International Lawyer

Volume 3 | Number 2 Article 7

1969

The Right of United States Lawyers to Practice Abroad

Benjamin Busch

BENJAMIN BUSCH *

The Right of United States Lawyers to Practice Abroad †

Introduction

The question as to whether it was permissible for a lawyer of one country to render legal services in another country, restricted exclusively to his own jurisdiction, was given scant attention by most members of the Bar until 1957 and the pronouncement by the New York Court of Appeals in *Matter of Roel.*[1]

Notwithstanding the fact that The Association of the Bar of the City of New York appeared in that case as *amicus curiae*, and argued on behalf of the foreign lawyer who advises on foreign law in New York, and even warned of the probability of reciprocal attack by foreign courts upon the activities of American attorneys in their respective jurisdictions, the New York court flatly held that when "a person gives advice as to New York law, Federal law, the law of a sister State, *or the law of a foreign country*,[2] he is giving legal advice," and even "practicing exclusively foreign law" in New York, "is violating . . . the Penal Law by practicing law in this State without being licensed to do so."[3]

The Court stated that it had reached this conclusion because "A foreign lawyer who is familiar with the law of the country in which he is a lawyer . . . is a specialist in a particular field of the law," but he "is

* BENJAMIN BUSCH, Partner, Katz & Sommerich, New York City; graduate of City College of New York and of Brooklyn Law School; Vice President, American Foreign Law Association; Director, Consular Law Society; Vice Chairman, Section of International and Comparative Law of the American Bar Association; author of "Foreign Law–A Guide to Pleading and Proof."

† This is the first of two articles on the Practice of Law Abroad by U.S. Lawyers in Foreign Countries. In this article the right to practice in the U.S.S.R., France, Portugal and Austria is reviewed. In the April issue the right to practice in Belgium, England, Italy, Spain and the Netherlands will be reviewed.

[1] 3 N.Y. 2d 224

[2] Emphasis supplied

[3] 3 N.Y. 2d, at p. 229

nevertheless a layman in this State when he is not a member of the Bar here."[4]

The dissenting opinion of Justice Van Voorhis sought to distinguish "between the practice of domestic law and of foreign law"[5] and pointed out that "The performance of such services by American lawyers in Great Britain, France or Germany, for example, would be precluded by the application in those jurisdictions of the doctrine * * * announced by the majority of [the] court."[6]

The passage of years has not dimmed the impact thus made or its applicability, but indeed has seen the doctrine firmly administered in the denial of compensation to out-of-State attorneys for services rendered in New York State.[7]

Nevertheless, for the most part, lawyers with an international law practice have not hesitated to travel abroad to continue as heretofore, in advising clients with respect to the laws of the United States, to participate in legal and commercial negotiations in foreign countries or to represent clients in arbitration proceedings pending abroad. For many attorneys such a course of conduct has been regular and systematic and we, of course, know that some of our colleagues have even opened offices in foreign jurisdictions.

Although it may be that such activities continue by sufferance because of the absence of specific challenge by court or bar association, the question is pertinent and important and kept very much in the background unanswered.

By sheer coincidence, almost at the same time that the European Law Committee of our Section was conducting an inquiry into this field, the International Bar Association was doing the same. The results of the International Bar Association study were reported at its Eleventh Conference Report;[8] some of the reports of our European Law Committee follow.

This study was inspired under the creative leadership of the late Otto C. Sommerich, as Chairman of the European Law Committee of

---

[4] 3 N.Y. 2d, at p. 231.

[5] id., at p. 234.

[6] id., at p. 235.

[7] Spivak v. Sachs, 16 N.Y. 2d 163 (1965); Ginsburg v. Fahrney, 45 Misc 2d 777 (1965), but see Spanos v. Skouras, 364 F. 2d 161, reversed on rehearing en banc 364 F.2d 161 (2d Cir. 1966), cert. den. 385 U.S.987 (1966), where services were rendered in one case pending in the Federal District Court of New York and the attorney was admitted to practice before the District Courts of his own State and had neglected, but could have been admitted on motion, to practice before the District Court where the case was pending.

[8] Lausanne, July 1966.

the Section of International and Comparative Law. Mr. Sommerich had first-hand acquaintanceship with the problem through his long and active practice as well as from the fact that he was one of the counsel to the Association of the Bar of the City of New York which appeared *amicus curiae* in the *Roel* case in support of the position of the foreign lawyer to give opinions on foreign law in this jurisdiction.

In The U.S.S.R.

Report by John N. Hazard

The practice of law is reserved by the Statute of the Bar of each Republic of the U.S.S.R. to citizens of the U.S.S.R. who are admitted to membership in a lawyer's "collegium." (Statute of the Bar of the R.S.F.S.R., 1962. English translation in XIV Current Digest of the Soviet Press, No. 41 [November 7, 1962], p. 5). This provision excludes attorneys from the United States who do not become citizens of the U.S.S.R. Even for those who acquire citizenship, permission to practice is denied until admission to a lawyer's "collegium," which requires that applicants complete a course of higher education in Soviet law and undergo a period of six months' probationary work within a "collegium" under the supervision of members.

The exclusionary rules do not prevent foreign attorneys from representation of foreign clients before Soviet courts and arbitration tribunals, although they must be personally acceptable to the visa authorities and must obtain permission to appear from the body before which they wish to represent their client. Practice has indicated that visas may be granted or denied depending upon the circumstances, as may the privilege of appearing in a case. In principle, the right to appear before the Foreign Trade Arbitration Tribunal of the All-Union Chamber of Commerce on behalf of a foreign party is granted without question.

If a foreign attorney wishes permanent residence in the U.S.S.R. for representational purposes as a business agent, he must qualify under the procedure for admitting foreign firms for the carrying out of trade operations on the territory of the U.S.S.R. (Decree of March 11, 1931–English translation in Soviet Statutes and Decisions. A Journal of Trnaslation. Vol. III, No. 1 [Fall, 1966], p. 60).

Although no regulations or practice are known to exist on the matter, a foreign attorney who gives advice during a brief visit on the law of his country to inquirers within the U.S.S.R. would probably not

be considered as practising law. If he were to give advice systematically over a period of time and for a fee, he would probably be denied a permit for long term residence, unless sponsored by a Soviet agency desiring such advice, for example, the Ministry of Foreign Trade or one of its import-export combines.

The Practice of Law in France by a United States Lawyer

Report by Doris Jonas Freed

This study will attempt an answer to the following questions:

May a lawyer who is a member of the bar in any of the states of the United States practice law in France? If so, to what extent? May he advise American clients who live in France? May he advise French clients? May he act as an arbitrator in arbitration proceedings in France? May he represent a client in such proceedings?

In order to provide answers to the foregoing, a clarification of the French meaning of the "practice of law" and a comparison with the American concept, will be attempted.

The Practice of Law–American View

In the majority of states of the United States, the right to engage in the practice of law is limited to American citizens, who must have resided in the state for a specified period and who must have been specifically admitted to practice law in that jurisdiction. Maine,[9] Tennessee,[10] and Virginia,[11] however, do permit a resident alien to practice law. Thirty-two states require United States citizenship[12] and in most if not all states, a person who desires to engage in the general practice of law must swear to support the state's Constitution and also the United States Constitution.[13]

Little consideration has been given by any state other than New York as to whether a foreign lawyer may, within that state, render legal services to clients in the field of foreign law.

[9] MAINE REV. STAT. tit. 4, § 802 (1964).

[10] 173 Tenn. 891; *see also* Sup. Ct. Rules.

[11] VA. CODE § 54-67 provides that "any person attached to a foreign embassy or legation may be, in the discretion of the Supreme Court of Appeals, granted a certificate to appear in the courts of Virginia in matters connected with his official duties if admitted to practice in the court of last resort of the jurisdiction of the embassy to which he is attached . . . "

[12] See Munroe, Intl. Bar Assoc. 11th Conference Report, 80, 81 (Lausanne 1966).

[13] *Ibid.*

In New York, Court of Appeals in *Matter of Roel,*[14] refused to permit a resident alien to give legal advice on Mexican divorce law to American clients. The Court held that Mr. Roel, a Mexican citizen and lawyer, had violated the New York Penal Law[15] and had been properly held in contempt for practicing law in New York without being licensed. Mr. Roel's activities in New York included advising New Yorkers on matters of Mexican law including Mexican divorce law. The Court said:

> Whether a person gives advice as to *New York law*, *Federal law*, the law of a *sister state* or the law of a *foreign country*, he is giving legal advice. Likewise, when *legal documents* are prepared for a layman by a person *in the business of preparing such documents*, that person is *practising* law whether the documents be prepared in conformity with the law of New York or any other law . . .
>
> In the present case we are dealing with the conduct of a person who renders legal services to the public as a business. While it is true that he renders only specialized services dealing with a field in which he claims to be peculiarly competent, the competence of appellant in the practice of his specialty is not dispositive of the case before us. (Underscoring supplied.)[16]

[14] 3 N.Y.2d 224, 165 N.Y.S.2d 31 (1957).

[15] Former N.Y. Penal Law § 270, now N.Y. Judiciary Law § 478.

[16] 3 N.Y.2d at 230, 165 N.Y.S.2d at 35. See Spivak v. Sachs, 16 N.Y.2d 163, 263 N.Y.2d 953 (1965). (California attorney who assisted his client in New York in matrimonial litigation pending in New York and Connecticut, sued his client who refused to pay his fee. Held by New York Court of Appeals that attorney was guilty of unlawful practice and denied his fees. The Court held that even though the attorney restricted himself to advice, counsel and recommendations to his client, he had engaged in the "practice of law" in violation of the New York Penal Law);

Skouras Theatre Corp. v. Spanos, 364 F.2d 161 (1966). cert. den. 385 U.S. 987 (1966). (leaving in effect the decision of the United States Court of Appeals (2d Cir.), that a California lawyer who performed legal services in New York relating to a federal claim may not be denied compensation because he is not admitted to practice in New York);

In re Estate of Waring, 221 A.2d 193 (N.J. 1966) (New Jersey's Supreme Court reversed a lower court's denial of fees to a New York law firm that collaborated with a New Jersey firm in performing the legal services incident to the administration of a decedent's estate);

Grievance Committee of the Bar of Fairfield County v. Dacey, 222 A.2d 339 (Conn. 1966) (The lower Court of Connecticut enjoined Norman Dacey, author of best-selling How to Avoid Probate, from pursuing a scheme of estate planning, including the preparation of wills and trust instruments, and the Supreme Court of Connecticut affirmed.);

Brotherhood of Railroad Trainmen v. Virginia State Bar, 377 U.S. 1 (1966) (An injunction was obtained by Virginia State Bar and affirmed by Virginia Court of Appeals, against the Brotherhood of Railroad Trainmen, enjoining it from maintaining a plan whereunder it advised injured members to obtain legal advice and recommended specific lawyers, on the ground that such activities constituted not only solicitation of legal business but also the unauthorized practice of law. On certiorari, the U.S. Supreme Court vacated the judgment and decree and remanded the case. A strong dissent maintained that the Brotherhood's activities were in flagrant disobedience of the law of most states regulating the legal profession);

Chicago Bar Association v. Chicago Motor Club, 362 Ill. 50, 199 N.E. (1935), Rhode Island Bar Association v. Automobile Service Association, 55 R.I. 122, 179 Atl. 139 (1935).

Judge Van Voorhis, dissenting, said that the practice of law in New York "does not forbid advising in reference to the laws of other countries or the preparation of papers for use in the courts of other countries where questions of status, property or other rights or obligations in New York are not affected."[17]

Judge Van Voorhis also noted that "many law firms in New York have offices in other cities, such as Washington, London and Paris, . . . The performance of such services by American lawyers in Great Britain, France or Germany, for example, would be precluded by the application in those jurisdictions of the doctrine now announced by the majority of the Court."[18]

The Practice of Law—French View

The French concept of the practice of law differs sharply from the principles enunciated in the New York case discussed above,[19] since in France, as long as there is no encroachment upon the exclusive province reserved by law for the professional lawyer, namely the "avoué," the "avocat" and the "notaire," there are practically no restrictions against activities by a foreign lawyer in France.[20]

A brief description of various exclusive domains of the "professional lawyer" in France, therefore would seem indicated.

French law regulates in detail the qualifications, duties and activities of the professional lawyer.[21]

The "avoué" and the "notaire" are "officiers ministeriels," appointed by the Minister of Justice.[22] To qualify as an "avoué," it is necessary to be French,[23] at least 25 years of age,[24] to have passed an examination[25] and be the holder of a law degree.[26] The "avoué" must

---

See also Morris, "State Borders: Unnecessary Barriers to Effective Law Practice," 53 A.B.A. J. 530 (1967);.

17 3 N.Y.2d at 234, 165 N.Y.S.2d at 39.

18 3 N.Y.2d at 234, 165 N.Y.S.2d at 40.

19 Matter of Roel, 3 N.Y.2d 224, 165 N.Y.S.2d 31 (1957).

20 David & DeVries, "The French Legal System" 17 (1958).

21 See Appendice au Code de Procedure Civile (1957) for regulation of "avocats" and Organization and Discipline of the Bar, Part II, P. 458-472; regulation of "notaires," Part III, B. P. 480-500; regulation of "avoues," Part III, C, P. 509-524.

22 Decree of Dec. 3, 1953.

23 Ord. Nov. 2, 1945, art. 2, ¶ 1.

24 *Ibid*, ¶ 2.

25 Ord. Nov. 2, 1945, art. 3.

26 Ord. Nov. 2, 1945, art. 2, ¶ 5.

also possess a certificate attesting his good moral character.[27] The number of "avoués" is established by law for each court,[28] and the avoué must live in the judicial district of the court to which he is appointed.[29] He has the exclusive right to render specified legal services in connection with litigation in this court.[30]

The "avoué's" functions correspond to those of an English solicitor. Every litigant in certain specified courts must be represented by an "avoué" who acts as his agent in all phases of his case up until the oral argument.[31] The avoué prepares the written pleadings which he signs on his client's behalf, arranges for service of process, exchange of evidence and writs of execution.[32] He negotiates settlements and handles and receives funds for his client. His compensation is fixed in accordance with an official schedule of fees.[33]

The "avocat" may be compared to the English barrister. He must (as in the case of an "avoué") be a French citizen.[34] He must hold a degree of licencié en droit as well as a certificate of professional aptitude and must be of good moral character.[35] He is a member of the "Ordre des Avocats" in his jurisdiction and is responsible to this body.[36] Unlike the "avoué," he may make his own arrangement for fees.[37]

Like an English barrister, he appears only in court. A litigant need not engage an "avocat" to argue his case in the court hearing but may do so himself.[38] In cases before the Cour de Cassation, the Conseil d'État, and the criminal courts, however, an "avocat's" services are required by law.

The "notaire" like the "avoué," is an "officier ministeriel" appointed for life.[39] He must be a French citizen[40] and a trained

[27] *Ibid*, ¶ 7.

[28] Appendice au Code de Procedure Civile, Part C, L. 27 Ventose, au VIII, art. 93.

[29] L. July 16, 1930, art. 21.

[30] L. 27 ventose au VIII, art. 94.

[31] Ord. Nov. 2, 1945, art. 1.

[32] CODE DE PROCEDURE CIVILE, art. 1, 55, 69, 70, 71, 72, 75, 76, 78, 79, 81.

[33] "Avoue" before court of first instance, Decree April 30, 1946, art. 1-70; Decree Dec. 27, 1920, art. 7, 8.

[34] L. April 10, 1954.

[35] L. April 8, 1954; Decree Oct. 13, 1954.

[36] Decree April 10, 1954.

[37] Decree April 10, 1954, art. 50.

[38] L. Jan. 12 & Decree Feb. 25, 1948.

[39] L. 25 ventose au XI art., modified by Ord. Nov. 2, 1945, art. 1, ¶ 2.

[40] L. Aug. 12, 1902, art. 35, 36.

lawyer,[41] and he must live in the place to which he is officially appointed.[42] He too is appointed by the government; the number of "notaires" being strictly limited.[43] The only way such a practice can be acquired is by inheritance or by purchase of the practice of a retiring "notaire."[44] His duties include the drawing up and attesting of all documents and contracts which must be drawn by a "notaire" or which the parties desire to be executed in notarial form in order to give them authenticity.[45] Certain transactions, such as mortgages, gifts, deeds of sale of real property, protest of bills and prenuptual contracts, are legally required to be executed before a "notaire."[46] His services are also required in the formation of stock corporations.[47]

A foreign lawyer who does nothing which may impinge upon the functions of the "avoué," "avocat" and "notaire," may represent clients in France without restriction.[48]

The general practice of law, with the exceptions above noted, is in fact open to any member of the public, whether trained as a lawyer or not.[49] Thus, in France there are a number of persons who advise on various legal aspects of business and other matters who have had no legal training whatsoever.[50] They are called "conseils juridiques" (also "jurisconsultes," and "agents d'affaires"). They need take no examination to qualify them for their activities nor are they required to belong to any professional organization.[51]

A number of American law firms have Paris offices and a number of individual American lawyers have offices in Paris, all of whom act as "conseils" there.[52]

There is a very real necessity for the American law office in Paris today. Normally clients of such an office will be American citizens who live in France and the American law office there performs a myriad of services for them, such as estate planning, preparing wills, deeds of gifts

[41] L. Aug. 12, 1902, 35, 42.
[42] *Id.*, art. 3.
[43] *Id.*, art. 31, 32.
[44] *Ibid.*
[45] Ord. Nov. 2, 1945, art. 1.
[46] 7 RIPERT ET BOULANGER, TRAITE DE DROIT CIVILE § 379 et seq. (1957).
[47] *Ibid.*
[48] Le Paulle "Law Practice in France," 50 COLUM. L. REV. 945, 947 (1950).
[49] *Ibid.*
[50] Note *Foreign Branches of Law Firms*, 80 HARV. L. REV. 1284, 1294 (1967).
[51] Munroe, Intl. Bar Assoc. 11th Conference Report 105 (Lausanne 1966).
[52] Id. 106-

and trusts, in accord with American law, as well as advising with respect to their investments in the United States.

The bulk of the work, however, is for American companies undertaking operations in France. French lawyers will be called upon by the American firms for consultation as to questions of French law.

The American firm advises as to the application of American laws to citizens and corporations in France, and assists in the business operations of United States corporations in France, i.e., in organizing a French subsidiary or a joint venture or in arranging for exclusive licensing operations, or in acquiring interests in French companies.

None of the above are considered the practice of law in France, as long as the respective domains of the "avoué," "avocat" and "notaire" are not invaded.

A United States lawyer in France today may visit France for the express purpose of advising his clients in France, and such visits may be systematically regular or occasional. He may render such advice in his own office, in a client's office or elsewhere and he may participate in contract negotiations, such as purchase or lease or any other legal activities which do not interfere with the areas exclusively reserved by French law to the "avoue," "avocat" or "notaire."

It would seem that French law at present presents no obstacles to an American lawyer serving as an arbitrator in arbitration proceedings in France or representing a client in such proceedings. Arbitration is by its very nature a private proceeding and the only oath required of an arbitrator is to be impartial.

However, the freedom accorded to American lawyers herein described may be ended in the near future. The national council of "avocats" held a meeting in Grenoble (May 9–12, 1968) during which a proposed reform of the French bar was debated. This reform has as its aim the unification of the "avocats," "avoués" and "conseils juridiques" into a single bar. The "conseils juridiques" would be required to satisfy the same requirements as the "avocats" and the "avoués" and be subject to the same discipline. The monopoly of consultation would then be in the hands of these professionals and the "practice of law" would then include those activities now engaged in by American lawyers in France. Sanctions would be applied to those who practiced law illegally. It is expressly noted by proponents of the proposed measure that this would put an end to the present practice of foreign lawyers coming to France and installing themselves as "conseils juridiques" when reciprocity is denied to French lawyers in certain countries. American lawyers would no longer be able to advise their

French clients and perhaps not even their American clients, but could act only through members of the French bar.[53]

In Austria

I. Sources.

Austria, being a country based exclusively on codified (written) law, the sources of the right of practising law in Austria must be found in the several codes, dealing with this subject matter. There is, however, not a single code devoted to this topic; the rules must be ascertained from various codes.

In the first place we have the "Rechtsanwaltsordnung" (R.A.O.; Law on Attorneys at Law) of July 6, 1868, Official Gazette No. 96, as amended, particularly in 1956. It contains especially the requirements for the exercise of the attorney's profession, his duties and his basic rights.[54]

Then there are the provisions about the representation of the parties in court; in civil matters in sections 26–39 Z.P.O. (Zivilprozessordnung, Law on Civil Procedure) and those in criminal matters in sections 38–50 St.P.O. (Strafprozessordnung, Law on Criminal Procedure); in criminal matters the designation of the defendant's representative is "Verteidiger in Strafsachen" (Defensor in Criminal Matters) which comprises all persons registered as such in specific registers. Each Austrian attorney at law is automatically (by operation of law) a "defensor" and is entered into the said register *ex officio*. In addition thereto and only upon application, such graduates from Austrian law schools may be entered who have passed the bar examination,[55] or the notary's examination[56] and all Austrian doctors of law who are members of a law faculty of an Austrian University. Thus the position of a "defensor in criminal matters" does not fully coincide with that of an attorney at law.

---

[53] *France Soir* May 9, 1968, p. 4.

[54] The assistance of Dr. André Gonçalves Pereira, of the Lisbon Bar, in the preparation of this report is gratefully acknowledged.

[55] An attorney's candidate has to serve 7 years as a kind of apprentice, at least 3 years in an attorney's office and 1 year in court. For the remaining 3 years he has the choice of an attorney's office or a court. After 4 years of practice he may take the bar examination, but that does not entitle him to abridge the time he must serve as a candidate; however he may be entered into the list of "defensors in criminal matters."

[56] Austrian notaries must also be law graduates, must serve a certain time as a candidate in a notary's office, and take and pass the notary's examination.

Supplementarily we have the general provisions of the Austrian Civil Code (ABGB—Allgemeines Buergerliches Gesetzbuch), twenty second chapter, sections 1002—1044, dealing with agency in general "and other modes of management" (sc. for other persons). These provisions are of a certain importance for our topic, because they open a limited way for foreign lawyers to represent foreign clients in Austria, if only occasionally (see later under V).

Article VIII d of the Introductory Law to the Law on Administrative Proceedings (EGVG) contains penal provisions concerning "hedge lawyers" (Winkelschreiber), i.e., unqualified persons practising illegally law in a businesslike manner.

With the expression of sincere gratitude I acknowledge here the help of the Board of Directors of the Chamber of Attorneys in Vienna, to which I submitted several questions in connection with the subject matter of this article and which obliged me with a detailed expert opinion. Since the said Chamber is an autonomous organization of the attorney's profession (each attorney at law must belong to the Chamber of his domicile) its opinion is of great weight and must be considered "an authority." (Referred to later as "Opinion").

II. Compulsory Representation by Attorneys at Law.

While it is true that, in general, each American party has the right to appear for himself here in court, this principle does not apply in Austria. The law distinguishes between absolute and relative compulsory representation through Austrian attorneys at law, and, in certain instances, when a party can be represented by anybody. In general (exceptions are omitted) the absolutely compulsory representation is ordered for all procedural acts in higher courts than the District Court (jurisdiction in general up to Austrian Schillings 15,000, i.e., about $600.66) in civil matters; in criminal matters for serious felonies (not mere misdemeanors which are subject to the jurisdiction of the District Courts); furthermore, for the written complaints to the Administrative and the Constitutional Court which must be signed by an attorney at law. The relative compulsory representation by an (Austrian) attorney at law is prescribed for the so-called "First Hearing" in civil matters, which serves rather formal preliminary purposes, and for the oral trial before the Administrative and the Constitutional Court, where the parties may plead personally, but, if represented, must be represented by an Austrian attorney at law.

III. Conditions for Lawyership in Austria.

Rights and Duties of a Lawyer.

Among the provisions set forth in section 2 R.A.O. for the attainment of a position of an attorney at law in Austria are: The degree of a doctor of laws of an Austrian University; seven years of practice after graduation as a lawyer's candidate (see footnote 55); Austrian citizenship (sect. 1 R.A.O.) passing of the Austrian bar examination (sect. 1); domicile in Austria and registration in the register of the Attorney's Chamber of his domicile.

Already these provisions show clearly that a foreign attorney at law is not qualified to act in Austria as such.

Concerning the rights and duties of an Austrian attorney at law, it is deemed advisable to set forth the translation of section 8 R.A.O.:

> An attorney's right of representing a client includes all courts and public authorities of the Republic of Austria,[57] AND COMPRISES THE LICENSE to act as a professional legal advisor of clients *in all matters in and out of courts and in all public and private affairs* (Emphasis supplied).[58]

While it is clear that in each case where the representation by an attorney at law is absolutely or even only relatively compulsory, no representation by anybody else, therefore also not by a foreign attorney at law, is allowed, the broad frame of the legal provision quoted *supra* excludes any professional activity of a foreign lawyer in Austrian matters. By law the Austrian attorney at law is subject to the disciplinary powers of the Chamber of Attorneys which may punish him for the violation of his duties set forth in Sect. 9 R.A.O., and that is an additional reason to exclude a foreign attorney not subject to these disciplinary powers[59] (Opinion).

IV. Lack of privileges of a foreign attorney in Austria.

From the aforesaid principles and legal provisions it follows clearly that an American attorney at law (as any other foreign attorney at law) does not enjoy any privileges in Austria in his position as an attorney at law of a foreign country. Accordingly he is not allowed:

[57] No connection with a certain (local) court!

[58] See *Lohsing-Braun*, Commentary to sect. 8 of the Austrian RAO.

[59] It is interesting to note that this is also exactly the gist of the New York decisions–the impossibility to exercise disciplinary powers over a foreign attorney is one of the reasons of prohibiting foreign attorneys even to represent or advise foreign clients here in matters of foreign law.

(a) to represent a client in Austria in matters where compulsory representation by an Austrian lawyer is requested by law (see II).
(b) to represent or to advise an Austrian client in Austrian matters (see especially sect. 8 R.A.O., *supra*).
(c) to represent professionally (see *infra*) a foreign client in Austria;
(d) to associate in any manner with an Austrian attorney at law, to add his shingle to one of an Austrian lawyer and, in general to do anything which would appear as the establishment of a branch office[60] (Opinion).
(e) to give professionally (see *infra*) legal advice to an Austrian client even about foreign law (Sect. 8 R.A.O. and Opinion).
(f) to acquire new clients in Austria (even foreigners) and to advise them (Opinion).

V. Permitted activities of a foreign lawyer in Austria.

From the aforesaid it is clear that a foreign lawyer cannot act in Austria in his quality of an attorney at law. But can he act otherwise, e.g., as an attorney in fact (ageny) especially in matters where the "compulsory representation by an attorney at law" does not apply? In a restricted way, the answer is "yes." To understand this situation fully I deem it advisable to quote here in English translation Art. VIII d EGVG (Introductory Law to the Administrative Procedure). A person is guilty of a violation of administrative law and is subject to administrative punishment,

> who ..... d) in matters in which he is not authorized to professionally represent parties, professionally draws written petitions or documents for the use before domestic or foreign authorities (courts or administrative authorities), who professionally gives advice, thereto, represents parties before domestic authorities, or who offers himself, orally or in writing, to such activities ("Winkelschreiber," i.e. hedge lawyer, "Shyster").

As already mentioned *supra,* the stress lays in the word "professionally." In this connection it means "as a profession" (i.e., within Austria), or businesslike, regularly. Hence it follows that such activities by a foreign lawyer, if exercised only occasionally, are perfectly legal and allowed. Only it must not be extended in a manner that it amounts to "exercising a business in Austria " (Opinion). Within these limits an American lawyer (of course only if he is conversant with the German language) may act in the following fields–of course, as I stress again, not as an attorney at law, but as an attorney in fact (agent) or as an expert:

[60] The prohibition of branch offices applies also to Austrian lawyers within Austria; the latter can have only *one* office at a certain location (sect. 5 and 21 RAO; Opinion).

(a) he may be called in–from time to time–as an expert of his law by an Austrian attorney at law, against whom he will then have a claim for an adequate consideration;
(b) he may act in court as an expert witness with respect to the American law and request fees therefor;
(c) while he may not represent clients before a court of arbitration within Austria (of course he may do so abroad), he may become one of the arbitrators within Austria.
(d) he may, of course only occasionally and only as an attorney in fact, represent his (foreign) client in an Austrian court or administrative body, where representation through attorneys at law is not compulsory, e.g. a District Court, or, what was more important several years ago, in restitution matters (for Nazi victims) before a "Restitution Commission" (a special court), where representation by attorneys was not compulsory.[61]
(e) he may, in American matters pending in the U.S., confer personally with his client in his hotel or in the client's residence or office; but he must avoid to transform his hotel room into a kind of office, because that would make these acts "professional" ones ("gewerbemaessig," businesslike).
(f) if, by way of legal assistance, witnesses are examined by an Austrian court in matters pending in the USA (depositions; examination through commission is not allowed in Austria), and the American attorney is in Austria visiting, he may intervene at such a hearing for his American client;
(g) within the same limits, he may also act for his American client before administrative bodies and authorities including tax authorities.

The representation of an Austrian client abroad lies, of course, not within the Austrian jurisdiction and is subject to the law of the country where such actions take place. The same law applies also to the fees for such activities. The Austrian courts, however, will not enforce contingent fees ("Quota litis"), because they hold that this would be in conflict with compulsory legal provisions of the Austrian codes,[62] even if they are agreed upon by an American lawyer with his American client, in case the latter has property in Austria and is sued there.

---

[61] In 1947 and 1948 I went, upon request of Amer. (former Austrian) clients to Vienna and represented some clients before the restitution commission, with full knowledge of and consent by the then President of the Chamber of Attorneys in Vienna; it was considered an occasional and not a professional activity.

[62] Sect. 879/2 ABGB, sect. 16 RAO and Commentary by *Lohsing-Braun*; *Prof. Dr. Sybille Bolla*, Austr. Internat. Private Law, p. 103 and Decision of the Supreme Court (Highest Austr. court) of April 4, 1951, Evidence Blatt No, 256.

VI. Conclusion.

If the question asked in this paper "Does the US Lawyer have the privilege of practising law in Austria?" is to be understood in a narrow sense, the answer is "no." But if we take a broader basis, the answer is a conditional "yes." He may act, if not as an attorney at law, as an agent, an attorney in fact, in certain matters set forth, *supra* in chapter V, provided he does it only occasionally and not businesslike, "professionally" (gewerbemaessig), whereby, of course, the latter condition applies only to his activities within Austria.