

**Izabela Urbaniak-Mastalerz**  
University of Białystok  
izaurbaniakmastalerz@gmail.com

## Application of the Provisions of the Code of Criminal Procedure in Disciplinary Proceedings Against Attorneys<sup>1</sup>

**Abstract:** The paper presents the problem of applying the provisions of criminal procedure to disciplinary proceedings against attorneys. The author will present both the rules that exist under the provisions of criminal procedure and disciplinary proceedings against attorneys as well as the similarities in terms of appeal and cassation. A starting point for the evaluation of the application of the Code of Criminal Procedure to disciplinary proceedings against attorneys will be jurisprudence and achievements of the doctrine in this regard.

**Keywords:** disciplinary liability, attorneys, criminal procedure, assumptions

### 1. Introduction

The provisions of the Code of Criminal Procedure have been designated to be applied appropriately in disciplinary proceedings against attorneys. It results directly from the reading of Art. 95n of the Act on the Advocacy (AA), pursuant to which matters that are not regulated in Section VIII on advocates' disciplinary liability are subject to the provisions of the Code of Criminal Procedure (CCP) respectively. Thus the criminal procedure provisions prevail and enjoy a superior status. Hence the provisions of the CCP may be applied directly or with necessary changes, or they may be applied appropriately<sup>2</sup>. Yet a person interpreting the provisions will usually

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2 See e.g.: The Decision of the Higher Disciplinary Court of 1 December 2015, WSD 124/15, Legalis No. 1514873; K. Dudka, Odpowiedzialność dyscyplinarna oraz zakres stosowania przepisów kpk. w postępowaniu dyscyplinarnym wobec nauczycieli akademickich, "Studia Iuridica Lublinensia" 2007, No. 9; W. Kozieliwicz, Odpowiedzialność dyscyplinarna sędziów, prokuratorów,

decide about a narrower or wider application of the CCP provisions to disciplinary proceedings against attorneys.

We should also consider the identity of fundamental principles of proceedings that ensue directly from the provisions of the AA, among others:

The principle of objectivism is contained in Art. 4 of the CCP. Furthermore, Art. 89 of the AA has been constructed following the example of Art. 4 of the CCP. It is by all means a general principle which was previously called the principle of impartiality. According to it, in the light of the provisions of the CCP, authorities carrying out criminal proceedings are obliged to examine and include circumstances both in favour and against the defendant. A person accused in disciplinary proceedings resembles a defendant in criminal proceedings. Constitutional Tribunal's case law has developed the notion of an impartial court<sup>3</sup>. The right to hear a case by an impartial court also results from Art. 45 of the Polish Constitution and Art. 6 of the ECHR. In the light of the AA's provisions, the fulfilment of the principle of objectivism will be guaranteed by the institution of exclusion of concrete persons from disciplinary proceedings who may affect the result of the proceedings, which, at the same time, is an analogy to the application of *iudex inhabilis* and *iudex suspectus*.

The principle of the right to defence is contained in Art. 6 of the CCP and Art. 94 of the AA constructed subsequently. Pursuant to Art. 6 of the CCP, the defendant has to the right to a defence counsel while the defendant should be advised of this right. Comparing the content of this provision to the regulation in the AA, it should be held that the main thesis of the above principle has by all means been preserved. As it is one of the fundamental human rights, it has also been written down in Art. 42 par. 2 of the Polish Constitution and in the international law, i.e. in Art. 14 par. 3 letter b and d of the UN ICCPR as well as Art. 6 par. 3 letter c of the ECHR. It should be remembered that the discussed principle is not an obligation but a right and possibility. The right to a defence counsel is a fundamental right of formal defence. Pursuant to Art. 94 of the AA, the accused has the right to appoint a defence counsel – exclusively an attorney at law. This provision stipulates *lex specialis* in relation to the CCP provisions. It means that within the right to defence in disciplinary proceedings, the accused may both make representations and refuse to answer questions. This principle also embraces other rights of the accused person connected directly with the principle of the right to defence such as acquiring information about the case, reading case files, participating in procedural actions, submitting motions, etc.

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adwokatów, radców prawnych i notariuszy, Warszawa 2012; W. Kozieliwicz, Stosowanie prawa karnego materialnego i procesowego w postępowaniu dyscyplinarnym w sprawach sędziów (zarys problematyki), (in:) L. Leszczyński, E. Skrętowicz, Z. Hołda (eds.), W kręgu teorii i praktyki prawa karnego. Księga poświęcona pamięci Profesora Andrzeja Wąska, Lublin 2005.

3 The Judgment of the Tribunal Court of 27 January 1999, K 1/98, OTK 1999, No. 1, item 3.

The principle of free assessment of evidence results from Art. 7 of the CCP. The counterpart of this provision is Art. 89 of the AA, which concerns self-contained and independent judgments reached on the basis of free assessment of the whole evidence. Free assessment of evidence means examination of all circumstances and evidence according to the principles of logic, life experience and state of knowledge. The Supreme Court's case law points out that courts may decide about credibility of some evidence and incredibility of other provided entire evidence and circumstances are disclosed and assessed according to the state of knowledge, life experience and rational reasoning<sup>4</sup>. Comparing the above considerations to Art. 89 of the AA, it should be held that this principle is also currently applicable to disciplinary proceedings against attorneys. In the light of this principle, evidence must not be evaluated without their prior comprehensive assessment and analysis. It means that evidence of both defence and prosecution must be assessed from the perspective of the entire evidence<sup>5</sup>.

The principle of discretion results directly from Art. 8 of the CCP. According to this principle, the court resolves a case at its own discretion and is not bound by the resolutions of another court or authority. This principle also results from Art. 86 of the AA, according to which disciplinary proceedings are carried out independently, that is separately from other proceedings. This principle is also called the principle of autonomous sentencing not without a good reason. Art. 86 of the AA envisages, however, a possibility of suspending disciplinary proceedings until the end of criminal proceedings and a ruling on the defendant's guilt. Autonomy of disciplinary tribunal's sentencing may also be limited if a case has been returned for revision. Then a disciplinary tribunal is bound by legal opinions and recommendations of the appellate court with regard to further proceedings. Autonomy of sentencing also occurs when a disciplinary tribunal must issue an obligatory decision on the advocate's temporary suspension from duties at the moment of being informed about a temporary custody of the accused by the common court.

The principle of an open trial results from Art. 355 of the CCP and is also reflected in Art. 95a of the AA. In the doctrine, this principle is also called the principle of audience<sup>6</sup>, and it is included both in Art. 45 par. 1 of the Polish Constitution and Art. 9 par. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as Art. 14 par. 1 of the International Covenant on Civil and Political Rights. According to the AA's provisions, exclusion of an open trial is possible if it threatens disclosure of advocates' professional secrecy, or if other, legally

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4 The Judgment of the Supreme Court of 13 October 2010, IV KK 248/10, OSNwSK 2010, No. 1, item 1940.

5 The Judgment of the Supreme Court of 3 March 1997, II KKN 159/96, "Prokuratura i Prawo" – insert 1998, No. 2, item 7.

6 A. Murzynowski, *Istota i zasady procesu karnego*, Warszawa 1994, p. 191 and following.

binding reasons for the exclusion of an open trial occur. It should be emphasized that a possibility of disclosing advocates' professional secrecy belongs to evaluative categories because such a circumstance may be invoked in nearly every case. One cannot appeal against a decision of a disciplinary tribunal excluding an open trial fully or partially. Other causes of the exclusion of an open trial are indicated in the CCP provisions.

Pursuant to Art. 14 of the CCP, court proceedings are launched upon the request of the authorized prosecutor or other authorized entity. The ensuing principle of accusatorial procedure is also apparent in the content of Art. 90 of the AA. Contrary to the action *ex officio*, accusatorial procedure means that proceedings are launched if a complaint is lodged. On the other hand, Art. 90 of the AA stipulates that disciplinary tribunal initiates proceedings upon the motion of the authorized prosecutor. A complaint may take various forms. Basic complaints may include Disciplinary Ombudsman's motion for a sentence, or subsidiary prosecutor's motion for a sentence. However, when Disciplinary Ombudsman acting as a public prosecutor withdraws from prosecution, a disciplinary tribunal or Regional Bar Council's Dean are not bound by the withdrawal. A disciplinary tribunal and Regional Bar Council's Dean are bound by the withdrawal of a complaint if a motion for a sentence has been submitted by a subsidiary prosecutor. The subject of the tribunal and Dean's examination is limited to the act the accused is alleged with. The alleged disciplinary breach should be accurately described factually and legally as a concrete act of a specific classification. The Supreme Court's case law points out that the extension of the scope of prosecution goes beyond the framework of prosecution and collides with the principle of accusatorial procedure<sup>7</sup>.

## 2. Appeals in the light of the provisions of the CCP and AA

A possibility of appealing against a judgment of a disciplinary tribunal resulting from the provision of Art. 88a of the AA resembles the institution of appealing against a judgment under Art. 425 and 445 of the CCP. Disciplinary proceedings satisfy the constitutional principle of two-tiered jurisdiction by providing a possibility of challenging disciplinary authorities' decisions. Different from a criminal trial, instead of naming an appeal as a complaint or appeal, in disciplinary proceedings against advocates it will always be an appeal.

Art. 445 of the CCP applies to appeals through analogy pursuant to Art. 88a of the AA; hence an appeal against a judgment must be submitted within fourteen days from the day on which a copy of the judgment together with the reasoning has been served.

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7 The Judgment of the Supreme Court of 24 April 2007, IV KK 58/07, OSNwSK 2007, No. 1, item 924.

The same as in a criminal trial, an appeal may be submitted within the time limit to lodge an application for the reasons to the judgment. In this case, regardless of the submitted application, a disciplinary tribunal drafts the reasons to the judgment *ex officio* and serves it to the party together with the judgment. Nevertheless, the content of Art. 88a of the AA is surprising as it univocally entails that the served judgment must be accompanied with instructions. Disciplinary proceedings discussed here concern a group of advocates, that is professionals who, as a rule, should know not only appeals in accordance with the CCP's provisions but also a course of appeals under provisions of disciplinary proceedings against advocates.

Such a solution in the AA's provisions is even more astonishing as the time limit to submit an appeal does not start to run without serving relevant instructions. On the other hand, if the instructions have been sent and also served at a later time, the time limit to appeal is then counted from the day on which the instructions have been served. Hence appeals in disciplinary cases appear to be more favourable in the AA's provisions than in the CCP's regulations. In the light of the above quoted provision, the parties to the proceedings, including the accused person and his or her defence counsel, the injured party and his or her attorney as well as Disciplinary Ombudsman, are entitled to submit an appeal. Pursuant to Art. 88a of the AA, Minister of Justice (who is now also Prosecutor General), who controls the activity of the advocates' self-government, is also entitled to submit a challenge. Applying the CCP's provisions to the AA respectively, it should be held that a ruling rendered in disciplinary proceedings may be challenged fully or partially, or with regard to the reasons themselves.

The occurrence of gravamen is assumed in relation to the appellant. The gravamen may be assessed not only with regard to the entire appeal but also individual claims submitted therein<sup>8</sup>. Yet, in case of any doubts, interest to act must be demonstrated in the challenge. In disciplinary proceedings against advocates, Disciplinary Ombudsman acts as a prosecutor, i.e. he or she may submit an appeal in favour of the accused. The same as in the CCP's provisions, an appeal in disciplinary proceedings must satisfy specific formal requirements.

Similar to the CCP's provisions, i.e. on the basis of Art. 431 of the CCP, the institution of the withdrawal of an appeal has been constructed. In the light of Art. 95g of the AA, an appeal may be withdrawn before a hearing is commenced, which then binds a disciplinary tribunal. As a rule, an appeal may be withdrawn by a person who submitted it; yet the accused may not withdraw an appeal in case of the occurrence of prerequisites under Art. 79 of the CCP. Nevertheless, the accused may withdraw an appeal of another entity submitted in his or her favour unless this entity is Disciplinary Ombudsman. Other entities who submitted an appeal in favour of the accused may withdraw it upon the accused person's consent. If, however, the prerequisites under

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8 The Decision of the Supreme Court of 19 May 2011, I KZP 2/11, OSNKW 2011, No. 6, item 47.

Art. 79 of the CCP occur, the accused may not give such a consent himself or herself but through his or her defence counsel. An appeal may be withdrawn both in the form of an oral statement made to the minutes during a hearing as well as a written statement if the appeal has already been submitted. What matters here is not the moment of manifesting the withdrawal of an appeal but the moment of efficient and formal submission of the statement to disciplinary authorities.

The content of Art. 95h of the AA corresponds to the content of Art. 433 of the CCP, according to which a disciplinary tribunal shall hear a case within the limits of the appeal, and in a wider scope only if it is envisaged in the Act. Comparing the above to the provision of Art. 95h of the AA, similar applications of these two provisions are apparent with only one difference, i.e. Higher Disciplinary Tribunal takes into account the violation of substantive law and gross violation of procedural provisions *ex officio*. Furthermore, pursuant to Art. 95h of the AA, regardless of the limits of appeal, the judgment shall be changed in favour of the accused or reversed if, obviously, it is unjust. This provision is analogous to Art. 440 of the CCP. The challenge must include the challenged judgment fully or partially, i.e. indicating the part we request to change, as well as the grounds of appeal and its “favour (direction)” – whether it is submitted for or against. The doctrine does not agree as to which elements of appeal designate its limits<sup>9</sup>.

However, the doctrine agrees that the limits of appeal are designated by the scope of challenge. According to another prevailing opinion, motions for appeal do not designate limits of appeal<sup>10</sup>. Therefore motions for appeal do not bind an appellate authority with regard to changing or reversing the judgment; and yet they may appear helpful in designating a “favour” (direction) of the appeal. Specified exceptions of a possible judgment beyond the limits of challenge in the light of the CCP’s provisions are included in Art. 439 § 1, Art. 440 and 455 of the CCP. This is different from the provisions of the AA, where relative causes of appeal contained in Art. 438 point 1, 2 and 4 of the CCP are sufficient to hear appeals beyond the limits *ex officio*. Violation of substantive law is a relative cause of appeal specified in Art. 438 point 1 of the CCP. Gross violations of procedural provisions are analogous

9 I. Izydorczyk, *Granice orzekania sądu odwoławczego w polskiej procedurze karnej*, Łódź 2010, p. 156 and following; M. Klejnowska, *Ograniczenia sądu odwoławczego orzekającego w sprawie karnej po wniesieniu środka zaskarżenia*, Rzeszów 2008, p. 45 and following.

10 Z. Doda, A. Gaberle, *Kontrola odwoławcza w procesie karnym*. Orzecznictwo Sądu Najwyższego. Komentarz, tom II, Warszawa 1997, p. 226; T. Grzegorzczak, *Kodeks postępowania karnego oraz ustawa o świadku koronnym*, Warszawa 2008, p. 913; S. Zabłocki, (in:) J. Bratoszewski, L. Gardocki, Z. Gostyński, S.M. Przyjemski, R.A. Stefański, S. Zabłocki, *Kodeks postępowania karnego. Komentarz*, tom III, Warszawa 2004, pp. 65-66; P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego*, tom II, P. Hofmański (ed.), Warszawa 2011, p. 754; J. Grajewski, L.K. Paprzycki, S. Steinborn, *Kodeks postępowania karnego. Komentarz*, tom II, L.K. Paprzycki (ed.), Warszawa 2013, p. 58.



to Art. 438 point 2 of the CCP because these are undoubtedly such violations of procedural provisions that affected the content of the judgment. On the other hand, grossly unfair rulings which are specified in Art. 440 of the CCP may obviously be classified as unjust. The Supreme Court's case law emphasizes the obligation to consider all claims included in the appeal, which means not only their formal but also substantial assessment<sup>11</sup>. A judgment is indeed a specific decision establishing which claims have been right and which wrong. That is why if other failures, which have not been claimed by the appellant, have been discerned, they must be specially grounded. Summing up, it may be claimed that the solution concerning the limits of challenge and possible consideration beyond the request (*ultra petita*) is more beneficial in the light of the AA.

The ban on *reformationis in peius* resulting from the content of Art. 95i of the AA is based on Art. 434 of the CCP. It means that a decision adverse to the accused may not be rendered if an appellate measure has not been filed against him or her. Due to this, similar to the CCP's provisions, the ban on *reformationis in peius* is connected with the "direction" of an appeal. Higher Disciplinary Tribunal is then a peculiar appellate court which, in turn, is bound by the claims made in the appeal<sup>12</sup>. Nevertheless, what matters here is not the terminology itself but whether the failure actually occurred<sup>13</sup>.

The application of the ban on *reformationis in peius* may limit possibilities of sentencing even if it collided with the principle of substantive reality. It means that submitting an appeal exclusively in favour, an appellate authority may not worsen the appellant's situation, or reverse a decision and refer the case for revision. It is undeniably connected with the issue of liability for an alleged act and factual decisions and other findings being made. For this reason, if an appeal has not been submitted

11 The Judgment of the Supreme Court of 6 June 2006, V KK 413/05, OSNKW 2006, No. 7-8, item. 76, Lex No. 188861; the Judgment of the Supreme Court of 10 August 2011, III KK 436/10, Lex No. 1044032; the Judgment of the Supreme Court of 21 October 2010 r., III KK 167/10, OSNwSK 2010, No. 1, item 2023, Lex No. 843346.

12 K. Marszał, Zakaz reformationis in peius w nowym ustawodawstwie karnym procesowym, Warszawa 1970, p. 13 and 97; K. Woźniewski, Zakaz reformationis in peius a zasada niezmienności przedmiotu procesu, (in:) Z. Cwiakalski, G. Artymiuk (eds.), Współzależność prawa karnego materialnego i procesowego w świetle kodyfikacji karnych z 1997 roku i propozycje ich zmian, Warszawa 2009, pp. 163-173; P. Wiliński, Zasada prawa do obrony w polskim procesie karnym, Kraków 2006, pp. 596-603.

13 S. Zabłocki, O niektórych zmianach wprowadzonych przez nowy Kodeks postępowania karnego w zakresie postępowania odwoławczego, „Przegląd Sądowy” 1997, No. 11-12, pp. 14-15; P. Hofmański, S. Zabłocki, Niektóre zagadnienia związane z granicami orzekania w instancji odwoławczej w procesie karnym, (in:) Problemy stosowania prawa sądowego. Księga ofiar Profesorem Skrętowiczowi, I. Nowikowski (ed.), Lublin 2007, pp. 191-192, and the Judgment of the Supreme Court of 14 November 2001., III KKN 250/01, „Krakowskie Zeszyty Sądowe” 2002, No. 7-8, poz. 31, LexisNexis No. 356474; the Decision of the Supreme Court of the 15 October 2003, III KK 360/02, OSNwSK 2003, item 2141.

against the appellant, an appellate court may not make new decisions because it is bound by the ban on *reformationis in peius*. On the other hand, if the defendant has been acquitted or the proceedings against him or her have been discontinued – the same as comparable disciplinary proceedings against the accused – the appellate court may not sentence him or her. It results from the *ne peius* principle which refers to these concrete situations. An appellate court which will discern failures may then only reverse a decision referring the case for revision to the first instance court.

What is more, disciplinary proceedings do not sentence to deprivation of liberty and life imprisonment. The Supreme Court expressed an opinion thereon pointing out to the provisions of the Act of 27 July 2001 on the Common Courts Organization (Journal of Laws No. 98, item 1070 as amended), which are currently important with regard to disciplinary proceedings against advocates. A submission of an appeal against the accused excludes the operation of the ban on *reformationis in peius* regulated in Art. 95i of the AA. However, it does not abolish bans resulting from *ne peius* principles<sup>14</sup>. Contrary to the CCP's provisions, disciplinary proceedings against advocates do not envisage exceptions from the ban on *reformationis in peius*; therefore they are more beneficial for the accused in this respect.

### 3. Differences and similarities of cassation

Cassation is an extraordinary measure of challenge in both AA and CCP provisions. Cassation in disciplinary proceedings of the advocates' self-government is regulated in the AA's provisions on the basis of a reference to the provisions on extraordinary measures of appeal as well as provisions concerning appeals under Art. 458 of the CCP. Pursuant to Art. 91a of the AA, the parties, Minister of Justice (Prosecutor General), Civil Rights Ombudsman and President of the Polish Bar Council have the right to submit cassation to the Supreme Court against a decision rendered by the Higher Disciplinary Tribunal in the second instance. Art. 520 of the CCP further regulates the parties' right to submit cassation. Art. 521 of the CCP enlists additional entities entitled to submit cassation including: Minister of Justice (Prosecutor General), Civil Rights Ombudsman, and Ombudsman for Children if children's rights have been violated in result of the rendered decision. In the light of the AA's provisions, cassation is admissible solely against decisions of the Higher Disciplinary Tribunal rendered in the second instance. The above is further confirmed by the Supreme Court's case law<sup>15</sup>.

It means that in disciplinary proceedings it is not permitted to submit cassation against regulations, decisions and rulings of disciplinary tribunals of first and second instance Bar Councils as well as Higher Disciplinary Tribunal's decisions rendered in

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14 The Judgment of the Supreme Court of 18 November 2004, SDI 38/04, Lex No. 568847.

15 The Judgment of the Supreme Court of 21 December 2006, SDI 28/06, Lex No. 471779.



the first instance. Moreover, Art. 520 § 2 of the CCP does not apply to these proceedings because the right to submit cassation does not depend on the circumstance of challenging the first or second instance's decision by the authorized subject. Hence despite a similar possibility of submitting cassation, it should be remembered that Art. 519 and 520 of the CCP do not apply here because both decisions that cassation may be submitted against as well as the scope of entities entitled to submit it in disciplinary proceedings of the advocates' self-government have been fully regulated; therefore there are no reasons for an appropriate application of the CCP provisions.

By the way, it should be noticed that different from the CCP provisions, disciplinary proceedings against advocates do not envisage a possibility of submitting extraordinary cassation by the privileged entities under Art. 521 of the CCP. This is a consequence of earlier considerations on the exhaustive nature of Art. 91a of the AA.

Another differences between the provisions of the AA and CCP are regulations on the enforcement of decisions before cassation is brought and obligatory payments. Pursuant to Art. 91a point 2 of the AA, a decision subject to cassation by authorized subjects shall not be enforced before cassation is submitted. Whereas according to Art. 532 § 1 of the CCP, if cassation has been filed, the Supreme Court may stay the execution of the challenged decision as well as other decision whose execution depends on the outcome of the cassation. Due to the regulation of the issue concerning stay of the execution of a decision, Art. 532 of the CCP does not apply. It is apparent that the solution of the above issues in the AA provisions is more beneficial because a decision that is subject to cassation shall not be enforced before cassation is filed, or after the lapse of time to file it as well. It is a mandatory action and not merely optional as in the CCP provisions. A decision rendered by the Higher Disciplinary Tribunal in the second instance becomes final from the time it was adopted. Its execution, however, is suspended until cassation is filed, or the time limit to submit it has elapsed.

An undeniable difference between the provisions of the AA and CCP with regard to cassation is the above mentioned mandatory payment. Art. 91d of the AA stipulates that cassation is not subject to court fees. This regulation is different from the provision of Art. 527 of the CCP, according to which a receipt of payment of court fees shall be appended to a cassation appeal. Whereas pursuant to Art. 91c of the AA, the time limit to file cassation with the Supreme Court amounts to thirty days from the day on which a decision together with the reasons thereto has been served. The issue of time limit to file cassation in the CCP provisions has been regulated in Art. 524 thereof.

Furthermore, an appropriate application of the CCP's provisions with regard to cassation is provided in Art. 522 of the CCP, according to which every entitled person may bring a cassation appeal concerning the same accused and the same decision only once. This provision introduces limited admissibility of filing cassation due

to the subjective and objective scope of a decision under challenge. What is more, an appropriate application with regard to disciplinary liability of advocates is also provided in Art. 526 of the CCP. It means that provisions which in the appellant's opinion have been violated must be specified. An essential and meaningful issue is also a requirement to sign cassation by an advocate who is not the accused<sup>16</sup>.

It should also be added that due to the lack of regulation in the AA, provisions on the causes of appeal included in Art. 438 and 439 of the CCP apply respectively to disciplinary proceedings. For this reason, the same as in the CCP, they are divided into relative and absolute causes of appeal. Under Art. 438 of the CCP in connection with Art. 95n of the AA, relative causes of appeal include: violation of the provisions of substantive law, violation of the procedural provisions if it might have affected the content of the decision issued, an error in the determination of the facts assumed as a basis of the decision if this may have affected the content of this decision, and gross disproportion of penalty or an unfounded application of a penal measure. Bearing in mind a respective application of Art. 439 of the CCP in connection with Art. 95n of the AA, absolute causes of appeal in disciplinary proceedings embrace a decision rendered with the participation of unauthorized persons or those subject to exclusion under Art. 40 of the CCP, inconsistent composition of the panel or absence of any of its members during a whole hearing, a decision rendered by a lower instance court in a case falling under the jurisdiction of a higher court, sentencing to a penalty or penal measure not mentioned in the Act, violation of the principle of majority of votes in sentencing, or a lack of signatures, discrepancy in the content of a decision, or ruling which prevents its enforcement, a decision rendered despite the fact that disciplinary proceedings on the same act committed by the same person have already been validly closed, or if one of the circumstances excluding the proceedings specified in Art. 17 § 1 point 5, 6, 8-11 of the CCP in connection with Art. 95n of the AA has occurred.

In the light of the AA's provisions, cassation may be grounded in a closed catalogue of causes. Pursuant to Art. 91b of the AA, cassation may be filed due to the gross violation of law and gross disproportion of penalty. Undoubtedly, absolute prerequisites under Art. 439 of the CCP belong to the gross violation of law. A cause of the gross violation of law may concern violation of both procedural and substantive law provisions. The Supreme Court decided that the gross violation of law in the meaning of Art. 91b of the AA occurs in case of the violation of a provision whose importance for the correct hearing and resolving of the case could have significantly affected the content of a decision challenged by cassation<sup>17</sup>.

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16 The Decision of the Supreme Court of 29 April 2008, sygn. SDI 11/08, Lex No. 1615364; the Decision of the Supreme Court of 30 July 2008, sygn. SDI 19/08, Lex No. 1615372; the Decision of the Supreme Court of 30 September 2008, sygn. SDI 22/08, Lex No. 1615375.

17 The Decision of the Supreme Court of 16 June 2005, SDI 13/05, Lex No. 568797.

A similar assumption is made on the basis of the CCP provisions, i.e. the violation of law may be assessed as gross if a manner of judicial processing, relative interpretation of the provision assumed by the court, or a manner of law applied by the court are obviously defective<sup>18</sup>.

A difference related to the CCP's provisions concerning the causes of appeal is a circumstance according to which in the light of Art. 91b of the AA, cassation may be filed due to the gross violation of law and gross disproportion of disciplinary penalty. Whereas in the CCP, cassation may exclusively concern absolute causes of appeals under Art. 439 of the CCP and, generally, may not be brought only due to the gross disproportion of penalty. The Supreme Court's case law underlines that proceedings on the control of disciplinary tribunals' decisions should respectively rely on the output of case law referring to cassation developed on the basis of the Code of Criminal Procedure<sup>19</sup>.

#### **4. Conclusions with regard to the case law**

Well-established case law confirms that a role of the accused and advocate may not be combined in the light of conditions admitting cassation drafted and signed by a defence counsel<sup>20</sup>. In the light of an appropriate application of the CCP's provisions, it is undeniable that cassations against Higher Disciplinary tribunal's decisions brought to the Supreme Court should satisfy a special formal requirement specified in Art. 526 § 2 of the CCP constituting compulsory legal assistance. The adoption of this principle entails that despite possible practicing as an advocate and being allegedly familiar with judicial procedures, an advocate acts as the accused in disciplinary proceedings of the advocates' self-government.

What is more, the Supreme Court's case law has repeatedly emphasized that compulsory legal assistance is satisfied not only by signing but also drafting cassation by a professional defence counsel or attorney. In the light of Art. 84 § 3 of the CCP and Art. 526 § 2 of the CCP on drafting and signing cassation by a defence counsel, he or she must both draft and sign cassation. Merely an advocate's signature itself under the appeal drafted by the party does not satisfy the above requirement and the same does not fulfil the requirements of cassation. This opinion has also been

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18 P. Hofmański, E. Sadzik, K. Zgryzek, Kodeks postępowania karnego. Tom III. Komentarz do artykułów 468-682, Warszawa 2012, p. 233 and oraz cited Hugh Court case-law.

19 The Decision of the Supreme Court of 1 October 2004, SDI 5/04, OSNKW No. 10/2004, item 95 and sygn. akt SDI 7/04, Lex No. 568870.

20 The Decision of the Supreme Court of 27 September 2012 r., sygn. akt. VI KZ 12/12 Lex No. 1221000; The Decision of the Supreme Court of 15 December 2010, IV KZ 73/10; The Decision of the Supreme Court of 25 July 2013, SDI 16/13, Lex No. 1341704; The Decision of the Supreme Court of 25 July 2013, SDI 14/13, Lex No. 1347901.

approved of in the literature<sup>21</sup>. The formulation of cassation claims, which may solely concern normative issues, should then be characterized by professionalism, be devoid of an emotional attitude to the case or subjectivism. The Supreme Court ruled that the substantive law base of attributing disciplinary liability, the same as any other type of repressive liability, must be grounded in statutory provisions while only possibly completed by sub-statutory provisions, or those contained in the resolutions of corporate authorities<sup>22</sup>. Hence it means that Art. 80 of the AA shall be the base of disciplinary liability of advocates. Pursuant to this provision, a base of disciplinary liability is conduct contrary to the law or principles of ethics and professional dignity, a breach of professional duties, or failure to conclude a mandatory insurance agreement mentioned in Art. 8a par. 1 of the Act.

Therefore, in order to assume disciplinary liability, it is not only necessary to specify which of the above listed forms are perceived as the base of the accused person's liability by a disciplinary tribunal but to indicate an embodying norm too. Art. 80 of the AA constitutes a statutory base of advocates' disciplinary liability. Furthermore, the obligation to provide concrete descriptions of an act which should be recognized as disciplinary torts derives from the commonly embedded case law referring to disciplinary cases against judges, which applied the requirement of grounding a case on statutory provisions<sup>23</sup>. The Supreme Court ruled that there are no bases to apply less restrictive standards in disciplinary cases against advocates with regard to the accuracy of formulation and classification of attributed disciplinary torts. All such cases hold a similar nature of a repressive liability.

Describing and attributing a disciplinary tort against advocates on the basis of a non-statutory provision is a gross mistake. For this reason, disciplinary tribunals should, above all, be familiar with up-to-date case law of the Supreme Court. Another important decision with regard to advocates' disciplinary liability is the Supreme Court's ruling, according to which it is inadmissible to attribute an act not included in the indictment to the advocate accused in disciplinary proceedings<sup>24</sup>. It is directly connected with the principle of accusatorial proceedings being in force in the Polish criminal procedure. In compliance with the CCP's provisions, which undeniably apply to this case with regard to the above issue, the infringement of the

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- 21 A. Sakowicz, (in:) K.T. Boratyńska, A. Górski, A. Sakowicz, A. Ważny, Kodeks postępowania karnego. Komentarz. Warszawa 2007, p. 1067; S. Steinborn, J. Grajewski, L.K. Paprzycki (eds.), Komentarz aktualizowany do art. 526 Kodeksu postępowania karnego, Lex/el. 2012, teza 13; W Kozielowicz, Odpowiedzialność..., *op. cit.*, Warszawa 2012, p. 309.
  - 22 The Judgment of the Supreme Court of 15 July 2010., sygn. akt. SDI 12/10, OSNKW 2011/3/25.
  - 23 The Judgment of the Supreme Court 23 January 2008, SNO 89/07, OSNKW 2008, vol. 5, issue 37; The Judgment of the Supreme Court 29 October 2009, SDI 22/09, OSN-SD 2009, item 132.
  - 24 The Judgment of the Supreme Court of 5 January 2001, III SZ 9/00, Lex No. 48845, OSNP 2002/4/98, OSNP-wkl. 2001/18/12, „Monitor Prawniczy” 2002/7/322, „Monitor Prawniczy” 2001/19/958.

principle of accusatorial proceedings, that is convicting for an act different than has been violated, is an absolute cause of appeal under Art. 439 § 1 point 5 of the CCP in connection with Art. 17 §1 point 9 of the CCP. The same act may constitute only one offence; hence it also designates a limit of the act. A correct determination of the limits of a concrete alleged act allows to observe the principle of non-alteration, that is adequate development of a description of an alleged act as well which, in turn, means that the principle of accusatorial proceedings is respected<sup>25</sup>.

The system of disciplinary proceedings against advocates has apparently been constructed on the basis of the model of the CCP's provisions. The Code of Advocates' Ethics and Professional Dignity and the AA's provisions constitute peculiar substantive law whereas provisions of Art. 80-95n of the AA together with the CCP's provisions constitute provisions of disciplinary proceedings against advocates. Similar reading of the content of the CCP and AA may be perceived in the entire procedure on disciplinary liability of the advocates' self-government.

The Supreme Court's case law points out to a more and more important role and impact of the CCP's provisions on the AA. Despite some distinct regulations and respective adjustment to the advocates' system, similarities between provisions are discernible. Perhaps this is why the issues not regulated in the AA are applied appropriately to the CCP's provisions, which directly results from Art. 95n of the AA. This further emphasizes the status and importance of the CCP's provisions. The principles of disciplinary proceedings against advocates as well as their similarities to criminal proceedings refer not only to advocates but also advocate trainees because in the light of Art. 2 of the AA, the advocacy is composed of all advocates and advocate trainees.

#### BIBLIOGRAPHY

- Doda Z., Gaberle A., *Kontrola odwoławcza w procesie karnym. Orzecznictwo Sądu Najwyższego. Komentarz*, tom II, Warszawa 1997.
- Dudka K., *Odpowiedzialność dyscyplinarna oraz zakres stosowania przepisów k.p.k. w postępowaniu dyscyplinarnym wobec nauczycieli akademickich*, "Studia Iuridica Lublinensia" 2007, No. 9.
- Grajewski J., Paprzycki L.K., Steinborn S., *Kodeks postępowania karnego. Komentarz*, Tom II, L.K. Paprzycki (ed.), tom II, Warszawa 2013.
- Grzegorzcyk T., *Kodeks postępowania karnego oraz ustawa o świadku koronnym*, Warszawa 2008.
- Hofmański P., Sadzik E., Zgryzek K., *Kodeks postępowania karnego*, tom II, P. Hofmański (ed.), Warszawa 2011.

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25 The Judgment of the Supreme Court of 20 September 2002, V KKN 112/01, Lex No. 55225, „Prokuratura i Prawo” – insert 2003/2/1.

Hofmański P., Zabłocki S., Niektóre zagadnienia związane z granicami orzekania w instancji odwoławczej w procesie karnym, (in:) Problemy stosowania prawa sądowego. Księga ofiarna Profesorowi Skrętowiczowi, I. Nowikowski (ed.), Lublin 2007.

Hofmański P., Sadzik E., Zgryzek K., Kodeks postępowania karnego. Tom III. Komentarz do artykułów 468-682, Warszawa 2012.