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## **The lawyer's professional confidentiality Austria**

### **1. Definition – Presentation**

What attorney / client privilege is and what is not?

Pursuant to § 9 sec. 2 of the Austrian Lawyer's Act (Rechtsanwaltsordnung) the lawyer is under the obligation of confidentiality in the interest of his client about matters entrusted to him and also facts revealed to him through his professional quality. According to law of procedure, he can execute this right to confidentiality in court and other official proceedings. The basic principle of this regulation is a client's assurance of the fact that affairs related to his lawyer will not be passed onto any third parties.

The lawyer's obligation to confidentiality includes every piece of information given to the lawyer, whether they are affairs confided to him personally or made known to him through his professional quality. This primarily applies to information related to the lawyer through the client himself. However, the obligation to confidentiality also applies to facts made known to the lawyer through third parties, for instance documents sent to the lawyer by courts or other public authorities.

As a matter of course the lawyer's obligation to confidentiality extends to private areas. The obligation to confidentiality remains among (external) colleagues even if they in turn are obliged to confidentiality.

According to various procedural regulations listed under part 2 below, a lawyer is under the obligation of confidentiality. In principle, this cannot be abolished by a court or public authority.

The obligation to confidentiality as constituted in the procedural regulations not only applies to witness statements but also to any associations with third parties (especially the media). This applies to records and evidence handed to the lawyer as well as documents drawn up by the lawyer himself.

### **2. Sources**

From which sources is the legal privilege derived?

#### **2.1. Some Relevant Statutes**

The protection of secrets and the lawyer's obligation to confidentiality are constituted in several laws.

a) § 9 sec. 2 and 3 of the Austrian Lawyer's Act (Rechtsanwaltsordnung).

As explained in part 1, the Lawyer's Act ensures a client's privilege to entrust his lawyer with information, knowing that it will not be revealed to anyone without the client's explicit approval.

§ 9 sec. 2 of the Austrian Lawyer's Act reads as follows: *The lawyer is obliged to discretion, in the interest of his client, about affairs entrusted to him and other information made known to him through his professional quality. According to law of procedure, he can execute this right to confidentiality in court and other official proceedings.* § 9 sec. 3 of the Austrian Lawyer's Act reads as follows: *A lawyer's right/obligation to confidentiality pursuant to sec. 2 cannot be abolished by any judicial or magisterial measures such as ordering the disclosure or confiscation of documents, image and data carriers or sound storage media or interrogation of the lawyer's assistants.*

§ 9 sec. 3 of the Austrian Lawyer's Act regulates the so called "ban on circumvention".

- b) § 157 sec. 1 I. 2 and sec. 2 Code of Criminal Procedure (Strafprozessordnung)  
§ 321 sec. 1 I. 3 and 4 Code of Civil Procedure (Zivilprozessordnung)  
§ 49 sec. 2 Administrative Law (Allgemeines Verwaltungsverfahrensgesetz)  
§ 24 Criminal Administrative Law (Verwaltungsstrafgesetz)  
§ 171 sec 1c and sec. 2, § 143 sec. 3 Federal Tax Code (Bundesabgabenordnung)  
§ 104 sec. 1d and sec.2, § 89 Finance Act (Financial Criminal Law / Finanzstrafgesetz)

The above named procedural laws constitute the lawyer's right to refuse testimony about any information given to him in exercise of his profession.

- c) § 305 I. 4 Code of Civil Procedure (Zivilprozessordnung)  
On the grounds of the above named regulation, the disclosure of documents can be refused under certain circumstances.
- d) § 23a Directives to Professionalism (Richtlinien zur Berufsausübung)  
Under regulation of the Code of Criminal Procedure a house search can be ordered under certain circumstances.  
However, even in the course of a house search in a lawyer's office or apartment, the obligation to confidentiality is to be maintained. For this reason § 23a Directives to Professionalism states, that in case of a house search, a representative of the Chamber of Lawyers has to be present for the sake of preservation of the obligation to confidentiality and the legality of the official act.

The representative of the Chamber of Lawyers who has been called in can make decisions in relation to the preservation of discretion.

e) The monitoring of telecommunication and electronic eavesdropping are regulated in § 134 ff Code of Criminal Procedure. Only if the attorney himself is the suspect may his phones be bugged. If however, a suspect is only expected to use or call an attorney's phone, electronic eavesdropping is not permitted. Any accidentally recorded conversations between an attorney and the accused may not be used as evidence within a trial. Similar regulations apply to confiscations and house searches. This always and solely applies to the communication between an attorney and his client.

## 2.2 Relevant Case Law

None

## 3. Scope / Limits

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

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

The right and the obligation to confidentiality extends to all parties involved without any temporal limits. The obligation to confidentiality remains intact even after the death of a client or in case of legal entities after their rescission. One can therefore state, that on a basic note, the obligation to confidentiality never expires. It does not cease with the ending of an attorney - client relationship nor with the ending of the attorney's advocacy.

As a basic principle, a client can release his attorney from his obligation to confidentiality. Provided that in doing so the release is given explicitly for an isolated case. Any implied release declarations are not sufficient.

Release from the obligation to confidentiality is regulated in procedural law.

Without having been released from his obligation to confidentiality, an attorney is not authorised to testify, nor can he be forced to.

Even in the case of an attorney's release from the obligation to confidentiality, he can not be forced to give evidence but has to verify if giving evidence could still hold negative consequences for his client. This is a necessary precaution since experience has shown that clients who release their attorney's from the obligation to confidentiality very frequently are not capable of estimating all the ramifications of said action. In the case of an attorney's release from the obligation to confidentiality it is therefore recommended to check all possible consequences before giving a testimony or handing over any documents.

Only the attorney's client can release said attorney from his obligation to confidentiality. In the case of the client's death, this right to release the attorney is passed onto the heir.

Some examples of limits of the obligation to confidentiality include:

a)

If an attorney is accused of a criminal offence - liable to prosecution according to either criminal, administrative, disciplinary or tax law - in relation to his professional function as a representative of a client, his professional obligation to confidentiality will suffer limitations.

Even then the obligation to confidentiality is to be respected as a basic principle. It does however cease to be valid if its abidance would lead to the accused attorney's conviction.

If the client himself appears as the accusing party in the course of criminal proceedings one can assume that the attorney is released from his obligation to confidentiality through the lodged accusation.

If criminal proceedings are initiated on the grounds of a third party's accusation or a public authority's notices, the basic principle of an attorney's defence limiting the obligation to confidentiality still applies. In such a case, the attorney should only disclose evidence relevant for his defence.

b)

In the case of legal proceedings for attorney's fees against a former client the professional obligation to confidentiality is also limited. As a matter of course the lawyer is not authorised to disclose any information entrusted to him in the course of the lawyer – client relationship which are not related to his claim for fees.

c)

If a former client pleads for damages due to deficient representation by an attorney the obligation to confidentiality will also suffer limitations.

Nevertheless, even in such a case, it is recommended to the attorney to ask the former client for a release from the obligation to confidentiality in order to give relevant information to one's liability insurance.

d)

Pursuant to § 23 Lawyer's Act (Rechtsanwaltsordnung) an attorney is under the observation/supervision of the Chamber of Lawyers Board throughout his professional function. Under certain circumstances (e.g. doubts concerning the proper conduct of office affairs) the Board can order someone to seize access to matters such as third party funds and relating documents. In this case the attorney has to give the Board's assignee access to all the relevant documents.

e)

Pursuant to § 40 Bank Law (Bankwesengesetz) an attorney is required to verify the beneficiary's identity to the bank when paying third party funds into a lawyer trust account.

Under certain circumstances (§ 8 a Lawyer's Act) the attorney is required to verify if there is cause for suspicion of money laundering or financing of terrorism. If the attorney finds probable cause for either money laundering or the financing of terrorism, he is required to notify the Federal Office of Criminal Investigation and relate his 'suspicion' to them before taking the case.

Pursuant to § 8 b Lawyer's Order, the attorney is required to demand sufficient means of identification from the client before taking over third party funds.

### **3.1 Correspondence between lawyers**

Correspondence between attorneys is not protected in a special way. Information passed on in this matter may be used by the attorney or client.

### **3.2 Third Parties**

See 3.1

### **4. In-house lawyers**

According to Austrian law, attorneys can only be self-employed or working for another attorney.

### **5. Prospective**

An attorney's obligation to confidentiality is very important in Austria and there is no tendency to disestablish or greatly constrict it. However there are some new regulations which allow a certain limitation in favour of more important matters, such as the notification of the authorities in case of a suspicion of money laundering or financing of terrorism - as stated under 3. e) pursuant to § 8 a Lawyer's Act.