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**TYPES AND CHARACTERISTICS OF GUARANTEES
DESIGNED TO PROTECT PROFESSIONAL SECRECY
IN THE PERFORMANCE OF THE PROFESSION
OF LAWYER IN POLISH LAW**

The role of professional secrecy primarily reflects the importance of privacy and discretion in social life. In the modern world, where globalization and the rapid development of technology is progressing, information – the flow of which is extremely efficient – and keeping it secret is becoming an ever greater challenge. This pace should be compatible with the pace of changes in the law.

Professional secrecy is – not only for the lawyer’s profession but also for current and future clients – a matter of fundamental importance and is a clear identifier of a liberal profession. With its observance, a special degree of social trust is associated with the enforcement of dignified behavior towards their clients, as well as towards their own environment. Without adhering to it, it is difficult to talk about the creation of a full bond between the client and broadly understood legal assistance. The representatives of the doctrine agree that the observance of professional secrecy guarantees the proper performance of the legal profession and enables the protection of individual human rights.

The guarantees are a kind of protective mechanism for goods and legally protected institutions. In the case of professional secrecy in Polish law, they exclude the possibility of reaching certain information or provide for specific sanctions for its violation in connection with broadly understood legal liability. The article attempts to evaluate the effectiveness of guarantees protecting legal professional secrecy in Polish law.

The first ones include absolute evidence bans – no interrogation of the defender and conditional – secrecy protection under Art. 180 of the Code of Criminal Procedure. The second group of guarantees includes civil liability for violation

of personal rights, criminal liability for the offense of violation of professional secrecy and disciplinary liability.

Due to the confidentiality I am discussing, consider the right to remain silent. The provision of Art. 175 § 1 of the Code of Criminal Procedure it provides for the right of the accused and suspect to submit explanations, but also to refuse to submit them without giving any reasons¹. Refusal to provide explanations in criminal proceedings is a way to defend, and because he accused has no right to lie, their submission cannot be obligatory and he cannot be forced to do so². It is also worth noting that not admitting guilt and showing no repentance can not affect the more severe punishment, because it is only a form of defense³. The right to remain silent may be exercised by an express statement as well as, in principle, by no reply whatsoever⁴. Despite the fact that the right to refuse to provide explanations is obviously related to keeping certain content confidential, it should be noted that “granting the accused the right to remain silent on the grounds of professional secrecy would be absurd given the general right to refuse to explain, arising from cited article”⁵.

Evidence ban, constituting guarantees, inter alia for professional secrecy, is a peculiar mechanism by which the possibility of reaching certain information is excluded. Evidence ban is defined both as “the inability to take specific evidence resulting from the act”, “a rule prohibiting the taking of evidence under certain conditions or creating restrictions in the search or extraction of evidence”, as well as in a three-element definition containing inadmissibility of evidence, prohibition of command, bans on the use of evidence⁶. The name “evidence bans” does not fall within the statutory category, while “is a Polish language terminology convention”, which means that it sets out legal provisions prohibiting the taking and obtaining of evidence in given conditions, or excluding the possibility of using a specific source or means of evidence in the process⁷.

It should be noted that the main purpose of the trial is to decide on the subject of the trial, and thus to determine whether or not substantive law has been violated, and – as appropriate to the decision – to apply or not to apply penalties or criminal measures. Nevertheless, the methods of discovering the truth must comply with the principles of the rule of law, humanism and democracy, and therefore acquired in a way that respects the rights and feelings of the individual

¹ The Act of 6 June 1997 – Code of Criminal Procedure (Dz.U. 1997, no. 89, item 555).

² T. Grzegorzczak, *Kodeks postępowania karnego*, t. I: *Komentarz do art. 1–467*, Warszawa 2014, p. 599.

³ *Ibidem*.

⁴ *Ibidem*, p. 600.

⁵ M. Rusinek, *Tajemnica zawodowa i jej ochrona w polskim procesie karny*, Warszawa 2007, p. 228.

⁶ *Ibidem*, p. 23.

⁷ *Ibidem*, p. 24.

in criminal proceedings⁸. Thus, procedural authorities should not seek legal discovery “at all costs”. This demarcation is necessary to protect intimate details of human life, and thus – basic human rights and freedoms⁹. Its purpose is, inter alia, to use evidentiary bans, protecting individual goods and individual interests of persons who perform important functions or perform important professions. Z. Krzemiński recognizes that the above-mentioned goods and interests are the same, and sometimes even more important than seeking to establish the truth in the trial. The purpose of applying these provisions is, in particular, to ensure respect for the values necessary for the proper functioning of society by limiting the possibility of reaching the truth, which gives them a guarantee and compromise between the various goods¹⁰. The author’s other important observation concerns certain specific tendencies, mainly in Western Europe, where, on the one hand, a broad interpretation of the prohibitions of evidence related primarily to the protection of the right to privacy is applied, and on the other, their strict interpretation, which leads to the belief that their violation should result in inadmissibility of evidence in a criminal trial¹¹.

It seems obvious that the problem of lawyer’s secrecy in a criminal trial is associated with a conflict of goods protected by the legal system. Evidence bans are therefore a guarantor and an element that creates trust between the parties who entrusted themselves with secrets in the process of communication related – in the case of lawyer secrets – to legal services. M. Rusinek, however, disagrees with this approach, pointing out that this is unnecessary repetition. In his opinion, there is no need to indicate that unconditional bans of evidence protect professional secrecy, which protects the element of trust in communication, because “it multiplies entities beyond the need”¹². The author therefore recognizes that unconditional bans of evidence are a mechanism of confidence protection separate from professional secrecy in specific professional activities.

It is also worth noting external professional secrecy perspective¹³. Namely, the relationship of a lawyer who is obliged to observe professional secrecy and public authorities having the right to obtain information for the purposes of proceedings conducted on the basis of legal provisions. The lawyer’s obligation to disclose this information is always associated with a collision between the obligation to remain faithful to secrecy and the need to testify as a witness. It is therefore an evident interference of the procedural authorities in the secret relationship between the lawyer and his client. A variety of prohibitions on evidence are used to protect the

⁸ *Ibidem*, p. 56

⁹ *Ibidem*.

¹⁰ *Ibidem*, p. 57–58.

¹¹ *Ibidem*, p. 62.

¹² *Ibidem*, p. 67.

¹³ P. Kardas, *Tajemnica adwokacka a procesowe zakazy dowodowe* [in:] *Etyka adwokacka a kontradiktoryjny proces karny*, eds. J. Giezek, P. Kardas, Warszawa 2015, p. 238.

values arising from this relationship. Their basic function, in addition to excluding the admissibility of taking certain evidence, is to fulfill the role of a statutory conflict of laws rule, i.e. resolving the conflict between secrecy protection and the good of justice¹⁴. The consequence of this is determining the scope of protection of legal secrets only at the procedural level. Bar representatives consistently take the position that barrister's secrecy is absolute, and therefore, evidentiary prohibitions do not, in their view, have the power to establish or specify its scope. On the other hand, a significant number of representatives of the doctrine of procedural criminal law and representatives of the judicial authorities consider evidential bans as a *lex specialis* in relation to the obligation of professional secrecy arising from the provisions of laws and professional ethics¹⁵. In addition, adequate protection of professional secrecy is necessary due to the constitutional rank of the profession of public trust and its social importance. Without trust in the relationship between the lawyer and the client, it is not possible to properly provide legal assistance and thus pursue the public interest.

Absolute evidence bans also have functions other than protection of trust, including the exclusion from the proceedings of such evidence that interferes with the determination of the factual state of truth due to their lack of credibility¹⁶. An example of such proof may be the evidence from the hearing of the lawyer, which is evidence of hearing, and thus derivative evidence. His knowledge of the case comes from the accused, who, due to his strong involvement in it, may tend to falsify reality, especially since he provides information to the defense counsel after criminal proceedings have been initiated against him. The defender himself, moreover, as interested in a positive outcome of the proceedings for the accused, is subject to the temptation of knowingly giving false testimony in his favor. A conditional ban on evidence would be too risky in this case for the good of the trial. The accused, having the chance to decide on the possible evidentiary use of these people, could somewhat control the course of the process by inhibiting the disclosure of information unfavorable to him¹⁷. The only solution to such a situation would be the need to allow the defender as a witness always, without any exceptions, and this, in turn, would create the risk of the accused providing him only selected, incomplete information.

Looking more closely at the evidence ban under Art. 178 point 1, its grammar interpretation should be mentioned, which speaks in favor of the interpretation, in the light of which it concerns both a lawyer acting as a defense attorney of the accused in the case and a lawyer who gave legal advice to the accused, suspected or detained person, provided that contacted a lawyer. This advice or handling of

¹⁴ *Ibidem*, p. 239.

¹⁵ *Ibidem*, p. 241.

¹⁶ M. Rusinek, *Tajemnica zawodowa...*, p. 68.

¹⁷ *Ibidem*, p. 69.

the case does not necessarily apply to the one in which the defense lawyer would be questioned. It is therefore about providing legal advice not only in the course of criminal proceedings, but also, *inter alia*, when the trial was not initiated¹⁸. Still, legal advice must be relevant to the substance of the trial in which the person is or will become the accused. The ban contained in the cited provision therefore applies to all information about which he learned in connection with the provision of legal advice from the aforementioned catalog of clients in a pending case and regardless of their source. In addition, the doctrine indicates that the defender is required to appear on summons, as it is possible that he may testify to circumstances not related to the evidence ban provided for in Art. 178 of the Code of Criminal Procedure¹⁹. He also notes that even the removal of a lawyer from the list of lawyers or the waiver of the defense function in relation to the accused cannot constitute grounds for repealing this prohibition, which confirms his absolute nature. It is noteworthy that it does not include messages that the lawyer obtained before establishing his representation²⁰.

Defense secrecy is invulnerable, similar to the one indicated in item 2) of Art. 178 – the secret of confession. This means that no one can release a lawyer from her, and his testimony revealing a defense secret can never constitute evidence in the case²¹. The nature of Art. 178 of the Code of Criminal Procedure bans “is so firm that it is undeniable that it cannot be waived”²².

An important provision from the point of view of lawyer’s professional secrecy when dealing with clients is Art. 180 – both § 1 and § 2 of the Code of Criminal Procedure. Until 30 June 2015, the provision of § 1 indicated that persons obliged to maintain professional secrecy or related to the exercise of a profession or function may refuse to testify as to the circumstances to which this obligation extends, unless the court or the prosecutor exempts them from the obligation to keep mystery. The amendment of 27 September 2013, which entered into force on 1 July 2015, the provision reads: persons obliged to keep (...) secrets related to the exercise of their profession or function may refuse to testify as to the circumstances to which this obligation extends, unless the court or prosecutor for the sake of justice releases them from the obligation of secrecy, unless specific laws provide otherwise²³. Until that date, the regulation did not specify

¹⁸ Z. Kwiatkowski, *Zakazy dowodowe w procesie karnym*, Katowice 2001, p. 166.

¹⁹ *Ibidem*, p. 168.

²⁰ *Ibidem*, p. 169.

²¹ J. Szczęsny, *Głos w obronie krzyku*, <http://archiwum.rp.pl/arttykul/969906-Glos-w-obronie--krzyku.html#loginMain> (20.08.2016).

²² P. Kardas, *Ochrona tajemnicy obrończej. Kilka uwag o dopuszczalności kontroli i utrwalania treści rozmów oraz przekazów informacji realizowanych przy użyciu środków technicznych pomiędzy obrońcą a mandantem*, „Czasopismo Prawa Karnego i Nauk Penalnych” 2011, nr 4, p. 17.

²³ Act of 27 September 2013 amending the Act – Code of Criminal Procedure and some other acts (Dz.U. 2013, item 1247).

any criterion which should be followed by the procedural authority, which was subject to justified criticism. Therefore, the introduced change deserves approval due to the need to specify a new condition, which is a necessary condition for exemption from the obligation to preserve, inter alia, professional secrecy²⁴. In the justification of the draft, it was emphasized that the change was necessary to strengthen the protection of the secrets indicated in the provision, but also as part of the implementation of the judgment of the Constitutional Tribunal of 2011, which ruled that the provision of Art. 180 § 1 of the Code of Criminal Procedure to the extent that it concerns the exemption from the obligation of statistical confidentiality, from Art. 47 and 51 paragraph 2 in relation with Art. 31 section 3 of the Polish Constitution²⁵. The Tribunal indicated that the provision of Art. 180 § 1 did not guarantee the transfer of information covered by statistical secrecy to the authorities in criminal proceedings only when it was necessary and necessary, as the release from secrecy did not require any specific conditions. The reasoning of this judgment also shows that in the years 2007–2011 the prosecutor's office released from the obligation of maintaining statistical confidentiality employees of official statistics bodies in more than a hundred cases, demanding, among others issuing statistical reports²⁶. The premise introduced is analogous to that which appears in the next paragraph.

In the light of Art. 180 § 2 of the Code of Criminal Procedure, persons obliged to keep notary, lawyer and legal counsel confidential (...) may be questioned as to the facts covered by this secret only if it is necessary for the good of justice and the circumstances cannot be determined on the basis of other evidence (...). This provision – similarly to the provision of § 1 – therefore, gives, in a sense, explicit consent to violation of the essence of confidentiality in lawyer-client contacts.

Furthermore, an advocate cannot be released from the obligation of professional secrecy as to the facts he has learned of when providing legal assistance or handling a case. This provision “binds” the client who is not the master of his own secret, which once entrusted remains at the full disposal of the lawyer, but at the same time only apparently does not give the possibility of violation by state authorities due to the existence of the provision of Art. 180 § 2 of the Code of Criminal Procedure. It is worth asking yourself how it is possible that Art. 6 § 3 is in its transmission only theoretically indisputable and why in the rule of law there is a gradation and degree of indisputability of a given provision. In Art. 180 § 2 of the Code of Criminal Procedure although the legislator implies that the dismissal of a legal professional from professional secrecy is permissible only if it is necessary

²⁴ K. Dąbkiewicz, *Kodeks postępowania karnego. Komentarz do zmian 2015*, Warszawa 2015, p. 250.

²⁵ Constitutional Tribunal's judgment of 13 December 2011, OTK-A 2011, no. 10, item 116.

²⁶ *Ibidem*.

for the administration of justice and the circumstance cannot be determined on the basis of other evidence. Unfortunately, the word “only” raises huge doubts and significantly broadens the field of activity of the court or prosecutor to such extent that the release of a lawyer from professional secrecy could in its number of cases become even the rule. The wording “good of justice” with its conciseness can cause that every secret of the individual will be underestimated in the name of higher, unspecified goals.

There are currently two basic positions in literature: the definition of professional secrecy as an absolute secrecy and a relative secrecy. The starting point for the recognition of the former were considerations of professional secrecy in the context of the duty of a lawyer and a F. Payen’ view, who considered that a lawyer should strictly safeguard the secret entrusted to him by the client and should under no circumstances disclose it²⁷. No one and nothing can free him from this obligation, even the client himself. The obligation to keep a lawyer confidential may not be waived by a resolution of the bar authorities, a court decision or a client’s decision. He is not subject to any concessions, and any dispensation seeking to be released from professional secrecy would make it fictitious²⁸.

According to J. Naumann, the current wording contained in art. 180 § 2 of the Code of Criminal Procedure “When it is necessary for the good of justice” has a disadvantage of vagueness and should not be equated with the notion of doing justice. In his view, that expression is also unacceptably open and, from a juridical point of view, unacceptable, elusive and thus incomprehensible²⁹. Therefore, there is no necessary clarification as to what is this good, and also what the custody of the court, which decides on the release of a lawyer from a lawyer’s secret, is expressed. Repeatedly, lawyers are released from professional secrecy, not because it is necessary for the good of justice, but because it is simply useful for implementing the principle of establishing the truth in a trial, and the indicated utility is not a sufficient circumstance. Moreover, the provisions do not specify the criteria against which the court is to examine the fulfillment of the necessity condition. J. Naumann in the justification of his views indicates *inter alia* for the linguistic interpretation of the adjective “necessary”, noting that it is something necessary, without which in a given situation one cannot survive or without which one cannot function normally³⁰. Therefore, something that is necessary must not be confused with what is needed, useful or very useful³¹. The author emphasizes that in a situation where it is necessary to choose between the protection of lawyer’s secrecy and the dismissal of a lawyer, he is put to the test. In the face of such

²⁷ F. Payen, *O powołaniu adwokatury i sztuce obrończej*, Warszawa–Kraków 1938, p. 158.

²⁸ M. Rusinek, *Tajemnica zawodowa...*, p. 31–34.

²⁹ J. Naumann, *Zbiór Zasad Etyki Adwokackiej i Godności Zawodu. Komentarz*, Lublin 2013, p. 213.

³⁰ *Ibidem*, p. 214.

³¹ *Ibidem*, p. 215–217.

a conflict of goods, the court, wanting to protect the secret, would have to limit itself and give up the evidence available to him in the form of a lawyer's testimony. Therefore, he would have to give up the possibility of taking evidence in the name of values that stand in opposition to the principle of establishing the truth in the trial. The secret stands for justice to what it is seeking. Naumann clearly states that judges in Poland often do not reach deep into professional secrecy and do not analyze its deontological aspects. Moreover, there is a lack of a common understanding of the seriousness of the state in which legal secrets would not exist in the area of justice as a result of its complete elimination or significant limitation. It would be a state of total perversion, resulting from the lack of consideration by the court of philosophical and legal as well as constitutional and constitutional aspects³². The author also indicates that as the prosecutor's office is not a judicial system, the court releasing him from secrecy in the preparatory proceedings does not meet his needs. Therefore, such an exemption will not fulfill the condition of "necessity for justice", but will only become useful. This, in turn, according to the author's thesis, may result in the lack of a legal basis for all requests of the prosecutor's office to courts for exemption from secrecy.

Proponents of the relative nature of professional secrecy, including R. Łyczywka and S. Garlicki, firmly reject the absolute nature of professional discretion, denying the tight attachment to its absolute value. In their view, the lack of exceptions to professional secrecy may paradoxically lead to the inability to properly practice the profession of lawyer. The observance of professional secrecy cannot, in fact, be an end in itself, and the impossibility of its repeal by the client itself must be considered unacceptable. In addition, as K. Łojewski emphasizes, ruthless professional secrecy may lead to situations contrary to the legal order or principles of social coexistence. The dispute between representatives of the doctrine results, in fact, from differences in the understanding of *ratio legis* of professional secrecy. While the French concepts consider the need for legal protection of professional secrecy as a means to protect the public interest and representatives of professional groups obliged to keep it, German concepts emphasize the maintenance of professional secrecy in order to protect the privacy of the individual³³.

An opinion containing elements of the theory of ruthlessness and relativity as to the nature of a lawyer's secret is the one presented by K. Łojewski, who believes that the only interest protected by professional secrecy is the interest of the individual, because the most important is the security of the entrusted message. It is only in the background that the lawyer's interest appears, which, although it cannot be ignored, cannot be a priority³⁴. Similarly, the Voivodship Administrative Court pointed out in its judgment of 2010, stating that "lawyer's secret should (...)

³² *Ibidem*.

³³ *Ibidem*.

³⁴ K. Łojewski, *Problematyka tajemnicy zawodowej adwokata*, „Palestra” 1967, nr 3, p. 54.

serve to protect the interests of the client who uses the services of a lawyer, not to protect a lawyer”³⁵.

It is noted that the sheer need for protection of the person concerned, and thus of the individual to whom the information relates, cannot constitute a ground for recognizing the absolute nature of professional secrecy³⁶. Non-disclosure of information can serve to protect the public interest in the form of crime prevention or proper justice.

Another situation justifying this view is the indictment of a legal representative of the profession of public trust by his client. So this is the moment when the interests of the parties, which until now were identical, become divergent. At the same time, the need to determine who the secret belongs to is revealed – whether solely to the legal profession or also to the individual. Therefore, assuming the granting of professional secrecy the attribute of ruthlessness – absolute binding on the professional secrecy of a lawyer – it would be impossible to defend him against the client’s charges in connection with the duty of discretion. As a result, the injured client is endowed with full freedom to disclose the circumstances related to the provision of legal services. Therefore, in the opinion of M. Rusinek, the absolutization of professional secrecy seems to be unjust from the point of view of legal order³⁷. This view was expressed, among others in the resolution of the Supreme Court in which he expressed the following thesis: “The obligation to keep secret and everything he learned from practicing his profession, covers all his conversations with the client who are related to discussing defense in a particular case. The obligation to remain silent falls if the advocate, in connection with the content of a given conversation with his client, finds himself in the position of the accused in disciplinary proceedings or the accused in criminal proceedings”³⁸.

In my opinion, reservations are raised above all by the refund contained in Art. 180 § 2 – “this circumstance cannot be determined on the basis of other evidence”. It is nevertheless worth considering whether this general clause does not give too wide gate to the authorities conducting criminal proceedings to refrain from taking complex actions to provide reliable evidence in the case and take a faster and easier way, namely releasing a lawyer from professional secrecy, obtaining confidential information by the client and violation of his right to privacy.

In considering professional secrecy, reference should be made to private secrecy, which protects private interests, which in turn must be derived from the constitutional right to privacy. Private secrecy is perceived in the doctrine as

³⁵ Judgment of the Voivodship Administrative Court in Wrocław of 28 May 2010, I SA/Wr 1918/09, Lex no. 706310.

³⁶ M. Rusinek, *Tajemnica zawodowa...*, p. 38.

³⁷ *Ibidem*.

³⁸ Resolution of the Supreme Court of 29 November 1962, VI Ko 61/62, Lex no. 1634715.

a subjective right to undisclosed information belonging to the sphere of private life, protecting man from discovering the secrets of this sphere, which he is not obliged to disclose³⁹. It can therefore be concluded that the provision of Art. 180 § 2 of the CCP is not only a *lex specialis* in relation to art. 6 clause 3 of the Law on the Bar, but also constitutes an exception to the right to privacy protected by the Constitution. Protection of this right included in Art. 47 of the Constitution was challenged by itself in the same provision recognizing the exceptions that may be included in statutes. Therefore, this exception extends to current and future regulations. Because of this, it becomes so extensive and generalized that it can threaten the essence of constitutional principles and rules.

How can one determine, without prejudice to legal principles and rules, whose interests are more important in a given situation? Since, therefore, in the light of Art. 180 § 2 of the Code of Criminal Procedure persons listed therein and obliged to maintain professional secrecy may be questioned as to the facts covered by this secrecy only if it is necessary for the good of justice, there is doubt as to why the good of justice should be considered more important than the good of the individual. Defenders of the public interest may argue for such a choice by the number of people to whom the good relates. However, if one considers the amount of abuse that may arise in connection with too hasty dismissal of legal professionals from professional secrecy, it may turn out that the “sum” of these disclosures will exceed the number of persons or situations benefiting from this disclosure and representing the total interest public or state.

Undoubtedly, in the aspect of collision assessment art. 6 PPA and Art. 180 § 2 of the Code of Criminal Procedure jurisprudence plays an important role, among others in common courts. As noted by P. Feliniak, in the overwhelming majority of cases, the courts of first instance are willing to revoke a secret protected by law, but in the second instance they approach it with due respect⁴⁰. First of all, it is worth pointing out the decision of the Cracow Court of Appeal in the decision of 2009, “release from secrecy is an exception to the principle of refusing to testify. The use of an exception should be justified and the exception may not be freely extended”⁴¹. The court further states that the *ratio legis* of the provision of Art. 180 § 2 of the Code of Criminal Procedure is not in the willingness to learn certain facts by the release entity from secrecy, but in the desire to obtain information necessary for justice. It is necessary, however, as the Court emphasizes, to show that there is no other evidence to examine those facts, the importance of which must be properly emphasized in the order exempt from secrecy. The court also opposes the recognition of professional secrecy in

³⁹ *Ibidem*.

⁴⁰ Judge of the Appellate Court in Lodz P. Feliniak, *Professional secrecy in the jurisprudence of common courts and the Supreme Court in the context of new legislative solutions*, Conference: *Contemporary challenges for professional secrecy*, Lodz, 29 September 2016.

⁴¹ Decision of the Court of Appeal in Cracow dated 13 January 2009, II AKz 651/08.

the trial as a harmful obstacle and its annulment as a mere formality without any meaning⁴².

It is also worth quote the resolution of seven judges from 16 June 1994. The Supreme Court at the time decided that “an advocate may refuse to testify as to the circumstances to which the obligation of secrecy extends, as specified in Art. 6 of the Act of 26 May 1982 – Law of the Bar (...), unless the court or the prosecutor dismisses him pursuant to Art. 163 of the Code of Criminal Procedure from the duty of secrecy. This release may occur only if disclosure of the circumstances covered by the secrecy – by hearing a lawyer as a witness – is necessary for proper judgment in the case”⁴³. The paradox of this situation was the view of the then chairman of the adjudicating panel A. Murzynowski, in the light of which the cases of dismissal of a lawyer from the obligation of professional secrecy for cases of crimes should be kept to a minimum, in which the testimony of a lawyer proves necessary and cannot be replaced by a means of evidence to establish whether such an offense was committed by the accused⁴⁴. By weighing the proportions of the value of protected goods underlying professional secrecy and those related to the need to establish material truth in the trial, the creators of the code preferred procedural ideas⁴⁵. The Codification Committee, which results from the justification of the CCP draft, choosing between the need to detect material truth in the criminal trial and the obligation to keep professional secrecy, gave an advantage to the needs of the judiciary. The legal community strongly criticized the above-mentioned Supreme Court Resolution, which was reflected in, among others in the Resolution of the National Council of Legal Advisers of 9 September 2003, indicating too frequent releases from professional secrecy on the basis of excessively vague grounds. According to the National Council, such an exemption can take place only in exceptional circumstances, and the reasons for such decisions must be formulated precisely and without being limited to enigmatic statements indicating that the circumstance cannot be determined on the basis of other evidence. In addition, the release from professional secrecy should be – in the light of the content of the Resolution cited above – a completely unique situation also for the sake of the justice system itself and preceded by a responsible consideration of all statutory conditions permitting a departure from the cardinal principle guaranteeing confidentiality of relations with the client⁴⁶. The court is obliged to prove in detail the premise of “good justice” and the inability to determine, so far and in the future, a specific circumstance by other

⁴² *Ibidem*.

⁴³ Resolution of the Supreme Court of 16 June 1994, I KZP 5/94, OSNKW 1994, no. 7–8, item 41.

⁴⁴ A. Murzynowski, *Refleksje na tle Uchwały Naczelnej Rady Adwokackiej dotyczącej tajemnicy adwokackiej*, „Palestra” 1994, nr 11, p. 53–56.

⁴⁵ *Ibidem*.

⁴⁶ Resolution no. 594/V/ 2003 of the National Council of Legal Advisers of 9 September 2003, „Radca Prawny” 2003, nr 6, p. 6.

evidence. The author emphasizes that it is also unacceptable to accept that the protection of the good of justice is necessary only because of the nature of the alleged acts and the extent of the damage⁴⁷.

J. Giezek presents a completely different view on this conflict in law. The author finds it incorrect to state that legal secret is confidential information intended for a given circle of addressees, which should not be disclosed to unauthorized persons. In his opinion, the secret is a reflection of the relationship between the communicator and the recipient⁴⁸. J. Giezek then considers the nature of the secret, analyzing the meaning of Art. 6 of the Law of the Bar. In his interpretation, the author departs from the literal wording of the recipe. In his opinion, despite the term “everything a lawyer learned about giving legal advice” in the provision, the meaning of “everything” should be limited, because not all information obtained from the client is of equal value. Often, an attorney obtains information from the client which, as it turns out in the course of the case, does not constitute any secret in the course of the pending proceedings, because they are well known to the authorities that conduct it⁴⁹. The author also points to the obligation of the advocate to cumulatively carry out tasks in the form of secrecy of everything he has learned in connection with the provision of legal services and protection against disclosure or undesirable use of the knowledge obtained in accordance with § 19 of the Code of Bar Ethics. In further considerations, J. Giezek is looking for an answer to the question whether the use of this information determined in this way is tantamount to disclosure of confidentiality. The answer, according to the author, should be sought for the intention behind the wrong actions, consisting in using information in a manner inconsistent with the above-mentioned provision. Disclosure does not have to be intentional, while the use should be understood as using one purpose to achieve some benefit.

At the end of the reflection, it is also worthwhile to point out the above-mentioned guarantees protecting lawyer’s secret, point to Art. 168a introduced by the Act of 27 September 2013 amending the Act – Code of Criminal Procedure and some other acts⁵⁰. This provision is a relatively “narrow attempt to adapt to Polish law the Anglo-Saxon doctrine of the ban on the use of «fruit of the poisoned tree»”⁵¹, consisting in the ban on the use of evidence in the process resulting from the

⁴⁷ Z. Kłatka, *Wykonywanie zawodu radcy prawnego i adwokata*, Warszawa 2004, p. 70.

⁴⁸ J. Giezek, *Tajemnica adwokacka – wartość względna czy absolutna? O nieujawnialności informacji objętych tajemnicą adwokacką* [in:] *Etyka adwokacka a kontradiktoryjny proces karny*, eds. J. Giezek, P. Kardas, Warszawa 2015, p. 185.

⁴⁹ *Ibidem*.

⁵⁰ Act of 27 September 2013 amending the act – Code of Criminal Procedure and some other acts (Dz.U. 2013, item 1247).

⁵¹ P. Czarnecki, *Dowód z czynności operacyjno-rozpoznawczych w postępowaniu karnym*, <https://nawokandzie.ms.gov.pl/numer-21/dobre-praktyki-numer-21/dowod-z-czynnosci-operacyjno-rozpoznawczych-w-postepowaniu-karnym.html> (10.09.2016).

illegal activities of investigative bodies⁵². This is confirmed by the Supreme Court in its judgment of 2 February 2016, indicating that the currently applicable Art. 168a of the Code of Criminal Procedure does not prohibit the use of “fruit of the poisoned tree”, as it only concerns the prohibition of carrying out and using direct illegal evidence⁵³. The Court noted that the majority of representatives of the doctrine support the admissibility of using in criminal proceedings the so-called evidence indirectly contaminated, and thus obtained as a result of other evidence, referred to as illegal evidence – defective, i.e. one of procedural irregularities causing inadmissibility of its use in criminal proceedings.

In my approach to the lawyer’s secrecy in Poland, one can notice some fluctuations as to its absolutization. At the beginning of the 20th century and for the next decades, it was considered absolute that in the period of strong computerization and threats of terrorism it should be limited in favor of the so-called public good or the justice system, and as a result reach the point where it once again gains its once lost rank due to the excessive use of the abovementioned goods in order to evade it. Undoubtedly, the amendment to the Code of Criminal Procedure of July 2015 contributed to its strengthening, taking into account the good of the judiciary as a condition for dismissal from professional secrecy and the opportunity to lodge a complaint against the decision of the court or prosecutor in this regard. However, it is still in vain to look in the court’s justifications for an appropriate argument for releasing a lawyer from secrecy in the name of an indefinite good of justice. In the lawyer’s opinion, the criminal procedure should provide for additional safeguarding of lawyer’s secrecy, such as the requirement of an adequate and detailed justification in the event of the necessity of its annulment.

It should also be noted that in the face of a collision of the individual’s personal rights and the good of justice, it is hard to ever justify the superiority of the former because they are marginalized as part of achieving the “higher purpose”, which appears to be to reach the truth and the public interest. It is therefore a kind of uneven fight in which the individual is doomed to lose.

The evolution of the right to privacy and other legally protected goods in opposition to it shows that one hundred percent indisputability of professional secrecy is not possible. Despite this, taking away its attribute of absoluteness does not have to mean approval of the broad catalog of cases of its repeal. In the context of *de lege ferenda* applications, legal confidentiality could therefore be regarded as relative, but with the exception of the possibility of its annulment based on the grounds of the Code of Criminal Procedure and taking into account the release of a lawyer by the individual. Therefore, in the light of the proposed changes, the lawyer’s secret would not belong to the lawyer but to his client.

⁵² Fourth Amendment to the United States Constitution.

⁵³ Supreme Court judgment of 2 February 2016, IV KK 346/15.

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RODZAJE ORAZ CHARAKTERYSTYKA GWARANCJI SŁUŻĄCYCH OCHRONIE TAJEMNICY ZAWODOWEJ W WYKONYWANIU ZAWODU ADWOKATA W PRAWIE POLSKIM

Streszczenie

Przedmiotem artykułu są rodzaje oraz charakterystyka gwarancji stworzonych w celu ochrony prawniczej tajemnicy zawodowej w Polsce. Jest to nierozdzielnie związane z jej charakterem i rolą w wykonywaniu zawodu prawniczego. Gwarancje te są jednym z najważniejszych czynników ochrony prawnej tajemnicy zawodowej – kluczowej nie tylko dla klienta, samego prawnika, ale także dla całego systemu ochrony prawnej. Zwrócono również uwagę na główne kwestie dotyczące tajemnicy prawniczej w procesie karnym związane z konfliktem dóbr chronionych przez system prawny. Dlatego też autorka podkreśliła znaczenie zakazów dowodowych, które są gwarantem i elementem budującym zaufanie między stronami, które powierzyły sobie tajemnice w procesie komunikacji związanej – w przypadku tajemnicy prawniczej – z obsługą prawną. Ponadto istnieje obecnie wzmożona potrzeba ochrony prawa do prywatności, co też zostało zauważone oraz podkreślone w niniejszym opracowaniu.

Słowa kluczowe: gwarancje, zawód prawniczy, tajemnica zawodowa, prawo procesowe, prawo do prywatności

Summary

The types and characteristics of guarantees created to shield Polish legal professional secrecy are the subject of this article. It is inseparably connected with the character and role of it in performing legal profession. Those guarantees are one of the most important factors in protecting legal

professional confidentiality – not only crucial for the client but also for the whole legal protection system. Additionally, the main issues of lawyer's secrecy in a criminal trial associated with a conflict of goods protected by the legal system have also been noted. Therefore, the author noticed the importance of evidence bans that are a guarantor and an element that creates trust between the parties who entrusted themselves with secrets in the process of communication related – in the case of lawyer secrets – to legal services. Moreover, there is now an increased need to protect the right to privacy, which was also observed and emphasized in this article.

Keywords: guarantees, legal profession, professional secrecy, procedural law, right to privacy