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ARTICLE

Attorney-client privilege in Polish law and legal practice – on legal gaps and some controversial matters

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Abstract
This article presents the legal framework of attorney-client privilege in Poland, indicating situations when an attorney is entitled or obliged to reveal information covered, in principle, by professional secrecy, as well as the consequences of an attorney's erroneous evaluation in this regard. The author refers to provisions which require legal amendment or functional interpretation in order to guarantee respect for attorney-client privilege in legal proceedings, pointing out also controversial interpretations in court practice of what, in principle, are clear legal provisions relating to attorney duties. Finally, the poor perspective for changes in relevant field and the reasons for this are explained.

Keywords Attorney-client privilege · Professional secrecy · Criminal proceeding

1 Attorney-client privilege in legal provisions

Attorney-client privilege creates a right on the part of an individual represented by an attorney and an obligation on the part of the latter to, as formulated in Polish attorney law,[1] *keep secret everything they have learned in connection with providing legal assistance*. Its importance was underlined by the statutory prohibition on releasing an attorney from their obligation of professional secrecy with regard to facts learned

[1] Art. 6.1 and 6.2 of the Law on Advocacy of 26.5.1982, Art. 3.3 and 3.4 of the Law on Legal Advisers of 6.7.1982. In the past, the performance of both professions was regulated differently. Currently, the differences regarding the provision of legal services are small and of a secondary nature.

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while providing legal assistance or conducting a case.[2] However, since the essence of providing legal assistance is to act in the interests of and for the benefit of a client, it is necessary to specify what falls within the scope of the above-mentioned *everything*, creating a framework of attorney-client confidentiality and to specify the extent to which attorney-client privilege can be limited when it collides with other legal values.

1.1 Acting to the benefit of a client (and 'desirable use' of entrusted information)

In accordance with para. 19.1 of the Polish Code of Advocate Ethics, *an attorney is obliged to keep confidential and protect against disclosure or undesirable use everything they have learned in connection with the performance of their professional duties*. This wording indicates that a distinction should be made between a *desirable* use of information revealed to attorney in connection with providing legal assistance and an *undesirable* one, which should be avoided.[3] *Desirable* use of what was learned by an attorney while performing professional duties is not only not prohibited, but even necessary to ensure the proper provision of legal assistance; otherwise an attorney might be accused of failing to take action which was indispensable to proper care for a client's interest.[4] Therefore the revealing of information by attorney in course of legal proceeding towards entities to whom it should be presented for the benefit of a client and with the client's approval (or at least with no objection on their part[5]) falls outside the scope of an attorney's statutory obligation to keep secret everything they have learned in connection with providing legal assistance.[6] Since it is the attorney who decides what information shall be revealed in legal proceeding for the benefit of their client – and such an assessment can differ on the part of different attorneys or even on the part of the same attorney at different stages of legal proceeding – the basic difference between *desirable* and *undesirable* use of information is the intention with which the information is used.[7]

[2] Art. 6.3 of the Law on Advocacy, Art. 3.5 of the Law on Legal Advisers.

[3] In case law, a distinction is drawn between information acquired *in connection with the provision of legal assistance* (in *providing legal assistance or handling a case*) and information gathered while cooperating with a client, or acquired in connection with providing legal services as a part of work performed (*e.g.*, in dividing up work in a company, in circulating documents or even in preparing a legal opinion and the position expressed in it on legal matters). The former is covered by attorney- client privilege, while the latter is not. (Judgment of Constitutional Court of 22.11.2004 (SK 64/03, OTK ZU 10A/2004/107), para 58; decision of Appeal Court in Kraków of 14.11.2017 (II AKz 432/17)).

[4] *Chojniak* [8], pp. 144-145; *Giezek* [11], pp. 103-104; *Giezek* [12], p. 191.

[5] *Giezek* [10], pp. 60-72; *Baszuk* [2], p. 121. Although it has also been observed that an attorney, while performing professional activities, enjoys full freedom and independence, *e.g.*, in deciding what the *desired* use of information revealed to them in connection with providing legal assistance is. The absence of the client's approval in this regard results in a lack of trust, which will make cooperation between attorney and client impossible. *Naumann* [22], p. 66-70; decisions of Higher Disciplinary Court of Attorneys of 18.10.2018 (WSD 52/08) and of 10.1.2009 (WSD 64/08).

[6] Judgment of Supreme Court of 20.12.2007 r. (SDI 28/07).

[7] *Baszuk* [2], pp. 120-121.

1.2 Statutory exclusions from attorney-client confidentiality

If disclosure of information might be undesirable for a client, an attorney should protect it. However, professional secrecy does not apply to information, which should be made available to authorities on the basis of provisions on counteracting money laundering and the financing of terrorism and information about tax optimalisation schemes that have been made available to clients, as defined in provisions of the Polish Tax Code, to the extent specified in these regulations.[8] The first of these exclusions applies where an attorney acts as a property and financial intermediary.[9] In accordance with the second exclusion, an attorney is obliged to report a tax optimalisation scheme,[10] when their client, as the beneficiary of such a scheme, releases them from the obligation to keep this information secret: otherwise the obligation to report a tax optimalisation scheme passes to the beneficiary thereof.

An attorney is also subject to criminal liability for any failure to notify an offence from the constantly expanding list included in Art. 240 of the Polish Penal Code, covering selected crimes: crimes against peace, humanity and war crimes, crimes against the State, public safety, life and health, and freedom, sexual crimes, taking a hostage and terrorist crimes, unless the attorney could reasonably assume that the authorities knew about the offence or else the attorney prevented its commission.[11]

1.3 Court decision to release attorney from professional secrecy

Information covered by attorney-client privilege, where disclosure might be undesirable to client, can also be revealed by an attorney in criminal proceedings on the basis of court consent. Except for cases where information falls within the scope of non-disclosable defender privilege covering facts communicated to an attorney while giving legal advice or conducting a case (Art. 178 of the Polish Code of Penal Procedure), a court can release an attorney from professional secrecy if this is *in the prevailing interest of the justice* and the relevant circumstances *cannot be determined on a basis of other evidence* (Art. 180 para. 2 of the Polish Code of Penal Procedure). A court decision in this matter can be challenged in appeal proceedings. Due to the fact that in investigative proceedings, a decision in this matter is taken by the court on the basis of the public prosecutor's request, without hearing an attorney, an appeal will be the first opportunity to present the attorney's position on this matter.[12]

Although the practical application of the exceptional provision enabling the release of an attorney by a court from professional secrecy – which is perceived as one of the pillars of the right to defence - should be narrow, its practical application,

[8] Art. 6.4 of the Law on the Advocacy and Art. 3.6 of the Law on Legal Advisors.

[9] Art. 2.1.14 of the Law of 1.3.2018 on counteracting money laundering and financing of terrorism.

[10] A tax optimalisation scheme is a solution, the main benefit of which (or one of the main benefits of which) is a tax advantage where the taxpayer could reasonably choose an alternative course of action, which would not involve obtaining such a benefit and where the scheme has at least one of the so-called "general hallmarks" specified in the statute.

[11] Cf. Wystąpienie generalne RPO z 7.3.2018 r. do Ministra Sprawiedliwości, p. 3-4; available at: http://www.rpo.gov.pl/sites/default/files/RPO do MS ws. karalności za niezawiadomianie o przestępstwie.pdf.

[12] *Misztal* [20], p. 137.

which has been observed by attorney bars[13] and human rights activists, has been increasing recently. The Helsinki Foundation for Human Rights, a widely recognised Polish non-governmental organisation, analysed in 2018 decisions of Polish courts on releasing attorneys from professional secrecy in criminal proceedings, on the basis of a public prosecutor's request. Out of 242 identified court decisions referring to 262 attorneys, 179 (almost 74%) were positive in first instance, but ultimately only 46 decisions (19%) were upheld by an appeal court.[14] In the grounds offered for their decisions, the courts referred to the scope of attorney-client privilege (*e.g.*, whether it includes the client's image and identity), the need to precisely indicate circumstances to which the attorney would testify (in order to avoid exemptions of a blank nature regarding *other significant circumstances that would arise during the questioning of a witness*)[15] and the need for a proper justification of a request to release an attorney from professional secrecy. *The prevailing interest of the justice* was justified by the importance of the circumstances to be explained, the significance of the legal value infringed by the offence and the seriousness of its consequences, whereas the right to privacy of the individual as a counterweight to the interests of justice was rarely considered.[16] In the grounds provided for their decisions, courts referred also to earlier case law pointing to the importance of attorney-client privilege to *the proper functioning of the judiciary in a democratic state ruled by law*.[17] The *impossibility to determine relevant circumstance on the basis of other evidence*, creating a second ground for the revocation of attorney-client privilege, was interpreted literally and excluded in a situation in which certain information was known by the authorities, but still needed to be verified by reference to additional evidence.[18]

This generally positive image of judicial perceptions of the importance of attorney-client privilege comes with the caveat that the existing legal formula for releasing attorneys from professional secrecy may still open the door to arbitrary judgments in this field and its application even to petty offences if a circumstance to be clarified is of certain significance and can be established only on a basis of revealing confidential information. Although the court must in each case consider the proportionality of any interference with the right to privacy, an approach of deciding solely on the basis of a literal understanding of a single legal provision, without reference to general legal principles, can be still seen in the case law.[19]

1.4 Rights of attorney in legal proceedings

Another example of circumstances in which a disclosure by an attorney of information which may be undesirable to a client falls outside the protective scope of

[13] *Giezek*, *Gutowski*, *Kardas* [13], pp. 9-10.

[14] *Wolny* [31], pp. 72-73.

[15] *Wolny* [31], pp. 77-78.

[16] *Wolny* [31], pp. 74-75.

[17] Decision of Appeal Court in Szczecin of 29.10.2013 (II AKz 330/13, OSASz 2014/2/37).

[18] *Wolny* [31], pp. 75-76.

[19] *Wolny* [31], pp. 78-79.

attorney-client privilege, is provided by the situation of where attorney-client confidentiality would deprive an attorney of basic legal protection. An attorney may fall victim to an offence carried out to their detriment by a client, *e.g.*, extorting a legal service without paying for it, threatening an attorney or insulting them. In such case, as it is indicated by representatives of attorney disciplinary courts, the personal data of a client who has been provided with legal assistance as well as documents (*e.g.*, invoices,[20] or correspondence including penal threats, blackmail or insults), which should allow the attorney to commence criminal or civil proceedings and to submit necessary evidence, can be revealed to the authorities. However, even in such a case, the attorney must not disclose any circumstances related to the client's own affairs but rather must limit themselves to those relating to the crime itself.[21]

An attorney may also, in connection with the content of conversations with clients, be found in the position of an accused in disciplinary or criminal proceedings. In such a case - as was indicated in a Supreme Court resolution issued in the 1960s - the attorney's obligation to remain silent about all conversations had with a client falls away, even if it relates to a discussion of the defence in a particular case, because of the fundamental right to a defence. Otherwise an attorney would be in a worse position than any other accused person.[22] Although self-government of attorneys expressed its support for this resolution, emphasising in addition that disclosure of information is acceptable only to the extent necessary for an attorney's defence,[23] exercising the attorney's right to defence by disclosing information covered, in principle, by attorney-client confidentiality is still a delicate issue.[24]

2 Consequences of violation of attorney-client confidentiality

Statutory provisions governing attorneys prohibit in principle the release of attorneys from professional secrecy with regard to facts learned while providing legal assistance or conducting case. This rule was emphasised by the Polish Supreme Court in its case law, when the court indicated that *person to whom legal assistance is provided may not release an attorney from the obligation to maintain confidentiality. Attorney-client privilege is regulated in statute and intended to protect not only private interests, but also the interest of professional self-government and the prevailing interest of the justice. For this reason, attorney-client privilege is jus cogens and not jus dispositivum.*[25] A client's consent may not release an attorney from professional

[20] Judgment of Supreme Administrative Court of 21.9.1998 (I SA/Ka 2214-2223/96, ONSA 1999/3/88), according to which *attorney- client privilege does not cover data, which should be included in financial documents* (*invoices, bills, etc.*); *therefore an attorney shall not refuse to present such documents to competent authorities, including tax authorities.*

[21] *Cydzik* [9].

[22] Resolution of Supreme Court of 29.11.1962 (VI KO 61/62, OSNKW 7–8/1962/157).

[23] Resolution of Presidium of Supreme Attorney Bar Council of 10.11.1966 (Palestra 1966/12/137-138).

[24] *Banach*, *Smarzewski* [1], pp. 44-45; *Baszuk* [3], pp. 256-257; *Baszuk* [4], pp. 168-173; *Chojniak* [7], pp. 285-294; *Kociubiński* [16], pp. 208-213; *Malicki* [17], s. 217.

[25] Decision of Supreme Court of 2.6.2011 (SDI 13/11), Similarly: decision of Supreme Court of 15.11.2012 (SDI 32/12).

secrecy, unless the contrary is provided for in statute (*e.g.*, regarding tax optimalisation schemes): it is for the attorney to decide what a desirable use of information is, falling within the scope of attorney-client privilege.[26] Any decision in this matter should be carefully assessed, because the attorney and his or her client bear the risk and consequences of an erroneous evaluation in this regard. Negative consequences may be associated with two situations: when an attorney interprets certain cases as requiring a refusal to testify with reference to attorney-client confidentiality, whereas a court sees this as an abuse of attorney-client privilege and, on the contrary, when an attorney believes that disclosing material covered by attorney-client confidentiality in a given case is acceptable, whereas in the opinion of the public authorities it is not.

An example of the first situation was provided by a case of the Polish Regional Court in Pruszków from 2019, in which an attorney, who had in the past been a defence attorney in criminal proceeding was summoned by a court to testify in a civil case regarding matters which might refer to circumstances covered by non-waivable defence attorney secrecy. The civil court position was that defence attorney privilege is not transferable from criminal proceedings to civil ones. Therefore an attorney, summoned as a witness in civil proceedings, must testify. However, if answering a question might put attorney-client confidentiality at risk, the witness should refuse to answer (only) single question. An attorney, to the contrary, interpreted defence-attorney privilege as absolute and consistent throughout the legal system. He therefore argued that as a former legal defender of a client who was now a party in civil proceedings, he was not obliged to testify about circumstances he had learned about in connection with providing legal assistance in any kind of legal proceedings. In reaction to the attorney's objection to testifying, the court imposed two fines on him, followed by a detention order. This case provoked strong reactions on the part of representatives of Polish attorney bars, who indicated that both courts and attorneys act in the prevailing interest of the justice. Where a court has a suspicion that an attorney is abusing attorney-client privilege, it should notify the matter to an attorney bar and leave the case to the decision of the attorneys' disciplinary court.[27] Although the decision on detention was eventually repealed, court representatives made statement that benefiting from the instrument of detention against attorney refusing to testify with reference to attorney-client privilege, was *drastic, but still legally acceptable instrument* and that *attorneys should be aware that the conflict of interest is inherent in the practice of their profession*.[28]

If an attorney reveals information that falls within the scope of attorney-client confidentiality (*e.g.*, because they rely on a legally ineffective client consent in this respect or because of ineffective protection of relevant documents or electronic data), he or she exposes both themselves and their client to negative consequences. In such a case, an attorney will be subject to disciplinary proceedings before the disciplinary court for attorneys and to criminal proceedings for disclosure, contrary to statutory provisions, of information learned in connection with work performed or a function

[26] *Giezek* [12], p. 194; *Malicki* [17], p. 215.

[27] *Gutowski* [14], p. 195-197.

[28] *Szymaniak*, *Kryszkiewicz* [29].

(Art. 266 para. 1 of the Polish Penal Code).[29] An attorney's client is not protected against disclosure of confidential data, even if this was obtained in an illegal way. In accordance with Art. 168a of the Polish Code of Penal Procedure: *if evidence has been obtained as a result of an infringement of criminal procedure or even as a result of committing an offence, it shall not be deemed inadmissible exclusively on these grounds, unless the evidence has been obtained in connection with fulfilment of official duties by a public officer, as result of: homicide, causing deliberate damage to health, or deprivation of liberty*. This means that evidence creating *the fruit of a poisonous tree* can form part of the basis of a court decision. First the court decides about its credibility and its evidential value. It is also worth mentioning that a public prosecutor, who decides to make use of illegally obtained evidence will not be subject to disciplinary proceedings, since – in accordance with the Public Prosecution Act – *an act or omission of a public prosecutor undertaken solely in the public interest shall not constitute a disciplinary offence* (Art. 137 para. 2 of the Public Prosecution Act).[30]

3 Current controversial issues concerning attorney-client privilege

The Polish Constitution guarantees (in Art. 42.2) to anyone against whom criminal proceedings have been brought, the right to defence at all stages of such proceedings, in particular by benefiting from the legal assistance of an attorney. Such a solution requires trust between client and attorney, based on the belief of the former that everything an attorney learns in connection with providing legal assistance will be kept secret. Otherwise a person receiving legal aid would be in worse position – in relation to disclosed information – than if they had not consulted an attorney at all, which would undermine the purpose of professional legal assistance. Therefore effective communication with an attorney must be protected (although this protection is not absolute).[31] However, in some cases guaranteeing attorney-client confidentiality within Polish legal system, may be beyond the attorney's capabilities. Such cases, which may require changes to the law, are presented below.

3.1 Lack of efficient judicial control over data obtained in operational control by surveillance bodies

In accordance with current provisions regulating operational control, if an operational officer recognises in collected material circumstances that are covered by attorney-

[29] However, the initiation of proceedings depends on the client's will, because a necessary condition for conducting criminal proceedings in respect of an act under Art. 266 of the Polish Penal Code is the request of the harmed party. The person initiating disciplinary proceedings before the disciplinary court for attorneys is also usually the attorney's client. Baszuk, R: *Tajemnica zawodowa*, p. 172.

[30] *Trociuk* [30], p. 12.

[31] *Marchwicki* [18], pp. 83-84. Cf. also observation of the CJEU that *lawyers would be unable to carry out satisfactorily their task of advising, defending and representing their clients, who would in consequence be deprived of the rights conferred on them by Art. 6 of the ECHR, if lawyers were obliged, in the context of judicial proceedings or the preparation for such proceedings, to cooperate with the authorities by passing them information obtained in the course of related legal consultations*. CJEU judgment of 26.6.2007 (C-305/05), para. 32, EU:C:2007:383.

client confidentiality, they should destroy it in an immediate, commissioned and recorded way (if the information refers to legal defender privilege) or hand it over to a prosecutor, who will submit it to a court with a request to exclude it from the scope of professional secrecy (if this is in the prevailing interest of the justice and the relevant circumstances cannot be determined on a basis of other evidence). An attorney cannot appeal from a court decision in this matter.[32] Thus an attorney, whose communication with a client was recorded without their knowledge and then analysed by non-judicial body in order to verify whether it may be useful in criminal proceedings, cannot react effectively to possible abuses in this regard.[33]

This legal gap shall be considered the most urgent one, due to its legal and practical importance. Its legal significance follows from the inconsistency between the impossibility of an attorney appealing against a court decision referring to professional secrecy with (at least) the right to a defence and to an effective legal remedy. Its practical significance has been seen above in the high percentage of decisions of courts of second instance in which decisions releasing an attorney from professional secrecy were amended, where the attorney could put forward their position on the importance of client-attorney privilege.

3.2 Lack of legal regulation of professional secrecy in reference to non-attorneys

One-attorney offices, in which the attorney works without support of any staff, are rare. A situation in which all information referring to each case is kept in documents stored only in physical form, without access to them by persons other than an attorney, is also highly unique. It means that in most cases access to data covered by attorney-client privilege is possessed by other persons working or practising in the attorney's office: secretaries, law students, lawyers without status of attorney and sometimes also accountants and information technology specialists.[34] In accordance with the requirements of the Code of Advocate Ethics, an attorney is obliged to keep confidential and protect against disclosure or undesirable use everything learned in connection with the performance of professional duties – and not only by themselves. Attorneys shall also oblige their associates and persons employed by them in performing their professional activity to abide by the obligations of attorney-client confidentiality, *e.g.*, by including a special clause in their employment contracts. However, the Code of Advocate Ethics is not generally-applicable law, but the internal regulation of attorney's profession, binding on attorneys and their trainees, but not on a court or public prosecutor, who rely on statutory provisions in performing their duties in criminal proceeding (*e.g.*, questioning witnesses).

Art. 178 of the Polish Code of Penal Procedure excludes the possibility of releasing legal defenders from professional secrecy, who in criminal proceedings - in

[32] Art. 19 of the Police Law of 6.4.1990; Art. 9e of the Border Guard Law of 12.10.1990; Art. 31 of the Law on Military Police and Military Law Enforcement Authorities; Art. 27 of the Law on Internal Security Agency and Intelligence Agency of 24.5.2002; Art. 31 of the Law on Military Counterintelligence Service and Military Intelligence Service of 9.6.2006; Art. 17 of the Law on Central Anti-Corruption Bureau of 9.6.2006. Similarly: Art. 122 of the Law on National Tax Administration of 16.11.2016.

[33] *Trociuk* [30], p. 10-12 with reference to ECHR judgment of 6.12.2012, *Michaud against France* (application No. 12323/11). See also: *Matusiak-Frącczak* [19], pp. 216-217 and 226-227.

[34] *Marchwicki* [18], pp. 85, 98-99; *Niedużak* [23], pp. 267-268.

accordance with attorney law - can be attorneys and their trainees. Art. 180 para. 2 of the Polish Code of Penal Procedure, which enables a court to release a witness from professional secrecy does not distinguish between attorneys and other persons having access to protected data and simply refers to *persons bound by the obligation of professional secrecy*, *i.e.*, of an attorney. However, in accordance with statutory provisions, such an obligation binds only attorneys and their trainees.[35] This means that, from a formal perspective, only an attorney and his or her trainee may avoid being questioned in legal proceedings under the clear legal provisions governing attorney-client confidentiality (unless a court decides otherwise in their case). Neither other persons who have access to data covered by attorney-client confidentiality while performing their duties in an attorney's office or (*e.g.*, remotely) for an attorney, nor an attorney's client can benefit from it when called on to testify, at least in accordance with wording of the law in force. Including a confidentiality clause in the (*e.g.*, employment) contract of person providing a service for an attorney will not solve this problem, since it may not itself create an attorney-client privilege effective against a public authority.[36]

This gap does not, however, seem to create problems in practice at the moment. A broad functional understanding of the scope of professional secrecy resulting in it being considered *as immunity referring to the type of protected information, not to certain persons* is recognised both in the case law[37] and in the literature on legal privileges.[38] Nonetheless, lack of legal regulation of professional secrecy in reference to non-attorneys is still perceived as potentially problematic,[39] what speaks in favour of statutory regulation, something which has been done regarding the search and seizure of documents stored in physical form or in devices containing information technology systems or information technology data, including e-mail correspondence (Art. 225 and 236a CPP). According to these provisions, if a person (who could be an attorney, his or her employee or a client), whose premises are being searched declares that a certain document includes information protected by legal privilege (or is of a personal nature), such document shall be transmitted, without prior reading, to a public prosecutor or to the court, in a sealed container. However, if the holder of a document declares that it refers to a legal defence, it should be left to its holder without getting acquainted with its contents or appearance. The statement of a defence lawyer in this regard should be accepted without further inquiry. If such a statement is made by another person and gives rise to doubts, the document should be transmitted, without prior reading, to the court in a sealed container. Having acquainted

[35] Art. 6.1, 6.3 and art. 75.5 of the Law on Advocacy, art. 3.3., 3.5 and art. 33.5 of the Law on Legal Advisers.

[36] *Niedużak* [23], pp. 271-272; *Rusinek* [25], pp. 58-61, 94-98, where the author draws the distinction between professional status regulated by law, which is connected with professional secrecy (and legal privilege), and the obligation of discretion, regulated by contract, which is not related to these aspects. He also raises the argument that a statutory obligation (*e.g.*, to testify) may be waived by reference to statutory privilege (*e.g.*, attorney-client privilege), but not by contractual regulation (under which someone has committed themselves to remain silent).

[37] Judgment of Polish Constitutional Court of 30.07.2014 (K 23/11), para. 668; decision of Appeal Court in Kraków of 30.3.2009 (II AKz 110/09).

[38] *Niedużak* [23], s. 274; *Safjan* [26], s. 58; *Sowiński* [27], s. 30.

[39] *Marchwicki* [18], p. 87-91.

itself with the document, the court should return it in to the person from whom it was taken, or issue a decision on its seizure for the purposes of the proceedings.

Similar regulation protecting *information* and not its *depositor* should exist in reference to hearing witnesses in criminal proceedings. Despite the (still) existing consensus on the inadmissibility of circumventing attorney-client privilege by hearing non-attorneys about facts which fall into the scope of attorney professional secrecy,[40] the perceptible atmosphere of legislative permissiveness regarding reducing the importance of legal privileges and increasing the number of cases in which courts are asked to release attorneys from professional secrecy, may also result in attempts to obtain protected information from non-attorneys. Thus the adoption of legal regulation unambiguously excluding such a possibility can be seen as a potentially important issue; in particular bearing in mind that once a circumstance which should be protected by attorney-client confidentiality is disclosed, the revealed information cannot be kept secret anymore and the client's trust is irreversibly lost.[41]

3.3 The differing scopes of the protection of attorney-client confidentiality in legal proceedings

Legal proceedings have different natures. Civil proceedings are of an adversarial and dispositional nature. The parties decide about what should be revealed to the court, bear the burden of proof and there is, in principle, no good reason to release an attorney from professional secrecy.[42] However, in accordance with the Polish Code of Civil Procedure, an attorney is obliged to testify as a witness (if appointed by a court), also regarding issues covered by attorney-client confidentiality, and only *may refuse to answer a question if* (...) *their testimony would involve violation of professional secrecy* (Art. 261 para. 2 of the Polish Code of Civil Procedure).[43] In practice, this means that an attorney, acting under a statutory obligation *to keep secret everything they have learned in connection with providing legal assistance*, will refuse to answer any question in this regard.[44] An attorney's decision whether, in a particular case, they can answer a particular question or whether professional secrecy requires exercising their right to refuse to answer it, is to be considered final and the court will not interfere in the attorney's assessment in this respect.[45]

[40] The Court of Appeal in Kraków found, in its judgment of 25.11.1993 (II AKr 144/93, KZS 1994/1/30), inadmissible evidence from the testimony of a person delegated by a public prosecutor to be present at the meeting of a detained defendant with their defence lawyer, regarding the content of the conversation, indicating that *it would violate the defendant's right to defence and circumvent attorney-client privilege*.

[41] *Bodnar* [5], p. 5.

[42] *Gutowski* [15], pp. 103-114.

[43] Similar regulation exists in Art. 196 para. 2 of the Polish Tax Code, Art. 83 para. 2 of the Polish Code of Administrative Procedure, in Art. 106 para. 5 of the Polish Code of Administrative Court Procedure and in Art. 36 para. 2 of the Polish Act on Administrative Enforcement Procedure.

[44] *Gutowski* [14], p. 187.

[45] *Gutowski* [14], pp. 194-195. In reference to tax proceedings, the Supreme Administrative Court indicated in its judgement of 6.3.2012 (I FSK 578/11) that *prerequisites for exercising the right to refuse to answer questions basically eliminate the possibility of their being demonstrated by a witness, and thus preclude any control by the tax authority, which makes them unknowable. Otherwise, the witness would be deprived*

However, as has already been seen above in the attorney-detention-case, even if existing differences in legal proceedings can be viewed as being justified in the light of the specificity of particular types of proceedings, certain problems may still appear regarding the transferability or otherwise, *e.g.*, of the wider protection of legal defender privilege, under which an attorney cannot be interrogated at all, to other proceedings, where an attorney is required to appear for the hearing and entitled (or obliged) to refuse to answer particular questions. The latter step can, itself, be problematic due to the fact that the court evaluates how to interpret the refusal to answer questions in the context of the case (Art. 233 of the Polish Code of Civil Procedure).

Resolution of this issue in a statute might put an end to differing interpretations escalating, in individual cases, even to the point of the detention of attorneys by courts. The closure of this gap seems to be less urgent, however, due to the fact that a satisfactory result can still be achieved by means of a functional interpretation and in the light of existing case law. Moreover, examples of controversial interpretations of seemingly clear statutory provisions by courts show that the regulation of an issue in statute may not only fail to put an end to a problem, but even create new ones.

3.4 Controversial interpretations of legal provisions in court practice

In accordance with the provisions of Polish criminal procedure, an attorney appointed *ex officio* in cassation proceedings (as well as in other listed proceedings) should draw up and sign the cassation appeal or *notify the court in writing of not having identified grounds for filing a cassation appeal* (Art. 84 para. 3 of the Polish Code of Penal Procedure). The wording of this provision seems to be clear and uncontroversial: an attorney should either draw up a cassation appeal or notify (*i.e.*, inform or deliver a message to) the court that he or she will not do this due to a lack of legal grounds. However, in practice courts – supported by the case law of the Supreme Court – presumably in order to verify whether legal assistance to a client has been provided properly (or even at all) require in the latter case that the attorney submits not simple information, but rather a legal opinion (*i.e.*, a comprehensive justification) on the lack of grounds to draw up a cassation appeal; and not only to a client, but also to the court.[46] Failure to meet this requirement - even if the attorney informs the court that a legal opinion in the relevant matter exists and has been submitted to the client - results in a court statement that the attorney has failed to fulfil his or her duty and in a request to remedy this defect by sending a legal opinion to the court (within seven days).[47]

Since a legal opinion requested by a court may contain data covered by attorney-client confidentiality (and may not necessarily benefit a client), some attorneys submit

of the legal protection granted to them in this provision. As specified in Art. 196 para. 2 of the Tax Code, a refusal to answer questions may amount to a refusal to answer all questions, and thus to refusal to testify at all, which (…) *cannot be questioned*. Cf. also the judgment of the Supreme Administrative Court of 29.1.2013 (II FSK 854/11); *Matusiak-Frącczak* [19], pp. 214-215; *Szubielska* [28], pp. 202-203.

[46] Judgment of Supreme Court of 10.9.2008 (II KZ 43/08, OSNKW 2008/10/86): *informing the court in writing about lack of grounds for filing a cassation appeal* (…) *- as a result of legal assistance provided – as specified in Art. 84 para. 3 CCP, should take the form of a legal opinion*.

[47] *Bojańczyk* [6], pp. 139-144.

it to the court in a closed envelope and inform the court about its confidential content. In such a case, a court will decide whether to open the envelope and add the opinion to the case file or else to accept the attorney's statement that there are no grounds for drawing up a cassation appeal and leave the envelope closed. However, even a practice such as this leaves doubt as to whether the attorney is properly protecting attorney-client privilege, in particular when he or she is acting as a legal defender.

4 What has already been done?

As has been seen above, legislative amendments are necessary in some cases, *e.g.*, where an attorney is to have the right to appeal from a court decision on the disclosure of data protected by attorney-client confidentiality regarding data obtained in operational control by surveillance bodies. In other cases, legislative amendments may not achieve their aim, *e.g.*, of clarification of certain relevant issues. First, because new statutory regulation may open discussion on new controversial matters; secondly, because even legal provisions which seem to be clear can be interpreted in a controversial way. Nonetheless, even in cases where legislative intervention seems necessary, it may not be expected due to what has been seen to be an atmosphere of acceptance of limiting the scope of attorney-client privilege by public authorities.

Examples depicting this atmosphere can be found in the increasing number of public prosecutors' requests to release attorneys from professional secrecy which have been observed by attorney bars in recent years,[48] as well as in the types of cases relating to attorney-client confidentiality in which the Polish Ombudsman has intervened. The Ombudsman, *e.g.*, appealed in February 2016 to the Polish Constitutional Court against provisions establishing a mechanism imposing on courts an obligation to issue a decision - which could not be challenged by an attorney - on the admission to use in criminal proceedings materials containing information protected by attorney-client confidentiality, obtained by surveillance officers in operational control, if this is considered to be *in the prevailing interest of the justice* and *if relevant circumstance cannot be established on a basis of other evidence*. Due to the constitutional crisis in Poland, resulting in the participation of unauthorised persons in the adjudication panel, the Ombudsman's intervention was withdrawn, but the problem remained.[49] In September 2018 the Ombudsman strongly objected to a planned statutory amendment, which aimed to enable public prosecutors (with the exclusion of any court) to release attorneys (as well as journalists and medical doctors) from professional secrecy. The Ministry of Justice eventually resiled from supporting this concept, but in other cases – *i.e.*, in advocating for the exclusion of attorneys from criminal liability

[48] In accordance with data gathered by attorney bars, in 2016 courts decided on releasing an attorney from professional secrecy in 217 cases (in 109 cases positively), in 2017 - in 412 cases (in 140 cases positively), 2018 - in 261 cases (in 147 cases positively). *Rojek-Socha* [24].

[49] Cf. cases *Pietrzak v. Poland* and *Bychawska-Siniarska and Others v. Poland* (applications Nos. 72038/17 and 25237/18) currently being considered by the European Court of Human Rights, concerning the compatibility of Polish national legislation authorising secret surveillance by the police and intelligence services in respect of communications, and data collection about those communications ("metadata"), with the requirements of Art. 8 (right to respect for private and family life) and Art.13 (right to an effective remedy) of the European Convention on Human Rights.

for the failure to inform law enforcement authorities about serious crimes committed by their clients or for not reporting tax optimisation schemes on which they had advised their clients – the Ombudsman's intervention was unsuccessful.[50]

Threats to attorney-client confidentiality, *e.g.*, in the case of the availability of information covered by attorney-client confidentiality to surveillance bodies, who carry out operational control, has been observed also by the Polish Constitutional Court. Despite noting the risk to the effective protection of professional secrecy here, the court indicated that *it is up to the legislator to introduce legal solutions that will prevent the risk of using information requiring protection or at least minimise this risk*[51] and that the possible *incorrect application of a provision in a specific case does not mean that it is unconstitutional*.[52] Such an attitude may be justified by respect for legislative autonomy, however, it is not sufficient where an irreversible breach of attorney-client confidentiality is at stake and the law does not provide the necessary guarantees for attorneys to protect it in the interests of justice.[53]

Declarations

Competing Interests The author declares no competing interests.

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[50] *Mrowicki* [21], p. 47.

[51] Judgment of Constitutional Court of 30.7.2014 (K 23/11, OTK ZU 7A/2014/80), para. 685.

[52] Judgment of Constitutional Court of 22.11.2004 (SK 64/03, OTK ZU 10A/2004/107), para. 60.

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