki, *op. cit.*, p. 217.

[43] Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, as subsequently amended by Protocols Nos. 3, 5 and 8 and supplemented by Protocol No. 2 (Journal of Laws 1993, no. 61, item 284); International Covenant on Civil and Political Rights opened for signature in New York on 19 December 1966 (Journal of Laws 1977, no. 38, item 167).

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to the extent disclosed and, moreover, when – especially on the initiative of such a client – disciplinary or criminal proceedings are pending against the advocate in connection with the content of those conversations. In this case, the right of defence comes into play, which cannot be restricted by the advocate/attorney-at-law being bound by the obligation of professional secrecy. This is so because if this obligation were to be retained, the advocate/attorney-at-law would be in a worse position than any other accused person".[44] That line of reasoning of the Supreme Court states that, in such a situation, the obligation of professional secrecy cannot fulfil any of the functions assigned to it, since, with this obligation being implemented, both the right of defence and the fundamental principle of equality before the rights of the defence would be compromised.[45] This was concluded even more strongly by a scholar in the field, who considered it ridiculous for the accused advocate/attorney-at-law to "allow himself or herself to be convicted innocently because the relevant facts in his or her favour are covered by secrecy for these or other reasons".[46]

While pointing to the admissibility of disclosure of information covered by the advocate/attorney-at-law secrecy, it is emphasised that this should be done in conditions where the trial is closed to the public and only to the extent that it is necessary for the advocate/attorney-at-law to undertake an active defence. Emphasising this element of operation of the advocate/attorney-at-law forces him or her each time to assess whether his or her conduct fits the legal excuse of state of necessity, i.e. whether the disclosed piece of information was important for the right of defence to be exercised.[47] This requires careful consideration by the advocate/attorney-at-law, as exceeding the necessary scope of information that may be disclosed may expose him or her to liability for failure to observe professional secrecy.[48]

The exercise of the right of defence in disciplinary proceedings should be assessed in a similar way. Disclosure of circumstances covered by professional secrecy should only take place within the limits set by the need to challenge the allegation of disciplinary misconduct (thus such information must be related to the liability for the alleged act), and the hearing before the disciplinary panel should be closed to the public.[49] The issue of excluding the openness of the hearing in disciplinary proceedings in the

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[44] Resolution of the Supreme Court of 29 November 1962, VI KO 61/62, OSNKW 1963, no. 7–8, item 157; Z. Klatka, *Tajemnica zawodowa – dochowanie obowiązków, ale i dyskusja o zmianie przepisów*, "Radca Prawny" 2011, no. 115–116, p. 16.

[45] Z. Klatka, *Dochowanie tajemnicy zawodowej*, [in:] *Zawód radcy prawnego. Historia zawodu i zasady jego wykonywania*, ed. A. Bereza, Warszawa 2017, p. 353; R. Baszuk, *Tajemnica zawodowa w wyjaśnieniach obwinionego składanych w postępowaniu dyscyplinarnym*, "Palestra" 2014, no. 3–4, p. 173.

[46] M. Cieślak, *op. cit.*, p. 173. See also J. Naumann, *op. cit.*, § 19, margin no. 22.

[47] E. Plebanek, M. Rusinek, *op. cit.*, p. 87.

[48] Article 31 (1) of the Polish Constitution; D. Seroka, *op. cit.*, pp. 170–171; R. Baszuk, *Tajemnica zawodowa…*, p. 172.

[49] R. Baszuk, *Tajemnica adwokacka…*, pp. 316–317.

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situation of the threat of disclosure of professional secrets is directly regulated in the Law on Advocates.[50] There is no such provision in the Act on Attorneys-at-Law, so the provisions of the Criminal Procedure Code[51] must be applied *mutatis mutandis*.

PROPOSALS OF CHANGE IN THE PROVISIONS ON THE OBLIGATION OF KEEPING PROFESSIONAL SECRECY

An attempt to resolve the issue presented herein, relevant to the liability of a lawyer disclosing information covered by professional secrecy, undertaken at the level of the Council of Bars and Law Societies of Europe (CCBE) is the Model Article on Confidentiality. It was adopted at the CCBE Plenary Session on 2 December 2016, and para. 8 thereof on the issue in question reads as follows: "The lawyer is entitled to disclose confidential information in proceedings between the lawyer and his or her client or in proceedings against the lawyer provided such disclosure is necessary for such proceedings and there is a direct relation between such proceedings and the lawyer's mandate from this client. Proceedings include court, administrative, professional and alternative dispute resolution proceedings".

The right of the lawyer to disclose information covered by professional secrecy contained in the Model Article on Confidentiality is derived from the right to a fair trial contained in the Convention for the Protection of Human Rights and Fundamental Freedoms.[52] The conditions for the admissibility for the disclosure by the lawyer of information covered by professional secrecy are similar to the rules applied in the Polish legal system under the construction of legal excuse. This is permissible when it is necessary to safeguard the interests (defence) of the lawyer in the proceedings listed in the provision and there is a direct link between such proceedings and the commissioning of legal services for the client and resulting activities. It should be noted that this concerns "confidential information covered by professional secrecy", so that the boundaries of the material scope of professional secrecy are built on a vague concept – "confidential", concerning the nature of the protected information (and thus differently from the Polish legal system).

On a Polish national level, an attempt to address this problem was made relatively early on by the National Bar of Attorneys-at-Law considering an appropriate amendment to the deontological rules. In 2013, a draft of the new extended Article 18 CEAL (by Z. Klatka) which reads as follows: "1. An attorney-at-law against

[50] Article 95a LoA; Ł. Chojniak, *op. cit.*, p. 287.

[51] Article 74[1] AAL in conjunction with Article 360 § 1 (1) (d) CPC (the "important private interest" indicated therein refers to the client of the advocate/attorney-at-law).

[52] Article 6 (3) (b) and (c) of the Convention for the Protection of Human Rights and Fundamental Freedoms.

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whom proceedings are initiated entailing a threat of criminal, administrative or disciplinary sanctions, may disclose information covered by professional secrecy to the authorities conducting the proceedings to the extent that is reasonably believed to be necessary to protect his or her rights. 2. In the event of a legal dispute relating to the legal assistance provided, the attorney-at-law may disclose information covered by professional secrecy in the proceedings, but only to the extent that is reasonably believed to be necessary to protect his or her rights. 3. In the cases referred to in paras 1 and 2, the attorney-at-law should endeavor to request that the proceedings be closed to the public. 4. The attorney-at-law, when performing the duties resulting from the Code towards an authority of the professional self-government, and in particular exercising the right to provide explanations, is entitled to disclose, to the extent necessary, circumstances covered by professional secrecy".

The draft has been developed using the rules prepared by the CCBE working group for the Model Principles of Ethics. It was initially discussed at the National Convention of Attorneys-at-Law in November 2013 and was subsequently submitted to the Extraordinary National Convention of Attorneys-at-Law in November 2014 in the process of developing a new Code of Ethics for Attorneys-at-Law. However, after a debate, it failed to win the approval of the delegates.[53]

Another proposal to amend the Code of Ethics for Attorneys-at-Law (authored by L. Korczak), already referring to the above-discussed model principles of professional secrecy adopted by the CCBE in 2016, came much later and boiled down to the addition of para. 4 to Article 15 CEAL, reading as follows: "However, the attorney-at-law may disclose information covered by professional secrecy in the course of statutory disciplinary, criminal, civil, administrative or other proceedings to which he or she is a party and which are caused by or are directly related to the legal assistance he or she provided. The information covered by secrecy may only be disclosed to the extent necessary to protect his or her rights. In doing so, the attorney-at-law should seek to make the proceedings closed to the public".[54]

It remains in the sphere of draft provisions, however, analysed only by legal scholars. Thus the problem continues to exist. The proposed amendments to the bye-laws of the legal professional self-government do not solve it, as they cannot affect the obligation of professional secrecy under the legislation, and thus the criminal liability for its violation, nor limit the rights of third parties, in this case clients whose secret has been disclosed. Moreover, such a provision introduced in the Code of Ethics for Attorneys-at-Law does not even preclude the disciplinary liability of the attorney-at-law since it eliminates only one of the grounds for its initiation, namely infringement of ethics rules, without referring to another ground – of unlawful conduct.[55]

[53] Z. Klatka, *Dochowanie tajemnicy…*, p. 356.
[54] L. Korczak, [in:] *Kodeks Etyki…*, pp. 167–168.
[55] Article 80 LoA; Article 64 AAL.

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A solution to the problem should therefore be sought at the level of the generally applicable rules, pointing, in the context of proposals *de lege ferenda*, to a bold but well-thought-out correction of the statutory regulations on professional secrecy, which should result in complementary changes to the bye-laws of the legal profession self-government organisations.

Voices for a change in statutory regulation are being raised in the legal community. These are usually accompanied by a legitimate demand for a prohibition on the release from professional secrecy (similarly to the secrecy of the defence counsel) by an external entity. Putting this issue aside, as going beyond the scope of the topic discussed, it is worth noting the proposal of the representatives of the Advocates' National Bar regarding the change of the substantive scope of professional secrecy.[56] The National Bar of Attorneys-at-Law went further, when at the turn of 2024 developed variant proposals for directional solutions as part of the internal debate on the draft amendment to the Act on Attorneys-at-Law. These concerned, i.a., the indication of specific behaviour of the attorney-at-law which does not constitute a violation of professional secrecy. The proposal referred to previous work in the National Bar of Attorneys-at-Law and ultimately received the following wording (part of the draft Article 3b of the Act on Attorneys-at-Law: "It is not a breach of professional secrecy to provide information covered by it: 1) to the extent necessary to protect the interest of the attorney-at-law in statutory criminal, civil, administrative, disciplinary and other proceedings, or in arbitration proceedings, if the proceedings are conducted or are in connection with the professional practice run by the attorney-at-law; 2) other attorneys-at-law in connection with their performance of the tasks of the self-government of attorneys-at-law".[57]

It remains the subject of analysis and discussion within the professional community, despite the already established internal direction of work on amendments to the Act on Attorneys-at-Law. However, the proposals for the draft bill to amend the Act on Attorneys-at-Law, discussed (on 16 March 2024) and adopted (on 14 June 2024) by the National Bar Council of Attorneys-at-Law, have not included such a regulation.[58]

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[56] Ł. Chojniak, *op. cit.*, pp. 293–294.

[57] Concept for the amendment of the provisions of the Act on attorneys-at-law concerning attorney's professional secrecy developed by the Working Group on professional secrecy.

[58] Resolution no. 173/XI/2024 of the National Bar Council of Attorneys-at-Law of 14 June 2024 covered only the amendment of Article 5b AAL, which concerned a minor correction in the reference to professional secrecy provisions (Article 3 (3) to (6) in place of Article 3 (4) to (6)) and to maintain the obligation of professional secrecy in the event that the request to disclose information obtained by the attorney-at-law related to legal assistance provided is issued not only by the President of the Office for Personal Data Protection, but any supervisory authority within the meaning of Article 4 (21) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (OJ L 119/1, 4.5.2016, as amended).

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CONCLUSIONS

In a legal situation where there are different regimes of liability of the advocate/attorney-at-law for infringing professional secrecy, the solution to the analyzed problem should be sought in the statutory area. As regards the obligation of professional secrecy, it is desirable that the law specify the permissible behaviour of the advocate/attorney-at-law (as a holder of professional secrecy), which does not give rise to criminal and/or disciplinary proceedings. This undoubtedly enhances the standards of legal professional's liability by striving for the maximum specificity of the prohibited act of disclosure of professional secrecy. Such a proposal is accompanied by the fear of a negative reception of another limitation on the protection of professional secrecy, which is tantamount to a guarantee of the confidentiality of information entrusted to the advocate/attorney-at-law. Despite considerable difficulties in preparing a satisfactory solution, different views on this issue and these exaggerated – in my opinion – fears, I hope that these proposals will be accepted (in this or a modified version) among the demands made by the National Bar of Attorneys-at-Law. Their fate will depend on a legislative initiative to be undertaken by authorized entities and the results of a broad discussion between representatives of associations of legal professions, who approach the issue of professional secrecy with the utmost seriousness due to its importance for the exercise of their profession and the caution inherent in extremely sensitive matters in the public perception.

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ABSTRAKT

Zagadnienia związane z zakresem tajemnicy zawodowej i obowiązkiem jej zachowania przez adwokata/radcę prawnego są przedmiotem debaty w środowisku prawniczym. Wynika to zarówno z fundamentalnego znaczenia tajemnicy zawodowej dla prawidłowego wykonywania zawodu adwokata/radcy prawnego, jak i z niespójności przepisów ustawowych oraz relacji tych przepisów do regulacji deontologicznych. Naruszenie obowiązku tajemnicy zawodowej skutkuje odpowiedzialnością karną i/lub dyscyplinarną. Na tym tle pojawia się problem dotyczący ujawnienia faktów objętych tajemnicą zawodową przez adwokata/radcę prawnego w sytuacji sporu cywilnego z byłym klientem

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lub postawienia adwokatowi/radcy prawnemu zarzutów w postępowaniu karnym lub dyscyplinarnym – pozostających w związku ze świadczoną wcześniej pomocą prawną. W sytuacji takiej ujawnienie informacji objętych tajemnicą zawodową – oczywiście w zakresie wymaganym potrzebą – nie stanowi przestępstwa (przewinienia dyscyplinarnego) adwokata/radcy prawnego z uwagi na działanie w ramach kontratypu stanu wyższej konieczności w celu ratowania dobra o wyższej wartości, jakim jest odpowiednio prawo do sądu lub prawo do obrony. Odejście od tej złożonej konstrukcji i wzmocnienie standardów odpowiedzialności poprzez dążenie do maksymalnej określoności czynu zabronionego przemawiają za wprowadzeniem zmian ustawowych wskazujących na konkretne zachowania adwokata/radcy prawnego, które nie stanowią naruszenia obowiązku zachowania tajemnicy zawodowej. Mimo prowadzonych prac i towarzyszących im analiz w samorządach prawniczych, żaden z nich dotychczas nie zdecydował się na oficjalne zaproponowanie takiej odważnej zmiany legislacyjnej.

Słowa kluczowe: tajemnica zawodowa; radca prawny; adwokat; stan wyższej konieczności; prawo do sądu; prawo do obrony

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