

Łukasz Chojniak  
University of Warsaw  
lukasz.chojniak@chw.com.pl

## The Analysis of Some Problems Associated with the Application of Substantive Disciplinary Law Referring to Advocates within the Scope of a Fair Trial for the Accused

**Abstract:** The text is dedicated to the analysis of the function and normative status of ethical and deontological principles concerning advocates' professions. It presents a normative status of the advocates' ethical code and its relationships with existing law regulations. It also includes some remarks on a fine and the issue of guilt in disciplinary proceedings.

**Keywords:** disciplinary law, professional ethics, deontological norms, responsibility, guilt, fine

Considerations on disciplinary proceedings in the context of the principles of a fair trial *ipso facto* focus on possible procedural problems. With regard to disciplinary proceedings against advocates, the above issues will result both from the application of solutions ensuing from the Act on the Advocacy (AA)<sup>1</sup> and appropriately applied provisions of the Code of Criminal Procedure. On the other hand, equally important problems of substantive disciplinary law recede into the background in the subject literature. This state of affairs may, in turn, lead to a wrong assumption that these problems either do not occur in practice, or their importance is insignificant. Meanwhile, legal solutions providing a possibility of pursuing disciplinary proceedings satisfying the standard of a fair trial and requirements of procedural justice will be of little avail without appropriate substantive legal bases guaranteeing the assurance of substantive justice despite more and more noticeable autonomy of procedural law<sup>2</sup>.

---

1 The Act of 26 May 1982 on Bar (Journal of Laws of 1982, No. 16, item 124, as amended) [Ustawa z dnia 26 maja 1982 r. Prawo o adwokaturze (Dz.U. z 1982 r. Nr 16, poz. 124 ze zm.).]

2 J. Skorupka, O sprawiedliwości procesu karnego, Warszawa 2013, p. 77 and following.

From the very beginning, it should be noticed that Rules of Advocates' Ethical Conduct and Professional Dignity (the Code of Advocates' Ethics – KEA), which is often an essential part of the grounds of disciplinary assessment of advocates and advocate trainees' conduct, do not contain any general solutions regulating the principles of disciplinary liability, forms of disciplinary tort's perpetration or exclusion of disciplinary liability; whereas Art. 95n point 2 of the AA refers the above scope to the appropriately applied provisions of Chapters I-III of the Criminal Code but only since 25 December 2014. Insofar as it is a correct legislative solution, the fact that the Rules adopted by the Polish Bar Council that have been elevated to the status of a code do not actually contain solutions typical of such a type of a legal act, i.e. general, defining and mandatory<sup>3</sup>, should be negatively assessed. The provisions of the Code of Advocates' Ethics included in the Chapter titled "General Provisions" refer not to the principles of disciplinary liability and related matters, as it could be expected, but formulate general types of disciplinary offences whose commission may imply the launch of disciplinary proceedings. Hence one may gain a justified impression that there is a lack of legal acts exhaustively regulating some issues connected with a substantive legal basis of disciplinary liability. What is more, even if such an autonomous regulation does appear somewhere, it may more often than not arise doubts.

Hence not attempting to comprehensively discuss substantive aspects of disciplinary law related to advocates, which would considerably exceed the framework of this article, I will only focus on selected issues.

An absolutely basic issue evoking certain doubts is a definition of the grounds of advocates' disciplinary liability. It is undeniable that the exclusive statutory base within this matter is Art. 80 of the AA stipulating that advocates and advocate trainees are subject to disciplinary liability for conduct contrary to the law, principles of ethics or professional dignity, or a breach of their professional duties; while advocates are further liable for a failure to conclude a civil liability insurance agreement.

Four autonomous bases of disciplinary liability contained in the above invoked norm constitute a closed catalogue. This does not change the fact that each of the

---

3 Also the Higher Disciplinary Court (pl. *Wyszszy Sąd Dyscyplinarny*, in short WSD) in its decision of April 26, 2014 (WSD 63/10), also expressed doubts as to the accuracy of adopting the "codex" status of the regulation of a set of ethical principles, indicating that the task resulting of Art. 3 par. 1 point 5 of Law on Bar of the professional self-government to set the rules of professional ethics cannot be equated with the obligation of their codification. The codification of the principles of ethics is, as the WSD observes, objectively impossible because of the inability to describe a closed catalog of all behaviors that can be assessed as ethically inappropriate. Despite the significantly misleadingly name of the second part of the resolution of the Supreme Bar Council, it is not a code – as the WSD notices – in the sense that it does not regulate the whole field of advocates' recommended or forbidden behaviors in a comprehensive and exhaustive manner, which is determined by the provisions of § 1 point 1 and 2 and § 2 KEA.

above quoted grounds of disciplinary liability may be extremely capacious except clearly and separately specified tort of a failure to conclude a civil liability insurance agreement. Nevertheless, despite a broad catalogue of conduct which may objectively fulfil the features of a disciplinary tort involving conduct either contrary to the law or breaching professional duties, their codification on the basis of valid legal acts should not cause major problems. These provisions are, of course, scattered in many legal acts but finding them is not only possible but also necessary in order to attribute a disciplinary tort thereto.

Advocacy Higher Disciplinary Tribunal accurately noticed that the ground of advocates' disciplinary liability must be Art. 80 of the AA, which defined conduct of advocates and advocate trainees subject to disciplinary liability. As it was further perceived by the AHDT, the same as in the case of every repressive liability, substantive legal grounds attributing disciplinary liability must be based on the statutory provision and possibly only completed by sub-statutory provisions, or those included in the resolutions of corporate authorities. Among the grounds of disciplinary liability enlisted in Art. 80 of the AA, the first three are of a flat-rate nature, i.e. they do not permit to independently establish whether specific conduct fulfils statutory features of a disciplinary offence. To accept disciplinary liability, it is not only necessary to specify in which of the above listed forms a disciplinary tribunal perceives the grounds of the accused person's liability, but also indicate the norm giving specific expression thereto. Hence, with regard to conduct contrary to the law, a concrete provision of law infringed by an advocate must be provided, whereas in the case of the second and third basis – a principle or duty regulated in the KEA or in another internal corporate regulation, yet also resulting from a historically developed custom confirmed by the uniform and consistent line of disciplinary tribunals' case law. Regulations contained in the KEA do not constitute self-contained, substantive legal grounds of disciplinary liability of a repressive nature<sup>4</sup>. Therefore formal violation of the rules included in the KEA itself is not a ground of disciplinary liability of advocates but conduct which is contrary to the law, principles of ethics or professional dignity, or breaching professional duties<sup>5</sup>.

---

4 The WSD Order of 26 April 2014 r., WSD 17/14. In this order, the WSD also reminded that the first written Code of Ethics for Barristers and Dignity of the Profession was passed by the Supreme Bar Council in 1961. Until then, there was no formal collection, list or catalog of offenses against the principles of barrister's ethics or the dignity of a lawyer. Nevertheless, the legal acts constituting the constitutional system provided for disciplinary liability for these types of offenses. See also the Judgment of the Supreme Court of 15 July 2010 r., SDI 12/10, OSNKW 2011, No. 3, item 25; the Judgment of the Supreme Court of 29 October 2009, SDI 22/09, OSN-SD 2009, item 132.

5 The Judgment of the Supreme Court of 27 September 2012, SDI 25/12.

Hence descriptions of desired or unlawful conduct subject to tort liability are of an exemplary nature<sup>6</sup>. The catalogue constructed in such a way is to facilitate advocates and advocate trainees to appropriately recognize conduct which may expose them to disciplinary consequences due to activities breaching the principles of ethics and professional dignity. Thus the validity of KEA in this or another reading is not necessary to attribute disciplinary liability under Art. 80 of the AA if it turns out that advocate's conduct is unethical or undermining professional dignity. However, since KEA was adopted, I believe it is necessary to ask two basic questions: firstly, about the statutory grounds of its issue and competence of advocacy's authority in this matter and secondly, about binding disciplinary tribunals by the KEA provisions.

Neither KEA itself nor amendments thereto<sup>7</sup> depict statutory grounds of their issue while the authority enacting them – the Polish Bar Council – does not refer to such a base too. Of course, it does not decide at all about a lack of the norm of competence to issue this legal act if it was, obviously, established in the AA itself. The problem is that the above norm is difficult to find for the Polish Bar Council itself. An adequate legal base could be here Art. 58 of the AA, which contains a closed catalogue of tasks of this authority. It does not envisage a possibility of enacting principles of professional ethics. It is beyond any doubts that even the most favourable reading of the quoted norm of Art. 58 of the ACC does not allow to assume that the Polish Bar Council has been appointed to fulfil itself a task imposed on the entire advocates' self-government in Art. 3 par. 1 point 5 of the AA, i.e. establishing and promoting principles of professional ethics and caring about their observance. Hence it appears that the only advocacy authority competent to establish principles of professional ethics is the National Congress of the Bar whose powers, opposite to the Polish Bar Council, have not been enlisted in Art. 56 of the ACC in a closed catalogue. Thus the Congress is vested with exclusive statutory power to enact principles of professional ethics, which on no account may be transferred into the Polish Bar Council.

The legislator entrusted the Congress, the highest authority of the Advocacy, with the power to establish principles of professional ethics not accidentally. By all means, it is one of the most important tasks of the advocacy if we take into account its autonomous position ensuing from Art. 17 par. 1 of the Constitution. It should be added that in relation to another task the professional self-government has been entrusted with, i.e. professional improvement of advocates and education of advocate trainees (Art. 3 par. 1 point 4 of the AA), the legislator has already directly vested

6 See the WSD Order of 26 April 2014 r., WSD 17/14 and the remarks presented in the footnote No. 198.

7 See e.g. the Resolution No. 64/2016 of the Supreme Bar Council of 25 June 2016 on the modification of art. 58 of the Code of Ethics for Barristers and Dignity of the Profession (consolidated text – the announcement of the Presidium of the Supreme Bar Council of 14 December 2011) – [www.nra.pl](http://www.nra.pl) (consulted: 28 January 2017).

the Polish Bar Council with the obligation to enact regulations concerning the fulfilment of the professional duty imposed on advocates with regard to professional improvement and powers of self-government bodies assuring the observance of this duty by advocates (Art. 58 point 12 letter m of the AA)<sup>8</sup>. Hence it cannot be assumed that a failure to entrust the Polish Bar Council with the power to establish principles of professional ethics is mere legislative omission which may be removed in the course of a correct interpretation of the norm of competence. Anyway, the interpretation which would extend the rights of the Polish Bar Council beyond those ensuing from the closed catalogue of Art. 58 of the AA would be inadmissible. This general rule concerns all authorities of public power including the Polish Bar Council. On the other hand, the Act on Legal Advisors<sup>9</sup> entrusts the National Congress of Legal Advisors with a closed catalogue of tasks, which is opposite to the National Congress of the Bar. Yet Art. 57 point 7 of the Act on Legal Advisors directly entrusts this Congress with the power to enact principles of legal advisors' ethics; that is to say it shall be done by the authority adequate to the National Congress of the Bar.

Therefore, since doubts about the establishment of currently valid principles of advocates' ethics by a relevant and competent body are reasonable, we should also ask a question about the consequences of this state of affairs.

Assuming that KEA has not been enacted by a competent body, it cannot exert legal effects in relation to all advocates and advocate trainees too. In other words, quoting KEA's provisions in disciplinary tribunals' rulings is also doubtful while an independent base of possible punishment should be here the norm of Art. 80 of the AA exclusively.

However, the above presented attitude does not mean that current KEA may be disregarded both in a daily practice of advocates and in disciplinary case law. Undeniably, it is an extremely important point of reference for the interpretation of Art. 80 of the AA within the scope of description of conduct which could breach the principles of ethics and professional dignity.

Furthermore, the above evokes another question. If pursuant to Art. 3 par. 1 point 5 of the AA, a role of advocates' self-government (its competent bodies) is to establish but not enact principles of professional ethics, it is still possible that such establishment will not correctly decode models of proper conduct. If so, is a disciplinary tribunal still bound by such establishment in the form of an internal corporate legal act even already adopted by a competent body of the advocates' self-government?

Answering this question, we should consider the content of Art. 89 par. 1 and 2 of the AA, which stipulates that a disciplinary tribunal is independent within the

---

8 See also the Decision of Supreme Court of 13 December 2016, SDI 60/16.

9 The Act of 6 July 1982 r. on Legal Advisors [(Journal of Laws of 1982, No. 19, item 145, as amended) [Ustawa z 6 lipca 1982 r. (Dz.U. z 1982 r. Nr 19, poz. 145 ze zm.)].

scope of sentencing. Moreover, it independently resolves occurring legal issues. If a disciplinary tribunal examining a case finds principles of advocates' ethics established in the KEA to be in contradiction with Art. 80 of the AA, i.e. a potential breach of the principles of advocates' ethics indicated by the KEA does not essentially exhaust this feature of disciplinary liability specified in Art. 80 of the AA (in other words, the principle of advocates' ethics has been wrongly established), the disciplinary tribunal may be then in a very difficult situation.

Independence and autonomy of sentencing would require a pursuit of the autonomous interpretation of Art. 80 of the AA contrary to the reading of a given KEA's provision or another internal corporate legal act the advocate is obliged to apply under § 63 of the KEA. What is more, a disciplinary tribunal is not entitled to submit a legal question to the Constitutional Tribunal under Art. 193 of the Constitution and Art. 33 par. 3 of the Act on the Organization and Course of Proceedings before Constitutional Tribunal<sup>10</sup>. Although disciplinary tribunals, including those related to advocates, perform activities belonging to the sphere of widely understood public tasks, they cannot be recognized as courts resolving cases in the constitutional meaning. Moreover, their rulings are subject to various forms of judicial control – in the constitutional meaning – during which a legal question may be asked<sup>11</sup>.

Hence a disciplinary tribunal has no tools allowing to dispel its possible doubts with regard to the compliance of the model established in the KEA with the interpretation of the content of Art. 80 of the AA made by this tribunal. Under such circumstances, although rather unlikely indeed, I believe that following the principle of its own independence and autonomy, a disciplinary tribunal should autonomously resolve any doubtful issues it encounters while not being bound by the very content of KEA itself but only Art. 80 of the AA.

If recently proposed changes in the KEA, which are further described herein, come into force, they, unfortunately, imply that such jurisdictional doubts may be experienced by many judges. According to a new proposal, § 66a would be added to the KEA in the following reading: "An advocate who has been charged in criminal proceedings that are carried out against him or her shall immediately inform about it Dean of the Regional Bar Council competent according to the professional seat of the RBC"<sup>12</sup>.

If a new solution came into force, it would put the advocate charged in criminal proceedings in a very difficult procedural situation. He or she could inform Dean

10 The Act of 30 November 2016 on the Organization and Procedure before the Constitutional Tribunal (Journal of Laws of 2016, item 2072, as amended) [Ustawa z dnia 30 listopada 2016 r. o organizacji i trybie postępowania przed Trybunałem Konstytucyjnym (Dz.U. z 2016 r., poz. 2072)].

11 M. Safjan, L. Bosk (eds.), Komentarz do art. 193 Konstytucji RP, Warszawa 2016, Legalis.

12 Bill of 15 December 2016, NRA-018-SEK-1/7/16 providing adding new § 66a KEA, not published.

about this fact, which in practice may mean a launch of disciplinary proceedings against this advocate. Dean is not competent to assess whether a possible commission of an offence by the advocate does not concurrently constitute a disciplinary tort. Thus he or she *nolens volens* must hand over the case to Disciplinary Ombudsman, which already implies a likely consequence in the form of repressive proceedings against the advocate. On the other hand, if the advocate conceals the information about his or her charges before Dean, he or she will risk autonomous disciplinary liability under § 66a of the KEA.

Hence the new § 66a of the KEA would be in direct contradiction with the reading of Art. 74 § 1 of the CCP and the constitutional principle of the right to defence expressed in Art. 42 par. 2 of the Polish Constitution, which is inextricably connected not only with the right to avoid self-incrimination in pending criminal (disciplinary) proceedings but also the right to avoid such proceedings. Raising such serious objections to the proposed § 66a of the KEA, it must be clearly said that such a change in the code of ethics would introduce liability for an act which cannot be recognized as a tort, on account of which disciplinary tribunals should refuse to apply it.

Yet the interpretation of substantive provisions of disciplinary law is even more complicated. P. Skuczyński rightly draws attention to the fact that a variety of expressions contained in the provisions that are substantive grounds of disciplinary liability is not appropriate because it has no substantial justification. This rather reflects the fact that the provisions have been drafted at different times and by different authors. They apparently lack an intention to develop distinct bases of disciplinary liability while in practice the interpretation of these provisions is similar and does not include various terminological expressions contained therein<sup>13</sup>.

The problem of legislative imperfection of internal corporate legal acts means, however, that the interpretation of disciplinary law provisions plays an extremely important role here, which is apparently emphasized by P. Skuczyński as well. Only then will it be possible to recurrently rationally decode the content of orders ensuing from disciplinary provisions of substantive law. It seems that a decisive role in designating the subjective scope of disciplinary liability of advocates and advocate trainees should be attributed to the purpose of disciplinary law, i.e. guaranteed observance of basic rules and principles of professional practice in order to protect the highest standards of legal aid provided by advocates performing a profession of public trust.

The interpretation of substantive law should also lead to the resolution of a potential conflict between orders ensuing from internal corporate disciplinary

---

13 P. Skuczyński, Aktualne problemy odpowiedzialności dyscyplinarnej zawodów prawniczych, (in:) A. Bodnar, P. Kubaszewski, Postępowania dyscyplinarne w wolnych zawodach prawniczych. Model ustrojowy i praktyka, Warszawa 2013, p. 62.



law and orders that are internally contradictory or contradictory to the provisions of ordinary law. If existing collisions between the provisions of internal law and commonly applicable law cannot be removed, the provisions of internal corporate law with regard to the principles of ethics and professional dignity should generally prevail. On the other hand, possible consequences that should be suffered by an advocate or advocate trainee due to the above are a different problem, i.e. if in the situation of a conflict between orders ensuing from the provisions of ordinary law forcing conduct contrary to the principles of professional ethics, advocates or advocate trainees decide to follow the first solution in order to avoid potential punishment or other types of sanctions or repressions. This is a subject requiring a separate study. Nevertheless, I believe that even though such conduct would exhaust the features of a disciplinary tort, a possibility of punishing the advocate remains questionable.

The Supreme Court held a similar opinion thereon assuming that an advocate cannot be held professionally liable for conduct in compliance with the order or ban, or authorization of the valid Act even if it formally violated norms of professional ethics contained in the code of professional ethics adopted by a given professional corporation<sup>14</sup>. Although the Supreme Court assumes that conduct contrary to the order ensuing from the internal corporate law but consistent with the order resulting from the Act is not a tort, in my opinion, this thesis is too far-reaching. With regard to its effects, it implies danger of effacing clear and plain principles of practicing the profession of an advocate and deontological norms when they are contrary to ordinary (common) positive law. On the other hand, assuming that given conduct remains a tort not always means it was culpable, which, in turn, excludes a possibility of disciplinary punishment.

Finally, the interpretation of the provisions of disciplinary law should not disregard the fact it involves repressive law. In other words, it should be narrow and close even if it is assumed that the catalogue of conduct included within the scope of conduct breaching principles of ethics and professional dignity (Art. 80 of the AA) is open. Moreover, the fact that disciplinary law belongs to the category of repressive law implies the need to interpret it in accordance with the accused person's guarantees.

Problems connected with the interpretation of the provisions of substantive disciplinary law are more than apparent in practice. Four situations can be presented here as examples thereof.

The advocacy consistently emphasizes the importance of advocates' professional secrecy. During the National Congress of the Bar of 2016 it was assumed that a foundation of practicing the profession of an advocate is just advocates' professional secrecy. Furthermore, advocates cannot be exempted from it under the Act determining the system of advocates' self-government and basic principles of

---

14 The Judgment of the Supreme Court of 27 September 2012, SDI 24/12, [www.wsd.adwokatura.pl](http://www.wsd.adwokatura.pl) (accessed: 28 January 2017).



practicing this profession. It has been assumed that advocates' professional secrecy is a guarantee not only for advocates but, above all, for their clients. This protection assures them fundamental rights to a fair trial and privacy protected not only by the Polish Constitution but also under international obligations. Finally, the opinion of the Human Rights Committee of the Polish Bar Council was approved of, according to which disclosure of advocates' professional secrecy threatens citizens' trust in the State and leads to a loss of a sense of security undermining credibility and legitimacy of the system of justice<sup>15</sup>.

The *in extenso* invoked opinion of the advocacy is accurate, yet with one reservation – it is admissible to exempt advocates of professional secrecy and interrogate them subsequently even under Art. 180 §2 of the CCP. If an advocate refuses to testify already after being exempted from the duty to keep professional secrecy, such a refusal will be found unreasonable under Art. 287 § 1 of the CCP which, in turn, opens the way to punish the advocate by a fine or even custody in an extreme situation. On the other hand, even the exemption of an advocate from the obligation to keep secrecy on the basis of commonly valid law does not free him or her from the liability for breaching it under § 19 par. 1 of the KEA.

Can we then require the advocate who could actually be fined for unreasonable refusal to testify to consciously accept this liability? If he or she decides to resolve this evident conflict in favour of a testimony, it seems that such conduct will exhaust the features of a disciplinary tort. Yet, taking into account potential consequences he or she could suffer, it is possible to consider his or her release from disciplinary liability assuming that the advocate acted under mental duress which, in turn, excludes attribution of his or her guilt.

A slightly different situation, which also requires interpretation, occurs with regard to the obligation imposed on advocates in Art. 118 § 5 of the CCP. Pursuant to the above quoted provision, if an advocate or legal advisor appointed in connection with cassation or procedure in action for the unlawfulness of a valid ruling does not find any grounds to submit an appeal, he or she is obliged to immediately inform the party and court about this in a written form not later than within two weeks from the day he or she was notified about such an appointment. The advocate or legal advisor attaches to such a notice an opinion he or she has drafted about no grounds to submit an appeal. Such an opinion is not enclosed to the case files and is not served to the opposite party.

On the other hand, an internal corporate legal act imposes a slightly differently formulated obligations on advocates in this respect. An advocate appointed *ex officio* to draft an appeal or complaint for the unlawfulness of a valid ruling and constitutional appeal may refuse to draft it if he or she decides there are no prerequisites justifying

---

15 The Resolution No. 15/2016 of the National Congress of the Bar of 26 November 2016, [www.adwokatura.pl](http://www.adwokatura.pl) (accessed: 29 January 2017).

its drafting. The case should be immediately examined in order to assess whether there are prerequisites justifying drafting an appeal. A refusal to draft an appeal must be made in the form of a written opinion served without unreasonable delay to the client and Dean of a competent Regional Bar Council. The advocate is also obliged to immediately inform the court about drafting such an opinion and sending it to the client and Dean of the Regional Bar Council<sup>16</sup>.

The resolution itself has many terminological flaws. Its wording seems to suggest that it refers exclusively to the principles of drafting an opinion about a lack of grounds to submit an appeal or complaint for the unlawfulness of a valid ruling and constitutional appeal. Literal interpretation of such wording in point 1 of the resolution would trigger a wrong conclusion that the catalogue of extraordinary measures of appeal is *numerus clausus* leaving beyond the scope of the resolution's validity even a possibility of a refusal to draft an appeal or application for revision of a judgment in criminal proceedings which, in fact, existed in the Polish criminal procedure on the day the resolution was adopted while the content of Art. 84 § 3 of the CCP also in 2007 permitted an advocate appointed to submit an appeal or application for revision of a judgment to refuse to draft them due to their groundlessness. Therefore functional interpretation allows to contain in the resolution both the above mentioned appeal or application for revision of a judgment as well as an appeal against the appellate court's judgment reversing the first instance court's judgment and referring the case for revision (Chapter 55a of the CCP), which was introduced to the Code of Criminal Procedure as of 15 April 2016.

However, comparing the content of Art. 118 § 5 of the CCP, although it was introduced as of 19 April 2010<sup>17</sup>, with the content of the resolution, two basic differences may be distinguished. Art. 118 § 5 of the CCP does not order to serve Dean of a competent Bar Council with the above mentioned opinion whereas the resolution just straightforwardly introduces such an obligation. On the other hand, insofar as Art. 118 § 5 of the CCP orders to serve the court with a copy of this opinion, although the resolution does not directly ban serving the court with the opinion, its interpretation must lead to such a conclusion. The reason for it is the fact that in point 3 of the resolution the court has been omitted as an entity to be served with the opinion while other entities have been indicated. Moreover, point 4 of the resolution set forth that an advocate is obliged to immediately notify the court about drafting the opinion and sending it to the client and Dean of the Bar Council, i.e. serving the court

16 The Resolution of the Supreme Bar Council 61/2007 of 15 September 2007 on the procedure of advocates appointed ex officio to assess the legitimacy of preparing and filing cassation proceedings, complaints about non-compliance with the law of a final judgment and a constitutional complaint, [www.nra.pl](http://www.nra.pl) (accessed: 29 January 2017).

17 See. K. Pachnik, *Odmowa sporządzania nadzwyczajnych środków zaskarżenia wymaga aktualizacji*, <http://www.adwokatura.pl/ogolnoprprawne/odmowa-sporzadzania-nadzwyczajnych-srodkow-zaskarzenia-wymaga-aktualizacji/> (accessed: 29 January 2017).

with it has not been envisaged. Such a solution seems to be justified by the protection of client's interest and sometimes even the necessity to protect information covered by the advocates' professional secrecy. The opinion which is essentially contrary to the party's expectations and accepts a judgment that is not in their favour due to no grounds for a further appeal should not be revealed to the court even if it is enclosed to the documents other than main files. By all means, it does not liquidate but merely limits a risk connected with disclosing the opinion to the third parties, including the opposite party.

Hence the question arises how to settle undeniable collisions between the commonly valid law and the resolution of the Polish Bar Council. Insofar as it is not too difficult to achieve with regard to serving Dean of a competent Bar Council with a copy of the opinion, yet the issue connected with the obligation to serve the courts with this opinion under Art. 118§ 5 of the CCP may evoke doubts.

In the first case we deal with an additional, internal corporate duty established on the basis of internal law provisions consistent with the provisions of the Act. Therefore it appears that an advocate should fulfil this obligation. Yet in relation to the collision between the order ensuing from Art. 118 § 5 of the CCP and the ban resulting from the Polish Bar Council's resolution, which concerns serving the court with the opinion, it seems that this time, contrary to the problem of colliding provisions within the scope of releasing advocates from professional secrecy, advocates should be expected to respect the provisions of the resolution. This may obviously put them at risk of the court's refusal to award them with the cost of unpaid legal aid given *ex officio* they are entitled to. Nevertheless, this consequence is not as severe as possible fines imposed under Art. 287 § 1 of the CCP. Hence in this case, taking into account the fact that the proposed interpretation does not infringe the advocate client's interest since he or she receives the opinion whose quality may be controlled by the competent authorities of professional self-government, and information covered by the professional secrecy is protected, it appears that internal corporate provisions should prevail.

In the light of the above, it can be seen that the resolution of collision between ordinary law and self-government law is not guided by one model of interpretation but depends on the consideration of a concrete case and function of disciplinary law including guarantees, which are essential from the accused person's perspective.

The problem of interpretation of disciplinary law provisions does not only regard collision between statutory norms and self-government-made law. Equally serious problems may emerge in the case of applicability of the principle of guilt in disciplinary law. The provision of § 65 of the KEA may lead to a wrong conviction that a tort of failure to pay a corporate contribution, which is exclusively determined in this provision, is based on the principle of guilt just because KEA refers directly to the issue of culpability only in this provision. And yet it would not be a correct opinion. The reading of § 65 of the KEA is another example of legislative imperfection within the scope of internal corporate legal acts. Nevertheless, it seems that under Art. 95n

point 2 of the AA in connection with Art. 8 and 9 § 1 and 2 of the Criminal Code applied respectively in disciplinary law, no other solution may be adopted but the one according to which the principle of guilt is a base of disciplinary liability. The solution where disciplinary liability entailing serious consequences for advocates and advocate trainees could be based on the principle of risk or objective liability independent of culpability is simply inconceivable. On the other hand, the above quoted provisions of the Criminal Code should be appropriately applied in disciplinary law, i.e. with certain changes and modifications. Disciplinary torts do not know a division similar to the one referring to offences divided into misdemeanours and crimes. In other words, we should adopt one model of liability based on the principle of guilt – either unintentional and intentional or only intentional.

Disciplinary torts are similar to misdemeanours with regard to sanctions. For this reason, an adequate model here may be Art. 5 of the Code of Misdemeanours envisaging that a misdemeanour may be committed both intentionally and unintentionally unless the Act stipulates liability only for intentional misdemeanour. Looking at the problem of guilt in disciplinary law also from the perspective of the accused person and his or her guarantees, the solution included in Art. 5 of the Code of Misdemeanours seems to be the one that could be applicable in disciplinary law by the appropriate application of the provisions of Art. 8 and 9 § 1 and 2 thereof. The same, it should be found that a disciplinary tort may be committed both intentionally and unintentionally unless the provisions either stipulate directly an intentional nature of a disciplinary tort, or it results from its essence.

The last problem regarding the scope of interpretation of disciplinary law provisions I would like to pay attention to is a combined sentence imposed under Art. 84 par. 2 point 3 of the AA to punish an advocate by two or more individual fines. The above invoked provision stipulates that a combined sentence cannot exceed a sum of a total number of fines and cannot be lower than the highest of them. A significant problem occurs here. Pursuant to Art. 82 par. 1 sentence one of the AA, an individual fine must be imposed within the limits – from one and a half to twelve times minimum salary as of the day on which the disciplinary tort was committed. Therefore it is a relatively designated sanction. According to the rules on a combined sentence in the Criminal Code, which cannot be respectively applied in disciplinary law due to the lack of reference in Art. 95n point 2 of the AA, imposing a combined fine and acting within the limits of a relatively designated sanction, a common court may impose it within the limits from the highest sentence for individual offences up to their sum not exceeding, however, a fine of 810 daily rates (Art. 86 § 1 of the CC). In other words, the upper limit of a combined fine in the Criminal Code may be a total sum of individual sentences not exceeding the limit of 810 daily rates. This second condition of the application of a combined sentence in the case of punishing an advocate by fines has not been included in the corporate Act. Thus the literal interpretation of Art. 84 par. 2 point 3 of the AA may imply that the upper limit of a combined sentence, which

is determined by only a total sum of individual sentences, may oblige the punished advocate to pay a fine that is grossly higher than the upper limit of an individual sentence, including a "ruinous" sentence. This is why I believe that Art. 84 par. 2 point 3 of the AA should be understood in the way according to which the upper limit of a combined sentence cannot exceed a total sum of individual fines while, concurrently, the second limit herein is the amount of the highest individual fine that may be imposed, i.e. up to twelve times minimum salary. At present, it is PLN 24.000<sup>18</sup>, which is relatively high. An additional argument supporting the above interpretation of the provisions on a combined sentence with regard to pecuniary penalties is also the fact that a disciplinary tribunal, which actually does not administer justice, should not have a possibility to sentence to higher fines.

The above described examples of problems connected with the application of substantive disciplinary law do not exhaust this subject at all. Each above discussed issue could be more thoroughly analyzed, which is not possible here on account of absolute editorial discipline (text capacity). Apart from this, substantive disciplinary law evokes a number of other interpretative difficulties which I have not even signalled here. Nevertheless, considering the assumed model of disciplinary proceedings which must satisfy standards of a fair trial, it must be remembered that without just and fair substantive disciplinary law procedural justice becomes merely an empty slogan.

#### BIBLIOGRAPHY

- Bodnar A., Kubaszewski P., *Postępowania dyscyplinarne w wolnych zawodach prawniczych. Model ustrojowy i praktyka*, Warszawa 2013.
- Borkowski G. (ed.), *Etyka zawodu radcy prawnego i adwokata. Kazusy. Objasnienia. Orzecznictwo*, Warszawa 2016.
- Łojko E., Dziurnowska-Stefańska E. (eds.), *Wartości a sukces zawodowy prawników – granice kompromisu?*, Warszawa 2011.
- Naumann J., *Zbiór Zasad Etyki Adwokackiej i Godności Zawodu. Komentarz*, Warszawa 2012.
- Pachnik K., *Odmowa sporządzania nadzwyczajnych środków zaskarżenia wymaga aktualizacji*, <http://www.adwokatura.pl/ogolnoprawne/odmowa-sporzadzania-nadzwyczajnych-srodkow-zaskarzenia-wymaga-aktualizacji/> (accessed on: 29 January 2017).
- Safjan M., Bosek L. (eds.), *Komentarz do Konstytucji RP*, Warszawa 2016 r., Legalis (electronic version).
- Świecki D., *Czynności procesowe obrońcy i pełnomocnika w sprawach karnych*, Warszawa 2015.
- Kozielewicz W., *Odpowiedzialność dyscyplinarna sędziów, prokuratorów, adwokatów, radców prawnych i notariuszy*, Warszawa 2012.

---

18 The monthly minimum wage for work is PLN 2000 gross – rozporządzenie Rady Ministrów z dnia 9 września 2016 r. w sprawie wysokości minimalnego wynagrodzenia za pracę w 2017 r. (Dz.U. z 2016 r., poz. 1456) [The Regulation of the Council of Ministers of 9 September 2016 on the monthly minimum wage for work in 2017 (Journal of Law of 2016, item 1456)].