

Pro Bono Practices and Opportunities in Austria¹

INTRODUCTION

The Austrian legal system has a tradition of providing a variety of pro bono services. These include the preliminary legal advice (*erste anwaltliche Auskunft*) provided by attorneys in the course of regular “jour fixes” organized by the local bar (i.e. a preliminary discussion and analysis of the facts and the legal implications of a matter), fixed weekly days on which judges at the district courts are obliged to provide free legal advice to individuals and, in particular, a comprehensive legal aid system which obliges Austrian attorneys to advise indigent natural and legal persons free of charge in civil and criminal matters. In addition, many Austrian attorneys, including law firms, regularly offer additional pro bono advice, i.e. above the level of the aforementioned preliminary discussion and analysis, and/or preliminary legal advice if the prerequisites to apply for legal aid are not met. Typical beneficiaries of such pro bono activities are (apart from individuals in need) cultural and art institutions as well as welfare and church institutions.

OVERVIEW OF THE LEGAL SYSTEM

The Justice System

Constitution and Governing Laws

The constitution of Austria establishes a framework of a federal parliamentary representative democratic republic. Its centerpiece is the Federal Constitutional Law,² which comprises the fundamental federal constitutional provisions. However, the Austrian constitution comprises a variety of additional constitutional acts and individual provisions in statutes and treaties which are designated as constitutional.

Austria consists of nine autonomous federal states (*Bundesländer*), which, just like the federation, all have constitutions defining them to be republican entities governed according to the principles of representative democracy.

Apart from republicanism and federalism, fundamental constitutional principles include the rule of law, the protection of personal liberty, the separation of powers and the right to a fair trial.³

The Courts

The court system is divided between ordinary courts (*Ordentliche Gerichte*), dealing with criminal and civil cases, and public law tribunals for constitutional law and administrative law matters (*Gerichtshöfe des öffentlichen Rechts*). Since 2014, administrative courts (*Verwaltungsgerichte*) have further been established in each of the federal states.

District courts (*Bezirksgerichte*), regional courts (*Landesgerichte*) and appellate courts (*Oberlandesgerichte*) constitute the hierarchy of the ordinary court system and provide a regional organization in each federal state. The supreme court in criminal and civil cases is the Supreme Court of Justice (*Oberster Gerichtshof*).

The Constitutional Court (*Verfassungsgerichtshof*) is the supreme court in constitutional matters whereas the Higher Administrative Court (*Verwaltungsgerichtshof*) is the supreme court in administrative proceedings.

¹ This chapter was drafted with the support of Schönherr rechtsanwälte gmbh.

² Bundes-Verfassungsgesetz (“B-VG”).

³ See B-VG Art 83, 2.



Regional courts (*Landesgerichte*) and appellate courts in commercial and labor matters can consist of mixed panels with lay judges and at least one professional judge depending on the specific matter in dispute. All other court panels consist of professional judges only. All judges are appointed by the state.

The Practice of Law

The legal education required to become a registered attorney has a two-tier structure. After a successful university education (i.e. a masters degree in law or business law) a five-year legal clerkship (*Praktische Verwendung*) in various branches of the legal system has to be completed.⁴ The prospective attorney must also pass the bar exam (*Rechtsanwaltsprüfung*), which consists of written and oral exams. The bar exam can be taken after completion of three years of the legal clerkship. A participation in pro bono activities during the legal university education or the legal clerkship is possible but not required. Even though university law clinics do exist, they are a very recent phenomenon only (see IV.a.v. below). Thus, the possibilities to engage in pro bono activities during the university education are still limited.

The admission to practice as an attorney is awarded by the local bar association (*Rechtsanwaltskammer*). In addition to the bar exam and the five-years legal clerkship, the applicant has to complete a certain number of training events, obtain indemnity insurance and pass a reliability check by the bar.⁵ There is no distinction between barristers and solicitors. There are specific regulations and certain exemptions for qualified lawyers from European Union and EFTA⁶ member states wishing to practice in Austria. There are no pro bono related requirements to obtaining or retaining the licensure. However, each practicing attorney is required to provide legal aid (*Verfahrenshilfe*) to any natural or legal person who is unable to bear the expenses of the proceedings (see III. below).

About 6,000 licensed attorneys currently practice in Austria,⁷ which equates to a median number of attorneys per capita of roughly one to 1430. In 2014, legal aid assistance was granted to indigent persons and legal entities in 22,000 cases.⁸

Legal Regulation of Lawyers

Attorneys are subject to the provisions of the professional code (*Rechtsanwaltsordnung*) and associated regulations. Apart from the professional rules of conduct, the bar rules also regulate the compensation of attorneys.⁹

Austrian attorneys are, in principle, free to agree their fees, including the type of fee, the amount of the fee and how it is to be paid.¹⁰ In practice, Austrian lawyers regularly charge their clients hourly rates rather than, for instance, fixed fees. Contingency fees (*Erfolgshonorare*) are prohibited; however, attorneys may agree on a premium for successful services.¹¹

⁴ See RAO §§ 1, 2.

⁵ See RAO § 1.

⁶ European Free Trade Association.

⁷ See <http://www.rechtsanwaelte.at/kammer/kammer-in-zahlen/mitglieder/> (last visited on September 4, 2015).

⁸ See <http://www.rechtsanwaelte.at/kammer/kammer-in-zahlen/verfahrenshilfe/> (last visited on September 4, 2015).

⁹ Federal Attorney-at-law-Standard-Rate-Act (Rechtsanwaltstarifgesetz, "RATG"), the Federal Profession Code (Rechtsanwaltsordnung, "RAO"), the Professional General Terms on Fees (Allgemeine Honorar-Kriterien, "AHK") and the Professional Guidelines (Richtlinien für die Ausübung des Rechtsanwaltsberufs, für die Überwachung der Pflichten des Rechtsanwalts und für die Ausbildung der Rechtsanwaltsanwärter, "RL-BA").

¹⁰ See RATG § 2, ¶ 1 and § 26, ¶ 2; RAO § 16, ¶ 1; AHK § 1; RL-BA § 50, ¶ 1.

¹¹ See Austrian Civil Code ((Allgemeines Bürgerliches Gesetzbuch) "ABGB") § 879, ¶ 2 N. 2; see also AHK, § 12 which allows in criminal matters a premium up to 50% of the incurred fees.



If there is no explicit agreement on fees between the attorney and the client, a statutory fee regime applies which is set forth in the bar rules.¹² The calculation of the statutory fees is based on the value of the dispute and, to some extent, on the time the attorney has spent on the matter. Statutory fee schedules provide for fees for every individual service rendered by the attorney to the client (such as phone calls, memos, letters, briefs, participation in negotiations or in court proceedings, etc.).¹³

LEGAL RESOURCES FOR INDIGENT PERSONS AND ENTITIES

The Right to Legal Assistance

In Civil Proceedings

Amtstage: On certain days, at least once a week, judges at the district courts are obliged to provide free legal advice to individuals. On these occasions individuals may also declare motions, claims and other legal statements verbally.¹⁴

In civil proceedings below a certain value, representation by an attorney in court is not required by law. Thus, the respective party may file actions and other motions without the assistance of an attorney. Nevertheless, such party shall receive guidance by the judges since the latter must fulfil their legal duty to inform and notify the parties of their situation in the process and discuss the legal and factual basis of the claim.

In civil proceedings, a party (either an individual or legal entity) may be granted legal aid by the court if certain requirements are met (see below III.b).¹⁵ In essence, a grant of legal aid results in the partial or full exemption from paying attorney's fees and court fees, i.e. court fees and the fees of the appointed attorney are waived if the beneficiary loses the case. However, in civil law litigations, the opposing party still has to bear the beneficiary's attorney's fees and court fees if the beneficiary prevails.

In Criminal Proceedings

Legal aid may also be applied for by individuals in criminal proceedings. Similar requirements and consequences apply as in civil proceedings discussed above.

State-Subsidized Legal Aid: Eligibility Criteria

Austrian citizens and foreign citizens, regardless of whether the applicant is a plaintiff or defendant, national or alien, are generally eligible for legal aid.

To receive legal aid, the applicant has to be indigent. An applicant has to prove that their income is too low and that they do not own sufficient property to engage in civil proceedings, or to pay an attorney in criminal proceedings, without jeopardizing basic maintenance. To demonstrate indigence, the applicant has to disclose an income statement and a declaration of assets.

In addition, in civil proceedings the applicant's claim must not be obviously without merits or frivolous.¹⁶ The "obviously without merits"-test requires a judge to determine the claim's merits. It is not required that the claim / defense has a strong chance of success but it must have a reasonable basis. In practice, only "hopeless" claims / defenses are denied legal aid. The second requirement implies, in particular, that applicants will not receive legal aid in cases where they can achieve their objectives in a more straightforward and cost-efficient manner. In criminal proceedings legal aid is granted if the legal and/or

¹² AHK, § 12.

¹³ See Lesigang, AnwBl, 157, 161 (1965); Neidhart, DAR 122 (1983).

¹⁴ See Code of Civil Procedure (Zivilprozessordnung "ZPO") §§ 439, 434.

¹⁵ See ZPO §§ 63 et seq.

¹⁶ See ZPO §§ 63, 66 and RL-BA §§ 56 et seq.



factual circumstances of the respective case require the assignment of a legal counsel to the accused to ensure a fair trial.

The conditions under which legal aid may be granted to a legal entity are similar to those for an individual. However, there is no eligibility for a legal entity if a third party that is economically or factually involved therewith (e.g., a shareholder) is not indigent.¹⁷

Mandatory Assignments to Legal Aid Matters

Attorneys are generally required to accept matters assigned to them under the legal aid scheme. In case a court decides that legal aid is granted and that the appointment of an attorney is necessary or mandatory, the judge will issue a request to the local bar association. The board of the local bar association will then assign the matter to one of its attorney members. To the extent possible, the board shall take into consideration requests for a specific attorney.¹⁸ The appointed attorney may only refuse the mandate for sound reasons such as a conflict of interest.¹⁹

As discussed above, the attorney is compensated by the opposing party if the applicant prevails in the litigation. Otherwise, the attorney is not entitled to fees. However, as legal aid has the character of a social security benefit, the federal states pay a certain contribution to the local bar as remuneration, thus providing for an indirect benefit to the attorneys registered with the bar. The funds are used to sponsor retirement pensions, occupational disability pensions and provision for dependents. Their volume basically depends on the number of members in the local bar association and the number of appointments within the legal aid scheme.²⁰ These contributions however generally do not match the fees which the attorneys would have generated in the matters, were they not subject to legal aid.

Unmet Needs and Access Analysis

Low income individuals, like single parents, who cannot afford legal costs insurance (*Rechtsschutzversicherung*) but are not “sufficiently poor” to qualify for assistance under the legal aid scheme always run the risk of being deprived of their rights.

Furthermore, NGOs and charitable organizations struggle to fulfill the requirements of the legal aid scheme. This often forces charitable organizations to choose between abandoning professional legal services completely or diverting funds from charitable purposes to cover legal expenses.

Finally, complex cases may be dealt with unsatisfactorily under the legal aid system. Despite the minimum professional standards stipulated by the bar rules, attorneys may tend to allocate less time and efforts to legal aid cases in comparison to regular matters which are subject to remuneration. Furthermore, some potential pro bono cases cannot be handled on a legal aid basis because special expertise or manpower is required. For example, cases with cross-border implications can usually not be handled by a single lawyer on a legal aid basis.

Alternative Dispute Resolution

Mediation, Arbitration etc.

Several public arbitration offices offer out-of-court dispute resolution schemes. In certain matters concerning tenant law and neighbor law, it is necessary to file the matter with the corresponding

¹⁷ See ZPO § 63, 2.

¹⁸ See ZPO § 67.

¹⁹ See RAO § 46, 2.

²⁰ See RAO § 47.



arbitration office before a judicial procedure can be initiated.²¹ The fees depend on the policies of the specific office. However, in many cases the arbitration procedure is free of charge.²²

Additionally, in civil law disputes it is possible to seek an out-of-court settlement by mediation pursuant to the Civil Law Mediation Act (*Zivilrechts-Mediations-Gesetz*). The Federal Ministry of Justice (*Bundesministerium für Justiz*) provides a list of qualified mediators who can be approached by the parties if a mediation proceeding is required. Even though the services of a mediator are not free of charge, the fees are fixed. Unlike court fees, these do not depend on the value of the dispute and, therefore, often provide for an affordable alternative to a legal proceeding.²³ Both the arbitration and mediation proceedings result in a binding out-of-court settlement if the parties so agree.

Ombudsmen

Ombudsmen are widely used to provide an easily accessible and cost-efficient alternative dispute resolution scheme. Most notably and specific to Austria is the Austrian Ombudsman Board (*Volksanwaltschaft*) which works on a federal level and mediates between citizens, public authorities and other administrative bodies.²⁴ A complaint, e.g., concerning unjust treatment or magisterial inactivity, may be filed with the Austrian Ombudsman Board at any time at no cost. In addition, some federal states have local Ombudsman Boards (*Landesvolksanwälte*).

Apart from that, a variety of ombudsmen schemes exist which offer mediation services and advice in disputes with regard to, *inter alia*, insurance, banking and finance, consumer online purchases, university matters and animal welfare.

PRO BONO ASSISTANCE

Pro Bono Opportunities

Private Attorneys

It is not mandatory for Austrian lawyers to participate in or report to the pro bono programs of the local bar associations. Attorneys have the opportunity to voluntarily provide free preliminary legal advice (*erste anwaltliche Auskunft*) in information centers set up by the local bar associations.²⁵ Some attorneys even offer this service in their own offices. There are also a variety of other forums for free legal advice where attorneys can participate in a pro bono manner.²⁶

However, the pro bono practice of Austrian attorneys is by no means limited to preliminary legal advice (*erste anwaltliche Auskunft*). Many attorneys, including law firms, regularly offer free legal advice even on a “secondary level”, i.e. above the level of the aforementioned preliminary discussion and analysis. Typical beneficiaries of such pro bono activities are – apart from individuals in need – cultural and art institutions, welfare or church institutions, regardless of their ability to pay.

²¹ See <https://www.help.gv.at/Portal.Node/hlpd/public/content/101/Seite.1010140.html> (last visited on September 4, 2015).

²² For example in cases of consumer disputes, see <https://verbraucherschlichtung.at/cm/index.php?id=78> (last visited on September 4, 2015).

²³ See <https://www.help.gv.at/Portal.Node/hlpd/public/content/101/Seite.1010140.html> (last visited on September 4, 2015).

²⁴ See <http://volksanwaltschaft.gv.at/ueber-uns#anchor-index-1528> (last visited on September 4, 2015).

²⁵ More detailed information on this service (Erste Anwaltliche Auskunft) is available at <http://www.rechtsanwaelte.at/> (last visited on September 4, 2015).

²⁶ See <http://www.help.gv.at/Content.Node/98/Seite.980300.html#Recht> (last visited on September 4, 2015).



Law Firm Pro Bono Programs

Many law firms, including the largest Austrian law firms as well as international law firms with a presence in Austria, have ongoing pro bono programs. However, sources for pro bono opportunities, especially for social organizations, such as major referral organizations, NGOs or clearing houses are difficult to find in Austria at present (see below b.ii.3.).

Legal Department Pro Bono Programs

In general, Austrian companies are strongly engaged in providing pro bono services. In 2014, nearly half of Austrian companies claimed to be engaging in pro bono projects.²⁷ However, such projects mainly consist of general corporate social responsibility activities rather than providing actual legal services to those in need.

Bar Association Pro Bono Programs

Local bar associations have set up information centers in which individuals can obtain free preliminary legal advice (*erste anwaltliche Auskunft*).²⁸ Legal advice is only given by attorneys who are admitted to the respective local bar association. It is provided irrespective of whether the person is indigent or not. However, the legal advice provided only comprises an initial legal assessment, practical and legal information, or a referral to a specialized body or organization.

University Legal Clinics and Law Students

In 2014, the first University Law Clinic, the Vienna Law Clinic,²⁹ was established. It provides free legal advice in civil law, asylum law and company start-up law. According to their mission statement, the students involved in the Vienna Law Clinic hope to contribute to and initiate the establishment of other law clinics in Austria.³⁰

Historic Development and Current State of Pro Bono

Historic Development of Pro Bono

Pro bono does not have a long history in Austria due to the comprehensive statutory legal aid scheme and a variety of other benefits facilitating the access to legal advice. However, with the emergence of regional and international law firms, institutional pro bono programs were established and brought to the public's attention.

Current State of Pro Bono including Barriers and Other Considerations

Laws and Regulations Impacting Pro Bono

“Loser Pays” Statute

The “Loser Pays” concept applies insofar as statutory fee schedules are designed for litigation matters, in which the defeated party basically bears all incurred costs and fees.³¹

Statutorily Mandated Minimum Legal Fee Schedule

In the past, any kind of fee dumping, i.e., charging less for legal services than provided for in the statutory fee schedules, was generally prohibited.³² An exception was made only for equitable reasons of equity and only subsequent to the conclusion of the matter. This, however, has changed

²⁷ Vgl. Verantwortungsatlas österreichische Wirtschaft, Julius Raab Stiftung 2014.

²⁸ More detailed information on this service (Erste Anwaltliche Auskunft) is available at <http://www.rechtsanwaelte.at/> (last visited on September 4, 2015).

²⁹ See <http://viennalawclinics.org> (last visited on September 4, 2015).

³⁰ See <http://viennalawclinics.org/about/> (last visited on September 4, 2015).

³¹ ZPO § 41; Wrabetz/Bertrams, AnwBl 505, 508 (1987).

³² See Lesigang, supra n. 7 at 157.

significantly in recent years. Under present Austrian law, lawyers may, even in litigation matters, charge less than the statutory fees.³³

Practice Restrictions on Foreign-Qualified Lawyers

Such restrictions exist and have an impact on pro bono services. The admission requirements for legal practice in Austria (see above II.a.iii) are strict and include an Austrian university degree, a five year clerkship and the bar exam. It is possible for EU citizens or citizens of Switzerland with a law degree from a foreign university to take the Austrian bar exam, provided that their degree is equivalent to an Austrian university degree. Additionally, their legal clerkship has to be comparable to the mandatory legal clerkship in Austria. Alternatively, European foreign-licensed lawyers may apply for admission as European Lawyers.³⁴ Lawyers from other jurisdictions on the other hand may not be admitted as practicing lawyers without completing the Austrian university legal education and the five-year clerkship.

Concerns About Pro Bono Eroding Public Legal Aid Funding

Concerns about pro bono eroding public legal aid funding apparently exist and have an impact on pro bono services. There is only a marginal pro bono practice in the litigation context. The main reason is that representation of a party in a litigation matter without charging any fees is not considered, by some, to be professionally ethical.

Regulations Imposing Practice Limitations on In-House Counsel

Whilst there are no apparent direct restrictions in this regard, indirect restrictions do exist. In-house counsel may not register as attorneys with the local bar associations as they are not regarded as “independent” within the meaning of the underlying statutes.³⁵ Professional indemnity insurance policies are usually offered to registered attorneys only. Thus, in-house counsel actually engaging in pro bono activities would have to face uncovered professional liability risks.

Availability of Legal Insurance for Clients

Affordable legal expense insurance policies are widespread in Austria and cover a great variety of areas of law. The insurance services cover, *inter alia*, the court fees, statutory legal fees and the legal fees of the other party, if the policy holder has to bear them. Most policies contain deductibles. Usually the amount of coverage is contractually limited.

Socio-Cultural Barriers to Pro Bono or Participation in the Formal Legal System

Almost all Austrian attorneys frequently work for indigent people. Usually however, unlike other, especially Anglo-American, countries, pro bono work by Austrian attorneys is not typically undertaken as part of an institutionalized pro bono program. Above all, this is due to the legal aid scheme which provides for a fairly comprehensive mechanism to assure access to justice for the poor and which is an institutionalized free legal assistance program. However, all major law firms in Austria have implemented additional pro bono programs which now are simply considered to be part of an attorney’s professional courtesy and responsibility.

Pro Bono Resources

This section lists some potential points of contact for attorneys willing to provide pro bono services and individuals in need for pro bono legal services:

Pro Bono Austria

Established in 2015, a clearing-house whose mission is to bring together pro bono service providers with indigent people from charitable organizations.³⁶

³³ Id.

³⁴ See European Lawyer Act (Europäisches Rechtsanwaltsgesetz „EIRAG“) §§ 1 et. seq.

³⁵ DLA Piper Legal Professional Privilege Guide 2015, pp. 11 et seq.

³⁶ See <http://www.probonoaustria.at/> (last visited on September 4, 2015).



Helping Hands

This NGO is focused on legal aid and advice around all aspects of asylum legislation in Austria and also cases of discrimination and racism. The organization is also engaged in integrative activities. The team consists of professional solicitors and aims to find concrete and individual solutions to cases. They also represent people facing deportation from Austria and some who have been deported in their legal proceedings to return to Austria.³⁷

Caritas Vienna – Asylzentrum

This organization provides legal advice and representation in asylum appeals, and voluntary return assistance. The legal advice covers: employment of foreigners, family reunion, citizenship law, detention, and administrative criminal cases. Languages of consultation include: Russian, Dari / Farsi, Arabic, Kurdish, Chinese, German, English, et al.³⁸

Netzwerk AsylAnwalt

Consists of a group of attorneys who provide legal services to asylum seekers in Austria.³⁹

CONCLUSION

In addition to the institutionalized comprehensive Austrian legal aid system, the provision of pro bono services is now standard practice for larger law firms and companies. A variety of (in some cases recently established) institutions and clearing-houses like Pro Bono Austria will increasingly facilitate access to pro bono programs.

September 2015

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³⁷ See <http://www.helpinghands.at/> (last visited on September 4, 2015).

³⁸ See <https://www.caritas-wien.at/hilfe-angebote/asyl-integration/beratung-fuer-asylwerberinnen/asylzentrum/> (last visited on September 4, 2015).

³⁹ See <http://www.asylanwalt.at/> (last visited on September 4, 2015).