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## THE SCOPE OF PROTECTION OF LEGAL PROFESSIONAL PRIVILEGE IN CRIMINAL PROCEEDINGS—SELECTED ISSUES

### INTRODUCTION

Nowadays, the Polish system of the Bar rests on the following foundations: independent self-government, professional ethics, immunity, and legal professional privilege.<sup>1</sup> Much importance is attached to the last aspect, viewed as an integral part of the system of legal protection.<sup>2</sup> Legal privilege makes it possible to exercise one's right to defence, since it ensures the confidentiality of the information disclosed to a lawyer. This confidentiality determines the proper operation of the justice system. The doctrine emphasises that failure to respect this confidentiality "affects the general perception of the advocate as an institution [...] which will not or is unable to guarantee the confidentiality of information entrusted to advocates."<sup>3</sup>

The law which defines the institutional framework of the Bar provides for an absolute, unconditional and complete ban on disclosure of information subject to professional confidentiality. This means that this ban cannot be lifted under any circumstances. On the other hand, the Polish Code of Criminal Procedure provides for cases where this confidentiality can be removed. In this study, we will seek to establish—using chiefly the logical-linguistic and comparative method—whether the current regulations guarantee proper

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<sup>1</sup> Z. KRZEMIŃSKI, *Etyka adwokacka. Teksty, orzecznictwo, komentarz* (Warszawa: Wolters Kluwer Polska, 2008), 5.

<sup>2</sup> M. SMARZEWSKI and M. BANACH, "Ochrona tajemnicy adwokackiej w procesie karnym w związku z czynnościami przesłuchania i przeszukania," *Palestra* 3 (2017): 75.

<sup>3</sup> *Ibid.*

protection of legal professional privilege. Our aim is also to determine whether this incoherence of regulations concerning the scope of legal professional privilege between the Law on the Bar<sup>4</sup> and the Code of Criminal Procedure<sup>5</sup> has an impact on the degree to which the privilege is maintained. What is more, the division into advocate's privilege and legal defence privilege will be discussed. We will try to determine whether the scope of these privileges during the performance of particular procedural activities is the same.

It should be mentioned that there are many publications discussing legal professional privilege. Most are concerned mainly with the essence of this institution. They focus mainly on searching for its origin, scope and functions.<sup>6</sup> On the other hand, studies dealing with the application of legal privilege in criminal proceedings, analyse its scope in individual procedural acts, such as interrogation or search,<sup>7</sup> the effects of the above-mentioned lack of coherence,<sup>8</sup> as well as the question of liability for the disclosure of professional confidential information.<sup>9</sup> This paper, unlike other studies, is intended to examine whether the scope of the protection in this regard has been regulated in the same way for individual stages of legal proceedings. It is important to establish whether at each stage and for each act of the procedure legal professional privilege is adequately protected.

The first part deals with the scope of professional privilege as regulated in the act that establishes the institutional framework of the Bar, that is the Law on the Bar. In addition, the division into advocate's privilege and defender's privilege will be discussed. Further on, we will analyse the scope of these privileges when particular procedural acts are performed, such as: interview, searching, contact with the client, as well as the surveillance and

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<sup>4</sup> Act of 26 May 1982—The Law on the Bar, Journal of Laws of 2018, item 1184, as amended [hereinafter cited as LB].

<sup>5</sup> Act of 6 June 1997—The Code of Criminal Procedure, Journal of Laws 2017, item 1904, as amended [hereinafter cited as CCP].

<sup>6</sup> See KRZEMIŃSKI, *Etyka adwokacka*, 15; P. KARDAS, "Konstytucyjne i ustawowe aspekty ochrony tajemnicy zawodowej powierzanej przedstawicielom zawodów zaufania publicznego," *Czasopismo Prawa Karnego i Nauk Penalnych* 4 (2014): 5–51; M. KUCHARCZYK, "Charakter prawny tajemnicy adwokackiej w ujęciu historycznym," *Czasopismo Prawa Karnego i Nauk Penalnych* 1 (2007): 57–72.

<sup>7</sup> See SMARZEWSKI and BANACH, "Ochrona tajemnicy," 75–87; K. PIKUL, "Zakaz zajęcia i zapoznania się z treścią pism z art. 225 § 3 k.p.k.," *Nowa Kodyfikacja Prawa Karnego* 27 (2011): 173.

<sup>8</sup> See E. MĄDRECKA, "W kwestii kolizji art. 180 § 2 kodeksu postępowania karnego i art. 6 Prawa o adwokaturze," *Nowa Kodyfikacja Prawa Karnego* 28 (2012): 147–160.

<sup>9</sup> See J. WARYLEWSKI, "Tajemnica adwokacka i odpowiedzialność karna za jej naruszenie (ujawnienie)," *Palestra* 5–6 (2005): 7–16.

recording of conversations. Also, the collision existing between Article 180 § 2 CCP and Article 6 LB will be discussed. The final part of the study offers a summary of the considerations and an attempt to address the presented research problems and to present proposals for modifications of the existing regulations.

### 1. ADVOCATE'S PROFESSIONAL PRIVILEGE IN THE REGULATIONS ON THE BAR

Pursuant to Article 6 LB, an advocate is obliged to keep confidential any information that he becomes aware of in connection with the legal aid he provides or while handling a case. Paragraph 3 of Article 6 states that the lawyer cannot be relieved of this obligation. Pursuant to Article 4 LB, the provision of legal assistance includes, in particular, advising on legal matters, drafting legal opinions, preparing legislative drafts, and appearing before courts and offices. The use of the term “everything” by the legislator means that any information obtained in connection with the provision of legal aid is subject to professional privilege. This privilege covers the verbal content as well as the messages recorded in materials, case files, notes, files recorded on hard drives, storage media or e-mails. Such a wide catalogue of sources causes that confidential information may come from not only the client, but also third parties, witnesses, the judge and even the other party.<sup>10</sup> It can also be the information obtained through one's own observations.<sup>11</sup> Secrecy also covers data concerning non-essential details, as well as information which, from the perspective of the lawyer himself, appears as insignificant.<sup>12</sup> However, not all sorts of information collected by the advocate are confidential but only this information which he has obtained in the course of his career.<sup>13</sup> The obligation of confidentiality cannot be time-barred or subject to prescription. This means that this obligation persists even if the power of attorney expires, the case is terminated or when the advocate's membership in a professional association ends.<sup>14</sup>

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<sup>10</sup> MĄDRECKA, “W kwestii kolizji,” 150.

<sup>11</sup> KRZEMIŃSKI, *Etyka adwokacka*, 16.

<sup>12</sup> Ibid.

<sup>13</sup> Decision of the Court of Appeal in Katowice of 5 August 2015, file ref. no. II AKz 443/15.

<sup>14</sup> M. CZERWIŃSKI, “Obowiązek zachowania tajemnicy zawodowej adwokata a uzasadniony interes społeczny,” *Palestra* 11–12 (2013): 58.

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## 2. ADVOCATE'S PROFESSIONAL PRIVILEGE DURING A HEARING

Undoubtedly, the procedural act which is the most likely to jeopardise legal professional privilege is the interview of an advocate in connection with the facts of the case. Pursuant to Article 178 CCP, a defence lawyer may not be questioned in the capacity of a witness in relation to information which he has come into possession while advising on or handling a case. In the light of this provision, the ban also covers an advocate or a legal counsel acting under Article 245 § 1 CCP as a representative of a detained person.<sup>15</sup> This is an incomplete, absolute evidence-related prohibition which cannot be lifted under any circumstances. This prohibition cannot be defeated either for the sake of the applicant or on account of the interview (in favour of the accused).<sup>16</sup> As Jarosław Warylewski rightly points out, “this prohibition maintains its force even after the participation of the defence counsel or advocate providing legal assistance to the detained person has ceased, and can be revoked even by the consent of the persons concerned.”<sup>17</sup> However, since it is an incomplete prohibition, it is possible to establish these circumstances by other evidence. This provision does not ban the interrogation of an advocate with respect to information obtained otherwise than in connection with the handling of the case or provision of legal advice.<sup>18</sup> It is accepted in the doctrine that this prohibition implies that it is not only inadmissible to interrogate but also to summon. On the other hand, there is no unified view on how the advocate should act when the authority requests him to be heard in spite of this prohibition. It is accepted that if—on the basis of the summons itself—it transpires that the defence lawyer is to be heard about the circumstances covered by the restriction under of Article 178 CCP, then he is under no obligation to appear. However, if the purpose of the interview is not evident from the summons, the lawyer should appear at the request of the authority taking part in the proceedings and demonstrate that the circumstances on which he is to testify are regulated in Article 178.<sup>19</sup>

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<sup>15</sup> SMARZEWSKI and BANACH, “Ochrona tajemnicy,” 78.

<sup>16</sup> Judgement of the Court of Appeal in Szczecin of 18 February 2015, file ref. no. II Aka 270/14, LEX no. 1668674.

<sup>17</sup> WARYLEWSKI, “Tajemnica adwokacka,” 9.

<sup>18</sup> P. HOFMAŃSKI and S. ZABŁOCKI, *Elementy metodyki pracy sędziego w sprawach karnych* (Kraków: Wolters Kluwer Polska, 2006), 150.

<sup>19</sup> See also L. PAPRZYCKI, J. GRAJEWSKI, and S. STEINBORN, *Kodeks postępowania karnego. Komentarz*, vol. 1, *Artykuły 1–424 k.p.k.*, ed. L. Paprzycki (Warszawa: Wolters Kluwer Polska, 2015),

In the light of Art. 180 § 2 CCP, individuals obliged to maintain legal professional privilege may be questioned as to facts covered by such confidentiality only if it is necessary for the good of the justice system and a specific circumstance cannot be determined on the basis of other evidence. In preparatory proceedings, the court decides on the subject of or admits an interview, in a meeting without the participation of the parties, within not more than 7 days from the date of delivery of the public prosecutor's motion. However, in the case of court proceedings, the court decides during the trial on a dismissal, although it is possible to refer the case to a hearing. The order to exempt the advocate from his professional privilege concerns only this specific criminal trial in which the order was issued.<sup>20</sup> The court's decision can be challenged. It is worth noting this legal remedy can be applied for either an order to admit or an order to decline.<sup>21</sup> In the light of the principles of professional deontology, the advocate is obliged to "take all possible measures to protect legal professional privilege."<sup>22</sup> For these reasons, where an advocate is exempted by the court from professional privilege, he must notify a competent regional bar council of that fact and challenge the exemption order.<sup>23</sup> The grounds for lifting the ban are regulated in such a way that their "precise interpretation and reference to the procedural situation of a particular case is very difficult," and sometimes even impossible.<sup>24</sup> In addition, those criteria have a judgemental character, which augments the risk of different interpretations or even over-interpretation by particular adjudicating panels.<sup>25</sup> The second criterion of exemption, that is when it is not possible to determine a circumstance on the basis of other evidence, is questionable. Such a regulation permits an exemption from the obligation of keeping secrecy also in cases where there is other evidence but cannot be used in the proceedings for various reasons. It is understood that all forms of limiting legal professional privilege should be regulated in a detailed and precise

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200; MĄDRECKA, "W kwestii kolizji art. 180 § 2," 150; T. GRZEGORCZYK, *Kodeks postępowania karnego. Tom I. Artykuły 1–467* (Warszawa: Wolters Kluwer Polska, 2014), 611.

<sup>20</sup> S. HOC, "Informacje niejawnie i tajemnice w postępowaniu karnym," in *Profesor Marian Cieślak—osoba, dzieło, kontynuacja*, ed. W. Cieślak and S. Steinborn (Gdańsk: Wolters Kluwer Polska, 2013), 740.

<sup>21</sup> S. ZABŁOCKI, "Znaczenie ustawy nowelizującej Kodeks postępowania karnego dla korporacji radców prawnych," *Radca Prawny* 6 (2000), 5.

<sup>22</sup> SMARZEWSKI and BANACH, "Ochrona tajemnicy," 86.

<sup>23</sup> Ibid.

<sup>24</sup> PAPRZYCKI, GRAJEWSKI, and STEINBORN, *Kodeks postępowania*, 202.

<sup>25</sup> M. KLEJNOWSKA, *Oskarżony, jako osobowe źródło informacji o przestępstwie* (Kraków: Wolters Kluwer Polska, 2004), 52.

manner. The degree of departure from the general rule should be directly proportional to the goal served by the exception.<sup>26</sup> The goal in this case is to further justice administration, which is in fact an undefined concept and gives rise to difficulties of interpretation. According to Roman Tokarczyk, “due to the importance of legal professional privilege for professional and moral exercise of the profession of lawyer, there are justified objections, not only from advocates, concerning exceptions exempting them from maintaining confidentiality in the name of some vague general clauses, in fact political reasons, for example the interest of the justice administration system.”<sup>27</sup> The Constitutional Tribunal also pointed out this aspect, but it reasoned that “the allegation of the vagueness of Article 180 § 2 CCP raised by the Constitutional Tribunal is not justified. The provision contains two criteria which, when both fulfilled, make it possible to exempt one from legal professional privilege—this must be required by the interests of justice and the impossibility of establishing the specific circumstance on the basis of other evidence. Furthermore, the provision requires that the interrogation of a person who is obliged to adhere to legal professional privilege be made necessary for the said goals to be achieved. While the notion of «the interest of the administration of justice» is very general, in the opinion of the Constitutional Tribunal the second criterion of Article 180 § 2, namely the lack of other evidence is specific, measurable and verifiable. Since the decision on the exemption from legal privilege is taken by the court, which is already in possession of the entire evidence gathered during the preparatory proceedings, it should be assumed that it has the power to assess the necessity of evidence, that is to conclude that it is impossible to prove a given circumstance using other, reasonably available proof of evidence (such a proof is certainly not the testimony of the accused, who has the right to remain silent. The argument about the lack of precision in the Article at hand is certainly not sufficient to call into question the constitutionality of the contested provision.”<sup>28</sup> The Tribunal’s position is quite controversial and, in my opinion, it does not deserve approval, which is because it admits the possibility of an abstract, misleading condition if accompanied by a specific, measurable, and verifiable criterion. Such a position of the Tribunal may lead to the implementation of bizarre solutions or the existence of various kinds of abuse.

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<sup>26</sup> M. MATUSIAK-FRĄCZAK, *Glosa do wyroku ETPC z dnia 6 grudnia 2012 r.*, LEX no. 12323/11.

<sup>27</sup> R. TOKARCZYK, “Zarys przedmiotu etyki adwokata,” *Przegląd Sądowy* 7–8 (2005): 36–37.

<sup>28</sup> Judgement of the Constitutional Tribunal of 22 November 2004, file ref. no. SK 64/03, ZU 2004, no. 10A, item 107.

Wojciech Marchwicki's reasoning proceeded in a similar vein. He stated that the position of the Tribunal "would make it possible to accommodate all the most vague clauses in a regulation limiting the constitutional rights and freedoms, as long as that they were applied jointly with another unambiguous and express criterion."<sup>29</sup> For these reasons, it is proposed that any departure from the established principles should be subject to specific, measurable criteria. Moreover, we are dealing with a certain paradox because legal professional privilege is to be removed for the benefit of the justice system when "it is itself an element of this sphere which is closely connected with the administration of justice and in this sense it can be said to be a value (good) of the justice system."<sup>30</sup> It should also be noted that the interests of justice require that in each case a judgement should be rendered on the basis of all disclosed facts relevant to the final decision. In view of the above, the literature of the subject emphasises that "the good of the judiciary does not require that the advocate's, legal counsel's, doctor's or journalist's professional secret be disclosed when it concerns not so much a secondary, as even a tertiary circumstance of minor (virtually irrelevant) importance for the case."<sup>31</sup> A similar position was taken by the Court of Appeal in Kraków, which assumed that "exemption from professional legal privilege should apply to specific circumstances about which the witness is to testify. It is for the court to assess whether these circumstances meet the requirements of Article 180 § 2, in other words whether they are necessary for the good for justice and cannot be determined on the basis of any other evidence. No determination implies that the exemption gives a *carte blanche* to law enforcement authorities, which then could freely use the knowledge of the witness to defeat the relevant restrictions."<sup>32</sup> For these reasons, Tomasz Razowski puts forward a proposal to amend this provision in such a way as to enable professional privilege to be lifted only if the facts covered by the privilege will have relevance for the outcome of the case.<sup>33</sup> In my opinion, this is a reasonable proposal, but amendments to this provision should have

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<sup>29</sup> W. MARCHWICKI, *Tajemnica adwokacka. Analiza konstytucyjna* (Warszawa: Wydawnictwo C.H. Beck, 2015), 99.

<sup>30</sup> Compare KUCHARCZYK, *Charakter prawny tajemnicy*, 60.

<sup>31</sup> PAPRZYCKI, GRAJEWSKI and STEINBORN, *Kodeks postępowania*, 202.

<sup>32</sup> A decision of the Court of Appeal in Kraków of 21 April 2010; as cited in WARYLEWSKI, *Tajemnica adwokacka*, 12.

<sup>33</sup> T. RAZOWSKI, "Zwolnienie świadka z obowiązku zachowania tajemnicy zawodowej w procesie karnym," *Prokuratura i Prawo* 7–8 (2010): 147–48.

more depth.<sup>34</sup> It should be possible to waive professional privilege only in important cases and in cases of “a graver kind,” in other words cases where an investigation has been conducted. Such a criterion—specific and clear—would be more likely to guarantee the protection of secrecy than the currently applicable rules. The specific provision of Article 180 § 2 CCP could look like this: “Individuals obliged to maintain notarial, advocate’s, legal counsel’s, tax adviser’s, medical, journalist’s or statistician’s secrecy, and the secret of the General Prosecutor’s Office, in cases under ongoing investigation, may be questioned on facts covered by this secrecy only if it is necessary for the resolution of the case and there is no other evidence on the basis of which the circumstance can be determined. In preparatory proceedings, the court decides on the subject of an interrogation or permitting an interrogation, in a closed meeting, within not more than 7 days from the date of delivery of the public prosecutor’s motion. The court’s decision may be challenged.”

### 3. ADVOCATE'S VERSUS LEGAL DEFENCE PRIVILEGES

Our analysis of the issue of legal professional privilege exercised during a hearing reveals that the legislator introduced a dichotomy in the construal of legal professional privilege, since under the Code of Criminal Procedure we distinguish between the defence counsel’s secret, regulated by Article 178, and the advocate’s privilege expressed in Article 180 § 2 thereof. Regulations contained in Articles 178 and 180 § 2 were designed by the legislator to strike a compromise between the right of the defence and the principle of legalism.<sup>35</sup> At this stage, we could perhaps consider the purpose of such professional privileges, their source and their mutual relationship, as well as see whether the legislator has managed to reach this compromise.

The privileges in question have distinct subjective scopes. According to Wincenty Grzeszczyk, “legal defence privilege refers to circumstances of which the defence lawyer became aware when providing legal advice, even

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<sup>34</sup> As it will become evident further on, I will propose that the scope of legal professional privilege under criminal procedural law be unified and made absolute. However, should the legislator decide to maintain the distinction between the two types of privilege, it is worth searching for solutions that could help to increase the protection of advocate’s privilege, guarantee the interests of the parties and comply with the principle of the good of the justice system.

<sup>35</sup> J. AGACKA-INDECKA, “Tajemnica zawodowa adwokata—znaczące rozstrzygnięcia sądów,” *Palestra* 9–10 (2005), 121.



if he did not finally undertake to defend the client, and to information obtained while handling the case, regardless of its origin (the accused, his most immediate family, other individuals or sources).”<sup>36</sup> However, the provision of Article 180 § 2 refers to any other information subject to confidentiality as stipulated by Article 6 para. 1 of the Law on the Bar, which at the same time does not constitute legal defence privilege.<sup>37</sup> Therefore advocate’s professional privilege has a considerably greater scope than the other privilege. The protective regimes are also different. The circumstances covered by legal defence privilege may not be disclosed and, should that occur, they cannot be used as evidence in a particular trial. On the other hand, under certain conditions, the content constituting advocate’s professional privilege may be divulged in proceedings and constitute evidence. In the case of breaching defence counsel privilege, the advocate–defence lawyer may incur criminal, civil and disciplinary liability. On the other hand, an advocate who has been released by the court from the obligation to exercise legal professional privilege and will disclose such a secret will not be held liable. It should be noted that the two privileges share a common personal scope since they relate to the lawyer providing legal aid.<sup>38</sup> However, the different substantive scopes, protection regimes, functions, and different evidence-related bans, show that in fact we are dealing with two different privileges. Jacek Giezek rightly pointed out: “Insofar as the classical and generally regulated interpretation of legal professional secret is connected with the essence of the guarantees necessary for the provision of legal assistance by a professional entity, legal defence privilege is accompanied by guarantees associated with the institutions constituting the system of repressive law, and—on a broader plane—many institutions with centuries-long traditions which ensure the possibility of having real and reliable defence.”<sup>39</sup> Therefore, in my opinion, legal defence privilege has been isolated from advocate’s professional privilege in order to guarantee the plausibility of the right to defence and presumption of innocence. On the other hand, advocate’s professional privilege stems from his or her position of public trust and its main purpose is to protect clients’ privacy and thus retain the client’s confidence in the advocate. A similar view is presented by Piotr Kardas, who assumes that “legal defence privilege is not a variation of legal professional

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<sup>36</sup> W. GRZESZCZYK, *Kodeks postępowania karnego. Komentarz* (Warszawa: LexisNexis, 2014), 230.

<sup>37</sup> HOFMAŃSKI and ZABŁOCKI, *Elementy metodyki*, 152.

<sup>38</sup> J. GIEZEK, “O granicach tajemnicy adwokackiej oraz zgodzie ‘dysponenta’ na jej ujawnienie,” *Palestra* 9 (2014): 65.

<sup>39</sup> *Ibid.*

privilege, binding on legal professionals of public trust, but a separate type of privilege connected with the function of defence. Its essence and scope therefore do not spring from the special role, tasks and functions of the professions of public trust and is not related to the protection of the right to privacy and freedom of communication, but is based on specific rights that constitute the rights of defence. It is undoubtedly part of the formal right of defence and an element of substantive law. An infringement of the obligation to maintain defence secrecy therefore constitutes not only an assault on the values protected by professional secrecy, especially the protection of privacy, the right to communicate and limit the scope of information public authorities gain about the citizens, but above all it also undermines the foundations of the right of defence.”<sup>40</sup>

In the following section, we will examine the scope of legal defence privilege and advocate’s professional privilege in other procedural activities. We will then consider whether it is necessary for the two kinds of privilege to occur in criminal proceedings.

#### 4. CONTACT WITH THE CLIENT DURING PROCEEDINGS

In light of Article 73 CCP, a defendant who subject to pre-trial detention may communicate with his defence counsel in person, in the absence of other persons, as well as through correspondence. The legislator did not introduce any restrictions with respect to the forms of contact, so it is possible to make direct contact, telephone contact, correspondence by post or electronic means.<sup>41</sup> However, a visit must be authorised by the authority in charge of the client. When issuing a permit, the public prosecutor, in special cases, may stipulate that—in order to protect the pre-trial proceedings—the prosecutor himself or a person authorised by them will be present during preparatory proceedings. For the same reasons, the prosecutor may order surveillance of the suspect’s correspondence with his or her defence counsel. It is worth noting that the possibility of breaching the right to contact a defence counsel in the absence of other persons is based on a vague premise of “a specially justified case.” Undoubtedly, this constitutes a significant threat to the legal defence privilege, therefore it is assumed that these reservations should be of an “exceptional nature, dictated by the actual need to safeguard

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<sup>40</sup> KARDAS, “Konstytucyjne,” 35.

<sup>41</sup> PAPRZYCKI, *Kodeks postępowania karnego*, 120.

the interests of proceedings.”<sup>42</sup> The prosecutor’s disposition cannot be challenged.<sup>43</sup> These prosecution objections may be applied only within fourteen days of the arrest of the suspect and do not apply after the indictment has been made.<sup>44</sup>

An issue that should be regulated is the question of the lawyer’s contact with the client brought to a hearing or a trial. Currently, it is customary that the defence counsel may talk to his or her client before or after the session, but this usually happens in the presence of police officers. Therefore, it would make sense to introduce a provision ensuring that the accused person under pre-trial detention can communicate with his lawyer in person, in the absence of others, both before and after a hearing or a trial.

#### 5. LEGAL PROFESSIONAL PRIVILEGE DURING A SEARCH

The distinction between legal defence privilege and advocate’s privilege other than legal defence privilege is also apparent in the provisions concerning the search procedure. Pursuant to Article 225 § 3 CCP, in the event that a defence counsel or other person who is requested to release a thing or whose premises are searched declares that the documents released or found in the course of the search or other documents concern circumstances related to the performance of the function of defence counsel, the authority performing the activities shall leave these documents to the person mentioned above without familiarising itself with their content or appearance. The defence counsel’s statement is absolutely binding on the authority, which means that the authority performing the activities is not authorised to verify the truthfulness of this statement.<sup>45</sup> If the statement of a person not being a defence counsel raises doubts, it is subject to verification, but in a manner that excludes the possibility of breaching legal defence privilege. In such a case, the authority is to hand over to the court the documents released or found, without acquaintance of their content or appearance in sealed packaging. If, having consulted the documents, the court finds that the declaration was true, the retained documents are resealed and returned to the person from whom they were taken away. On the other hand, the court will issue an

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<sup>42</sup> GRZESZCZYK, *Kodeks postępowania karnego*, 80.

<sup>43</sup> S. STEINBORN, J. GRAJEWSKI and P. ROGOZIŃSKI, *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, ed. S. Steinborn, LEX 2016, 90.

<sup>44</sup> GRZESZCZYK, *Kodeks postępowania karnego*, 80.

<sup>45</sup> PAPRZYCKI, *Kodeks postępowania karnego*, 120.

order to retain the materials for the purposes of the proceedings if it deems the statement not to be true.<sup>46</sup> It is accepted in the doctrine that this prohibition is binding on the authority even if such a declaration is made by a trainee advocate authorised by the lawyer to represent him as defence counsel in the case.<sup>47</sup> The prohibition imposed on the authority to familiarise itself with the appearance or content of the letters is not intrinsic and is realised after a relevant declaration has been made.<sup>48</sup> Therefore, it would be justified to incorporate in the Set of Principles of Advocate Ethics and Professional Dignity<sup>49</sup>—as postulated in the literature on the subject—the obligation for an advocate to submit a statement in the case files that they contain information subject to confidentiality.<sup>50</sup> If the defence counsel does not make a declaration, the authority has the right to keep these documents, but they may not constitute evidence in a case.<sup>51</sup> Although this provision does not make reference to the advocate of the detained person, the doctrine assumes that this lawyer has the same rights as a defence counsel.<sup>52</sup> However, documents containing information subject to advocate’s privilege other than legal defence privilege can be used as evidence in criminal proceedings when this is necessary for the benefit of the justice system and the circumstance cannot be determined on the basis of other evidence.

## 6. SURVEILLANCE OF CONVERSATION VERSUS LEGAL PROFESSIONAL PRIVILEGE

As Michał Rusinek rightly pointed out, “the issue of secrecy is inseparably connected with surveillance of conversation. One cannot question the claim that the very idea of tapping hinges on access to information that is hidden from the public.”<sup>53</sup> Protection of confidentiality in this aspect of proceedings is particularly important because it is through the defence counsel speaking

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<sup>46</sup> Decision of the Supreme Court of 26 October 2011, file ref. no. I KZP 12/11, OSN KW 2011, no. 10, p. 90.

<sup>47</sup> Ibid.

<sup>48</sup> PIKUL, “Zakaz zajęcia,” 173.

<sup>49</sup> Resolution of the Supreme Bar Council No. 52/2011, NRA of 19 November 2011—The Set of Principles of Advocate Ethics and Professional Dignity (Code of Advocate Ethics).

<sup>50</sup> SMARZEWSKI and BANACH, “Ochrona tajemnicy,” 83.

<sup>51</sup> GRZEGORCZYK, *Kodeks postępowania karnego*, 100.

<sup>52</sup> STEINBORN, GRAJEWSKI, and ROGOZIŃSKI, *Kodeks postępowania karnego*, 93.

<sup>53</sup> M. RUSINEK, *Tajemnica zawodowa i jej ochrona w polskim procesie karnym* (Kraków: Wolters Kluwer Polska, 2007), 70.

with the client (the communication is assumed to take place without the participation of third parties) that “the defence counsel acquires the factual knowledge of the perpetrator’s conduct and the circumstances of the event which is the subject of the proceedings and builds a defence strategy.”<sup>54</sup>

In the light of Article 237 § 1 of the Code of Criminal Procedure, after commencing proceedings, the court, upon the motion of the prosecutor, may order the control and recording of the content of telephone conversations in order to detect and obtain evidence for the ongoing proceedings or to prevent the commission of a new offence. Such surveillance is possible in relation to the suspected or accused person and to the victim or other person who may be contacted by the accused or who may be associated with the perpetrator or with an imminent offence. As Gabriela Musialik aptly argues, “the linguistic interpretation leads to the conclusion that the legislator did not provide any specific protection for persons obliged to maintain secrecy in connection with the exercise of their profession.”<sup>55</sup> Despite the fact that the Act does not expressly prohibit the use of interviews with lawyers, in the literature there is a predominant opinion that such interviews are conducted on the same terms as interviews. This means that a defence counsel cannot be eavesdropped on, but an advocate who is not a defence counsel may be eavesdropped on if it is necessary in the interest of the justice system and this circumstance cannot be determined on the basis of any other evidence.<sup>56</sup> The Supreme Court also ruled that “the defence lawyer is obviously outside the circle of persons who can be listened on and have their conversations recorded.”<sup>57</sup> Nevertheless, this issue should be regulated because the current state of affairs gives the procedural authorities a great deal of latitude. I think it would not be right to impose a total ban on the eavesdropping of a defence counsel because such an advocate may carry out economic activities that will be subject to control or the defence counsel can be accidentally recorded when applying legal operational control towards the accused person.<sup>58</sup> It would be better to introduce expressly a ban on using recorded conversations in a trial.

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<sup>54</sup> MARCHWICKI, *Tajemnica adwokacka*, 52.

<sup>55</sup> G. MUSIALIK, “Dopuszczalność stosowania podsłuchu telekomunikacyjnego w stosunku do osób zobowiązanych do zachowania tajemnicy zawodowej na gruncie Kodeksu postępowania karnego z 1997 r.,” *Palestra* 11–12 (1998): 89.

<sup>56</sup> PAPRZYCKI, *Kodeks postępowania karnego*, 120.

<sup>57</sup> Decision of the Supreme Court of 26 October 2011, file ref. no. I KZP 12/11.

<sup>58</sup> D. SZUMIŁO-KULCZYCKA, “Tajemnica obrończa a podsłuch procesowy i kontrola operacyjna,” *Palestra* 1–2 (2013): 96.

7. LEGAL PROFESSIONAL PRIVILEGE IN THE ACT  
—LAW ON THE BAR VERSUS CONFIDENTIALITY  
IN THE CODE OF CRIMINAL PROCEDURE

It should be noted that the provision of Art. 178 CCP sufficiently guarantees that legal defence privilege is respected and is positively assessed by the representatives of the bar. However, the regulation provided in Article 180 § 2 CCP is criticized by them. Their doubts are caused by the very fact that the veil has been lifted, and by the content of the reasons for the waiver. There was also a dispute in the doctrine concerning the relationship between Article 180 § 2 CCP and Article 6 of the Law on the Bar.<sup>59</sup> The Supreme Bar Council has consistently taken the view that legal privilege is absolute and cannot be waived in any way. Consequently, in her opinion, the regulation contained in Article 6 LB takes precedence over other provisions of law relating to professional secrecy. Many representatives of the Bar also argue that provisions of the law constitute *lex specialis* in relation to the CCP provisions.<sup>60</sup> However, the predominant view is that Article 6 LB is a *lex generalis* norm in relation to Article 180 § 2 CCP. Supporters of this idea argue that the provisions of the Law on the Bar regulate the institution of legal professional privilege in a general way, while the provisions of the Code refer only to “a specific procedural situation which is the testimony of an advocate in a criminal trial.”<sup>61</sup> Therefore, Article 180 § 2, which regulates only a certain aspect of legal professional privilege, is a *lex specialis* norm and, according to the *lex specialis derogat generali* rule, will take precedence over Article 6 LB.<sup>62</sup>

Regardless of whose position is correct, it should be pointed out that the lack of coherence between the scope of legal professional privilege con-

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<sup>59</sup> The scope of this study does not permit an in-depth study of this issue. Therefore, only the main arguments of the parties to the dispute in question are discussed. For more on the collision between Article 180 § 2 of the Code of Criminal Procedure and Article 6 of the Law on the Bar, the reader is encouraged to consult the following publications: MAĐRECKA, “W kwestii kolizji art. 180 § 2,” 147–60; KUCHARCZYK, “Charakter prawny tajemnicy,” 57–72; SMARZEWSKI and BANACH, “Ochrona tajemnicy,” 75–87.

<sup>60</sup> S. JANCZEWSKI, *Ustrój adwokatury. Komentarz* (Warszawa: Wydawnictwo Prawnicze, 1960), 118–23; S. KALINOWSKI, “Stanowisko obrońcy w polskim procesie karnym,” *Palestra* 6, no. 8 (1962): 14–15; KRZEMIŃSKI, *Etyka adwokacka*, 16; Z. SKOCZEK, “Spór o tajemnicę adwokacką,” *Palestra* 13, no. 2 (1969), 28ff.

<sup>61</sup> KUCHARCZYK, “Charakter prawny tajemnicy,” 60.

<sup>62</sup> See also B. KURZEPA, “Zakazy dowodzenia w procesie karnym,” *Prokurator* 2 (2002): 47–81; KUCHARCZYK, “Charakter prawny tajemnicy,” 60; KLEJNOWSKA, *Oskarżony, jako osobowe źródło*, 52.

tained in the Act regulating the legal system and the scope of legal professional privilege in criminal proceedings may raise some concerns. First of all, such a legal construction “causes the spectrum of legal professional privilege to be blurred as a value in its abstract sense, and results in serious problems in connection with the need to further specify the concepts derived from it and to draw precise boundaries between them.”<sup>63</sup> Moreover, that regulation may give rise to a conflict of values between the obligation to observe professional secrecy and the obligation to respect the decision of the court exempting the court from the obligation to observe professional legal privilege.<sup>64</sup> This dichotomy also concerns the status of advocates in a trial. In the light of these provisions, the advocate–defence counsel is in a privileged position because he is confident that the information he is obliged to keep confidential will not be disclosed. The situation of advocates who act as attorneys of the auxiliary prosecutor, private prosecutors or have obtained confidential information in another way is less favourable because the court may exempt waive their professional privilege. Therefore, in a trial, there may be two categories of advocates at the same time. According to Zdzisław Krzemiński, “it is difficult to consider such a situation as normal and healthy.”<sup>65</sup> For these reasons, the scope of legal professional privilege should be harmonised on the basis of criminal procedural law and made absolute. This harmonisation could consist in abolishing defence secrecy and leaving only professional privilege in criminal proceedings, the scope of which would be the same as the current scope of protection for defence secrets. This would be in line with the postulate of legal security and legal certainty. The opponents of such a solution argue that this would lead to the absolutisation of legal professional privilege. In my opinion, this fear is groundless because the absolute inadmissibility of evidence (which under the current legislation only covers legal defence privilege, and which will hopefully in the future include advocate’s professional privilege) is not complete, so the circumstances covered by the confidentiality may be determined on the basis of other evidence.

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<sup>63</sup> SMARZEWSKI and BANACH, “Ochrona tajemnicy,” 86.

<sup>64</sup> RAZOWSKI, *Zwolnienie świadka*, 147–48.

<sup>65</sup> KRZEMIŃSKI, *Etyka adwokacka*, 16.

## CONCLUSION

As well as ensuring the suitable prestige of the advocate profession, legal professional privilege, above all, guarantees the proper exercise of the right to a defence and a fair trial for everyone. Therefore, we should negatively view the fact that the provisions of the Code of Criminal Procedure do not guarantee proper protection of legal professional privilege. First of all, it should be noted that there is no coherence between the regulations concerning the scope of advocate's professional privilege in the Act—Law on the Bar and the Code of Criminal Procedure. In the former, legal professional privilege is absolute and in the latter it is relative. It is also questionable that the lifting of secrecy is contingent on a vague, underspecified criterion represented by the “interest of the justice system.” In view of the above, we should join the recurring claims of the Bar to unify the scope of legal professional privilege under our criminal procedural law and make it absolute.

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#### THE SCOPE OF PROTECTION OF LEGAL PROFESSIONAL PRIVILEGE IN CRIMINAL PROCEEDINGS—SELECTED ISSUES

##### Summary

The chief aim of this study is to explore the essence of legal professional privilege and analyse its scope in criminal proceedings. Legal professional privilege plays an essential role in the criminal process as it guarantees every individual the adequate exercise of his or her right of defence and to a fair trial. It should be stressed that the privilege is not uniform since there is dualism manifested by a distinction between defence lawyer's privilege and advocate's privilege, other than the former. The author discusses the Polish regulations and relevant case law. Also, amendments to the current regulations will be proposed.

**Key words:** the Bar; legal professional privilege; defence lawyer's privilege; interview; search.

*Translated by Tomasz Pałkowski*



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