

### ***Reform of the Law on Legal Counselling***

*Goals and basic structure of the recommendations for new legislation on legal counselling in the ministerial draft of the Federal Ministry of Justice*

<http://www.bmj.bund.de/media/archive/894.pdf>

#### **A. Goals of the New Legislation**

- Replacement of the almost 70-year-old, historically burdened law on legal counselling
- Protection of persons seeking legal advice from unqualified legal counselling
- Strengthening of civic commitment and charitable legal counselling
- Deregulation, reduction of bureaucracy and liberalisation of the law governing legal counselling

#### **B. Development of the Proposed Legislation Until Now**

- September 2004: discussion draft of a Legal Services Act (*Rechtsdienstleistungsgesetz – RDG*)
- Broad-based discussion of the draft legislation at the 55<sup>th</sup> German Jurists Forum in Bonn
- Evaluation of the well over 100 position statements on the discussion draft
- April 2005: Ministerial draft with transitional provisions and supplementary rules on representation at proceedings
- Since June 2005: Evaluation of the position statements on the ministerial draft and preparation of a governmental draft bill

#### **C. Basic Structure of the Draft Legislation**

- **Article 1** contains the new Legal Services Act, which will regulate extrajudicial legal services in the future.
- **Article 2** contains an Introductory Act to the Legal Services Act (RDGEG) which, in addition to transitional regulations for advocates and holders of old authorisations, contains provisions regarding the remuneration of registered persons and holders of old authorisations.
- **Articles 3 to 5** contain changes in the Federal Regulations for Practising Lawyers, the Regulations for Patent Lawyers and the Code of Criminal Procedure to enable new forms of professional cooperation between practising lawyers and other service providers.
- **Articles 6 to 10** contain provisions about the authorisation for judicial representation in the various codes of procedure (Code of Civil Procedure, Labour Court Act, Administrative Court Rules, Social Court Act, Code of Procedure for Finance Courts).
- **Articles 11 and 12** provide for attendant changes in other statutes.

## D. The New Regulation in the RDG (Legal Services Act) Authorising the Provision of Extrajudicial Legal Services

- **Section 1 subs. 1 RDG** restricts the statute's scope of application to extrajudicial legal services and specifies its purpose to be the protection of those seeking legal advice, protection of legal transactions and the legal order
- **Section 1 subs. 2 RDG** includes the principle that authorisation to provide legal services may be regulated in other statutes as well.
- **Section 2 subs. 1 RDG** defines the key term "provision of legal services" as

*Activities in concrete non-personal matters which, according to general opinion or the recognisable expectation of the person seeking legal advice, require a specific evaluation of the legal situation, taking into account the circumstances of the specific case.*

- **Section 2 subs. 2 RDG** makes the collection of accounts receivable within the scope of an independent business operation subject to the statute's area of prohibitions if the prerequisites of section 2 subs. 1 RDG are not fulfilled.
- **Section 2 subs. 3 RDG** excepts from the prohibitions under the statute requests for legal advisory opinions, activities as an arbitrator, (true) mediation, reporting in the media, and taking care of legal business in corporations subject to company law.
- **Section 3 RDG** contains the central prohibitory norm and simultaneously clarifies that only activities as a self-employed person, but not activities for a superior in a dependent employment situation, are subject to the prohibitions under the statute
- **Section 4 RDG** contains a prohibition against legal services that are incompatible with another obligation to provide service. Necessary for this is that the *legal service directly influences the fulfillment of the other obligation*; the ordinary and proper fulfillment of the legal service must be endangered thereby.
- **Section 5 subs. 1 RDG** contains the central permissible activities for the entire area of paid economic activities, and in this context permits

*Legal services that constitute supplementary services belonging to the profession or the activity, or are a part of the complete fulfillment of the primary contractual or statutory obligations.*

Determinative for the question of whether a supplementary service exists is, in addition to the scope and substance of that service, the necessary professional qualification for exercising the primary activity.

- **Section 5 subs. 2 RDG** provides that legal services are always permissible in connection with execution of wills, administration of houses and apartments, evaluation of freight, and consultations on funding support.
- **Section 5 subs. 3 RDG** allows non-attorney service providers to collaborate with lawyers or to include them in specific cases. They may thereby provide legal services as a portion of their own service offerings, if these are not classified as supplementary services. On the lawyers' side, these new opportunities for cooperation are enabled by changes in the law regulating the profession, in section 59 a BRAO (Federal Regulations for Practising Lawyers) (Article 3). Professional obligations of lawyers, particularly the lawyer's obligation of confidentiality (right to refuse to appear as a witness, prohibition against seizure) are secured by way of changes in the Code of Criminal Procedure (Article 5).

- **Section 6 subs. 1 RDG** is the central provision for free-of-charge and charitable fields permitting all legal services which are not connected with a paid activity.
- On the other hand, **Section 6 subs. 2 RDG** establishes, for unpaid legal services outside of the circle of family and friends, an obligation to involve a person qualified in law by way of

*Direction by a person who is also permitted to provide legal services for payment, or by a person qualified to hold judicial office.*

No provision obliging conclusion of a liability insurance policy has been established.

- **Section 7 subs. 1 RDG** allows all associations to provide legal advice to their members, to the extent that this is not of superior importance compared with the actual fulfillment of the remaining tasks as provided by the by-laws.
- **Section 7 subs. 2 RDG**, as does section 6 subs. 2 RDG, regulates the obligation to involve a person with legal qualifications; furthermore, however, it includes an obligation to maintain appropriate personnel, non-personnel and financial resources.
- **Section 8 subs. 1 RDG** permits public and publicly-recognised and/or supported facilities to provide legal services within their areas of activity.
- **Section 8 subs. 2 RDG** obligates consumer protection centres and associations, providers of welfare services, youth services, and handicapped services to involve a person qualified in law and to maintain appropriate resources pursuant to section 7 subs. 2 RDG.
- **Section 9 RDG** enables the *Länder* responsible for the implementation of the statute, in the case of repeated unqualified legal services, to prohibit persons and associations from continuing to provide legal services for a maximum of five years. To protect legal transactions, this prohibition is published in the legal services register (section 15 RDG).
- **Sections 10 to 18 RDG** regulate the authority to provide legal services by collection agencies, pension advisers and consultants providing advice on a foreign law. A condition for such activities is registration in the Legal Services Register. Individuals who are personally suitable and reliable, and who document their expertise as well as the existence of a liability insurance policy, may be registered.
- The RDG does not regulate any **additional legal services professions**. Insurance consulting, still regulated in the RBerG (Legal Counselling Act), is, pursuant to section 1 subs. 2 RDG, to be regulated in special legislation to implement the EU Directive on Insurance Agents and Brokers. No authorisation to provide legal services is to be given to graduates of universities of applied sciences – not even restricted to specific sub-fields such as economic or social (welfare) law.
- The draft legislation has thus far made no provision for an **administrative fine** for violations of the RDG. The law of competition, the opportunities to file suit pursuant to the Prohibitory Injunction Act, and the possibilities of administrative execution are sufficient to punish violations and guarantee consumer protection.

## E. The New Rules Authorising Judicial Representation in the Codes of Procedure

- Overall, representation authority for judicial proceedings is not allowed in the same scope as the authority to provide extrajudicial legal services. The provisions of the codes of procedure are harmonised to the extent possible.
- Nothing changes in the provisions regarding the **requirement of representation** by an attorney.
- In **party proceedings** as well, as a general rule paid representation at proceedings is reserved to attorneys.
- In **civil proceedings** (Article 6), the separation to date between representation outside of and within the hearing is discontinued.

**Section 79 subs. 2 of the Code of Civil Procedure** provides that in party proceedings, as a general rule only the following are authorised to provide representation in addition to attorneys:

- Employees of the party to the proceedings,
- Family members working without pay,
- Fully qualified professionals in the field of law working without pay,
- Consumer associations in certain consumer protection matters, as well as
- Collection agencies in judicial payment order proceedings.

Authorising collection agencies to appear at judicial payment order proceedings is designed to enable cost-effective proceedings to attain enforcement orders. Collection agencies may not claim the costs for the judicial proceedings in the same manner as attorneys, according to section 2 subs. 4 RDGEG (Article 2).

- For **labour court proceedings** (Article 7), section 11 of the Labour Court Act (ArbGG) adopts the regulations of the Code of Civil Procedure, with the exception of the provisions on consumer associations and collection agencies. The existing authorisations to provide representation remain unaffected for representatives of trade unions and employers' associations.
- The same is true for **administrative, social and finance court proceedings** (Articles 8 to 10). In all public-law codes of procedure, the existing representation authorisations for representatives of trade unions and other employee or employer associations, as well as representatives of handicapped associations, remain unchanged. In **social court** proceedings, section 73 subs. 1 no. 3 SGG provides an additional authorisation to provide representation for pension advisers .