

THE LEGAL PROFESSION IN GERMANY

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Characteristics of the legal profession

Before sharing best practices on regulation it is always useful to have a look at characteristics of the systems in focus. In regards to the regulation of the legal profession in Germany, it is essential to look at some specialties of the whole legal professional community and some historical developments to get a better understanding for the system as it appears today.

Fully Qualified Lawyers

The most important characteristic of the German legal system is the fact, that all legal professions share the same professional education. Since the late 19th century law is studied at university and followed by a two years judicial traineeship (*Referendariat*) run by the state. The judicial trainees are members of the civil service and are paid by the state. During this time all legal professionals conduct trainings and work as judges at civil courts, state attorneys in criminal cases, in the public administration as well as lawyers in the courts room or legal consultant. These fully qualified lawyers (*Volljurist*) have all the formal education to serve as judge, state attorney, legal advisor for public services or in the private sector or as lawyer (*Rechtsanwalt*). For those fully qualified lawyers admission to the bar is just a formality. Unlike in the US system no further examination is needed.

No distinction between types of lawyers

Further more there is no distinction between different legal services provided by a lawyer (*Rechtsanwalt*) in the German system today. Every legal professional, who has joined the chamber of lawyers, can practice all kind of legal services for their clients. The German system does not have any distinction as in the common law countries between a barrister, who is allowed to appear in court and to present the case and solicitor, who prepares the statements and consults the client. Germany had also two similar categories of practicing lawyers until the late 18th century: The so-called “*Prokurator*” appeared in court. The “*Advokat*” was a legal advisor paid by his clients similar to the common law model of today.²

Compulsory Licensing

Every practicing lawyer has to be member of the chamber of lawyers. With the membership the license to practice law is granted. This practice was established in 1713 in Prussia, when any “*Advokat*” had to be registered by state authorities, which was intended to limit the freedom of practicing the legal counseling.³ Today the regional chambers grant the license and permission to practice law by admission of the lawyer to the chamber.

Consultation Monopoly on Legal Matters

Another leftover from repressive times is the legal service monopoly of the members of the chamber. Everyone who provides legal services to clients without being a member of the chamber acts illegal. When it was first established in the first German Lawyers

Act in 1878 after unification of all German territories within the *Deutsche Reich*, such a monopoly was intended to give the state some degree of control over the lawyers, but foremost guarantee good quality of legal services. How repressive this tool can be used was demonstrated by the Nazi regime in the mid-1930s. A Legal Service Law (*Rechtsberatungsgesetz - RBerG*) was passed in 1935, which established a restrictive monopoly for all legal services. Only members of the chamber were allowed to provide any law related services to clients. The lawyers should also serve in the interest of the state and Nazi ideology. All political opponents as well as all especially Jewish lawyers lost their licenses and membership in the chamber of lawyers to practice law and by this their economic existences. The remaining, practicing lawyers acted loyal to the state and Nazi regime. This is documented by the fact that among the lawyer community you could hardly find any outstanding political opposition to the Nazi regime and their crimes in the period of 1933 to 1945.⁴ Of course, the regulation was substantially changed after the end of the Nazi regime in West and East Germany.

Today this redefined monopoly just exists to guarantee professional legal services of similar and high quality. The consultation monopoly has been reduced by several rulings of the Federal Constitutional Court in the past decades. Today it is also under pressure from liberalization tendencies for services from the European law.

I. Numbers and organizations

By the end of 2007 there were 142,830 practicing lawyers in Germany.⁵ The number is still increasing and it is expected that the number of 150,000 will be reached by 2009. 44,703 lawyers are female - around 30%. Germany has a population of around 82 Million people. As a result there is one lawyer among 578 inhabitants. In other terms 173 lawyers per 100,000 inhabitants.⁶ As Germany had 20,138,31 judges (including part-time judges) in 2007 this cumulate to seven lawyers per judge.⁷

1. Federal Chamber of Lawyers and its regional branches

All practicing lawyers (*Rechtsanwälte*) in Germany are members of regional chambers (*Rechtsanwaltskammer*). Certain kind of law firms with an own legal identity (for example, the *RA-GmbH*, a kind of limited liability corporation law firm) as well as their managing directors can be also members of the Chamber. The possibility to set up such a law firm was just recently regulated. Thus such types of law firms are very rare.

Chambers are established in every higher regional court district (*Oberlandesgerichtsbezirk*). Additionally all practicing lawyers at the Federal Court of Justice (*Bundesgerichtshof*) constitute their own regional chamber. These 28 regional chambers form together a Federal Chamber of Lawyers (*Bundesrechtsanwaltskammer - BRAK*). The chambers are public law corporations. The Federal Lawyers' Act (*Bundesrechtsanwaltsordnung - BRAO*), a federal parliamentary law, regulates the chambers and the legal profession. The chambers support and advise their members in matters related to their profession. They have to grant the right to practice to every qualified lawyer. If the right to practice law is granted to a lawyer, he becomes automatically member of the chamber. The chamber is fully funded by the fees of its members. The members elect the managing bodies of the chambers. The chambers are

service providers for their members. They administrate the membership list and contact details to be shared among the lawyers. They distribute information which is relevant for the profession and run lawyer offices in every major courthouse with basic office equipment to assist lawyers to fulfill their duties. The chambers run and observe continuing legal training to guarantee a high level of legal service provided by all members. Lawyers with a special focus, for example on criminal law, can run special courses and pass an examination to claim the title of a Specialized Criminal Lawyer (*Fachanwalt für Strafrecht*). A commission of the regional chamber examines these candidates according to the Charter on Specialized Lawyers (*Fachanwaltsordnung – FAO*) as set by the federal chamber. The title of a specialized lawyer is not a further qualification, which grants any additional rights or duties, but is intended to serve as a sign of quality for the client in this particular area of law.

The *Laender* – the federal states of Germany – conduct the legal oversight over the chambers. They observe the legal compliance with the Federal Lawyers’ Act, but do not judge or interfere into any substantive decision of the chamber. The chamber’s independence is guaranteed by federal law, as well as by the constitution (*Grundgesetz*).

As public institution the chambers ensure compliance of their members with the existing regulation for lawyers in the Federal Lawyers’ Act (*BRAO*) and in the Lawyers’ Code of Conduct (*Berufsordnung für Rechtsanwälte - BORA*), which has been adopted by the federal chamber as a legally binding charter on the basis of applicable law (§§ 59b, 191a-e Code of Conduct -*BRAO*). In cases of an offence, the chamber can reprimand a lawyer (§ 74 Federal Lawyers’ Act - *BRAO*). Its decisions can be subject to review by a special court, the Lawyers’ Disciplinary Court (*Anwaltsgericht*). This court is responsible for disciplinary proceedings. It will set disciplinary measures against lawyers in cases of severe offences (§§ 113 Federal Lawyers’ Act - *BRAO*). The federal constitution court had ruled in several cases on decisions of the chambers on disciplinary sanctions against chamber members. More than 20 years ago in the famous Bastille Case, the federal constitution court allowed lawyers to inform and advertise their legal services to attract new clients.⁸ Such public relations activities were banned before by the chambers’ code of conduct. Lawyers become subject to disciplinary measures by the chamber and legal action by other lawyers. The Bastille Decision of 1987 was another step towards greater freedom of the legal profession. The constitutional court declared in this case, which was followed by several other cases, that several common regulations on the profession, such as the ban of public relations activities, a strict residence rule and restrictions on compensation were not in compliance with the right to freely exercise any profession of choice. These decisions resulted in further deregulation of the legal profession. The chambers’ influence was further limited and the individual protection to practice law for every lawyer was further strengthened.

As the chamber is a public institution regulating the profession and also a lobby group for the lawyers’ profession, it conflicts from time to time with those lawyers’ associations, which have no public functions, but just consider themselves as a lobby group of the profession or at least parts of it. It is expected that the chamber should stay neutral in political questions, but should speak out for its members’ interests in public. This of course, is often a difficult task, especially as the interest of its members can

differ a lot. The big majority of the lawyers organized in the chamber are individual lawyers with an own, small law office. Their interests often vary from those of the large law firms, which dominate the business related law practice in Germany and are also members of the chamber. The challenge for the chamber is to balance the very different expectations towards implementing existing regulation, ensure a high level of quality of provided legal service by all its members and lobby for or propose measures to the lawmaker to further strengthen the lawyers' professional freedom. In its own interest it will avoid those issues, on which the community of lawyers cannot agree in a large majority.

2. Other forms of representation in associations

While the chamber has to ensure the laws (Federal Lawyers' Act – *BRAO*) on the profession and its charters (Code of Conduct - *BORA* and *FAO*), which regulates the profession, other lawyers associations present themselves as lobby groups and service providers as well. Their main intention is to be a strong voice to support lawyers' interests in the public. Membership is voluntary and not a precondition to practice law. As the lawyers' community is diverse, the different associations focus on different issues. It is common that members of one association are also members of another. They play an important role in the parliamentary process of law making and in the public debate. In contrast to the chambers, they do not only focus on issues related to the regulation on the lawyers' profession, but also on civil rights issues.

a) German Bar Association (Deutscher Anwaltsverein – DAV)

The *German Bar Association* - as the *Deutscher Anwaltsverein (DAV)* calls itself in English - was founded already in 1871. It was forced to close by the Nazi regime in 1934 and re-founded in 1945. It is the strongest lobby group of lawyers in Germany until today. It has around 66,000 members, which is around 50 % of all members of the chambers. There are 250 regional associations all over Germany, but also abroad in France, UK and Italy. The DAV intends to represent and protect all professional and economical interests of the lawyers' profession, especially by promoting administration of justice and legislation, education and further training, encouragement of professional solidarity and scientific spirit among lawyers. It aims on uniting all lawyers in Germany. The association observes political and confessional neutrality. The DAV is also a service provider for its members. It distributes information regarding the profession. It promotes communication among colleagues. Opinions by its 33 *Committees on Legislation* regarding national draft laws and draft directives of the European Community influence parliamentary law making efforts in Germany and Europe. Working groups of the DAV on special issues, such as Criminal Law, organise conventions and seminars. The DAV publishes a number of leaflets and booklets for collective publicity or the lawyers' community and publishes a professional magazine called *Anwaltsblatt*. The DAV also offers business services to its member and runs an academy for lawyers - the *Deutsche Anwaltakademie* – which offers training course in all mayor cities in Germany.

b) Republican Bar Association (Republikanischer Anwältinnen- und Anwalts-verein – RAV)

The Republican Bar Association (Republikanischer Anwältinnen- und Anwälteverein - RAV) is much smaller and younger than the DAV. Currently they have around 1,000 Members. The RAV was founded by a group of criminal lawyers in 1979. In the late 70s West Germany experienced a violent left wing terrorism, which resulted in harsh reaction of the state. Lawyers, who offered legal assistant to the suspected persons, become under pressure and subject to criminal prosecutions and lawyer tribunals. Things have changed this then. Some prominent (founding) members of the RAV have become Ministers of Justice or Interior. The first and only current female chair of a regional chamber is also a member of the RAV. The RAV is opposing the continual expansion of criminal law and police authority. It gives special attention to the laws on asylum and foreigner legislation. The protection of human rights for the weak and underprivileged is the key motivation for its members, who consider themselves as socially engaged advocates of their clients and believe that they are only responsible to their client and their own conscience. Therefore the RAV works closely with other civil rights and non-governmental organisations and groups of the new social movement. The association influences the development of law by taking part in the professional legal discussions. It presents statements and views to the constitution court and the lawmaker and is one of the publishers of the respected “*Grundrechte-Report*” (Fundamental Rights Report), which evaluates annually the status of fundamental rights implementation in Germany and identifies current shortcomings, which need special attention. The RAV organizes training courses for lawyers and run special activities such as so-called “*Legal Teams*” during mass demonstration. For example, during the G8 summit in summer 2007 in Heiligendamm. The “*Legal Teams*” observed the actions of the police and law enforcement bodies during the event and provided legal assistant on the spot to demonstrators, who become subject to law enforcement activities. The legal teams received Human Rights prizes for their activities.

4. Common forms of organizing practice

All forms of legal practices are common in Germany. The dominating form of running the business is in small offices. 88% lawyers practice in offices with nine or less employees, including non-legal staff. 9,1 % you can find in middle-sized law firms with 10 to 19 employees. Only 2,9 % employees of the sector work in law firms with 20 and more employees.⁹

a) Solo practice

Solo practice is especially common in rural areas. Often solo practicing lawyers share an office with one or two colleagues. Main motivation for this is a reduction of cost for office space, office equipment and non-legal staff. They distribute incoming clients among them depending on workload, specializations and interests. Every lawyer runs his or her own business and operates independently on own risk and benefit.

b) Partnerships

More than half of all lawyers work in a partnership with other lawyers. For this joint practice or partnership various legal structures are used.¹⁰ The partners of this law firm control the business together and appear to the outside with one name. Normally just a few of the lawyers in the firm are partners. All other lawyers in the company are employed. It is quite common, that bigger law firms have offices in several cities and even several hundred partners. Some of those bigger law firms are parts of international law firms. Many US and British law firms operate on the German market. German partners have often linked up with those international law firms and quite often took the name of the international partner.¹¹

c) Co-operations

Co-operations between solo practicing lawyers and small joint practicing lawyers are more and more common as an answer to the challenge these lawyers face with the big law firms. These co-operations are often not legally definite and appear just as a vague connection. The lawyers co-operate from time to time or even just suggest the services of other to their own client, when they cannot and are not willing to provide this service. In such co-operations every lawyer practices on own risk and benefit.¹² Often lawyers with different areas of specialty link up to be able to offer to their clients all kind of high level advisory services in all fields of the law. They also can offer services in several locations in Germany and abroad. Especially in the common market of the EU it is important for middle size businesses to be able to have legal service providers, which can assist them in the whole area they operate their business in. There are also few franchise companies operating, which appear with the same logo and advertisement campaign, but operate independently. From the legal perspective they are not more than a co-operation. Still in all these forms of co-operations every lawyer practices on own risk and benefit.¹³

d) Challenges for the legal service market

The existing structure of the German market for legal services is in constant change. The pressure towards big law firms as in all other industrialized countries is substantial. As mentioned above there is a need for companies which limit their business not only to an regional, local market, but to all over Germany, the Europe Union or even beyond the borders of the EU to get comprehensive and coherent legal assistance at all locations of their business.

Another challenge the German lawyer market is facing is the enormous increase of lawyers in the recent years. In the year 1995 unified Germany had 75,000 practicing lawyers. This was in the years after the unification, when the public structures and economy in the New Länder of East Germany was still in transformation. Privatization of state owned companies and property claims were a substantive market for lawyers. Today after most of these issues have been solved, Germany will have 150,000 practicing lawyers soon. The number has doubled in less than 15 years.

This dramatic increase of practicing lawyers has led to reduction of incomes for lawyers in Germany. The average income for practicing lawyers went down from 1994 to 2006 by 17%. The biggest falls within one year were reported in 1997 with -5,1 % and in

1999 with -4,2 %. It has to be mentioned that these figures do not consider the impact of inflation on the incomes of lawyers.¹⁴

e) Segmentation of the market

The result of this challenge is the segmentation of the market, which seems to be a common phenomenon in industrialized countries. Big, in parts multinational law firms dominate the market for business related law consulting and services. The German Federal Statistical Office considers companies of the legal services sectors with 20 and more employees already as “big”. So it is even more astonishing, that those companies with just 2,9 % of the workforce in the legal service sector, have 38,5 % of the total revenue of the sector in Germany. Middle size law firm with 10 to 19 employees with 9,1 % of the sector’s workforce have just a share of 22,5 % in the total revenue of the business sector of legal services. The still typical, locally embedded offices for the ordinary client of solo practicing lawyers or small partnerships with nine or less employees only create 39,1 % of the total revenue, although they employ 88 % of the workforce in the whole sector of legal services.¹⁵

These small offices run the burden of all the day-to-day business for the ordinary citizens. Traditionally their main area of business to gain revenue is the civil law practice for small and middle size businesses. The small private business for individual clients is a solid source for practicing, but does not create high revenue. Civil, public and criminal law cases for private clients are not the issues where lawyers earn much money in Germany. Usually lawyers can run their business in a long run successfully when they can combine both: Serve private and business clients. As the law firms are taking over more and more of the business related legal services, including for middle-size businesses, it is getting harder for the traditional lawyer to survive on the money they earn by providing their services. The cross-subsidization, which worked for decades, is less and less effective. As a result the segmentation of the market continues. Large law firms have the full-size businesses as clients and broaden their activities more and more towards middle-size businesses. Middle and small law offices are left with the rest, what cannot generate large revenues. At the same time the number of solo practicing lawyers and small office increase as the numbers of lawyer have increased dramatically in recent years as already mentioned. Therefore potential business and income for these lawyers has diminished dramatically in recent years.

Another form of segmentation in the market is the specialization of law firms and lawyers. The old styled lawyer, who works in all areas of law, becomes more and more exceptional. The law as such has become too detailed and the volume of regulation is so huge, that an individual lawyer can hardly cover all areas. As the market is also so overwhelmed with lawyers it is also necessary to present a unique selling point. Therefore more and more lawyers reach out for the title of a “Specialized Lawyer” (*Fachanwalt*), which is been granted by the chamber after substantive court practice, additional training and an examination by a special commission of the chamber.

II. Admission to the chamber of lawyers

Admission to the chamber of lawyers is just a formality for legal professionals. There are no special tests required, invitations or limitation of numbers etc. Everyone who has gained the professional education can join. Law guarantees transparent and fair access to the lawyer profession. The constitutional court has ruled several times on the issue and strengthened the rights of applicants for membership.

1. No extra examination when joining the chamber

As already mentioned in the introductory remarks, there is no entry examination to the chamber as such. Every fully qualified lawyer (*Volljurist/-in*) can join the chamber. The formal test to be passed before becoming a fully qualified legal professional is the first and second state examination. As already mentioned before, the qualification is also the same one required to perform as legal counselor in the private or public sector, as prosecutor or judge.

2. Professional legal education

Formal requirement to be admitted to the chamber of lawyers are the two state examinations and the judicial traineeship (*Referendariat*).

a) First State Examination

The first examination is held after at least four years of legal studies at university and is also considered of as a formal degree of the university. All graduates who finished law studies with the first state examination are granted the academic title of a *Diplom-Jurist* by their last university. The examination consists of nine written test of five hours each within two weeks time. This is followed few weeks later by an oral examination of five hours in a group of five students by a commission of five university professors, prosecutors, lawyers and judges. All areas of law are covered. They are divided into civil, criminal and public law. Around 30 % of all applicants fail the examination and can repeat the test only once. Around 27 % also fail this second chance.

After the successfully passed first examination the graduates can work as legal in-house advisors in private business, public services or even law firms. But they are not allowed to provide legal services to others outside their company, service or business. This kind of work is typically considered as in interim job for young graduates.

b) Judicial Traineeship (*Referendariat*)

Most legal graduates apply for a judicial traineeship (*Referendariat*). During two years judicial trainees are members of the judicial service and are paid by the state a small salary. During this time they take part in trainings and work as junior judges in civil courts, appear as state attorneys in criminal court, work in the public administration as well as lawyers in the courtrooms or legal consultants. They get to know all aspects and perspectives of the legal professional life in Germany. Several months of this traineeship can be served outside Germany under supervision of any legal professional, for example, at an international organization, an EU institution or at an attorney's office

in the US. During these months the trainees are paid by the German state and remain in the German health and pension system.

c) Second State Examination

The second state examination consists of eight written tests of five hours each within two weeks time. This is followed few weeks later by an oral examination of five hours in a group of five students by a commission of five prosecutors, lawyers and judges. All areas of law are covered. They are divided into civil, criminal and public law. The examinee is provided with typical case documents and has to prepare a bill of indictment of a prosecutor, judgments in a function of a civil or public law judge, and different motions to courts, applications to public offices, complaints to the opposing party in a civil case or similar formal, written documents in the function of a lawyer. Around 15 % of the applicants do not pass the examination.

3. Other requirements to join the chamber

Applicants to the chamber have to send an application, present a proof of proper liability insurance and have to agree to the chambers' code of conduct. They should have no current criminal record and the applicant has to respect the democratic fundamental values of the state. No invitation is required. No current member of the chamber has to act as a guarantor or referee for the new applicant as it is common in some countries.

Additionally applicants are required to join the pension fund of the chamber. This is a basic pension fund. Monthly contributions reflect the monthly salary or income and start from around 100 EUR per month minimum. All this money will be paid back with interest as a pension. Compared to the compulsory pension system of the state it is an attractive option.

4. Cost of admission to the chamber

To join the chamber applicants have to pay a fee of around 250 –300 EUR as an administrative fee. Annually members have to pay 200-300 EUR membership fee. The board of the chamber sets the fees. It covers the expenses of the local chamber and in parts the federal chamber. Reasonable liability insurance costs between 150 and 500 EUR or more. The price depends on the amount and kind of legal services provide by the lawyer. To put this figures into context it is useful to be aware, that employed legal professionals lawyers and employed legal counselors earned in Germany in 2006 in average 82,000 EUR per year before costs for social insurances and taxes have been deducted.¹⁶ Considering this the costs for admission and membership are reasonable.

III. Cost of services

Legal services are affordable for the most part of the population. Overall the legal aid systems is functioning quite well, but there is room for improvements, especially with regard to the compensation for services provided by lawyers in cases of legal aid.

1) Regulated fees set by law

Fees for legal services are set for the most part by law. Since 1 July 2004 the new Lawyers Compensation Act (*Rechtsanwaltsvergütungsgesetz – RVG*) regulates the payment. It followed the old Federal Act of Lawyers' Fees (*Bundesrechtsanwaltsgebührenordnung - BRAGO*) and deregulated the whole issue. The lawyers are now much more flexible to agree with the client the kind of payment. The concrete amount of the individual fee is set by secondary legislation, which is issued by the Federal Ministry of Justice in consultation with the Federal Chamber of Lawyers.

Traditionally and still in most cases lawyers are compensated based on the value in dispute of case. The court rules on it in a separate decision. In civil case, for example, this is the amount the clients claims from someone else. Based on that amount in dispute the fees are set. In social law, criminal law and administrative penalty law the value in dispute is set by secondary legislation. The lawyer gets fees for every different kind of services provided. For example, for the responding with a letter to the other party, preparing a written statement to the court or drafting and submitting a claim, representing in court, etc. the lawyer will charge a fee. Every action is compensated with an individual fee.

The fee for extra judicial services outside court such as exchange of letters with the other party to clarify facts on dispute or negotiating for the clients with the other party depend on the volume and complexity of the legal service provided. The importance of the issue for the client and her or his financial capacity is also put into consideration. The law and secondary legislation provides categories for that and there is detailed adjudication on every component.

An additional fee for office supplies and telecommunication covers parts of the cost for the administration in the lawyer's office, which starts with a lump sum of 20 EUR for small cases.

The first consultation is normally free of charge. As it depends of the value of dispute how much a lawyer will be paid, it is not possible to give just one price for representing in court hearings or drawing a simple document as such. But just to give some idea: To review a simple, private rental contract for a two-room-flat, a lawyer will ask for at least 50 EUR. To be represented in a civil law court a case related to such a contract with a small value in dispute will start from 150 EUR.

More detailed in a small example: The client is demanding a payment of 6,000 EUR. The lawyer brings the claim to civil court and presents the case in a court hearing. The court rules in favor of the client. For such services the lawyer can bill according to the Lawyers Compensation Act (*RVG*) the following:

Amount in dispute: 6,000 EUR

- *1,3 Proceeding Fee 3100 VV (Vergütungsverzeichnis – Fee catalogue) 439,40 EUR*

| | |
|--|---------------|
| - 1,2 Fee for Presenting in Court 3104 VV EUR | 405,60 |
| - Fee for office supplies and telecommunication cost etc. 7002 VV EUR | <u>20,-</u> |
| Amount of fees EUR | 865,00 |
| VAT 19 % EUR | <u>164,35</u> |
| Total cost for legal services provided EUR | 1,029,35 |

To claim 6,000 EUR the client has to pay 1,029,35 EUR to the lawyer, when the case is successful in the first instance.

2) Negotiated compensation

It is also possible to agree on individual compensation with the lawyer based on working hours or an overall lump sum. This compensation can be freely negotiated. Since 1 July 2006 the law even says, that it is the normal case to have an individual compensation agreement in extra judicial services provided by the lawyer. This development is also one of the deregulation steps taken by the lawmaker and it is welcomed by most of the lawyers as it opens possibilities to offer flexible and attractive solutions to the customers. Prices per hour depend on the quality and specialization of the lawyer. A junior lawyer will start with 50 EUR and several hundred EUR can be charge by senior partners of a law firm.

3) Ban of conditional or success fees (*quota litis*)

A conditional or contingent fee as it is common in the United States or the UK is not allowed in Germany as stated in § 49 b 2 of the Federal Lawyers' Act (*BRAO*) of 2004. Even in the United States contingency fees are only standard in personal injury cases, but are less common in other types of litigation. In family law and criminal law most jurisdictions also in the United States prohibit working for a contingency fee. In Germany this concept of success fee for legal services is not very much welcomed in the legal community. Nevertheless the Federal Constitutional Court has ruled in 2006¹⁷ that there can be a need for limited use of such compensation agreements in some restricted cases. This is the case, when a conditional fee is the only chance and possibility for the client to be able to afford legal assistance, which would restrict the client to ask for justice. The Constitutional Court ruled that an absolute ban of such fees would limit the client's right of access to justice. An amendment to the existing legislation was passed and went into force on 16 June 2008. It allows conditional fees in very limited cases. It is not expected that it will become a wide spread practice.

4) Settlements of compensation and quality of service dispute

If there is disagreement between the lawyer and client over the fees as set by the lawyer, the chamber can be consulted to settle the dispute (§ 74 II Federal Lawyers Act – *BRAO*) or a court can be asked to review the bill presented by the lawyer to the client. Few regional chambers, for example, one in Stuttgart, have installed Ombudsman institution for the settlement of disputes on compensation. This happens very rarely. In a survey of the Institute for Lawyers Management on quality of legal services provided by lawyers, clients that 80% of them are overall satisfied with the work of their lawyer. 71 % said that they are satisfied with the legal solutions created through the activities of their lawyers.¹⁸

5) Legal costs insurance

It is quite common to have a legal cost insurance in Germany. These insurances cover all costs related to legal action. Insurances differ in scope of coverage and price. There are limited legal cost insurances for private car use, which cover all legal risks related to the use of one's car. So the drivers are covered. This includes civil law, administrative charges, or even criminal accusations. Such an insurance costs between 50 and 100 EUR per year. A legal cost insurance with wider coverage, for example, all private related issues, such as employment, housing or disputes with public offices etc. starts from 200 EUR per year.

6) Legal aid

Every lawyer can provide legal aid. The state is covering the costs. There are no separate institutions or structures for legal aid, such as legal clinics or public defender offices like in the United States, Finland and some other countries. The registry of courts are obliged to assist persons, who are not able to write, to record any orally issued complaint. Nevertheless they are not allowed to provide any legal assistance or even to advise what kind of complaint should be the right one to be filed.

Legal aid can be granted for every legal proceeding. It does not matter whether the case is criminal, civil or public law. In the process how legal aid is granted is distinguished between criminal defense cases and all other forms of legal action.

a) Criminal law – legal aid in cases of necessary criminal defense

In cases of so-called necessary defense (*notwendigen Verteidigung*) the accused had to be provided with a so-called assigned criminal defense lawyer according to §§ 140 Criminal procedure Code (*StPO*). In such cases the lawyer is paid by the state.

aa) Assignment and fees

When the bill of indictment in case of necessary defense is delivered, the defendant is asked to appoint a defense lawyer of his choice. At the same time he is offered, that the court appoints a defense lawyer. If the defendant already has a defense lawyer of his own choice, the lawyer can ask the court to be assigned to the defendant. That means in result, that the defendant can choose his or her assigned defense lawyer. The lawyer can just charge fewer fees, if she or he is assigned by court. Fees of assigned lawyer are

reduced by law compare to the ones of a defense lawyer of free choice. Therefore the lawyer has to agree to a cut in pay. Still the client and lawyer can agree on an extra payment.

If the accused is sentenced, the convict will be charged with all costs of the proceedings, including the costs of his or her defense paid by the state to the lawyer. In such cases the lawyer can apply to the court to state that the convict is solvent. Then the lawyer can charge not the reduced fee, but the normal, higher ones to the convict. Still, most of the sentenced are insolvent. Therefore lawyers rarely ask for such courts' statement.

bb) Cases of necessary criminal defense

Assigned lawyers are just limited to cases of necessary criminal defense. These are cases, in which the legislation assumes that the defendant will not be able to defend her- or himself without competent, legal assistance. In such cases the law requires that a lawyer must be assigned to the defendant, even if the defendant refuses the offer of legal assistance. According to §§ 140 of the Criminal Procedure Code (*StPO*) necessary defense is required in the following cases:

- **Jurisdiction of the Regional Court (*Landgericht*) or Higher Regional Court (*Oberlandsgericht*)**

§ 140 I Nr. 1 Criminal Procedure Code (*StPO*) regulates that a defense lawyer is required for criminal proceedings at first instance at Regional Court (*Landgericht*) or Higher Regional Court (*Oberlandsgericht*). According to § 120 Constitution of the Courts Act (*Gerichtsverfassungsgesetz – GVG*) these are crimes against the state as they have the first instance at the Higher Regional Court. Additionally these are all major crimes as they are under the jurisdiction of the Regional Court. These are especially criminal charges, which can lead to imprisonment of more than four years. Complexity of the proceedings can also require jurisdiction of the Regional Court.

- **Suspicion of a major crime**

According to § 140 I Nr. 2 Criminal Procedure Code (*StPO*) an assigned lawyer is obligatory, when the defendant is accused to a major crime. According to § 12 I Criminal Code (*StGB*) these are all criminal charges with a penalty with a minimum of one-year imprisonment.

- **Threat of occupational ban**

Necessary defense is also obligatory, when the charges can lead to a ban of exercising the own profession, § 140 Abs. 1 Nr. 3 Criminal Procedure Code (*StPO*). Such fine is regulated under §§ 70 Criminal Code (*StGB*).

- **Imprisonment for more than three months**

If someone has been imprisoned for longer than three months a lawyer must be assigned, § 140 I Nr. 5 Criminal Procedure Code (*StPO*). This is even the case, when imprisonment was ordered by court.

- **Ordered hospitalization in a psychiatric clinic for a medical opinion**

In cases of an ordered hospitalization in a psychiatric clinic for preparation of a medical opinion on the accused, a lawyer must be assigned, § 140 I Nr. 6 Criminal Procedure Code (*StPO*).

- **Ordered hospitalization in a closed, psychiatric clinic**

For those, who are not guilty by reason of insanity, courts can order the hospitalization in a closed, psychiatric clinic, § 20 Criminal Code (*StGB*). In these cases a lawyer has to be assigned, § 140 I Nr. 7 Criminal Procedure Code (*StPO*).

- **Exclusion of the current defense lawyer**

If during the proceedings the defendant's criminal defense lawyer of free choice is excluded, for example, because of the fact, that the lawyer also works for another accused in the same proceedings, a lawyer has to be assigned, if no lawyer of free choice is proposed by the defendant, § 140 I Nr. 8 Criminal Procedure Code (*StPO*).

- **Other reasons for assignment of a lawyer**

An assignment of a lawyer is required in cases, in which because of the cruelty of the crime or the complexity of the facts and circumstances of the crime an assignment of a lawyer is necessary or the defendant is not able to defend her- or himself, § 140 I and II Criminal Procedure Code (*StPO*).

cc) No legal aid for other criminal charges

For all other petty crimes and administrative charges no legal aid is provided as the legislation expects that no legal assistance is required. The accusations in question are not too complex and the possible sanctions are not too harsh, so that legal aid is not necessary. The client should be able to defend her- or himself.

b) Legal aid in civil, social and public law cases

In all non-criminal charges related legal proceedings, every lawyer will examine whether the client is obliged to receive what is called Advisory and Proceeding Cost Assistance (*Prozesskostenhilfe*). If appropriate the lawyer will assist the client to apply for this assistance. Still the client assigns the lawyer, so that the client has to pay the lawyer, when the legal aid is not granted. To avoid any problems and in their own interests lawyers review the case and just file an application for legal aid, if the chances

of the case seem promising. When the court had decided, that legal aid is granted, the lawyer will start legal action.

Legal aid is also granted for any action related to public administrative, § 114 I Civil Procedure Code (*ZPO*). Advisory and Proceeding Cost Assistance can be granted to everyone involved in a proceeding. Normally these are the two opposing parties, but also third parties can be obliged to legal assistance. Non-German citizens and those without any citizenship have also the same right to receive legal aid, which is quit important for asylum- und refugee cases. Even legal entities can apply for this legal assistance.

Application for Advisory and Proceeding Cost Assistance can be addressed to this court, under which jurisdiction the case falls. Applicants have to provide details of their personal and financial situation to prove their indigence. Additionally the court will analyze in a preliminary examination the chances for success for the proposed legal action. Cost Assistance will be just granted by court, if it expects that there is some prospect to win the case. Assistance will be also denied, when the legal action is frivolous.

b) Legal aid provided by charity organizations

Beside this regulated legal aid system there are also all kinds of *pro bono* activities and charity initiatives, which provide “first aid” legal advice. For example, it is common, that social service NGOs provide some assistance free of charge to asylum seekers and war refugees. Consumer associations or lessee associations provide some legal advice to their members. Often lawyers provide such assistance voluntarily. Sometimes the lawyers are paid by an NGO. Normally they provide just basic assistance, for example, they review the documents and assist in drafting applications. In cases, which require more complex legal action, a proper legal aid case is initiated and the lawyer will draft an application to the judicial authority for Advisory and Proceeding Cost Assistance.

Quite often local bar associations offer also legal consultation-hours in their local office for poor people and provide legal advice to prisoners free of charge. Both activities are charity work, but can be also a way for lawyers to look out for new clients and generate paid work. These persons often seek legal advice, but do not want to contact a lawyer directly as they are not able to pay a lawyer themselves. Some of their questions and concerns are relevant for proper legal aid. Then the lawyer can start a proper case and apply for Advisory and Proceeding Cost Assistance.

d) Overall positive perception of the legal aid

Overall the legal aid system is perceived as satisfactory. Especially the Advisory and Proceeding Cost Assistance is in regular use and helps people to receive quality legal services from a lawyer of their choice.

The increase of fees for the assigned criminal defense lawyers in recent years helped to make this occupation more interesting for lawyers and to strengthen an effective criminal defense. A remaining problem is the relative low fee for legal assistance in

asylum and migration cases. Most asylum seekers and migrants have no financial resources to pay for legal services. Therefore asylum seeker and migration cases are for the most part legal aid cases. Lawyers complain, that to assist asylum seekers quite often time-intensive research has to be done to collect all relevant information for the individual case. The fees paid are much too little to compensate for this work. Increasing the fees for services related to asylum and migration law will strengthen the legal aid in such cases.

IV. Reform Agenda in Germany for the Legal Profession

1. Recent reforms

Several laws on the regulation of the lawyers' profession were launched by the legislature in the recent years. This was needed because of demands by the Constitutional Court to deregulate the profession and to pull down old styled bans, for example, on advertisement, and to strengthen the right to practice law as a free profession. The European Community also demands to harmonize the regulations in Germany in accordance with the European standards. To open the market for legal services and to strengthen the competition within the market was the cross-cutting motivation for all changes in regulation in the recent years.

a) Limits to the monopoly of legal services

A step in this direction was the Law on Legal Services (*Rechtsdienstleistungsgesetz – RDG*), which was enacted on 1 July 2008. It opened the market for legal services and limited the monopoly of the lawyers on legal advice. The law regulates provision of legal services by charities – now a common practice. It also regulates that businesses can advise in limited topics on legal matters, if they are connected with their business and are not too complex. On the other hand, lawyers are now also allowed to provide advice on tax issues and also a success fee is allowed in limited cases.¹⁹

b) Strengthening the autonomy of the chamber of lawyers

Since 1 June 2007 the lawyers received the permission to practice law from the chambers of lawyers. The president of the chamber administers the oath on the constitution and the lawyers' code of conduct. The chamber is also in charge of the revocation of permission to practice law. Before the permission was administered by the Judicial Services, which is under the authority of the federal states, the Laender. With this move of authority, the autonomy of the chambers of lawyers was further strengthened.²⁰

c) Abolishing of local residence rules

Already since 1 January 2000 the limitation to practice law only in the lawyer's own district was abolished. Before lawyers were just allowed to appear in the courts of their chamber's district. Since then lawyers are allowed to appear in every local district court (*Amtsgericht*) and regional district court (*Landgericht*) all over Germany. Since 1 August 2002 this applies also to the higher regional court (*Oberlandesgericht*). As of 1

June 2007 there is also no five-year waiting period before lawyers receive the permission to appear in front of a higher regional court anymore. Today every lawyer in Germany can appear in every local, regional and even higher regional court all over Germany on his/her first day of admission to one local chamber of lawyers. At the same time the ban of opening a second office and to providing legal consultation-hours not in one's own office was lifted on 1 June 2007 as well.²¹ This opens new business opportunities to lawyers and more competition to legal service providers.

2. New developments

As in other countries good practices from other legal systems are copied in Germany and the lawyers profession tries to establish similar instruments also in Germany. This is done with the intention to provide suitable and effective solutions for the clients with legal certainty, and to provide high quality legal services.

a) Mediation

In recent years mediation as a tool of conflict resolution, which was generated first in a more academic discourse at university, became more and more a tool which is taken seriously in the legal community in Germany. The most limiting factor for it is the fact, that the costs of mediation have to be covered by the conflicting parties together and that they have to agree on the payment before solving the conflict. This has raised a lot of skepticism in the lawyers' community. The common and traditional way how to settle disputes is still confrontational. This is for the most part is also the most comfortable one for the client: he or she can leave everything with the lawyer. Still, there are some areas of law where mediation has been applied also very successfully in Germany. In family law cases it is being used regularly as the conflicting parties are aware that a confrontational approach does not solve most of their problems. The Cologne Chamber of lawyers and the Cologne Bar Association have started recently a project with the financial support of the Hans-Sodan-Foundation to run mediation within on-going proceedings and to provide high-level mediation services in the context of court proceedings. In appropriate civil law cases the proceedings are halted with the agreement of all parties and the court. The mediation is started with the conflicting parties and their lawyers. The mediators, who are all also fully qualified and experienced lawyers, run the mediation and try to reach a result which can be accepted by all sides. At the end there is a legally binding document which will be included to the protocol of the court and will finish the legal proceedings of the court. The mediation services are billed by the hour.

b) Ombudsman on Legal Service Quality

As in all other service industries, in the legal service industry there are also many complaints about poor quality services. There is no proper institution in the German system dealing with complaints of the consumers of legal services, the clients.²² For now clients can just sue their lawyers. In most cases, this not a very productive endeavor, which puts a lot of financial risk on the consumer. Concerns are raised that clients have no independent institutions to apply to, if they are provided with poor legal advice. Until now they could address only the chamber of their lawyer. As the lawyer in

question is a member of the chamber, there is skepticism that the chamber as such can assist with solving a dispute over the quality of services. The only real penalty the chambers have to ensure good quality is the threat to recall the permission to practice law from the lawyers. Such action is for good reasons used very rarely. Therefore some voices lobby for a fully independent ombudsman institution on the legal service quality, which should be also independent from the chambers. Others see an advantage in the connection of such an ombudsman and the chamber. They think it makes more sense to empower an existing structure than to establish a new one. Today chambers deal mainly with disputes over proper billing and fees. Some, as the chamber of lawyers in Stuttgart, run arbitration cases on such compensation issues. Others, as the chamber in Berlin, offer free consultations once per week to receive complains about individual members. At the same time the chamber does not want to provide legal advice on possible legal actions against the lawyers in question. In Cologne the chamber established an own department for arbitration and elected the current president of the chamber as an Ombudsman for such disputes. All these institutions cannot force the lawyer in question into anything. Participation in the examination of the Ombudsman or reviews by the chamber is voluntary for any lawyer in question.

As the deregulation of the legal services market continues, especially the lawyers' community sees the need to have an institution, which can ensure and control the concrete service provided. How this will be done, is still discussed and will not be decided by the legislator in this election period, which lasts until end of 2009, but will stay high on the agenda.

3. Public assessment on the reforms and outlook

Overall the deregulation of the profession is welcomed by most of the lawyers and the legal community as well as by the general public. It is welcomed that lawyers lose privileges and that the strict monopoly of legal counseling has been weakened. This opens new flexibility and business opportunities for non-formal lawyers in related fields. The massive growths of the profession in numbers of practicing lawyers, as well as the segregation of the market for legal services into big business and small individual practices, create challenges for the lawyers' profession. The chambers face the problem to unify the lawyers' community, as it appears at the same time more and more diverse in its structure and financial power. To set standards which fit all parts of the profession becomes a major task. Still, the lawyers in Germany have a common interest to advance their profession. Legal professionals fear the loss of control over the quality of legal services as there is less and less a local legal community, in which everyone knows each other at the courts. It is more and more common that lawyers practice not only in one city and meet more or less always the same counterparts, but travel to every court district their clients send them to. The self-control mechanism of the legal community has been weakened in this regard. Therefore institutions, such as an independent ombudsman on quality of legal services, will be needed. Attempts are made by lawyers' organizations in Germany to find an appropriate answer to this discussion in open and focused debates. It is telling that the discussion is dominated by the lawyers' community and not by other actors of the legal community or consumer rights activists. The lawyers are aware of the challenges for their profession.

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² Volker RÖMERMANN and Wolfgang HARTUNG, *Anwaltliches Berufsrecht*, München 2002, Rdn. 1, Page 11.

³ RÖMERMANN/HARTUNG, Rdn 3.

⁴ RÖMERMANN/HARTUNG, Rdn 13.

⁵ Federal Chamber of Lawyers (BRAK), 2008, www.brak.de.

⁶ The CoE used this scheme to compare the number of lawyers in its European Judicial Systems evaluation. CEPEJ (2006). The report reflects the figures of the year 2004.

⁷ CoE CEPEJ figures reported by the German Federal Ministry of Justice for 2007 in CEPEJ evaluation 2008.

⁸ Bastille Case – Federal Constitution Court (BVerfG), 14. July 1987 (*Anwaltsblatt* 1987, pages 598 and 603).

⁹ Federal Statistical Office (Statistisches Bundesamt), for 2005, www.destatis.de.

¹⁰ Ludwig KOCH/Matthias KILIAN, *Anwaltliches Berufsrecht*, NJW Praxis, Munich 2007, Rdn 784 and HOMMERICH/KILIAN/JACKMUTH/WOLF, *Anwaltsblatt* 2007, pages 219, 221.

¹¹ The ten biggest law firms in Germany are the following (total revenue in Million EUR in 2007): Freshfields-Bruckhaus-Deringer (401), Clifford-Chance (225), Hengeler-Mueller (215), Linklaters (192), CMS Hasche- Sigle (182), Lovells (163), White & Case (119), Taylor-Wessing (112), Gleiss-Lutz (109), Shearman & Sterling (100), Die ZEIT and JUVE Rechtsmarkt.

¹² KOCH/KILIAN, Rdn 825 ff..

¹³ KOCH/KILIAN, Rdn 825 ff..

¹⁴ Christoph HOMMERICH/Matthias KILIAN, *Strukturwandel der Anwaltschaft*, *Anwaltsblatt* 8 + 9, 2008, pages 623f..

¹⁵ Federal Statistical Office (Statistisches Bundesamt), for 2005, www.destatis.de.

¹⁶ Federal Statistical Office (*Statistisches Bundesamt*), www.destatis.de.

¹⁷ Federal Constitution Court (*BverfG*), 12 December 2006, 1 BvR 2576/04.

¹⁸ *Anwaltsreport*, August 2007, pages 5 and 6.

¹⁹ see Hans-Jochen MAYER, *Anwaltsblatt* 7 / 2008, pages 473 ff..

²⁰ Law on Strengthening the Autonomy of Lawyers' Profession (*Gesetz zur Stärkung der Selbstverwaltung der Rechtsanwaltschaft*) 30 March 2007 (BGBl I 2007, 358, Ausgabe 11 vom 30. März 2007).

²¹ Second office residence and consultation-session in non-resident districts (*Zweitstellenverbot and auswärtige Sprechtag*) see in the Law on Strengthening the Autonomy of Lawyers' Profession (*Gesetz zur Stärkung der Selbstverwaltung der Rechtsanwaltschaft*) 30 March 2007 (BGBl I 2007, 358, Ausgabe 11 vom 30. März 2007).

²² *Anwaltsreport*, August 2007, pages 5-9, The Ombudsman Model of the Cologne Chamber.