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EXCEEDING AUTHORITY BY PROFESSIONAL SELF-GOVERNING BODIES OF ADVOCATES AND LEGAL ADVISORS: AN ANALYSIS IN LIGHT OF § 19(8) OF THE PRINCIPLES OF ADVOCACY ETHICS AND DIGNITY OF THE PROFESSION (THE CODE OF ETHICS FOR ADVOCATES) AND ARTICLE 20 OF THE CODE OF ETHICS FOR LEGAL ADVISORS

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Abstract

This article examines the rationale behind the establishment of professional self-governing bodies for advocates and legal advisors, as well as the ethical principles guiding these professions. It identifies a critical issue: these bodies have mandated that their members refrain from submitting motions for evidence in court if doing so would disclose confidential professional secrets. The author contends that this prohibition conflicts with the fundamental role of advocates and legal advisors, both in societal and procedural contexts. It undermines the core purpose of legal representation and contradicts the obligation to act in the best interests of clients. The article calls for further discussion to address these concerns.

Keywords: advocate, legal advisor, professional secrecy, legal assistance, client's interest, motions for evidence, evidence

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I. OPENING REMARKS

In Poland, two distinct legal professions provide paid legal assistance: advocates and legal advisors. This 'legal assistance' constitutes the primary function of both advocates (Article 4(1) of the Law on Advocates)[1] and legal advisors (Article 4 of the Law on Legal Advisors).[2] However, it is a more specific concept than the broader 'professional duty' referenced in various provisions (e.g., Article 1(3), Article 7(1), Article 58(12)(m), and Article 80 of the Law on Advocates; Article 27(1), Article 60(8)(h), and Article 64(1) of the Law on Legal Advisors).[3] Legal assistance may be provided both in procedural contexts and out-of-court scenarios. For the purposes of this publication, however, the focus is exclusively on in-court representation, excluding out-of-court activities (see Article 4(1) *in fine* of the Law on Advocates; Article 6(1) *in fine* of the Law on Legal Advisors). Article 14 of the Law on Legal Advisors stipulates that legal advisors must maintain independence when representing clients before decision-making authorities. In contrast, the Law on Advocates does not contain an equivalent provision but generally requires advocates to perform their duties 'individually and duly' (Article 76(1) and Article 78d(1) of the Law on Advocates). While the laws governing advocates and legal advisors do not elaborate on additional principles for providing legal assistance, they clearly define the roles these professionals play in legal proceedings. Article 6(1) *in fine* of the Law on Legal Advisors states that legal advisors represent or defend clients in courts and before administrative bodies. Similarly, Article 77(2) of the Law on Advocates specifies that advocates act as defence lawyers in criminal proceedings and in cases involving financial offenses. The absence of additional principles governing legal assistance in legal proceedings is not an oversight but rather a reflection of the distinct nature of these two professions. The differences between advocates and legal advisors stem from varying licensing requirements, legal structures, organisational frameworks, and the responsibilities of their professional self-governing bodies. The rules governing the appearance of advocates and legal advisors before judicial and administrative authorities are set out in the relevant procedural codes, whether civil or criminal. However, these codes do not authorise any professional self-governing organisation to create new procedural solutions or modify existing ones.

II. DETERMINANTS OF PRACTISING LEGAL PROFESSIONS BY ADVOCATES AND LEGAL ADVISORS

One of the most important principles in the practice of legal professions by advocates and legal advisors – alongside 'scrupulousness' (Article 5 of the Law on Advocates; Article 27 of the Law on Legal Advisors) and 'diligence' (Article 3(2)

[1] Act of 26 May 1982 – The Law on Advocates (consolidated text: Journal of Laws of 2022, item 1184, as amended).

[2] Act of 6 July 1982 on Legal Advisors (consolidated text: Journal of Laws of 2022, item 1166).

[3] Judgment of the Supreme Court of 1 December 2016, SDI 65/16, LEX 2182292.

of the Law on Legal Advisors) – is the unconditional obligation to maintain confidentiality (secrecy) regarding 'everything learned in connection with providing legal assistance' (Article 6(1) of the Law on Advocates; Article 3(3) of the Law on Legal Advisors). Information obtained 'in the course of providing legal services', whether by advocates or legal advisors, is considered confidential even if there was a 'potential possibility' of obtaining it through other means.[4] This obligation aligns with the classification of both professions as public trust professions,[5] as stipulated in Article 17(1) of the Constitution of the Republic of Poland.[6]

The aforementioned provision also allows for the establishment, by legislation, of professional self-governing bodies for these professions, tasked with representing their members and overseeing 'the proper performance of these professions, in line with the public interest and for its protection'. The proper practice of these professions is ensured through supervision of compliance with professional regulations (Article 3(1)(3) of the Law on Advocates; Article 41(5) of the Law on Legal Advisors), continuous enhancement of professional qualifications (Article 3(1)(4) of the Law on Advocates; Article 41(4) of the Law on Legal Advisors), and the development of professional ethical standards (Article 3(1)(5) of the Law on Advocates; Article 57(7) of the Law on Legal Advisors).

These ethical standards appear to be equally important in the practice of the advocate and legal advisor professions as legal knowledge itself. In the case of legal advisors, this is explicitly stated in Article 3(2) of the Law on Legal Advisors and is reinforced by the oath of office outlined in Article 27(1) of the same law. A similar equivalence between ethical standards and legal knowledge can be inferred for advocates from their oath, which requires them to perform their professional duties in accordance with 'the provisions of the law' as well as 'the principles of dignity, honesty, fairness, and social justice' (Article 5 of the Law on Advocates). This equivalence is further supported by § 2(1) of the Regulation on the Practice of the Advocate Profession,[7] which derives the 'principles of practice' from the 'Law on Advocacy', the 'Collection of Principles of Advocacy Ethics and Dignity of the Profession',[8] as well as from the 'Regulation [itself] and the resolutions of the bodies of the Advocacy or the bodies of local bar associations (…)'. The observed equivalence between legal and ethical principles

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4 Decision of the Supreme Court of 11 December 2019, II DSI 78/19, LEX 3364191.

5 Courts expect individuals in such professions (legal advisors, in this case) to conduct themselves in an exemplary manner, both in their professional duties and private lives, setting a standard that serves as an example for other members of society. See decision of the Supreme Court of 19 March 2019, II DSI 31/18, OSNID 2020, No. 1; decision of the Supreme Court of 14 December 2020, II DSI 63/20, LEX 3116096.

6 Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483, as amended).

7 Resolution of the Polish National Bar Council No. 140/2023 of 1 December 2023 implementing the Regulation on the Practice of the Advocate Profession; available at https://www.adwokatura.pl/admin/wgrane_pliki/file-regulamin-wykonywania-zawodu-adwokata-1122023–39479.pdf [accessed on 27 December 2023].

8 The Collection of Principles of Advocacy Ethics and Dignity of the Profession (Code of Advocacy Ethics) – see § 1(5)(2) of the Regulation mentioned in footnote 7.

likely stems from the legislator's assumption that these principles do not conflict. However, this assumption becomes problematic when confronted with § 19(8) of the Code of Advocacy Ethics and Article 20 of the Code of Ethics for Legal Advisors.[9]

III. ISSUES RELATED TO § 19 OF THE CODE OF ADVOCACY ETHICS AND ARTICLE 20 OF THE CODE OF ETHICS FOR LEGAL ADVISORS

The ethical provisions cited above explicitly prohibit submitting motions for evidence[10] that would require advocates or legal advisors to testify as witnesses in order to disclose information obtained in the course of their professional duties (§ 19(8) of the Code of Advocacy Ethics). This prohibition also extends to legal advisors or any individuals with whom they may jointly practise their profession under the law (Article 20 of the Code of Ethics for Legal Advisors), specifically to prevent the disclosure of facts protected by professional confidentiality. Despite some textual differences, these provisions can be interpreted as prohibiting advocates or legal advisors from filing motions for evidence that would involve calling witnesses bound by confidentiality obligations. Such evidence is otherwise permissible – under specific conditions – under Article 180 § 2 of the Code of Criminal Procedure[11] and Article 261 § 2 of the Code of Civil Procedure.[12]

The likely intention behind these codes of ethics was to prevent members of both legal professions from being placed in a conflict where they would have to choose between their duty to maintain professional confidentiality and their duty to testify. However, this potential dilemma appears most relevant in civil cases under Article 261 § 2 of the Code of Civil Procedure, where the decision to testify

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[9] Resolution No. 884/XI/2023 of the Presidium of the National Council of Legal Advisors on the Publication of the Consolidated Code of Ethics for Legal Advisors.

[10] In light of § 19(8) of the Code of Advocacy Ethics, the Supreme Court rejects the argument that the motion mentioned in this provision is not a submitted motion but one that has not yet been reviewed. According to the Court, any violation of this prohibition should be assessed 'in light of the original content of the motion for evidence presented to the judicial authority' (see decision of the Supreme Court of 12 December 2014, SDI 44/14, LEX 1565786). According to this judgment, 'submitting an evidentiary motion' is considered a disciplinary offence under § 19(8) of the Code of Advocacy Ethics, classified as 'committing an offence rather than merely attempting to commit it'. This position underscores that the subsequent outcome of the motion does not affect the grounds for holding the advocate accountable. However, the Supreme Court did not address any potential inconsistency between § 19(8) of the Code of Advocacy Ethics and other statutory provisions, nor did the appellant raise such an issue. Additionally, the provisions of § 19 of the Code of Advocacy Ethics and Article 20 of the Code of Ethics for Legal Advisors do not offer grounds for exoneration for individuals who submit a motion to question an advocate or legal advisor about matters protected by attorney-client privilege, even if it is known from the outset that such a motion will be ineffective.

[11] The Act of 6 June 1997 – Code of Criminal Procedure (consolidated text: Journal of Laws of 2024, item 37).

[12] Act of 17 November 1964 – Code of Civil Procedure (consolidated text: Journal of Laws of 2023, item 1550, as amended).

is left to the discretion of the witness.[13] A similar conflict should not arise in criminal cases, where a court can waive confidentiality under Article 177 § 1 of the Code of Criminal Procedure, prioritising the duty to testify over other obligations.[14] Nonetheless, advocates and legal advisors remain opposed to the relative nature of their professional secrecy. It is also noteworthy that professional self-governing bodies recognise this potential dilemma only in relation to members of their own and related professions, yet they do not extend the same consideration to other professional secrets, such as medical or notarial confidentiality, even though these are also associated with public trust professions.[15] Interestingly, § 19(8) of the Code of Advocacy Ethics and Article 20 of the Code of Ethics for Legal Advisors restrict the initiation of evidentiary proceedings only in relation to personal sources of evidence, while overlooking physical evidence. However, physical evidence can also lead to breaches of confidentiality, as permitted under Article 226 in conjunction with Article 180 § 2 of the Code of Criminal Procedure and Article 248 § 2 in conjunction with Article 261 § 2 of the Code of Civil Procedure. A closer analysis of the legal provisions governing advocates and legal advisors is necessary, not only due to the issues outlined above but also because it is highly likely that both § 19(8) of the Code of Advocacy Ethics and Article 20 of the Code of Ethics for Legal Advisors are incompatible with several higher-ranking regulations.

The underlying premise of both provisions is highly problematic. At first glance, it evident that these provisions aim to limit the right to initiate evidence proceedings using a specific source of evidence. However, such a limitation should only be imposed by statutory provisions on evidence preclusion, such as Article 187(2)(1) of the Code of Civil Procedure in conjunction with Article 205^3(2), as well as Article 458^5 (1) and (2) and Article 381 of the Code of Civil Procedure). No other provision deprives parties, and consequently their professional legal representatives, of the right to introduce even the most misguided or absurd evidence, as such motions[16] remain subject to verification under Article 170 § 1(1)–(6) of the Code of Criminal Procedure[17]

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[13] A. Turczyn, 'Komentarz do art. 261', in: Piaskowska O.M. (ed.), *Kodeks postępowania cywilnego. Postępowanie procesowe. Komentarz aktualizowany*, LEX 2023, comment 4.

[14] More importantly, a witness who is an advocate or legal advisor – even if acting at the request of a former client and 'in their interest' – cannot testify on matters heard in open court in cases other than criminal cases, without prior release in accordance with Article 180 § 2 of the Code of Criminal Procedure. This was affirmed by the Supreme Court in its ruling of 15 November 2012, SDI 32/12, LEX 1231613.

[15] E. Kosiński, 'Prawny status zawodu lekarza. Wybrane zagadnienia', *Studia Prawa Publicznego*, 2019, No. 3(15), pp. 18–20 (pp. 9–28); M. Modrzejewski, 'Pozycja ustrojowa notariusza', *Nowy Przegląd Notarialny*, 2008, No. 1, pp. 25–38; similarly, as to the status of notaries, decision of the Polish Constitutional Tribunal of 13 January 2015, SK 34/12, OTK-A 2015, No. 1, item 1.

[16] In this regard, the rights of the defence lawyer or legal representative align with those of the accused or other participants in the proceedings, which is not typically the case. For example, notable differences arise in relation to the right to participate in actions under Article 185a et seq. of the Code of Criminal Procedure, or in drafting and signing certain appeals. See also K. Wierzbicka, 'Uprawnienia obrońcy w procesie karnym – wybrane zagadnienia', *Themis Polska Nova*, 2018, No. 2(14), p. 160 (pp. 152–165).

[17] As noted in Polish scholarship, Polish criminal procedure follows a 'model of negative verification of motions for evidence', meaning that unless specific evidence is explicitly rejected,

or Article 235^2 § 1 (1)–(6) of the Code of Civil Procedure. The Supreme Court recognised this inconsistency in case II DK 94/21.[18] When examining the issue of liability for a disciplinary offence, the court focused solely on the inadmissibility of limiting the right to initiate evidence proceedings under § 19(8) of the Code of Advocacy Ethics, without addressing the broader implications of this provision. Specifically, the court failed to consider its compatibility with the primary duty of a legal representative: the obligation to act in the client's best interest, and more specifically, the duty to act in the interest of the defendant.[19] I have repeatedly highlighted the inconsistency between § 19(8) of the Code of Advocacy Ethics and Article 1(1) and Article 4(1) of the Law on Advocates, as well as between Article 20 of the Code of Ethics for Legal Advisors and Article 2 and Article 4 of the Law on Legal Advisors.[20] However, it seems that from a higher vantage point, these issues receive less attention – or perhaps the library resources at Krasiński Square, where the Polish Supreme Court is located, are not as extensive as one would hope for such a distinguished judicial authority. This suggests that the reasoning in the decision for case II DK 94/21 is not as thorough as one might expect. Moreover, the right to initiate evidence proceedings, though normatively distinct, is not an autonomous right but rather a component of the broader right to defence[21] – specifically, defence against a criminal indictment (Article 6 in conjunction with Article 167 of the Code of Criminal Procedure and Article 338 § 1 of the Code of Criminal Procedure), defence against civil lawsuits (Article 205^3 § 2 in conjunction with Article 235^1 of the Code of Civil Procedure), the right to prosecute (Article 55 § 2 in conjunction with Article 331 § 1(1) and (2) of the Code of Criminal Procedure; Article 487 of the Code of Criminal Procedure),[22] the right to pursue claims (Article 187 § 2 (1) of the Code of Civil Procedure in conjunction with Article 235^1 of the Code of Civil Procedure), and finally, the constitutionally guaranteed right to a court (Article 45(1) of the Constitution of the Republic of Poland).

Both § 19(8) of the Code of Advocacy Ethics and Article 20 of the Code of Ethics for Legal Advisors – which were not examined in case II DK 94/21 – are fundamentally indefensible. These provisions effectively undermine the i n d e p e n d e n c e that advocates and legal advisors are guaranteed under their

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all other evidence is considered admissible. See P. Wiliński, *Zasada prawa do obrony w polskim procesie karnym*, Kraków, 2006, p. 381.

[18] Judgment of the Supreme Court of 22 February 2022, II DK 94/21, LEX 3340991.

[19] This rule, however, does not apply to a person charged with a petty offence, as Article 41 § 4 (1) of the Act of 24 August 2001 – Code of Procedure in Petty Offences (consolidated text: Journal of Laws of 2022, item 1124, as amended) excludes the possibility of the court releasing a witness 'from confidentiality related to the practice of the profession of an advocate, legal adviser (…)'.

[20] P.K. Sowiński, *Prawo świadka do odmowy zeznań w procesie karnym*, Warszawa, 2004, pp. 176–177; idem, 'Jeszcze o tajemnicy adwokackiej z perspektywy przepisów art. 178 pkt 1 i art. 180 § 2 k.p.k. Uwagi polemiczne', *Roczniki Naukowe KUL*, 2019, No. 1, pp. 78–79.

[21] K. Woźniewski, *Inicjatywa dowodowa w polskim prawie karnym procesowym*, Gdynia, 2001, pp. 32–40, where the author considers the evidentiary initiative to be a manifestation of the principle of the right to defence.

[22] E. Kruk, *Skarga oskarżycielska jako przejaw realizacji prawa do oskarżania uprawnionego oskarżyciela w polskim procesie karnym*, Lublin, 2016, p. 128.

governing laws.[23] The introduction of a restriction on the right to submit motions for evidence, as stipulated in § 19(8) of the Code of Advocacy Ethics, conflicts with Article 1(3) of the Law on Advocates, which states that advocates are subject only to statutory law in the performance of their professional duties. The provision in the Code of Ethics is clearly not statutory law. The situation for legal advisors appears similar, although Article 40(1) of the Law on Legal Advisors explicitly grants the attribute of independence to the professional self-governing body as a whole rather than to individual members. However, can an independent self-governing body, which is 'subject only to the provisions of statutory law,' truly consist of members who do not adhere to the same principle? It seems that the independence of legal advisors can also be derived from Article 9(1) and Article 14(1) of the Law on Legal Advisors,[24] which ascribe to them qualities such as 'autonomy' and an 'independent position' in conducting cases before adjudicating bodies. In Polish, 'autonomous' means 'not dependent on anyone', 'not influenced', 'independent', or 'sovereign'.[25] In legal literature, it is emphasised that the independence of advocacy self-governing organisations is expressed in their role of 'protecting advocacy values, which in turn serve the enforcement of rights and freedoms in their procedural aspect'.[26] While this statement is correct, it also highlights the servient nature of both the advocacy and legal advisory professions. Professional confidentiality is not a value in itself, nor one created for the benefit of advocates or legal advisors, but rather a safeguard in the interest of their clients. This applies equally to both current and former clients, as professional confidentiality does not expire and is not temporally limited (Article 6(2) of the Law on Advocates and Article 3(4) of the Law on Legal Advisors). One could attempt to defend § 19(8) of the Code of Advocacy Ethics and Article 20 of the Code of Ethics for Legal Advisors by arguing that their rationale – rooted in reciprocity and solidarity – serves the interests of clients represented by other advocates or legal advisors. However, does adherence to these prohibitions not render the legal assistance provided to one's own client deficient? Clients have the right to expect that their legal representatives' actions are both lawful and appropriate to the procedural situation. This expectation is legally sound, as such activity by an advocate acting as a defence lawyer or by a legal advisor in a criminal case is mandated by Article 86(1) of the Code of Criminal Procedure. It is worth noting that the phrase 'to undertake actions' in Article 86(1) of the Code of Criminal Procedure may appear to limit legal representatives to certain activities, such as 'making a decision to do something'.[27]

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[23] The same principle of independence underlies the prohibition imposed on advocates by Article 4b(1)(1) of the Advocacy Law – see M. Gawryluk, *Prawo o adwokaturze. Komentarz*, Warszawa, 2012, comment 3 to Article 4b.

[24] See more on this in: P.K. Sowiński, 'Uchylenie tajemnicy zawodowej w trybie art. 180 § 2 k.p.k. a niezależność zawodowa radcy prawnego. Uwagi polemiczne', *Radca Prawny. Zeszyty Naukowe*, 2023, No. 2, pp. 92 et seq. (pp. 91–106).

[25] https://sjp.pwn.pl/doroszewski/samodzielny;5494777.html [accessed on 27 December 2023].

[26] M. Pietrzak, 'Tajemnica adwokacka jako fundamentalny element systemu ochrony praw i wolności', *Palestra*, 2019, p. 94 (pp. 89–95).

[27] https://wsjp.pl/haslo/do_druku/64514/przedsiebrac [accessed on 1 January 2024].

However, it is also pertinent to consider that, in certain cases, this article should be interpreted not literally but teleologically, acknowledging that omissions by the defence lawyer may also be inconsistent with it.[28] While not every omission amounts to negligence, W. Grzeszczyk, in his moderation of excessively radical assessments of defence behaviour, excludes from the scope of Article 86(1) of the Code of Criminal Procedure only those omissions that are 'obviously groundless' (e.g., failing to file an appeal).[29] However, § 19(8) of the Code of Advocacy Ethics and Article 20 of the Code of Ethics for Legal Advisors do not penalise unnecessary or groundless actions; instead, they impose a blanket prohibition on certain actions, including those that may be desirable or even necessary to strengthen a party's argument before the court or to demonstrate that the represented party is right. If seeking professional legal assistance is meant to enhance a party's procedural awareness and improve their chances in the adversarial[30] struggle over the outcome of the proceedings, it could – *o ierum, ierum, o quae mutatio rerum!* – result in self-represented parties being in a better position than those represented by professional attorneys, as the latter are constrained by extra-procedural considerations in their approach to evidence.

The provisions that guide the procedural activity of an advocate or legal advisor – and simultaneously serve as arguments against the continued validity[31] of § 19(8) of the Code of Advocacy Ethics and Article 20 of the Code of Ethics for Legal Advisors – are numerous. For example, Article 6 of the Code of Criminal Procedure addresses legal assistance as an element of the right to defence. Article 86 § 1 of the Code of Criminal Procedure should also be noted in this regard. Identical guidance regarding the expected activities of legal representatives in civil and criminal cases is found in Article 1(1) and Article 4(1) of the Law on Advocates, as well as Articles 2 and 4 of the Law on Legal Advisors. The 'legal assistance' referenced in these provisions is defined as 'an action supporting and improving the situation of the person',[32] receiving such assistance. Legal assistance *ex officio* is also recognised in civil proceedings, specifically in Title II of the Code of Civil

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[28] H. Paluszkiewicz, 'Komentarz do art. 86', in: Dudka K. (ed.), *Kodeks postępowania karnego. Komentarz*, LEX 2023, comment 4; T. Grzegorczyk, *Kodeks postępowania karnego. Tom I. Artykuły 1–467. Komentarz*, LEX 2014, comment 3 to Article 86.

[29] W. Grzeszczyk, *Kodeks postępowania karnego. Komentarz*, LEX 2014, comment 1 to Article 86.

[30] Submitting motions for evidence is considered an expression of the adversarial nature of criminal proceedings – see W. Juchacz, 'Zasada kontradyktoryjności w nowym procesie karnym', *Studia z zakresu nauk prawnoustrojowych. Miscellanea*, 2013, No. 3, p. 23 (pp. 21–30). Both regulations significantly impacted the interests of parties in criminal proceedings between 2015 and 2016, when the balance between the parties' evidentiary initiative and the court's *ex officio* action was temporarily replaced by the principle of party initiative – cf. S. Zabłocki, 'Art. 167 k.p.k. po nowelizacji – wstępne nakreślenie problemów', *Czasopismo Prawa Karnego i Nauk Penalnych*, 2015, No. 2, p. 86 (pp. 83–111).

[31] The evolutionary approach to certain principles of professional ethics for advocates is discussed by P. Hofmański in: idem, 'Gwarancje prawa do obrony w świetle zmian Kodeksu postępowania karnego zawartych w ustawie z dnia 27 września 2013 r.', in: Kolendowska-Matejczuk M., *Prawo do obrony w postępowaniu penalnym. Wybrane aspekty*, Warszawa, 2014, p. 15 (pp. 7–16).

[32] https://sjp.pl/pomoc [accessed on 1 January 2024].

Procedure ('*Ex Officio* Legal Assistance'). The absence of this term in relation to party-appointed representatives is not problematic, as these representatives fulfil the same function (Article 86 § 1 in conjunction with Article 89 § 1 of the Code of Civil Procedure); the only difference lies in the source of their authorisation.

Such assistance should be unconditional and may be restricted only by statutory provisions ('in accordance with legal provisions' – Article 5 of the Law on Advocates; Article 27(1) of the Law on Legal Advisors), serving without exception the 'legal protection of the interests of persons for whom it is performed' (Article 2 of the Law on Legal Advisors). Such a restriction cannot be derived from Article 2 § 2 of the Code of Criminal Procedure, which states that 'true factual findings form the basis of all decisions,' nor from Article 3 of the Code of Civil Procedure, which explicitly requires parties and participants in the proceedings to 'provide explanations regarding the circumstances of the case truthfully and without concealing anything, and to present evidence' (a requirement that should also apply to their legal representatives). Although the principle of truth is not absolute and unconditional,[33] as it is a rule derived from statutory norms,[34] it cannot be modified by lower-ranking provisions, such as those contained in the ethical codes discussed in this paper.

Since § 19(8) of the Code of Advocacy Ethics and Article 20 of the Code of Ethics for Legal Advisors negatively impact the quality of legal assistance in general, they also adversely affect the specific form of assistance referred to in Article 6 of the Polish Code of Criminal Procedure. This is because these provisions do not afford special treatment to defence lawyers.[35] However, the assistance provided by defence lawyers is an integral part of the right to defence, a right enshrined in the Constitution (Article 42(2) of the Polish Constitution). For this reason, legislators drafting laws concerning advocates and legal advisors should carefully consider whether such limitations are admissible by means other than 'solely through statutory law'.[36] This consideration should also prompt legislators to assess whether any limitation of this right is necessary 'in a democratic state for the sake of public safety or order, or for environmental reasons, health, public morals, or the rights and freedoms of others', a requirement that appears to have been overlooked. Such an assessment is essential, given that the conditions for 'limitations on the exercise of constitutional rights' are outlined in Article 31(3) of the Polish Constitution, without distinguishing whether the potential limitation is direct or indirect or whether the exercise of those rights pertains to one's own rights or those of another, as is the case with individuals providing legal assistance. The right to defence may indeed be subject to certain limitations, even

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[33] D. Pożaroszczyk, 'Prawda w procesie karnym', *Studia Iuridica*, 2011, No. 53, p. 211 (pp. 205–214).

[34] As to the possible constitutional basis for the principle of substantive truth in criminal proceedings, see more broadly Ł. Chojniak, 'O zasadzie prawdy materialnej w procesie karnym w świetle Konstytucji RP', *Państwo i Prawo*, 2013, No. 9, pp. 18–29.

[35] The question arises as to whether such a prohibition is reconcilable with the 'duty to undertake procedural actions' imposed on a court-appointed defence lawyer under Article 84 § 2 of the Code of Criminal Procedure.

[36] Statutory determinants of defence lawyers' activism were discussed by A. Malicka, 'Granice działań obrońcy w polskim procesie karnym', in: Grzegorczyk T., Izydorczyk J., Olszewski R. (eds), *Z problematyki funkcji procesu karnego*, Warszawa, 2013, p. 433 (pp. 431–437).

though Article 42(2) of the Polish Constitution does not explicitly provide for such a possibility. More significant is the fact that this article does not prohibit limitations on the right to defence, just as Article 6(3)(c) of the European Convention on Human Rights[37] and Article 48(2) of the Charter of Fundamental Rights[38] do not. Therefore, even in the context of the right to defence, certain limitations may be acknowledged if they are necessary to protect other values. Disregarding the failure to meet the 'formal prerequisite',[39] it seems that § 19(8) of the Code of Advocacy Ethics and Article 20 of the Code of Ethics for Legal Advisors would not pass the test of necessity. This is because Article 167 of the Polish Code of Criminal Procedure does not exclude the possibility of using evidence in the form of witness testimony, including *ex officio* witness testimony, which may encompass matters covered by professional secrecy. Furthermore, Article 180(2) of the Polish Code of Criminal Procedure expressly allows such evidence, albeit under certain conditions.

IV. FINAL REMARKS

The Supreme Court ruling in case II DK 94/21, marked by a superficial analysis, merely foreshadows the urgently needed shift in the interpretation of § 19(8) of the Code of Advocacy Ethics and related deontological regulations. Even if this provision, along with Article 20 of the Code of Ethics for Legal Advisors, is viewed as an expression of the professional self-governments' oversight of advocates and legal advisors, such oversight must still be exercised with purpose and in accordance with the guidelines outlined in Article 17(1) of the Polish Constitution. This article mandates that such oversight be conducted 'within the limits of public interest and for its protection.' The restriction of the procedural freedom of advocates and legal advisors through these extra-statutory provisions violates constitutional principles, creating a conflict with the client's right to legal assistance. This conflict arises because § 19(8) of the Code of Advocacy Ethics and Article 20 of the Code of Ethics for Legal Advisors effectively 'force' advocates and legal advisors to omit certain actions that could benefit their clients. The establishment of professional self-governments is tied to the delegation of specific public authority powers to these bodies, reflecting a form of decentralisation. The scope of this decentralisation is defined by Article 17(1) of the Polish Constitution, alongside relevant legislation governing advocates and legal advisors. This legislation assigns various responsibilities to the self-governments, including 'drafting and promoting the principles of [advocate] professional ethics and ensuring their observance' (Article 3(1)(5) of the Law on Advocates) and 'adopting the principles of legal advisors' ethics' (Article 57(7) of the Law on Legal

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[37] Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, subsequently amended by Protocols No. 3, 5 and 8, and supplemented by Protocol No. 2 (Journal of Laws of 1993, No. 61, item 284, as amended).

[38] Charter of Fundamental Rights of the European Union (OJ C 303, 14.12.2007, p. 1, as amended).

[39] P. Wiliński considers the requirement of a statutory form of restrictions to constitute such a condition, see: P. Wiliński, *Zasada*…, op. cit., pp. 449 et seq.

Advisors). However, the drafting of rules by professional self-governing bodies that extend to evidentiary matters exceeds the functions entrusted to them,[40] particularly since § 19(8) of the Code of Advocacy Ethics and Article 20 of the Code of Ethics for Legal Advisors are not mere recommendations but strict prohibitions enforceable through disciplinary measures. The continued existence of these provisions will inevitably lead to conflicts between advocates or legal advisors and their clients. These regulations compel legal professionals to forfeit significant aspects of their procedural autonomy, thereby undermining their ability to act fully in their clients' interests. Furthermore, they create grounds for liability, stemming from the inherent ambiguity surrounding disciplinary offenses as outlined in Article 80 of the Law on Advocates and Article 64(1) of the Law on Legal Advisors. This ambiguity results from the 'objective impossibility'[41] of legislatively cataloguing all such offenses.[42] As noted by P. Kruszyński, no action taken by a defence lawyer that is permitted by procedural law can be deemed a violation of substantive legal norms. Although his argument primarily concerns provisions of substantive criminal law,[43] is there any justification for excluding deontological rules from the application of this principle?

The current wording of § 19(8) of the Code of Advocacy Ethics and Article 20 of the Code of Ethics for Legal Advisors exacerbates these concerns. How should an advocate or legal advisor who complies with these provisions act toward their client? Should they remain silent, or should they disclose everything to the client? The first option results in what could be described as a form of 'recidivism' by the legal representative. By failing to actively defend the client's interests and concealing existing evidence, the lawyer not only neglects their duty to act in the client's best interest but also compromises the client's case. The second option, on the other hand, risks circumventing the deontological prohibition, as a client who is informed in advance may independently submit a motion to present evidence, interpreting the disclosure as a thinly veiled encouragement to take action – potentially under Article 167 of the Code of Criminal Procedure or Article 3 *in fine* of the Code of Civil Procedure. Neither of these alternatives is satisfactory. It appears that, in this instance, the inimitable Corporal Kuraś was correct when he quipped: 'No matter how you turn, your back is always behind you.' I trust that this perhaps audacious quotation will be forgiven for its vivid illustration of the dilemma at hand.

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[40] P. Tuleja, 'Komentarz do art. 17', in: Czarny P., Florczak-Wątor M., Naleziński B., Radziewicz P., Tuleja P., *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, LEX 2023, No. 1.

[41] Judgment of the Supreme Court of 8 June 2009, SDI 4/09, LEX No. 611833.

[42] The case law refers to an 'open construction of disciplinary offences'; see judgment of the Supreme Court of 5 April 2018, SDI 1/2018, LEX 2526748.

[43] P. Kruszyński, *Stanowisko prawne obrońcy w procesie karnym*, Białystok, 1991, p. 90.

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