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Freedom of speech for a legal counsel

Abstract

Wolność słowa radcy prawnego

Wolność słowa radcy prawnego jest gwarancją swobody wykonywania jego zawodu. Wolność słowa bezpośrednio determinuje wolność zawodu, co wynika z faktu iż podstawowym narzędziem pracy radcy prawnego jest słowo mówione i pisane. Zagadnienie granic wolności słowa i odpowiedzialności za jej naruszenie jest wciąż aktualne ze względu na zmieniające się standardy oceny wypowiedzi w życiu powszechnym. Granice podziałów wytyczone przez ustawodawcę pozwalają nam wyróżnić wolność słowa radcy prawnego sensu largo oraz *sensu stricto*. Wolność słowa radcy prawnego sensu largo – będąca po prostu przejawem powszechnej wolności wypowiedzi, odróżniana jest kryterium wyłącznie podmiotowym – poprzez fakt, iż korzysta z niej radca. Przedmiotem naszego zainteresowania jest jednak wolność słowa *sensu stricto*, której zakres wyznaczony jest przede wszystkim przez art. 11 ustawy o radcach prawnych[1] (dla pełnej rekonstrukcji tego pojęcia należy odwołać się również do art. 2 w związku z art. 4 i 6 u.r.p.).

Gwarancją wolności słowa radcy prawnego *sensu stricto* jest immunitet wprowadzony w art. 11 u.r.p., który skutkuje wyłączeniem określonych osób spod orzecznictwa sądów. Przedmiotem artykułu jest analiza granic wolności słowa radcy prawnego, konsekwencji ich przekroczenia przejawiających się w odpowiedzialności dyscyplinarnej, karnej i cywilnej oraz charakteru immunitetu radcowskiego.

1 „Art. 11.1. Radca prawny przy wykonywaniu czynności zawodowych korzysta z wolności słowa i pisma w granicach określonych przepisami prawa i rzeczową potrzebą. 2. Nadużycie wolności, o której mowa w ust. 1, stanowiące ściganą z oskarżenia prywatnego zniewagę lub zniesławienie strony lub jej pełnomocnika, świadka, biegłego albo tłumacza podlega wyłącznie odpowiedzialności dyscyplinarnej".

KEYWORDS: freedom of speech, immunity, violation of personal goods, disciplinary and civil responsibility
SŁOWA KLUCZOWE: wolność słowa, swoboda wykonywania zawodu radcy prawnego, immunitet

1. Introduction

Freedom of speech guarantees a legal counsel the freedom to perform his/her profession. Freedom of speech directly determines the freedom of this profession due to the fact that one of the basic tools of a legal counsel is the written and spoken word. The issue of limits on the freedom of speech and the responsibility for its breach is still open becayse the standards of judging speech in everyday life continue to change. One may wonder if the continuous vulgarization of speech affects in any way the question of the freedom of speech of a legal counsel. However, when talking about freedom of speech the subject of the discourse needs to be well defined. Different criteria to define the scope of this notion may be applied, but at the very beginning we need to reject a very tempting criterion which differentiates speech "in a gown" from speech "not in a gown", in a courtroom and outside it as the limits specified by the legislator are different and allow us to define freedom of speech of a legal counsel *sensu largo* and *sensu stricto*. For the freedom of speech of a legal counsel *sensu largo* – being just a manifestation of common freedom of speech, the only differentiating criteria is the speaking subject for the fact that it is enjoyed by a legal counsel. However, even in this case the responsibility of a legal counsel (in both its scope and nature) will be a bit different from common ones due to the regulations regarding, for example, the protection of the dignity of this profession. Freedom of speech in its widest sense results directly from Article 54 section 1 of the Polish Constitution and is also guaranteed under Article 10 section 1 EKPCz of Nov 4th, 1950[2]. Freedom of speech covers the right to hold opinions and information, to share and receive them. Substantially, freedom of speech covers all areas. This freedom is considered to be a foundation of a democratic society in which its citizens share their ideas and opinions about issues of common interest.

2 Dz.U. z 1993 r. Nr 61, poz. 284 ze zm.

However, we are here interested in the concept of freedom of speech *sensu stricto*, whose scope is specified above all in Article 11 of the Act on Legal Counsels (for a complete reconstruction of this notion we also need to refer to Article 2 in connection with Articles 4 and 6, which define the notions of the performance of the profession, legal assistance and professional activities[3]). In this provision both: the subjective limits (a message of a legal counsel directed to a party, its attorney, a witness, an expert or an interpreter) and the substantial limits (a message formulated during the performance of professional activities which has the features of an insult or defamation). The freedom of speech and writing, also covering the right to criticize the courts and executive authorities is the basis of the independence of the profession of a legal counsel. The difference between common freedom of speech and the freedom of speech of a legal counsel *sensu stricto* is emphasized in the Polish jurisdiction – "the freedom of speech referred to in Article 11 section 1 of the Act on Legal Counsels may not be identified with the constitutional freedom of speech guaranteed to everybody as a personal freedom under Article 54 of the Polish Constitution because a legal counsel, when drawing up a pleading in determined proceedings on behalf of a principal does not execute his/her own personal freedom but performs his/her professional activity. The provisions of Article 11 section 1 of the Act on Legal Counsels are supposed to protect the freedom and reliability of the profession of a legal counsel which has a special meaning for the interpretation of the limits of this freedom under this provision"[4].

The freedom of speech of a legal counsel *sensu stricto* is guaranteed with immunity, introduced in Article 11 of the Act on Legal Counsels, whose effect is that certain specified persons are excluded from court jurisdiction. The immunity has a substantial and legal character as it annuls the penalization of a crime and impedes process of going to trial[5]. The following characteristics of this immunity may be pointed out[6]. It is a partial immunity because it only covers certain specific crimes. It is absolute, because it may not be annulled by any authority (it creates an

3 Wyrok Sądu Najwyższego – Izba Cywilna z 24 maja 2012 r., sygn. akt V CSK 255/11.
4 Wyrok SN z dnia 27 września 2012 r., sygn. akt SDI 24/12, Lex.
5 Por. T. Grzegorczyk, *Kodeks postępowania karnego. Komentarz*, Kraków 2003, s. 109.
6 Por. Wyrok Trybunału Konstytucyjnego z dnia 14 grudnia 2005 r., sygn. akt SK 22/05.

irrevocable obstacle against the enforcement of criminal responsibility) and permanent (it also protects the person after the termination of the function with which their immunity is connected). The immunity refers to professional activity as long as during its performance the legal counsel performed an act which have the features of a crime of insult or defamation (Article 212 and Article 216 of the Criminal Code) against the subjects referred to in Article 11 section 2 of the Act (i.e. a party, its attorney, a witness, an expert or an interpreter). Apart from that, within subjective and substantial limits, a legal counsel may bear penal responsibility under the general provisions. The immunity does not discharge them from civil responsibility for the violation of personal goods but, as we will prove hereinafter, it affects the evaluation of the unlawfulness of the breach.

A strict connection between freedom of speech and the performance of professional activity which outlines the limits of this freedom has also been emphasized in a different ruling of the Supreme Court – "The freedom of speech and writing of a legal counsel – covered with a substantial immunity which means that insulting or defamatory content may be prosecuted only under the regime of disciplinary proceedings – refers to all activities included in the legal assistance carried out in the course of court proceedings as well as out of them. At the same time it refers only to activities carried out when providing legal assistance. Whereas it does not cover the relationships of a legal counsel (as well as a trainee legal counsel – Article 33 section 5 of the Act on Legal Counsels) with the media, public opinion, etc., even if the statement made in the media or in public refers to issues connected with the performance of the profession of the legal counsel or with legal assistance provided by a determined legal counsel.[7]

The subject of the following part of this discourse will be issues connected with freedom of speech in the meaning defined in Article 11 of the Act on Legal Counsels and the responsibility for its breach. Considered the immunity, only disciplinary and civil responsibility will be taken into account in this context. (In this case the breach of the limits of freedom of speech will be a violation of personal goods).

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7 Postanowienie Sądu Najwyższego – Izba Karna z dnia 21 listopada 2008 r., sygn. akt SDI 27/08.

2. Disciplinary responsibility

A legal counsel for the abuse of this freedom i.e. for a violation in speech or in writing – during the performance of their professional activities – of the provisions of law or substantial need bears – under Article 64 section 1 point 1 of the Act – a disciplinary responsibility. This does not exclude the possibility of holding a legal counsel liable under a different kind of responsibility – in particular under the provisions of civil or criminal law, as long as the act has the features referred to therein. This principle is limited only if a legal counsel is liable for an act of the abuse of the freedom under discussion carried out on a private prosecution, which is an insult or defamation to a party, their attorney, a witness, an expert or an interpreter, as in such a case – under Article 11 section 2 of the Act – a legal counsel may not be held liable under criminal responsibility and a legal counsel is only subject to disciplinary responsibility (of course, he or she may also bear civil responsibility). The obligation under Article 11 section 1 of the Act has also been specified *expressis verbis* in Article 38 section 1 of the Legal Counsels Code of Ethics, hereinafter referred to as the "LCCE" or the "Code"[8]. In accordance with this provision of the LCCE, "A legal counsel when executing his or her right to the freedom of speech and writing during the performance of their profession may not breach the limits specified in the provisions of law and substantial need". It also needs to be pointed out that in the LCCE some aspects of the obligation under discussion have been specified in a more detailed manner. In particular, Article 38 section 2 of the Code states that a legal counsel in their professional speech may not threaten with criminal or disciplinary proceedings. The Code also set certain obligations in relation to the courts, authorities and certain persons. In case of a breach of the above-mentioned principles of professional ethics, a legal counsel (or a trainee legal counsel) bears a disciplinary responsibility under Article 64 section 1 point 2 of the Act.

When analyzing the obligation under Article 11 section 1 of the Act and referred to in Article 38 section 1 LCCE one needs to take into consideration the fact that on the one hand this is a consequence of the

8 Kodeks Etyki Radcy Prawnego uchwalony przez Nadzwyczajny Krajowy Zjazd Radców Prawnych w dniu 22 listopada 2014 r., stanowi załącznik do uchwały Nr 3/2014.

special character and function of the profession of the legal counsel and the nature (purposes) of legal assistance provided by legal counsels and on the other hand it is a guarantee of the proper performance of that profession and the accomplishment of the purposes of legal assistance. Considering the above, when judging whether this obligation has been breached in a given context, it is necessary to take into account the nature of this profession as a profession of public trust which manifests itself in entrusting legal counsels with vital functions within the judicial system (as specified in the preamble to the LCCE, "a legal counsel in his or her special quality serves the interest of justice as well the subjects which entrusted them with the enforcement of their claims and the protection of their freedom and rights")[9]. Moreover, we need take into account the purposes of legal assistance provided by legal counsels (Article 2 of the Act), the obligation to perform professional activities "in accordance with the law, honestly, knowingly and with due accuracy" (Article 3 section 2 of the Act), the obligation to uphold the dignity of the profession during the performance of professional activities and the obligation to remain independent.

The abuse of the freedom of speech and writing of a legal counsel involves exceeding the limits of this freedom set forth – under Article 11 section 1 of the Act – in the provisions of law and by substantial need. The breach of even one of these features during the performance of the profession means the abuse of the freedom under discussion, which is a disciplinary offence.

To decide whether a piece of speech or writing by a legal counsel formulated in the course of the provision of legal assistance is compliant with the provisions of law should basically not be problematic. It is different though, for the principle of substantiality. This feature is not very precisely defined, a fact which needs to be examined – considering the nature and the circumstances of the case, including the requests and arguments of the person litigating with the legal counsel's client that need to be refuted[10]. When analyzing this feature, we need to bear in mind above all the purpose of the legal assistance provided by a legal counsel which – under Article 2 of the Act – is the legal protection of the client's

9 See: wyroki TK z dnia 8 listopada 2006 r., sygn. akt K 30/06, z dnia 1 grudnia 2009 r., sygn. akt K 4/08, i z dnia 7 marca 2012 r., sygn. akt K 3/10, Lex.

10 See: wyrok SN z dnia 27 września 2012 r., sygn. akt SDI 24/12.

interest. In each case, in order to evaluate if the acts by a legal counsel were substantial it needs to be determined if it was necessary to guarantee the protection under discussion in the given case as "it is the protection of the principal's interest to specify [...] the scope of the statements and accusations put forward in the given case"[11]. This means that the same statement made by a legal counsel may be considered in one case not exceeding the limits of the freedom of speech and writing whereas in a different case it may be seen as an abuse of this freedom. For example, if when executing the representation in proceedings at civil law, a legal counsel in a pleading outlines the negative features of the character of the person litigating with the legal counsel's client, in a case for the payment of debts it will not be (in most cases) justified with the need to protect the client's legal interest and as such will breach the requirement of substantiality, whereas in some other cases (in particular in family cases) it may be seen as substantially grounded.

However, it needs to be pointed out that even if it is necessary for a legal counsel to quote certain circumstances to secure the client's interest, due to the high ethical standards binding a legal counsel as a person performing a profession of public interest, he or she also has certain obligations regarding the form and content of speech and writing. As duly pointed out by the Supreme Court in the judgment of April 20th, 2006, case no. IV CSK 2/06, Lex: "the form of the speech may not be drastic, it should be characterized with moderateness and discretion", and "an opinion about a person should be expressed in connection with grounded statements and proofs, it may not be groundless with no proof in the case files". Moreover, even if a legal counsel is not obliged to verify the statements provided by the client and does not bear responsibility for their credibility or for "the evaluation of proofs by the court"[12], they should consider whether the credibility of the client's statements is not obviously dubious. Consequently, for the evaluation of a legal counsel's activity when quoting little probable circumstances it is not indifferent if they "use a phrase introducing a reference to a statement, view or position of the party which they represent"[13] (i.e. they expressly specify their

11 Wyrok SN z dnia 24 maja 2012 r., sygn. akt V CSK 255/11, Lex.

12 See: wyroki SN z dnia 24 maja 2012 r., sygn. akt V CSK 255/11, Lex, z dnia 20 kwietnia 2006 r., sygn. akt IV CSK 2/06, Lex.

13 See: wyrok SN z dnia 20 kwietnia 2006 r., sygn. akt IV CSK 2/06, Lex.

source which – in our view – may imply for example the use of a phrase such as "The claimant states", "According to the claimant", "Based on the information provided by the claimant I conclude that"), "outline the reasoning based on which they are defined", and even "the use of the subjunctive without being excessively categorical in the statements and accusations put forward" as in such situation a legal counsel should act "with caution"[14]. However, it needs to be emphasized that a legal counsel bears responsibility for the provision of factual circumstances, if "they acted with an awareness of their noncompliance with the truth"[15].

To sum up, it needs to be stated that even though in order to guarantee to a legal counsel the ability to duly perform their profession, the legislator reserved for the benefit of legal counsels a wide range of freedom of speech and writing during the provision of legal assistance (as well as a substantial immunity covering some cases of the abuse of this freedom), it needs to be expected from the persons performing this profession, which is a profession of public trust, that they be responsible for what they say or write, that they choose their words in speech and writing properly, that they show due respect to the employees of the judicial system and other authorities, other attorneys-at-law and other persons referred to in Article 30 LCCE, and that they do not show a disrespectful attitude to other persons with whom the legal counsel has contact as part of their professional activity, including using a tactful and without prejudice attitude to the party litigating with their client (Article 27 section 3 LCCE). Obviously, many fundamental professional activities of a legal counsel are connected with the necessity to argue with the statements of the courts or other authorities, persons litigating with the legal counsel's client, their attorneys, with the findings provided by experts, etc., or even to criticize these statements or findings. This is the essence of these professional activities. Undoubtedly, the dispute under discussion is also carried out in the special conditions of the courtroom, among which the stress connected with the necessity of a quick reaction by a legal counsel, including, not so rarely, to statements on the part of the participants of the legal proceedings which are offensive or surprising for other reasons. It also needs to be pointed out that clients expect full commitment from their legal counsel. These circumstances (taken into account by the

14 See: wyrok SN z dnia 23 kwietnia 1993 r., sygn. akt I PAN 3/93.

15 See: wyrok SN z dnia 24 maja 2012 r., sygn. akt V CSK 255/11, Lex.

legislator when constituting the immunity of a legal counsel), however, do not justify the breach by a legal counsel of the principles of ethics of the legal counsels. A legal counsel when performing their professional activities to assure the legal protection of their client's interest, including when participating in the dispute under discussion, should focus on substantial issues and not show their negative emotions by getting involved in personal arguments whose only purpose is to undermine or insult another person. The proper provision of legal assistance should not involve showing such emotions but the commitment of a legal counsel should be manifested in their firm and substantially grounded actions.

Article 11 section 2 of the Act sets forth the exclusion of penal responsibility of a legal counsel for the abuse of freedom of speech and writing during the performance of their professional activities which involves an insult or defamation against the persons referred to therein, prosecuted on private prosecution (immunity of a legal counsel). In such case, a legal counsel may only be punished with disciplinary penalties. This means that even though the immunity under discussion protects them from criminal responsibility, "it does not mean a total discharge from responsibility for or acquiescence in unlawful or unethical acts", and the disciplinary responsibility which affects the legal status of legal counsels is indeed connected with the high ethical standards which bind them.

The immunity under discussion is the basis of the independence of legal counsels when performing their profession.

The immunity of a legal counsel is a substantial immunity, as its effect is the exclusion of criminal responsibility for the deed referred to in Article 11 section 2 of the Act (and, consequently, it impedes the ability to proceed with criminal proceeding). Like any substantial immunity, its character is absolute – there is no procedure that would make it possible to "annul" it by any authority. The immunity is also permanent as it protects a legal counsel even after they cease to perform in the profession and partial as it only covers a determined, limited range of crimes[16].

Because the provision of Article 11 section 2 of the Act is of a special nature, it needs to be interpreted strictly. The immunity will not apply, if a legal counsel commits an act of insult or defamation during the performance of activities which are not their professional activities or if the abuse of freedom of speech or writing is a crime different from insult or defamation

16 See: wyrok TK z dnia 14 grudnia 2005 r., sygn. akt SK 22/05, Lex.

prosecuted on private prosecution. In such cases, a legal counsel may be held liable not only under disciplinary but also criminal responsibility.

3. Civil responsibility

Exceeding the limits of freedom of speech may lead to a violation of personal goods (dignity or privacy) and consequently, to responsibility under civil law. As emphasized in the judgment of the Constitutional Tribunal[17] referred to above, the protection of personal dignity with the means under civil law is at least as important as the protection under criminal law.

The provision of protection to personal goods is conditioned with the existence of a positive feature (the fact of the existence of a given good and its violation) and a negative feature (no circumstances excluding the unlawfulness of the breach). The Civil Code does not provide for a definition of a personal good. The views of the representatives of the doctrine specifying the essence of personal goods were balanced for years between subjectivist and objectivist approaches. From the subjectivist perspective, represented by S. Grzybowski, personal goods are "individual values of the world of feelings, of the condition of the psychical life of a human"[18], whereas according to the second approach, represented by A. Szpunar, "they are immaterial values connected with the human personality commonly recognized in a given society[19]. The objectivist interpretations of personal goods currently prevailing in doctrinal views assume the independence of the definition of a personal good and its violation from the subjective sensations of an individual. They require, however, the petrification of a value and they condition the provision of legal protection either on the statutory recognition of a personal value (the existence of a legal provision being the basis of the norm protecting the given value) or on the social recognition of the personal value (the dissemination in society of legal and moral views which unambiguously approve of the value)[20].

17 Wyrok Trybunału Konstytucyjnego z dnia 14 grudnia 2005 r., sygn. akt SK 22/05.

18 S. Grzybowski, *Ochrona dóbr osobistych według przepisów ogólnych prawa cywilnego*, Warszawa 1957, s. 15 i n.

19 A. Szpunar, *Ochrona dóbr osobistych*, Warszawa 1979, s. 106.

20 See: B. Gawlik, *Ochrona dóbr osobistych. Sens i nonsens koncepcji tzw. praw podmiotowych osobistych*, „Zeszyty Naukowe Uniwersytetu Jagiellońskiego" 1985, z. 41, s. 125.

It needs to be pointed out that the choice of one of the above-mentioned approaches is not only of primary importance for the definition of a personal good, but it also secondarily affects the evaluation of the fact that a good was violated. When adopting a subjectivist perspective, as an inevitable consequence we would also accept the risk of a significant subjectification of the evaluation of the fact and the degree of the violation of a personal good. A person excessively sensitive about their honor could say that their personal good was violated in trivial situations that would be viewed as meaningless by objective observers. This could lead to the escalation of claims and impede or even make impossible a fair discussion and argumentation, in particular in an atmosphere of judicial controversy. On the other hand, people who, due to their mental condition are not able to make a rational evaluation of the events they participate in could be deprived of protection. This is a vital argument for the benefit of the objective interpretation; it also makes possible a predictable evaluation of behaviors. This does not mean, however, that an objectivist approach is a remedy for all the disadvantages of the subjectivist approach. This means that if we condition the provision of legal protection on a normative recognition of a personal value (with a binding legal provision), we will have a quite unambiguous criterion of evaluation, but we will lose its flexibility and social adequacy. If we, on the other hand, base it on a social recognition of a personal value, we keep the above-mentioned flexibility and social adequacy but we will have to specify on what basis we recognize that a given good and the scope of its protection are socially approved. These are the courts and the doctrine of law, which are obliged to identify new personal goods, define their content and outline the limits of their protection. However, it needs to be specified in this context that "the court does not create new personal goods but rather names them and tries to cover them with protection in compliance with social expectations"[21]. Expert opinions or statistical research or surveys will be of little help, but they cannot be excluded – let us remember, however, that they only allow us to know what percentage of society shares a given approach or opinion about the existence of the personal good and the scope of its protection but do not determine if the given good really exists and to what extend it is protected. In the end, the burden of such a decision will be borne by the court adjudicating in a specified case.

21 See: J. Barta, R. Markiewicz, *Media a dobra osobiste*, Warszawa 2009, s. 25.

The concept of human dignity covers an internal aspect (personal dignity connected with one's self-esteem) and an external aspect (a good image connected with the opinion of other people). In this context, we are interested mainly in the good image. It may be offended by the formulation of different defaming statements which are traditionally divided into opinion statements and statements regarding facts. The unlawfulness of a statement regarding facts – contrary to what one might think – does not at all depend only on the mentioned facts being true or false: the intentions of the speaker are also of key importance. The evaluation of the intentions is due to the court and it depends on the circumstances.

"Acting in their role as an attorney in proceedings, a legal counsel is usually "sentenced to" knowledge only about the facts about which they learn from their principal. So they present these facts in the proceedings and they are not obliged to verify if the facts are true. Therefore, they may not bear responsibility for their truthfulness, unless their opponent in the proceedings proves that the attorney acted with the awareness of their untruthfulness (cf. judgments of the Supreme Court of July 19th, 1978, I CR 254/78 OSNC 1979, no. 6, item. 21 and of October 19th, 1989, II CR 419/89, of April 20th, 2006, IV CSK 2/06, OSNC 2007 no. 2, item. 30)."[22] The Supreme Court also gave a similar opinion in a different case, pointing out that an attorney in litigation may not thoughtlessly quote the statements of the represented party: "An advocate is not obliged to verify the facts and statements provided by the party and does not bear the responsibility for their truthfulness but they should consider if they are not obviously doubtful in terms of their compliance with the reality."[23]

The evaluation of the unlawfulness of an opinion statement depends on its form – a statement will be unlawful if it contains phrases and expressions commonly viewed as offensive, defaming, rude or if the statement, apparently acceptable in terms of its form, contains contents based on which it is possible to state that their author had *animus iniurandi*, the intention to offend. The freedom to criticize and express one's opinions and views is indeed limited by the rights of the criticized person. This thesis is illustrated by a judgment of the Supreme Court,[24] under which:

22 Wyrok Sądu Najwyższego – Izba Cywilna z 24 maja 2012 r., V CSK 255/11.
23 Wyrok Sądu Najwyższego – Izba Cywilna z 20 kwietnia 2006 r., IV CSK 2/06.
24 Orzeczenie SN z 19 września 1968 r., sygn. akt II CR 291/68, OSN 1968, poz. 200.

"criticism is a practice socially useful and advisable, if it is practiced in the social interest, if its purpose is not to mock another person and if it is characterized with due diligence and factuality" (the case regarded a press release and not a statement by a legal counsel but this thesis may *per analogiam* be also applied to statements by an attorney in court proceedings).

The identification of a positive feature will look exactly the same in the case of the universal protection of personal goods as in the case of protection against the abuse of freedom of speech by a legal counsel. But the differences are identified with respect to the negative feature. Under Article 24 of the Civil Code, the protection of personal goods is due only against unlawful acts[25], which is why it is so important to specify a catalogue of circumstances excluding unlawfulness. Although the doctrine is not unanimous, we may say under general principles that in the catalogue of circumstances excluding the unlawfulness of an offence to personal goods there are the following:

1) acting within the legal order,
2) execution of a subjective right,
3) consent of the aggrieved party although this is doubted if acting in defense of a grounded social interest may be a feature excluding the lawfulness of the offence[26].

In the case of the violation of a personal good by the statement of a legal counsel in the case regulated in Article 11 of the Act on Legal Counsels, of fundamental importance is acting within the legal order (i.e. within the limits set forth in the provisions of the law and by a substantial need), which at the same time will include acting in the social interest (this interest will be a due solution of the controversy). Under the provisions regarding the protection of the dignity of the profession, it is disputable whether the "principle of clean hands" may be applied (under which a party which violates personal goods may not claim the protection of them).

An analogous attitude was expressed by the Supreme Court when analyzing Article 8 section 1 of the act Law on the Bar when it stated that this provision "is a kind of an "indicator" of unlawfulness, as it is the basis for the qualification of the behavior of the advocate who,

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25 See: S. Dmowski, [w:] *Komentarz do kodeksu cywilnego. Księga pierwsza. Część ogólna*, Warszawa 2001, s. 86.

26 See: M. Pazdan, [w:] M. Safjan (ed.), *System prawa cywilnego*. Vol. I: *Prawo cywilne – część ogólna*, Warszawa 2007, chapter XVI: *Dobra osobiste i ich ochrona*, s. 1161.

during the performance of their profession, violated someone else's personal good qualifying it as an unlawful or lawful act (within the limits set forth by the provisions of law)[27]. The essential elements referred to in the above-mentioned judgment which let us determine if a statement by an attorney in proceedings was justified by the substantial protection of the client's interest are: the nature of the case, its circumstances, among which are the claims and arguments of the counterparty which need to be refuted. As we mentioned before, the form of the statement may not be drastic, and it should be characterized with moderateness and discretion. An opinion about a person should be expressed in connection with grounded statements and proofs; it may not be groundless, with no proof in the case files.

The criterion of substantial need was of key importance for the hearing of a case for protection of personal goods which was pending before the court of appeal in Krakow. The claimant requested that the court recognize the violation of his good name by his wife's attorney, who in the appeal against the ruling in the case for eviction used the following phrase: "d e g e n e r a t e threats of rape and murder". In this case the court passed a judgment unfavorable for the party represented by him due to the lack of its mandate in proceedings. In the opinion of the court adjudicating in the case for the protection of personal goods, because the action was dismissed for reasons different from the evaluation of the party's behavior, there were no reasons why the evaluation of these behaviors should be exposed to such a degree, which resulted in the recognition of the validity of the action for the protection of personal goods.[28] According to the court, the use of the incriminating phrase "degenerate" was an opinion attribute not justified by the need to protect the principal's rights. Therefore, the court did not at all evaluate the validity or adequacy of this opinion statement or its compliance with a possible social evaluation of the claimant's (who was charged with maltreatment, beating of his wife, attempted rape and theft to her prejudice) behavior.

The above considerations allow us to conclude that the freedom of speech of a legal counsel is manifested above all in the existence of the

27 Wyrok Sądu Najwyższego – Izba Cywilna z 20 kwietnia 2006 r., IV CSK 2/06.

28 Wyrok Sądu Apelacyjnego w Krakowie z dnia 1 lipca 1997 r., I ACa 328/97, B. Gawlik (ed.), *Dobra osobiste. Zbiór orzeczeń Sądu Apelacyjnego w Krakowie*, Kraków 1999, s. 263.

immunity of that legal counsel, which protects them in specified situations against criminal responsibility. However, the existence of the disciplinary responsibility (not valid for other subjects) and the responsibility under civil law (where the criteria of evaluation in the case of the violation of a personal good by a legal counsel are stricter than for other subjects) implies that a legal counsel should be very careful and reserved when enjoying this freedom.

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