PROFESSIONAL LIABILITY OF LAWYERS

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CHAPTER 1

AUSTRIA

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INTRODUCTION

Presently, approximately 3,000 attorneys are permitted to practice in Austria, a relatively small number when compared to the size of the bars of other European countries. The reason for this can in part be found in the Austrian bar's stringent admission requirements. Admission to the bar requires, following the completion of law studies, five years of practice besides passing the bar exam, which may be taken only after the applicant has completed three years of practice.

Members of the Austrian bar are called *Rechtsanwalt*. Unlike the English and Welsh system, there is no distinction between solicitors and barristers, and unlike the present, German system, Austrian attorneys are not limited as to the courts before which they may practice. The Austrian *Rechtsanwalt* is entitled to represent clients in all legal matters and before all courts.

Legal services

However, legal services in Austria may also be procured from other professionals. The *Notar* (notary public) serves as a judicial commissioner in probate and similar proceedings. He prepares a special form of document, that is, notarial deeds, and may also act as private counsel in contract and commercial matters. They are, as a general rule with some exceptions, not entitled to represent clients in court.

Another group of legal advisors is formed by *Wirtschaftstreuhänder und Steuerberater*, accountants and tax advisors. They provide financial accounting services and counsel clients in tax matters. They are entitled to represent clients in certain proceedings relating to tax law. In certain areas, such as labour law, other persons and/or organisations are permitted to give legal advice and represent clients in court.

The Austrian bar is organised on a federal basis with every province having its own bar (*Rechtsanwaltskammer*). The nine provincial bars form the federal *Rechtsanwaltskammertag*, which is the national representative

body of Austrian attorneys.[1] Membership in the bar is mandatory and every attorney is a member of the bar of the province in which his office is located.[2]

The organisation of the bar, is regulated by statute, the *Rechtsanwaltsordnung* (RAO).[3] The procedural and substantive rules governing disciplinary actions are set forth by a statute known as the *Disziplinarstatut* (DSt).[4] The disciplinary measures range from a warning to a permanent ban from practice. The DSt created a disciplinary body, called the *Disziplinarrat*, which is authorised to take disciplinary measures against members of the bar and trainee attorneys, that is, those who have not completed their practice period for admission to the bar.

At present, membership in the Austrian bar is limited to Austrian citizens. However, following the formation of the European Economic Area (EEA) attorneys admitted to practice in any member state of the EEA will be permitted to practice in Austria upon passing an "entry exam" called the *Eignungsprüfung*. The requirements for this test were established by a recent statute, the EWR *Rechtsanwaltsgesetz* 1992.[5]

Practice structures

The majority of Austrian attorneys practice either alone or together, in other words, with one other attorney. Only recently have firm sizes expanded so that there are presently a number of firms consisting of five or more partners. Further structural changes in the practice of law are occuring as some Austrian firms have formed relationships with larger foreign law firms.

Law firms can only operate as partnerships or as professional corporations, called *Erwerbsgesellschaften*.[6] These professional corporations resemble partnerships, however, contrary to a partnership under Austrian law, they can hold title to property and can sue and be sued in court. Nonetheless, incorporation does not affect professional responsibility;[7] nor does it insulate the partners from malpractice actions. Austrian attorneys are not permitted to form corporations with limited liability.

1. See *Rechtsanwaltsordnung*, Section 35.
2. See *Rechtsanwaltsordnung*, Section 22.
3. *Gesetz vom* 6. Juli 1868, *RGBl* Nr. 96, *womit eine Rechtsanwaltsordnung eingeführt wird.*
4. *Gesetz vom* 1. April 1872, *RGBl* Nr. 40, *betreffend die Handhabung der Disziplinargewalt über Rechtsanwälte und Rechtsanwaltsanwärter.*
5. BGBl Nr. 21/1993.
6. See *Erwerbsgesellschaftengesetz, BGBl* 1990/257; statute regulating the formation of professional corporations.
7. See *Rechtsanwaltsordnung*, Section 21 (d).

GENERAL CAPACITIES

In the Austrian legal system, the attorney is the source of legal advice. He represents clients in criminal and civil proceedings at the courts and before administrative authorities. Attorneys also act as custodians and are frequently appointed as trustees in bankruptcy. Although attorneys, to a certain degree, do specialise, their power to represent is not affected or limited by such specialisation.

GENERAL DUTIES

The professional standards and duties of an attorney are defined by the RAO, the DSt and the general provisions of the Austrian Civil Code (ABGB).[8] The RAO and the DSt contain, *inter alia*, general provisions regarding an attorney's obligation to observe his professional duties,[9] to be faithful to his client and his client's interests,[10] to keep all information received confidential,[11] to avoid conflicts of interest,[12] and to protect the interests of his clients for a certain time period after the representation has terminated.[13] Furthermore, the attorney is obliged not to violate the honour and reputation of the bar.[14]

The bar oversees compliance with these rules.[15] Violations are prosecuted by the bar[16] before the *Disziplinarrat* in a proceeding similar to a criminal hearing. Two appellate bodies review the decisions of the *Disziplinarrat*. The *Disziplinarrat* has no power to award damages or to decide as to the civil liability of attorneys. These actions are within the jurisdiction of the public courts.

Civil courts are not bound by the decisions of the *Disziplinarrat* or by the other disciplinary bodies of the bar. In deciding malpractice cases, the courts do not apply the DSt and only rarely refer to the RAO; instead, they base their decisions on the general principles of the Austrian law of damages as they are set forth in the ABGB.

8. *Allgemeines bürgerliches Gesetzbuch*; 1 June 1811, JGS 946.
9. *Disziplinarstatut,* Section 1.
10. *Rechtsanwaltsordnung,* Section 9 (1).
11. *Rechtsanwaltsordnung,* Section 9 (2).
12. *Rechtsanwaltsordnung,* Section 10 (1).
13. *Rechtsanwaltsordnung,* Section 11.
14. "Ehre und Ansehen des Standes"; *Rechtsanwaltsordnung,* Section 10 (2) and *Disziplinarstatut,* Section 1.
15. *Disziplinarstatut,* Section 1.
16. *Disziplinarstatut,* Section 21.

PROFESSIONAL STANDARDS

There are no statutes or normative provisions defining the specific duties of an attorney, with which an attorney must be familiar, what advice must be given to a client in a specific situation, or which court decisions or legal publications have to be known. The specific duties an attorney has to comply with have been defined and specified by the courts.[17] Their decisions are based on Section 1299 and Section 1300 of the ABGB which set forth the standard of knowledge and diligence which is required from an expert in his field. Attorneys are such experts within the statutory meaning. Section 1299 and Section 1300 No. 1 of the ABGB read as follows:

"Section 1299:

A person who publicly claims an office, art, trade, or handicraft, or who voluntarily assumes, without necessity, a business which demands specialised knowledge or extraordinary diligence, thereby that he warrants the necessary diligence and extraordinary knowledge; therefore, such person is liable for the lack thereof."

"Section 1300 (first sentence):

An expert is liable when he gives, for consideration, negligently bad advice in matters of his art or science".[18]

Under Section 1299 and Section 1300 of the ABGB, an attorney, like any other expert, will be held liable if he fails to meet the standard of diligence and knowledge that would be required from an average and responsible member of his profession. In applying this rule, the courts compare the conduct of the attorney with that required from an average member of the profession. The comparison, it should be noted, is not to the actual conduct of most members of the same profession, but to the conduct which could and should be required from the average member. Thus, the comparison is not a question of fact but of law.

The standard of diligence and knowledge can be altered by an agreement between the parties. An attorney can agree to provide advice in fields of law which the average attorney would not be required to know. For example, although it is common that attorneys will advise the client to consult tax counsel in regard to specific questions concerning tax law, the attorney may agree that he will provide the client advice in all tax matters. In such circumstances, the attorney would be subject to the high standard of knowledge in this field of the law as well.

Courts will also impose a stricter standard upon attorneys who hold themselves out as being specialists in certain fields of the law. According

17. For a comprehensive survey, see Graf, *Anwaltshaftung*, pp. 41 *et seq.*

18. These are private translations based on the translation of P. Baeck, *The General Civil Code of Austria*, 1972. No official translations have been rendered to date.

to Sections 45 *et seq.* of the *Richtlinien zur Berufsausübung* (RL-BA),[19] attorneys may designate specific areas of law as specialties.[20] The local bar organisations keep a list of attorneys who have designated themselves as specialists. A client, justifiably relying on such a designation, can expect the attorney to be more knowledgeable in the area of specialisation than the average practitioner, and thus, lack of such knowledge may render the attorney liable.

However, the effect of the designation of areas of specialisation should not be overestimated. On the one hand, clients often do not know that an attorney holds himself out as a specialist in the field of law or that their cases touch such areas. It remains to be resolved whether, in such circumstances, an attorney will be subject to a stringent standard of knowledge required of a specialist, though the client did not actually rely on the attorney's specialisation. On the other hand, even attorneys who are not specialists are required to advise clients as to the fact that a matter involves certain legal issues they are not familiar with. Therefore, if a matter for which the attorney is retained requires special knowledge of tax law and the attorney takes the case without advising the client as to his lack of knowledge in this field, he will be held liable if he subsequently fails to see or solve tax law issues involved.

It will be no defence to argue that the knowledge of these tax law issues is beyond the standard of knowledge required from an average member of the profession. In this case, the "extraordinary knowledge" required under Section 1299 of the ABGB is not the knowledge of the tax law issues *per se,* but the knowledge that tax law issues the attorney is not familiar with will be involved. In other words, an attorney is required to know whether he has the necessary knowledge to take on a certain matter. Only when an attorney advises the client that he is not a specialist in the field of law in question and the client still wants him to pursue the matter, will the courts apply the lower standard of knowledge.

Austrian law on damages

To collect damages under Austrian law, three requirements must be satisfied. These requirements will be addressed in the context of an action by the client for breach of contract, out of which most legal malpractice suits arise. In a suit for damages based on a claim for breach of contract the client must prove that:

(1) He suffered a loss (for example, that he had to pay extra taxes or lost a trial);

19. A regulation issued by the bar regulating the exercise of the profession.
20. See *Richtlinien zur Berufsausübung,* Section 45 (2) lit g.

(2) The loss was caused by the attorneys breach of contract (i.e. that the loss would not have occurred had the attorney acted dutifully; that the attorney's failure was a *conditio sine qua non* for the loss); and
(3) The attorney violated his contractual obligations (for example, that the attorney did not give proper advice or failed to act in time).

If the client can satisfy this burden of proof, the attorney, in some cases, can avoid being liable if he can prove that he did not act negligently, that is, he did not act with fault.

Loss

The first requirement is more or less self-evident. A client may bring a suit only if he suffered a certain harm. Austrian law distinguishes between financial losses and non-monetary injury.[21]

In the field of legal malpractice, only claims for financial losses are relevant. The available remedies are restitution and monetary damages. A person causing a loss must either return the damaged property to its former state, that is, make restitution, or pay the estimated price thereof, that is, pay monetary damages.[22]

The amount of damages is the difference between the claimant's actual financial situation and the position in which he would have been had not the harmful event occurred.[23] The difference is the monetary value of the loss caused, and the amount that a claimant is entitled to recover.

21. Damages for non-material harm are granted only in a limited number of cases, so, for example, where a person has suffered personal injury the courts may award damages for the "suffering of the person", ABGB, Section 1325; similarly in the case of injury to personal freedom, ABGB, Section 1329; see OGH EvBl 1990/135, 27 March 1990, 5 Ob. 544/90. Non-material damages are of no practical importance in the field of legal malpractice. In Austria, not all decisions of the Supreme Court, the *Oberster Gerichtshof*, or the Courts of Appeal are reported; however, a substantial number of decisions appear in official court reports — for civil matters it is the "*Entscheidungssammlung des Österreichischen Obersten Gerichtshofes in Zivil- (und Justizverwaltungs) sachen*", cited as "SZ" — or private legal publications, such as the "*Anwaltsblatt*", cited as "AnwBl.", the "*Österreichische Juristenzeitung*", cited as "EvBl." or the "*Juristische Blätter*" cited as "JBl". Decisions of the Supreme Court in this paper are cited by publication either with the page or with the number within this publication, the official docket number and the date. Unreported decisions are cited with their docket number and the date and are referred to as "not reported". Unless indicated otherwise, all decisions cited are Supreme Court decisions. Contrary to the United States or England, decisions are not cited with the names of the parties.

22. See ABGB, Section 1323, first sentence: "In order to make amends for damages caused, the damaged property must be returned to the former state or, if this is not possible, the estimated price thereof must be paid."

23. See, Koziol-Welser, *Grundriß des bürgerlichen Rechts*, 9th ed., Vol. I, p. 423 ; SZ 55/29, 3 March 1982, 1 Ob. 829/81; SZ 53/107, 27 August 1980, 1 Ob. 636/80.

Causation

The second requirement concerns causation. The plaintiff may collect damages only if a certain act or omission of the defendant caused the loss. Further, the plaintiff will only be liable if his act or omission can be regarded as the adequate cause of the harm done to the plaintiff. In other words, there is no liability if the harm is the result of a highly uncommon and unlikely chain of causation.[24]

Whether a certain act caused an event is a question of whether the act was a *conditio sine qua non* for the event. Thus, if the event would have occurred even without the action in question, the action was not its cause. The same standard is used to determine whether an omission caused a certain event. In this circumstance, the court investigates whether the harming event would have taken place even if the defendant had acted dutifully.[25]

Breach of contract

A party to a contract will be held liable only if he acted "unlawfully".[26] A party to a contract acts unlawfully if he did not perform the contract in accordance with its terms. Therefore, the plaintiff must show either that the attorney violated the specific terms of the contract or that he did not perform his services as it would be required from an average and responsible member of the profession.

Fault

The basic presumption of the Austrian law of damages is that a person will only be held liable if he acted with fault. In the absence of an agreement to the contrary, there is no strict liability under Austrian contract law.[27] Therefore, liability will not only be based on the showing

24. The first requirement that the claimant's loss was caused by the defendant is a factual question; see 8 May 1990, 4 Ob. 512/90, not reported. On the other hand, the second requirement, whether the loss was an adequate consequence of a certain act, is a question of law; see Koziol-Welser, *Grundriß des bürgerlichen Rechts*, 9th ed., Vol. I, p. 413.

25. See, Koziol-Welser, *Grundriß des bürgerlichen Rechts*, 9th ed., Vol. I, p. 412; EvBl 1990/135, 27 March 1990, 5 Ob. 544/90.

26. See ABGB, Section 1294.

27. See ABGB, Section 1295(1), first sentence: "A person is entitled to demand indemnification for the damage from a person causing an injury by his fault; the damage may have been caused either by violation of a contractual duty or without regard to a contract."

that the defendant violated his duties, i.e. acted unlawfully; additionally, there must be proof that the defendant could have performed the contract. The test is whether an average and responsible person in the same situation as the defendant would and could have performed the contract.

The general rule in tort is that all conditions, damage, unlawfulness, fault, and causality have to be proven by the party claiming damages.[28] This rule is modified in contract cases. If the act causing the damage constitutes a breach of contract, then the party seeking recovery does not have to prove that the defendant acted with fault. Rather, the burden is on the defendant to prove otherwise.[29]

However, this defence is not available if the plaintiff's case is based on the allegation that the attorney did not have the necessary knowledge or diligence as required by Section 1299 of the ABGB. Under this provision, the attorney will be held liable for the lack of "necessary diligence and extraordinary knowledge".

Civil liabilities

The vast majority of legal malpractice cases involve the attorney's liability to his client for breach of contract. To prevail in such a suit, the client has to satisfy his burden of proof as to the requirements outlined in the previous section.

Not only is the client with whom the attorney has contracted entitled to claim damages for breach of contract, but third-party beneficiaries are as well. The attorney will be held liable to a third-party beneficiary if at the time he performed his services he knew or should have known that his services should benefit a certain individual or at least an easily identifiable person. In order to prevent unlimited liability, the courts apply the following rather strict requirement for a third party beneficiary to recover damages:

(1) The transaction must be intended to benefit the third person; and
(2) It must have been foreseeable for the attorney that his failure could harm the third party.

Sometimes the cases suggest, in addition to the aforementioned requirements, that there must be a special relationship between the contractual

28. See ABGB, Section 1296; Koziol-Welser, *Grundriß des bürgerlichen Rechts*, 9th ed., Vol. I, p. 421; OGH 27 February 1990, 4 Ob 607/89, 1991 AnwBl 51.

29. See ABGB, Section 1298: "A person who asserts that he has been prevented from performing a contractual or legal obligation without any fault on his part must bear the burden of proof thereof."

party and the third party which justifies the intended benefit, however, it seems that the courts no longer require a third party beneficiary to establish this fact.[30]

For example, the intended beneficiary of a will that was drafted by an attorney has a recognised claim against the attorney for malpractice if the will due to the attorney's failure to properly perform was not valid and the intended beneficiary did not receive whatever he should have received.[31]

The claim for damages of the third party beneficiary is derived from and based on the contract between the attorney and client. The contract therefore, can limit the attorney's liability. So, for example, if the contract specifies that a legal document, such as a legal opinion rendered by the attorney, must not be given to third parties the courts will reject a claim by a third party who nevertheless received the legal opinion, relied on it, and suffered damages because the opinion was incorrect.[32]

It is unlikely that courts would find that a legal opinion is inherently drafted to benefit third persons and that such third persons could rely on the legal opinion even if the legal opinion expressly states that it is only intended for the use by certain persons. However, if there is no such provision, a court would probably find that those third parties who could be foreseen to rely on the legal opinion are entitled to claim damages for breach of contract as third-party beneficiaries.

Another area in which the question of an attorney's liability to third parties could arise concerns the representation of corporate clients. The general rule is that only the client, that is, the corporation, may sue for breach of contract. Consequently, shareholders who are not parties to the contract between the corporation and the attorney could only sue in tort. Theoretically, there remains the possibility that in a case in which a corporation hires an attorney to handle a matter in which only the shareholders and not the corporation would benefit, the shareholders could sue for damages in contract as third-party beneficiaries. However, no such cases have been decided by the Supreme Court as yet. The same holds true for other third parties such as directors.[33]

30. See, Koziol-Welser, *Grundriß des bürgerlichen Rechts*, 9th ed., Vol. I, p. 309.

31. See OGH SZ 59/106, 19 June 1986, 7 Ob. 568/86 regarding the liability of a notary public.

32. See SZ 43/236, 22 December 1970, 8 Ob. 281/70, regarding the liability of an accountant. To date, there have been no decisions of the Supreme Court dealing with an attorney's liability to third parties who relied on a formal legal opinion which later turned out to be wrong. However, the criteria applied in such a case would probably be the same.

33. In cases in which an attorney represented the corporation and later is asked to represent a director in a matter against the corporation, the attorney has to reject the second matter, as a conflict of interest would arise.

Attorney drafting a contract

The general rule is that an attorney owes his professional duties only to his client, but there is an exception of great practical importance. An attorney who drafts an agreement between his client and his client's business partner will usually be held liable not only to his client but also to the business partner(s). Most of the cases which reflect this doctrine involve real estate and loan transactions.[34]

A line of cases holds that it is not necessary that each party formally authorised the attorney to draft the contract.[35] It is sufficient that based on all the circumstances, the attorney knew or should have known that the parties to the contract were relying on him to draft the contract not only in the interests of one of the parties, but of all the parties.

To avoid this expanded liability, an attorney must explicitly state that he is representing only one of them. In such circumstances, the other parties will have been put on notice that their interests will not be represented by the attorney drafting the contract. However, the standard for an effective disclaimer is very high. If there is any doubt as to whether the attorney is representing the interests of a specific party, the courts will hold against the attorney. No liability arises in the case where the third party made it clear that he does not need the attorney's advice. For example, in one case, an attorney representing the buyer in a real estate transaction was not held liable to the seller who never contacted the attorney and where the circumstances made it clear that the seller was not relying on his advice.[36]

Similar reasoning should apply in cases in which the third party is represented by an attorney, since the third party has made it clear that he is relying on his own attorney. However, in a recent decision, the Supreme Court held that an attorney who drafts the sales contract in a real estate transaction could be liable to the other party even though the latter was represented by another attorney.[37]

It is not clear what the legal basis for the other party's claim against the attorney is. In most cases, there is no express agreement between the attorney and the third party. Some decisions find an implied contractual relationship between the attorney and the third party[38] and others simply state that the third party was entitled to rely on an attorney's general

34. See SZ 28/57, 23 February 1955, 7 Ob. 77/55; RZ (*Richterzeitung*) 1967, 202, 22 December 1966, 5 Ob. 209/66 (not reported) 26 January 1988, 8 Ob. 593/87, for further reference and a more detailed discussion, see Graf, *Anwaltshaftung*, pp. 96 *et seq.*

35. See EvBl. 1959/262; 3 June 1959, 5 Ob. 193/59; SZ 57/108, 13 June 1984, 3 Ob. 612/83.

36. NZ (*Notariatszeitung*) 1987, 284, 5 March 1987, 7 Ob. 534/87.

37. NRsp. 1988/185, 15 March 1988, 8 Ob. 645/87.

38. See, JBl 1962, 152, 20 September 1961, 6 Ob. 279/61.

standard of care.[39] Also, some legal writers suggest that the third party should be protected as a third-party beneficiary.[40]

None of these theories is particularly convincing. The basis for the protection of a third-party beneficiary is the contract between the original parties, that is, the attorney and the client. It is not very convincing to argue that the attorney and client intended to protect the third party's interests. Usually, quite the opposite is true, the client engaged the attorney to improve his position in contract negotiations and to protect his own rights. The same arguments apply in the case of implied contractual relations. The adverse interests of the client and his business partner conflict with the proposition that the attorney implicitly entered into a contract with this third party. As to the third argument involving the implied trust in the attorney's professional duties, it was already stated above that the attorney does not owe obligations to the general public. As a general rule, he is only responsible to his client. In the absence of such legal obligations to the general public, there is no basis for the courts to protect the general public's trust in such, non-existing, duties.

In some cases, an attorney's liability to a third party can be based on Section 1003 of the ABGB, which in effect requires an attorney to immediately notify a potential client who wanted to retain the attorney if he is not willing to handle the matter. Otherwise, the attorney will be held responsible for any damages suffered by the client because of this failure to notify. In the case of an attorney drafting contracts it can be argued that the failure to notify his client's business partner that he is drafting the contract only on behalf of his client falls within the scope of Section 1003 ABGB, that is, the attorney failed to notify that he is not willing to protect the business partner's interests, too.

Tort

An attorney's liability to third parties, who are not third-party beneficiaries, is of no practical importance. Under the Austrian law of damages, a financial loss that does not involve personal injury and/or damage to property is recoverable only:

(1) In the case of a breach of contractual duties;
(2) If the person causing the loss acted willfully; or
(3) If the loss was caused by an action that violated a specific statutory duty that was intended to protect the person suffering the loss.

39. See SZ 43/221, 2 December 1970, 6 Ob. 282/70 (not reported), 19 April 1983, 5 Ob. 613/82.

40. See Koziol, *Österreichisches Haftpflichtrecht*, 2nd ed., Vol. II, p. 87.

Besides these exceptions, the Austrian law of damages does not provide for recovery of mere financial losses in tort.

None of the three cases is relevant in the field of legal malpractice. Most of the malpractice cases involve negligent rather than willful action and the acts of attorneys usually do not result in personal injury or damage to property. Furthermore, statutory provisions prescribing an attorney's professional duties are usually interpreted as protecting only the attorney's client but not other third parties.[41]

Procedure

A malpractice action against an attorney must be brought in a court. Depending on the amount of damages claimed and the nature of the claim and the underlying transaction, either a district court (*Bezirksgericht*), a court for general civil matters (*Landesgericht*), or a commercial court (*Handelsgericht*) will have jurisdiction over the matter.

In the case of a violation of the rules of professional responsibility, there may also be a proceeding within the local bar organisation. In this disciplinary proceeding, only disciplinary measures against the attorney can be imposed. A person suffering damages would not be a party to such a disciplinary proceeding, and no damages can be awarded by the bar itself.

Recoverable damages

Under the Austrian legal system, the courts may award damages for breach of contract only in an amount equal to the actual damage suffered by the claimant, but no punitive damages are available. It is up to the claimant to prove the amount of damages suffered. Such damages can include: actual financial loss, additional costs incurred due to the attorney's failure, and expected gains which were not realised due to the attorney's failure.

SPECIFIC CIVIL LIABILITIES

The following section will provide a comprehensive overview of those areas of legal practice in which malpractice cases have frequently arisen.

As a general rule, it is up to the client to provide the attorney with all information necessary to handle the situation for which he has sought

41. Attorney malpractice can, theoretically, result in criminal liability as well. However, those cases are of no practical importance.

legal advice. However, the client, especially if inexperienced in legal matters, often will not know which factual details are of legal importance. The client often will inform the attorney only as to the facts he deems necessary and important. The attorney must be wary of this "selection of facts" by the client. He has to inquire actively as to all the additional facts significant and necessary to form a legal opinion in the matter to provide advice. An attorney's failure to inquire as to the relevant facts can result in liability.[42]

Once the attorney has satisfied this obligation and has instructed his client as to which additional information is relevant, it is the client's responsibility to provide him with all necessary information. The attorney need not check on the veracity of the information supplied by his client. With regard to factual information such as time and place of an accident or deficiencies of goods delivered, the attorney need not check whether the information received was correct. However, any legal inferences drawn by the client such as if and when a contract was formed or what kind of contract, may not be relied upon, since a layman is not competent to judge such matters.[43]

The attorney may also assume that the client would not intentionally supply misleading information. Therefore, no legal malpractice action may be based on the claim that the attorney should have suspected that the information received from the client was incorrect.

Knowledge of the law

Statutes, regulations, other normative provisions

Attorneys are presumed to know all statutes, regulations and other normative provisions.[44] Lack of such knowledge will constitute negligence. There are no exemptions for statutes or regulations which are used only rarely or which are outside the main areas of the attorney's practice.[45] Therefore, for practical purposes, the standard applied with respect to the requisite knowledge of the law is higher in degree than the one used to

42. See 26 April 1983; 4 Ob. 505/83, not reported.

43. See 26 April 1983, 4 Ob. 505/83, not reported: The attorney acts negligently if he relies only on the information of his client as to the person against whom a claim should be brought.

44. See EvBl. 1972/124, 11 November 1971; 1 Ob. 296/71; SZ 58/165, 7 November 1985, 7 Ob. 501/85; WBl ("*Wirtschaftsrechtliche Blätter*") 1989, 160, 2 February 1989, 7 Ob. 720/88.

45. See RdW ("*Recht der Wirtschaft*") 1989, 221, 1 March 1989, 1 Ob. 516/89; EvBl 1963/482, 4 September 1963, 1 Ob. 115/63; such a limitation was suggested for German law, see Vollkommer, *Anwaltshaftungsrecht* (1989) Rz., pp. 124 *et seq.*

determine negligence, that is, complete knowledge is required rather than the knowledge of the average and responsible member of the profession.

Knowledge of foreign law is required if such knowledge is necessary to handle a certain matter correctly. Therefore, the attorney must either gain the necessary knowledge by research, retain a foreign attorney, or advise his client that he is not competent to render an opinion as to the foreign law aspects of the matter. The client is then left to seek legal advice as to these questions from another source.

Though the requirements in respect of the knowledge of law are very strict, upon inspection, they seem reasonable. The risk of the attorney not applying a relevant normative provision must lie either with the attorney or the client. There are good reasons to impose this risk upon the attorney. First, an attorney is not required to take on a particular client, and as a general rule there is no obligation on the part of the attorney to take on every mandate.[46] Second, obviously only the attorney would be competent to judge what questions of law are involved and whether he is competent to answer these questions and take the case. The client generally would neither be able to judge which fields of the law are involved nor whether they are commonly used and understood by attorneys. He has to rely on the attorney.[47] Third, the attorney is in the best position to procure adequate insurance to cover the risk of legal malpractice. The costs for such insurance can be spread among all clients. The client has no possibility to cover or spread his risk. Thus, it is the attorney who is in a better position to recognise, to avoid, and finally to bear the risk that he is not competent to render advice on a particular matter.

An attorney may rely on the existing legal provisions in counselling his client. He is not required to investigate whether the normative provisions are, in fact, constitutional. The Supreme Court has held that an attorney will not be liable if he has advised his client to follow a specific statutory provision which later is successfully challenged on the ground that it violated the Constitution.[48] Attorneys need not predict the likelihood of the client's case being a vehicle for change in the law.

It has to be stressed that these standards are imposed only if the attorney has sufficient time to properly research a certain matter. Thus, if advice must be immediately rendered, the standard of knowledge will be lower. However, an attorney's negligence could be found if the attorney does not point out to his client that this advice lacks the certainty of a more thoroughly examined expertise.

46. An exception applies in the case of attorneys' being required to act for indigent clients; in those cases there is an obligation to take a case. The attorney cannot reject the case arguing that it involves fields of the law he is not comfortable with. The basis for this is the legal presumption that an attorney has to know all the law and that there are no specialists.

47. See WBl. 1989, 280, 26 April 1989, 1 Ob. 529/89.

48. See 18 April 1989, 5 Ob. 555/89 (not reported).

Malpractice cases related to the lack of knowledge of the law seem to be the most frequent reasons for malpractice actions.[49]

Court decisions, professional literature

The standard of knowledge required of an attorney with respect to court decisions and academic legal opinions is less stringent. However, attorneys should keep up to date with the published decisions and professional literature. Attorneys are presumed to know rules of law that have been reaffirmed in a line of cases.[50] These holdings are readily obtainable through legal publications and have, even in a civil law country, great persuasive power.

There is no settled standard as to other decisions that turn out to be relevant to a certain matter but that are not part of such repeated holdings of the Supreme Court. However, as a general rule an attorney will not be held liable for negligence with respect to unsettled propositions of the law if his opinion is reasonable although subsequently not followed by the courts. There is no negligence if the attorney's opinion as to a certain question of law is reasonable and legally justifiable.[51]

ADVICE

One of the most important professional duties of an attorney is to give complete and full advice to his client.[52] The main objective of the attorney's work is to give his client advice as to the best and most advantageous way to proceed with his case.

Courts recognise that giving advice requires judgement and that many issues are often uncertain and are subject to disagreement. Therefore, it would be patently unfair to subject an attorney to liability simply because a judge later disagrees with the attorney's judgement. Because of this situation, it is generally accepted that an attorney is not liable for an error of judgement on an unsettled proposition of law.[53]

49. See, for example, EvBl. 1963/336, 30 April 1963, 8 Ob. 115/63; RdW 1989, 128, 15; 12 December 1988, 7 Ob. 661 – 665/88; RdW 19 86, 268, 9 April 1986, 1 Ob. 518/86.

50. See EvBl. 1972/124, 11 November 1971, 1 Ob. 296/71; WBl. 1989, 160; 2 February 1989, 7 Ob. 720/88.

51. See SZ 58/165, 7 November 1985, 7 Ob. 501/85.

52. See SZ 56/181, 30 November 1983, 1 Ob. 785/83; RdW. 1986, 268, 9 April 1986, 1 Ob. 518/86; NZ 1987, 148, 24 April 1986, 7 Ob. 550/86.

53. This rule is accepted in other jurisdictions as well, see Mallen, Smith, *Legal Malpractice*, Sections 14.1 *et seq.*, who trace the origins of this rule back to a 1767 decision of the House of Lords.

Points of law established in a line of Supreme Court decisions will be regarded as settled, and the attorney is obliged to know them. However, as to many legal issues, it is far from clear whether the courts will regard them as settled or unsettled. In advising his client, the attorney must research the various ways in which the client's case could proceed. The attorney has a duty to avoid involving the client in unsettled and potentially unfavourable areas of the law if research reveals alternative means as less problematic in achieving the same result.

Incorrect advice concerning the statute of limitations and other time bars or the special form requirements under Austrian law are a frequent basis for legal malpractice actions. If several statutes of limitations are applicable to a certain claim an attorney has to act according to whichever limitation expires earliest. An attorney may not rely on the fact that it is reasonable to conclude that the longer period of limitation is applicable. He must act in the safest way possible and must bring the claim within the shorter statute of limitations.[54]

The same reasoning applies to available remedies. If it is not clear in which period of time a claim for a particular remedy must be brought the attorney has to act in the shorter period. Similarly, if there are two remedies available, the attorney has to choose the remedy which is more likely to lead to a favourable result for the client.[55] All arguments which can be useful and helpful have to be incorporated.

There are also strict requirements as to the scope of the attorney's obligation to advise. Clients will often not see all the legal aspects of the factual situation. Their questions to the attorney will often be incomplete. Therefore, the attorney is not only required to give advice as to those points expressly addressed in the questions but also on other related aspects which the attorney believes to be important and has reason to believe that the client is not aware of. So, for example, when an attorney represents a client in a criminal matter, he has to advise the client of any civil claim his client may also have, such as a claim for damages connected to this matter, which could be barred by a statute of limitation. It is no defence for an attorney to argue that the client did not ask whether a claim connected to this criminal procedure would be barred by the statute of limitations.[56]

The obligation to give full and complete advice is somewhat limited as to clients who have legal knowledge or who are experienced in legal matters. Such clients are deemed to be able to formulate the questions put to the attorney, and the attorney may rely on the client being able to specifically address all the relevant issues. Therefore, with respect to

54. See EvBl. 1963/482, 4 September 1963, 1 Ob. 115/63; WBl. 1987, 212, 4 March 1987, 1 Ob. 710/86; JBl 1972, 426, 2 February 1972, 1 Ob. 11/72.

55. See JBl. 1956, 620, 7 March 1956, 3 Ob. 119/56.

56. See EvBl. 1963/482, 4 September 1963, 1 Ob. 115/63.

those clients, the attorney is not obliged to address issues not raised by the client. Whether the client has legal knowledge would be revealed by his occupation or profession. An attorney may reasonably presume that a bank in respect of a typical banking transaction will need his advice only as to those points specifically addressed in the questions. For example, a bank will be deemed knowledgeable as to legal issues associated with securing a loan. Thus, an attorney will not be held liable if he advises the bank only to those issues raised by the bank. The attorney need not advise on connected matters which he reasonably can assume to be known by a bank.[57]

Extended counselling will be required if an attorney knows or should know that the client is legally inexperienced or at least is not experienced with respect to the legal issues relevant to the matter he has brought before the attorney. A typical example would be a foreign client who is not familiar with the Austrian legal system. For example, the Supreme Court held an attorney liable for not apprising his foreign client as to the existence and special function of the Austrian *Grundbuch*, a public register in which many relevant facts as to real estate are entered. The Court held that the attorney could not rely on his foreign client being familiar with legal institutions that are specific to the Austrian legal system.[58] Similarly, advice as to other typical Austrian legal requirements has to be very detailed. For example, the Austrian *Gebührengesetz* is a statute that imposes a fee, i.e. a kind of tax, for the execution of certain documents. If an attorney does not advise his client of the fact that signing a document may trigger a fee, the attorney will violate his professional duty.

Malpractice actions are frequently brought by clients on the basis that their attorney did not advise them correctly as to the chances of succeeding in litigation.[59] Since the outcome of litigation is usually not predictable, the attorney is not required to specify the chances of winning a case in court. However, if *ab initio* there was no chance of winning a case, the attorney is obliged to apprise the client of this. The difficulty for the attorney is that in predicting whether the case may later be held as having had no chance of succeeding. Not all cases are as clear as the one decided by the Supreme Court in which an attorney brought a suit against the clear and unambiguous wording of a statute.[60] It was held that the attorney violated his professional duties because he failed to clearly advise the client that there was no chance of succeeding. In such a hopeless case, it did not suffice, and therefore was no defence, that the

57. See NZ 1987, 148, 24 April 1986, 7 Ob. 550/86.

58. Not reported, 26 January 1988, 8 Ob. 593/87.

59. See WBl. 1989, 160, 2 February 1989, 7 Ob. 720/88; SZ 58/165, 7 November 1985, 7 Ob. 501/85.

60. WBl 1989, 160, 2 February 1989, 7 Ob. 720/88.

attorney had told his client that there was "some risk" involved in the proceeding or that the "likelihood of succeeding was not great".

Generally, the burden is on the client to prove that the attorney failed to give correct advice. However, a *prima facie* case is made regarding an attorney's failure to inform the client of the likelihood that he would prevail where the action had no chance of succeeding. The presumption is that a reasonable client would not bring a claim in a hopeless action. It will be up to the attorney to prove that he gave correct advice or that there were specific reasons why the client wanted to bring an action even though there was no realistic chance of success. With respect to the latter argument, the attorney, for example, may show that the client wanted to improve his situation in settlement negotiations and therefore wanted to bring the claim, though he was advised that there was no chance of succeeding. It will then be up to the client to prove that the attorney's advice was incorrect.

INSTRUCTIONS BY THE CLIENT

The attorney is bound to follow the instructions given by his client.[61] If the attorney does not approve of a certain instruction he must either terminate his representation or follow the instruction. He may not simply disregard it.

The duty to follow the client's instructions, also implies that the attorney has to obtain the client's approval regarding material decisions. The attorney is the client's advisor and not his guardian; therefore, it is up to the client, for example, to decide whether to accept a settlement, or enter into a contract. However, the attorney is not obliged to obtain the client's approval for every minor step to be taken in a matter. Thus, decisions which do not materially alter the client's position, such as procedural questions, whether to offer a certain piece of evidence in a trial or what arguments to use in a brief may be made by the attorney alone.

If obtaining of a client's instruction as to a certain matter would cause delay, which could be harmful for the client's interests, the attorney may proceed without instruction, but must seek approval as soon as possible. If the attorney believes that following the client's instruction would be detrimental to his cause he must so inform and warn the client, to avoid liability.[62]

The issue whether an attorney has to advise his client as to possible malpractice claims that a client may have against the attorney has yet to

61. See Section 1009 ABGB; Section 9 RAO; RdW 1983, 106, 23 June 1983, 6 Ob. 610/83.

62. See Strasser in Rummel, ABGB, Rz., pp. 14 *et seq.* on Section 1009.

be decided by the courts. German courts have held that the attorney must advise his client as to such possible claims.[63] However, the legal situation in Germany and Austria in this regard is not comparable. Under the applicable German Statute,[64] a malpractice claim has to be brought within three years after the termination of the contractual relationship between the attorney and his client. In Austria, a claim against the attorney can be brought within three years after the client knows that he suffered a loss and that the loss was caused by the attorney,[65] but in any event no later than 30 years following the occurrence of the event from which the loss arose.[66] In other words, in Germany clients have to bring suit within three years whereas in Austria clients could have as much as thirty years. Therefore, the decisions of the German courts were intended to balance the adverse effects on clients' interests of the short statute of limitations.[67] In Austria, one could argue, there is no need to impose such a duty upon the attorney as the long statute of limitations provides sufficient protection for the client.[68]

DEFENCES

Elements of claim

As outlined in the previous sections, a claim for damages has to include proof that the act was unlawful, that there was a loss and that there was a causal link between the act and the loss. An attorney's fault, i.e. his negligence or wilful wrongdoing, will be presumed according to Section 1298 of the ABGB. The lack of either of these conditions provides a valid defence for the attorney.

In some cases, it may prove difficult for the client to establish that he suffered a loss due to an attorney's negligence. This arises where an unfavourable result was obtained in a proceeding brought by the attorney on behalf of the client, and the client later alleges that the loss was due to the attorney's negligent representation. In such cases, the client must prove that a decision more favourable to him would have been rendered if the attorney had not acted negligently. The same reasoning applies where an attorney negligently fails to appeal against an unfavourable decision.

63. See Vollkommer, *Anwaltshaftungsrecht* (1989), pp. 260 *et seq.*

64. *Bundesrechtsanwaltsordnung*, Section 51 — Federal Statute regulating the legal profession.

65. ABGB, Section 1489.

66. ABGB, Section 1489.

67. See, Vollkommer, *Anwaltshaftungsrecht*, pp. 255 *et seq.*

68. For further references, see Graf, *Anwaltshaftung* note 138 at p. 34.

A typical scenario involves a client who instructs his attorney to proceed with an appeal against an unfavourable court or administrative decision, the attorney then negligently fails to bring the appeal within the proper time period, and the adverse judgement, therefore, becomes final and conclusive, i.e. no further avenues for appeal remain. Subsequently, the client institutes a malpractice action against the attorney, claiming that the judgement would have been reversed by the appellate court provided an appeal had been filed.

Furthermore, the client claims entitlement to compensation from the attorney for adverse financial consequences suffered as a result of the attorney's error. To defend himself against the malpractice claim the attorney may show that the appellate court would have affirmed the lower court's decision and that the client, therefore, did not suffer a loss, but was actually spared the cost of an appeal. The burden of proof is on the plaintiff, i.e. the client.

In such a proceeding, a court must first decide which result the client would have obtained in the first suit had an appeal been filed in time. Based on this hypothetical decision, the court hearing the malpractice claim will decide whether the attorney's failure was the cause for the client losing the underlying suit. If the court finds that the client would have lost the first proceeding anyhow, then it will find for the attorney and will reject the client's malpractice action against the attorney. In the absence of proof as to how the hypothetical appeal would have ended, the court hearing the malpractice action will base its decision on how it would have decided the hypothetical appeal.[69]

The attorney, in his defence, may argue that the client acted negligently too, i.e. that the loss was partly caused by the attorney's failure but that it could either have been avoided or limited if the client had not also acted negligently. Under Section 1304 of the ABGB, negligence on the part of the client and which contributed to the loss reduces the recoverable damages to the extent attributable to the client.

However, according to a recent Supreme Court decision, a client may rely upon an attorney's competence and is not obliged to supervise an attorney's work. In that case, the attorney had to prepare an appeal. An argument which could have been successful was not included in the appeal. Before filing the appeal, the attorney sent a copy to the client who read the appeal and authorised the attorney to file it. The appeal was not successful. Later, in the malpractice action, the client argued that the attorney's failure to include the argument made him liable. The attorney argued that the client, who himself was legally knowledgeable, should have

69. For a detailed discussion of the problem of the "hypothetical appeal" and a suggested solution, see Graf, "The Hypothetical Appeal: Aspects of Legal Malpractice in Austria", *New York University Journal of International Law and Politics*, Summer 1992, Vol. 24; number 4 at 1651 *et seq.*

noticed that this argument was missing and further that the client's failure to do so should be considered as amounting to contributory negligence, thus reducing the amount of damages recoverable. The Supreme Court did not adopt the attorney's argument. It held that a client's right to rely upon an attorney's competence extends even to clients who have knowledge of the law.

There is no obligation on the part of the client to supervise the attorney's work. Only in the case of an obvious mistake by the attorney which was actually recognised by the client would an obligation arise to inform the attorney of his error.[70]

Time bars

An action based on a malpractice claim has to be brought within three years from the time the client discovers or could have discovered that he suffered a loss and that the loss was caused by the attorney. Therefore, if the client after 10 years finds out that he lost a proceeding due only to an attorney's failure to act properly, he may file suit against the attorney within the three years of that date. There is also an absolute time bar in Austria; after 30 years from the day of the harming event, no action can be instituted.[71]

LIABILITY

As long as an attorney practices alone, there is no question as to who is liable. In the case of a partnership, all the partners who were contractually bound by a certain mandate are jointly and severally liable if the contract with the client was breached. It suffices that the client can satisfy his burden of proof as outlined above as to one of the partners. Under Section 21 (d) of the RAO, all partners of an *Erwerbsgesellschaft* (professional corporations) are personally liable if they violate their professional obligations. This liability cannot be limited by the corporate charter. Therefore, like in a partnership all the partners are jointly and severally liable for losses caused by one of the partners.

It is not clear whether attorneys can limit their liability by means of risk limitation clauses in their contracts with their clients. The bar organisation is presently preparing a regulation which would allow attorneys to exclude liability for losses caused by slight negligence. However, the

70. See JBl 1989, 727, 11 April 1989, 5 Ob. 530/89.
71. ABGB, Section 1489.

bar organisation is not authorised to issue norms binding persons other than attorneys. It remains to be seen whether civil courts will be willing to enforce such risk limitation clauses.

INSURANCE

Under Section 21 (a) (3) of the RAO, every Austrian attorney is required to have a minimum insurance coverage in the amount of 500,000 Austrian Shillings. The statute, however, does not specify which risks have to be covered by this insurance. The standard form contracts of the insurance companies, which are not mandatory but widely used, exclude several risks. The form contract will not cover claims that are brought in foreign courts, even if they can be enforced within Austria; losses caused by Austrian attorney's failure to observe foreign laws; or losses caused while the attorney acted outside Austria. To achieve sufficient insurance coverage, law firms would have to negotiate the coverage with their insurance companies.