

GERMANY

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1. DEFINITION – PRESENTATION

What attorney-client privilege is and what it is not.

1.1 Attorney-client privilege or professional secrecy obligation

1.1.1 Generally, the term attorney-client privilege stipulates an exception to the rule that certain documents are subject to a discovery or disclosure proceeding. Under German law, an answer to the question if there is an attorney-client privilege must differentiate between civil litigation, governmental investigations, and criminal defense representation. This article is limited to giving advice under German national law; it does not cover the representation under EU law.

1.1.2 In civil litigation in Germany, there is generally no discovery or disclosure proceeding, neither pre-trial nor during the trial. Generally, no party is obliged to give the other side access to any document or other communication, including e-mails, memos or letters. This is true for the communications between two business men or engineers as well as the communication between an (in-house or outside) attorney and a client. Therefore, there is no need to stipulate an exception in form of an attorney-client privilege. However, there is a limited exception: on the application of a party and with the order of the court a party may be obliged to file a specific deed or document with the court if only such party has access to it (see no. 2.1.3 below).

To protect the confidentiality of the communication between an attorney at law who is a member of the German bar and a client on matters based on German law, § 43 a (2) of the Federal Lawyers' Act stipulates the duty of an attorney to keep confidential any information he/she obtains "in exercise of his/her profession". This includes all private, tax, operational, occupational, political or commercial matters the attorney learns in relation to the retained matter, be it in written, electronic, or verbal

form and irrespective of whether the information was obtained from the client or from a third party. Only information obtained by the attorney on a strictly private basis or in the context of an additional occupational activity different from his legal practice such as guardian, custodian, trustee or member of a supervisory board is not subject to this professional confidentiality obligation.

The attorney's confidentiality obligation corresponds with a right to protect confidential information from disclosure; therefore, the attorney has a right to refuse to give testimony. However, the attorney must invoke this privilege; it need not be observed ex officio.

This confidentiality obligation also includes any information obtained in a first contact when the German attorney is approached by a client on a matter governed by foreign law up to the point where the German attorney has to inform the client that he is not licensed to give advice under such foreign law.

1.1.3 Also in a Government investigation, an attorney at law is under his/her professional confidentiality obligation. However, this confidentiality obligation of the attorney does not extend to documents which are in the client's possession or custody. Therefore, generally any communication sent by the out-side attorney at law to a client is not protected or privileged. The only exception to this rule is communications between a defense attorney and a client charged with a crime or offence (see 2.1.4 below).

Experienced attorneys will ask their clients, if they really want to have a written answer to their questions if the answer could indicate that not everything is fully legal. In such a case, the attorney would give his answer and advice orally and/or write an attorney work product and have the party read it in his/her office. Alternatively, the attorney would recommend destroying the letter after it was read. Therefore, the Governmental authorities would not easily learn of the concern of the officers or directors and would not have proof of potentially willful misconduct. Additionally, there is no legal obligation for a person under investigation to answer all questions completely and honestly; in Germany, a charged or accused person cannot commit perjury.

1.1.4 If an attorney is hired to defend a person under investigation or in criminal trial, all communication and all correspondence between the attorney at law defending such person and such person is protected under an attorney – client privilege in accordance with § 148 German Code of Criminal Procedure.

2. SOURCES

From which sources is the legal privilege derived?

2.1 Relevant statutes

2.1.1 § 43a (2) of the German Federal Lawyers' Act

As mentioned above, this rule defines an attorney's obligation to keep confidential any information obtained "in exercise of his/her profession".

2.1.2 § 383 (1) no. 6 of the Code of Civil Procedure § 53 (1) nos. 2, 3 of the Code of Criminal Procedure § 46 of the Regulatory Offences Act

As there is no general duty to disclose information under German law, an important aspect of the attorney-client privilege is the attorney's right to refuse testimony in civil, criminal and regulatory offence matters under the above rules with regard to any information he has obtained "in exercise of his/her profession" or to release any document he/she has received from the client.

2.1.3 § 142 (2) of the Code of Civil Procedure

In the exceptional case that a party does have a right under German law to request disclosure of a - clearly identified and relevant – deed or a document to which one of the parties has referred to in a civil litigation, an attorney is entitled to refuse production of such a document under this rule as far as he would be entitled to refuse testimony (see 2.1.2 above) with regard to information contained in this document. This means that all documents in the possession of the attorney which are subject to his/her confidentiality obligation are protected from discovery or disclosure under the above-mentioned rule. However, the party is obliged to present such deed or document if it is ordered by the relevant court hearing the case.

2.1.4 § 97 of the Code of Criminal Procedure § 148 of the Code of Criminal Procedure

In criminal and regulatory offence matters (including antitrust matters) law enforcement authorities are generally entitled, after having received a court order, to search and seize residences and offices for evidence. There is one exception: in order to prevent circumvention of the attorney's right to refuse testimony about information which falls under the confidentiality obligation, all documents relating to such information are also protected from seizure, if they are in the attorney's custody (§ 97 of the Code of Criminal Procedure). To the extent that documents are

protected from seizure, any search of the attorney's offices for such documents is prohibited, too.

If the documents are, however, not in the attorney's, but in the client's custody, they are not privileged from search and seizure. Thus, the client's residence and offices can be searched and all documents, including letters from the attorney at law, can be seized there. The only exception to this rule is communications between a client charged with a crime or offence and his defense attorney relating to such defense. Such defense documents are also privileged from search and seizure when they are in the client's custody to assure the right to an effective defense (§ 148 of the Code of Criminal Procedure).

2.1.5 § 100c (6) of the Code of Criminal Procedure

According to § 100c (6) of the Code of Criminal Procedure, attorneys are also protected from eavesdropping by law enforcement authorities, unless the attorney himself is suspected to be a participator in a crime. If the eavesdropping authority only becomes aware of the privilege during or after the wiretapping, all records must be erased immediately and may not be used as evidence in any court proceedings.

2.2 Relevant Case Law

None

3. SCOPE/LIMITS

3.1 General observations

Can the attorney-client privilege be waived? If yes, how?

Is the privilege limited? Which documents/information are involved?

It is the duty of the attorney to assert the professional confidentiality obligation privilege by invoking his right not to testify, not to disclose privileged documents or to object to seizure of privileged documents. If the attorney does not invoke these rights (and obligations towards his/her client), the privilege is waived and the disclosed information will be available as evidence to the courts or the opposing party. As this would constitute a breach of the confidentiality obligation, the attorney may then be liable for damages to his/her client. The attorney may also be subject to criminal prosecution under § 203 of the Criminal Code.

The client is free to waive his/her attorney's confidentiality obligation (partially or totally, expressly or even impliedly). Both the attorney and the client should consider carefully whether or not a certain action constitutes an implied waiver of the confidentiality obligation.

An implied waiver could, for example, be assumed in cases in which the client asks the attorney to disclose confidential information to a third party such as party appointed experts. Likewise, correspondence by e-mail can lead to an - at least partially - implied waiver of the confidentiality obligation. An attorney who sends to a client confidential information by e-mail may be jeopardizing his/her confidentiality obligation since e-mail correspondence, unless encrypted, may always be read by unauthorized third parties. If, however, the client responds in the same way, he/she impliedly waives the confidentiality obligation, because it is commonly known that e-mail communications are insecure.

There are three limitations to the privilege:

(1) If the attorney receives information "in exercise of his/her profession" with regard to certain felonies such as murder, manslaughter, kidnapping, robbery or counterfeiting, he/she is obliged (and entitled) under § 138 of the Criminal Code to notify the law enforcement authorities. The same applies under §§ 6, 11 of the Money Laundering Act, if the attorney becomes aware of money-laundering activities. These statutory obligations override the attorney's confidentiality obligation towards his/her client.

(2) If the attorney himself/herself is suspected of being a participant in a crime or if documents or items in the attorney's possession are obtained by a crime or required to commit a crime, the search for and seizure of documents or items related to such crime is admissible under § 97 (2) of the Code of Criminal Procedure irrespective of any privilege.

(3) Furthermore, the attorney is entitled to reveal privileged information in cases of legitimate self-interest, e.g. in a lawsuit against the client in which the attorney is dependent on the disclosure of privileged information to substantiate his/her claim against the client or to defend against a claim filed by the client.

3.2 Between lawyers

Is the correspondence between lawyers protected?

3.2.1 Correspondence, which is covered by the professional confidentiality obligation

Correspondence between attorneys at law who represent the same client in the same matter under German law is covered by the professional confidentiality obligation. Further, if an attorney at law is instructed by a client to ask for the legal advice of another attorney on behalf of the client, such communication between such attorneys at law is also protected.

3.2.2 Correspondence, which is not covered by the professional confidentiality obligation

However, information which is disclosed by the attorney (or the client) to parties outside the attorney-client relationship can be used as evidence in court proceedings by these parties.

3.3 Third parties

See 3.1 above

4. IN-HOUSE LAWYERS

Which regulations regarding legal privilege apply to in-house lawyers?

4.1 Not all in-house lawyers are admitted to the bar

Not every in-house lawyer is admitted as attorney at law with the German bar. Only an in-house lawyer who receives the permission by his/her employer to represent a client independently and without any instructions by the employer and to act in accordance with his/her duties under the German Federal Lawyers Act can be permitted to be an attorney at law if he/she files an application. Such in-house lawyers who is admitted as an attorney at law has to have a lawyers office which is distinctively separate from the other offices of the company (many of these in-house lawyers who are admitted as attorney at law have such office at home). In order to ensure the privilege as best as possible, it is therefore advisable to keep and store communications between in-house counsel who is admitted as an attorney at law and employees, officers or directors of the company exclusively in the custody of the attorney. The documents should be stored in such a way that only the attorneys and their staff have exclusive access to it. If the legal department is run under the supervision and control of the CFO, then one can question if the attorneys at law in the law department can act for the company in accordance with the obligations under the German Federal Lawyers Act.

Only in-house lawyers who are additionally admitted as attorney at law are obliged to observe the confidentiality obligation and have the right to refuse to give testimony (see no. 2.1 above).

4.2 In-house lawyers cannot represent their employers in court or arbitral proceedings

An in-house lawyer, who is admitted as an attorney at law, is prohibited to represent his/her employer in a litigation or arbitral proceeding (§ 46 German Federal Lawyers' Act).

4.3 Other legal activities

An in-house lawyer, who is admitted as an attorney at law, may give legal advice, draft and negotiate agreements, and perform other legal services. Communications between an in-house lawyer who is admitted as an attorney at law and employees, officers or directors of the company are protected from disclosure to the same extent as are communications between the outside attorney at law and his/her client. In any event the privilege only applies, if the communications refer to legal advice under German law as opposed to mere business advice or management or administrative tasks or foreign law if the lawyer is not admitted also under the bar rules of the respective country.

In order to ensure the privilege as best as possible, it is therefore advisable to keep and store communications between in-house counsel and employees, officers or directors of the company exclusively in the custody of the in-house counsel or the legal department. The documents must be stored in such a way that only the in-house counsel or the legal department has exclusive access to it.

Furthermore, the protection from search and seizure by law enforcement authorities (see 2.1.4. above) is only given when the documents or other communications are (exclusively) in the custody of the in-house counsel or the legal department. This will require that only the attorney at law and his/her staff will have access to such documents and communications; therefore, the documents have to be kept in cabinets or offices where other employees, officers and directors will have no access to.

As documents containing legal advice can be seized if they are in the custody of a client, they can also be seized when they are in the custody of employees (outside the legal department), officers, or directors of the company. This, however, will probably be the case most of the time as legal advice by in-house counsel is predominantly prepared for addressees outside the legal department.

Since in-house counsel are not allowed to represent their company in court (§ 46 of the Federal Lawyers' Act), the exception of § 148 of the Criminal Code for the seizure of defense documents in the custody of a client charged with a crime or offence (see 2.1.4. above) does not apply to defense communications in the custody of the company which an in-house counsel has prepared with regard to the defense of his company in a criminal or regulatory offence matter. These communications are only privileged when they come from or were sent to an outside defense attorney.

5. PROSPECTIVE

There is no activity to either increase or limit the professional confidentiality obligation of attorneys at law in Germany.