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# Constitutional Guarantees Protecting Professional Secrecy in the Practice of an Attorney under US Law

**Keywords**: guarantees, legal profession, attorney-client privilege, Amendments to the Constitution
**Słowa kluczowe**: gwarancje, zawód prawniczy, przywilej adwokacki, Poprawki do Konstytucji

**Abstract**

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. The right to privacy is not without significance for the subject of the article, which is the fundamental value and the core of the relationship between the lawyer and the client. These guarantees are one of the most important factors in the legal protection of professional secrecy – crucial not only for the client, the lawyer himself, but also for the entire legal protection system. In particular, attention was paid to the main issues concerning legal secrecy in the Amendments to the US Constitution, which indirectly create a protective system for it.

**Streszczenie**

**Konstytucyjne gwarancje służące ochronie tajemnicy zawodowej w wykonywaniu zawodu adwokata w prawie Stanów Zjednoczonych Ameryki**

Przedmiotem niniejszego artykułu są rodzaje oraz charakterystyka gwarancji stworzonych w celu ochrony prawniczej tajemnicy zawodowej w USA. Jest to nierozerwalnie związane z jej charakterem i rolą w wykonywaniu zawodu prawniczego. Nie bez znaczenia dla tematu artykułu jest prawo do prywatności, które stanowi podstawową wartość oraz trzon w relacji pomiędzy prawnikiem a klientem. Gwarancje, o których mowa są jednym z najważniejszych czynników ochrony prawnej tajemnicy zawodowej – kluczowej nie tylko dla klienta, samego prawnika, ale także dla całego systemu ochrony prawnej. Zwrócono przede wszystkim uwagę na główne kwestie dotyczące tajemnicy prawniczej w Poprawkach do Konstytucji Stanów Zjednoczonych, które pośrednio tworzą dla niej system ochronny.

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## I. Introduction

The role of professional secrecy reflects the importance of privacy and discretion in social life. In today's globalized world and the rapid development of technology, information – the flow of which is exceptionally efficient – and its non-disclosure aspect are becoming increasingly challenging. This pace should be compatible with the pace of change of law.

In modern democratic societies, whose functioning is based on the law in force, lawyers play an important role as guardians of justice as well as human rights and fundamental freedoms. Representatives of the legal professions have a special responsibility to maintain an adequate standard of justice. The basis of this responsibility lies in the rules of professional ethics, the observance of which is their duty to the client, the judiciary and society as a whole. The rules of professional etiquette reveal their presence in both the law and the custom, rules of law practice, and in judicial decisions.

As noted by M. Pietrzak, legal secrecy is an essential element of the procedural system for the protection of all rights and freedoms. Without effective

legal confidentiality protection, access to court cannot be guaranteed. Effective secrecy protection requires not only appropriate regulations establishing secrecy, but also the independence of advocates and their self-government, as well as awareness and culture of respect on the part of public authorities, especially law enforcement agencies and courts, for this lawyer and civic *sacrum*[1].

The basis 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 principle of confidentiality (rule of confidentiality). Both 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.

In the law of the United States, the backbone of guarantees consists mainly of selected Amendments to the Constitution[2] and some privileges of evidence, which are equivalent to prohibitions of evidence in a trial. The American law provides for civil, criminal, and disciplinary liability for breach of professional secrecy.

What is more, the primary and direct source of the deontology responsibilities of lawyers in the United States is the Model Rules of Professional Conduct[3]. The guarantor of the protection of the confidentiality rule is MRPC Point 1.6. Point 1.6 (b) of the act, however, indicates cases of the admissibility of disclosure by a lawyer of the content of professional confidentiality, but only to the extent that is necessary to achieve the purpose of the condition.

## II. Research methods

The main research objective is to characterize the constitutional guarantees protecting lawyers' secrecy in American law. Due to the scope of the subject mat-

[1] M. Pietrzak, *Tajemnica adwokacka jako fundamentalny element systemu ochrony praw i wolności*, "Palestra" 2019, no. 7–8, p. 89.

[2] Constitution of the United States, passed on September 17, 1787 (entered into force in 1789).

[3] Hereinafter referred to as MRPC. Internet source:, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/(18.12.2020).

ter, the non-constitutional guarantee protecting this legal institution was excluded from the considerations. It should therefore be indicated to what extent and on what basis the legislator decided to protect this type of privacy. The set goals determined the choice of the layout of the study and research methods. The main research method that was used is the dogmatic and legal method, however, to a large extent, extensive jurisprudence was used in this area, while literature on the subject – only complementary. The analytical method was used as an auxiliary, which allowed for the presentation of the subject of research from the point of view of its evolution, and thus obtaining a full picture of the discussed issues.

## III. Research

The direct constitutional protection of the attorney–client privilege results mainly from the Sixth Amendment to the Constitution and applies only in criminal proceedings[4]. The courts have repeatedly indicated the nature of the privilege, which is a privilege of proof and has no source in the Constitution, and therefore uses its protection to a lesser extent[5]. In the jurisprudence it was called i.a. "the legislative product" which, due to its lack of constitutional origin, should not be "worshiped"[6]. "The rationale of the privilege has several layers. The privilege enables clients to tell their lawyers everything about the matter—a "full and frank" disclosure. The information disclosed by clients allows lawyers to render the best possible advice to the clients[7].

However, due to the indirect relationship of some of the Amendments to the Constitution with the privilege in question, the consequences of their

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[4] *Greater Newburyport Clamshell Alliance v. Public Service Co. of New Hampshire*, 838 F. 2d 13, 19, 10 Fed. R. Serv. 3d 151 (1st Cir. 1988).

[5] *Fisher v. U.S*, 425 U.S. 391, 401, 96 S.Ct. 1569, 48 L. Ed 2d 39 (1976); *Smith v. Moore*, 137 F. 3d 808, 819 (4th Cir. 1998); *U.S v. Bankston*, 2000, West Law: 1252582; *OKC Corp. v. Williams*, 461 F. Supp. 540, 546 (N.D. Tex 1978); *Sanborn v. Parker*, 629 F.3d 554, 575 (6th Cir. 2010); *Lange v. Young*, 869 F. 2d 1008, 1012 n.2 (7th Cir. 1989).

[6] *Magida on Behalf of Vulcan Detinning Co. v. Continental Can Co.*, 12 F.R.D. 74, 76 (S.D.N.Y. 1951).

[7] G.M. Giesel, *The Entity Attorney-Client Privilege Meets the Twenty-First Century: Rethinking Functional Equivalent Analysis in the Time of a Nonemployee Workforce*, "Penn state Law Review" 2022, vol. 126:2, p. 482.

mutual influence should be indicated in this part. Thus, although the Constitution is not a direct source of an attorney–client privilege, its violation in criminal proceedings lays the groundwork for the application of the First, Fourth, Fifth and Sixth Amendments to the Constitution[8].

The First Amendment states that no law of Congress may introduce or prohibit the free practice of religion, limit freedom of speech or the press, or the right of the people to peacefully assemble, or to petition the supreme authorities for compensation. Although attorneys in the United States are accorded the same freedom of speech as other citizens under the Constitution, this power does not override the lawyer's duty to protect the confidential content of communications with a client as an attorney–client privilege. By agreeing to act in the role of an attorney at law, the advocate in a way relinquishes his constitutional right to disclosure, as set out in the First Amendment, to protect the fulfillment of obligations arising, inter alia, from the Code of Professional Responsibility[9], which consists in disclosing the content of communication with the client as part of the freedom of speech[10].

The US Fourth Amendment states that the right of the people to personal integrity, housing, documents, and property shall not be infringed by unjust search and detention; an order in this regard may be issued only if there is a plausible cause confirmed by oath or a declaration replacing it. The place to be searched and the persons and things to be detained should be specified in the order in detail. The relationship between the Fourth Amendment and attorney–client privilege is most often revealed when a search of a law office or a law firm is ordered in order to obtain evidence in connection with a suspected offense committed by an attorney or one of his clients. Courts, as a rule, permit such a search if it is carried out with due diligence and without unnecessary interference in professional secrecy[11]. Because searches of law offices are not, as such, considered an unacceptable means of interference, their initia-

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[8] *In re Grand Jury Proceedings-Gordon*, 722 F. 2d 303, 310, 14 Fed. R. Evid. Serv. 510 (6th Cir. 1983).

[9] Online source:, http://www.supremecourt.ohio.gov/LegalResources/Rule/professional/professional.pdf (18.12.2020).

[10] *Goffer v. Marbury*, 956 F.2d 1045, 1047–48, 73 Ed. Law Rep. 37 (11th Cir. 1992).

[11] *Andresen v. Maryland*, 427 U.S. 463, 479–84, 96 S.Ct. 2737, 49 L. Ed 2d 627 (1976); *U.S. v. Laurins*, 857 F. 2d 529, 540, 26 Fed. R. Evid. Serv. 1346 (9th Cir. 1988).

tion will be justified if it is carried out in accordance with the scope provided for in a valid court order. However, the court, when examining the correctness of such a search, carefully analyzes its course, the type and scope of the search, and the possible seizure or confiscation of property resulting therefrom. In *Klitzman and Gallagher v. Krut*, the court ordered the return of all the seized documents, finding that the search had gone beyond the scope indicated in the order. In the assessment of this case, the Court was particularly influenced by the search of the office on third parties—clients using legal services, and the possible violation of attorney–client privilege[12]. As the court further adjudicated, "it cannot be denied that the indicated actions of public authorities completely depreciated the concept of an attorney–client privilege […], causing *de facto* intrusion into the privacy sphere of clients of the searched law firm […]. Moreover, the entities conducting the searches did not make any real attempt to limit the degree of interference in the customer records—and thus the confidentiality guaranteed by the privilege – being aware of the fact that the searched documentation was kept secret"[13]. The Court acted differently in the *National City Trading Corp. v. U.S* case. It considered that the search had been carried out within the framework of applicable law and with appropriate caution. The court found that the Fourth Amendment to the Constitution had not been violated, and the entities searching the office operated within the limits of the law, thus not violating the confidentiality of communication between the lawyer and his clients. The correctness of such a search in the context of the protection of the attorney–client privilege depends to a large extent on the degree of diligence in the actions of the entity performing such an act[14].

Another aspect of the relationship between attorney–client privilege and the Fourth Amendment is the use of wiretapping and broadly understood electronic surveillance. Courts generally allow this type of activity, but order the least possible interference with lawyer–client confidentiality. However, in order to assess the usefulness of the intercepted conversation for evidence purposes and its possibly confidential nature, entities authorized to do so must listen to at least part of the conversation. The problem of the existence of the

[12] *Klitzman and Gallagher v. Krut*, 744 F. 2d, 959, 17 Fed. R. Evid. Serv. 880 (3d Cir. 1984).

[13] *Ibidem*.

[14] *National City Trading Corp v. U.S.*, 635 F. 2d 1020 (2d Cir. 1980).

privilege arises when surveillance agents discover that a lawyer is one of the parties to the conversation[15].

In the case of *United States v. Valdez-Pacheco*[16], despite the application by the attorney of the party under surveillance to reject the evidence in the form of a recording of the wiretap conversation, the court found that the law enforcement authorities did not infringe the law when seeking evidence, even though they had discovered the content of communication covered by attorney–client privilege, as there was a reasonable suspicion of a drug offense committed by the intercepted person. However, the attorney added that obtaining the content of the communication covered by the privilege is only allowed with caution and if interference with confidential data is minimized. An assessment of these factors is carried out each time by the court, which examines whether the law enforcement authorities interrupted the wiretapping process at the appropriate moment, i.e., when they could obtain sufficient information to allow them to assume that a crime may have occurred[17]. It seems that modern surveillance methods can lead to a weakening of trust and honesty in the relationship between the lawyer and the client. The solution in this situation may be, for example, a motion to reject the evidence by the court. In the case of *U.S. v. Valdez-Pacheco*, such a request was rejected. In order to assess whether there was a violation of attorney–client privilege, the Court did not assess the possible violation of the privilege, but only pointed out that it was necessary to conduct a separate evidentiary hearing in this case[18]. This is a procedure often used to determine whether there has been a breach of legal confidentiality.

As indicated by Fifth Amendment to the US Constitution, no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be

[15] See: *U.S. v. Hatcher,* 323 F.3d 666, 60 Fed. R. Evid. Serv. 1412 (8th Cir. 2003); *U.S. v. Harrelson*, 754 F. 2d 1153, 17 Fed. R. Evid. Serv. 738 (5th Cir. 1985).

[16] *U.S. v. Valdez-Pacheco*, 701 F. Supp. 775 (D.Or. 1988).

[17] *U.S. v. Gotti*, 771 F. Supp. 535, 544, 34 Fed. R. Evid. Serv. 286 (E.D.N.Y. 1991).

[18] *U.S. v. Valdez-Pacheco*, 701 F. Supp. 787 (D.Or. 1988).

a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The rights expressed in the Fifth Amendment apply only to the individual, and only the individual may raise claims thereunder. It should be noted that two privileges can be derived from the Fifth Amendment: the right to protection from self-incrimination and the right to a fair trial. The right to protection against self-incrimination serves to protect the suspect from being forced to testify against himself or to provide other evidence of a testimony or information-carrier nature[19]. It is a personal and inalienable right, which means that it applies strictly to a given individual who may take advantage of the privilege. Therefore, professional secrecy in the form of attorney–client privilege does not entitle an advocate to raise the privilege of the Fifth Amendment, which belongs to his client, in order to avoid giving testimony that could possibly incriminate him, as the courts have repeatedly indicated. Moreover, the lawyer may not refuse to answer a question during the trial that the client had the right not to answer if asked personally[20]. A landmark for the application of the Fifth Amendment was the ruling in the *Miranda vs. Arizona* case, which requires the US Supreme Court to communicate the rights of anyone who is arrested or detained. These rights were later called "the Miranda rights"[21].

Another aspect of protection under the Fifth Amendment is the right to a fair trial. Although it is believed that "seizing" the content of communications protected by attorney–client privilege may deprive the defendant of the right to a fair trial[22], the courts have set a very high threshold for such violation, upon reaching which they recognize the damage and order its repair. As noted by the Third Circuit Court of Appeals, particular caution should be exercised in finding violations of the right to a fair trial under the Fifth Amend-

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[19] *Ibidem*.

[20] See: *Couch v. U.S.*, 409 U.S. 322, 335, 93 S.Ct. 611, 34 L.Ed. 2d 548 (1973); *In re Grand Jury Proceedings,* 760 F. 2d 26, 26, 18 Fed. R. Evid. Serv. 567 (1st. Cir. 1985); *U.S. v. Haddad,* 527 F. 2d 537, 539 (6th Cir. 1975).

[21] *Miranda vs. Arizona*, 384 U.S. 436 (1966).

[22] See *U.S. v. Kleifgen*, 557 F. 2d 1293 (9th Cir. 1977); *U.S. v. Kennedy*, 225 F.3d 1187, 1194 (10th Cir. 2000).

ment by public authorities. Such a breach will occur only when the actions of public authorities can be described as "exceeding the limits of tolerance"[23]. However, such activities cannot be called "deception" or "bluffing," which are techniques used by law enforcement agencies to conduct an investigation[24].

In order to raise an infringement of the attorney–client privilege to the level of a violation of the Constitution—in this case the Fifth Amendment—the entity to which the privilege relates must cumulatively demonstrate: that the public authorities knew about the existence of the lawyer–client relationship; that public authorities have deliberately "entered" the sphere of confidentiality between these entities; actual and serious damage resulting from the indicated activity[25]. In addition, the Fifth Circuit Court of Appeals added that the damage must be provable[26]. In turn, in the case of *U.S. v. Ofshe*, the Eleventh Circuit Court of Appeals, stated that actions by a public authority, even if inappropriate, must also be blatant in the context of the entire legal system and the judiciary[27]. Moreover, the U.S. District Court[28] for the Northern District of Illinois has established an additional ground for violation of attorney–client privilege in the form of willfulness, which in this case is equivalent to the public authorities' knowledge of the inclusion of material obtained by attorney–client privilege[29]. When examining the case, the court considered that the entities searching the law firm did not interfere in the email correspondence between the client and the lawyer representing him and did not attempt to convert the files on the lawyer's computer in order to obtain their content. Based on these statements, the Court ruled out the existence of a condition of intent[30]. The result of the finding by the Court of the existence of the premises and the violation of attorney–client privilege by violating the right to a fair trial is, as a rule, the rejection of evidence as a result of "the fruit of violation of individual rights". This is what the Court did in *U.S. v. Haynes*, pointing

[23] *U.S. v. Hofffecker,* 530 F.3d 137, 154 (3d Cir. 2008).

[24] *Ibidem*.

[25] *Ibidem*.

[26] *U.S. v. Fortna*, 796 F.2d 724, 21 Fed. R. Evid. Serv. 618 (5th Cir. 1986).

[27] *U.S. v. Ofshe*, 817 F.2d 1508 (11th Cir. 1987).

[28] It is worth noting that U.S. District Courts are the primary courts in the federal court system that deal with criminal and civil cases at first instance.

[29] *U.S. v. Segal*, 313 F. Supp. 2d 774, 780 (N.D. III. 2004).

[30] *Ibidem*.

to the unlawful intrusion of public authorities into the sphere of the privilege of a lawyer, meeting the above-mentioned conditions, which resulted in the "contaminated" evidence being disregarded[31].

As stated in the Sixth Amendment to the US Constitution, in the prosecution of criminal offenses an accused has the right to a speedy and public trial before an impartial jury trial of the state and district in which the crime was committed; the determination of this district must result from a previously issued law. The accused also has the right to be informed about the type and basis of the accusation, to confront the prosecution witnesses, to summon witnesses of the defense, and to legal assistance in the defense[32]. From the standpoint of legal privilege, two aspects of the Sixth Amendment are important: the right to legal aid in defense and the right to confront the prosecution witnesses.

Another right protected by the Sixth Amendment and important from the point of view of the privilege of a lawyer is the right of the accused to confront the prosecution's witnesses. In order to find a link between the Sixth Amendment and attorney–client privilege, it is necessary to answer the question: if a witness of the opposing party, who is an organ of public authority, refuses to answer a question the content of which violates attorney–client privilege? Answering this question requires re-emphasizing that a privilege protects the content of communication, not information. The privilege does not protect the knowledge possessed by a witness only because its content was previously passed on to a lawyer. Consequently, increasing the privilege theoretically does not deprive the accused of information known to the witness[33]. However, practice shows that the privilege may prevent the accused from accessing specific data, as a confidential relationship with a lawyer may create situations that are the only source of honest and full communication. As a result, attorney–client privilege may constitute a real obstacle in obtaining evidence that may both contribute to the defense of the accused and the assessment of the witness's credibility by a jury.

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[31] *U.S. v. Haynes*, 216 F. 3d 789, 796–97 (9th Cir. 2000).

[32] See *Wise v. Samuels*, West Law: 1280975; *Granviel v. Estelle*, 655 F.2d 673, 682–683 (5th Cir. 1981); *Lange v. Young*, 869 F.2d 1008, 1013 (7th Cir. 1989).

[33] E.S. Epstein, *The Attorney-Client Privilege and The Work-Product Doctrine*, New York 2017, p. 6.

The scope of the so-called Confrontation Clause—a law enshrined in the Sixth Amendment to the Constitution—remains unclear, however. The guidelines of the Supreme Court of the United States include only the negative catalog, and therefore a set of powers that the Clause does not guarantee[34]. For example, the Clause does not guarantee that all witnesses testifying against the accused will testify at trial. It also does not ensure that the Court will arrange for them to be brought, even in order to record their presence[35]. Moreover, the Supreme Court noted that the Clause cannot guarantee that the testifying witness will remember every fact the disclosure of which will allow him to answer the question asked during the hearing. This is because the clause provides a chance for an effective hearing of a witness, and not the certainty of its effectiveness[36]. However, the Courts of the Seventh, Ninth, and Eleventh Circumstances agreed that the raising of the privilege by witnesses employed by a public authority may result in the defendant being deprived of the above-mentioned Sixth Amendment right[37].

## IV. Conclusion

Even though the Constitution does not directly guarantee attorney–client privilege, the very construction of the concept of derivative proof should constitute the *ratio legis* for its exclusion if it is obtained in a way that violates the privilege, but without the characteristics of violating the provisions of the Constitution. The underlying premise of such an effect is that the individual is protected against infringement of the rights established for him in order to eliminate future infringements of this kind.

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[34] *U.S. v. Inadi*, 475 U.S. 387, 399, 106 S.Ct. 1121, 89 L.Ed. 2d 390, 19 Fed. R. Evid. Serv. (1986).

[35] *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed. 2d 597, 7 Fed. R. Evid. Serv. 1 (1980).

[36] *U.S. v. Owens*, 484 U.S. 554, 108 S.Ct. 838, 98 L.Ed. 2d 951, 24 Fed. R. Evid. Serv. 193 (1988).

[37] *U.S. v. Rainone*, 32 F.3d 1203, 1206 (7th Cir. 1994); *Murdoch v. Castro*, 489 F.3d, 1063, 1066 (9th. Cir. 2007); *U.S. v. Almeida*, 341 F.3d 1318, 1326, 62 Fed. R. Evid. Serv. 345 (11th Cir. 2003).

Despite the fact that, under American law, legal secrecy is not absolute, judges – who are largely former advocates – 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 case without fear of disclosing its details[38]. It should be noted, however, that the judicial authorities do not claim that they cannot obtain information by means of evidence other than questioning an attorney. 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 advocate from confidentiality by the court in the proceedings in the interest of the judiciary is therefore unacceptable.

The process leading to the modern understanding of legal secrecy is the result of the centuries-long evolution of law. A consequence of this process is the concept of confidentiality, so fundamental for legal practice that apart from functioning under the evidentiary privilege, it also exists as an entrenched component of legal ethics. No other principle of evidence has been found so virtuous or essential to legal practice, as well as so strongly present in the media. To look at this evolution means to understand that lawyer secrecy can be perpetuated by an idea but should still be improved in practice[39].

Taking the above into consideration, in my opinion, the privilege should benefit from constitutional protection measures and be subject to its legal regime, if only because it revives, and gives meaning and value to, the guarantees contained in the Constitution.

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