Privileged to be a lawyer? A German perspective on privilege

Legal privilege as it is known in the legal systems of the United Kingdom or the United States does not exist in Germany. This does not mean, however, that communications between a client and his lawyer are without protection: German law does provide for a rather extensive concept of the right to remain silent, which is indeed one of the fundamental principles of German criminal law, and professional secrecy.

Secrecy and the right to refuse to testify

Under German law, lawyers are bound by secrecy. In fact, sharing client information with third parties can not only have professional, but also criminal consequences for a lawyer. Section 53 of the German Code of Criminal Procedure (GCCP) corresponds therewith in providing that lawyers may refuse to testify concerning information that was entrusted to them or became known to them in their capacity as lawyers. Only when the client releases counsel from the obligation of secrecy is the lawyer able to testify in court and share client related information. As a further consequence all correspondence between a lawyer and his/her client cannot be seized, per section 97 GCCP, as long as such correspondence is in the possession of the lawyer.

It is worth noting that these protections have never been granted to in-house lawyers. From a German perspective lawyers who are admitted to the bar but work permanently on the basis of an employment contract for one company are considered as in-house lawyers. Because of their proximity to their client they are subject to certain professional restrictions. One of them is the prohibition against representing their clients in a court where procedural law provides that a party must be represented by a lawyer. In addition German law refuses to acknowledge that their communication with their employer are equally worthy of protection. In this context, it is argued that in-house lawyers miss certain characteristics other lawyers have, such as the necessary professional independence, a concept which includes not being bound by instructions. As a result, documents which are in the possession of the in-house lawyer can generally be seized by criminal investigation authorities.

However, where lawyers are admitted to the bar and in this capacity not only work as in-house lawyers, but also as external lawyers, the latter activity is still covered by the professional secrecy principles.
**Release from secrecy**

A controversial - and to a certain degree still unresolved - question is how legal entities can release their lawyers from their duty of secrecy. As just mentioned, a lawyer may only divulge client information when the client releases him/her from the obligation of secrecy.

Specifically, uncertainty exists in the situation where a former managing director issued a legal mandate and the successor, the current managing director, wants to release the lawyer from his professional secrecy obligations. Where the client is a company most courts require that both individuals, namely the former managing director as well as the legal entity itself represented by its new managing director, must provide consent for a release from secrecy. Only this does justice to the ambiguity of the lawyer-client relationship: On the one hand, the lawyer is contracted by the legal entity and has a professional relationship only with that entity; on the other hand information can only be entrusted by a natural person. Trust can only be understood in a natural and not normative way. Therefore a legal entity can neither entrust information nor release the lawyer from secrecy solely by itself. As a consequence the former managing director as the natural person who entrusted the information to the lawyer also has to approve the release from secrecy.

Critics complain that this approach leaves too much room for uncertainty and is not very practical. It seems farfetched to divide a single mandate into two relationships and in the end this approach impedes the efficiency of criminal proceedings and in many cases the interest of the company. In the absence of a clear legal provision dealing with this kind of situation or a judgment of the Federal Court of Justice, however, the above principles are being applied by most German courts.

**Documents created for the purpose of criminal defence**

Another interesting aspect regards the documents which are being written specifically for criminal defence purposes. Where the law generally provides that the documents which are in the possession of the (external) lawyer may not be seized, the same applies to documents which are in the possession of the client, provided that they have been created for the purpose of setting the client’s criminal defence ready. This doubtlessly applies to documents which an individual has prepared for his/her criminal defence.

But how about legal entities? After all German law does not provide for criminal responsibility of legal entities so that they cannot be defendants in criminal proceedings. In July 2015 the Braunschweig Regional Court stated that all documents held by a defendant that had been created for the purpose of his criminal defence cannot be confiscated. The court also stressed that the same rule applies to administrative offences committed by legal entities like companies. As a consequence, the records of an in-house lawyer made in preparation of the defence of his/her employer cannot be seized. Although this decision does not change the applicability of the principles of legal secrecy and section 97 GCCP, it does enhance the protection of corporate entities in administrative proceedings.

**Civil proceedings and disclosure**

The above applies to criminal investigations and the right of criminal prosecutors to seize documents. But what about civil proceedings? In this context the absence of privilege in the common law sense does not create any real problem. The reason for this is that German law not only does not have a concept of privilege, it also has an extremely limited concept of disclosure or discovery proceedings. Although as set out in section 142 of the German Code of Civil Procedure courts can, under certain circumstances, order the disclosure of documents in a civil proceeding, such disclosure never serves the purpose of investigating facts relevant to the litigation. Parties may only apply for disclosure where they are in a position to name the document that they want the other side to disclose to prove specific facts which they must set out with their application. In other words: A request for discovery under section 142 may not serve the
purpose of investigating the facts of a case. In addition, German courts are extremely reluctant to grant disclosure (the law provides for the court's discretion in such matters), so that in practice parties to a German civil lawsuit are not really in need of privilege.

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