

Pro Bono Practices and Opportunities in Germany

***Excerpt from: A Survey of Pro Bono Practices and
Opportunities in Selected Jurisdictions***

September 2010

Prepared by **Latham & Watkins LLP** for the **Pro Bono Institute**

This memorandum and the information it contains is not legal advice and does not create an attorney-client relationship. While great care was taken to provide current and accurate information, the Pro Bono Institute and Latham & Watkins LLP are not responsible for inaccuracies in the text.

@ Copyright 2010. All Rights Reserved.

I. Legal Services and the Legal Profession in Germany

In Germany, the compensation of lawyers is regulated by a set of federal laws¹ and professional rules issued by the German Bars.² The system is generally based on a statutory fee scale annexed to the Federal Attorneys-At-Law Remuneration Act (“RVG,” *Rechtsanwaltsvergütungsgesetz*) for legal services. As a general rule, German lawyers are required to charge fees for their services and the German state provides financial aid to those unable to afford a lawyer. However, German lawyers are allowed to negotiate fees with a client when the lawyer is giving advice outside the litigation context. Since June of 2008, a negotiable success fee is also permissible within the litigation context, as an exception to the general rule that success fees are forbidden in Germany.

Statutory fees that are charged according to the RVG in the litigation context are based on the “value of the dispute” (*Streitwert*) — for instance the amount of a damage claim or the consideration in a transaction — and not on the time spent on the matter. Individual “fees” are earned for various stages in proceedings: consultation, drafting and filing a complaint, trial, settlement or adjudication, appeals and so forth.³ The system has traditionally been focused on court activities and litigation. However, it is also possible — under certain circumstances — to agree on hourly-rate fees or a lump-sum payment for the whole case. The primary purpose behind the scheduled fees in the litigation context is to prevent price competition among lawyers and secondarily to keep legal services affordable. There continues to be a strong belief in Germany that price competition among lawyers will not only compromise lawyers’ integrity and ethical responsibility to clients’ interests, but also the administration of justice in general. Success fees have been historically prohibited and considered unethical in Germany.⁴ However, in December 2006, the German Federal Constitutional Court ruled that the prohibition of success fees without any exceptions violated the German Constitution.⁵ Thus, the German legislator changed the regulations regarding the prohibition of success fees and created exemptions for cases in which success fees are essential to allow clients to pursue their rights. These provisions can be found, *inter alia*, in Section 6 (1) of the Legal Services Act (*Rechtsdienstleistungsgesetz* (“RDG”)) and Section 34 (1) of the RVG. The latter provision states that consultation, legal opinions and mediation outside the litigation context – if not associated with billable legal services – do not fall under the statutory fee scale annexed to the RVG (*Vergütungsverzeichnis*). Lawyers and clients may freely agree – in the above mentioned cases (acc. Section 34 (1) RVG) on a compensation below the statutory fees, and also on legal advice free of charge, *i.e.*, *pro bono*.

The statutory fee constitutes a minimum fee in matters involving legal proceedings, such as lawsuits and administrative proceedings. In matters outside the litigation context, negotiated fees below the statutory levels are permissible for legal representation, *i.e.*, if they are proportionate to the effort and the risk of liability to the lawyer. Consequently, German lawyers

¹ See the Federal Attorneys-At-Law Remuneration Act (*Rechtsanwaltsvergütungsgesetz* (“RVG”)) and the Legal Services Act (*Rechtsdienstleistungsgesetz* (“RDG”)).

² The pertinent laws regulating the German legal profession standards are the Federal Attorneys-At-Law Code (*Bundesrechtsanwaltsordnung* (“BRAO”)), as well as the Professional Code (*Berufsordnung* (“BORA”)).

³ *Inter alia*, the so-called “*Geschäftsgebühr*,” a “business fee” payable on first consultation and draftings and the so-called “*Terminsgebühr*,” the fee payable to the attorney for attending a court hearing.

⁴ See Kleiner-Cosack, *Bundesrechtsanwaltsordnung mit Berufs- und Fachanwaltsordnung, Kommentar*, Paragraph 49b, marginal number 11.

⁵ See Judgment of the German Federal Constitutional Court (*Bundesverfassungsgericht* (“BVerfG”, file number 1 BvR 2576/04) dated December 12th, 2006, BVerfGE 117, 163 et seq.

may agree on fees below the statutory levels in matters that do not involve the representation of clients before courts, magistrates or administrative courts.⁶ General consultation, corporate representation and transactional practice therefore can be undertaken *pro bono* or at fees below the statutory levels as stated above. Fee agreements, where they deviate from the statutory fees, must be in writing and must be executed before the representation is undertaken. This rule is designed to protect the client and does not restrict the ability of German lawyers to render transactional legal services on a *pro bono* basis.

Furthermore, a German lawyer may waive his or her fees *after* the conclusion of the matter, but only for “reasons [particular to] the client, particularly indigence.”⁷ The restriction of fee waivers to reasons particular to the client is interpreted to preclude fee waivers in circumvention of the prohibition of success fees. Thus, a fee may not be waived because a case was lost.⁸ Also, an attorney may not waive a fee because there are ulterior motives in representing the client, such as publicity due to the representation of celebrity clients.⁹ A waiver may not be promised before the representation is undertaken.

II. *Legal Aid in Germany*

The requirement that German lawyers have to charge minimum fees for their services in the litigation context is considered acceptable in Germany because the state provides legal aid to those in need of legal services who are unable to fully afford them. Furthermore, there are several governmental and non-governmental organizations that provide general legal advice, such as municipal offices, ministries, agencies, and charitable and civic organizations. Actual representation by counsel is available through a court-administered system of legal aid. Such legal aid is geared toward litigation or representation in magisterial and administrative proceedings.

An indigent litigant who has a claim that is “reasonably expected to be successful” has a statutory right to both court fees and attorney’s fees if he or she is unable to afford them.¹⁰ Both German residents and foreign residents are eligible. The applicant must disclose income and assets to demonstrate indigence, and schedules exist to determine whether to grant full or partial aid, deferment of fee payments, or installment payments. It should be noted that Germany follows the “loser pays” system, such that a successful indigent litigant will not bear any fees or costs.

The requirement for whether a claim can “reasonably be expected to be successful” has been solidified by German courts in the past. A judge processes the application for legal aid and assesses the claim’s chances of success. Therefore, it is not required that the claim has a strong chance of success but it is sufficient so long as it has a reasonable basis. In practice, only hopeless

⁶ See Section 4 (2) RVG.

⁷ Section 49 (b) (1) 2 BRAO. Other instances in which fee waivers have been considered acceptable in the representation of friends or relatives. See also judgment of the German Federal Court of Justice (*Bundesgerichtshof* (“BGH”), BGH NJW 1995, 1425 (elaborating that fees can be reduced even after the decision of the German Federal Constitutional Court (*Bundesverfassungsgericht* (“BVerfG”), BVerfGE, 76, 171; NJW 1988, 191).

⁸ See Kleiner-Cosack, marginal number 10.

⁹ As in most countries, there are restrictions on German lawyers when it comes to advertising their services. While specific solicitation in view to a particular matter is impermissible, advertising in general is now permitted. The names of clients may be listed in brochures with their consent.

¹⁰ Sections 114 et. seq. German Code of Civil Procedure (*Zivilprozessordnung* (“ZPO”)).

and frivolous claims are denied legal aid. An interesting indication of the German approach in this area is seen in cases where a claim is made in the face of contrary precedent. In such cases, a claim for legal aid may not be denied if the applicant makes a plausible showing of why existing precedent should be overturned. However, a claim for legal aid will be denied if it is apparent that the applicant cannot offer sufficient evidence to support his or her claim.

If the state grants legal aid, the state will pay the scheduled statutory fees to the attorney of the indigent litigant's choice and will waive court fees.¹¹ If the indigent litigant prevails in the litigation, the opposing party is responsible for attorneys' and court fees and the state is reimbursed. However, if the indigent litigant loses the case, the court fees will be waived but he or she must bear the costs for the opponents' attorney.

III. *Pro Bono Opportunities in Germany*

The rules impacting *pro bono* work in Germany contain three basic principles:

- The minimum attorney's fees in the litigation context are set by a statutory fee scale annexed to the RVG,
- "the loser pays," and
- the state provides legal aid to those who cannot afford court or attorney's fees.

These principles shape not only the law but also the legal culture in Germany. Traditionally, there are common convictions that: fees should be set; too much competition among lawyers is bad; success fees give lawyers the wrong incentives; one ought not to have to pay for a lawsuit if one wins; and those in need of assistance to gain access to the courts should receive it as a matter of right, and not as a charitable act of the legal profession.

However, this legal culture has shifted noticeably in Germany. In fact, there has been widespread press coverage and discussion of *pro bono* work,¹² and the word itself has already become established as part of a German lawyer's vocabulary. The profession has changed profoundly due to the globalization of finance and commerce, the arrival of international, and in particular American and British law firms, and a prolonged wave of consolidations among German law firms. *Pro bono* work has become more common in Germany, especially by international law firms taking on *pro bono* work outside the litigation context. German lawyers increasingly recognize the need for *pro bono* legal services in addition to the traditional financial contributions to charitable and civic organizations. In this context, so-called "round tables" have been established in several German cities where German lawyers, mainly from international law firms, discuss the possibilities to establish and extend *pro bono* work in Germany. Most of them have already presented their *pro bono* concepts to their respective local bar associations, the majority of which have responded positively to the concepts. Furthermore, the annual European

¹¹ In the lowest courts (such as small claims courts) in which representation by counsel is not required, the state will pay for a lawyer if the judge assessing the claim feels that it is necessary (that is, helpful) or if the opponent is represented by counsel (section 121 ZPO).

¹² See, for example: *Westenberger*, BRAKMagazin, June 2009, *Pro Bono – Do good and talk about it* (*Pro Bono – Tue Gutes und rede darüber*); *Budras*, *Frankfurter Allgemeine Zeitung*, October 6th, 2007, *Advocates in favor of good cause* (*Advokaten für die gute Sache*); *Amann*, *Financial Times Deutschland*, March 31st, 2006; *In favor of good cause and for a positive image* (*Für die gute Sache und das gute Image*); *Baelz/Moelle/Zeidler*, *Neue Juristische Wochenschrift* 2008, p. 3383 ff., *Legal advice pro bono publico in Germany – a review* (*Rechtsberatung pro bono publico in Deutschland – eine Bestandsaufnahme*).

pro bono forum under the patronage of the Public Interest Law Institute (PILI) is scheduled to take place in Paris, France in November 2010. Charity organizations and law firms meet at the forum to discuss the possibilities of *pro bono* work throughout Europe.¹³

In fact, there is a need for *pro bono* work in Germany despite the comprehensiveness of the existing legal aid system. For example, very extensive and complex cases may be unsatisfactorily dealt with by the legal aid system since lawyers will tend to provide minimum effort to these cases, ultimately resulting in an unsatisfactory outcome. Also, charitable organizations sometimes have problems fulfilling the requirements for legal aid, forcing organizations to choose between abandoning professional legal services or diverting funds from the main purpose of the organization: to cover legal expenses. Furthermore, some potential *pro bono* cases cannot be handled on a legal aid basis because special expertise is required. For example, cases with international components cannot be handled by a single lawyer on a legal aid basis. The judgment of the German Federal Constitutional Court in the context of prohibition of success fees in December 2006¹⁴ recognized that the legal aid system in Germany may not be sufficient to provide legal services in all cases in which legal aid is necessary. Consequently, the German legislator substituted the German Act on Legal Counseling (*Rechtsberatungsgesetz* (“RBerG”), which generally prohibited free legal advice, with the RDG. According to Section 6 of the RDG, free legal services can be provided by non-lawyers who must be instructed by a professional lawyer, if they are not associated with a paid legal service given by a professional (“*unentgeltliche Rechtsdienstleistungen*”).¹⁵ If non-professionals are permitted to give free legal advice for reasons of civic engagement, it follows that professionals with the ability to provide legal advice should also be permitted to do so. With the intention of enhancing active citizenship and a sense of solidarity, the German legislator encouraged the already ongoing *pro bono* movement in Germany.

It remains true, however, that German lawyers are in general only allowed to grant free legal services outside the litigation context to people and organizations who usually cannot afford their services. In this context, the offices of Latham & Watkins in Munich, Frankfurt and Hamburg represent several individuals, non-profit associations and charitable foundations. Furthermore, it would be conceivable to give legal advice to a variety of populations in need, such as casualties of natural disasters (such as tsunamis, earthquakes or hurricanes), the homeless and jobless, founders of new businesses, or other needy people outside the litigation context. These are just a few of the possible *pro bono* opportunities available in Germany.

In the litigation context, State financial aid for litigants appears to satisfy the demand for affordable legal representation. Since there are many individuals practicing in the German Bar, the supply of lawyers actively seeking court appointments under the legal aid system exceeds the demand. Seeking to represent litigants *pro bono* would therefore create competition with a segment of the German Bar. Further, it is not permissible to establish a formal *pro bono* program in the litigation context since fee waivers are not allowed to be agreed upon before the conclusion of a case. However, it should be possible for international law firms to take on more time-consuming, difficult, and complex cases that are not particularly attractive to other lawyers on an individual basis, and agree to waive the fee *after* the conclusion of the litigation. *Pro bono* representation in litigation cases will therefore necessarily remain occasional, unless the German practice or regulations on this subject change.

¹³ http://www.pili.org/index.php?option=com_content&view=article&id=40291&Itemid=30096.

¹⁴ See *supra* note 4.

¹⁵ Legal services according to Section 2 (1) RDG are all legal activities specifically being of others’ concern.

IV. Conclusion

Pro bono work in Germany is currently possible in the fields of representation of non-profit associations, charitable foundations or other needy people outside the litigation context.

With respect to *pro bono* activities in the litigation context, the Legal Services Act, which entered into force on 1st July 2008, and the revised Legal Fees Act (“RVG”) have amended German fee rules in the litigation context already. However, at present, the impact of fee rules in Germany is that *pro bono* matters in the litigation context can only be obtained through contacts or by chance; they are never solicited by a law firm. Thus, they are not always called *pro bono* matters because it is impermissible to agree upon a fee waiver before the conclusion of a case. There is currently no organization that acts as a clearinghouse for *pro bono* projects, and substantial *pro bono* projects are difficult to come by.

In response to the latest judgment of the German Federal Constitutional Court that the blanket prohibition of success fees is unconstitutional,¹⁶ the German legislature may take the opportunity to allow success fees in the context of *pro bono* cases.

¹⁶ See *supra* note 547.