

Professional confidentiality in criminal matters in Poland

Issues related to protection of clients' confidential information have recently become a widely commented topic among legal community in Poland.

The Polish legislation regarding the judiciary has been recently changed - the prosecutor's office is now subordinate to the General Prosecutor who is a member of the government as a Minister of Justice - which means - dependent on the politicians from the currently ruling party.

Since the mentioned functions of the Minister of Justice and Prosecutor General are joint, there were attempts to evade the professional secrecy of lawyers in criminal cases on a large scale.

According to the rules in force, duty of confidentiality entrusted to a defense lawyer cannot be waived under any circumstances.

However, when a lawyer provides legal assistance (not a defense in criminal matter), the duty may be waived under specific circumstances:

- it is to the interest of justice system;
- no other evidence is available to establish specific facts;

The decision (issued by a prosecutor or a court) may be appealed.

At present, we deal with growing number of attempts to waive the confidentiality duty, even in trivial matters, trying to evade often costly and lengthy evidence gathering.

This issue is linked to the scope of the lawyer confidentiality in the internal investigations. In this context, it is worth considering the confidentiality scope binding a legal counsel who acts as an in-house lawyer. Most of them are employed.

Despite the ruling of the CJEU (Akzo Nobel case) which may give the grounds for limiting a confidentiality duty of such lawyers, it is necessary to defend the position that the in-house lawyer, like any other legal counsel, is bound by professional confidentiality duty which can be revoked only by the court in the circumstances mentioned above.

It can, however, be presumed that the professional confidentiality of the in-house lawyer will be repealed more often than in other cases. There are also practical reasons why keeping clients' information confidential within the frames of corporate organization is difficult (emails copied many times, without proper headlines). But there are also fundamental questions, e.g. whether the employed in-house lawyer provides independent legal assistance.

Undoubtedly, the professional privilege rules apply to the internal investigations. Upon my experience the attempts to waive or circumvent the confidentiality rules in such cases happen more often than previously – the prosecuting authorities demand documents, reports, minutes of witness's interviews prepared in course of the internal investigation under sanction of a search – even in a law office.

Lawyers in Poland present persistent opinion that these materials are fully covered by the professional privilege. There is no judgement of the Polish Supreme Courts in this respect, however, based on my practice - lawyers facing such attempts are so far resisting successfully. As the Polish Parliament is currently working on a new law on corporate liability which obliges Polish companies to conduct internal investigations in the event of a suspected irregularity being reported by an employee or other person, this issue will become much more important, especially when considering benefits for self-reporting.

Unfortunately, the professional confidentiality is nowadays “under attack” and subject to limitations (AML rules, specific tax schemes to be reported by lawyers). As an example - in recent months an unprecedented situation occurred in Poland – a lawyer refused to testify in civil proceedings basing on a professional secret [as he was called as a witness to testify on the facts he had learned while being a defense lawyer in another case] and as a result the Circuit Court imposed the penalty of arrest. The arrest penalty was repealed immediately, and the Warsaw as well as National Bar have intervened without delay, but it is one of the proofs of professional secrecy being deprecated.

Dominika Stępińska-Duch