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Grounds for the Deletion from the List of Attorneys-at-Law in the Context of Their Impact on the Right to Practice the Profession and the Membership of the National Bar of Attorneys-at-Law

Przesłanki skreślenia z listy radców prawnych w kontekście ich wpływu na prawo do wykonywania zawodu oraz przynależność do samorządu radców prawnych

SUMMARY

The article provides an analysis concerning grounds for the deletion from the list of attorneys-at-law in Poland. The author distinguishes two spheres within the status of attorney-at-law: 1) the right to practice as an attorney-at-law and 2) the membership of the professional self-government of attorneys-at-law. Individual grounds are assessed in terms of the impact of their occurrence on both these spheres. The article discusses the effect caused by resolutions on the deletion from the list of attorneys-at-law, adopted as a result of emergence of the statutory grounds for the deletion in each of these spheres.

Keywords: attorney-at-law; deletion from the list of attorneys-at-law; grounds for the deletion from the list of attorneys-at-law; cessation of the right to practice as an attorney-at-law; termination of the membership of the National Bar of Attorneys-at-Law

INTRODUCTION

The Act of 6 July 1982 on Attorneys-at-Law[1] governs a number of aspects of the membership in the professional self-government of attorneys-at-law (National Bar of Attorneys-at-Law). It contains many provisions that delegate powers to the bodies

[1] Consolidated text Journal of Laws 2018, item 2115, hereinafter: the Act.

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of the bar association, thus enabling them to have a real impact on its functioning, nonetheless the most crucial rules for the system and structure of the self-government of attorneys-at-law seem to be governed primarily at the statutory level.

Pursuant to the Act, the membership of attorneys-at-law and trainee attorneys-at-law in the professional self-government is compulsory (Article 40 (2) of the Act). Undoubtedly, the nature of this affiliation is linked to the purpose for which such structures have been established in the Polish legal system. This purpose is expressed in the Constitution of the Republic of Poland[2]. It expressly stipulates that by means of a statute, self-governments may be created within a profession in which the public repose confidence, and such self-governments shall concern themselves with the proper practice of such professions in accordance with, and for the purpose of protecting, the public interest (Article 17 (1) of the Constitution).

The status of the profession of attorney-at-law, distinguished as a profession of public confidence[3], is determined by the fact that the rules of membership in such professional group should be very precisely defined, including the conditions where such membership arises and circumstances that cause it to cease.

Termination of the relationship between an attorney-at-law and the National Bar of Attorneys-at-Law seems to be a particularly interesting aspect here. This includes even more interesting relationship between the statutory conditions resulting in that the person concerned ceases or may cease to be an attorney-at-law and the effect of those conditions on the sphere of membership in the self-government and the sphere of rights to pursue one's professional practice. On the one hand, these relationships are linked with the possibility of distinguishing, within the administrative legal scholarly opinion, between constitutive and declarative decisions, the nature of which would not always arise directly from the law under which they are to be issued, and on the other hand with the possibility of extracting two elements of the status of an attorney-at-law having the right to practice.

Constitutive acts create, modify or cause the termination of an existing legal relationship, this change being precisely the result of that administrative act[4]. In the case of declarative decisions, their consequences are retroactive to some extent as they are effective from the date of the emergence of law-making facts[5]. As

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[2] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, No. 78, item 483 as amended), hereinafter: the Constitution. English translation of the Constitution at: www.sejm.gov.pl/prawo/konst/angielski/kon1.htm [access: 10.02.2019].

[3] A. Trubalski, *Samorządy zawodów zaufania publicznego na przykładzie samorządu radców prawnych. Perspektywa konstytucyjnoprawna*, „Studia Iuridica Lublinensia" 2014, t. 21, DOI: http://dx.doi.org/10.17951/sil.2014.21.0.223, pp. 232–234.

[4] G. Łaszczyca, C. Martysz, A. Matan, *Kodeks postępowania administracyjnego. Komentarz*, t. 2, Warszawa 2010, p. 22.

[5] B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 2011, p. 405.

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a consequence, the distinction presented herein boils down to whether a particular administrative act creates the legal reality or merely establishes what the legal reality is like by attesting its shape.

As regards the very essence of the status of an attorney-at-law formulated for the purposes of this paper, it is reasonable, in my opinion, to refer to the dualistic nature of this status. This is so because the statute provides for that the right to pursue the profession of attorney-at-law is created upon the registration of the person concerned with the list of attorneys-at-law and taking an oath (Article 23 of the Act). Therefore, this activity contains both the entry into the list supplemented with the oath. The registration on the list will always be an event preceding the oath. An attorney-at-law will be a person registered on the list of attorneys-at-law[6], but the person must pledge the above-mentioned oath to be granted the right to practice the profession. Apart from the right to practice the profession, the regulations do not generally specify any effects of failure to pledge the oath on the existing entry in the list of attorneys-at-law. However, the refusal to pledge the oath should be primarily deemed a disciplinary offence. It is also reasonable to assume that the failure to pledge an oath points to the failure to meet, as early as of the moment of registration on the list of attorneys-at-law, the condition of the guarantee of due exercise of the profession, which in turn would provide grounds for the resumption, *ex officio*, of the registration procedure[7].

The above argumentation to clarify the dual nature of the status of an attorney-at-law having the right to practice the profession of attorney-at-law is extremely important from the point of view of further discussion. Hence, it is reasonable to examine to what extent each of the components of the status of the attorney-at-law will be covered by the grounds for being deleted from the list of attorneys-at-law and the deletion made as a result of meeting them.

Since we can speak of disciplinary liability resulting from membership of the self-government of attorneys-at-law even before taking the oath, and the membership in question does not result from taking the oath but from being registered on the list of attorneys-at-law, the key factor to this membership will be, first of all, the existence of an entry into the list of attorneys-at-law. It is the fact of registration on the list of attorneys-at-law that is the element of the status of attorney-at-law

[6] Z. Klatka, *Wykonywanie zawodu radcy prawnego i adwokata*, Warszawa 2004, pp. 9–10. The author states, referring in general to self-governing organizations of public confidence, that the membership in a self-government is by the very operation of law and is created upon the registration on the list. He concludes, at the same time, that an individual registered on the list and granted the right to practice the profession becomes a member of the professional association. Concerning the self-government of attorneys-at-law, the first conclusion is fully valid while the second needs to be made more specific because obtaining the right to practice the profession is subsequent to the membership in the self-government connected with the entry into the list.

[7] *Idem*, *Ustawa o radcach prawnych. Komentarz*, Warszawa 1999, pp. 252–254.

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to which the grounds for deletion from the list of attorneys-at-law apply. If the grounds for the deletion from the list of attorneys-at-law were correlated with the sphere of rights of attorneys-at-law to practice the profession of attorney-at-law, this would lead to the conclusion that an attorney-at-law who has not taken the oath after being registered on the list cannot be deleted from the list of attorneys-at-law due to the fact of not having the right to practice the profession. In the opinion of the author hereof, the deletion from the list of attorneys-at-law will always entail the deprivation of the right to practice the profession, unless the loss of this right occurs earlier. The cessation of the status of attorney-at-law will be connected with the grounds for being deleted from the list of attorneys-at-law, which does not mean, however, that the mere existence of such grounds will not sometimes result in consequences in the sphere of membership in the self-government and in terms of the right to practice the profession yet before being deleted from the list of attorneys-at-law. Any interference in the sphere of the right to practice the profession related to the grounds for deletion from the list of attorneys-at-law will not always be connected with the simultaneous effect related to the entry into the list of attorneys-at-law existing in the legal system, which is to be illustrated in more detail in this analysis.

The Act articulates very precisely the grounds correlated with the cessation of the membership of an attorney-at-law in the professional self-government. This is the intended purpose of the institution of deletion from the list of attorneys-at-law (Article 29 of the Act). The law lists grounds for its application in the following cases: when applied for by the attorney-at-law (Article 29 (1) of the Act), even partial limitation of the capacity to perform acts in law (Article 29 (3) of the Act), deprivation of public rights by a court judgement (Article 29 (4) of the Act), failure to pay membership fees for a period longer than one year (Article 29 (4a) of the Act), death of the attorney-at-law (Article 29 (5) of the Act), disciplinary ruling or court judgement on the deprivation of the right to practice the profession of attorney-at-law (Article 29 (6) of the Act). A special situation is a deletion from the list of attorneys-at-law due to an act committed prior to the entry into the list if the act was not known to the Bar Council at the time of registration and constituted an obstacle to the registration (Article 29^3 of the Act). Each of these grounds constitutes a separate basis for the deletion from the list of attorneys-at-law, and all of them together constitute a closed catalogue of circumstances giving grounds for the deletion from the list.

With regard to the first five conditions (application of the attorney-at-law; even a partial limitation of legal capacity; deprivation of public rights under a court ruling; failure to pay membership fees for more than one year; death of the attorney-at-law), the only competent body which has powers to take a resolution on the deletion from the list of attorneys-at-law will undoubtedly be the Council of the relevant district bar association (Article 29^1 of the Act) which keeps the list of attor-

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ney-at-law concerned. The resolution on this subject is an administrative decision. According to one of the definitions of administrative decisions, there is no doubt that, in the context of deletion, it is a unilateral act of a public administration body which has an appropriate legal form and defines the consequences of the legal norm applied in relation to a specific addressee in an individual case[8]. Any provisions of the Code of Administrative Procedure[9] will apply to the procedure on the deletion from the list of attorneys-at-law. It must be definitely held, in that case, that the Council of the district bar association, by deleting from the list of attorneys-at-law, will act within the limits of authority delegated by the state. This does not mean, however, that each of the activities of the Council of a regional bar association will be related to the exercise of administrative authority[10], but interference with a group of individuals who practice a profession of public confidence should be considered such an activity. In the administrative procedure concerning a deletion from the list of attorneys-at-law, the guiding principle will be the principle of objective truth employed by the Code of Administrative Procedure, which obliges the authorities to thoroughly examine all the facts in order to correctly establish facts of the case[11]. As a rule, a decision on the deletion from the list of attorneys-at-law will in principle be a constrained administrative decision (a decision to be taken without any margin of discretion)[12], as the authority is obliged to issue it in the event of a situation where statutory conditions take place, except where disciplinary proceedings against the attorney-at-law are pending. It is then possible to refuse deletion from the list of attorneys-at-law before the end of such proceeding despite a request to do so submitted by the attorney-at-law[13].

Although the most important statutes for proceedings concerning the removal of attorneys-at-law from the list of attorneys-at-law will be the Act on Attorneys-at-Law and the Code of Administrative Procedure, the internal regulations of the self-government also apply to this type of proceedings. Currently, it is governed in the Regulations on keeping the lists of attorneys-at-law and lists of trainee attorneys-at-law[14]. This internal act was issued based on a statutory delegation to

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[8] M. Jaśkowska, A. Wróbel, *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 2011, pp. 615–616.

[9] Act of 14 June 1960 – Code of Administrative Procedure (consolidated text Journal of Laws 2018, item 2096), hereinafter: CAP.

[10] "Hence, in the activity of the self-government of attorneys-at-law, the following two spheres must absolutely be separated: the public administration and the so-called organisational interior of the association" – see an argumentation taken from the substantiation of the judgement of the Supreme Administrative Court in Warsaw of 12 November 1991, II SA 773/91, ONSA 1992, No. 3–4, item 71.

[11] K. Kwapisz, *Ustawa o radcach prawnych. Komentarz*, Warszawa 2013, p. 81.

[12] Z. Klatka, *Ustawa…*, p. 264.

[13] *Ustawa o radcach prawnych. Komentarz*, red. T. Scheffler, Warszawa 2018, p. 459.

[14] Resolution No. 110/VII/2010 of the National Bar Council of 30 January 2010 on the regulations on keeping the lists of attorneys-at-law and lists of trainee attorneys-at-law (consolidated text

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adopt the Regulations on keeping the lists of attorneys-at-law and lists of trainee attorneys-at-law (Article 60 (8) (d) of the Act). However, Chapter 3 of the Regulations, entitled "Procedure for the deletion from the list of attorneys-at-law", contains only two sections which, in principle, contribute little to the procedure in question. Thus, in accordance with the Regulations, proceedings on the deletion from the list of attorneys-at-law are to be initiated either *ex officio* or at the request of the attorney-at-law concerned (§ 21 of the Regulations). This norm is in principle the paraphrased provision of the Code of Administrative Procedure which states that administrative proceedings shall be instituted either at the request of a party or *ex officio* (Article 61 § 1 CAP). It should be noted, however, that despite this similarity, these both norms are of a very general nature. It is only the specificity related to the particular reasons for deleting from the list of attorneys-at-law which determines whether in a given case it will be possible to institute proceedings both *ex officio* and upon request, or only *ex officio*, or only upon request. In the chapter on the procedure in question, the Regulations further stipulate that, once proceedings are instituted, the President of the Bar Council shall notify the interested party of the commencement of the procedure and of the right to be heard and to submit requests within seven days of the date of notification (§ 22 (1) of the Regulations). The President of the Bar Council is also obliged to notify the interested party of the date and place of the meeting of the Regional Bar Council where the case is to be heard (§ 22 (2) of the Regulations). The Regulations also stipulate that the party concerned shall have the right to participate in a meeting of the Bar Council to the extent that it relates to him or her, and the right to speak during the meeting (§ 22 (3) of the Regulations). In this respect, the Regulations also concerns the matter referred to in the generally applicable provisions of law (Article 10 § 1 CAP) and, in principle, constitute its clarification, mainly by arranging the course of proceedings.

For the above-mentioned five first grounds, when the deletion is clearly within the responsibility of the Council, an appropriate resolution should be adopted by it within 30 days of becoming aware of the event referred to in individual grounds (Article 29^1 of the Act). The time limit is of a formal nature and, in principle, instructional[15]. The purpose of this provision is to impose on the body an obligation of prompt action and making decisions within a prescribed period, however exceeding that time limit does not deprive the body of its power to issue a decision[16]. An exception is the situation of deletion due to an act committed prior to the entry into the

resolution No. 275/IX/2016 of the Board of the National Bar Councilof Attorneys-at-Law of 20 July 2016 on the regulations on keeping the lists of attorneys-at-law and lists of trainee attorneys-at-law, http://bibliotekakirp.pl/items/show/586 [access: 2.11.2018]), hereinafter: the Regulations.

[15] See *Ustawa o radcach prawnych…*, p. 459.

[16] Judgement of the Supreme Administrative Court of 9 April 2013, II GSK 76/12, LEX No. 1337212.

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list where the act was not known to the Bar Council at the time of registration and constituted an obstacle to the registration. In this case, the legislature did not set for the Bar Council any, even instructive, time limit for the adoption of the resolution. The time limit for the deletion was also not articulated with regard to the condition related to a previously issued disciplinary ruling or a court judgement on deprivation of the right to practice the profession of attorney-at-law, which is due to the fact that the jurisdiction of Regional Bar Council does not cover a deletion from the list of attorneys-at-law as a result of a disciplinary ruling. The powers in this area will be presented in more detail below, as part of the characteristics of individual grounds for the deletion from the list of attorneys-at-law as compared with others.

DELETION UPON A REQUEST

One of the grounds for deleting from the list of attorneys-at-law is the request of the person concerned to do so. The nature of this ground determines that the procedure based on it will always be a procedure initiated at a request. In the author's opinion, it should be assumed only a theoretical possibility to initiate *ex officio* proceedings on the deletion from the list of attorneys-at-law in a situation of a request of the party to do so. Admittedly, the provisions of administrative procedural law[17] provide for, as an exception to the rule, the possibility of initiating *ex officio* proceedings where it is necessary to be initiated by a request of the interested party, provided that a substantive settlement of the matter requires a declaration of intent of the party consenting to the proceeding, which will somehow make up for the failure to submit the request. The above thesis on the exclusively theoretical possibility of replacing a party's request, in the discussed case, with an action by a body, is related to the fact that the implementation of this body's powers was conditional on a particularly important interest of the party. This qualification gives this possibility a unique character while underlining the uniqueness of the very regulation[18]. The statutory catalogue of circumstances enabling the deletion from the list of attorneys-at-law has been categorically exhausted[19], which even more strengthens the thesis that it is difficult to develop an example of a situation in which a particularly important interest of the party would justify undertaking *ex officio* an initiative in this regard directly by the competent authority.

[17] Article 61 § 2 CAP: "A public administration authority may, due to a particularly important interest of the party, initiate proceedings also where the law requires a request from the party. The authority is obliged to obtain the consent of the party in the course of the proceedings, and to discontinue the proceedings if the consent is not granted".

[18] G. Łaszczyca, C. Martysz, A. Matan, *Kodeks postępowania administracyjnego. Komentarz*, t. 1, Warszawa 2010, pp. 509–513.

[19] Z. Klatka, *Ustawa*..., p. 263.

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As mentioned above, the membership in the professional self-government is mandatory for attorneys-at-law. However, this does not preclude a situation where the interested party may be unwilling to practice as an attorney-at-law, or finally, may be unwilling to be on the list of attorneys-at-law and to be a member of the bar association. The applicant's reasons will be of no legal significance here, since only the fact of legal effectiveness of a request for deletion from the list of attorneys-at-law will be relevant. The very willingness to lose one's membership in the self-government of attorneys-at-law does not change the legal situation. Only a resolution on the deletion from the list of attorneys-at-law will be of key importance. It should be attributed the constitutive character[20] both in the sphere of the right to practice the profession and in the sphere of membership in the self-government. A resolution on the deletion from the list of attorneys-at-law upon a request of an interested party is always adopted after hearing the administrative case, and it is this decision, not the will of the interested party, that creates a new legal situation. Such a decision has *ex nunc* effects and deprives the person concerned of the right to practice his profession. A situation where a condition for the deletion from the list of attorneys-at-law involves submitting an interested person's request to do so may not have any effect on his professional capacity before his deletion from the list of attorneys-at-law, is inadmissible. As a general rule, the body will be bound by the request of an attorney-at-law for the deletion and it is difficult to attribute to such a decision any discretionary power under administrative discretion. The only exception to this will be a situation when the attorney-at-law is subject to disciplinary proceedings. It is then possible to refuse deletion from the list of attorneys-at-law before the end of such proceeding despite the request of the attorney-at-law to do so (Article 30 (1) of the Act). This regulation is to prevent evasion of a disciplinary penalty due the fact that a person deleted from the list of attorneys-at-law ceases to be subject to disciplinary liability. In such a situation, the request of the interested party will not be binding on the body, and the decision taken in this respect should be based on its discretion[21].

LIMITATION OF THE CAPACITY TO PERFORM ACTS IN LAW

Deletion from the list of attorneys-at-law due to at least partial limitation of the capacity to perform acts in law is of a slightly different nature. Of course, this provision is about limiting the capacity to perform acts in law vested in the attorney-at-law concerned. This provision is related to the statutory conditions for being registered on the list of attorneys-at-law. One of them is having full capacity to perform acts in law (Article 24 (1) (4) of the Act). This condition applies to all those applying for

[20] See *ibidem*, p. 264.
[21] Z. Klatka, *Ustawa*..., p. 271.

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registration on the list of attorneys-at-law, also to those who are not required by the Act to pass the attorney-at-law examination and undergo the attorney-at-law training, as well as to those for whom only a successful attorney-at-law examination is a necessary condition for registration. Full capacity to perform acts in the law shall be acquired upon reaching the age of majority[22]. Minors over the age of thirteen and partially incapacitated persons have limited capacity to perform acts in law (Article 15 CC). People under the age of thirteen and those fully incapacitated shall have no capacity to perform acts in law (Article 12 CC). A person registered on the list of attorneys-at-law will always have full capacity to perform acts in law, so the fulfilment of this condition should be considered only in the light of a later partial or full incapacitation. Of course, the loss of capacity to perform acts in law also occurs in the case of death, while death itself, as already mentioned, constitutes a separate ground for the deletion from the list of attorneys-at-law.

The regulations provide for full incapacitation where, as a result of mental illness, mental disability or other types of psychiatric disorders, in particular alcohol abuse or drug addiction, the person concerned is not able to control his or her conduct (Article 13 § 1 CC). Partial incapacitation is possible due to mental illness, mental disability or other types of psychiatric disorders, in particular alcohol abuse or drug addiction, if the health condition of the person concerned does not justify incapacitation but he or she needs assistance for running his or her affairs (Article 16 § 1 CC). Both types of incapacitation are decided upon by the court, which assesses the existing conditions for them. Depending on the nature of incapacitation, the court would decide to appoint a guardian or a custodian.

The ground for the deletion from the list of attorneys-at-law based on the capacity to perform acts in law appears to be fully reasonable. It is difficult to imagine a situation in which a person who is unable to take care of his or her own affairs, regardless of the specific reason, would be involved in the professional conduct of third party affairs requiring commitment necessary for the exercise of the profession of public confidence. Interestingly, the legislature decided in this case to introduce a slightly different regulation than that in civil law, where the limitation of the representative's capacity to perform acts in law does not affect the validity of an action performed by the representative on behalf of the principal (Article 100 CC) and does not cause the need to "eliminate" such representative. An attorney-at-law, as a professional representative, must meet higher standards to ensure high quality of legal assistance and certainty of transactions, especially in the context of the potentially significant importance of the matters entrusted to him or her. Even a partial limitation of capacity to perform acts in law will already constitute a basis for the deletion from the list of attorneys-at-law and thus the elimination of the attorney-at-law from the group of

[22] Article 11 of the Act of 23 April 1964 – Civil Code (consolidated text Journal of Laws 2018, item 1025 as amended), hereinafter: CC.

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professional representatives. However, this does not change the fact that, until the actual deletion from the list of attorneys-at-law, the above-mentioned regulation under the Civil Code will remain in force and an attorney-at-law with limited capacity to perform acts in law will theoretically be able to perform effective acts in law as a representative. However, such action should be ruled out in respect of an attorney-at-law who has been fully deprived of capacity to perform acts in law (*per analogiam*).

The proceedings concerning the deletion from the list of attorneys-at-law, relating to even a partial limitation of the attorney's capacity to perform acts in law, shall be initiated *ex officio*. In a case under this ground, there is no room for the body's free discretion. In the author's opinion, the request for deletion submitted by an attorney-at-law who no longer has the capacity to perform acts in law should not be the basis for the proceedings, but it should constitute a prerequisite to take proceedings in this matter *ex officio* to examine all circumstances of the case. The request would be effective when submitted by an attorney-at-law with at least limited capacity to perform acts in law, and the circumstances of the case indicate that the applicant is sufficiently aware, or when the request has been submitted or approved by the guardian or custodian. In the author's opinion, in the case of such a request, however, we will deal in fact with the deletion upon request, because the strict implementation of the ground for the deletion from the list of attorneys-at-law as a result of even a partial limitation of legal capacity will be the prerogative of the Bar Council as a consequence of becoming aware of relevant facts in this scope. A resolution on the deletion from the list of attorneys-at-law due to at least partial limitation of capacity to perform acts in law should be attributed the constitutive effect[23] as regards membership in the professional self-government. This resolution will remove from the list of attorneys-at-law based on the grounds that had already occurred previously, but only its content would create a new legal situation. As a consequence, it should be assumed that the day when the decision on total or partial incapacitation becomes final will not determine the date of termination of the membership in the professional self-government. This cannot be changed, in the author's opinion, by the fact that on that date a statutory criterion for registration on the list of attorneys-at-law, namely full capacity to perform acts in law, becomes not applicable.

The effect of a resolution on the deletion from the list of attorneys-at-law on the grounds of at least partial limitation of capacity to perform acts in law in the sphere of the right to practice the profession depends, in the author's opinion, on whether the loss of this capacity is full or partial. After all, there are no grounds to assume, as mentioned above, that the previously discussed civil-law construct of the effectiveness of acts of a representative deprived of full capacity to perform acts in law

[23] A contrary view in: Z. Klatka, *Ustawa…*, p. 264. However, the author does not distinguish how the result of the deletion based on the ground of even a partial limitation of capacity to perform acts in law affects the sphere of membership in the self-government and the right to practice the profession.

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cannot be applied to acts taken by a partially incapacitated person under until he or she is removed from the list of attorneys-at-law. Thus, a resolution on the deletion of an attorney-at-law with limited capacity to perform acts in law from the list of attorneys-at-law would have a constitutive effect in the sphere of the right to practice the profession. It should, therefore, be stated that a final decision resulting in a limitation of capacity to perform acts in law will not affect the sphere of the right to practice the profession of attorney-at-law. This right will be waived only when the attorney-at-law is deleted from the list of attorneys-at-law, therefore in both separate spheres the resolution on the deletion will have a constitutive character. In the author's opinion, the situation will be different if the attorney-at-law is completely deprived of the capacity to perform acts in law. Given the fact that the civil-law structure of the power of attorney does not provide for effective action by a representative who is completely incapacitated to perform acts in law, the resolution on the deletion of an attorney-at-law from the list due to the total loss of capacity to perform acts in law will be declaratory in nature in the sphere of the right to practice the profession.

However, it is obvious that there may be a situation where a lot of time elapses between the actual loss of the capability of the attorney-at-law to practice the profession and his or her incapacitation. In such a situation the attorney-at-law will still be a fully-fledged member of the bar association, having the right to practice the profession. It cannot be ruled out that the formal incapacitation will not take place for a long time or never happens at all, because the closest relatives will not be interested in such a form of decision. The President of the Bar Council should then immediately appoint a deputy for such an attorney-at-law based on the statutory provisions[24] supplemented by the provisions of § 25 of the Regulations governing the practice of the profession of attorney-at-law[25].

LOSS OF PUBLIC RIGHTS UNDER A COURT JUDGEMENT

Likewise, as in the case of loss of full capacity to perform acts in law, the failure to meet one of the conditions of entry into the list of attorneys-at-law, namely the fullness of public rights, constitutes a basis for the deletion from the list of attorneys-at-law. The denial of public rights is a penal measure provided

[24] Article 21 (2) of the Act: "Where necessary, the president of the Regional Bar Council shall appoint *ex officio* a deputy attorney-at-law for an attorney-at-law who has been removed from the list of attorneys-at-law or is temporarily unable to perform professional activities. The president's decision authorises the appointed attorney-at-law to run the undertaken cases and is tantamount to granting further power of attorney to represent in court proceedings".

[25] Resolution No. 94/IX/2015 of the National Bar Council of 13 June 2015 on the Regulations for the practice of the profession of attorney-at-law, http://bibliotekakirp.pl/items/show/426 [access: 2.11.2018].

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for by the Penal Code[26] and the Penal Fiscal Code[27]. Deprivation of public rights includes the loss of the rights of suffrage and to stand for election as a member of a public authority, a body of local government or economic self-government, a loss of the right to participate in the administration of justice and a function in State bodies and institutions and local government or professional self-government, as well as loss of one' military rank and degradation to the rank of a private. The deprivation of public rights also includes the loss of distinctions, decorations and honorary titles and the loss of one's capacity to be awarded them during the period of deprivation of rights (Article 40 § 1 PC in conjunction with Article 20 § 2 PFC). The court may rule on the deprivation of public rights in the event of conviction to imprisonment for a period of not less than three years for an offence committed as a result of a motivation worthy of special condemnation under the Penal Code (Article 40 § 2 PC), and when imposing an aggravated punishment and in the event of conviction to imprisonment for a period not shorter than three years on the ground of the Penal Fiscal Code. Under the first of those statutes deprivation of public rights, unless specifically provided otherwise, is to be sentenced in years, for a period of one year to ten years (Article 43 § 1 PC), while in the case of fiscal criminal offences it is also to be imposed in years, but for the period of one year to five years (Article 34 § 4 PFC).

The legislature expressly provided for the loss of the rights of suffrage and to stand for elections to a professional self-government body and the loss of the right to exercise a function in professional self-government bodies as a consequence of the loss of public rights. Consequently, with regard to the mere status of attorney-at-law, consisting of the membership in the professional self-government and the right to practice, it is mandatory to take a resolution on the deletion from the list of attorneys-at-law. Although the condition of having full public rights is not met, the resolution on deleting from the list of attorneys-at-law due to the loss of these rights has a constitutive effect[28]. Once the criminal judgement, the content of which includes a criminal measure in the form of deprivation of public rights of a person registered on the list of attorneys-at-law becomes final, we will only deal with the effects directly arising from Penal Code and Penal Fiscal Code. However, the entry into the list of attorneys-at-law and the right to practice will remain, in the author's assessment, until the administrative decision on the deletion of the list of attorneys-at-law is taken, which simultaneously deprives him or her the right to practice the profession. The assumption of the declaratory nature of the resolution

[26] Act of 6 June 1997 – Penal Code (consolidated text Journal of Laws 2018, item 1600 as amended), hereinafter: PC.

[27] Act of 14 June 1999 – Penal Fiscal Code (consolidated text Journal of Laws 2018, item 1958), hereinafter: PFC.

[28] A contrary view: Z. Klatka, *Ustawa*..., p. 264.

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on the deletion from the list of attorneys-at-law as a result of deprivation of public rights would raise questions about the reasonableness of simultaneous depriving of voting rights and rights to perform functions in the professional self-government by the penal statute. At the same time, the time limit of 30 days for taking this resolution by the Bar Council would be irrelevant, as it would only have to implement the criminal court's judgement in the sphere of the already non-existent status of attorney-at-law.

FAILURE TO PAY MEMBERSHIP FEES FOR MORE THAN ONE YEAR

The condition of non-payment of membership fees for a period of more than one year constitutes another ground for the deletion from the list of attorneys-at-law. This condition is related to the fact that membership fees are one of the sources for financing the activities of professional self-government (Article 63 (1) of the A). The National Bar of Attorneys-at-Law, despite the fact that, apart from its own activities, it has a huge spectrum of activities delegated by the State, it is not subsidized from the state budget. Therefore, it can be concluded that this provision, as a warning to attorneys-at-law, is to guarantee the continuous and efficient operation of bodies of the self-government of attorneys-at-law. Currently, the rules of paying membership fees are regulated by an appropriate resolution[29]. Despite the discrepancies that may appear as a result of case law analysis, this obligation, in the author's opinion, is certainly of a civil-law nature[30], which does not change the fact that failure to comply with it may cause consequences in the administrative and legal spheres.

The provision on the deletion from the list of attorneys-at-law due to non-payment of membership fees for a period longer than one year should be considered a norm obliging the Regional Bar Council of attorneys-at-law to deletion from the list of attorneys-at-law when the period of 12 months of arrears in due membership fees expires. The fact that the body waits for more than 12 months for the debtor to pay does not constitute inactivity *contra legem* as long as it falls within the statutory time limits of the aforementioned 30 days for the adoption of a decision by the Council.

[29] Resolution No. 7/VIII/2010 of the National Bar Council of 10 December 2010 on the amount of membership fee and insurance contribution, rules of their payment and distribution and special purpose funds of the National Bar Council (consolidated text resolution No. 125/IX/2017 of the Board of the National Bar Councilof Attorneys-at-Law of 20 July 2016 on the announcement of the consolidated text of the resolution on the amount of membership fee and insurance contribution, rules of their payment and distribution, http://bibliotekakirp.pl/items/show/586 [access: 2.11.2018]).

[30] As proposed by Z. Klatka, *Ustawa*..., p. 266.

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A decision on the deletion due to 12-month arrears in membership contributions will always be of a constitutive nature[31], both as regards the existence of the very entry as a condition for membership of a self-government and as regards the right to practice the profession. Ultimately, it is the Council that will undoubtedly control the date of initiation of actions aimed at deleting an attorney-at-law from the list of attorneys-at-law based on this ground. Thus, the legislature allows for the possibility of practicing the profession by a legal attorney-at-law who does not meet his fiscal obligations towards the professional self-government, but after exceeding the statutory limit, the right of the Council to deprive such a person of membership in the community of attorneys-at-law is exercised. It should be noted that, in view of the civil-law nature of these amounts due, the deletion from the list of attorneys-at-law does not deprive self-government bodies of the possibility of claiming overdue payments for the period up to the date of termination of membership in the professional self-government by way of civil proceedings[32].

DEATH OF AN ATTORNEY-AT-LAW

Full capacity to perform acts in law shall cease not only as a result of a judicial decision restricting that capacity or depriving it but also as a result of death. This aspect was signaled when discussing the condition of loss of full capacity to perform acts in law as a condition for deletion from the list of attorneys-at-law since death was listed by the legislature as a separate reason for deletion from the list of attorneys-at-law. In view of the fact that upon the attorney-at-law's deletion from the list as a result of his death, the deceased cannot be the subject of rights and obligations, the resolution on that matter must be considered declaratory[33]. It would be difficult to defend the idea that the right to practice until the time of deletion from the list of attorneys-at-law is held by a deceased person. The same applies to membership of the professional self-government of attorneys-at-law. The resolution will, therefore, be effective *ex tunc* and will be taken in the context of constrained administrative decisions.

However, certain doubts may concern the declaratory nature of the resolution when considered together with the fact that, until the moment of its adoption, the resolution on the list of attorneys-at-law is applied in practice and the very entry

[31] See *ibidem*, p. 264.

[32] Both the claiming of membership fees and the deletion from the list of attorneys-at-law due to failure to pay them may entail interesting practical issues as a consequence of the manner of regulation of the membership fee in the internal rules of the self-government, but these issues are not covered by this analysis and will be subject to separate deliberation.

[33] As proposed by Z. Klatka, *Ustawa*..., p. 264.

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into the list is the consequence of the resolution. The death of an attorney-at-law eliminates the subject of the legal status, but the name of the deceased is physically still on the list of attorneys-at-law. In view of this condition, it is clear that an entry into the list of attorneys-at-law, while regarded in the present deliberations as an element of the status of attorney-at-law related to the membership in the self-government, in itself also has its own technical dimension reflecting the resolution on registration on the list of attorneys-at-law. As with all the conditions discussed so far, the author links the effect of the resolution on the deletion from the list of attorneys-at-law primarily with the entry as an element of the status of attorney-at-law, in the same way as regarding the condition related to death, the declaratory effect of the deletion resolution should also be referred to an entry as an element of this status, and not to an entry as the name physically put on the list. This justifies attributing a declaratory nature to the resolution on the deletion, as there is no subject of rights related to the status of an attorney-at-law. It is not a resolution on the deletion, but the moment of death of an attorney-at-law creates a new legal situation involving termination of the membership of the professional self-government and, therefore, the right to practice. Other conclusions would lead to the assertion that a deceased person may still practice as an attorney-at-law, or at least be a member of the professional self-government of attorneys-at-law.

DISCIPLINARY RULING OF COURT JUDGEMENT ON THE DEPRIVATION OF THE RIGHT TO PRACTICE THE PROFESSION OF ATTORNEY-AT-LAW

The terminology of the Act does not seem to be fully precise. While in the case of a disciplinary ruling it can indeed deprive of the right to practice as a legal attorney-at-law, in the case of a court judgement the legislature probably not so much intended to deprive of rights but rather to impose a ban on a particular profession and the present ground should be related to that prohibition[34]. This is especially true since

[34] The Supreme Administrative Court in its judgement of 26 April 2006 (II GSK 56/06, LEX No. 209709), ruled otherwise, stating that the decision of the criminal court in the judgement on the measure prohibiting the practice of the profession for a specified period of time cannot be regarded as tantamount to a court decision in a judgement prohibiting the practice of the profession of attorney-at-law without a time limit. In the opinion of the Supreme Administrative Court, a decision by a criminal court prohibiting the practice of the profession of attorney-at-law for a specified period of time should result in the initiation of disciplinary proceedings. Z. Klatka (*op. cit.*), in the commentary referred to herein above, refers the penal measure consisting in the ban on the practice of a profession to the ground for deletion connected with a court judgement on deprivation of the right to practice the profession of attorney-at-law, and this reasoning is adopted by the author hereof. This study will not cover a polemic with the arguments of the Supreme Administrative Court.

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the criminal law in this respect duplicates its conceptual network from the period of entry into force of the provisions setting out the conditions for deletion from the list of attorneys-at-law, hence the thesis that the literal wording of the act is out of date due to numerous amendments to penal laws is unreasonable. Banning the practice of a particular profession is a punitive measure (Article 39 (2) PC and Article 2 (2) (5) PFC). It is to be sentenced for one to fifteen years under the Penal Code (Article 43 § 1 PC) and from one to five years under the Penal Fiscal Code (Article 34 § 4 PFC). A court may order such a prohibition if the perpetrator has abused the profession when committing a criminal offence, or proved that further pursuit of the profession puts at risk important interests protected by law (Article 41 § 1 PC in conjunction with Article 20 § 2 PFC). These norms refer generally to the prohibition of performing an unspecified profession, while in a specific case they may be referred to, among others, the profession of attorney-at-law. Deprivation of the right to practice directly related to the profession of attorney-at-law is also one of the disciplinary sanctions that may be imposed on attorneys-at-law (Article 65 (1) (5) of the Act). The penalty of deprivation of the right to practice the profession of attorney-at-law entails deleting from the list of attorneys-at-law without the right to apply for re-enrolment for a period of ten years from the day the deprivation of the right to practice the profession of attorney-at-law became final (Article 65 (2c) of the Act). This is the most severe punishment that can be imposed by a disciplinary court against attorneys-at-law and is implemented at the most severe disciplinary offences.

The ruling of the disciplinary court and court judgement on deprivation of the right to practice as a legal attorney-at-law, despite constituting separate grounds for a deletion from the list of attorneys-at-law, have been included in one legal norm and additionally under one paragraph, with the conjunction "or" between them. In practice, this may give rise to doubts concerning the application and implementation of the above-mentioned grounds. Namely, under the currently applicable legislation, for the deletion from the list of attorneys-at-law as a result of a disciplinary ruling, differently from the deletion related to all the previously discussed grounds, we will not deal with any jurisdiction of the Bar Council of attorneys-at-law. The Bar Council will not create a new legal situation here, nor will it state an emergence of a new legal situation that had arisen before a specific ground occurred. The waiver of the mentioned power of the Bar Council is related to the amendment to the Act, which entered into force on 25 December 2014[35] and with its scope aimed at improving disciplinary proceedings conducted also within the professional self-government of attorneys-at-law. The key date for this condition of deletion will be the date the relevant disciplinary ruling became effective. Even before the above-mentioned amendment providing for the execution of the disciplinary penalty in question, the

[35] Act of 7 November 2014 on the amendment of the Act – Law on the Bar and Certain Other Acts (Journal of Laws 2014, item 1778).

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Supreme Administrative Court concluded that the status of a legal attorney-at-law entails the right to practice as a legal attorney-at-law and not its actual exercise. This status is not lost upon the deletion of an attorney-at-law from the list, but in the case of a decision of a disciplinary court declaring the loss of the right to exercise the profession, once it becomes final. In such a situation, the deletion from the list of attorneys-at-law is therefore only of a formal nature[36]. In the author's opinion, under the legislation previously in force, such statement was certainly accurate in relation to the sphere of the right to practice and in this respect it remains valid despite the aforementioned change in regulations.

From 25 December 2014, the President of a Regional Bar Association became responsible for the execution of disciplinary sanctions, and thus for the removal from the list of attorneys-at-law as a result of a disciplinary ruling depriving them of the right to practice the profession of attorney-at-law (Article 71 (2) of the Act). The purposefulness of such a solution was substantiated in the grounds for the Senate's draft bill amending the Act – the Law on Advocates and the Act on Attorneys-at-Law. In the aforementioned grounds for the draft, it was noted that this would eliminate the problem of challenging resolutions on the deletion on the administrative and judicial administrative path by persons punished by a final decision of a disciplinary court. In practice, this will significantly speed up the execution of the most severe disciplinary penalties[37]. This argument, taking into account the quoted decision of the Supreme Administrative Court, may be disputable, since even the lack of quick removal from the list of attorneys-at-law did not affect the possibility of practicing the profession of attorney-at-law if there was issued a final decision of the disciplinary court depriving of such a right. Certainly, however, the shape of these amended provisions must be assessed positively in the context of elimination of the possibility of conducting unproductive disputes, in which a resolution of the council would be challenged first on the administrative and then on the judicial administrative path, although its binding nature in relation to the previously imposed disciplinary penalty did not allow for other settlement of the matter. The removal from the list of attorneys-at-law, in this case, boiled down to a material and technical activity to which the President of the Regional Bar Association remains authorised and obliged. An act performed by the President will always be declaratory in the sphere of the right to practice the profession of attorney-at-law and constitutive in the sphere of the existence of an entry on the list of attorneys-at-law. In this particular case, the legislature gave up explicit granting the administrative nature to the deletion from the list of attorneys-at-law. For this reason, the deletion of an attorney-at-law in such conditions will not be subject

[36] Decision of the Supreme Administrative Court of 8 June 2011, II GSK 515/10, LEX No. 864308.

[37] Sejm Papers No. 2415 of 25 April 2015, http://orka.sejm.gov.pl/Druki7ka.nsf/0/9F8BA4D-8CEE1744EC1257CE6002F27B7/%24File/2415.pdf [access: 2.11.2018], p. 5 of the substantiation.

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to the Code of Administrative Procedure, but also to the Regulations in the scope providing for notification of the date and place of the meeting of the Council, hence also in the scope of the possibility to take part in the meeting.

The proposed substantiation for the draft act relates only to the decision of a disciplinary court. As stated before, a ruling of the disciplinary court and court judgement on deprivation of the right to practice as a legal attorney-at-law, despite constituting separate grounds for deletion from the list of attorneys-at-law, have been included in one legal norm in one paragraph. Due to the modification of the Article 29^1 of the Act, the amendment resulted in that the provision on the requirement to take a resolution on deletion within 30 days of becoming aware of the existence of a relevant condition, does not currently refer to the condition related to a disciplinary ruling (due to the prerogative of the President of the Bar Association), but also to the condition related to a judgement of a general court, imposing a penal measure in the form of deprivation of the right to practice the profession. At the same time, the provision providing for the previously discussed technical activity of the President relates only to the disciplinary decision. This raises the question of the jurisdiction in terms of deletion from the list of attorneys-at-law in a situation where it is based on a general court's judgement prohibiting the practice of the profession of attorney-at-law. In the author's assessment, even a careful analysis of wording of the statute and the changes in its content, may result in the conclusion that the power to delete from the list of attorneys-at-law due to a penal measure applied is not explicitly provided for in the statute and should be inferred from the generality of all statutory regulations. It can, therefore, be inferred that, apart from the condition based on the penal measure applied in Article 29^1 of the Act, the legislature intended only not to set the instructive time limit of 30 days for the Council to make a resolution or to completely exclude the powers of the Council. In view of the adopted way of deleting from the list as a result of a disciplinary ruling, a second solution could be rather chosen, in particular taking into account the effect of a criminal court's judgement, "comparable" to that of a disciplinary decision. However, given the general power of the Bar Council to make deletions from the list of attorneys-at-law and the lack of grounds for inferring the extension of the prerogative of the President, it is the Council which has the power to make a deletion from the list of attorneys-at-law following a prior judgement of a common court. A resolution on deletion from the list of attorneys-at-law taken due to the penal measure applied must be considered, in the author's assessment, declaratory in the sphere of the right to pursue the profession of attorney-at-law, and constitutive in the sphere of the existing entry into the list of attorneys-at-law[38].

[38] See Z. Klatka, *Ustawa*..., p. 264. When pointing to the declaratory effect, the author does not distinguish the effect of the deletion on the basis of that condition on the sphere of membership in the self-government and the right to practice.

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The penal measure applied will thus prevent practicing the profession, but in itself does not affect the membership of the self-government.

The legislature has not decided to deprive attorneys-at-law of the right to practice the profession in the event of non-compliance with the conditions necessary for the registration on the list of attorneys-at-law, and associated with the requirement of flawless character and ensuring due practice of the profession of attorney-at-law by their conduct. Circumstances which allow finding objectively the absence of these qualities in an attorney-at-law, will not automatically and directly result in a deletion from the list of attorneys-at-law, even though these qualities are required and assessed upon the entry on the list of attorneys-at-law (Article 24 (1) (5) of the Act). The cessation of compliance with these statutory requirements may lead, although not necessarily, to the deletion from the list of attorneys-at-law, except that only as a result of disciplinary or criminal proceedings. Therefore, it may be associated with the condition for deletion from the list of attorneys-at-law in the case of a disciplinary ruling or a court judgement resulting in the deprivation of the right to practice the profession of attorney-at-law, except that these proceedings will assess the very deed committed, not the fact of meeting these conditions.

AN ACT COMMITTED BEFORE AN ENTRY IN THE LIST

As previously mentioned, the legislature provided for a special regulation for the above discussed conditions, allowing a Regional Bar Association to delete a legal attorney-at-law from the list of attorneys-at-law due to an act committed prior to the registration, if the council was not aware of the act at the time of registration and the act would be an obstacle to the registration. This condition must be considered special due to, for example, the very location thereof in the structure of the Act. Attorneys-at-law may be deleted from the list based on this condition, when the Bar Council reaches the conclusion that the fulfilment of this condition was incorrect due to the fact of holding, during the registration procedure, only scarce information that can be used to assess the integrity and the guarantee of due conduct as a legal attorney-at-law by the interested applicant. As regards the underlying event, there is no possibility of instituting disciplinary proceedings, as this is an event that occurred before the entry on the list of attorneys-at-law, i.e. before the period of being subject to disciplinary liability. The discussed solution should be considered necessary and important as it protects the self-government of a legal profession of public confidence against the inability to respond properly and eliminate from its community a person who was registered on the list of attorneys-at-law only because the Bar Council failed to obtain information that is relevant for the registration procedure.

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In contrast to the other grounds for deletion listed in the legislation as situations in which a legal attorney-at-law is simply deleted, in the case of an act committed before the registration, the statute uses the word "may". However, it is difficult to imagine a situation where the Council refrains for any reason from deleting a person who should have never been registered on the list. It seems, however, that a decision made in such circumstances is taken within the Council's discretion margin and is of a discretionary nature. In the author's opinion, it should be attributed the effect of a constitutive nature. Despite the fact that the deletion is intended to concern a person who should not have been registered on the list of attorneys-at-law at all, there are no grounds for any other conclusion. Attributing the declarative effect to a resolution on the deletion from the list of attorneys-at-law due to an act committed prior to the entry could lead to a situation in which, for example, it would *de facto* be found that certain procedural acts were taken by a duly authorised person who at that moment could not be a legal representative. Also due to this circumstance, the *ratio legis* of the discussed condition speaks in favour of attributing a constitutive effect to a decision based on this condition, both in the sphere of membership in the self-government and in the sphere of the right to practice the profession.

CONCLUSIONS

The foregoing discussion points out that, according to the author's proposal, the institution of deletion from the list of attorneys-at-law allows the adoption of a dualistic concept of the status of legal attorney-at-law, which manifests itself in the existence of two fundamental spheres of this status, correlated with the emergence of the grounds for deletion from the list of attorneys-at-law. These conditions will finally affect both the sphere of membership in the professional self-government and the related registration on the list of attorneys-at-law and the sphere of the right to practice the profession, but the effect of the emergence of these two conditions on the two spheres would differ. Likewise, the effect of the fulfilment of these conditions following the deletion of an attorney-at-law from the list of attorneys-at-law may be different for each of these spheres. Based on the foregoing considerations, it must be stated that, where a resolution on the deletion from the list of attorneys-at-law has been attributed a constitutive effect in a particular sphere, the mere fact of fulfilment of a condition for the deletion does not in any way affect that sphere of the status as an attorney-at-law. Hence, it is possible that the existence of certain conditions for the deletion may produce effects in a particular sphere even before the deletion itself. If the right to practice the profession does not terminate earlier, the deletion from the list of attorneys-at-law will always include deprivation of the right to practice. This is so since a person who has been deleted from the list of attorneys-at-law has no right to practice the profession of attorney-at-law.

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To conclude, it must be held that when referring to the deletion from the list of attorneys-at-law following the emergence of statutory conditions, the nature of that effect must be referred separately to the sphere of membership in the self-government of attorneys-at-law and separately to the sphere of the right to practice the profession.

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STRESZCZENIE

Artykuł zawiera analizę dotyczącą przesłanek skreślenia z listy radców prawnych. W ramach statusu radcy prawnego autor wyróżnił dwie sfery: 1) prawo do wykonywania zawodu radcy prawnego oraz 2) przynależność do samorządu zawodowego radców prawnych. Poszczególne przesłanki zostały ocenione pod kątem wpływu ich zaistnienia na obie sfery. W opracowaniu określono skutek, jaki wywołują uchwały w przedmiocie skreślenia z listy radców prawnych, podejmowane w następstwie zaistnienia ustawowych przesłanek skreślenia w każdej z wyodrębnionych sfer.

Słowa kluczowe: radca prawny; skreślenie z listy radców prawnych; przesłanki skreślenia z listy radców prawnych; ustanie prawa do wykonywania zawodu radcy prawnego; ustanie przynależności do samorządu radców prawnych