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## THE MISSION OF THE SELF-GOVERNMENT OF ATTORNEYS-AT-LAW AND ITS MEMBERS

### ABSTRACT

This article presents the issues of the mission of the professional self-government of legal advisers as well as the mission of legal advisers associated with the self-government. The elements defining, in fact, the mission of professional self-government, together with the mission of legal advisers, are determined by the goals set for the profession of legal adviser, being participation in the justice system and supporting a democratic state ruled by law. Art. 17 sec. 1 of the Constitution contains a regulation expressed in the obligation to harmoniously combine the many functions of the self-governments of professions of public trust. Importantly, the function of professional self-government is not only to shape the environmental interests of people performing public trust professions but also to seek to agree them with the public interest. Professional self-governments are primarily committed to the priority of implementing the public interest.

**Keywords:** attorney-at-law, professional self-government, mission of self-government, public interest, profession of public trust

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## 1. The importance of the professional self-government of attorneys-at-law in the public sphere

The Constitution of the Republic of Poland,<sup>2</sup> by providing the opportunity to establish self-governments that group people performing professions of public trust, assigns them a particular mission. This seemingly lofty word has its undeniable value, most notably nowadays in the age of so many violations of the rule of law. The normative value of such a solution is to form the basis for the implementation of the state organization, based on the decentralization of the performance of public tasks, which also covers delegating these tasks to be performed for the benefit of certain professional groups. These self-governments are, therefore, an emanation of the principles which constitute the foundation of the constitutional system of the Republic of Poland, i.e., subsidiarity, self-governance, and proportionality.

The self-governments of public trust professions representing legal professions predominantly care about ensuring the legal security of citizens, entrepreneurs, and other entities. They exercise all the competences assigned to them by law in this respect. This should be the guidance for every activity, every action of its representatives and individual members. When performing their tasks, professional self-governments conduct their activity in order to implement, and within the boundaries of, the public interest. This results directly from Art. 17 sec. 1 of the Constitution of the Republic of Poland. As per this provision, professional self-governments may be formed by way of legislation, and be represented by persons performing professions of public trust and supervising the proper performance of these professions within the limits of the public interest and for its protection. Exercising custody over the due performance of the profession of an attorney-at-law is related to the theoretically distinguished function of the impact of local government on the provision of legal aid by individual attorneys-at-law, the constitutional limits of which are both set by the “public interest” and its protection. The concept of “public interest”, in a broad sense, essentially corresponds to the notion of “common good” originating from Art. 2 of the Constitution as well as, importantly, the constitutional values listed in Art. 31 sec. 3 of the Basic Law. Enabling the professional self-government of attorneys-at-law (and their bodies) to “supervise the proper performance of the profession” consequently leads to the conclusion that the bodies of the self-government of attorneys-at-law must have an influence on shaping the rules of practising the profession within the limits of other constitutional values, which in turn means the need to create legal mechanisms that secure this local government influence. In the doctrine, the specific tasks and competences of the professional self-government in this context cover, in particular, deciding, or at least co-deciding, on admission to the profession of attorney-at-law, and influence on the professional education of attorneys-at-law as well as trainee attorneys.<sup>3</sup>

<sup>2</sup> Constitution of the Republic of Poland of 2 April 1997, Dz.U. No. 78, item. 483 as amended.

<sup>3</sup> See M. Szydło, *Commentary on Art. 17 of the Polish Constitution*, [in:] *The Constitution of the Republic of Poland. Comment*, ed. L. Bosek, M. Safjan, Legalis; W. Mojski, *Disciplinary liability of attorneys-at-law. Selected constitutional and international aspects*, “Radca prawny. Zeszyty naukowe” [“Attorney-at-law. Law Review”] 2018, Vol. 4(17), p. 25–36.

Art. 17 sec. 1 of the Constitution contains a legal normalization expressed in the obligation to harmoniously link many functions of the self-governments of public trust professions. Importantly, the professional self-government exists not only – and perhaps primarily not only – to shape the environmental interests of people exercising professions of public trust but also to try to reconcile them with the public interest. Principally, professional self-governments consider implementing the public interest as the highest priority.<sup>4</sup>

Undoubtedly, the notion of public interest – as it is changeable over time owing to the dynamics of socio-economic or political processes – requires constant redefinition. Nevertheless, there is no doubt that in each case, the implementation of the principle of a democratic state ruled by law and the common good of citizens should guide all of us (public authorities and professional self-governments) in implementing this interest. It is advisable here to express the conviction that each of these entities will undertake convergent actions aimed at the most effective protection of this interest. It seems that this will largely depend on providing self-governments associating professions of public trust with the possibility of the independent exercise of the assigned competences, which should take into account the mechanism of decentralization of the public tasks' implementation adopted in the Constitution. This chiefly applies to the competence to perform disciplinary jurisdiction, or also to trainee attorneys-at-law.

The self-governments of public trust professions representing legal professions predominantly care about ensuring the legal security of citizens, entrepreneurs, and other entities. In this area, they exercise all the competences assigned by law, and this should underpin each activity, each action, of its representatives and individual members. We should require the legislative authority to enact regulations that will extend access to justice, and in the case of attorneys-at-law, will guarantee independence in the provision of legal assistance. Hopefully, the representatives of the legislative and executive authorities will perceive us as a partner in the pursuit of public tasks, including ensuring legal security and the implementation of civil rights and freedoms. Therefore, there is no doubt that the immanent objective of attorneys-at-law functioning in society as professional legal representatives is to provide legal aid based on the attribute of independence. Independence within all activities related to the sphere of providing legal assistance is a fundamental value of the attorney-at-law profession. It guarantees the protection of constitutional human and civil rights and freedoms and also serves to ensure the proper functioning of the system of justice.

For many years, the functioning of the professions of public trust has been an integral part of building a state under the rule of law. Especially the self-governments of the legal profession, including the self-government of attorneys-at-law, play a vital role in fulfilling the above objective. The participation of the professional self-government of attorneys-at-law as well as its members in public life invariably has a significant impact on the increase in the legal awareness of citizens, which is essential in the process of shaping

<sup>4</sup> R. Stankiewicz, *In the name of public interest implementation. Attorney-at-law as a guarantor of the security of the individual*, [in:] *Professional self-government as a guarantor of the security of the individual*, The Senate of the Republic of Poland, the Senate Chancellery, Warsaw 2017, p. 16.

a civil society. The observed constant increase of trust in the legal assistance provided by attorneys-at-law, as well as the increasing number of them, will certainly contribute to a significant strengthening of such values as the rule of law and justice, but also to the protection of civil liberties and rights.

This year, the self-government of attorneys-at-law is celebrating the 40th anniversary of its activity. This long period of its functioning was to a large extent reflected in the construction of a democratic state of law. Attorneys-at-law and their self-government contributed to the development of the basic constitutional principles being the foundation of the system of the contemporary Polish State as well as to the protection of civil liberties and rights. Yet, a lot has changed in this respect in recent years. The values underlying the constitutional principle of separation of powers have been significantly undermined. Since 2015, we have actively participated in the fight for the rule of law. We take a firm stand against all unconstitutional legislative bills relating to the National Council of the Judiciary and the Supreme Court as well as the common judiciary system in Poland. The competences of the National Council of Legal Advisers, in this respect, are supported by the established Centre for Research, Studies, and Legislation. We hope that in the coming time, the functioning of the self-government of attorneys-at-law will have an even greater impact on the development of the values underlying the system of the Republic of Poland. What is more, we also undertake initiatives consisting of indicating in which areas of law there are problems related to the existence of regulations negatively affecting access to justice. In this regard, we will propose specific legislative solutions.

It has to be highlighted that the guaranteed – in Art. 17 of the Constitution of the Republic of Poland – functioning of public trust self-governments is reflected in the statutory regulation of, inter alia, the active participation (“cooperation”) of the self-government of attorneys-at-law in the making and application of the law (Art. 41 item 3 of the Act on Attorneys-at-Law). As rightly noticed by *T. Scheffler*, it is a “separate” task of self-government, “being a special case” of the task described in Art. 41 item 1 of the Act on Attorneys-at-Law (participation in ensuring conditions for the performance of statutory tasks of attorneys-at-law).<sup>5</sup> Cooperation in shaping the law means the right of the self-government (and the corresponding obligation of public authorities) to participate in law-making processes concerning any aspect of the attorney-at-law profession (therefore, not only directly related to attorneys-at-law but also indirectly influencing the performance of the profession, e.g., by changing the judicial procedures) and the functioning of self-government.<sup>6</sup> This also applies – and of this, there is no doubt – to the need to take a stand on issues related to the system of justice. The autonomy of the judiciary from the executive branch guarantees the implementation of a democratic state ruled by law and the protection of civil rights.

We call for the possibility to be able to participate in the legislative process in such a way that our voice is heard during parliamentary work. We would like to note that

<sup>5</sup> T. Scheffler, *Commentary on art. 41, [in:] Act on Attorneys-at-Law. Comment*, ed. T. Scheffler, Warsaw 2018, Legalis.

<sup>6</sup> *Ibidem*.

the extremely fast pace of legislative work, leading to the omission of the public consultation mode in the legislative process, has a negative impact on the quality of law-making. Therefore, regardless of the ruling political option, we declare our readiness to fully cooperate and participate in legislative work. The expertise, experience, and professionalism of our local government members may turn out to be useful and necessary for the creation of good quality law in Poland.

## 2. The mission of the profession

The profession of an attorney-at-law is firmly anchored in the Constitution of the Republic of Poland, with guarantees of independence. Our occupation, as we know, belongs to the category of public trust professions. Our professional activity plays a special role, mainly due to ensuring the protection of individual rights guaranteed by the provisions of Basic Law.

Although the legislator has not created a legal definition of the term “profession of public trust”, the response to the question of when we are dealing with the profession of public trust should be sought in the quite extensive achievements of the doctrine and jurisprudence.<sup>7</sup> The following features of the public trust professions are indicated; first of all, special attention is drawn to the importance of matters entrusted to the professional activity of the representatives of a given profession included in the category of public trust professions – our services are used in the event of a real or even potential danger to the good of an individual of a special nature (e.g., life, health, freedom, dignity, good name). Secondly, it is considered a characteristic of such professions to entrust – under conditions of high trust – the personal and private information concerning the users of their services. Thirdly, in the process of using the information in the course of granting legal aid, such information is considered to be a professional secrecy that may not be disclosed. And finally, the fourth feature: persons possessing such secrecy are granted immunity from criminal liability for non-disclosure of information.

We, attorneys-at-law, therefore, bear a significant responsibility (no matter how lofty it sounds) for the state of a democratic country ruled by law. Many of us do not forget what a vital role we have to play, especially in these harsh times of constant undermining of the rule of law. We support public administration bodies in resolving administrative cases as well as courts in resolving disputes. We take part in the process of deciding on the implementation of the public interest and securing the subjective rights of citizens, entrepreneurs, and other organizational units.

Granting attorneys-at-law the right to professional secrecy,<sup>8</sup> the use of special immunity in the course of performing professional activities, the possibility of associating

<sup>7</sup> M. Szydło, *Commentary on Art. 17 of the Polish Constitution*, [in:] *The Constitution of the Republic of Poland. Comment*, ed. L. Bosek, M. Safjan, Legalis (and references indicated therein).

<sup>8</sup> See in more detail a series of articles in the collective work: *Professional secrecy of an attorney-at-law*, ed. R. Stankiewicz, Warszawa 2018.

within the framework of professional self-government, the submitting of any offences related to improper performance of the profession under the professional system of disciplinary liability, guarantees the due performance of our professional activities. Such guarantees do not serve us, but rather the entities that we represent.

Owing to the above-mentioned provisions contained in Art. 17 of the Constitution of the Republic of Poland, attorneys-at-law in Poland have strongly anchored guarantees of independence and self-reliance in the performance of their profession.<sup>9</sup> It is, therefore, a crucial issue to guarantee through “ordinary legislation” that professional representatives obtain the necessary attributes of independence for the provision of legal assistance. Independence within all activities related to the sphere of providing legal assistance is a fundamental value of the attorney-at-law profession. It guarantees the protection of constitutional human and civil rights and freedoms and also serves to ensure the proper functioning of the system of justice.

Pursuant to Art. 7 sec. 1 of the Ethics Code of Attorneys-at-Law, independence in the performance of the profession of an attorney-at-law is a guarantee of protection of civil rights and freedoms, a democratic state ruled by law, and the proper functioning of the system of justice. An attorney-at-law, when performing his or her professional activities, should be free from any influence resulting from personal interests, external pressure, and interference from any party, or for any reason. Instructions or suggestions expressed by anyone that limit independence, may not affect the position he or she presents in a case (Art. 7 sec. 2 of the Code).<sup>10</sup>

There is no doubt that the provision of legal assistance by attorneys-at-law is related to the observance of civil rights and freedoms (Art. 30, Article 31 sec. 1 and 2, Article 32 sec. 1 and 2, and 45 sec. 1 of the Constitution of the Republic of Poland). We not only have the right but also – and perhaps above all – the obligation to support legal protection authorities in the implementation of these rights and freedoms. Attorneys-at-law participate in the process of deciding on the implementation of the public interest and securing the subjective rights of citizens, entrepreneurs, and other organizational units. Thus, the essence of the functioning of these local governments is to act for the common good to the extent to which it can support and, principally, supplement the performance of tasks by public authorities. There are many manifestations of the activity of the self-government of attorneys-at-law and members of the self-government in the implementation of civil rights and freedoms as well as ensuring legal security for all those in need. Attorneys-at-law provide free legal assistance as part of cooperation with municipal offices and engage in actions *pro bono* that are initiated by local government bodies as well as participate in the system of developing legal education.

Legal advisers, as a professional group, are competently trained to protect the subjective rights of citizens both by providing legal assistance to them during their preparation

<sup>9</sup> Cf., inter alia, R. Stankiewicz, *Independence of an attorney-at-law as a public interest protection function*, [in:] *Independence of an attorney-at-law*, ed. R. Stankiewicz, S. Patyra, T. Niedziński, Warszawa 2020, pp. 93 et seq.

<sup>10</sup> See in more detail in: T. Jaroszyński, *Commentary on Art. 7 of the Code of Ethics*, [in:] T. Jaroszyński, A. Sękowska, P. Skuczyński, *Ethics Code of Attorneys-at-Law. Comment*, Warszawa 2016, p. 53 et seq.

for and during court proceedings, but also by participating in all currently available alternative dispute resolution methods. In our view, the broadening of the availability of mediation institutions in many civil cases can, to a large extent, relieve the classical justice system from the deluge of cases that could in fact be resolved outside of it, with the participation of professional legal representatives. We perceive it to be justified to introduce obligatory mediation in family and guardianship cases, some economic disputes, individual disputes in the field of labour law, disputes about infringement of personal rights, or consumer disputes.

### 3. Expanding the competences of the professional self-government members and the catalogue of forms of professional activity

Undoubtedly, the effective provision of legal assistance by attorneys-at-law requires the existence of stable legal regulations shaping the system of performing this profession. We will consistently support such amendments to the regulations of the act on legal councils that will expand the competences of members of our professional self-government. In this respect, we suggest commencing work on such legislative changes that will expand the competences of attorneys-at-law, among others, for the preparation of certificates. The issue left for consideration is supplementing the admissible organizational forms of practising the profession with a limited liability company, reservation of the name “*Law Firm*” for the form of conducting activities by attorneys-at-law and advocates, and introducing statutory indexation of the minimum rates for the activities of attorneys-at-law (and, therefore – fees constituting the basis for awarding the costs of legal representation by courts) as well as fees for legal assistance provided by attorneys-at-law *ex officio*. In the latter respect, we are ready to present detailed proposals corresponding to the reality of economic transactions.

We consider it particularly important to initiate a discussion on extending the compulsory representation by a lawyer in court proceedings. Increasing the role of this authority is noticeable in the legal systems of many European Union countries. It is becoming a necessity also due to the dynamically changing legal status, the evolution of socio-economic relations, and the intensification of cross-border and legal transactions. Extending the compulsory representation by a lawyer is consistent both with the interests of the parties to the proceedings and the interests of the system of justice. It will ensure that the parties receive legal aid at an appropriate level, and for the system of justice, it will result in an increase in the effectiveness and efficiency of proceedings through the faster resolution of the initiated cases. The expansion of this authority is particularly important when the legislator prefers to introduce instruments signifying a departure from the model of a process based on the principle of objective truth in the direction of reinforcing the adversarial elements. The strengthening of the adversarial principle makes it necessary for the parties to actively partake in the proceedings and to take action before the court in a professional manner. This may result in a weaker position for the party appearing in the case without a professional attorney, especially in the context of

the solutions of the Code of Civil Procedure in the scope of concentration of evidence.<sup>11</sup> A uniform position of our community regarding this issue should induce the legislator to initiate talks about the future extension of the compulsory representation by a lawyer and attorney-at-law in proceedings before the common court.

#### 4. The future of professional secrecy?

The threat to the rule of law in Poland has set new tasks for us and we are facing a unique situation that we have not had to face before. We are an element of the broadly understood system of justice.<sup>12</sup> Our job, a profession of public trust, entails an important responsibility and so, our duties and obligations to protect the subjective rights of all those in need are all the greater, as are the threats facing the independence of the courts and judicial independence. Professional secrecy is a particularly important attribute enabling the performance of the profession; we should encourage the actions of public authorities in order to guarantee the keeping of professional secrets obtained with our clients. This is an extremely critical factor in ensuring the correct provision of legal assistance. Violation beyond the real need for professional secrecy remains in contradiction to the essence and nature of relations resulting, for example, from the power of attorney issued in a trial (trust in the attorney who has been entrusted with the client's affairs). In recent years, a number of legal regulations have appeared that *de facto* interfere excessively with the essence of professional secrecy.

The obligation for professional secrecy set out in Art. 3 of the Act on Attorneys-at-Law cannot be separated from the purpose for which the profession of legal adviser has been created. This objective, in turn, was specified in Art. 2 of the Act on Attorneys-at-Law, which states that legal support provided by an attorney-in-law is intended to protect the legal interests of entities for which it is performed.<sup>13</sup> Yet, it should be borne in mind that the overriding interest of the beneficiary of the protection granted, resulting from the purpose of legal aid, does not mean and cannot be understood as allowing the implementation of this interest in violation of the applicable legal and ethical order.<sup>14</sup> The exercise of the profession of an attorney-at-law consisting in the provision of legal assistance and aimed at legal protection of the interests of entities for which it is performed is directly related to the protection of the public interest. Legal advisers are not only comprehensively and professionally prepared to provide legal assistance but at the same time, they are obliged to comply with the principles of professional ethics listed in the Code of

11 R. Stankiewicz, *Extension of the representation by a lawyer will speed up civil proceedings*, "Rzeczpospolita" 2018, daily newspaper of June 23, No. 144.

12 Cf. T. Scheffler, *Commentary on the Preamble*, [in:] *Code of Ethics of the Attorney-at-law. Comment*, ed. T. Scheffler, Warsaw 2016, Legalis.

13 See: Z. Cage, *Commentary on Art. 2 of the Act on Attorneys-at-Law*, [in:] *Act on Attorneys-at-Law. Comment*, Warsaw 1999, p. 9.

14 See: B. Sołtys, *Commentary on Art. 2 of the Act on Attorneys-at-Law*, [in:] *Act on Attorneys-at-Law. Comment*, ed. T. Scheffler, Legalis.



Ethics of the Attorney-at-law. Any violation of ethical principles is treated as a disciplinary offence equivalent to the unlawful performance of professional activities. Statutory regulations as well as internal (local government) regulations relating to the exercise of the profession to such a wide extent, guarantee the best possible and highest quality performance of professional activities by attorneys-at-law.

Professional secrecy is an imperative factor that ensures the correct provision of legal assistance. It not only serves the people using the support of legal professionals but is also an element of the proper functioning of the judiciary and the entire legal protection system in a democratic state. Professional secrecy is the responsibility of an attorney-at-law, and its observance enables them to build a relationship with the client based on trust. It should be pointed out that clients of legal advisers seeking legal assistance and protection of their interests entrust them with vital information from almost every area of their personal or professional life and have the right to expect that it is properly protected against access by third parties. The regulations referring to the obligation to keep professional secrecy can be found both in the acts regulating the performance of the profession of attorney-at-law and advocate as well as in the ethical codes adopted by both – local and national – governments. Professional secrecy covers everything that the attorney-at-law learns in connection with the provision of legal aid. We should bear in mind that the professional self-government of attorneys-at-law is liable for ensuring that professional secrecy is observed by legal advisers, and the fulfilment of this obligation is an element of ensuring the proper performance of the profession of a legal adviser. The duty to continually monitor the observance of legal adviser's confidentiality, and its potential violations, was included in the Guidelines of the National Convention of Attorneys-at-Law in 2016.

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