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Disciplinary liability of attorney-at-law for breach professional secrecy

*Odpowiedzialność dyscyplinarna radcy prawnego za złamanie
tajemnicy zawodowej*

ABSTRACT

In this research paper, the issue of disciplinary liability for breach of professional secrecy of attorney-at-law will be presented. The concept of the above ethical norm will be shown in a narrow way to the profession of attorney-at-law and the rules functioning on the basis of the Code of Ethics of Attorney-at-law and selected statutory regulations relating to this issue. This subject is fundamental issue for the activity of attorney-at-law, setting boundaries for their scope of operation and for the protection of rights of the subject of a legal action. Shaping the mechanisms of disciplinary responsibility is a guarantee of the proper performance of its functions by The National Bar of Attorneys-at-Law, which is an important part of the entire legal system in Poland and motivates an exhaustive analysis. Moreover this issue goes back to the primary aspects of the existence of disciplinary proceedings, i.e. the basis of attorney-at-law's liability under professional ethical principles. The formation of mechanisms for the functioning of professional secrecy is guarantee of the above assumption and therefore deserves an exhaustive analysis. The above article will also point out the operation of troublesome discrepancies in the regulations on professional secrecy of attorney-at-law and liability for its violation.

Keywords: disciplinary liability, professional secrecy, professional ethics, profession of attorney-at-law.

INTRODUCTION

Ethical standards has received much attention in recent time. Especially in legal professions but still disciplinary law isn't honoured in Polish legal order. However disciplinary proceedings is based on a disciplinary liability and received compen-

sation function¹, which is important in system maintaining ethical standards in The National Bar of Attorneys-at-Law. On this background, there is a system that sets limits on the liability of attorney-at-law for breaches ethical standards. One of the most serious ethical violations is breaking a professional secret, which constitutes grounds for disciplinary liability.

PROFESSIONAL SECRECY OF ATTORNEY-AT-LAW

Polish legislation does not define the concept of secrecy in a clear way. In principle, it would not be wrong to assume that when the legislator refers to this it means the exclusion of information, fact or document from public view². The lack of a structured definition leads to the need to construct its boundaries on the basis of several legal acts (the Act on Attorney-at-law of 6 July 1982, the Code of Criminal Procedure of 6 June 1997, the Code of Ethics of Attorney-at-law of 22 November 2014). Regulation of professional secrecy in many normative acts, with different status leads to the conclusion that it is a very complex legal institution. It consists of various obligations and rights of many entities³.

According to article 3.3 of the Act on Attorney-at-law, attorney-at-law is obliged to keep secret everything he has learned in connection with providing legal assistance⁴. Article 3.5 of the Act on Attorney-at-law stipulates that attorney-at-law may not be exempt from the obligation of professional secrecy regarding the facts which he has learned while providing legal assistance or conducting the case⁵. On the grounds of the Act on Attorney-at-law, observance of professional secrecy is established in a virtually absolute manner, with only two exceptions (the obligation of professional secrecy does not apply to information: 1) made available on the basis of the provisions of the Act on Prevention of Money Laundering and Financing of Terrorism, 2) transmitted on the basis of Chapter 11a Section III of the Act of August 29, 1997 – Tax Ordinance).

Professional secrecy also operates under criminal law. Against the background of criminal law regulations, a conflict of protected values has arisen – the protection of professional secrecy and the interests of justice. The main issue in this matter

¹ See: W. Lang, *Struktura odpowiedzialności prawnej (Studium analityczne z dziedziny teorii praw)*, “Zeszyty Naukowe Uniwersytetu Mikołaja Kopernika w Toruniu. Nauki Humanistyczno-Społeczne” 1968, nr 31.

² M. Jabłoński, J. Węgrzyn, *Ochrona tajemnic w polskim porządku prawnym – tajemnica radcowska i adwokacka* [in:] *Przegląd Prawa i Administracji* XCV, Wrocław 2013, p. 65.

³ Jaroszyński T., Sękowska A., Skuczyński P., *Kodeks Etyki Radcy Prawnego. Komentarz*, Warszawa 2016, pp. 98–99.

⁴ Ustawa o radcach prawnych z 6 lipca 1982 roku. Dz.U.2020.75.

⁵ *Ibidem*.

is the admissibility of hearing the attorney as a witness. Pursuant to Article 178 of the Code of Criminal Procedure, attorney-at-law acting under Article 245 § 1 may not be questioned about the facts of which he became aware while giving legal advice or conducting a case⁶. Nevertheless, on the basis of the regulations of the Code of Criminal Procedure, a premise is allowed, which allows questioning about facts covered by this secrecy when it is necessary for the good of justice and the circumstance cannot be established by other evidence (Article 180 § 2). Central problem with this possibility is the imprecision of the terms, in which the court may allow the hearing of the attorney-at-law⁷.

DISCIPLINARY LIABILITY FOR BREACH PROFESSIONAL SECRECY

Undoubtedly, professional secrecy is a statutory guarantee and its violation is subject to criminal liability⁸. However, breach of professional secrecy is also subject to disciplinary liability under the Code of Ethics for Attorney-at-law. According to article 15.1 of that Code, attorney-at-law is obliged to keep in secret all information concerning the client and its affairs disclosed to attorney-at-law by the client or obtained in any other way in connection with the performance of any professional activities by him regardless of the source of the information, the form and manner in which it was recorded⁹. In addition, professional secrecy is specified as not only a right but also a duty¹⁰. The qualification of the above legal institution to the duties of attorney-at-law is extended in Article 19. According to it, attorney-at-law should take all measures prescribed by law to avoid or limit his exemption from the obligation of professional secrecy¹¹. The purpose of such regulation is to minimize the

⁶ Kodeks postępowania karnego z dnia 6 czerwca 1997 roku, Dz.U.2021.534.

⁷ Cf. M. Rusinek, *Tajemnica zawodowa i jej ochrona w polskim procesie karnym*, Warszawa 2007, pp. 138–172.

⁸ Pursuant to Article 266 § 1 of the Penal Code, whoever, contrary to the provisions of the Act or to the obligation assumed by him, discloses or uses information coming to his knowledge in connection with his function, work, public, social, (business or scientific) activity, shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years. (Kodeks karny z 6 czerwca 1997 roku Dz. U. 1997 nr 88 poz. 553).

⁹ Załącznik do uchwały Nr 3/2014 Nadzwyczajnego Krajowego Zjazdu Radców Prawnych z dnia 22 listopada 2014 roku, Kodeks etyki radcy prawnego.

¹⁰ Jurisprudence of the Constitutional Court indicates that the provisions on professional secrecy give this legal institution the rank of an obligation. See: the judgment of the Constitutional Tribunal of 22 November 2004, SK 64/03 and cf. Jaroszyński T., Sękowska A., Skuczyński P., *Kodeks Etyki Radcy Prawnego. Commentary*, Warsaw 2016, p. 67.

¹¹ *Ibidem*.

risk of unlawful disclosure of information covered by it in the course of activities undertaken by public authorities¹².

In the area of professional ethics, professional secrecy is an absolute obligation imposed on attorney-at-law. Thus, regardless of the legislative rationale – the duty to maintain secrecy is ethically absolute. This means that even if the law allows the lawyer to be released from professional secrecy, he is obliged to keep it (also in the situation of release from it by the client)¹³. It follows that attorney-at-law may be summoned as a witness by a court, but this does not exempt him from disciplinary liability under the Code of Ethics for violation of professional secrecy. In order to avoid conflict, attorney-at-law should refuse to answer questions related to the possession of information obtained in connection with the provision of legal assistance.

Attorney-at-law is a profession of public trust and only by maintaining the highest ethical standards is it possible to properly fulfill one's duties in serving clients. That is why the protection of professional secrecy is so important and, in the event of its violation, attorney-at-law can be held responsible for disciplinary liability. In view of the above, it is important that all violations of the obligation to respect professional secrecy be subject to appropriate legal consequences aimed at restoring an exemplary model of attorney-at-law behaviour and creating an appropriate image of a professional attorney¹⁴. Pursuant to Article 64(1) of the Attorney-at-law Act he is subject to disciplinary liability for conduct inconsistent with the law, rules of ethics or the dignity of the profession. The act of violating professional secrecy by attorney-at-law meets the prerequisites of this provision, as it violates the law, i.e. Article 3 of the Attorney-at-law Act, embezzles the adviser's oath set out in Article 27 of the Attorney-at-law Act and violates Article 19 of the Code of Ethics¹⁵.

CONCLUSION

Professional secrecy is the basis of the Attorney-at-law's activities on behalf of the client. It should, therefore, be an institution particularly protected by Polish legislation. Recently, however, there has been a statutory trend to reduce its scope. Despite this, professional associations guard the importance of its absolute observance. Moreover, in the literature there is an aspect of the possibility of in-

¹² T. Jaroszyński (ed.), *op. cit.*, p.121.

¹³ <https://codozasady.pl/p/tajemnica-adwokacka-i-radcowska-w-polsce>.

¹⁴ N. Wojtkowska, Odpowiedzialność dyscyplinarna radcy prawnego za naruszenie tajemnicy zawodowej – na przykładzie wybranych orzeczeń sądowych [in:] "Zeszyty Naukowe Uniwersytetu Rzeszowskiego", zeszyt 111/2020, p. 423.

¹⁵ https://www.temidium.pl/artykul/radca_prawny_jako_swiadek_w_swietle_przepisow_proceduralnych_i_kodeksu_etyki_radcy_prawnego-6349.html

cluding the repeal of professional secrecy in the absolute prohibitions on evidence without exceptions¹⁶. The analysis of this problem indicates the operation of troublesome discrepancies in the regulations concerning the professional secrecy of attorney-at-law and liability for its violation. Regulations presented in the above paper research constitute a complicated issue of professional secrecy, exemption from it for attorney-at-law and disciplinary liability.

LITERATURE

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ABSTRAKT

W niniejszej pracy zaprezentowana zostanie problematyka odpowiedzialności dyscyplinarnej za naruszenie tajemnicy zawodowej radcy prawnego. Koncepcja powyższej normy etycznej zostanie ukazana w sposób zawężony do zawodu radcy prawnego i zasad funkcjonujących na gruncie Kodeksu

¹⁶ For more on the issue of professional secrecy in the aspect of prohibitions of evidence and conflict situations see: P. Kardas, *Zasady ochrony tajemnicy adwokackiej w polskim systemie prawa. (Kilka uwag o praktyce sądów w zakresie zwalniania adwokatów z obowiązku zachowania tajemnicy zawodowej w postępowaniu karnym)* [in:] M. Mrowicki (ed.), *Ochrona tajemnicy adwokackiej (radcy prawnego) a działania władzy*, Warszawa 2019.

etyki oraz wybranych regulacji ustawowych odnoszących się do tej problematyki. Powyższy temat jest fundamentalnym zagadnieniem dla działalności radców prawnych, wyznaczania granic zakresu ich funkcjonowania oraz dla ochrony praw podmiotu czynności prawnej. Kształtowanie mechanizmów odpowiedzialności dyscyplinarnej jest gwarancją prawidłowego wykonywania funkcji przez samorząd radcowski, co stanowi istotny element całego systemu prawnego w Polsce i motywuje wyczerpującą analizę. Zagadnienie to sięga ponadto do pierwotnych aspektów istnienia postępowania dyscyplinarnego, tj. podstaw odpowiedzialności radcy prawnego z tytułu zasad etyki zawodowej. Ukształtowanie mechanizmów funkcjonowania tajemnicy zawodowej stanowi gwarancję powyższego założenia i dlatego zasługuje na wyczerpującą analizę. W powyższym artykule wskazane zostanie również funkcjonowanie kłopotliwych rozbieżności w przepisach dotyczących tajemnicy zawodowej radcy prawnego i odpowiedzialności za jej naruszenie.

Słowa kluczowe: odpowiedzialność dyscyplinarna, tajemnica zawodowa, etyka zawodowa, radca prawny.