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Jan Budziński,
Jagiellonian University

CAN AN ATTORNEY CONDUCT A «PRIVATE INVESTIGATION»?

Abstract. The considerations contained in my work concern research related to the possibility of conducting a private investigation by a lawyer in Poland. Concepts such as private evidence, private documents and private investigations are defined in detail. For comparative purposes, the regulations of this matter in other countries have also been described. The conclusion of the analysis of norms and views of the doctrine on this issue is the conclusion that a lawyer can conduct a private investigation. However, it was necessary to set limits within which it could do so, as well as the effects of crossing them. The types of activities that a lawyer may perform under private investigations are also specified. All considerations were based on the literature of such legal authorities as prof. Jerzy Skorupka, or prof. Romuald Kmiecik.

Keywords: private evidence, evidence from a private document, private document, private investigation.

Description of the problem. In Polish legislation, the issues of conducting investigations are regulated in detail. However, there are no rules that govern the institution of private investigation by a lawyer. Therefore, there are a number of problems such as: Can an attorney unofficially gather evidence? Can he interview potential witnesses outside the procedure? Does he risk any responsibility if he goes too far?

The purpose of this article is to answer these and many other questions regarding private investigation.

Presentation of the main material. To answer questions included in description of the problem, we should start by establishing what the term «private investigation» means. The concept of an inquiry is defined in the Criminal Procedure Code (In the following parts of the work I will use the abbreviation CPC) and thus in accordance with Article 325a of the CPC, we find that the Police, Prosecutor, and in specific cases also Border Guard bodies, Internal Security Agency, National Tax Administration, Central Anti-Corruption Bureau or the Military Ganderie may carry it out. The situation is similar in the case of an investigation. According to Article 311 of the CPC, we learn that the investigation is being conducted by the Prosecutor, but he can entrust it to the Police. There is therefore no doubt that a lawyer has no statutory authorization to conduct an official investigation, as well as the resulting competences, such as conducting an inspection or a search. It is worth noting that, in accordance with the general clause contained in Article 116 of the CPC, an attorney could in such a situation submit a motion to conduct a given

action, however, its inclusion would depend on the court, and the action itself would be ultimately carried out by the Prosecutor or the Police.

However, the term «private investigation» itself does not appear in the Code of Criminal Procedure. We will not find any «private ID» mentioned in the Act either. The great amendment to the Code of Criminal Procedure of 27 September 2013 [1] introduced Article 393§3 (*Wording of art. 393§3 CPC per day 18.09.2019 – Any private documents prepared outside of criminal proceedings, in particular statements, publications, letters, and notes, may be read aloud at the trial*) which contains the term of a private document. We should agree with R. Kmiecik considerations, according to which «The term «private evidence» in a criminal trial is a neologism of the legal language, unknown to criminal-trial legal (statutory) terminology and evidence taxonomy. Whether a private document is admissible in criminal matters as a source of conceptual proof should be referred to as «private evidence» is a matter of terminology convention. The term «evidence from a private document» sounds more correct» [2]. It seems, that these terms should not be equated not only because of their terminological relevance, but also because «private evidence» is a much broader concept than a private document. One should agree with the vast majority of the doctrine, which believes that the term «document» should be understood broadly. Based on J. Skorupka comment, a «private document» should be considered not only the statements, publications, letters and notes resulting from the statutory calculation, but also, e.g. secret messages, calendar entries, electronic notebooks and electronic information carriers, calculations, prepared lists, diaries – gathered during the criminal proceedings, outside of it or even before its initiation. Private documents also include a recording of the conversation, even if it was recorded secretly [3]. However, these documents cannot be presented due to the limitation resulting from Article 174 of the Code of Criminal Procedure, according to which evidence from the accused's explanations or testimony of a witness cannot be replaced by the content of letters, notes or official notes. However, private evidence will be any evidence that has been collected, retrieved, secured or in any way recorded by an entity other than a procedural body [4]. As I mentioned at the beginning of this work, I consider it is necessary to define the term «private investigation» properly. In view of above considerations, it can be concluded that this term should be understood as unofficial, detached from criminal proceedings, collecting, gathering various types of information that may become evidence in the case in the future. It would be a huge mental shortcut to say that private investigation relies on the unofficial collecting of evidence. From Article 393§3 CPC, it follows that such documents can be read, and it is up to the court to determine whether this happens or not. Similarly, in the case of motions of evidence from Article 170 CPC, the court will decide whether the information, item or circumstance can be considered as evidence in the case.

Before I proceed to answer the title question, I would like to briefly describe how the issue of private acquisition and collection of evidence is regulated in other countries. And so, according to research carried out by Michał Rusinek and Marcin Żak, the results are as

follows. In most of the studied by them countries, the criminal-trial regulations do not contain provisions regarding the private collection of evidence. This occurs in Austria, Brazil, Estonia, Japan, Germany, the United States and Turkey. However, there are a few countries in which these issues have are explicitly regulated by law, such as Ukraine, Hungary and Italy [5].

The prevailing view of the countries form the first group is that private collection of evidence is allowed, despite the lack of explicit statutory acquiescence. First of all, it is argued that this is an element of exercising the right of defense, as well as the implementation of the principle of material truth. The furthest in this matter is the Austrian doctrine, which wonders whether conducting private investigation is not even the duty of a lawyer, as part of the proper conduct of his client's affairs [5].

However, among countries where there is no regulation regarding private collection of evidence, there are also those in which this is deemed unacceptable. For example, the Japanese criminal procedure, in which, although the parties are granted, including defense, the right to submit evidence, there prevails – as is apparent from the content of the national report presented – the view that private search and collection of evidence by the parties is unacceptable [5].

In the group of countries that have legally regulated private collection of evidence, these regulations are differential. And so, in the new Code of Criminal Procedure of Ukraine (hereinafter the CPC of Ukraine) [6], which entered into force on November 19, 2012, the subjects of proving were defined, i.e. the prosecution party and the defense party (part 1 of Article 93 of the CPC of Ukraine).

Therefore, a lawyer providing legal assistance in a criminal trial is a direct subject not only of the criminal justice system but also to the rules of evidence. A novelty of the CPC of Ukraine was the entitlement of a lawyer to collect evidence himself (part 3 of Article 93 of the CPC of Ukraine), in other words – to investigate. Some scientists compare attorneys and private detectives because of this function. It should be noted that in this legal status, refusal to provide information upon a lawyer's request, delayed or incomplete transmission of information, and providing false information provides for legal liability under the statute [7].

The legal systems of Hungary and Italy contain much more extensive regulations. Hungarian legislation regulates in detail the principles of conducting activity in the field of private collection of information, including information which may constitute evidence; it is regulated by Act No. CXXXIII of 2005 on the protection of persons and property and detective activities. The statute specifies, among others principles of access to information about people or recording of image and sound (monitoring) in public places. On the other hand, the Code of Criminal Procedure of Italy contains provisions regulating the so-called defense investigation (Article 391 et seq.), which grants an attorney the right to collect evidence for the defendant, including obtaining information and statements from witnesses, authorities, as well as inspecting places or things [5].

At this point it is worth to mention about the existence of Article 367a of the Code of Criminal Procedure in Poland from July 1, 2015 to April 14, 2016. This article gave the defendant,

his defense counsel, assistant prosecutor and private prosecutors, as well as their proxies, the opportunity to apply to the court to order the appropriate authority to provide documents that the party cannot obtain, either for dismissal or for release of a specific person from secrecy for the purposes of submitting an evidentiary application. It was undoubtedly a move towards more adversarial process, but as you can see the existence of this article lasted very shortly and the legislator quickly decided to withdraw from it.

Poland belongs to the first of the group of countries I described above, so there is no regulation on the «private investigation» in the Polish CPC. Private collection of evidence is not a part of criminal proceedings, so it is difficult to require that it should be regulated by the CPC. This code clearly indicates who, when and how can undertake criminal proceedings without the risk of unlawful violation of constitutionally guaranteed civil rights and freedoms, not to mention about exposure himself to criminal and civil liability. From the fact that the Code of Criminal Procedure doesn't regulate the private gathering of evidence, there is nothing more than the fact that entities undertaking such activities – without authorization arising from the Code of Criminal Procedure. – they may be subject to various types of legal liability (constitutional, criminal and civil), depending on who and how collected the evidence in a «private way» [2]. Given the above, there is no doubt that a party, and her lawyer, may seek, collect and consolidate in a non-litigious way information relevant to the determination of the subject of criminal proceedings [4]. Again I have to emphasize that, it is only information about the proof. Only after submitting the evidentiary motion and its acceptance by the court, this information may become an evidence.

However, there are a numbers of evidentiary actions that have been regulated in the Code of Criminal Procedure. These are, for example, searching, visual inspection or detention. In the case of this type of activities, the statutory regulation is quite detailed and precisely indicates who can perform them. The view seems to be the most accurate according to which if the legislator wanted private entities to be empowered to carry out this type of activities, he would do it. [9]. It is worth paying attention to Article 7 of the Act on detective services, according to which the detective may not use technical means and operational and reconnaissance methods and activities, reserved to authorized bodies under separate provisions. Therefore, it seems justified in the light of the above views to make the thesis that legal entities cannot perform evidentiary acts regulated in the Code of Criminal Procedure, without getting a risk for exposing to broadly understood responsibility. However, they may unofficially gather evidence by activities unregulated in CPC.

However, it should be remembered that the evidential value of the so-called private evidence is much lower because of their subjectivity. G. Buconń rightly observes that if this evidence were fully equal, it could even lead to evasion of law by law enforcement authorities. For example, a policeman could «advise» the victim to record the next conversation with the defendant, thus bypassing the premise of the prosecutor's consent required for wiretapping [9]. In addition, in these types of situations, the defendant may be often provoked by the victim

or a specific situation, which is why the courts have to be very careful when assessing this type of «private evidence». Of course, a kind of natural barrier against excessive eavesdropping or recording conversations is Article 267 §3 of the Penal Code [10], according to which a «whoever, with the purpose of gaining unauthorised access to information, installs or employs a wire-tapping or visual device, or other device or software, is subject to a fine, restriction of liberty, or imprisonment of up to 2 years». This responsibility covers, however, only a part of possible situations caused by eavesdropping, because for its occurrence it requires that the obtained information be proprietary. On the other hand, it's hard to talk about proprietary information if a person has revealed it to us, even if they didn't know that they were being overheard. However, it should be remembered that in accordance with the current wording of Article 168a CPC — proof cannot be considered inadmissible solely on the basis that it was obtained in breach of the rules of procedure or by means of a criminal action.

Conclusions. To conclude the above considerations, it should be recognized that a lawyer may conduct a «private investigation», understood as unofficial, detached from criminal proceedings, collecting, gathering various types of information that may in future become evidence in a given case. The limit that determines the breadth of this investigation is the activities that the legislator has expressly reserved to whom it grants powers to perform. Each time, however, depending on the circumstances in which the given information about the evidence is collected (by whom, in violation of the law or the rules of procedure or without these violations, at what time, etc.), the court will decide whether to allow or reject this evidence application, as well as about the probative value to grant him.

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Будзінський Я.

Чи може адвокат провести «приватне розслідування»?

Анотація. Міркування, що містяться в моїй роботі, стосуються дослідження, пов'язаного з можливістю проведення приватного розслідування адвокатом у Польщі. Такі поняття, як приватні докази, приватні документи та приватне розслідування, визначені докладно. Для порівняльних цілей також описані положення цього питання в інших країнах. Висновок аналізу норм та поглядів доктрини з цього питання є висновком, що адвокат може вести приватне розслідування. Однак потрібно було встановити межі, в межах яких це могло б зробити це, а також наслідки їх перетину. Також визначені види діяльності, яку адвокат може здійснювати під час приватного розслідування. Усі міркування ґрунтувалися на літературі таких правових органів, як проф. Єжи Скорупка, або проф. Ромуальд Кмієцік.

Ключові слова: приватні докази, докази з приватного документа, приватний документ, приватне розслідування.

Будзиньский Я.

Может ли адвокат провести «частное расследование»?

Аннотация. Соображения, содержащиеся в моей работе, касаются исследований, связанных с возможностью проведения частного расследования адвокатом в Польше. Такие понятия, как личные доказательства, личные документы и частные расследования, определены подробно. Для сравнительных целей, правила этого вопроса в других странах также были описаны. Выводом из анализа норм и взглядов доктрины по этому вопросу является вывод о том, что адвокат может провести частное расследование. Однако необходимо было установить пределы, в пределах которых он мог бы это сделать, а также последствия их пересечения. Также указаны виды деятельности, которые адвокат может выполнять в рамках частных расследований. Все соображения основывались на литературе таких правоохранительных органов, как проф. Ежи Скорупка, или проф. Ромуальд Кмичик.

Ключевые слова: личное доказательство, доказательства из частного документа, личный документ, частное расследование.