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THE LEGAL REPRESENTATIVE AND THE WITNESS IN CIVIL PROCEDURE. REMARKS ON THE DUTIES OF THE ADVOCATE/ATTORNEY-AT-LAW AND THE DIRECTION OF STATUTORY CHANGE

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Abstract. The situation of an advocate/attorney-at-law appearing in civil proceedings both as a legal representative and witness is controversial because it goes beyond the scope of providing legal assistance. This poses a threat to his or her independence and the obligation to maintain professional secrecy. Combining these procedural roles at the same time is negatively perceived by organizations of legal professions, hence the prohibition, resulting from ethical rules, on proposing a motion for the questioning of an advocate/attorney-at-law as a witness, or the inability to provide legal assistance in the case if the lawyer testified as a witness about the circumstances of the case. Such a situation is formally possible, as the Code of Civil Procedure does not prohibit testimony by a professional legal representative of a party. The protection of professional secrecy is ensured by the right to refuse to answer a question if the testimony would entail a violation of essential professional secret (Article 261(2)). The obligation to keep professional secrecy under the Law on Advocates and the Act on Attorneys-at-Law prevents an advocate/attorney-at-law from testifying about circumstances related to the legal assistance provided, also in the case of the consent or request made by the client being represented. With this respect, there have been drafts to amend the civil procedure, but each of them is flawed. Under the draft law of 2018, the advocate/attorney-at-law had the right to refuse to testify about circumstances covered by professional secrecy, but it provided for the court's right to exempt the advocate/attorney-at-law from professional secrecy, in a way similar to the provisions of criminal procedure. The second draft, which is now at the stage of the legislative process (after the petition of 2019 was filed), rules out the possibility of testifying as a witness by a legal representative. This amendment raises a lot of reservations, and in its modified version, submitted as part of public consultation by legal professional associations, boils down to petrifying the protection of advocate/attorney-at-law secrecy in civil proceedings. This is a risky solution, as it may lead to a restriction of the right to a fair trial on the level of evidence taking by rendering it impossible, in special situations, to weigh this value and protection of the client's interest against the value of the protection of professional secrecy.

Keywords: civil procedure; witness; legal representative; attorney-at-law; advocate; professional secrecy; professional deontology.

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INTRODUCTION

An advocate/attorney-at-law acting as a witness in civil proceedings, in which he/she is also a legal representative of a party, raises numerous controversies in the practice of providing legal assistance. These arise not only from the different tasks of a witness and a legal representative, but also from the need to maintain independence and gravity in the practice of the profession of advocate/attorney-at-law and the obligation to keep professional secrecy. The latter issues concern spheres that are extremely sensitive in the exercise of any profession of public trust. This issue has been discussed in the legal literature, but there is still no clear position – despite the debate within the legal professional associations – regarding the assessment of such behaviour by an advocate/attorney-at-law. Most importantly, however, there is still no satisfactory normative solution in this respect. This situation is undoubtedly influenced by the never-ending dispute over the essence of attorney-client privilege and its material scope. The basic norms on professional secrecy of advocate/attorney-at-law are included in the laws on the practice of these legal professions and in the codes of ethics that clarify them.[1] They are only an element of the system of legal norms concerning the procedural issue of professional secrecy, the protection of which (e.g. in the form of prohibitions to take certain types of evidence) is regulated differently in civil and criminal procedures [Baszuk 2015, 318].

The study concerns the classification of the conduct of an advocate/attorney-at-law (including the risk of disciplinary liability) acting in civil proceedings in a double role – a legal representative and a witness (also testifying in this capacity with the consent of the client) and the assessment of the proposed normative solutions. In this context, the thesis about a potential conflict of values concerning the obligation of professional secrecy, legal protection of client's interests and preservation of independence and gravity in practicing the profession of advocate/attorney-at-law arises. The duties of an advocate/attorney-at-law should not contradict the purpose of providing legal assistance, namely the legal protection of the client's interests. They should complement each other by protecting the value of legal assistance provided in a manner consistent with the public interest (interest

[1] Article 3(3) of the Act of 6 July 1982 on attorneys-at-law (Journal of Laws of 2024, item 499) [hereinafter: AAL]; Article 6(1) of the Act of 26 May 1982, the Law on advocates (Journal of Laws of 2024, item 1564) [hereinafter: LoA]; Article 15 of the Code of Ethics of Attorney-at-Law (consolidated text in the annex to Resolution No. 884/XI/2023 of the Board of the National Bar Council of Attorneys-at-Law of 7 February 2023 [hereinafter: CEAL]; para. 19(1) to (3) of the Principles of Ethics and Dignity of the Profession of Advocate – Code of Advocate's Ethics (consolidated text in the communication of the Board of the National Bar Council of 1 July 2021) [hereinafter: PEDPA].

of justice) without undermining confidence in the entirety of people practising as advocates/attorneys-at-law.[2]

Decoding the only correct model of behaviour of an advocate/attorney-at-law in civil proceedings in the analysed situation is not easy due to the need to balance the values protected or guaranteed statutorily and in the Constitution of the Republic of Poland. An advocate/attorney-at-law should avoid situations that give rise to such collisions, as their very occurrence leads to the blurring of the canon of values based on which the prestige of a legal profession of public trust is built. The obligation to keep professional secrecy by an advocate/attorney-at-law acting both as a legal representative and witness is closely related to the discussed issue, but this issue – due to its complexity – has been addressed only to the extent necessary to discuss the topic concerned.

1. OBLIGATION TO TESTIFY BY AN ADVOCATE/ATTORNEY-AT-LAW

In civil proceedings, the parties are obliged to present evidence to establish the circumstances from which they derive legal consequences, as they bear the burden of proof (Article 6 of the Civil Code, Article 3 and Article 232 of the Code of Civil Procedure).[3] The situation becomes complicated when only the advocate/attorney-at-law as the client's legal representative, possesses the appropriate knowledge about them, while the opposing party has already presented evidence regarding a fact that is crucial for the resolution of the case. In such a situation, the passivity of the client and his/her representative, along with the lack of appropriate evidence, will result in negative procedural consequences (result of Article 230 CCP), especially losing the case.

Anyone may be a witness in civil proceedings, unless otherwise provided by law. The Code of Civil Procedure contains no prohibition to question an advocate/attorney-at-law as a witness, so they may be questioned if they has information that is relevant to the outcome of the case (Article 227 CCP). The subjective exclusions indicated in Articles 259 and 259[1] CCP (which constitute absolute or relative evidentiary prohibitions) do not include an advocate/attorney-at-law also when he/she is a legal representative of the party. Due to the general obligation to testify as a witness (Article 261(1) CCP), an advocate/attorney-at-law summoned in this capacity cannot refuse to testify, nor can he/she invoke a collective refusal to testify as to facts of which he or she has become aware while providing legal assistance (the second sentence of Article 261(1) CCP applies only to a clergyman

[2] Judgment of the Supreme Court of 8 June 2017, ref. no. SDI 18/17, Legalis no. 1632724.

[3] Act of 17 November 1964, the Code of Civil Procedure (Journal of Laws of 2024, item 1568 as amended) [hereinafter: CCP].

as to facts entrusted during a confession). Nevertheless, a statement by an advocate/attorney-at-law that everything they know about the case is related to the legal assistance provided and is covered by professional secrecy will be virtually tantamount to a collective refusal to testify, which does not limit the power of the court and the parties to continue further questioning.

2. ADVOCATE/ATTORNEY-AT-LAW'S RIGHT TO REFUSE TO ANSWER QUESTIONS

A lawyer/attorney-at-law has the right to refuse to answer a question if the testimony would entail a breach of significant professional secret (Article 261(2) CCP).[4] This right transforms into an obligation imposed on the advocate/attorney-at-law summoned as a witness. This also applies to information obtained in connection with providing legal assistance to other clients or a principal in earlier cases, since the obligation to maintain professional secrecy cannot be limited temporally and continues even after the cessation of providing legal assistance.[5] Therefore, it does not matter that the advocate/attorney-at-law previously disclosed this information in a public hearing, acting as a representative or defence counsel before a procedural authority.

An advocate/attorney-at-law, relying on the lawyer-client privilege arising from Article 6(1) LoA or Article 3(3) AAL, does not justify the factual reasons underlying the refusal to answer the question asked. Their identification could lead to the disclosure of circumstances covered by professional secrecy, which is protected by the norm set out in Article 261(2) CCP. Such a statement made by the advocate/attorney-at-law enjoys a kind of presumption of truth, and the court is in principle unable to verify it, and therefore cannot expect or request a response to the question asked in a situation where the advocate/attorney-at-law invokes the right to refuse an answer resulting from the obligation to protect professional secrecy [Błaszczak 2019; Sowiński 2024, 694; Gawryluk 2012, 48]. What is covered by this obligation is decided by the advocate/attorney-at-law himself and, if he has doubts, he should assume that the information constitutes professional secrecy.[6] It is irrelevant

[4] A similar right to refuse to answer questions in proceedings before the authority has been regulated in Article 83(2) of the Act of 14 June 1960, the Code of Administrative Procedure (Journal of Laws 2024, item 572) [hereinafter: CAP] and Article 196(2) of the Act of 29 August 1997, the Tax Ordinance (Journal of Laws 2023, item 2383 as amended.

[5] Article 3(4) AAL; Article 6(2) LoA; Article 17 CEAL; para. 19(7) PEDPA; para. 2.3.3. of the Code of Conduct for European Lawyers adopted at the Plenary Session of the Council of Bars and Law Societies of Europe (CCBE) held on 28 October 1988.

[6] For the criteria to be followed by the advocate/attorney-at-law in establishing what is covered by secrecy, see: Marchwicki 2015, 149-51, 153-56, 158-62, 166-67, 169-70, 172-73, 176, 219; Resolution of the National Bar Council of Attorneys-at-Law no. 520/VI/2006 of

whether this concerns information that is favourable or disadvantageous to the client, so the mere refusal by the lawyer to answer questions should not result in negative procedural consequences for the client. It is unacceptable for the court to assume that the refusal to answer a question is based on the fact that it concerns information that may prove unfavourable to the customer [Matusiak-Frącczak 2023, 217].

The judicial practice in civil proceedings usually shows that such conduct of an advocate/attorney-at-law is considered understandable as long as his or her statement regarding the obligation to maintain professional secrecy does not raise serious doubts and is not clearly aimed at circumvention of the provisions on the obligation to testify.[7] The situation becomes more complicated when the client declares before the court that he or she exempts the attorney/attorney-at-law from professional secrecy, and thus further refusal to answer the question based on the right to silence may be treated as unreasonable [Górski 2023].

Article 261(2) CCP employs only the term "professional secrecy" (which does not have a legal definition) of a general nature, concerning various professions whose practice is associated with the obligation to keep secret. In the context of civil proceedings, no distinction is made between the secrecy of advocate, attorney-at-law or defence counsel, thus their protection is provided by procedural instruments on professional secrecy in general.[8] This protection applies to all information covered by professional secrecy acquired in the course of providing legal assistance, i.e. not only related to pending civil proceedings, but also when providing legal assistance in other cases, regardless of type. The obligation to maintain professional secrecy arises from the legislation on the exercise of the professions of advocate and attorney-at-law, and its violation is subject to criminal and disciplinary sanctions.

Noteworthy is also the relationship between Article 261(2) CCP and Article 6(1) LoA and Article 3(3)(3) AAL. The regulation of civil procedure empowers the advocate/attorney-at-law to refuse to answer a question

16 December 2006 containing the position on the imposing of a penalty for breach of order on an attorney-at-law who refuses to answer questions as cited in: *Opinia OBSiL KRRP w przedmiocie tajemnicy zawodowej w postępowaniu cywilnym* of 25 November 2015 (author Zenon Klatka).

[7] Different judicial practices and underlying juridical reasons and the position of the bar association of attorneys-at-law is analysed by Machnikowska 2022, 69-70, 72-74.

[8] Apart from Article 261(2) CCP, it is also Article 248(2) CCP, concerning the lawyer's evasion of the obligation to present a document constituting evidence of a fact relevant to the outcome of the case, in his possession, if the contents of the document relate to circumstances about which he could, as a witness, refuse to testify, and Article 761(2) CCP, concerning the refusal to explain at the request of the enforcement authority, if he/she can evade such a request to the extent that he/she can refuse to present a document (Article 248(2) CCP) or answer as a witness to a question asked (Article 261(2) CCP).

if the testimony would entail a violation of relevant professional secrets, and therefore refers to the content of the information forming part of the evidence and its meaning (and therefore should be 'relevant') for the confidential relationship between the client and the lawyer. On the other hand, in the regulations on the practice of legal professions, information covered by the obligation of professional secrecy was only specified by their property of being acquired by a lawyer due to the provision of legal assistance [Klatka 2004, 65; Korczak 2019, 43-44].[9] The norm concerning the subject matter of relevant professional secrecy should be decoded through the lens of the object of protection indicated in Article 6(1) LoA and Article 3(3) AAL and boils down to determining which information is a professional secret of the advocate/attorney-at-law and which does not. This also confirms the view that these provisions constitute a *lex specialis* in relation to Article 261(1) CCP [Knoppek 2016, 348].

The content of Article 261(2) CCP may lead to a wrong conclusion that the right of the advocate/attorney-at-law to silence is subject to limitations and does not apply to facts covered by professional secrecy but which are not relevant professional secret. An interpretation leading to the conclusion that some information covered by professional secrecy does not constitute relevant professional secret is unreasonable in the context of the lawyer-client privilege [Gutowski 2019a, 187-88]. There is also a view that the "relevant professional secrecy" does not pertain to the information covered by it, which is characterized by homogeneity, but rather to significance of the very professional secrecy within the system of legal protection and the socially useful function performed by representatives of public trust professions who are obliged to maintain it. This allows the inclusion of the lawyer-client privilege in the group of "relevant professional secrecies" [Machnikowska 2022, 71-72]. For the above reasons, regardless of the interpretation of the concept of relevant professional secret, the advocate/attorney-at-law advisor is obliged to maintain professional secrecy in its entirety. [Klatka 2017, 349-50; Korczak 2023, 135].

3. THE LEGAL REPRESENTATIVE – ADVOCATE/ATTORNEY-AT-LAW AS A WITNESS

The party's legal representative – advocate/attorney-at-law who also acts in the capacity of a witness is an occasional situation, highly controversial albeit formally admissible [Knoppek 2016, 367].[10] Certainly, such testimony

[9] Ruling of the Supreme Disciplinary Court of 8 June 2029, ref. no. WSD 36/19, Legalis no. 3010947.

[10] Judgment of the Appellate Court in Katowice of 14 February 2014, ref. no. I ACa 1034/13, Legalis no. 1062661.

cannot be considered as the provision of legal assistance, which is the responsibility of an advocate/attorney-at-law. Nevertheless, the Code of Civil Procedure does not prohibit combining these procedural roles, as it does in the case of the roles of legal representative and expert, or legal representative and judge.[11] For this reason, a legal representative acting as a witness cannot be summoned to give an opinion as an expert, also on facts about which he or she has testified as a witness, even though the law allows such an opinion to be sought from a witness, even if he or she has previously given an opinion on behalf of an entity other than the court (Article 505^{7}(3) CCP).

The combination of the role of advocate/attorney-at-law as a legal representative and a witness leads to various restrictions resulting from legal provisions and implies various conflict situations in the judicial proceedings. A legal representative standing as a witness cannot be present at the questioning of other witnesses until he/she has given evidence himself/herself (Article 264 CCP, second sentence).[12] Consequently, the court should hear him/her first, otherwise he/she will not be able to attend as the party's representative the hearing of witnesses questioned previously. A legal representative who testifies cannot ask questions to themselves (Article 271(1) CCP), but may refuse to answer the question (if the testimony is to entail a breach of relevant professional secrecy). After all, an advocate/attorney-at-law acting as a witness cannot be obliged by the client to testify solely in client's favour. Bearing in mind the obligation to act in the interest of the client, the lawyer may face a dilemma, as part of the obligation to testify the truth, about the scope of disclosure of circumstances covered by professional secrecy, relativising its substantive scope, refusing to answer depending on the question being asked or person asking the question (e.g. questions asked by the opposing party concerning facts unfavourable to the client). This renders such testimony unreliable, also due to doubts regarding their objective nature (it should be assumed that a witness performing the duties of a legal representative of a party perceives the realities of the case differently). Such an legal representative is also in an awkward situation during the final speech, assessing the credibility of testimonies of all the witnesses (Article 210(2) CCP) [Knoppek 1984, 74-77]. Such events do occur in practice, but given this unusual situation, the court should pay attention to the evidentiary value of such testimony for the resolution of the case.

Legal professional organizations treat such a situation in civil procedure as exceeding the limits of correct representation of client's interests and undesirable from the point of view of prestige and dignity of the profession. Moreover, the admissibility of questioning the lawyer as a witness

[11] Article 48(1)(4) CCP and Article 281(1) CCP.

[12] See also judgment of the Appellate Court in Warsaw of 25 May 2015, ref. no. I ACa 958/14, Legalis no. 1316264.

may in many cases undermine the confidence of the party in their representative or call into question their loyalty, which is the basis for the relationship between the client and the advocate/attorney-at-law providing legal assistance to the party. Hence, similar restrictive regulations (differing in the personal scope of prohibition) contained in deontological regulations. An attorney-at-law may not request that another attorney-at-law, or another person with whom the attorney-at-law may legally cooperate in practicing the profession, be heard in order to find the circumstances covered by their obligation of professional secrecy (Article 20 CEAL). An advocate may not report evidence from the testimony of a witness, who is an advocate or attorney-at-law for the purpose of disclosure of information obtained in the course of their professional activity (para. 19(8) PEDPA). Making such a request is a tort (it is formal in nature and it is not necessary for its commission to take effect in the form of a hearing of the advocate/attorney-at-law as a witness) and gives rise to disciplinary liability due to a breach of rules of ethics. *The rationale* of such a provision is the assumption that the mere request to take such evidence may, in the perception of the clients, put their legal interests at risk by disclosing information communicated by them to the advocate/attorney-at-law.[13] Since the advocate/attorney-at-law may not submit such a request, he/she should also not actively participate in the questioning of another advocate/attorney-at-law by asking questions concerning circumstances covered by professional secrecy (he/she should additionally ensure that such a position is recorded in the report of the hearing). However, that does not prevent him/her from instructing the client on how one should exercise their procedural rights when hearing such a witness.[14]

A request for the hearing of a legal representative may also be submitted by any party to the proceedings, without risking disciplinary liability (unless they are an advocate or attorney-at-law). Submitting such request does not compel the legal representative to revoke the power of attorney or to abandon further providing legal assistance to the party represented. The same applies to situations where the representative appears as a witness and refuses to answer questions due to the obligation to maintain professional secrecy (i.e. does not testify "about the circumstances of the case"). A different stance would lead to an unjustified limitation of the right to choose a legal representative by allowing the opposing party to disqualify the legal representative [Korczak 2023, 136; Błaszczak 2019, 168].

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[13] Decision of the Supreme Court of 12 December 2014, ref. no. SDI 44/14, Legalis no. 1766684; Ruling of the Supreme Disciplinary Court of 5 July 2014, ref. no. WSD 52/14, Legalis no. 1515064.

[14] Article 8, Article 11(1) and Article 20 in conjunction with article 7(3) CEAL; See https://kirp.pl/wp-content/uploads/2023/02/sk-22.03.2021-zjm.pdf [accessed: 31.05.2025] and supplement of 29 March 2021, https://kirp.pl/wp-content/uploads/2023/02/p-29.03.2021-rw.pdf [accessed: 31.05.2025].

The case law includes also a separate view suggesting that the legal representative of a party in civil proceedings may be questioned as a witness on the condition that he/she renounces the power of attorney, and even a more far-reaching position that such questioning is inadmissible.[15]

The analysis of the generally applicable provisions in the context of the qualification of the conduct of an advocate/attorney-at-law acting as a witness precludes him/her from being held disciplinarily liable for unlawful conduct. However, this does not exclude the application to him/her in a specific situation of another ground of disciplinary liability, namely the breach of the rules of ethics (Article 80 LoA; Article 64 AAL). The statutory power to establish rules of ethics by the bar associations of advocates and attorneys-at-law is intended to ensure that they are able to supervise the proper exercise of their professions. The rules of ethics are a restrictive regulation that carries a disciplinary sanction in the event of their breach. Although this character is reserved for statutory acts, it is considered permissible to specify the "non-essential" elements of the substantive legal grounds for disciplinary liability in sub-statutory acts [Mojski 2018, 30]. Rules of ethics are autonomous in relation to legal norms and, as such, do not need juridical legitimacy, especially when they refer to the values of dignity and independence in the exercise of a profession implementing an important social function [Baszuk 2015, 311].[16]

An advocate/attorney-at-law, when testifying as a witness, is involved in the case in a capacity other than that of a legal representative. Instead of providing legal assistance, he/she provides factual assistance, which is not in line with the principle of loyalty of the lawyer to the client [Korczak 2022, 82].[17] An advocate/attorney-at-law should not act in a dual role in the trial (i.e. as a legal representative and a witness) due to the obligation to avoid a conflict of interest, established to ensure proper provision of legal assistance (Article 10(1) CEAL), and the duty to maintain professional secrecy. This calls into question the correctness of actions of the lawyer, particularly lawyer's independence in assessing and describing the factual

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[15] Judgment of the Appellate Court in Warsaw of 6 May 2008, ref. no. VI ACa 1517/07, Legalis no. 420486 and judgment of the Supreme Court of 15 December 2000, ref. no. I PKN 165/00, Legalis no. 54290. For the critical analysis of these judgments, see Skibińska 2020, 69-71.

[16] See: resolution of the Constitutional Tribunal of 17 March 1993, ref. no. W. 16/92, OTK 1993, part 1, item 16, Legalis no. 10155; judgment of the Constitutional Tribunal of 27 February 2001, ref. no. K. 22/00, OTK ZU 2001, no. 3, item 48, Legalis no. 49666; judgment of the Constitutional Tribunal of 23 April 2008, ref. no. SK 16/07, OTK-A 2008, no. 3, item 45, Legalis no. 97130.

[17] Similarly should be assessed a request for evidence related to the submission of an own advocate's/attorney's study as incompatible with the purposes of civil procedure and the role of a professional legal representative – judgment of the Regional Court in Warsaw of 25 February 2020, ref. no. XXV C 195/16, Legalis no. 2334219.

state due to the differing obligations of a legal representative and a witness [Kurosz 2024, 122, 124]. This also applies to situations where the legal representative – advocate/attorney-at-law testifies as a witness at the request of their client with the use of knowledge about the subject-matter of the dispute (circumstances of the case) in the client's interest, and then continues to provide legal assistance to the client. Such conduct of the advocate/attorney-at-law cannot be justified by the duty to exercise due diligence in the professional practice of the profession to protect the client's interest.

Such conduct was sanctioned by para. 22(2) of the Principles on Legal Ethics and Dignity of the Profession of Advocate of 1998, in the light of which an advocate who has testified in a given case as a witness cannot act as a proxy or defender.[18] This provision was repealed as of 1 January 2012 and no new regulation has appeared instead.[19] Similarly, Article 22(1)(f) CEAL prohibited an attorney-at-law from conducting a case and providing any form of legal assistance if he/she gave testimony in that case as a witness.[20] After its repeal, on 1 July 2015, it was included as Article 27(2) CEAL, prohibiting an attorney-at-law from providing legal assistance if he/she had previously testified as a witness in a case involving the circumstances of the case. This regulation is autonomous, so it is irrelevant whether the testimony on the circumstances of the case concerned information covered by professional secrecy [Woroniecka 2023, 255]. Basically, an attorney-at-law, being aware that he/she will stand as a witness in the case, should refuse to provide legal assistance due to the circumstances of the case (refusal due to important reasons) and if such a request appeared at the stage when he/she was already the client's legal representative and he/she intends to testify about the circumstances of the case, he/she should abandon further provision of legal assistance (Article 30a(1) and (2) CEAL) [ibid., 268]. This means that the legal representative – advocate/attorney-at-law should terminate the power of attorney no later than after testifying as a witness (Article 27(2) in conjunction with Article 10(2) and Article 30a(2) CEAL) [Ereciński and Dziurda 2024, 197]. However, he/she is under an obligation under the first sentence of Article 94(2) CCP, to act for the party for a further two weeks, unless the principal relieves him/her of that obligation. If he/she does not do so, it may occur that the attorney-at-law, in performance of the

[18] Resolution no. 2/VIII/1998 of the National Bar Council of 10 October 1998.

[19] Para. 70 of the Principles of Ethics and Dignity of the Profession of Advocate (Code of Advocate's Ethics) (consolidated text in the communication of the Board of the National Bar Council of 14 December 2011).

[20] Resolution 5/2007 VIII of 10 November 2007 of the National Assembly of Attorneys-at-Law on the adoption of the Code of Ethics of Attorney-at-Law as amended (consolidated text in the annex to Resolution No. 8/VIII/2010 of the Board of the National Bar Council of Attorneys-at-Law of 28 December 2010 (consolidated text in annex to Resolution no. 884/XI/2023 of the Board of the National Bar Council of Attorneys-at-Law of 7 February 2023).

statutory obligation, will continue to participate in the proceedings during the aforementioned period and should not be subject to disciplinary liability for this fact [Baumgart 2019].[21] Apart from this special situation, if after testifying he/she continues to provide legal assistance to the party (client), he/she commits a disciplinary tort, violating the principles of ethics.

The introduced prohibition is rooted in the established ethical assessment of such behaviour (even if the advocate/attorney-at-law does this in the interest of the client), which may offend the dignity of the profession, undermine its prestige, and/or undermine trust in representatives of the profession of public trust.[22]

A separate issue remains how the court should treat a request to hear the legal representative – advocate/attorney-at-law as a witness in civil proceedings. It is not the court's role to supervise compliance with ethical rules or adherence to the obligation of maintaining lawyer-client privilege by the legal representative. Undoubtedly, the court should assess whether the fact for which this evidence was requested to be taken is relevant for resolving the case, therefore it should consider if such a fact requires proof, the circumstances covered by the evidence request have not been proven by other means, and the situation where acceptance of such a request may subsequently expose the advocate/attorney-at-law to disciplinary liability or loss of trust from the client.[23] Such a request, filed by the opposing party's representative, should also be evaluated by the court in terms of its contradiction with the clause of good practices (Article 3 CCP). If it violates the rules of advocate/attorney-at-law ethics, it may be considered by the court as contrary to good practices and consequently disregarded (Article 235^2(1)(1) CCP) [Błaszczak 2022, 191]. Due to the sensitivity of the matter concerning protection of professional secrecy, the court should take into account all these circumstances if it intends to admit such evidence *ex officio*.

4. PROFESSIONAL SECRECY DURING TESTIMONY BY A LEGAL REPRESENTATIVE – ADVOCATE/ATTORNEY-AT-LAW

In light of the provisions of the Code of Civil Procedure, a legal representative – advocate/attorney-at-law may testify as a witness even if the thesis of the request for evidence points to circumstances covered by the lawyer-client privilege. Such testimony, when it discloses information covered by professional secrecy, constitutes evidence in civil proceedings,

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[21] See also Article 47 CEAL.

[22] Cf. judgment of the Supreme Court of 8 June 2017, ref. no. SDI 18/17, Legalis no. 1632724.

[23] Judgment of the Regional Court in Warsaw of 25 February 2020, ref. no. XXV C 195/16, Legalis no. 2334219.

as there is no absolute or relative prohibition of taking evidence in this situation, and Article 261(2) CCP does not prohibit a witness from testifying [Knoppek 2021; Ziemianin 2019a, 135]. It also constitutes an act that meets the criteria of a disciplinary tort based on a knowing and culpable breach of the oath, the law and the rules of ethics [Naumann 2023; Bergier and Jacyna 2016, 182-83].[24]

In civil proceedings, the court does not have the powers to waive the obligation to keep the lawyer-client privilege (a waiver by the court in the mode of procedure specified in criminal procedure does not extend to civil proceedings), and in the laws regarding the practice of the professions of advocate and attorney-at-law there is a general prohibition against waiving the obligation to maintain professional secrecy (Article 6(3) LoA; Article 3(5) AAL) [Błaszczak 2019, 167, 170].

An advocate/attorney-at-law cannot exempt himself/herself from the obligation of professional secrecy and freely dispose of the acquired knowledge for the needs of the procedural authority, even as a witness. This obligation is not a right of the advocate/attorney-at-law but his professional duty.[25] The client, despite a special relationship based on trust between the client and the lawyer, cannot exempt the lawyer from the obligation of professional secrecy, because the client is not the only holder of professional secrecy [Kożuch 2015, 269; Malicki 2015, 224].[26] Professional secrecy is a substantive-legal institution of the nature of *ius cogens*, protecting the constitutional freedoms of the individual, building social trust in the professions of advocate/attorney-at-law and ensuring the proper functioning of the justice system. Its protection is therefore justified not only by the individual interests of the client but also by the public interest [Malicki 2015, 217; Naumann 2023].[27] The obligation of the advocate/attorney-at-law to act for the client

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[24] The statutory text of the oath to be taken by the advocate and attorney-at-law requires maintaining professional secrecy (Article 5 LoA and Article 27(1) AAL); Article 6(1) LoA and Article 3(3) AAL. Cf. decision of the Supreme Court of 15 November 2012, ref. no. SDI 32/12, Legalis no. 549636.

[25] Decision of the Supreme Court of 15 November 2012, ref. no. SDI 32/12, Legalis no. 549636. Cf. decisions of the Appellate Court in Krakow of 30 March 2009, ref. no. II AKz 110/09 and of 16 June 2010, ref. no. II AKz 198/10, Legalis no. 178196 and no. 287215.

[26] Ruling of the Supreme Disciplinary Court of 27 October 2018, ref. no. WSD 68/18, Legalis no. 2480021; see *Stanowisko OBSiL KRRP z dnia 12 listopada 2014 r. w sprawie odpowiedzi na pytanie: „Czy zgoda klienta na złożenie przez radcę korzystnych dla klienta i jego pracowników zeznań może uchylać obowiązek tajemnicy zawodowej?"* (author Zenon Klatka).

[27] Decision of the Supreme Court of 2 June 2011, ref. no. SDI 13/11, Legalis no. 442143; decision of the Appellate Court in Szczecin of 29 October 2013, ref. no. II AKz 330/13, Legalis no. 966087; decision of the Appellate Court in Krakow of 11 October 2016, ref. no. I ACa 659/16, Legalis no. 1532995; decision of the Appellate Court in Wrocław of 4 November 2010, ref. no. II AKz 588/10, Legalis no. 357840.

is not tantamount to an unrestricted precept.[28] The client cannot dispose of the advocate/attorney-at-law his/her procedural role as a witness, exempting him/her from professional secrecy, and the advocate/attorney-at-law cannot violate the rules of the profession in order to meet the expectations of the client, court or third parties (Article 7(3) CEAL) [Woroniecka 2023, 93; Malicki 2015, 218, 224].

This categorical position, currently prevailing in the case-law of disciplinary courts of legal professional organizations, under the influence of views of legal scholars [Łojewski 1970, 166-67; Buchała 1969, 45; Garlicki 1964, 14], the principles applicable in other countries, and realities of providing legal assistance, is gradually being softened (by moving away from the so-called public order theory) and, in my opinion, has matured for revision through changes in the laws governing the practice of the professions of advocate and attorney-at-law. In practice, a situation may arise (such as when a legal representative – advocate/attorney-at-law testifies as a witness in civil proceedings on matters covered by professional secrecy), where the paradigm of public interest in terms of professional secrecy conflicts with the individual interest of the client represented by the advocate/attorney-at-law.

Professional secrecy should be perceived as an instrument to protect the freedom of communication between the advocate/attorney-at-law and the client, and the information covered by this secrecy as the client's secret. Thus, the client as the holder of the secret should decide whether or not to disclose certain information [Bogusz 2022, 675-76]. This view is also supported by the constitutional freedom of the client to dispose of information that concerns the client himself/herself or their case. In this context, the possibility appears of disclosing information covered by professional secrecy with the client's consent or at the client's direction by way of testimony as a witness by the client's advocate/attorney-at-law. On the one hand, the permissibility of such a situation is supported by the fact that the obligation of professional secrecy was introduced in the interest of the client who uses the services of the advocate/attorney-at-law and the fact that the legal existence of professional secrecy is based on the will of the client. On the other hand, the institution of professional secrecy cannot be used freely according to client's wishes. Instrumental treatment of an advocate/attorney-at-law for private purposes as part of accepted litigation tactics is not only inappropriate, but also violates the dignity of the profession and undermines public confidence in these legal professions (Article 11(2) CEAL) [Malicki 2015, 221].

Therefore, there is more and more accepted view in the legal literature that the existence and scope of the obligation of professional secrecy is determined by the advocate/attorney-at-law in agreement with the client

[28] Judgment of the Supreme Court of 8 June 2017, ref. no. SDI 18/17, Legalis no. 1632724.

[Giezek 2014, 72; Warylewski 2015, 11; Baszuk 2019, 120]. An advocate/attorney-at-law may, if deems it necessary, with the consent or at the request of the client, testify as a witness in civil proceedings about circumstances covered by the obligation of professional secrecy. This applies to exceptional situations, so when making such a decision, the advocate/attorney-at-law should take into account both the gravity and type of goods concerned by the civil proceedings, the nature and extent of the damage that the client may suffer in the absence of his/her testimony as a witness, and the risks associated with such a procedural act in the context of the evidence-taking proceedings [Sala-Szczypiński 2025, 60, 90, 102-103]. The refusal of the advocate/attorney-at-law to do so should take place if he/she considers it detrimental to the interest (good) of the client whose protection is the purpose of the legal assistance being provided. In such a situation, he/she is obliged to refuse to answer questions about circumstances related to the provision of legal assistance (Article 2 AAL; para. 6 and 7 PEDPA; Article 8 CEAL) [Bogusz 2022, 676; Chojniak 2015, 281].

As argued by certain authors, such a view may, in a broader perspective, lead to the destruction of the entire institution of professional secrecy that forms the cornerstone of the professions of public trust and the legal and social degradation of the profession of advocate/attorney-at-law [Korczak 2019, 45; Malicki 2015, 217; Skoczek 1969, 30; Kaftal 1970, 46]. Such a position does not facilitate the debate, as it blurs the rational arguments on the essence of the issue.

5. ATTEMPTS TO SOLVE THE PROBLEM BY AMENDING THE CODE OF CIVIL PROCEDURE

Among scholars in the field, there have been proposals for different regulation ensuring the protection of professional secrecy in civil proceedings. These concerned the introduction of the right to refuse testimony by an advocate/attorney-at-law (by modifying the content of Article 261(1) CCP) modelled on solutions that successfully operate in civil procedures in other countries (e.g. Germany, Italy, France) [Błaszczak 2019, 177; Skibińska 2020, 55-56, 78-80, 82; Gil 2022, 44-45].

This issue was also addressed in the draft Act of 17 May 2018 amending the Code of Civil Procedure and certain other laws (ref. no. UD 180). It introduced for those obliged to maintain professional secrecy the right to refuse to testify as to the circumstances covered by this obligation (Article 261^1(1) CCP). Unfortunately, at the same time, this draft provided for the possibility for the court to exempt an advocate/attorney-at-law from the obligation of professional secrecy (Article 261^1(1) *in fine* and (2), first sentence CCP) in accordance with the rules set out in Article 180(1) *in fine* and (2)

of the Code of Criminal Procedure[29] the draft provisions of which were closely duplicated. The brief explanatory memorandum does not contain the rationale for these solutions that deviate from the nature of the civil-law relationship and the and judicial implementation of claims resulting therefrom, and the differences in the purposes and values protected in criminal proceedings. The prerequisite for exemption from professional secrecy by the court was to be the good of the justice system, which is not implemented in civil proceedings aimed at satisfying the interests of the parties. This dangerous draft amendment has been criticized by representatives of associations of legal professionals, not only for the sake of protection of professional secrecy, but also of the rules of adversarial civil procedure (the court which *ex officio* takes such evidence, replaces a party in the exercise of its rights, exposing itself to criticism due to unequal treatment of the parties and undermining the principle of equality of arms) [Gutowski 2019b, 103-107, 109-14].[30]

In the search for a solution to the problem, another direction of statutory amendment appeared, which did not directly concern professional secrecy and the rules of exempting an advocate/attorney-at-law from the obligation to maintain it, but boiled down to introducing an absolute prohibition for the legal representative to stand as a witness. Its purpose, like any evidentiary prohibition, was to develop a rule to prevent the achievement of goals by all available means in civil proceedings, which may lead to the violation of other values, no less important than the principle of objective truth in civil proceedings. L work has been underway for several years following the submission of a civic petition on 30 December 2019 on amending Article 259 CCP, concerning the extension of the circle of persons who may not be witnesses in civil proceedings, i.e. to include legal representatives of the parties. The draft amendment to the Code of Civil Procedure, prepared by the Committee of Human Rights, Rule of Law and Petitions of the Senate of the Republic of Poland of 10th term in 2021 (Senate papers no. 380 and 381), was the subject of analysis and consultation. The proposed extension of the list of subjective evidentiary prohibitions covering all representatives of the parties, without distinction between professional and other representatives, raised many doubts (e.g. regarding the prohibition of using this kind of evidence as the sole source of knowledge about the circumstances relevant for the case, also after the power of attorney has been terminated) and concerns about the use of this institution to circumvent the provisions of the law (e.g. appointing persons

[29] Act of 6 June 1997, the Criminal Procedure Code (Journal of Laws of 2024, item 3) [hereinafter: CPC].

[30] See https://www.adwokatura.pl/admin/wgrane_pliki/file-kpc-opinia-tajemnica-zawodowa-23485.pdf [accessed: 20.06.2025].

as representatives in order to prevent the opposing party from summoning them as witnesses).[31]

The direction of the amendment is basically in line with the postulates of associations of legal professionals and legal scholarly opinion, aimed at strengthening the protection of professional secrecy which is the cornerstone of the professions of advocate/attorney-at-law [Ziemianin 2019b; Skibińska 2020, 80, 82; Machnikowska 2022, 74-75]. It has been assumed that the protection of the interests of the represented party in civil proceedings can only be implemented without infringing upon the value of maintaining professional secrecy. At the same time, it has been noted that introducing an absolute evidentiary prohibition related to the legal representatives of the parties in proceedings may negatively affect the interests of the party and the proper administration of justice.

The amendment proposed by associations of legal professions (in Piotr Rylski's opinion) concerned the addition of point 5 in Article 259 CCP in a modified version from the original draft, by introducing the prohibition of questioning as a witness of "representatives of the parties, unless the party agrees or the court deems it necessary, and the fact cannot be established using other evidence," and by introducing a new Article 259^2 CCP in the wording: "An advocate or attorney-at-law may not be a witness as to facts of which he or she has become aware while providing legal assistance or conducting the case, unless otherwise provided by law."[32]

The construct of Article 259^2 CCP, as proposed, was partially borrowed from Article 178(1) CCP, and referred to the regulation on the protection of professional secrecy contained in the Law on advocates and the Act on attorneys-at-law (which results from the content of the opinion prepared). A difference can be seen in the substantive scope of professional secrecy under the laws on the practice of the professions of advocates and attorney-at-law: "everything that he/she learned while providing legal assistance," and the draft amendment to the Code of Civil Procedure: "facts of which he or she has become aware while providing legal assistance," but it is irrelevant, since anything that goes beyond the sphere of facts cannot be the subject of a request for evidence and the evidence itself (Articles 235^1 and 236 CCP). Thus, the new evidentiary prohibition is merged with the existing

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[31] See https://www.senat.gov.pl/download/gfx/senat/pl/senatdruki/11386/druk/381.pdf; https://www.senat.gov.pl/download/gfx/senat/pl/senatekspertyzy/6231/plik/oe-382.pdf; https://www.senat.gov.pl/download/gfx/senat/pl/senatinicjatywypliki/1409/4/381_sn.pdf; https://krs.pl/en/163-uchwaly-opinie-stanowiska/1013-opinia-krajowej-rady-sadownictwa-z-dnia-30-kwietnia-2021-r-wo-420-47-2021-druk-senacki-nr-381.html [accessed: 04.01.2025].

[32] See https://www.senat.gov.pl/download/gfx/senat/pl/senatinicjatywypliki/1409/4/381-obsil.pdf; https://www.adwokatura.pl/admin/wgrane_pliki/file-nra12-st-2442022-37139.pdf [accessed: 31.01.2025].

construct regarding the obligation of maintaining professional secrecy under the Law on advocates and the Act on attorneys-at-law. The proposed amendment means that it is not possible for an advocate/attorney-at-law to testify as a witness (regardless of being a legal representative of a party) about circumstances covered by the obligation of professional secrecy. It significantly reduces the possibility for an advocate/attorney-at-law to commit an offence or disciplinary tort concerning the disclosure of information covered by professional secrecy during his/her testimony as a witness. It introduces an absolute evidentiary prohibition binding on a court in civil proceedings, so such testimony of an advocate/attorney-at-law are inadmissible, and the evidence obtained contrary to the prohibition is illegal. In such a situation, the client's consent is irrelevant, as it would lead to the relativisation of the statutory evidentiary prohibition. At the same time, the nature of the regulation under Article 261(2) CCP, regarding the protection of the lawyer-client privilege would change, as its application would be incidental, i.e. when an advocate/attorney-at-law testifies about circumstances unrelated to the legal assistance provided, and questions related to this area (thus covered by professional secrecy) arise during the questioning. This also applies when he/she gives evidence as a legal representative of a party having met the conditions set out in the proposed point 5 of Article 259 CCP (constituting a relative evidentiary prohibition). The proposed solution more petrifies than strengthens professional secrecy (without having to redefine its broad objective limits), abolishing the possibility of taking into account the client's request for the examination of the advocate/attorney-at-law as a witness about the circumstances covered by this secrecy. Thus, an advocate/attorney-at-law who is a depositary (custodian) of information covered by professional secrecy cannot be released from the obligation to keep it by the client for whom the legal assistance is provided. This proposal, axiologically reasonable, is consistent with the statutory provisions on the obligation to keep professional secrecy by advocates/attorneys-at-law but a circumstance should be taken into account that it was submitted as part of public consultation within the limits determined by the draft amendment to the Code of Civil Procedure. The rules of the legislative process and the proposals put forward by legal professional organizations heretofore do not allow taking another position, but still one can look for another solution regarding the submission of testimony as a witness by an advocate/attorney-at-law, which differs from the model adopted based on a formal interpretation of the provisions of the Law on advocates and the Act on attorneys-at-law.

The opportunity of abandoning the construct of professional secrecy protection as set out in the Act on attorneys-at-law was not taken advantage of during the legislative work conducted in the bar association of attorneys-at-law in the period 2023-2025. The proposed normative solutions

address many important issues related to professional secrecy (sometimes resolved in the case-law and scholarly opinion, and thus applied in practice), including clarifying its objective scope and expanding its subjective scope.[33] Regarding the subject-matter of the study, the postulate to abolish the possibilities of exemption from attorney-at-law professional secrecy existing in other laws (Article 180(2) CPC) and to introduce absolute evidentiary prohibitions concerning the possibility of questioning an attorney-at-law about facts learned while providing legal assistance or running a case (the proposed new Article 259^2 CCP, Article 82(4) CAP, and Article 43(1a) of the Act on the Supreme Audit Office[34]) is significant. It is a solution that goes in the right direction, strengthening the attorney-at-law secrecy against third parties (including the bodies conducting the proceedings), but along with the petrifaction of the model of protection of attorney-at-law secrecy, the client as the disposer of information covered by professional secrecy has been forgotten. The proposed solution of an absolute prohibition of testimony is a risky and even dangerous solution, due to the need to protect the interests of the client, which is the purpose of the legal assistance being provided. According to the proposed regulations, an attorney-at-law may use information covered by professional secrecy, *inter alia*, to protect their interest as part of the exercise of their right to court (in terms of the right to evidence) or the right of defence, if the proceedings are in connection with the practice of the profession of attorney-at-law, therefore the deprivation of the client of the right to court in the area of evidence-taking, and the impossibility of weighing its value against the good of protecting professional secrecy, is incomprehensible.

CONCLUSION

A categorical approach to professional secrecy while simultaneously sacrificing the individual interest of the client raises doubts. It undermines the reciprocity-based relationship of trust between the representative and the client, the client's competence in exercising his/her fundamental rights (the right to privacy and freedom and confidentiality of communication),[35] and may hinder the pursuit of the client's interest and the achievement of the desired result concerning client's rights, which he/she cannot achieve independently

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[33] See *Projekty dotyczące uregulowania tajemnicy zawodowej, konfliktu interesów, wolności słowa, immunitetów oraz niezależności w nowej ustawie o radcach prawnych,* Ośrodek Badań, Studiów i Legislacji KRRP, 20.03.2025.

[34] Act of 23 December 1994 on the Supreme Audit Office (Journal of Laws of 2022, item 623).

[35] Article 47, Article 49 and Article 51 of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 443 as amended) [hereinafter: Polish Constitution]. For more detail, see Marchwicki 2015, 62-66.

and must seek professional legal assistance – exercising the right to court and the right of defence (Article 42(2) and Article 45(1) of the Polish Constitution) [Gruszecka 2019, 80-81; Marchwicki 2015, 50-52]. These doubts become when, for establishing objective truth before the court, it is necessary to take evidence, with the consent or upon request of the client, from the testimony of an advocate/attorney-at-law concerning circumstances covered by professional secrecy as part of the legal assistance provided to the client, and which cannot be established by other evidence. The way of resolving this conflict of values (protection of professional secrecy versus the client's interest) through the lens of public interest that safeguards the protection of professional secrecy, indicating an absolute prohibition on testimony, is risky.

The obligation of professional secrecy is established in the interest of the client, so it is the client who should decide on the disclosure of the information covered by it (constituting the client's secret), instructed about the consequences of such a decision by the lawyer representing him/her. However, this should not result in the obligation of the advocate/attorney-at-law to disclose this information, including in particular to testify about circumstances covered by professional secrecy at the request or instruction of his/her client. The advocate/attorney-at-law should refuse to consent when he/she considers that it is contrary to the interest of his/her client (which may take the form of defending the client against himself/herself) or it violates the trust of other persons from whom the advocate/attorney-at-law obtained information covered by professional secrecy. This is a safer solution[36] and is not detrimental to the dignity of the advocate/attorney-at-law and the prestige of the profession of public trust (which otherwise could occur if the client's will is ignored, and therefore the autonomy of client's will is not respected [Giezek 2014, 71-72; Baszuk 2019, 121; Rusinek 2007, 40].

An effect of this proposal is the revival of the debate about the essence and scope of professional secrecy protection. Information covered by the lawyer-client privilege should be absolutely protected (in a way similar to the defence counsel secrecy) from being accessed by third parties (including public authorities conducting the proceedings), which essentially gives it a public character, correlated with the obligation of confidentiality by the advocate/attorney-at-law. Article 261(2) CCP sufficiently protects the advocate/attorney-at-law secrecy, provided that it is responsibly applied by the advocate/attorney-at-law. However, the possibility of testimony by an advocate/attorney-at-law with the client's consent in civil proceedings, concerning

[36] The proposal of amendment could be based on the appropriately reworded evidentiary prohibition contained in Article 2591 CCP with not only the client's consent taken into account but also the consent by the advocate/attorney-at-law. See Błaszczak 2019, 177 pointing out the consequences of introducing such evidentiary prohibition.

matters covered by professional secrecy, requires amendment to Article 6(4) LoA and Article 3(6) AAL, followed by relevant deontological regulations.

This does not imply acceptance for combining procedural roles in the form of giving testimony as a witness by a legal representative regarding the circumstances of the case they are running. A hindrance is the violation of the independence of the advocate/attorney-at-law during procedural acts and the conflict of interest associated with combining factual assistance, which does not fall within the scope of providing legal assistance. Such a situation should be accompanied by the termination of the power of attorney by the advocate/attorney-at-law acting as a witness in order to properly implement the rules of civil procedure. In this respect, the solutions contained in the deontological regulations seem sufficient.

Consequently, the proposed amendment concerning the introduction of item 5 in Article 259 CCP (also in the version modified by legal professional organizations, submitted during the public consultation) seems too far-reaching. It gives the court in civil proceedings the right to take evidence from the testimony of a representative if necessary, and the addition of a new Article 259^2 CCP will prevent the advocate/attorney-at-law to testify as a witness about circumstances covered by professional secrecy as part of the construct of legal excuse in the interest of the represented party, justified by the implementation of values of special importance protected in the legal system. A solution to the problem, not only for the civil procedure, should be sought in the Law on advocates and the Law on attorneys-at-law, in the provisions on the extent of the obligation to protect professional secrecy.

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