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# Out of constituent guarantees protecting professional secrecy in the practice of the attorney under US law

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## 1. Introduction

The basis of the existence of legal secrecy in the US legal system is certainly confidentiality. Confidentiality is, in turn, one of the principles in the client-lawyer relationship, and its concept consists of the following legal aspects: attorney-client privilege, the principle of keeping information obtained from the client confidential – work-product doctrine and the rule of confidentiality. Both the attorney-client privilege and the principle of secrecy of information obtained from the client are rules applicable in a court trial, where a representative of the legal profession may be called as a witness.

The aim of the article is to present the non-constitutional sources of law of the United States of America, which are a guarantee of legal professional secrecy. Thus, in addition to the Constitutional Amendments constituting the backbone of such protection, there are other provisions in US law that may strengthen this protection. Therefore, it seems that they constitute not only an important so

called air for the indicated institution, but also its solid foundation, which this article aims to depict. It is worth asking at this point whether the non-constitutional sources effectively and adequately protect professional secrecy.

In the law of the United States, the core of guarantees consists mainly of selected Amendments to the Constitution<sup>1</sup> and some evidentiary privileges, which are equivalent to prohibitions of evidence in a trial. As in the case of Polish law, American law provides for civil, criminal and disciplinary liability for breach of professional secrecy. However, not only the Amendments play a significant role in constituting the shield for the professional secrecy in US law. The primary and direct source of the deontology responsibilities of lawyers in the United States is the Model Rules of Professional Conduct.<sup>2</sup> It is a set of rules of conduct for legal professionals, accompanied by a commentary. However, the authors of this code assumed that due to the abstract nature of moral principles, lawyers may have problems with their interpretation and implementation in specific situations. To this end, special institutions are set up in each state to answer questions from the legal professions at all times. They form state committees or local legal councils.

## 2. Research and results

The crucial guarantor of the protection of the confidentiality rule is MRPC Point 1.6. Point 1.6(b) of the act. It can, therefore, prevent the client from committing a crime or fraud that would lead to significant material damage to another person's property; in order to prevent, mitigate or repair possible material damage to property of another person; in order for the lawyer to obtain appropriate knowledge about proper compliance with the rules for legal and

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<sup>1</sup> Constitution of the United States, passed on September 17, 1787 (entered into force in 1789).

<sup>2</sup> Internet source: [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/) (access: 10.12.2020). Hereinafter referred to as MRPC.

ethical representation; in order to bring an action against the client or to protect against it on the part of the client or by third parties in connection with the representation; in connection with the need to apply other law (including foreign law), as well as to identify and resolve any conflict of interest resulting from the change of your employer.<sup>3</sup> It is worth noting that the provision indicates the optional disclosure of the content of communication in the indicated cases, and not an obligation. It seems, however, that the determination of the admissibility of the scope of its disclosure indicates the possibility of a lawyer exposing himself to disciplinary liability if it is exceeded. It should also be remembered that the obligation to comply with the above rule lapses by the decision of the individual represented by a lawyer.

It is imperative to distinguish the often confused confidentiality from the confidentiality rule. Confidentiality is the idea in the spirit of which the above-mentioned principles of practicing the profession of a lawyer in the legal system of the United States were invoked, while the confidentiality rule is only one of these elements and has a different source and scope than the other two concepts.<sup>4</sup> The rule of confidentiality has its source in legal ethics and obliges the lawyer to keep confidential everything that he learns about in connection with the client's representation. On the other hand, the attorney-client privilege, although it enjoys the protection provided by deontological rules, is primarily a product of common law and guarantees protection of the content of communication between the lawyer and the client, but does not cover commonly known facts and information.<sup>5</sup>

It is also worth noting that the basic difference between the attorney-client privilege and the principle of secrecy of information obtained from the client (work-product doctrine) is the value and purpose of keeping information confidential. The privilege protects

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<sup>3</sup> Point 1.6(b) of MRPC.

<sup>4</sup> F.C. Zacharias, *Harmonizing privilege and confidentiality*, "Public Law and Legal Theory" 1998, No. 13, San Diego, p. 4.

<sup>5</sup> E.J. Krauland and T.H. Cribb, *The attorney-client privilege in the United States. An age-old principle under modern pressures*, "Symposium Issue of the Professional Lawyer" 2003, p. 3.

that part of the content of the communication which directly affects the resolution of the dispute and is used against the opponent, which in the latter case is extremely rare. It can be considered that the principle of secrecy of information obtained from the client is protected because of its content, while the attorney-client privilege is protected despite its content.<sup>6</sup>

The Federal Rules of Evidence (FRE)<sup>7</sup> acts as a general procedural law of evidence in any trial in the United States at the federal level. As R.V. del Carmen reminds us, American law is not a uniform legal system and consists of separate federal and state systems, which gives a total of 52 separate and completely independent legal systems (federal system, 50 state systems and the District of Columbia system).<sup>8</sup> However, despite the diversity of these systems, “some federal laws, including the Federal Rules of Evidence, often provide a unified model for regulating the state’s evidence law (34 states have promulgated federal-style evidence rules)”.<sup>9</sup>

The Rules of Evidence are closely related to the notion of an evidentiary privilege. Evidentiary privilege occurs in both civil and criminal procedures. Evidentiary privileges are used to exclude evidence, concealing evidence relevant to the case, and to protect confidential messages of the content of communication between the sender – the owner of the information and another person defined by law. A person summoned to appear in court may therefore refuse to testify on the grounds of protection of the information in his possession by virtue of the privilege [...].<sup>10</sup> As the author notes, evidentiary privileges are an expression of a departure from the centuries-old common law rule, which indicates that “society has

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<sup>6</sup> *KW Muth Co. v. Bing-Lear Mfg. Group L.L.C.*, 219 F.R.D. 554, 566 (E.D. Mich. 2003).

<sup>7</sup> *Federal Rules of Evidence* of January 2, 1975, as amended.

<sup>8</sup> R.V. del Carmen, *Criminal Procedure. Law and Practice*, Wadsworth/Thomson Learning 2004, p. 3.

<sup>9</sup> *Ibidem*.

<sup>10</sup> M. Jurzyk, *Prawna ochrona tajemnicy spowiedzi w Stanach Zjednoczonych*, „Kwartalnik Prawa Publicznego” 2001, No. 1/2, p. 10.

the right to know evidence in the case of each person".<sup>11</sup> Granting the privileges of evidence a *raison d'être* is based on a precise justification of their usefulness for other, essential purposes, which are more important than the process of seeking the truth.<sup>12</sup>

The important position of the privileges of evidence in the provisions of the Federal Rules of Evidence can be justified, for example, by the frequency of their application by courts, which significantly exceeds the number of situations where other provisions of this act are applied.<sup>13</sup> It applies primarily to district courts (including Washington District), Courts of Appeal, Courts dealing with smaller claims or misdemeanors (U.S. Claims Courts) and US offices. In 1974, the National Conference of Commissioners on Uniform State Laws adopted the Uniform Rules of Evidence,<sup>14</sup> largely amended in 1999, to constitute a unified set of rules of evidence for state courts. It has the character of guidelines and almost repeats the act of the Federal Rules of Evidence.<sup>15</sup> Forty-two states have officially adopted the act.<sup>16</sup> Other states operate on the basis of acts issued before the entry into force of the Federal Rules of Evidence, or – such as the State of New York – refrain from codifying the rules of evidence for fear of politicizing the law of evidence and too wide discretion in court decisions.<sup>17</sup> However, due to the overwhelming majority of states that have adopted the Uniform Rules of Evidence Act, it is necessary to describe its most important guarantees in relation to professional secrecy.

Contrary to the rest of the evidence rules, privileges are not designed to support the quest for truth – one of the essential

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<sup>11</sup> Ibidem.

<sup>12</sup> Ibidem.

<sup>13</sup> Online source: <https://www.hg.org/article.asp?id=27305> (access: 18.12.2020).

<sup>14</sup> Online source: <http://www.uniformlaws.org/shared/docs/rules%20of%20evidence/evid98am.pdf> (access: 18.12.2020).

<sup>15</sup> Online source: <http://legaldictionary.thefreedictionary.com/Rules+of+Evidence+%28United+States%29> (access: 18.12.2020).

<sup>16</sup> J.L. Ingram, *Criminal Evidence*, LexisNexis 2009, p. 17.

<sup>17</sup> S. Zeidman, *Who Needs an Evidence Code?: The New York Court of Appeals' Radical Reevaluation of Hearsay*, New York 1999, p. 1.

functions of judicial proceedings. It should therefore be noted that sometimes social values, even such as privacy, take precedence over the goal of establishing the truth in the process. Privileges, in general, are essential to the coherence of the US legal and political system and are essential to the proper functioning of major social institutions.<sup>18</sup>

Rule 501 of the above-mentioned act restricts the admissibility of certain pieces of evidence. It states that, except as provided for in the US Constitution or by Congressional or Supreme Court rules, the privilege of a witness, person, public authority, state or other territorial entity is governed by common law as interpreted by the courts of the United States, according to their knowledge and experience. However, in civil proceedings, with respect to the claims and pleas law as prescribed by state law, the privilege of a witness, person, public body, state, or other territorial unit shall be determined in accordance with that law. The adoption of this Rule was a compromise worked out by Congress, and its value manifested itself in the possibility of drawing clear boundaries between the admissibility and exclusion of evidence in the proceedings.<sup>19</sup>

The recognition of the privilege under the Federal Rules of Evidence is based on a careful analysis of the client's communication with the lawyer. The courts weigh the benefits of maintaining the privilege of protecting confidential client-lawyer communications and the consequences of its waiver – and therefore the possible harm resulting from the disclosure of classified information.<sup>20</sup> However, the long-standing tradition of the attorney-client privilege requires lawyers to refrain from testifying about facts they have learned from their clients, especially when it could cause harm.

In the context of criminal law, until 1980, federal prosecutors generally considered that lawyers were not a potential source of

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<sup>18</sup> M. Jurzyk, *op.cit.*, p. 10.

<sup>19</sup> E.J. Imwinkelried, *An Hegelian Approach to Privileges under Federal Rule of Evidence 501: The Restrictive Thesis, the Expansive Antithesis, and the Contextual Synthesis*, "Nebraska Law Review" 1994, Vol. 73, Issue 3, p. 511 and 514.

<sup>20</sup> Online source: <http://legal-dictionary.thefreedictionary.com/attorney-client+privilege> (access: 18.12.2020).

information for inquiry or investigation. Such calls were rather rare or were rejected. After 1980, the Department of Justice under President Ronald Reagan revised these assumptions, which resulted in the conclusion that this method of obtaining information was deemed appropriate.<sup>21</sup> The next step was to recognize this type of information gathering as a special investigative tool, allowing law enforcement agencies to use information obtained by a lawyer from a client, which the privilege does not apply to. The effect of the new trend at that time was an avalanche of requests to hear lawyers based on an aggressive policy aimed at using exceptions to the privilege when they were not applicable.<sup>22</sup> The greatest increase in such applications was recorded in the years 1983–1985. As the Court noted in the *United States v. Klubock* case, such conclusions may lead to a conflict between the attorney acting as a witness and his client.<sup>23</sup> As a result of this situation, there has been a retreat from this type of practice, and now the legal secrecy has regained its strength and importance.

Rule 502 of the above-mentioned act concerns strictly the attorney-client privilege and limitations as to the scope of its annulment. It was introduced to the Federal Rules of Evidence by the Committee on the Federal Rules of Evidence in May 2007, with the aim of the new regulation in mind: eliminating discrepancies in ruling on an unintentional waiver and reducing costs related to the validity of an attorney-client privilege in a given case.<sup>24</sup>

Rule 502 took effect after the President signed the amendment on September 19, 2008, and was subsequently also included in the Uniform Rules of Evidence.<sup>25</sup> Its core is the principle set out in point a), according to which the disclosure of privileged information in Proceedings before the Federal Court, Federal Body or

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<sup>21</sup> M.D. Stern, D. Hoffman, *Privileged informers: The attorney subpoena problem and proposal for reform*, "University of Pennsylvania Law Review" 1988, Vol. 136, Issue 6, p. 1787.

<sup>22</sup> *Ibidem*, p. 1788.

<sup>23</sup> *United States v. Klubock*, 832 F.2d at 653 (1<sup>st</sup> Cir. 1986).

<sup>24</sup> J.M. Barkett, *Evidence Rule 502: The Solution to the Privilege-Protection Puzzle in the Digital Era*, "Fordham Law Review" 2013, Vol. 81, Issue 4, p. 1594.

<sup>25</sup> *Ibidem*.

Agency revokes the privilege of attorney [...], and the waiver also extends to undisclosed facts only if: it is intentional, both disclosed and undisclosed information relate to the same matter, which are considered together.<sup>26</sup> As a rule, the presumption of disclosure of other information is inadmissible, except for the exceptions specified in the provision. The said Rule therefore constitutes additional protection for the privilege in proceedings before courts. The *ratio legis* of adopting this Rule also lies in the intention to construct uniform, predictable standards according to which the parties will be able to adequately anticipate the consequences of disclosing the content of confidential communication in the process. Moreover, the introduction of rule 502 breaches the absolute common law which stipulates that each, even partial disclosure of a lawyer's secret by a client causes its annulment.<sup>27</sup>

The essence of the privilege in the process is to protect the communication between the client and the lawyer related to the provision of professional legal advice. The privilege therefore allows a lawyer to refuse in the process of giving evidence. The attorney-client is *de facto* relevant only at the stage of the proceedings. When the Court finds that a privilege may be established, and therefore has not found any exceptions to its applicability, the privilege becomes absolute and no one, except the party to whom the privilege belongs, may waive it.

However, attention should be paid to its very narrow delineation. It concerns only the communication between the lawyer and the client, and not information given to each other. Thus, if the entity concerned discloses his secret to a third party and a lawyer, the privilege will not apply to communication with that person, but only to communication with the lawyer.<sup>28</sup>

However, it should be noted, especially in the context of the law of evidence, that the attorney-client privilege, like all other

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<sup>26</sup> Online source: [https://www.law.cornell.edu/rules/fre/rule\\_502](https://www.law.cornell.edu/rules/fre/rule_502) (access: 18.12.2020).

<sup>27</sup> Ibidem.

<sup>28</sup> *North Pacifica, LLC v. City of Pacifica*, 274 F.Supp.2d 1118, 1127 (N.D. Cal 2003).

privileges of evidence, may obviously make it difficult to find the truth. The role of the court is to balance these goods properly and not to rashly decide to repeal them.

American law lists the so-called exceptions to the preservation of the attorney-client privilege, i.e. situations and such content of communication that are not protected by it. The exceptions can be referred to as specific guarantees in the sense that the applicable law ensures that the absence of a specific exception maintains the privilege.

The most important exceptions are: the communication exception for the purpose of a crime or fraud, the joint representation exception, communication in connection with the breach of fiduciary duties in companies, the exception related to the overturning of a will, the exception relating to the right to access information about the activities of public agencies and other organizations. The first one is worth discussing as it occurs very often compared to other exceptions and concerns the client seeking legal advice in order to commit a crime. At the same time, for the purposes of this dissertation, it is not necessary, in my opinion, to discuss the remaining exceptions in detail, especially since the mechanism of their lifting in the process is similar.

As indicated by the court in one of its decisions in 1989, the privilege was structured in law to protect an important public interest by protecting the unhampered exchange of knowledge, thoughts and observations. However, this privilege must not be allowed to be used intentionally to violate the law.<sup>29</sup> This means that – as already noted in 1933 by the Supreme Court of the United States – when a client consults a lawyer in order to effectively carry out his intention contrary to applicable law, the privilege will not protect the content of that consultation.<sup>30</sup> Thus, if a privilege protects communication aimed at frank discussion and fair representation by a lawyer, then communication aimed at engaging in

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<sup>29</sup> *Finley Associates, Inc. V. Sea & Pines Consolidated Corp.*, 714 F. Supp. 110, 117 (D. Del. 1989).

<sup>30</sup> *Clark v. U.S.*, 289 U.S. 1, 15, 53 S. Ct. 465, 77 L. Ed. 993 (1933).

illegal activities must not use the same custody.<sup>31</sup> Moreover, in the event of such conduct by the client, a representative of the legal profession is obliged to provide advice aimed at ceasing activities that violate legal norms or resigning from the intention to do so in the future.<sup>32</sup>

In order for this type of exception to be granted as a lawyer, it is not necessary that a crime, fraud or other offense has occurred. It is enough for actions aimed at violating the law to be the goal of an individual, which is to be implemented thanks to legal advice provided by a lawyer.<sup>33</sup> However, the District of Columbia Court expressed a different opinion – remaining in the minority in relation to the solutions adopted by the Courts of other states – in a judgment of 1997, stating that in order to recognize the exception to the application of the privilege of attorneys, it is necessary to meet two conditions: recognizing that the client's intention was is to obtain legal advice in order to take illegal action and to state that such a violation has been committed, and to execute or implement a violation of the law in the form of an actual commission of a crime or committing fraud.<sup>34</sup> It should be noted that the court did not cite any case that could confirm his thesis. The doctrine indicates that it is unwise and unreasonable. The condition for committing a crime cannot be required or the customer has committed fraud. Legal confidentiality does not include the situation when an individual seeks legal advice, dictated by the will to violate the law. Consequently, communication between a client and a lawyer cannot be retroactively granted a legal prerogative just because the client has changed his mind by choosing not to infringe the law. The more so, such communication cannot benefit from protection if the client did not have the opportunity, chance or possibility to achieve his unlawful intentions. The reason why this type of situation falls under the exception to the privilege is

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<sup>31</sup> *Coleman v. American Broadcasting Companies, Inc.*, 106 F.R.D. 201, 206–207 (D.D.C. 1985).

<sup>32</sup> *United States v. Hodge & Zweig*, 548 F. 2d (9<sup>th</sup> Cir. 1977).

<sup>33</sup> *Duttie v. Bandler & Kass*, 127 F.R.D. 46, 53 (S.D. N.Y. 1989).

<sup>34</sup> *In re Sealed Case*, 107 F. 3d 46, 37 Fed. R. Serv. 3d 540 (D.C. Cir. 1997).

the recital itself. In this case, the presumption of innocence should not be applied in the form of assuming that the lack of committing a crime or committing fraud by an individual stems from rational considerations resulting in a change of opinion and intentions.

Therefore, despite the fact that the reason for the failure to implement the idea of committing a crime or fraud is the impossibility of committing it, and thus a certain obstacle, it does not change the fact that there is an unlawful intention to commit an illegal act. In a situation where a lawyer has a reasonable suspicion that the client has obtained legal advice in order to commit a crime or committing a fraud, he should report the so-called imminent violation of the law. However, this raises the fear of a possible violation of the attorney-client privilege, which included communication between the lawyer and the client in the period before obtaining legal advice in order to commit a crime or commit a fraud.<sup>35</sup> In order to establish this exception, the court must carry out a two-element test. First, it must conclude that there is *prima facie* evidence that the client, when seeking legal advice from a lawyer, intended or committed a criminal or fraudulent act. Second, there must be a reasonable assumption that the obtaining of legal aid was aimed at or was closely related to illegal activities.<sup>36</sup> It is worth noting that the burden of proving the existence of this evidence rests on the opposing party, who wants to make an exception to the attorney-client privilege, and thus obtain information that could be concealed as a result of the privilege. The so-called *prima facie* evidence in US evidence law consists in the court's conviction that there is a cause-and-effect relationship between two existing facts, consisting in the inevitable emergence of a specific effect as a result of a specific event.<sup>37</sup> However, the party is under no obligation to provide direct evidence.<sup>38</sup> If, after presenting *prima facie* evidence,

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<sup>35</sup> *U.S. v. Hamilton*, 128 F. 3d 996, 48 Fed. R. Evid. Serv. 233, 1997 FED App. 0327P (6<sup>th</sup> Cir. 1997).

<sup>36</sup> *In re Grand Jury Investigation*, 842 F. 2d 1223, 1226, 24 Fed. R. Evid. Serv. 1067, 10 Fed. R. Serv, 3d 409 (11<sup>th</sup> Cir. 1987).

<sup>37</sup> Online source: [https://www.law.cornell.edu/wex/prima\\_facie](https://www.law.cornell.edu/wex/prima_facie) (access: 18.12.2020).

<sup>38</sup> *Deposit Ins. Corp. v. Cafritz*, 762 F. Supp. 1503 (D.D.C. 12.08.1991).

the party accused of intent to commit a crime or of fraud provides a satisfactory explanation to the court, then the privilege may be applied to the content of the communication between the client and the lawyer.<sup>39</sup>

It is worth noting at this point that while an attorney-client privilege may be applied at a certain stage in the existence of communication between an individual and a legal professional, the principle of confidentiality exists, as a rule, from the very beginning of the appearance of this type of bond. It should be emphasized that the jurisprudence consistently accepts that the presentation of *prima facie* evidence does not require proving the alleged crime, fraud or other violation of law.<sup>40</sup> Nor is it the same as saying that the person is guilty.<sup>41</sup> Most courts also note that in order to obtain *prima facie* evidence, it is necessary to demonstrate above-average intention to infringe the law when seeking legal advice.<sup>42</sup> There are, however, some doubts as to what it is to demonstrate above the average certainty that there is an intention to commit a crime or to commit fraud. Most of the courts assume that it is necessary to at least demonstrate the so-called “Quantum of proof” in order to apply this exception to the application of attorney-client privilege. In other words, there must be some element that will make it legitimate to apply the exception to the privilege.<sup>43</sup>

The vague requirements of the standards of presenting *prima facie* evidence resulted in a somewhat weakening of the privilege, although they were originally intended to persuade clients to communicate freely, but honestly. However, if the *prima facie* evidence is admitted by the Court, the second condition is assessed and therefore it is determined whether there is a reasonable presumption that the obtaining of legal aid was aimed at undertaking illegal

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<sup>39</sup> *For You Ease Only Inc. v. Calgon Carbon Corp.*, 2003 West Law: 22889442, \*1 (N.D. Ill. 2003).

<sup>40</sup> *Parkaway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 116 F.R.D. 46, 53 (M.D.N.C. 1987).

<sup>41</sup> *U.S. v. Cleveland*, 1997, West Law: 232538 (E.D. La. 1997).

<sup>42</sup> *Detection Systems, Inc. v. Pittway Corp.*, 96 F.R.D. 152 (W.D. N.Y. 1982).

<sup>43</sup> *Aiossa v. Bank of America, N.A.*, 2011, West Law: 4026902.

activities or was closely related to them. The court then considers whether a hearing in camera is necessary. He must then allow the suspected party to be heard. This can be done either by presenting relevant arguments or by presenting other evidence. After hearing the party, the Court analyzes the material collected. If the Court finds the testimony of the party claiming the privilege sufficient to disprove the prima facie evidence, the privilege will be upheld. On the other hand, if the Court finds it insufficient, then the attorney-client privilege will be challenged. The issue related to the fraud exception is special due to the essence of the intention to commit this violation of law. This exception can only be made if the opposing party demonstrates that the legal advice was obtained knowingly for the purpose of unlawful conduct.<sup>44</sup> It is not easy to present evidence of a clear and indisputable motive for consulting a lawyer, but it is not necessary for the Court to establish an exception. It is enough for the opposing party to prove that the party claiming the privilege knew or should have known that the planned action is unlawful.<sup>45</sup>

One of the most important principles of the common law system in the United States in the context of professional secrecy is the inadmissibility of its annulment in proceedings for the benefit of the judiciary, which is especially important for the purposes of this work in the context of the principles of the Polish criminal process. American courts hold the position that the emergence of professional secrecy is itself a result of balancing the interests of the individual and the state. Recognizing the value of professional secrecy, they have already granted it priority, and therefore its position in the trial cannot be re-established. "Not every source should be open, [...] and the attainment of the objectives of the trial cannot be done without moderation", as indicated by the Court in its judgment of 1849.<sup>46</sup>

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<sup>44</sup> *Medical Laboratory Management Consultants v. American Broadcasting Companies, Inc.*, 30 F. Supp. 2d 1182, 1206 (D. Ariz. 1998).

<sup>45</sup> *U.S. v. Doe*, 465 U.S. 605 (1984).

<sup>46</sup> *Piers v. Piers*, 2 HL Cs 331 (1849).

In both legislation and jurisprudence, there is a general belief in the need to maintain the legal privilege in most cases, even at the cost of discovering the truth in the trial. The adversarial system would suffer if lawyers representing clients in court were successively weakened by their inability to collect confidential information from their clients.<sup>47</sup>

At the end of the considerations regarding the above-mentioned guarantees of legal secrecy in American law, the problem of the possibility of weakening confidentiality due to actions taken by the state as part of the anti-terrorist and anti-money laundering policy should be mentioned. An expression of these activities is, among others, the so-called Sarbanes-Oxley Act for Listed Companies.<sup>48</sup> The provision of Art. 307 imposes, among others, an obligation on legal professions to inform their authorities about any breaches of securities law by the company. The *ratio legis* of the adoption of the said act is an attempt to rebuild investors' confidence in financial markets. However, the doctrine notes that this is inevitably at the expense of professional secrecy.

### 3. Conclusions

Confidentiality of client communications, loyalty and integrity are kind of the anchor of the attorney's confidentiality – as a value – in all democratic legal system, especially in the United States of America.

It should be emphasized that while the Model rules of Professional Conduct act is not binding, it is an invaluable set of values for legal professionals. It is a typical deontological source, being a set of certain values that should be followed by the attorneys and that are implemented in legal regulations and jurisprudence.

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<sup>47</sup> Online source: [http://nationalparalegal.edu/public\\_documents/courseware\\_asp\\_files/Ethics/Confidentiality/AttorneyClient%20Privilege.asp](http://nationalparalegal.edu/public_documents/courseware_asp_files/Ethics/Confidentiality/AttorneyClient%20Privilege.asp) (access: 18.12.2020).

<sup>48</sup> *Sarbanes-Oxley Act* of 30<sup>th</sup> of July 2002, Pub.L. 107–204, 116 Stat. 745.

The so-called evidence privileges constitute a specific exclusion of the application of the rules of evidence in a trial. However, these privileges were not designed to support the quest for the disclosure of the truth – one of the essential functions of legal proceedings. Therefore, it is important for the functioning of the legal system of the United States to protect certain social and individual values, such as privacy, which takes precedence over establishing the truth at any cost in the process. Privileges, in general, are crucial to the coherence of the American legal and political system and are an invaluable value for the functioning of major social institutions. Rules 501 and 502 of the Federal Rules of Evidence are of key importance to enhance legally protected secrets. The indicated rules strengthen attorney-client privilege in proceedings before the courts. Despite the fact that in American law legal secrecy is not absolute, judges – who are largely former attorneys – extremely rarely and reluctantly release lawyers from professional secrecy, considering it a necessary guarantee of freedom, under which an individual may freely tell his attorney about the case without fear of disclosing its details. It should be noted, however, that the judiciary authorities do not claim that they cannot obtain information by means of evidence other than hearing an advocate. The *ratio legis* of such a solution is based on the belief, deeply rooted in jurisprudence and doctrine, that US law cannot be constructed in a way that weakens attorneys and their ability to collect necessary data from clients. The release of an attorney from confidentiality by the court in the proceedings in the interest of the judiciary is therefore unacceptable. Additionally, on the basis of this system, it is unacceptable to waive the legal secrecy for the benefit of the administration of justice. In American jurisprudence, such proceedings would be regarded as an admission to the weakness of the justice system and its methods of obtaining evidence. The protection of the confidentiality of an individual in law is, therefore, the effect of a compromise between private and public interest.

## STRESZCZENIE

### Pozakonstytucyjne gwarancje służące ochronie tajemnicy zawodowej w wykonywaniu zawodu adwokata w prawie Stanów Zjednoczonych Ameryki

Przedmiotem artykułu są rodzaje i charakterystyka gwarancji chroniących tajemnicę zawodową w USA. Gwarancje te są jednym z najważniejszych czynników ochrony prawnej tajemnicy zawodowej – kluczowej nie tylko dla klienta, samego prawnika, ale także dla całego systemu ochrony prawnej. Zwrócono uwagę przede wszystkim na pozakonstytucyjne gwarancje chroniące zawodową poufność: etykę prawniczą oraz tzw. przywileje dowodowe. Podkreślono również wzmoczoną potrzebę ochrony prawa do prywatności. Głównym celem artykułu jest ukazanie funkcji oraz roli przepisów prawa umieszczonych poza Konstytucją Stanów Zjednoczonych, a stanowiących swoistą otoczkę dla źródeł wynikających z poprawek do Konstytucji. Wydaje się bowiem, że zarówno akt *Model Rules of Professional Conduct*, jak i przywileje wyłączające stosowanie tzw. reguł dowodowych w procesie są kluczowe dla funkcjonowania tajemnicy prawniczej w prawie amerykańskim.

**Słowa kluczowe:** gwarancje; etyka prawnicza; proces karny; przywileje dowodowe; przywilej adwokacki

## SUMMARY

### Out of constituent guarantees protecting professional secrecy in the practice of the attorney under US law

The subject of the article is the types and characteristics of guarantees created to protect legal professional secrecy in the USA. It is inseparable from its character and role in the performance of the legal profession. These guarantees are one of the most important factors in the protection of legal professional confidentiality – crucial not only for the client, the lawyer himself, but also for the entire legal protection system. The attention was paid primarily to non-constitutional guarantees protecting professional confidentiality: legal ethics and the so-called evidence privileges. The increased need to protect the right to privacy was also underlined. The main purpose of the article is to present the function and role of legal provisions placed outside the US Constitution, which not only provide a kind of envelope for the sources resulting from the Amendment to the Constitution,

but also as its core. It seems that both the Model Rules of Professional Conduct act and the evidentiary privileges constitute sets of principles that are key to professional confidentiality under American law.

**Keywords:** guarantees; legal ethics; criminal procedure; privileges of evidence; attorney-client privilege

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