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CHANGE OF THE PROFESSION
OR FORM OF ITS PRACTICE FROM THE PERSPECTIVE OF THE PROFESSIONAL ETHICS OF ATTORNEYS-AT-LAW

ABSTRACT

The article discusses issues related to the professional mobility of attorneys-at-law in light of the Code of Ethics of Attorneys-at-Law. The author discusses changes in the profession or form of its practicing in terms of movement between the public and private sectors as well as within the private sector itself. The article also addresses the issue of changing the form of practicing the profession or the entity where the profession is practiced. These phenomena, though partially regulated by law, escape ethical regulation; the Code covers them only to a narrow extent (professional secrecy and conflict of interest). The question is, therefore, whether this and the indirect application of several other principles of professional ethics (independence, dignity of the profession, loyalty, and trust) can be considered appropriate. The author analyzes if the application of the above ethical principles is sufficient in terms of safeguarding against the unethical use of relationships or networks from the professional past as well as avoiding the related reduction in independence, conflicts of interest, breach of professional secrecy, or loyalty.

Keywords: professional mobility, change of the profession, movement between the public and private sectors, movement within the private sector, change of form of practicing the profession, change of entity where the profession is practiced, rules of professional conduct

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1. Introduction

Professional mobility is a socially and economically desirable phenomenon. Movement of persons between different legal professions (judge, public prosecutor, notary public, bailiff, advocate, attorney-at-law, counselor of the State Treasury Solicitor's Office – "Lawyers") positively affects the opportunities to acquire and apply different qualifications, powers, competencies, and professional experience in different professions. This includes changes in forms of practicing professions which positively contribute to the maintenance and growth of professional practice. This benefits the justice system, society, the economy as well as all persons involved.

Moving, sometimes several times in professional life, from one legal profession to another – Lawyers not only change it. Due to the fact that this may be a movement from the public to the private sector or vice versa, or a change within the private sector, they must also be aware of certain ethical constraints involved ("Change of the Profession"). These are the rules of conduct for a Lawyer who, after a Change of the Profession, encounters persons and their associated networks of relationships or contacts, institutions and associated professional roles previously held, information, matters, results/effects, or other "vestiges" of his/her professional past.

In turn, change of employment relationship to a contract of commission or vice versa, change of employment to a law firm/partnership or vice versa, and acquisition or sale of a law firm/partnership delineate the area within which a change in the form of practicing the profession may take place ("Change in the Form of Practice"). A Change in the Form of Practice may also be combined with a change of entity understood as a change of the unit/organizational structure where the profession is practiced, or of its personal composition (e.g., transfer to another organizational unit) ("Change of Entity"). This raises ethical implications which boil down to the question of how an attorney-at-law should act in this situation in relation to his/her clients and colleagues, particularly in connection with the cases handled to date.

As opposed to legal regulations,[2] these phenomena have so far escaped ethical regulations that would directly address them. They have also rarely been of interest to the professional literature.[3] The Code of Ethics of Attorneys-at-Law ("CEAL")[4] does not expressly govern the rules of conduct during a Change of the Profession or Change in the Form of Practice (including a Change of Entity). Even if some of the CEAL principles (especially

2 This article does not analyze the phenomenon of professional movement of persons from the perspective of the laws regulating the practice of particular legal professions, including those holding public office, as this is beyond its scope. In particular, limitations in this respect may result from: Act of 6.07.1982 on attorneys-at-law (Journal of Laws 2020, item 75, as amended) ("AAL"), Act of 21.08.1997 on restrictions upon conducting business activity by persons performing public functions, Code of administrative procedure, Code of civil procedure, Code of criminal procedure.

3 See: R. Sarkowicz, *Amerykańska etyka prawnicza*, Kraków 2004; K. Mikołajczyk-Gaj, *Revolving door. Etyczne aspekty zmiany wykonywanego zawodu prawniczego*, [in:] *Etyka prawnicza. Stanowiska i perspektywy 3*, ed. H. Izdebski and P. Skuczyński, Warsaw 2013, pp. 104–113; S.W. Ciupa, *Przejście na drugą stronę (revolving door). O etyce w praktyce*, blog dla prawników, www.oetycewpratyce.pl (accessed 17 March 2021).

4 Code of Ethics of Attorneys-at-Law (appendix to the resolution no. 3/2014 of the Extraordinary National Convention of Attorneys-at-Law of 22.11.2014).

independence, professional secrecy, conflict of interest, the dignity of the profession, loyalty, and trust), due to their scope of application, may cover the cases mentioned above, their normative (prescribed or prohibited) behavior has been and still is a rather poorly researched issue, both in practice and in the context of professional mobility. All this means that the above phenomena should become the focus of interest of professional ethics.

2. Change of the profession – moving from the public to the private sector

A change of the profession by a Lawyer moving from the public sector (judge, public prosecutor, notary public, bailiff, counselor of the State Treasury Solicitor's Office), as persons performing public functions (Article 115 § 13 and 19 of the Penal Code) to the private sector in order to practice as an attorneys-at-law is subject to narrow regulation under the CEAL.

When governing conflicts of interest, the CEAL takes into account the context of professional mobility in the above regard. An attorney-at-law may not provide legal assistance if he/she previously participated in a case as a representative of public authorities or a person performing a public function (Article 27 point 1 of the CEAL). This is a general and unconditional prohibition on providing legal assistance in either a potential or a real conflict of interest. This regulation, despite its imprecise wording,[5] applies inter alia to judges, public prosecutors, notaries, and bailiffs who have moved to the attorney-at-law profession (private sector) as so-called public officials (Article 115 § 13 of the Penal Code). The expression "participated in a case" should be understood as forming an attitude to the case through participation in it, i.e., substantive (preparation, decision-making), formal (supervision, control), and even organizational or material-technical participation, if there was an opportunity to become acquainted with the case.[6] However, could the commencement of practicing the profession of an attorney-at-law in a multi-person organizational structure by a Lawyer listed in Article 27 point 1 of the CEAL give rise to a conflict of interest for all other participants in that structure concerning its client, whose interests are in conflict with the attorney-at-law associated with the Lawyer joining the structure? This is not out of the question, but such a conflict will not arise automatically.[7] The case at hand requires an individual assessment in light of

5 "Exercising a public function" is equivalent to "performing a public function" and corresponds to the legal definition in Article 115 § 13 and § 19 of the Penal Code. The expression "public authority bodies" should be understood as bodies having statutory powers (legislative, judicial, or executive), being organs of the state, local government, professional self-governments, civic organizations, or religious associations – if the statute confers such powers on them (see Article 7 of the Constitution of the Republic of Poland). However, it is underdetermined and overlaps with "performing a public function". As a result, it may raise problems of interpretation. See: K. Mikołajczyk-Gaj, *Revolving door…*, p. 108; S.W. Ciupa: *Przejście na drugą stronę…*

6 See: S.W. Ciupa: *Przejście na drugą stronę…*

7 There is no relevant regulation, except for the exercise of professional activities abroad or contacts with lawyers in member states of the Council of Bars and Law Societies of Europe (CCBE), as the CCBE Code applies (Article 2 of the CEAL).

Articles 26–27 of the CEAL. One should take into account the opinion about the client's case formed as a result of the public function performed in the past office and knowledge gained about the case on the basis of prior relationships and networks of contacts. Additionally, one should also assess its impact on the observation of the duty of independence, professional secrecy, and loyalty to the client resulting from ethical regulations binding the Lawyer previously and currently, also after ceasing the practice of the previous profession (Articles 8 and 10 of CEAL).

Relationships and networks of contacts from the professional past can be no less troublesome when changing a profession. Their impact on the practice of the new profession should be assessed from the perspective of maintaining independence and avoiding conflicts of interest. Continued relationships and contacts from the professional past are not prohibited as long as they do not bring harm to the maintenance of autonomy in the performance of professional activities. When performing his/her professional activities, an attorney-at-law must be free from all past influences resulting from his/her personal interests, external pressure, and interference by any party or for any reason as well as orders, suggestions, or directions (Article 7 of the CEAL). The expectations of third parties also must not be met in violation of the rules of professional ethics (e.g., acting "under dictate" or "favoring" third parties). This does not imply any obligation to completely break with the previous professional environment, this would be an absurd, unreasonable, and disproportionate requirement. Personal relationships of this kind may also involve conflicts of interest (Article 10 of the CEAL). In particular, these are relationships of proximity or other relations (e.g., economic or financial) which may affect the conduct of the case (Article 27 point 5 of the CEAL) or its outcome (Article 15 of the AAL[8]). Thus, when providing legal assistance, one should be guided by law, one's own judgment, and content-related reasons as well as by the welfare and interest of the client, disregarding any reference to the previous professional environment. Independence, however, does not imply the absence of bias and self-interest characteristic of the duties of public authority – on the contrary, a former public official, now acting as an attorney-at-law, is no longer impartial because he/she acts in the interest of the client.

Because of the prior public function of an attorney-at-law, his/her current relationship with courts and other public authorities takes on particular significance. An attorney-at-law may not publicly display his/her personal attitude towards employees of the judiciary, authorities, or other institutions before which he/she appears (Article 49 of the CEAL). This is in order to maintain a healthy professional distance with persons from the previous working environment when performing professional activities or being in public situations. This involves observing higher standards of professional culture towards such persons, i.e., not only maintaining an atmosphere of order, seriousness, and calm but also showing respect, lack of protectionism or disrespect as well as the culture of speech (professionalism, matter-of-factness, moderation, tact, restraint, prohibition of unjustified criticism or other negative statements, even in response to illegal or unacceptable behavior by such persons – Article 39 of the CEAL). On the other hand, there is the prohibition of relying on acquaintances or other sorts of influence with persons

8 Act of 6.07.1982 on attorneys-at-law (Journal of Laws 2020, item 75, as amended) ("u.r.p.").

from the previous professional environment by showing public intimacy or confidence in contacts and refraining from behavior or gestures that could be externally perceived as familial or indicate connections (Article 49 of the CEAL).[9] It is also important to take care of the dignity of the profession in all relations with institutions or persons from the professional past (Article 11.1 and 11.2 of the CEAL).

A change of the profession also affects informing about the profession and acquisition of the clients (Articles 31–33 of the CEAL). Pursuant to the provisions of Article 31.3 point 3 of the CEAL, it is allowable to provide information about the professional CV, functions and positions held, professional experience, and skills that may relate to the professional past. In communicating such information, however, great care should be taken and excessive detail, as well as exaggerated "self-praise" of the professional past, should be avoided. Due to its content, form, place, manner, or context of dissemination, information regarding the public past may not be misleading (Article 32 point 1 of the CEAL) or suggest that there is some connection with the previously practiced profession, or that it may be used in the interest of the client (so-called relying on influence or other connections – Article 32 point 3 of the CEAL), or result in greater effectiveness of the exercised professional activities, including making unreliable guarantees or promises in this respect. To the extent that such conduct controls, in effect, the client's behavior in a manner desired by the attorney-at-law, but not necessarily beneficial to the client – it is a manifestation of restricting the client's freedom of choice (Article 32 point 3 of the CEAL). In turn, soliciting clients using old "institutional" relationships or networks of contacts may be contrary to good morals, as is interfering with the principles of fair peer competition (Article 33.2 of the CEAL) or being disloyal to colleagues (Article 50.1 of the CEAL).

3. Change of the profession – moving from the private to the public sector and within the private sector

A change of the profession involving the movement of an attorney-at-law from the private to the public sector (judge, public prosecutor, notary, bailiff, counselor of the State Treasury Solicitor's Office) and within the private sector (from advocate to attorney-at-law or vice versa[10]) remains, with a certain exception, outside the scope of the CEAL regulation. The above-mentioned exception concerns the obligation to maintain professional secrecy, which does not expire in time despite the cessation of practicing the profession of an attorney-at-law (Article 17 of the CEAL). This means that the above obligation applies after the aforementioned movement to the same extent and scope as when practicing as an attorney-at-law. The information covered by this obligation

9 See: S.W. Ciupa, *Przejście na drugą stronę…*

10 If an advocate begins to practice the profession of an attorney-at-law, he/she may not practice the previous profession but, while remaining on the list of advocates, is subject to both the rules of advocate ethics as well as the ethics of attorneys-at-law (so-called double professional deontology).

cannot, therefore, be disclosed or used in one's own or another's interest in connection with and during the practice of the new profession.[11] Ethical regulation thus protects only in a general way and regarding the unauthorized use of professional secrecy in a new profession, without the context of professional mobility.

4. Change in the Form of Practice and Change of Entity

A Change in the Form of Practice may occur with or without a Change of Entity. Merely converting the legal form of a company (e.g., a partnership into another partnership) or an organizational unit or changing the legal basis for the employment of an attorney-at-law within the same organizational unit, does not result in a Change of Entity. Such an entity continues its operation in a new form but with the same personal composition. A Change of Entity occurs, however, in the event of the transformation of a law firm into a partnership, sale/acquisition of a law firm/partnership, or transfer of an attorney-at-law from the current organizational unit to another organizational unit (change of the organizational unit). From the ethical point of view, it is important whether and how a Change in the Form of Practice or a Change of Entity affects persons jointly practicing or collaborating in the practice of the profession ("Personal Composition"). Specifically, it is about the impact of Personal Composition on the client portfolio after the change.

In the event of a Change in the Form of Practice, particularly related to a Change of Entity, the attorney-at-law should take into account the problem of conflicts of interest resulting from the previously performed public function as well as changes in the client portfolio and Personal Composition.

If an attorney-at-law moves from the public to the private sector, the previously performed public function (as an employee of the government administration, another state or local government authority, or as an employee in an organizational unit that disposes of public funds – Article 115 § 13 and Article 19 of the Penal Code) may lead to a conflict of interest in the event of a Change in the Form of Practice (including the one related to a Change of Entity) (Article 27 point 1 of the CEAL – see section 2 above in this respect).

Changes in the client's portfolio may lead to a conflict of interest due to a potential threat or real violation of professional secrecy as well as the knowledge of the former client's affairs that would give an undue advantage to another client (Article 26.1 of the CEAL). This involves the use of information obtained from the client in connection with the practice in the previous/new structure for the benefit of the new/old client in a manner that threatens or prejudices the interests of one of such clients. It is also unacceptable for the same attorney-at-law or two different attorneys-at-law from the same professional structure to act for clients with conflicting interests (including litigation opponents) in the same or a related case. This is a behavior that may lead to a conflict of interests (Articles 28 and 29 of the CEAL), is disloyal (lack of care for realization of the client's interests

11 S.W. Ciupa, *Przejście na drugą stronę…*

and will – Articles 8 and 10 of the CEAL), and undermines trust in attorneys-at-law (as it negatively affects the authority and image of an attorney-at-law as a professional acting independently, without conflicts, for the good of the client, loyally, and in trust towards the client – Article 11.1 and 11.2, and Article 45 of the CEAL).

It should also be verified whether the Personal Composition resulting from the Change in the Form of Practice or Change of Entity Composition gives rise to a conflict of interest. On the one hand, it must be determined whether external and internal relationships with the client's opponents or third parties (e.g., affectional, neighborly, or social ones) or other relationships (e.g., economic, financial) affect the conduct or outcome of the case (Article 15 of the AAL and Article 27 point 5 of the CEAL). Third parties may include persons from the old or new Personal Composition, who have an interest in the outcome of the case, in particular with regard to the principles and manner of distribution of amounts received from clients or other financial settlements – should it lead to a material interest of these persons in the outcome of the case, even without participation in its conduct. On the other hand, the question is whether, in connection with the joint practice of the profession in a new Personal Composition on behalf of the same client, there will be any case giving rise to a conflict of interest, even for a single member of the Personal Composition (Article 27 point 4 of the CEAL). Although the CEAL does not regulate the principle of automatic "imputing" a conflict of interest of one attorney-at-law to other attorneys-at-law in the same multi-person professional structure, it is possible that such a conflict may occur.

Even the absence of a conflict of interest related to the Change in the Form of Practice or Change of Entity does not release an attorney-at-law from the obligation to verify whether accepting a case or its continuation in a changed professional structure will not result in a loss of independence (Article 7 of the CEAL) or the client's trust (Article 11.1 and 11.2, and Article 45 of the CEAL) and whether it is loyal to the client. Commencing practice in a new professional structure must be free of influences from the professional past. Previous or new professional and nonprofessional relationships and networks of contacts related to professional activities may not affect their performance in a way that would limit the autonomy of professional activities. It is based on maintenance of loyalty to the client, i.e., care about the client's interests and will (Articles 8 and 10 of the CEAL), however, without violating the rules of ethics in order to meet the expectations of the client or third parties, e.g., a new partnership or organizational unit (Article 7.3 of the CEAL). Loyalty to the client is about serving his/her best interests, and purposeful and focused action for the benefit of the client as well as mutual trust. Trust is fundamental in relationships with clients, and its absence justifies termination of the order and power of attorney (Article 45 of the CEAL). Without the client's trust, professional activities cannot be fully and effectively performed.[12]

Changes of Entity, including those combined with a Change in the Form of Practice, may result in the termination of collaboration between attorneys-at-law. However, this does not terminate the obligation of maintaining loyalty and a fellowship attitude towards colleagues from the old Personal Composition (Article 50.1 and 50.2 of the CEAL).

12 See: *Ibidem*.

Loyalty in this context means acting with honesty and integrity towards colleagues as a collaboration ends, especially in the case of a change in the client portfolios and in view of market competition. Clients should be informed about the end of a collaboration. They are also free to decide which attorney-at-law they want to continue working with. In such a situation, it is also necessary to observe the rules of conduct in the case of resignation from the existing collaboration (Articles 45 and 47 of the CEAL) and joining or taking over clients' cases from colleagues (Article 53.1 and 53.2 of the CEAL). In addition, one should also observe the rules governing the transfer of client information and records (Articles 53.3 and 59 of the CEAL) as well as settlements with the clients (Articles 36.5 and 53.4 of the CEAL). One cannot take actions with a view to deprive another attorney-at-law of employment or lose a client unless it results from the obligations provided for by law or from permitted client solicitation (Article 50.3 of the CEAL). Honest peer concretion after the termination of collaboration also means a prohibition of direct comparison of the quality of professional activities with the colleagues from the professional past (Article 32 point 5 of the CEAL) and a prohibition of negative assessments (criticism or opinions) of former colleagues that are not based on truth and public interest (Article 52.3 and 52.4 of the CEAL).

Fellowship, on the other hand, means a duty to maintain respect, friendliness, courtesy, good manners, moderation, and tact, to not violate dignity, and to help each other (within the limit of the client's interest) – in mutual relations despite the split (Article 12.3, Articles 48 and 57 of the CEAL).

5. Summary

In summary, the CEAL does not automatically and directly regulate the Change of the Profession or Change in the Form of Practice (including Change of Entity). It directly regulates the context of professional mobility only to a narrow extent (professional secrecy – Article 17 and conflict of interest – Article 27 point 1 of the CEAL). The possibility of indirect application of several other principles of professional ethics (in particular independence, the dignity of the profession, loyalty, and trust) in this regard does not seem to be sufficient. This results in an increasing regulatory and ethical uncertainty, including the problem of utilizing relationships or networks of contacts from the professional past, and avoiding the associated restraints on independence, conflicts of interest, or loyalty. It also provokes the question of whether increased professional mobility of Lawyers Changing the Profession or the Form of Practice (including within the framework of Change of Entity) should encounter a regulatory "gap" or "vacuum" and be left only to the ethical and situational sense.

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