

# **A Survey of *Pro Bono* Practices and Opportunities in 71 Jurisdictions**

**Prepared by Latham & Watkins LLP  
for the Pro Bono Institute**

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## FOREWORD

This Survey of *Pro Bono* Practices and Opportunities in 71 Jurisdictions goes back to an initiative of the Pro Bono Institute and Latham & Watkins to make information about global *pro bono* legal services accessible. The first edition of the survey published in 2005 covered 11 jurisdictions, mostly in Europe. The 2012 edition covers over 70 jurisdictions in Europe, Asia and the Pacific region, the Americas, Africa and the Middle East. As the interest in global *pro bono* has grown, and this survey with it, the conversation about global and international *pro bono* has shifted. Whereas the focus just a few years ago was on issues of permissibility and compatibility with the local legal system, the focus today is decidedly practical: *pro bono* has gained in acceptance and the question is how, not whether, *pro bono* representations can be undertaken. The developments have been profound and exciting.

The survey is part of an ongoing effort, shared by many law firms, organizations and corporate legal departments, to promote and stimulate the growth of *pro bono* representation globally and in international settings. Its purpose is to serve as an introductory resource for law firms, private practitioners, in-house lawyers and NGOs seeking to engage or learn more about the culture and provision of *pro bono* in their own or other countries. The chapters describe, for each jurisdiction, what access-to-justice or publicly funded legal aid programs exist, what unmet needs for legal representation remain, what perceptions or culture shape the discussion of *pro bono*, and what professional-conduct laws and rules provide the framework for *pro bono* representation.

In 2012, lawyers from Latham & Watkins' 30 offices around the globe have updated all prior chapters and added chapters covering nearly 30 new jurisdictions. We consider the survey to be a work in progress and welcome your feedback and comments to help us improve future versions (please direct your requests to: [Gianni.DeStefano@lw.com](mailto:Gianni.DeStefano@lw.com)). While we have worked, to the extent possible, with local counsel and NGOs to provide information that is both current and accurate, we note that the situation in many of the jurisdictions is fluid, and that errors and omissions are unavoidable. The survey is therefore a work in progress in this sense as well and we invite your comments.

We owe a debt of gratitude to Esther Lardent and Tammy Taylor of the Pro Bono Institute, with whom we have collaborated on this project. The survey is the effort of a large team, involving not only many lawyers at Latham & Watkins, but also local law firms and practitioners, in-house lawyers and NGOs around the globe. We are grateful for their contributions and their time.

August 2012

Gianni De Stefano and Wendy Atrokhov



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## THANKS

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Last, but not least, each individual, both in law firms and legal departments, active in *pro bono* representations to address the unmet legal needs of those with limited means.

## PRO BONO PRACTICES AND OPPORTUNITIES IN GERMANY

*Pro bono* work continues to become more and more common in Germany. The latest surveys indicate that nearly two-thirds of the German lawyers work on *pro bono* mandates. Nevertheless (and although a comprehensive and well-developed legal aid system exists in particular for in-court legal assistance), there is still an extensive need for *pro bono* work in Germany. The following chapter provides a brief overview of legal services and describes the practice and culture of *pro bono* in Germany as well as preconditions, limits and opportunities.

### I. LEGAL SERVICES AND THE LEGAL PROFESSION IN GERMANY

#### A. The Legal Profession<sup>1</sup>

In Germany, the compensation of lawyers is regulated by a set of federal laws<sup>2</sup> and professional rules issued by the German Bars.<sup>3</sup> The system is generally based on a statutory fee scale annexed to the Federal Attorneys-At-Law Remuneration Act (*Rechtsanwaltsvergütungsgesetz*) (“RVG”) for legal services. As a general rule, German lawyers are required to charge fees for their services and the German state provides financial aid to those unable to afford a lawyer. However, German lawyers are allowed to negotiate fees with a client when the lawyer is giving advice outside the litigation context, i.e., out-of-court. Since June of 2008, a negotiable success fee is also (under certain conditions) permissible within the litigation context, as an exception to the general rule that success fees are forbidden in Germany.

Statutory fees that are charged according to the RVG in the litigation context are based on the “value of the dispute” (*Streitwert*) – for instance the amount of a damage claim or the consideration in a transaction – and not on the time spent on the matter. Individual “fees” are earned for various stages in proceedings: consultation, drafting and filing a complaint, trial, settlement or adjudication, appeals and so forth.<sup>4</sup> The system has traditionally been focused on court activities and litigation. However, it is also possible – under certain circumstances – to agree on hourly-rate fees or a lump-sum payment for the whole case. The primary purpose behind the scheduled fees in the litigation context is to prevent price competition among lawyers and secondarily to keep legal services affordable. There continues to be a strong belief in Germany that price competition among lawyers will not only compromise lawyers’ integrity and ethical responsibility to clients’ interests, but also the administration of justice in general. Success fees have been historically prohibited and considered unethical in Germany.<sup>5</sup> However, in December 2006, the German Federal Constitutional Court ruled that the prohibition of success fees without any exceptions violated the German Constitution.<sup>6</sup> Thus, the German legislature changed the regulations regarding the prohibition of success fees and created exemptions for cases in which success fees are essential to allow clients to pursue their rights. These provisions can be found, *inter alia*, in Section 6 (1) of the Legal Services Act (*Rechtsdienstleistungsgesetz*) (“RDG”) and Section 4a and 34 (1) of the RVG. The latter provision states that consultation, legal opinions and mediation outside the litigation context – if not associated with billable legal services – do not fall under the statutory fee scale annexed to the RVG (*Vergütungsverzeichnis*). Lawyers and clients may freely agree in the abovementioned cases (acc. Section 34 (1) RVG) on a compensation below the statutory fees, and also on legal advice free of charge, i.e., *pro bono*.

<sup>1</sup> In Germany the median number of attorneys per capita is roughly 1 per 533 residents (data of 2010) and the number of licensed lawyers keeps increasing each year.

[http://www.brak.de/w/files/04\\_fuer\\_journalisten/statistiken/statistiken2012/entwicklungraebis2012.pdf](http://www.brak.de/w/files/04_fuer_journalisten/statistiken/statistiken2012/entwicklungraebis2012.pdf);  
<https://www-genesis.destatis.de/>

<sup>2</sup> See the Federal Attorneys-At-Law Remuneration Act (*Rechtsanwaltsvergütungsgesetz* (“RVG”)) and the Legal Services Act (*Rechtsdienstleistungsgesetz* (“RDG”)).

<sup>3</sup> The pertinent laws regulating the German legal profession standards are the Federal Attorneys-At-Law Code (*Bundesrechtsanwaltsordnung* (“BRAO”)), as well as the Professional Code (*Berufsordnung* (“BORA”)).

<sup>4</sup> *Inter alia*, the so-called “*Geschäftsgebühr*,” a “business fee” payable on first consultation and draftings and the so-called “*Terminsgebühr*,” the fee payable to the attorney for attending a court hearing.

<sup>5</sup> See Kleiner-Cosack, *Bundesrechtsanwaltsordnung mit Berufs- und Fachanwaltsordnung, Kommentar*, paragraph 49b, marginal no. 13; Henssler/Prütting, *Bundesrechtsanwaltsordnung, Kommentar*, marginal number 58 et seq.

<sup>6</sup> See Judgment of the German Federal Constitutional Court (*Bundesverfassungsgericht* (“BVerfGE,” file no. 1 BvR 2576/04), Dec. 12, 2006, BVerfGE at 117, 163 et seq.



The statutory fee constitutes a minimum fee in matters involving legal proceedings, such as lawsuits and administrative proceedings. In matters outside the litigation context, negotiated fees below the statutory levels are permissible for legal representation, i.e., if they are proportionate to the effort and the risk of liability to the lawyer. Consequently, German lawyers may agree on fees below the statutory levels in matters that do not involve the representation of clients before courts, magistrates or administrative courts.<sup>7</sup> General consultation, corporate representation and transactional practice therefore can be undertaken *pro bono* or at fees below the statutory levels as stated above. Fee agreements, where they deviate from the statutory fees, must be in writing and must be executed before the representation is undertaken. This rule is designed to protect the client and does not restrict the ability of German lawyers to render transactional legal services on a *pro bono* basis.

Furthermore, a German lawyer may waive his or her fees *after* the conclusion of the matter, but only for “reasons [particular to] the client, particularly indigence.”<sup>8</sup> The restriction of fee waivers to reasons particular to the client is interpreted to preclude fee waivers in circumvention of the prohibition of success fees. Thus, a fee may not be waived because a case was lost. Also, an attorney may not waive a fee because there are ulterior motives in representing the client, such as publicity due to the representation of celebrity clients.<sup>9</sup> A waiver may not be promised before the representation is undertaken.

## B. Legal Aid

The requirement that German lawyers have to charge minimum fees for their services in the litigation context is considered acceptable in Germany because the state provides legal aid to those in need of legal services who are unable to fully afford them. Furthermore, there are several governmental and nongovernmental organizations that provide general legal advice, such as municipal offices, ministries, agencies, and charitable and civic organizations. Actual representation by counsel is available through a court-administered system of legal aid. Such legal aid is geared toward litigation or representation in magisterial and administrative proceedings.

An indigent litigant who has a claim that is “reasonably expected to be successful” has a statutory right to both court fees and attorney’s fees if he or she is unable to afford them.<sup>10</sup> Both German residents and foreign residents are eligible. The applicant must disclose income and assets to demonstrate indigence, and schedules exist to determine whether to grant full or partial aid, deferment of fee payments, or installment payments. It should be noted that Germany follows the “loser pays” system, such that a successful indigent litigant will not bear any fees or costs.

The requirement for whether a claim can “reasonably be expected to be successful” has been solidified by German courts in the past. A judge processes the application for legal aid and assesses the claim’s chances of success. Therefore, it is not required that the claim has a strong chance of success but it is sufficient so long as it has a reasonable basis. In practice, only hopeless and frivolous claims are denied legal aid. An interesting indication of the German approach in this area is seen in cases where a claim is made in the face of contrary precedent. In such cases, a claim for legal aid may not be denied if the applicant makes a plausible showing of why existing precedent should be overturned. However, a claim for legal aid will be denied if it is apparent that the applicant cannot offer sufficient evidence to support his or her claim.

If the state grants legal aid, the state will pay the scheduled statutory fees to the attorney of the indigent litigant’s choice and will waive court fees.<sup>11</sup> If the indigent litigant prevails in the litigation, the

<sup>7</sup> See RVG § 4 (2).

<sup>8</sup> BRAO § 49 (b) (1) 2. Other instances in which fee waivers have been considered acceptable in the representation of friends or relatives. See also judgment of the German Federal Court of Justice (*Bundesgerichtshof* (“BGH”)), BGH NJW 1995, 1425 (elaborating that fees can be reduced even after the decision of the German Federal Constitutional Court, BVerfGE, 76, 171; NJW 1988, 191)).

<sup>9</sup> As in most countries, there are restrictions on German lawyers when it comes to advertising their services. While specific solicitation in view to a particular matter is impermissible, advertising in general is now permitted. The names of clients may be listed in brochures with their consent.

<sup>10</sup> German Code of Civil Procedure (*Zivilprozessordnung* (“ZPO”)) §§ 114 et. seq.

<sup>11</sup> In the lowest courts (such as small claims courts) in which representation by counsel is not required, the state will pay for a lawyer if the judge assessing the claim feels that it is necessary (that is, helpful) or if the opponent is represented by counsel (ZPO § 121).

opposing party is responsible for attorneys' and court fees and the state is reimbursed. However, if the indigent litigant loses the case, the court fees will be waived but he or she must bear the costs for the opponents' attorney.

## II. *PRO BONO* IN GERMANY: OPPORTUNITIES AND OTHER CONSIDERATIONS

### A. *Pro Bono* Opportunities And Barriers To *Pro Bono* Work

The rules impacting *pro bono* work in Germany contain three basic principles:

- The minimum attorney's fees in the litigation context are set by a statutory fee scale annexed to the RVG.
- "The loser pays."
- The state provides legal aid to those who cannot afford court or attorney's fees.

These principles shape not only the law but also the legal culture in Germany. Traditionally, there have been common convictions that: fees should be set; too much competition among lawyers is bad; success fees give lawyers the wrong incentives; one ought not to have to pay for a lawsuit if one wins; and those in need of assistance to gain access to the courts should receive it as a matter of right, and not as a charitable act of the legal profession.

However, this legal culture has shifted significantly in Germany. In fact, there has been widespread press coverage and discussion of *pro bono* work,<sup>12</sup> and the word itself has already become established as part of a German lawyer's vocabulary. The profession has changed profoundly due to the globalization of finance and commerce, the arrival of international, and in particular, American and British, law firms and a prolonged wave of consolidations among German law firms. *Pro bono* work has become more common in Germany, especially by international law firms taking on *pro bono* work outside the litigation context. According to a recent survey,<sup>13</sup> two-thirds of German lawyers provide *pro bono* legal services and an active *pro bono* lawyer handles on average nine mandates per year without charge. Following the results of the survey, *pro bono* in Germany is particularly common in small local law firms as well as in big international law firms. German lawyers therefore increasingly recognize the need for *pro bono* legal services in addition to the traditional financial contributions to charitable and civic organizations. In this context, so-called "round tables" have been established in several German cities where German lawyers, mainly from international law firms, discuss the possibilities to establish and extend *pro bono* work in Germany. Most of them have already presented their *pro bono* concepts to their respective local bar associations, the majority of which have responded positively to the concepts. Furthermore, the annual European *pro bono* forum under the patronage of the The Global Network for Public Interest Law (PILnet, (formerly known as the Public Interest Law Institute or PILI)) is scheduled to take place in Madrid, Spain in October 2012. Charity organizations and law firms meet at the forum to discuss the possibilities of *pro bono* work throughout Europe.<sup>14</sup>

In fact, there is a need for *pro bono* work in Germany despite the comprehensiveness of the existing legal aid system. For example, very extensive and complex cases may be unsatisfactorily dealt with by the legal aid system since lawyers will tend to provide minimum effort to these cases, ultimately resulting in an unsatisfactory outcome. Also, charitable organizations sometimes have problems fulfilling the requirements for legal aid, forcing organizations to choose between abandoning professional legal services or diverting funds from the main purpose of the organization to cover legal expenses. Furthermore, some potential *pro bono* cases cannot be handled on a legal aid basis because special expertise is required. For example, cases with international components cannot be handled by a single lawyer on a legal aid basis. The judgment of the German Federal Constitutional Court in the context of prohibition of success fees in December 2006<sup>15</sup> recognized that the legal aid system in

<sup>12</sup> See, e.g., Westenberger, BRAKMagazin, 6/2009, Pro Bono – Do good and talk about it (Pro Bono – Tue Gutes und rede darüber); Budras, Frankfurter Allgemeine Zeitung, October 6th, 2007, Advocates in favor of good cause (*Advokaten für die gute Sache*); Amann, Financial Times Deutschland, March 31st, 2006; In favor of good cause and for a positive image (*Für die gute Sache und das gute Image*); Baelz/Moelle/Zeidler, Neue Juristische Wochenschrift 2008, p. 3383 ff., Legal advice pro bono publico in Germany – a review (*Rechtsberatung pro bono publico in Deutschland – eine Bestandsaufnahme*).

<sup>13</sup> SOLDAN INSTITUTE, 17.11.2011, <http://www.soldaninstitut.de/index.php?id=2871>; Kilian, AnwBl 2012, 45.

<sup>14</sup> <http://probonoforum.eu/>.

<sup>15</sup> See BVerfGE, *supra* n.6.

Germany may not be sufficient to provide legal services in all cases in which legal aid is necessary. Consequently, the German legislator substituted the German Act on Legal Counseling (*Rechtberatungsgesetz* (“**RBerG**”), which generally prohibited free legal advice, with the RDG. According to Section 6 of the RDG, free legal services can be provided by nonlawyers who must be instructed by a professional lawyer, if they are not associated with a paid legal service given by a professional (*unentgeltliche Rechtsdienstleistungen*).<sup>16</sup> If nonprofessionals are permitted to give free legal advice for reasons of civic engagement, it follows that professionals with the ability to provide legal advice should also be permitted to do so. With the intention of enhancing active citizenship and a sense of solidarity, the German legislator encouraged the already ongoing *pro bono* movement in Germany.

However, German lawyers are, in general, only allowed to grant free legal services outside the litigation context to people and organizations who usually cannot afford their services. Furthermore, it would be conceivable to give legal advice to a variety of populations in need, such as casualties of natural disasters (such as tsunamis, earthquakes or hurricanes), the homeless and jobless, founders of new businesses or other needy people outside the litigation context. These are just a few of the possible *pro bono* opportunities available in Germany.

In the litigation context, state financial aid for litigants appears to satisfy the demand for affordable legal representation. Since there are many individuals practicing in the German Bar, the supply of lawyers actively seeking court appointments under the legal aid system exceeds the demand. Seeking to represent litigants *pro bono* would therefore create competition with a segment of the German Bar. Further, it might not be permissible to establish a formal *pro bono* program in the litigation context, since fee waivers are not allowed to be agreed upon before the conclusion of a case. However, it should be possible for international law firms to take on more time-consuming, difficult and complex cases that are not particularly attractive to other lawyers on an individual basis, and agree to waive the fee *after* the conclusion of the litigation. *Pro bono* representation in litigation cases will therefore necessarily remain occasional, unless the German practice or regulations on this subject change.

## **B. Pro Bono Resources**

Many law firms, including the largest German law firms as well as international law firms with a presence in Germany, have ongoing *pro bono* projects. Some large law firms have founded the “*Pro Bono Deutschland e.V.*,”<sup>17</sup> a registered German association, to achieve greater recognition and more widespread implementation of the concept of *pro bono* legal advice among lawyers in private practice in Germany. For this purpose, the association’s aim is to improve the framework conditions under general statutory law as well as under professional code of conduct and advocate engagement in the area of *pro bono* legal advice. The association does not itself render any legal services and does not coordinate the *pro bono* activities or solicit *pro bono* mandates for its members.

In addition, further sources for *pro bono* work are student initiatives organized by universities and law schools. Several law schools have established *pro bono* centers and clinics where students have the opportunity to participate directly in *pro bono* work.<sup>18</sup> Similar to those concepts, the private corporation called “Student litigators”<sup>19</sup> gives *pro bono* legal advice supported by licensed lawyers.

A relatively new but nevertheless much promising development is that internationally well-established clearing houses start to list *pro bono* opportunities in Germany, thereby making *pro bono* needs in Germany much more transparent.

<sup>16</sup> Legal services according to RDG § 2(1) are all legal activities specifically being of others’ concern.

<sup>17</sup> [http://www.upj.de/fileadmin/user\\_upload/MAIN-dateien/Aktuelles/Nachrichten/probono\\_flyer\\_2011.pdf](http://www.upj.de/fileadmin/user_upload/MAIN-dateien/Aktuelles/Nachrichten/probono_flyer_2011.pdf)

<sup>18</sup> See, e.g., <http://www.paralegal.uni-jena.de/>; <http://www.lawandlegal.de/de/>; <http://www.jura.hhu.de/hilfe/>; <http://www.lto.de/recht/studium-referendariat/s/iuratio-und-student-litigators-der-nachwuchs-foerdert-sich-selbst/>.

<sup>19</sup> <http://www.student-litigators.de/index.html>.

### III. CONCLUSION

Today, out-of-court, *pro bono* work in Germany is permissible without any restrictions in the fields of representation of nonprofit associations, charitable foundations or individuals who or whose matters qualify for *pro bono*.

With respect to *pro bono* activities in the litigation context, the Legal Services Act, which entered into force on July 1, 2008, and the revised Legal Fees Act (“RVG”) have amended German fee rules in the litigation context already “in the right direction.” However, at present, the impact of fee rules in Germany is that *pro bono* matters in the litigation context can only be obtained through contacts or by chance; they are never solicited by a law firm. Thus, they are not always called *pro bono* matters because it is impermissible to agree upon a fee waiver before the conclusion of a case.

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*Pro Bono* Practices and Opportunities in Germany

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