Global Privilege and Professional Secrecy Guide - Germany

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# 01 - Discovery

## What disclosure/discovery is required in litigation?

There is no formal process of disclosure or discovery under German procedural law, and the duty to produce documents is very restricted. Since a change of the German Code of Civil Procedure ("**Civil Procedure Code**") in 2008, the court may order that a party or a third party disclose specific documents to which one of the parties has referred and that are in the other party's or the third party's possession (section 142 of the Civil Procedure Code). The facts that are to be evidenced by the documents must be in dispute and relevant to the outcome of the case, and the party that has the burden of proof must adequately substantiate the facts of its case independently of disclosed documents. The highest German civil court, the Bundesgerichtshof (BGH), has confirmed that a court must not order the production of documents solely for the purpose of extracting information. For this reason – and probably also because disclosure is at odds with the traditional approach in German civil litigation – disclosure orders are rare in practice. Therefore, case law on the application of section 142 of the Civil Procedure Code is sparse.

According to section 142 of the Civil Procedure Code, a court has discretion whether to order the production of a document or not. In exercising this discretion, the court, according to the BGH, may take into consideration the principle of proportionality and also legitimate interests in maintaining confidentiality. Thus, a court may find that the other party does not have to disclose documents, for example, if they contain business or trade secrets. Some scholars also argue that, in order to protect the attorney-client relationship, the other party would not have to disclose documents prepared within such relationship. At present, however, it cannot be assumed that this view would be shared by the courts.

Furthermore third parties are not obliged to disclose documents if it would be unreasonable for them to do so or if they have a right to refuse testimony (section 142 paragraph 2 of the Civil Procedure Code). Thus, for example, a lawyer would not be obliged to disclose a document falling within the scope of their confidentiality obligations, as explored further in this chapter.

# 02 - Type of privilege

## Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

Yes, both communications between lawyer and client and documents prepared by or for lawyers enjoy some kind of protection. However, because of the limited disclosure regime, privilege does not play a significant role in German civil litigation. Also, the rationale behind the "privilege" is different from the Anglo-American concept. As, generally speaking, there is no obligation to disclose documents, there is no corresponding privilege for not disclosing certain documents. Rather, in Germany, privilege (more accurately "Anwaltsgeheimnis," i.e., professional secrecy of lawyers) protects lawyers, who are considered as independent agents of the administration of justice, against state intervention. Also, it is accepted that lawyers can only properly fulfill their role if there is a relationship of trust between lawyers and their clients. Therefore, the relationship between lawyer and client is protected by professional confidentiality regulations set out in the Code of Professional Conduct and Regulations concerning the Legal Profession. Without the consent of the client, lawyers are prohibited from divulging any confidential information or documents obtained in the course of their professional activities. Breaches of this duty carry criminal penalties under the German Criminal Code.

The obligation to preserve confidentiality is mirrored by the right of the lawyer to refuse to divulge such information in civil and criminal procedures as set out in the Civil Procedure Code and the Criminal Procedure Code. Thus, under German law, the communication itself is not privileged, but the lawyer is under a duty not to disclose the information it contains and thus has a right to refuse testimony. Nevertheless, for the purposes of this chapter, the expression "privilege" will be used.

With regard to criminal procedures, under the Criminal Procedure Code (section 97), written correspondence between the accused and persons who may refuse testimony (such as lawyers) must not be seized. The same applies for notes etc. taken by the lawyer concerning matters covered by the right to refuse testimony.

# 03 - Scope of privilege

## Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

In Germany, attorney-client communication is not privileged as such. Rather, lawyers have the obligation and the right to not disclose confidential information. The Civil Procedure Code does not explicitly rule on the question of whether attorney-client communication held by the client is also protected. Given that disclosure does not play a significant role in civil litigation in Germany, there is no established case law relating to this issue. Based on a decision of the Regional Court of Karlsruhe and on scholarly writings, there is a basis for clients to argue that privilege should apply in this context. However, we consider that there is a considerable risk that privilege would not be extended to such communications. This is because even in criminal cases copies of attorney-client communications held by the client are, in principle, not protected (as the wording of the Criminal Procedure Code grants the right not to disclose confidential information only to lawyers). Nevertheless, by way of exception, documents that relate to a defense to alleged criminal or regulatory offenses must not be seized even if they are in the possession of the accused. This is to ensure that the confidentiality of communications with defense counsel is effectively guaranteed and follows from the right to an effective defense (as a part of the right to a fair trial), which is guaranteed by the German constitution and the European Convention on Human Rights. The limitations of this privilege from seizure are, however, unclear. For example, it is disputed whether or not documents relevant to a defense that are in a third party's (e.g., an expert's) possession also enjoy protection from seizure.

## Are in-house lawyers treated in the same way as external lawyers for determining privilege?

No. A change in the Criminal Procedure Code in 2015 has clarified that in criminal proceedings in-house lawyers are not entitled to refuse testimony in relation to information that was entrusted to them or became known to them in their capacity as in-house lawyer. As a consequence, documents prepared by in-house lawyers do not enjoy protection from seizure in criminal cases. In civil litigation, however, an in-house counsel may refuse to give testimony regarding information obtained from their employer if the in-house counsel is admitted to the bar. If this is the case, in-house counsel are not obliged to disclose corresponding documents.

## Does privilege extend to internal communications between in-house lawyers?

Yes in civil cases (but only if the in-house lawyers are admitted to the bar), but no in criminal cases. In 2015, the German legislature decided that in-house lawyers are not entitled to refuse testimony in relation to information that was entrusted to them or became known to them in their capacity as in-house lawyer (section 53, No. 3 of the Criminal Procedure Code). As a consequence, documents prepared by in-house lawyers may be seized in criminal or regulatory situations.

## Are foreign lawyers recognized for the purposes of privilege?

Foreign lawyers who are admitted to the German bar are recognized for the purposes of privilege. Whether other foreign lawyers also enjoy privilege is disputed. A number of authors are of the view that all lawyers who are admitted to the bar in a Member State of the EU may invoke privilege. Occasionally, it is argued that all foreign lawyers should benefit from privilege (at least in criminal cases).

## Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

Yes. Certain nonlegal professionals like accountants and tax consultants are obliged to preserve confidentiality due to their rules of professional conduct. Again, this confidentiality obligation is mirrored by the right to refuse to divulge such information in civil and criminal procedures.

It should be noted, however, that due to regulations set out in the Civil Procedure Code and the Legal Services Act, nonlegal professionals are not allowed to advise on legal issues without specific permission.

# 04 - Sharing documents with third parties

## In what circumstances (if any) can a document be given to a third party without losing protection?

As a general rule, there are no such circumstances. If documents compiled by a lawyer are sent to a third party (e.g., a foreign lawyer or even a client), the legal privilege is no longer applicable. Thus, only documents in the exclusive possession of a lawyer can be privileged. This is due to the fact that "privilege" actually results from professional confidentiality regulations. If a document is sent to a third party (which is only allowed with the client's consent), who in turn is obliged to maintain secrecy (e.g., another German lawyer), the document will fall under the confidentiality obligations of the third party.

As a consequence of the different legal background, there is no concept of waiver like in the Anglo-American system. Yet, the client may release the lawyer from the obligation of confidentiality. In this case, the lawyer is no longer entitled to refuse testimony and has to divulge the corresponding documents.

However, there are significant exceptions to that rule in relation to documents that relate to a defense to alleged criminal or regulatory offenses. As set out above, these documents enjoy greater protection in order to secure the right to an effective defense.

# 05 - Investigations

## Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

Yes. Privilege is almost a non-issue in German civil litigation. It does, however, have greater significance in the context of dawn raids, e.g., in cartel cases or other compliance-related matters.

In particular, the confidentiality of communications with defense counsel is effectively guaranteed and requires that privilege applies to such communication. The same applies to documents prepared for the purpose of defense.

So far, regional courts have been reluctant to grant privilege in cases of internal investigations (at least unless the company is already accused and the internal investigation is directed at preparing the defense). The Regional Court of Bonn held that documents prepared during an internal cartel compliance investigation may be seized at a subsidiary company's premises if the external lawyers who prepared the documents were retained by the parent company and not for the immediate purpose of preparing the defense of the subsidiary company. According to the court, only communications between an accused and the lawyer instructed to prepare the defense are protected.

The Regional Court of Hamburg reached a similar decision. According to its judgment, a lawyer's notes taken during an interview with an employee of the client in the course of an internal investigation could be seized, as there was no relationship of mutual trust between the employee and the lawyer. This was because the lawyer was engaged by the employer to assess its position vis-à-vis the employee in relation to potential damage claims. Both decisions have been criticized, and there is scope to argue that they are based on too strict an interpretation of the law. Further, a change in the Criminal Procedure Code in 2011 may support the view that at least documents from internal investigations in the lawyer's possession must not be seized (Regional Court of Mannheim).

Yet, the German Federal Constitutional Court in 2018 took a strict view. It held that documents prepared during an internal investigation (launched by the parent company with the intent to submit the results of the investigation to the US Department of Justice) can be seized at an international law firm's German office (as the documents were not prepared for the defense of an accused but in the context of an internal investigation). The law firm had argued that the right to choose and practice a profession (in combination with general fundamental rights) includes protection of the relationship of mutual trust between an attorney and its client. As a consequence, documents prepared during an internal investigation should enjoy privilege, irrespective of whether the company who mandated the lawyers is accused in criminal or regulatory proceedings in Germany. This argument has, however, been dismissed by the Federal Constitutional Court. It reasoned, inter alia, that even though a German office was involved, the law firm itself as an international entity (a general partnership in the state of Ohio, US), could not invoke this particular constitutional right that only applies to German citizens and entities.

The international law firm and some of the lawyers employed there then raised complaints against Germany before the European Court of Human Rights (ECHR) (1022/19 and 1125/19). They complained that the search of the law firm's Munich office, as well as the securing of documents and data which the lawyers had compiled or created during the internal investigation, had violated their rights under article 8 of the European Convention on Human Rights (Right to respect for private and family life). The ECHR considered the complaints to be manifestly ill-founded. It held that the search for and securing of documents in the present case did not concern documents and data protected by legal professional privilege in the criminal investigation at issue. Rather, it only concerned material regarding a third party obtained by the applicants in the exercise of their profession on behalf of a client not targeted in the criminal investigation and some of which the client had, in any case, permitted to be shared with the authorities. In addition, the criminal investigation proceedings in the US, in which context the applicants had been mandated, had already been concluded at the time of the search in March 2017. In these circumstances, according to the ECHR, the national authorities had a wider margin of appreciation in the context of the assessment of the necessity of the impugned measures.

## Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

There is a high risk that such communications will not be considered as privileged. This is particularly true if the subject is not (yet) accused in criminal proceedings and/or the interview is conducted with a person which is not the lawyer's client.

# 06 - Regulatory investigations

## Can governmental regulators require a privileged document to be provided to them?

Privileged documents must not be seized by public authorities and are protected from disclosure by the Criminal Procedure Code. However, the scope of privilege in that sense is rather limited. Its main scope of application is written correspondence between the accused and persons who may refuse testimony (such as lawyers), or documents prepared for defense purposes.

# 07 - Artificial intelligence

## Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

In December 2024, the German Federal Bar Association issued guidelines concerning the use of generative AI by lawyers. The guidelines point to the fact that the use of nonconfidential AI tools entails the risk that lawyers violate their obligation to maintain professional secrecy. When using generative AI tools, lawyers have to ensure that they do not divulge client information. In addition, inputting information into generative AI tools would most likely be regarded as providing the respective information to a third party so that privilege no longer applies (see section 4 above).

The guidelines of the Bar Association also state that, due to their professional duties, the lawyer is obliged to carefully review the outputs of generative AI tools. As a result of the review, the outputs are protected in the same way as legal advice provided by a lawyer without the assistance of AI.

# 08 - Recent issues

## What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

A constitutional complaint (1 BvR 398/24) is currently pending before the German Federal Constitutional Court in which a lawyer is challenging the order to search their office premises. The search was ordered and carried out as part of a preliminary investigation conducted against the lawyer on the basis of a criminal complaint filed by a former client of the lawyer.

The German Federal Bar Association has published a statement in which it calls for stricter requirements for law firm searches to protect attorney-client privilege. The Bar Association points out that the search of law firm premises regularly entails the risk that protected data of non-accused persons, such as clients, is disclosed to the investigating authorities, which the clients may believe to be safe in the sphere of the professional secrecy holder. This would affect the fundamental rights of clients. The Bar Association emphasizes that the protection of the relationship of trust between lawyer and client is also in the public interest in the effective and orderly administration of justice. These interests, according to the Bar Association, require special consideration when examining the appropriateness of an investigative measure. Therefore, the Bar Association urges the Federal Constitutional Court to specify the requirements for searches of persons subject to professional secrecy and to implement high thresholds for such a search to be permissible.

In the previous edition of this guide, we reported on a draft law on corporate criminal law, which also included provisions on internal investigations. It was foreseen that the results of an internal investigation would not enjoy the privilege from seizure according to section 97 of the Criminal Procedure Code. This was highly criticized, as it may prevent companies from conducting such an investigation. As a result, the draft law was not adopted. The current coalition agreement of the new German Government does not contain any indication of plans or initiatives for enacting a new law relating to this topic.

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