

GIR PRIVILEGE KNOW-HOW 2019

Germany

Thomas Schuerrle and Friedrich Popp
Debevoise & Plimpton LLP

NOVEMBER 2019

GIR
I N S I G H T

Scope of the privilege

1 Are communications between an attorney and client protected? Under what circumstances?

German law respects the need for a client to disclose all facts to his or her attorney, in particular defence counsel, and protects the confidentiality of attorney–client communications as well as all kinds of documents pertaining to said communications.

German law follows the civil law concept to impose secrecy obligations on the part of attorneys and to safeguard the professional secrecy with procedural rules. Without the permission of the client, the attorney must not disclose issues that form part of the secrecy obligation, and it is the client’s trust and his benefit from this secrecy obligation that the law protects. Hence, the “privilege” is historically not one of the attorney but one of the client, and it may be waived only by the client. It can be waived as a whole or to a certain extent. In criminal proceedings, for example, attorneys may refuse to testify about any information received from the client in the course of the exercise of professional duty. Likewise, attorneys may refuse to produce documents that contain such confidential information and the seizure of such documents by a state prosecutor is principally prohibited. In addition, criminal investigations against an attorney with the aim of obtaining access to protected information are prohibited.

2 Does the privilege only protect legal advice? Does it also protect non-legal communications between an attorney and client, such as business advice?

Professional secrecy attaches to all information the attorney gains in the exercise of his or her professional practice. It also attaches to information the attorney receives from third parties, as long as this occurs in the exercise of his or her professional work.

3 Is a distinction made between legal advice related to litigation and other legal advice?

No, the rules regarding the professional secrecy do not make a distinction between legal advice related to litigation and other legal advice. But there is a distinction between legal advice of defence counsel and that of a normal attorney in that the communication between a defence counsel and his or her client enjoys in some respects a higher protection.

4 What kinds of documents are protected by the privilege? Does it cover documents that were prepared in anticipation of an attorney–client communication? Does it cover documents prepared during an attorney-led internal investigation?

The professional secrecy protects any kind of documents containing attorney–client communications. The professional secrecy also protects documents prepared by the client or the attorney in anticipation of such communications. The privilege does not always extend to documents prepared by the attorney during an attorney-led internal investigation. The interview notes are protected to the extent that they have been produced as part of the lawyer’s work in conducting the case for the client and communicating accordingly. Special care, however, must be applied if the attorney conducts interviews and produces notes directly for and on behalf of the client or a subsidiary of it because in such a situation the notes could possibly be considered as produced by the client directly and not as part of privileged communication. Germany does not know a doctrine comparable to the attorney-work product doctrine in the US. In addition, documents are protected that the attorney produces for his or her own support, such as internal memoranda. If protected documents are situated with the client or someone other than the attorney, they can be seized there. There is an exception for communications between a defence counsel and his or her client, which is protected by the privilege irrespective of who holds the documents.

5 To what extent must the communication be confidential? Who can be privy to the communication without breaking privilege?

The professional secrecy attaches to every attorney–client communication, irrespective of whether or not it was labelled or meant as confidential. The privilege attaches to the attorney, his or her firm and its staff, and also to persons that the attorney hires within the performance of his services.

6 Is the underlying information privileged if it can be obtained from a non-privileged source?

The privilege does not apply to information obtained from a non-privileged source. The secrecy obligation may still continue to apply to the attorney.

7 Are there any notable exceptions or caveats to the privilege?

The attorney may not refuse to testify if and to the extent the client has released him or her from the duty of professional secrecy.

The professional secrecy does not apply to facts that are readily apparent to the public or that do not need to be kept secret from the point of view of their limited significance.

Documents pertaining to confidential information are not protected from seizure if they are held by the client. In a criminal defence, communications between a defence counsel and his or her client are protected by the privilege, irrespective of who holds the documents.

Attorneys are obliged to notify the prosecutor if they learn about certain serious crimes planned by their client; this includes a duty to inform the German Federal Bar Association if they definitely know that their client is seeking legal advice for money laundering purposes.

The professional secrecy does not prevent the seizure of attorney communications if there is evidence suggesting that the attorney is an accomplice to the crime or is unlawfully obstructing justice.

8 Are there laws unrelated to privilege that may protect certain communications between attorney and client?

The right to secrecy of correspondence and telecommunications protect the content of communications in general, including the attorney–client communication. Insofar as personal data are concerned, data protection laws also apply to attorney–client communications.

Protected parties

9 To what extent does the privilege extend to in-house counsel?

If and to the extent the in-house counsel is professionally independent and not bound by instructions he can generally represent its employer as an attorney in civil, administrative and criminal proceedings but with certain exceptions: First, representation is not permitted in criminal proceedings relating to the employer or in administrative misdemeanour proceedings involving fines concerning company-related charges. Second, the in-house attorney cannot represent his or her employer in civil proceedings in higher courts, including labour courts, in cases where the representation by an attorney is required.

On privilege, the in-house counsel has the right to refuse testimony in civil proceedings about his or her in-house work as witness. But, as regards criminal law, such attorney has no right to refuse testimony in criminal proceedings and his documents can be seized during investigations.

If and to the extent an in-house counsel is permitted by the terms of his or her service to represent other clients as their attorney, the privilege applies for this particular type of work.

10 Does the privilege protect communications between an attorney and a corporate client's employees? Under what circumstances?

As the external attorney's duty to professional secrecy covers all information he or she learns about in the performance of his or her services, information resulting from communications with the employees of its corporate client is also protected. The protection relating to information received from the employees ends if and to the extent the corporate client waives the professional secrecy.

The privilege does not protect communications or documents pertaining to communications in criminal matters or in administrative misdemeanour proceedings involving fines between an in-house counsel on the one hand and his or her employer or employer's staff on the other hand.

11 Does the privilege protect communications between non-lawyer employees of a corporate client if they are acting at the direction of counsel or gathering information to provide to counsel?

Information communicated by a non-lawyer employee of a corporate client is considered protected by the attorney–client privilege if and to the extent the employee communicates information to counsel on behalf of the corporate client as part of the case. In such a situation, the privilege attaches between the corporate client and the attorney. It does, however, not extend to the individual itself nor is it part of the privilege on the attorney's side on the basis that the person has been instructed to assist

by the attorney. Only persons that qualify as professional assistants and support the lawyer directly are being included in the privilege on the side of the attorney. See also question 13.

12 Must the attorney be qualified to practise in your country to invoke the privilege?

The attorney must be admitted to practise or otherwise be a member of an attorney bar in Germany, which may include attorneys from another member state of the European Union or a German Bar admission in accordance with World Trade Organization rules.

13 Does the privilege extend to non-lawyer third parties? In which circumstances does the privilege protect communications with third parties if they are providing advice related to a legal matter?

The privilege extends to non-lawyer third parties if they contribute direct support to the professional activity of the attorney, irrespective of whether the third party is employed or self-employed. Please note that forensic service providers are often chartered auditors or tax advisers that enjoy an independent privilege under German law.

14 Does the privilege apply to communications with potential clients?

Yes. The professional secrecy protects any kinds of documents prepared by the client or the attorney in anticipation of attorney–client relations.

Ownership of the privilege

15 Does the attorney or the client hold the privilege? Who has rights under the privilege?

The “privilege” consists effectively of a protection of the professional secrecy in favour of the client. The attorney does not only have the right against the state but also the obligation to his client to remain silent. The professional secrecy and its extent are controlled entirely by the client. If and to the extent the client has waived the professional secrecy, the attorney may no longer refuse to testify about the relevant information received from the client in the course of the exercise of professional duty. The attorney’s right to refuse testimony or document production is based directly to his obligation of secrecy towards the client and applies to the extent not waived by the client.

16 Can the privilege be waived? Who may waive it?

Only the client can waive the professional secrecy, in whole or in part. Once the professional secrecy has been waived by the client, the attorney may no longer rely on his or her right to refuse testimony. The attorney could theoretically ignore his or her right to refuse testimony, but will likely not do so as this would be breaching his or her duty of confidentiality.

17 Is waiver all or nothing? Is it possible to waive the privilege for certain communications but not others?

A waiver can be limited to a certain extent and for the purposes of a communication to a certain person only. A waiver cannot, however, be limited to minute facts or statements as this would permit falsifications or misinterpretation of facts.

18 If two defendants are mounting a joint defence, can they share privileged information without waiver? What about two parties with a common interest?

In both cases the sharing of confidential information requires a waiver by each of the defendants.

19 Is it common for attorneys and clients to agree to a confidentiality provision in a contract?

No. In Germany there is no need for a contractual confidentiality agreement as the obligation to professional secrecy is imposed by statutory law.

Enforcement considerations

20 Describe the legal basis of the rules governing the privilege. Are these rules found in a constitution or statute, or in case law?

The legal basis of the professional secrecy is the Federal law governing the attorney profession. Statutory provisions in procedural rules safeguard the professional secrecy by providing the attorney with a right to refuse testimony concerning confidential matters and the exemption of certain documents pertaining to said matters from seizure. Further statutory procedural rules prohibit criminal investigations against an attorney that aim at revealing information protected by professional secrecy.

The professional secrecy serves the protection of the client's interest in the confidentiality of his communication with his attorney and, thus, his or her rights to informational self-determination and refusal to testify against him or herself, which enjoy constitutional rank.

The German Constitutional Court considered current privilege standards in its June 2018 decisions relating to the VW investigation constitutional to the extent they relate to third-party searches and attorney work product.

21 Is the privilege primarily characterised as a procedural or evidentiary rule, or is it characterised as a substantive right?

In Germany the professional secrecy obligation and the corresponding right of the client are as such substantive in nature. Their legal basis is the federal law governing the attorney profession. The professional secrecy is effectively protected by procedural rules governing the taking of certain evidence that is protected from disclosure. These include essentially the attorney's right to refuse testimony on matters falling within the professional secrecy and the inhibition of seizures of corresponding documentation. Further, there are procedural rules prohibiting criminal investigations against an attorney with the aim of obtaining access to protected information.

22 Describe any differences in how the privilege is applied in the criminal, civil, regulatory or investigatory context.

In criminal, and to a likewise extent in administrative proceedings, investigations as well as in civil proceedings the professional secrecy is protected by the attorney's right to refuse testimony and to avoid seizure of protected documents. In German civil proceedings there is generally and principally no document discovery and hence no necessity for a protection against forced seizure of documentary evidence as in criminal or administrative proceedings.

23 Are the rules regarding the privilege uniform nationwide or are there regional variations within your country?

The rules regarding privilege and professional secrecy apply nationwide. There are no regional variations.

24 Does a professional organisation enforce the maintenance of the privilege among attorneys? What discipline do attorneys face if they violate privilege rules?

Yes. The attorney bar organisations and disciplinary courts for attorneys enforce the maintenance of the professional secrecy and impose for (negligent and wilful) violation of secrecy sanctions including warning, caution, a fine of up to €25,000, a ban on acting as representative and counsel in certain fields of law for a period of between one and five years, or exclusion from the legal profession.

25 What sanctions do courts impose for violating the attorney–client privilege?

The violation of the professional secrecy can qualify as a criminal violation of private secrets that can lead to imprisonment not exceeding one year or a fine.

Civil courts can impose damages on the violating attorney, resulting from several heads of damages: either from the breach of the contractual obligation to secrecy under the mandate agreement, a violation of a protective law (in case of a criminal secrecy violation) or a tort (absolute right to informational self-determination).

26 How can parties invoke the privilege during investigations or court proceedings? Can the privilege be invoked on the witness stand?

If during investigations information covered by the professional secrecy is seized, the information must not be used and has to be deleted without undue delay. In court hearings, the attorney as a witness would invoke the right to refuse testimony in the witness stand.

27 In disputes relating to privilege, who typically bears the burden of proof?

The burden of proof rests with the party claiming or benefitting from the professional secrecy, or with the attorney as witness if he or she invokes the right to refuse testimony on grounds of his or her obligation of professional secrecy towards his or her client.

28 Does the privilege protect against compulsory disclosures such as search warrants or discovery requests? Is there a distinction between documents held by the client and documents held by the attorney?

The professional secrecy is protected by procedural rules prohibiting seizure or compulsory disclosures. Documents pertaining to attorney–client communications as well as all documents prepared by either the client or the attorney that are protected by the professional secrecy may not be seized during investigations. However, this rule only applies if the documents are in the possession of the attorney. Documents that are in the possession of the client may be seized during investigations and the underlying information may be used. An exception to this rule are documents that form part of a criminal defence. Communications between a defence counsel and his or her client are protected by the privilege, irrespective of who holds the documents.

29 Describe the choice-of-law rules applied by your courts to determine which country's privilege laws apply. To what extent does your country recognise the validity of choice-of-law provisions in contracts, particularly as they apply to privilege?

There is no choice-of-law with respect to the lex fori providing for the attorney right to refuse testimony and prohibit the seizure of attorney–client communication. If the German court were to seek evidence in a foreign country and the privilege were invoked there, that country's law would likely govern the applicable privilege under the assumption that the evidence-taking would be done by an authority of that state. In practice, for instance, a German authority, and certainly a US authority, would not enforce a request of a German court to seize documents from a US attorney in violation of US privilege.

Termination of the privilege

30 Does the privilege terminate on the death of either the attorney or the client?

No. The privilege continues to operate beyond the end of a mandate.

31 Does the privilege terminate on the conclusion of the attorney–client relationship?

No. The privilege continues to operate beyond the end of a mandate.

32 Is the privilege destroyed if the client communicates information to the attorney to further a crime or perpetuate a fraud?

No. Should the attorney learn in his or her professional capacity about the client's plans to commit certain serious crimes, such as homicide, the lawyer has an obligation to notify the prosecutor like any other citizen. In addition, the attorney is under a statutory duty to inform the Federal Bar Association in case he or she positively knows that his or her client is seeking legal advice for money laundering purposes. In addition, the restrictions on seizure of protected documents do not apply if there is evidence that the attorney participated in the criminal offence, also as an accessory after the fact, by committing obstruction of justice or by handling goods obtained by means of, or emanating from, a criminal offence or goods that were used or are intended to be used to commit a criminal offence.

33 Is the privilege terminated if the attorney makes an inadvertent disclosure? If such a disclosure is made, can the attorney retrieve the privileged information or otherwise correct the error?

The prevailing view suggests that professional secrecy ends in case of an inadvertent disclosure. The attorney can claim the protected information back, but only with future effect. Likewise, the right of an attorney to refuse testimony ends to the extent the client has waived his rights under the professional secrecy. However, the right to refuse testimony regains (future) effect if, and as soon as, the client revokes the waiver. Admissions the attorney has made in the meantime are not privileged (again) and may be used.

34 Is the privilege terminated if a third party is included in the communication or is subsequently forwarded the communication?

No. Neither the inclusion of a third party in the attorney–client communication nor the subsequent forwarding of such communication terminates the professional secrecy.



Thomas Schuerrle
Debevoise & Plimpton LLP

Dr Thomas Schuerrle is the managing partner of Debevoise & Plimpton's Frankfurt office. He advises on corporate governance and corporate transactions, including litigation, and is active in firm's antitrust and cybersecurity and data privacy groups. He was admitted to practise in Germany in 1985 and in the State of New York in 1988.



Friedrich Popp
Debevoise & Plimpton LLP

Dr Friedrich Popp is a senior associate of the Debevoise & Plimpton's Frankfurt office and a member of the firm's litigation department. His practice focuses on arbitration, litigation, internal investigations, corporate law, data protection and anti-money laundering. Dr Popp is admitted to practise in Austria, Germany and in the State of New York.

Debevoise & Plimpton

Debevoise & Plimpton LLP is a premier law firm with market-leading practices, a global perspective and strong New York roots. Approximately 650 lawyers work in nine offices across three continents, within integrated global practices, serving clients around the world. Our lawyers prioritise developing a deep understanding of the business of our clients. We then pursue each matter with both intensity and creativity to achieve optimal results.

Debevoise's white collar and regulatory defence group excels in high-profile, complex representations for clients facing corporate crises. The group's depth of experience and global reach means it works strategically and effectively with international clients to anticipate and respond to risks, swiftly identifying the root of any problem.

The team's expertise includes defending against criminal prosecutions and civil enforcement actions, securities related litigation, conducting internal investigations, negotiating complex global settlements, and facilitating cooperation with government regulators.

The team also routinely counsels clients regarding preventive measures, compliance programmes and the collateral consequences of criminal proceedings.

The group is made up of highly experienced partners in New York, London, Paris, Frankfurt, Shanghai, Moscow, Hong Kong, and Washington, DC. It is one of the few in the market to have exceptional capabilities across geographies.

TaunusTurm
Taunustor 1
60310 Frankfurt
Germany
Tel: +49 69 2097 5000

Thomas Schuerrle
tschuerrle@debevoise.com

Friedrich Popp
fpopp@debevoise.com

www.debevoise.com