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International Law Practicum

A publication of the International Law and Practice Section
of the New York State Bar Association

Practicing the Law of the World from New York

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PRACTICUM: FORM AND POLICY

The *International Law Practicum* is a semi-annual publication of the International Law and Practice Section of the New York State Bar Association. The *Practicum* welcomes the submission of articles prepared by practicing attorneys. The length of an article, as a general rule, should not exceed 3,500 words, footnotes included. Shorter pieces, notes, reports on current or regional developments, and bibliographies are also welcomed. All manuscripts must be sent in laser printed triplicate accompanied by a 3½" disk formated in Microsoft Word or WordPerfect to: The *Practicum*, c/o Daniel J. McMahon, Esq., New York State Bar Association, One Elk Street, Albany, N.Y. 12207-1096. Both text and endnotes must be double-spaced. Endnotes must appear at the end of the manuscript and should conform to *A Uniform System of Citation* (the Harvard Bluebook). Authors are responsible for the correctness of all citations and quotations. Manuscripts that have been accepted or published elsewhere will not be considered. The *Practicum* is primarily interested in practical issues facing lawyers engaged in international practice in New York. Topics such as international trade, licensing, direct investment, finance, taxation, and litigation and dispute resolution are preferred. Public international topics will be considered to the extent that they involve private international transactions or are of general interest to our readership.

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Annual Meeting Presentations:

The Impact of 9/11 in Latin America

Balancing Privacy and Security Concerns in the Wake of September 11th

Checking Conflicts of Interest in Cross-Border Transactions

Editor's Note: The following is an edited transcript of the presentations made at the Annual Meeting of the International Law and Practice Section of the NYSBA on 28 January 2004.

I. Welcoming Remarks

JAMES P. DUFFY, III: Good morning. My name is Jim Duffy. I'm the outgoing Chair of this Section. I guess this is one of the last times I will be addressing you formally or officially. We have arranged a very, very good program for you this morning. And I would like to thank Bob Leo for all of his efforts in helping to pull it together.

We are going to talk first about the impact of 9/11 in Latin America. Following that panel, we are going to have a panel on balancing privacy and security concerns after 9/11. Our third panel will be discussing the duty of New York lawyers to check conflicts in cross-border transactions. So without further ado, I would like to turn the podium over to Bob Leo, who will discuss the programs in a little more detail, and then introduce the first panel.

ROBERT J. LEO: Thank you, Jim. Welcome everybody. You're going to get some very good substantive tips, updates on what's happening around the world in a post-9/11 environment and especially in the United States. The third panel is a very important one on an area of ethics in the international field.

One thing I want to do is to thank all the panel chairs. I really did very little. We have three fantastic panel chairs, and they and their chair colleagues have each put together a very good program. And I want to mention them now: Ollie Armas, who is on our program now; and there's Andre Jaglom, who actually put together a terrific program on privacy and then got called out of town by a client, but his partner, Don Prutzman, will be taking over. And he will be followed by Jack Zulack on international conflicts checks. They have done a great job, and they are going to do a great job this morning. I look forward to the presentations. I know you don't want to hear me; you want to hear the panelists. Let's get started. I'll now hand the podium over to Ollie.

II. The Impact of 9/11 in Latin America

A. Introductory Remarks

OLIVER ARMAS: Good morning, everyone. I'm Oliver Armas from Thacher Proffitt & Wood in New York City. Our panel this morning will discuss the impact of 9/11 in Latin America and the post-9/11 environment there.

We have focused this panel to a very large degree on previewing and discussing topics that we will be addressing later this year, since we will have our annual seasonal meeting in Santiago, Chile. This is my plug for the meeting. I am the chair of that meeting.

With that I'd now like to turn to the focus of this panel. Unfortunately, two of our speakers have not been able to make it: one due to the inclement weather, the other because he was called away on business unexpectedly. But we have two fine substitute speakers for the view from Mexico. Originally Eduardo Ramos-Gomez would have spoken to you about the impact of 9/11 on Mexico and the U.S.-Mexico relationship. But he was called away on business. Gabriela Garate, to my right, will be stepping in and discussing those issues with you.

Francis Lackington of Santiago, Chile, was unfortunately unable to make it. There is still a chance he will show up midstream, and if so we will be hearing the Chilean perspective. If not, I've been introduced to Juan Francisco Pardini from Pardini & Associates in Panama, who graciously accepted the invitation to join our panel this morning and improvise a presentation on the Panamanian perspective.

I remember the weekend before 9/11. I was attending the Americas Conference, where everyone was very excited about what appeared to be a great relationship being embarked upon by the U.S. and Latin America. And I remember that no one was more excited about it than the keynote speaker of the conference, President Vincente Fox of Mexico, who spoke with much pride about the great personal relationship that he had with President Bush.

As we all know, all of that changed overnight as this country came to focus on the war on terror. A goodly number of our neighbors to the south have felt at times ignored, and many of them have felt unfairly treated. And we will be hearing a little bit about that later this morning.

At this point I would like to turn over the podium to Guillermo Malm Green of the law firm of Brons & Salas, where he is a corporate partner. He will be giving us the Argentinean perspective.

B. Argentina

GUILLERMO MALM GREEN: Well, thank you very much. It is a pleasure to be here, especially considering the snow out there, and that when I left my country it was almost 98° Fahrenheit.

My presentation is about the situation of Argentina right now and the impact of September 11th. And the truth is that Argentina has experienced dramatic changes in the legal system in the last two years: more than mere changes, it was an earthquake of legal modifications. The responsibility for these changes has been assigned to September 11th alone. But this would be far from true. September 11th signaled war, uncertainty and recession, and Argentina was not an exception. The flow of capital from the U.S. and other countries was strongly impacted, and now these are belt-tightening times.

September 11th was not in itself the kick-off event. 9/11 only deepened the situation and further shrunk the flow of investments that had been gradually and consistently reduced in 2000 and 2001. The truth is that, from the legal and economic side, September 11th had little impact, compared to another dramatic (if not comparable) event, namely, the Argentine crisis that erupted in December of 2001. Argentina is still suffering from the effects of that crisis.

Indeed, in November of 2001, and after eleven years of the Convertibility Law that tied the peso to the dollar in a 1-to-1-exchange relationship, President Fernando de la Rua was not only suffering from his own indecisiveness and inability to instill confidence but also experiencing heavy pressure from the Peronist Party, as well as his own party, which had put him in office.

Argentina was going through its third consecutive year of recession, but it was almost impossible to convince the provinces to reduce their deficits. Even though a zero-deficit law had been approved, the government did not have the political power to implement the drastic measures that would have had to be taken in order to enforce that law. In this context of lack of confidence and recession, Argentina was renegotiating its external debt, and rumors of possible default caused a massive withdrawal of deposits from the banks. The peak was reached on Friday, 30 November 2001, as a result of which the government issued Decree 1570/01, what we called the "*corralito*," establishing limitations on cash withdrawals from the banks. All transfers of funds abroad were prohibited without authorization of the Central Bank. Proceeds from exports were required to be brought into Argentina, and exports of certain foreign currency could not exceed US $1,000. But the main limitation was on cash withdrawals from the banks.

The reaction of the community to these restrictions was appalling, especially the reaction of the Peronists, who historically had never been eager to participate in economic and political decisions and who were now staring down the government. Why was that? Primarily because Argentineans were used to conducting almost all of their transactions in cash, and because the banks were not prepared to process the thousands upon thousands of requests for ATM cards, the opening of bank accounts, and wire transfers, and the system collapsed. People were queuing for hours at the bank doors, and temperatures began to rise. Not only did de la Rua fail to receive any support, he was forced to resign. Thus, all this political, economic and social instability worsened the economic situation.

When President Duhalde assumed office in January of 2002, the Congress, at his request, passed the Economic Emergency Law, which basically created a "pesification" of the economy, and which supplemented the system then in place. The current system reflects the following changes:

- The 1-to-1 exchange relationship was eliminated.
- All deposits in dollars at the banks were converted at 1-to-1.40, plus a coefficient to protect the deposit from inflation.
- All debts with banks in dollars were converted at 1-to-1, plus also the coefficient to protect the deposit from the inflation.
- Any obligations among individuals were converted at 1-to-2, plus the same coefficient.

Basically the issue was the "pesification" of the economy, and, with some exceptions (including those noted above), all transactions in dollars were converted to pesos 1-to-1.

In addition, labor laws were modified, and the main change was that, in cases of termination, where an employee is terminated without cause, the employee in question would have the right to receive double severance.

Moreover, the bankruptcy law was amended in several aspects. For instance, the exclusivity period during

which debtors in reorganization have the right to submit proposals to creditors was extended to 180 days, and this term may be renewed for another 180 days. The minimum payment of 40 percent was eliminated. The one-year extension to fulfill obligations from compositions that were underway at the time of enactment of this bankruptcy law, and all execution proceedings, including those regarding mortgages and pledges, were suspended for certain time periods.

These three laws were enacted in less than two months. And all these changes strongly impacted the situation of foreign creditors. Why? In our experience, one of the main issues that had to be determined was whether all credits were "pesificated" or only those credits arising from contracts governed by Argentine legislation, which would be the position of the courts in that regard. The government soon issued Decree 410, providing that trade rights arising from contracts governed by laws other than Argentine laws were, fortunately, excluded from the "pesification" regime.

The second issue to be determined was whether all trade rights arising from contracts governed by Argentine legislation were "pesified," or only those credits falling due after the enactment of the Economic Emergency Law—in other words, were credits already in default in dollars at the time of enactment of the Economic Emergency Law "pesified" or not? There are differing opinions and contrary case law in regard to this question.

In the beginning, the trend of opinion was that only those credits falling due after enactment of the law were "pesified," but, unfortunately, two months ago the Congress passed an amendment of the Economic Emergency Law, providing that all trade rights prior to enactment of this law were "pesified," regardless of their maturity date. This seems to me unconstitutional, but we still await the opinion of the Supreme Court in this regard.

Now where is Argentina today? The official unemployment rate has dropped to 17 percent. But 40 percent of the people are living below the poverty level. The gap between rich and poor people is becoming wider; also on the rise are security concerns. But contrary to all predictions, Argentina is much more stable than expected. Now the dollar is being traded at 2.80, while in 2002 it reached a peak of 3.90. Predictions of growth for the coming year are in the neighborhood of seven percent, and the cumulative inflation from January 2002 is only 42 percent, which definitely is a huge number compared to U.S. standards. It must be remembered, however, that the original predictions called for an onset of hyperinflation by September of 2002. And the cumulative inflation rate in 2003 was only four percent.

The legal profession had to adapt to the new scenario: changing rules, lack of investment and recession. M&A transactions and privatizations may have been the rising stars during the '90s, but there are no crown jewels left to privatize, and major investments are few. The official information furnished by the General Inspection of Corporations shows that foreign companies registering their by-laws, articles of incorporation and good standing certificates in order to hold equity in local companies declined from 1,700 in 2000 to only 400 in 2002. And if all the legal rules are changed from one day to another, all kinds of contracts and legal relationships must be amended and renegotiated. Then, for the international attorney, 2002 and 2003 were years of restructuring. And then, what I call the "parish news" at the end of contracts—the arbitration, jurisdiction, and applicable law provisions—were closely monitored once again. Arbitration, litigation, and insolvency proceedings have represented a substantial part of the work of the international lawyer over these last two years.

From a strictly personal perspective, even though we as attorneys had a substantial amount of work, the legal profession has not been as rewarding as it had been in the past. We are always working in murky waters, in a more turbid situation than usual. New rules and new situations challenge us on an almost daily basis. Fortunately, M&A transactions are on the rise again; other areas that attracted interest are mining, cattle, tourism, and real estate.

What may be expected for the future?—stricter enforcement and more regulations. In this sense I believe September 11th had an impact. The need to control capital flows and their origin, as well as the desperate attempts of the government to prevent tax evasion, represents a trend towards the control of the origin of capital and companies established in tax havens. The picture is still bad but it never stays so forever.

In conclusion, one asks, what may be the best piece of advice to give a foreign investor who still wants to do business in Argentina? I think one should closely monitor current legislative developments. There is a substantial trend towards the recycling and updating of legal principles that have been enforced for many, many years. One ought also to keep a sharp eye out for business opportunities, because this is an excellent time for venture capital.

Thank you very much.

MR. ARMAS: Thank you. Our next speaker is Renata Neeser from Demarest & Almeida, and she will be addressing the Brazilian perspective on the post 9/11 situation in Latin America.

C. Brazil

RENATA NEESER: Good morning, and thank you for inviting me to speak here today. I'm glad finally to have joined the New York State Bar Association.

I would like to talk about 9/11. I was here on 11 September 2001, so for me was it was an incredible situation that I never imagined I would have to experience. Although I can't remember all the details of that day, it was extremely shocking for all of us. It was a very, very sad day.

Our office is on Madison Avenue, and it is a small building, so we were able to stay there for almost the entire day that day, and we saw everybody walking uptown covered in dust, and it was very, very difficult. I remember that we tried to help the consulate and all the Brazilian families that were looking for people whom they couldn't find. It was a major challenge to everyone, and that's pretty much what we were able to do. But our work in New York was very much affected; everybody was just too shaken to do anything really.

Turning to how it affected Brazil in general and our practice in particular, I can make the general observation that things changed a lot, as did our view of what the future is going to look like. I believe that the economy slowed down considerably everywhere, not only in the states but in Brazil, the rest of South America, and Europe as well. 9/11 had a snowball or domino effect throughout the entire world. Obviously, the attack and the prospect of war had a negative impact on investment and economic development.

In Brazil, for example, I believe that 9/11 has had a big impact on the economy, and you can tell this from the decrease, a steady decrease, in foreign direct investment, although we also had problems on our own. For example, in 2001, 21 billion was invested in Brazil; the next year, 18; and now, 10. Because we have had a new president, there is a lot of uncertainty, and so if there is less capital to invest, people are concerned about being cautious and not going too crazy anywhere. This is one of the impacts in Brazil.

Thus, if it used to be a great idea to invest in Brazil, now there is less capital to invest, and investors are probably thinking about investing that capital in a different way. That's what we have been experiencing.

We are hoping that this trend is going to change, but it is taking time. Last year, the new president, thankfully, showed to the international community that he's out to do the right thing: establishing appropriate policies to enable the macroeconomy to bring stability to the country and to maintain that stability. It is hoped that we are going to start growing again next year. Under the least optimistic predictions, the Brazilian economy is expected to grow from three-and-a-half to four-and-a-half percent. We can grow even more than that, but we need our partners. And the U.S. was always one of our most important partners, but that partnership has become difficult.

There are other measures related to September 11th that created some difficulties; these include in particular new laws that have been enacted in the U.S. For example, new bioterrorism legislation has changed the rules for foods imported into the U.S. Now companies involved in this must register with the FDA, through its Web site. Moreover, certain data must be supplied, within very short deadlines, to the FDA, to be maintained of record for several years.

Brazilian producers complained about the difficulty of complying with these new rules within the short time frames set by the legislation. Now it seems that the U.S. government is giving more time for everybody to adjust. The Brazilian government, however, forecasts a loss of exports into the U.S. this year because of these new rules, at least until companies can adapt and ensure that they will not be subject to the penalties imposed by the legislation (which penalties include fines or destruction of the merchandise or livestock). These rules have been a major issue and affected all in Brazil. Although people are adjusting to the new situation, it has been a challenge to make the necessary adjustments within such a short time period. In addition, the new requirements are somewhat restrictive and have led to concerns about civil liberties and privacy.

Brazil, as I believe you all know, has become enveloped in somewhat of a skirmish with the U.S. over the new U.S. fingerprinting requirements. There has been much frustration over these requirements and over the Brazilian judge's decision to require the fingerprinting of U.S. visitors to Brazil. On the one hand, the concern is that everyone is simply being forced to comply with whatever the U.S. decides to impose as a requirement. On the other hand, the imposition of such requirements would seem to be fair enough, in light of the U.S.'s needs regarding its own security. Yet, other countries feel the need to be more respected as good partners. And, so, Brazilians, who see themselves as peaceful and easygoing, can feel upset or even mistreated when faced with these new security requirements. There have also been reports of mistreatment at the borders—not just of undocumented immigrants, but also of people who have the wrong type of visa. Some of these people have been handcuffed and have spent an entire day at the airport under humiliating circumstances. The situation has been difficult, and the relationship with the U.S. has deteriorated somewhat as a result.

Before these measures were taken in the aftermath of 9/11, Brazilians viewed the U.S. as having the best of

everything. Now, feelings are more mixed, especially about how people are being treated. Today they are sending the first full plane of deportees back to Brazil. More and more undocumented immigrants have been jailed, and many complain about bad treatment, especially since they are being incarcerated in penitentiaries with common criminals. Most of those people are ordinary, decent folks looking for a better life, a better way to make some money and send it back to Brazil for their families. This is a sad situation.

It has been reported that there are about a thousand such people in jail right now, and 250, I believe, are being sent back today to Brazil. The Brazilian government, again, is very upset with this situation.

I believe that it is very important to the U.S., like everybody else, to feel safe and to make sure that its borders are safe and that products imported into the U.S. are safe. However, if good people are treated like the bad, if no distinction is made between friends and enemies, relationships will suffer. In this age of globalization, it would seem preferable to build and strengthen partnerships. So hopefully we are going to improve our relationship with the U.S. by sorting out these visa and fingerprinting issues and by adapting to the new regulations or by finding a middle ground and by working together towards a more peaceful world in an atmosphere of mutual respect. Thank you.

MR. ARMAS: Thank you. Our next speaker is Gabriela Garate, a Mexican attorney and member of our Section. She is filling in for Eduardo Ramos-Gomez and will give the Mexican perspective.

D. Mexico

GABRIELA GARATE: Good morning, everyone. It is a pleasure to be here. I really feel lucky that Eduardo got called away on business so that I have an opportunity to speak before you today.

I am going to speak a little bit, as Ollie said, about the impact or the aftermath of September 11th on the practice of Mexican law, and, more particularly, about the impact that the change in the relationship between Mexico and the United States has had not only on how business is done in Mexico but also on how we lawyers have changed, to some extent, the way we represent our clients.

So has there been an impact? Yes, certainly, and, probably for many—and I say this as a lawyer of course—the impact has been tremendous. The impact, however, has not been so great in terms of actual changes in the law.

Certainly, after September 11th, Mexico was ready to express its solidarity with the United States, its condolences over the loss of human life, its concern over the economic loss and its outrage at the acts of terror. Now, let me turn to what happened after September 11th and how we got to the point where we are now in the relationship between Mexico and the United States. First, let me give you some background regarding the history of the relationship between Mexico and the United States. It has been an interesting relationship and not an easy one.

Basically, since the time of Mexico's independence from Spain in the early 19th century, the relationship between Mexico and United States has been characterized by territorial disputes, invasions, and the domination by what has since become a much bigger economic and political power than Mexico. With the subsequent entry into Mexico of foreign investment, coming predominantly from the U.S., in the second half of the 19th century, the Mexican economy started to develop in a serious way. United States interests were very quick to move down to Mexico. American companies became well-established and became very prominent in Mexico. They acquired a prominent role in the Mexican economy and became successful. And basically the economic and business relationship between Mexico and the United States was founded right there.

Throughout the first half of the 20th century, this relationship changed dramatically. First of all, the Mexican economy became a very protected economy. Throughout much of the 20th century the Mexican economy remained largely closed to foreign investment. Up until the late 1980s, foreign investment in Mexican companies remained in most sectors of the economy limited to a maximum of a 49-percentage interest. Majority Mexican ownership of most companies was required. There were many, many so-called strategic sectors that remained completely closed to foreign investment.

The United States mounted growing pressure on Mexico to open its economy and to implement a series of legal changes culminating in the negotiations and implementation of NAFTA in the four years from 1990 through 1994. With implementation of NAFTA, a whole series of changes in the Mexican legal system started to develop. As a result of NAFTA, we went through a ten-year period in which Mexico had to modify all of its laws gradually to permit an increased participation of foreign investment in many sectors that had until then remained closed to foreign investment or allowed only a certain limited percentage of foreign investment. We went through a complete change in our legal system, and simultaneously the trade relationships between Mexico and United States increased and improved to the point where Mexico became the second most important trade partner of the United States.

After this legal reform and after NAFTA has now been in place for over ten years, NAFTA is working in an almost seamless way. It's something that has become a part of our day-to-day life. It is not anticipated that any more legal changes will need to be made in the Mexican legal system to implement fully all the provisions of NAFTA. So NAFTA has become in a way a non-issue. Of course, there is still much talk about NAFTA, but it is something that has become so embedded in our day-to-day life that we tend to forget that there is anything else that can be done with it, especially in terms of strengthening the relationship between Mexico and United States.

Now, interestingly, after all these issues—for example, the power struggles between the United States and Mexico, the implementation of NAFTA, and the legal reform—we come to 2000, when Mexico had national presidential elections. President Vincente Fox was elected, the first president from an opposition party to be elected to power in Mexico in more than 70 years. So Mexico was heralded for its changes in democracy and was finally perceived and applauded by the United States as a country that is working hard at becoming a full and complete democracy.

Coupled with that, George Bush was elected president of the United States, and it happens that he and President Fox go back a long way. They share a lot in terms of friendship, personal interests, and views about where they want to take the relationship between the two countries. President Bush is very quick to express his view that there is no more important partner for Mexico than the United States. Unfortunately, very soon thereafter we came to September 11th. President Bush had been in Mexico beforehand and reinforced his views about the future relationship between Mexico and the United States. After September 11th, Mexico was not quick to support the United States in the Security Council of the United Nations. We Mexicans used this opportunity to make a statement to the world that we are our own country, and that we are not biased by our geographic proximity or by our close economic ties to the United States. And basically, the relationship deteriorated right then and there. All prospects of a much more improved relationship stopped right there. All the talks about immigration reform to allow regularized undocumented Mexican immigrants into this country stopped right there. Moreover, Mexico was affected by the subsequent recession that occurred in the United States.

What is the effect of all of this? Again, in terms of the legal profession, no changes in the law have been made as a result of September 11th. We have not enacted an anti-terrorist act. We have not enacted any sort of security act. There are no legal reforms that are expected as a result of changes in the relationship between Mexico and the United States. But as lawyers, we have found ourselves in a position in which our traditional role as negotiators, implementers of our clients' business ideas, and protectors of our clients' rights through contract-drafting and other documentation has changed to our having to pitch a deal as if we were on the business side of the deal, when we are representing Mexican clients. We also find ourselves providing reassurance and emotional support to our clients who are worrying about the future of business in Mexico because of the relationship between Mexico and the United States.

Thank you very much for your attention.

MR. ARMAS: Thank you, Gabriela. Francis Lackington, who literally just arrived from Chile, will be providing the Chilean perspective.

E. Chile

FRANCIS LACKINGTON: When I received the invitation to talk about the changes in the practice of law in Chile after the events of September 11th, I really didn't realize how difficult it would be for a Chilean to come up with a presentation that would last ten minutes. We did some serious brainstorming in my office, and we really don't feel there have been any changes in the practice of law in Chile after September 11th, except those that are derived from the extraterritorial effects of U.S. legislation, as it may apply to Chile.

For example, you all know that Sarbanes-Oxley affects Chilean issuers who trade their stock through ADRs in the United States. Now Chilean issuers have a series of reporting requirements under that statute and otherwise. Also, exports to the United States from Chile are subject to special reporting requirements and to what is basically a new regulatory framework that was put into place after 9/11.

As for my personal experience, during most of 2003—and I came to New York several times—I represented Ultravito Central, which was the biggest project in Chile last year. Ultravito Central is an automatic toll road. It is a free-flowing toll road in Santiago and it corresponds to the Santiago trench of the highway that connects Arigo, which is in the north of Chile, to Seleno, so that highway now is a toll road, a free-flowing toll road. And this toll road issued bonds in local currency and in U.S. dollars. This was an approximately $600 million issue. It was the first time in Chile that bonds were placed by the same issuer both in local currency and in U.S. dollars and in two different markets at the same time. Now, due to certain stock exchange regulations that are different in Chile from those in New York, the payment of these bonds was subject to different

rules. And since these bonds were rated by MBIA, and this is what makes the bonds AAA, 9/11 took on significance because of the concern over what would occur if a 9/11 event happened on the day the bonds were to be placed in Chile but where the bonds were not placed because they had to be placed in New York on the next day. This was an issue that we had to deal with, and we were able to deal with it. But it was an important issue, and many lawyers billed a lot of time on this issue because of the size of the transaction.

One of the other things that happened after 9/11 to Chileans was, for example, that a Chilean clown of sorts announced on a plane bound from Miami only two weeks after 9/11 that he had a bomb at the airport. He was removed from the plane, was imprisoned and was questioned for about three weeks. So, you see, Chileans also have the ability to make it into the news in situations like this.

There is also the matter of the fingerprinting. I was just fingerprinted at the airport. When you go to Chile for the semi-annual meeting in November, you will also be fingerprinted. This is standard procedure now. As of February 1st, everybody entering an airport in Chile will be fingerprinted and photographed. I think that is a consequence, obviously, of what the United States did, and the United States obviously did it after what happened on 9/11. I thought the fingerprinting was going to be very arduous, but it went very fast. You know, you put your right finger and then your left finger, and then you are photographed. They don't even tell you when they are going to photograph you; you just look at the camera and it happens very, very fast. I hope we can come up with the same level of technology in Chile so you don't have to wait in line when you come to Santiago.

These are the things that have happened after 9/11.

Now, I would like to refer briefly to probably the most important legal news that developed in Chile and the United States after 9/11. It's not a result of 9/11 but it happened after 9/11. So there is the connection. And it's the Chile-USA Free Trade Agreement, which Chile and the United States have entered into. The Free Trade Agreement covers several topics, but a free trade agreement with Chile for the United States was something very important and has been on the administration's agenda for several years. And coincidentally, on 11 September 1992, President George H. W. Bush, on the day he released what was called the Agenda for American Renewal, said that America was a place where ordinary people could do extraordinary things if only they were set free. And the first step in their being set free was the unlocking of foreign markets, and the first thing the then-President Bush mentioned was that the U.S. wanted a free trade agreement with Chile.

As some of you may know, September 11th is also an important date in Chilean history. The military coup that led to the Benitti administration occurred on 11 September 1973, with the support of the U.S., and, although people have different views of this, the coup saved Chile from economic devastation and communist dictatorship. When the events of September 11th took place, Chile and the United States had a meeting in a round of negotiations scheduled that day. The meeting was postponed until the next day, so there was really no problem. The Free Trade Agreement was successfully passed by the House and Senate in the United States with ample majority. And maybe it is not very important in terms of the amount of economic activity that Chile may represent to U.S. businesses, but it is probably the proverbial foot in the door for hopefully a free trade area of the Americas in the future.

The Free Trade Agreement became effective on 1 January 2004, and covers several aspects, including market access, terrorism, quotas and subsidies, in regard to which the parties agreed to a national treatment of directly comparative and substitutive goods. I really don't have time to go into detail concerning the Free Trade Agreement, but we will examine the details of this agreement and related topics at the November meeting of this Section in Santiago.

I am going to be your host because I am the Santiago chapter chair, so I really look forward to seeing you all there. Thank you very much for inviting me.

F. Questions

MR. ARMAS: We don't have much time, but we can take a few questions from the audience if anyone has anything to ask our speakers.

MR. LEO: Francis, in your opinion will the Free Trade Agreement between Chile and the U.S. be undercut or somehow constrained by the security concerns and all the security measures the U.S. is putting in place at the borders?

MR. LACKINGTON: Yes, I think it will. Those measures will be somewhat of a constraint, and reporting requirements will become perhaps a little bit more bureaucratic than trade between the two countries demands. But still the security or safety requirements imposed by the United States cannot actually affect all of the agreement. So I guess practice will show how this works, and some of the legislation or regulations that are being passed may have to be reviewed.

SPEAKER IN AUDIENCE: Well, in that vein, I note that this agreement is a U.S. treaty, while the Homeland Security Act is a statute. A treaty overrides a statute. At least when our courts interpret it, that's what's supposed to happen. So do you now see particular issues

where courts are going to have to examine whether our principles of jurisprudence are going to hold up, or do you see that it is just basically a question of bureaucracy and how the administrators interpret it?

MR. LACKINGTON: I see it mainly as a question of bureaucracy. I think the principles that are established in the state-of-the-art Free Trade Agreement are very solid. The agreement is really a very modern and very good piece of legal work, so I see this as only delaying commercial activity.

SPEAKER IN AUDIENCE: The Bioterrorism Act and the federal Food and Drug Administration require foreign suppliers and storers of food to register and give prior notification. I know that Chile is a major food supplier to the United States, Mexico and certainly Argentina. I'm wondering if you're seeing any concern from your clients or hearing of any concern in your countries about the new interim regulations that went into effect in December.

MR. LACKINGTON: Well, I know that the fruit exporters have a concern—but we don't have any fruit export clients, so I'm really not familiar with that business. But I've been in social gatherings in Santiago recently where this issue was sort of touched on. And I guess, in the fruit export business, exporters have to have or were used to having the possibility of changing the deal while the fruit was on the boat, but they can't do this any longer. This is the big issue.

MR. ARMAS: Thank you very much.

III. Balancing Privacy and Security Concerns in the Wake of September 11th

A. Introductory Remarks

MR. LEO: We have already heard a little bit about security and privacy concerns, as well as the fingerprinting that's going on at the moment, so the prior discussion segues nicely to our next panel, which is on balancing security and privacy concerns. Don Prutzman is our speaker.

MR. PRUTZMAN: Good morning. Welcome to our panel. Today we have two particularly well-qualified and distinguished government officials. Both of them have extensive experience dealing with the protection of personal privacy in connection with data collection and dealing with security concerns.

We have Nuala O'Connor Kelly on the telephone. She is the Chief Privacy Officer at the Department of Homeland Security, appointed to that position by Secretary Ridge on 16 April 2003. Her responsibilities include privacy compliance throughout the department, attempting to assure that the technologies that are used to collect data sustain and not erode privacy protections. She is also responsible for reviewing and evaluating legislation and regulatory proposals involving data collection.

She recently earned high praise in the press for making privacy concerns a central part of the Department of Homeland Security's implementation of the new U.S. Visit Program that we just heard a little bit about, which involves the photographing and fingerprinting of all persons entering the country by air and water from most countries.

Ms. O'Connor Kelly has been focused on privacy protection for a substantial part of her career. Prior to becoming the Chief Privacy Officer of the Department of Homeland Security, she was the Chief Officer of the Department of Commerce, and before entering public service she was the Vice President of Data Protection and Chief Privacy Officer for Emerging Technologies at Double Click, an online meeting services company. She's also spent time as a practicing lawyer in Washington with several firms. She's a graduate of Princeton University, holds a Master of Education from Harvard, and is a graduate of the Georgetown University Law Center.

Our other distinguished panel member is the Honorable Mozelle W. Thompson, a Commissioner of the Federal Trade Commission since December 1977. He has been heavily involved with privacy protection issues as a Commissioner and one of the principal negotiators of the U.S.-EU Safe Harbor Agreement in 1999 and 2000, which allowed U.S. companies to receive and collect personal information from EU customers and companies without running afoul of the EU's privacy directive.

Before joining the FTC, Commissioner Thompson was the Principal Deputy Assistant Secretary at the Treasury Department. He comes from New York, and before his service at Treasury, he was Acting Executive Director and General Counsel to the New York State Finance Agency. He's a member of the New York Bar, has been a practicing lawyer at Skadden Arps, a faculty member of the Woodrow Wilson School and Fordham Law School, and a Visiting Scholar at Stanford Law School. He received his undergraduate and law degrees from Columbia and holds a Master in Public Administration from the Woodrow Wilson School.

Our program today is going to consist of presentations by each of our panel members and then a period for questions and answers. First we are going to hear from Ms. O'Connor Kelly.

B. Privacy Office of the Department of Homeland Security

NUALA O'CONNOR KELLY: I'm delighted to be here, at least by telephone. I thought I'd start by giving you some background on the Department of Homeland

Security Privacy Office, because it is a unique entity in the federal government at this time.

Building on the concerns over the creation of the Department of Homeland Security in 2001 and 2002, members of Congress wrote into the enabling statute for the Department a provision (Section 222) creating the Privacy Office. It is somewhat independent from the Department and is charged with some of the things you've already heard: ensuring that the use of new technology sustains privacy protection; overseeing the Privacy Act of 1974, the Freedom of Information Act and the Electronic Government Act of 2002; reviewing privacy impact assessments of all new proposed rules or programs of the Department of Homeland Security to minimize the impact on personal information of both our citizens and visitors to our country; and, what is most unique, having a direct reporting relationship with Congress on activities of the Department that affect privacy, including all complaints of privacy violations, implementation of the various statutes, internal controls that were placed on the Department, and other related matters. So this is a relatively new paradigm for privacy enforcement at the federal-government level.

Mozelle has been very involved in enforcement in the private sector, and we have had a Privacy Act since 1974, which has been running well at an operational level. But this is the first time there has been a senior policy level official reporting both directly to the Secretary of the Department and to Congress on privacy policy, as well as statutory, matters.

I think it's important to note that, in clause 5 of Section 222, there is provision for a direct report to Congress, which is unusual, and of course, as I said, there are no other statutory privacy officers. It is more like an inspector-general-type arrangement, an organization that fits within the Department and is yet somewhat outside of it as well. I think this is very much due in part to the awareness of the structure of protection-authorities around the world and our desire to create an office which has both policy oversight and an independent level of review to address concerns and complaints. It also reflects the realities of the potential commingling of personal data compiled by over 22 federal agencies and parts of several more. Such commingling brings with it, hopefully, excellent synergy, but it also can have a tremendous impact on privacy concerns.

Structurally, we have a headquarters Privacy Office, and we also have over 300 privacy impact employees and officers across the department, both at an operational level and at a senior-policy level. These levels are called directorate divisions, dealing with things like border security and transportation security, and even including all the divisions of the former Immigration and Naturalization Service (INS), as well as the organization formerly known as the Federal Emergency Management Association (FEMA).

I would like to highlight the idea that the Department of Homeland Security is truly a protective agency, rather than an investigatory and counterterrorism agency. We are about more than simply preventing terrorist attacks, though that is one of the primary missions. We are about strengthening security across our various infrastructures, including in particular our critical infrastructures and the private sector. So a great deal of my office's focus is on working not only with individuals who are concerned about the impact of the program on their privacy, but also with industry in creating a cooperative understanding of how data flows between the public and private sectors, how it should flow, what kind of privacy protections should be in place on both the giving and receiving end of that information, and of course, what kind of data protection principles should surround that kind of activity, including notice, access and redress mechanisms in the public and private sectors.

Obviously, it was very kind of you to say that we have been mentioned in the press a great deal, and I'm actually very pleased that there has been so much attention given to the important issues that we are dealing with. These include, among others, the implementation of biometric technology. I believe you discussed to some extent in the earlier session the new U.S. Visit Program, and, in addition to the privacy and protection concerns in that program, there is certainly a new awareness of both the opportunities and also the challenges involved in using new technologies.

Biometrics—fingerprints and photographs in particular—strike many of us as coming from a criminal sphere where people are fingerprinted because of having done wrong. I think we are moving into a place where biometric technology can be used responsibly in very limited fashion to protect identity theft, to strengthen our security systems at our borders, and also to provide greater services to those who come not only to visit but also to stay in the United States on a more permanent basis. That means that there is an opportunity here to forge good rules and good frameworks for the use of new technology in the public and private sectors.

We have certainly seen some missteps in the use of biometric technologies in the private sector, and I think the government is in an unusual position to take the lead in the responsible use of good technology in a way that helps industry and helps government as well.

For example, we have, as you mentioned, put in place both privacy impact assessments and systems of records and notices required under the Privacy Act of

1974 that clearly disclose what information is being collected, how it is collected, why it is collected, who it is shared with, and how it is stored. These measures also allow for tremendously robust access and redress mechanisms whereby individual citizens and noncitizens alike can call, write, or come to the Department of Homeland Security and learn what information may be in their file or used about them in determining whether or not they are coming into or out of the country. They are also able to correct information that might have been misapplied to their case, and find out what else the government knows about them, which I think is a good crucial principle of "transparent" data collection. Those rules have been in place on a less robust or less utilized level, but a program as high profile as the U.S. Visit Program, which affects so many people, requires, in our view, provision for immediate appeals at airports and ports of entry, as well as appeals to the privacy officer for that program, who reports to my office. There is also then a final appeals program that is monitored and adjudicated by my staff and in the headquarters of the Privacy Office.

The good news about all of this is that we haven't had to implement any of these measures, because there have not been any complaints. Among the over 4,000 people who were processed through the system the first day or two, there were only 30 people who had even a questionable image on their fingerprints or other information. All of that was resolved actually at the point of entry within a matter of minutes after the initial image was captured.

So we have been extraordinarily pleased not only with the amount of preparation we put in place as an organization for privacy processes, but also with the fact that the technology works so well and was so transparent to individuals. As a result, we found that, for the most part, the process actually speeded up citizens' and noncitizens' entry into the country and has had a positive effect on visitors' relationships with the Department of Homeland Security at airports and points of entry. So I think it is a good example of good policy and good employee training, which my office is involved in, and good technology used effectively and in a limited fashion to protect privacy. I think all of these elements need to be in place.

Obviously, many of you are very interested in our conversations with the European Union in particular and other data protection authorities around the world, not only about the U.S. Visit Program but also about our use of passenger name record data and various different programs throughout the Department of Homeland Security, including, in particular, our recent negotiations, which have been ongoing, with members and staff of the European Commission leading towards an adequacy finding at the end of last year. Certainly, that is not a process that is complete, but we are extremely heartened by the hard work of many other agencies and their staff in forging a bilateral arrangement that is reciprocal and workable to address those types of security concerns on both sides of the Atlantic.

I think that one thing is often misunderstood or mistaken in conversations, and that is that one side of the Atlantic is more concerned about one of those issues than the other. The contrary is actually the case. As many of you are certainly aware, many parts of Europe have dealt with domestic and international terrorism on a much longer basis than we in the United States have dealt with domestic terrorism. And we actually already have more of a framework for this pursuant to our Privacy Act of 1974 and our approach to industry than is widely recognized. From my perspective, this is not a black and white issue. This is an issue for both sides of the Atlantic and both sides are concerned with security and privacy. But I think we will really see that built upon in future years, not only with our relationship with the European Union but also with other parts of the world, in increasing passenger security and increasing the flow of goods and people internationally, while also protecting data in that flow.

So I think that we should all be very pleased with the work that's been done so far, the excellent work done by staff of both the Department and Commission, and the work that I think will continue to be done in those negotiations going forward.

A few other hot issues, and then I'll turn it over to Mozelle, who will have many things to say on the FTC's work. Inter-agency and intra-agency data flows are a prime issue. Obviously, what was one of the most compelling issues when the Department of Homeland Security was created was the commingling of 22 separate agencies and parts of others. There are clear rules under the Privacy Act about how those different elements did their work before March 1st of last year, and we are undertaking a review of all the applicable systems of record-keeping, notification, and Privacy Act matters, as well as the decisions in the various agencies to come up with a coherent and comprehensive approach to data sharing and data limitation. As you can imagine, this is an incredibly large task. There are literally thousands of relevant documents out there that need to be coordinated.

We also have data flows with state and local partners. President Bush and Secretary Ridge have said numerous times that homeland security is not something that can be done only from Washington. It is a partnership. As we all know from our experience in New York and Washington on September 11th that our first responders are state and local fire, rescue and

police departments, and how we get and manage information with those partners is of crucial importance. How we abide by the relevant privacy and data protection framework in our various jurisdictions is very important and an issue that we will be looking at in the weeks, months and years ahead.

Most recently there has been a great deal of press on the data sharing and data flows between the Department of Homeland Security and our partners in the private sector. Over 85 percent of our critical infrastructure in the United States is in the hands of the private sector. That is kind of a shock to many in other parts of the world, where so many crucial and critical infrastructure elements are owned, operated or regulated in a greater sense by federal, state and local governments. And I'm talking predominantly now about airline security, but also about our water and electric infrastructure, as well as our bridges and tunnels. These critical infrastructure elements are not only in private sector hands but also to a significant extent in state and local hands. How we share information to increase security of those elements while also abiding by federal, state and local requirements to protect individual information is incredibly challenging. I think it is one of the most compelling privacy issues in the federal government today.

We have begun work not only internally on how we use data responsibly that is offered by the private sector, but also how we work together in partnership with members of the private sector to ensure that they are informing their clients, their customers and consumers about data-sharing with the federal government, whether, as you've seen in some cases, they report on a voluntary basis or under regulation or direction from the Department of Homeland Security.

And with that, I will turn it over to Mozelle to hear his perspective.

MR. PRUTZMAN: Thank you very much.

C. Federal Trade Commission

MOZELLE THOMPSON: Well, good morning all of you. I'm here from the government, and I'm here to help you!

I wanted to thank you, Donald, for having me, and the State Bar Association for organizing this panel.

Now, before I go much farther, I must repeat the usual caveat that my general counsel requires, that is, that my views are my own and do not necessarily represent the views of the Commission as a whole or other Commissioners. I think that they at least represent my views.

As most of you know, the Federal Trade Commission (FTC) is the federal government's antitrust and consumer protection agency. And because of its consumer protection mission, the FTC has long been involved with data collection and privacy issues through our Section-5 authority, which allows us to protect consumers from unfair deceptive acts and practices.

Clearly, however, the nature of information gathering and disbursement has changed in recent years, along with advances in technology, including such marvels as the Internet. At the same time, the events of September 11th have also affected America's view of information, privacy and national security.

As you heard from Ms. Kelly, the federal government has the heavy responsibility of protecting all Americans, including our national security interests. And it's a very delicate task to balance people's interest in security with other interests, such as their right to privacy and speech. Fortunately, for me, most of the time I don't have to deal with such weighty issues, because many of the cases that arise in the national security context have little, if anything, to do with issues we see at the FTC arising in the context of consumer protection and the various types of commercial collection and use of information. Usually by the time they get to me, the dealings are so bad that they just call out for action.

But another way of looking at it is that consumers usually don't have to give their personal information to identity thieves and telemarketers in order for consumers to feel more secure. And protecting consumers from terrorists is not inconsistent with the FTC's enforcement policy work in the context of the Fair Credit Reporting Act or Gramm-Leach-Bliley Federal Modernization Act, including its privacy rules and our Do-Not-Call Log and the new CAN-SPAM Act. Now, that's not to say that there aren't times when there aren't certain intersections, at least in the eye of the public. An example of this is the recent Jet Blue situation, where a public interest group approached the FTC, claiming that a company violated its privacy policies by releasing consumer information to third parties for national security purposes. Another example of this can be found in the context of financial institutions via legislation like the Bank Secrecy Act. But I note that neither of these industries is under FTC jurisdiction. Banking is usually dealt with by the banking agencies, and, to the extent that airlines are dealt with, they are common carriers, and they are dealt with by other agencies. But they illustrate my point regarding the intersections.

There are some situations, though, where the FTC has a joint interest and jurisdiction, and you heard a reference to it this morning, such as in the case of identity theft and cyber security, where we work with the Department of Justice (DOJ), and in instances where we receive complaints from consumers that reveal attacks

on our infrastructure or where the crime of identity theft occurs, both of which have national security implications.

As you may know, the FTC is statutorily charged with keeping the national identity theft database. And we have civil jurisdiction to prosecute civil cases. But in cases that are the most egregious, which involve breaches of infrastructure, cyber security or other egregious conduct, we work with the DOJ so they can prosecute criminal investigations. But for the most part, these are the exceptions rather than the rule. So what I am saying is that most of our work at the FTC deals with fraud, deception and the abuse of information.

Some recent examples of this include two security-based deception cases involving Eli Lilly and Microsoft. Now, I won't go into too much detail right now about those cases, but the general gist of them was that consumers were promised that their information would be kept secure, and we allege that this information wasn't secure. And in Eli Lilly the lack of security resulted in the inadvertent disclosure of information to people who weren't entitled to get it.

Now, I've spent most of my comments here talking about the government's role. But I also want to remind people out here that a similar balancing test exists from a business perspective. Now, this is illustrated a bit by the airlines, because they are clearly on the frontline right now on a lot of national security issues. But they and others will have to reexamine the representations they make to the public about information-sharing in order to manage public expectations. So it's not just a legal issue; it's also a business issue.

Similarly, one of the important challenges of those of us in government is to manage public expectations by talking about what's reasonable to expect in regard to the use of information. And all of that must be done in an international context, where frankly, some of our international colleagues may not have the same types of concerns or at least not the same balance of concerns in security and privacy, or transparency. We, nonetheless, strive toward cooperating where we can. I know that's really evident in how we pursue some of the fraud and deception cases that I've described earlier, where perpetrators reach across boundaries. And that led to the OECD developing its guidelines on cross-border fraud-prosecution cooperation, as well as our pending legislation in the U.S. to help the FTC do that job better. And at the same time we are dealing with new media, as in the context of SPAM and the Internet and Do-Not-Call Lists, which involve safeguarding consumer interests and safeguarding their information in line with basic First Amendment principles.

It is a very interesting time for all of us. We look forward to coming to forums like this to hear your ideas about how we can best meet these challenges. So yes, I am from the government, and I am here to help you. So I'm going to leave it at that, because I'm more interested in hearing some of your questions.

MR. PRUTZMAN: Well, thanks to both of you.

D. Questions

MR. PRUTZMAN: I see we have some questions, but I would like to start off with a question of my own. We called this program Balancing Privacy and Security Concerns in the Wake of September 11th. Is balancing really the right concept? Are we detracting from security by protecting privacy?

MS. KELLY: Can I jump in on that one?

MR. PRUTZMAN: Please.

MS. KELLY: I would like everyone to ban the word "balancing" when talking about privacy and security. I think it is absolutely the wrong paradigm. Depending on where the pendulum is swinging in the days immediately after 9/11 or in the years ahead, where there might be no immediate or apparent immediate security risk, our equation would obviously differ. I see the goal as achieving both privacy and security. These are both legitimate public policy goals; they are both elements of a free and open society. And I live this out every day in my office's work: I would not pit my office against the ultimate mission of the Department, which is to strengthen security, literally and figuratively around the country, but rather I would articulate it as part of the mission of a larger and more broadly written homeland-security focus, which is to protect not only the people, places and physical assets of the country but also the life styles and liberties that are embedded in our Constitution and in our cultural frameworks as well.

So the placement of an office of security, an office of privacy, and an office of civil liberties at the senior-leadership level, shows at least the Congressional intent and also the intent of President Bush and Secretary Ridge to achieve all of these goals as part of a larger framework of protecting America. That is how the President and Secretary Ridge have articulated the mission for the Department. It is not solely about counterterrorism, or physical infrastructure, but the goal is to create a safe space for all Americans and for visitors to our country, and this includes protecting their dignity, privacy and civil liberties.

COMMISSIONER THOMPSON: I would say for the most part I agree. When I talk about balancing, I think

the key is being able to hear and balance what public expectations are. That's a challenge for all of us.

One of the interesting questions that I have faced over the years is trying to assess what consumers really expect in terms of how their information is being used, and what they expect to happen to it. This is especially so here in the United States, where the public expectation is not that the government make decisions for individuals, but that individuals make decisions for themselves. We clearly have a lot of different factors that each of us weighs, but it is important for us to begin to talk to the public about expectations. That's a challenge for all of us, and, for the most part, good security and good privacy are the same thing.

MS. KELLY: I just want to agree wholeheartedly with the idea of public expectation. In fact, there have been a couple of reports regarding public expectation and trust in various public agencies. Within a few months of being open, the Department of Homeland Security scored fairly low on the scale in respect of what it was perceived as doing to protect privacy and civil liberties. Of course I was crushed even though I had been on the job for only a few weeks. And so I talked to the authors of the reports. The truth is, when we asked people what they think about the Department, they say they are not really concerned about the protection of privacy. They say they want us to get the security job done. So I think it is also a matter of educating people about what protections we are putting in place to achieve both. But you're absolutely right, public expectations differ, depending on what good, service or activity the particular representative of the public is engaged in. That's such a good point.

SPEAKER IN AUDIENCE: Miss Kelly, do you have any responsibility, directly or indirectly, for the administration of the Freedom of Information Act as to whether or not information shall be withheld or disclosed based on public requests? And if you do have any such responsibility, I have a follow-up question to that.

MS. KELLY: The answer is yes. It was actually not statutorily given but delegated by the Secretary. Those activities usually fall within management or operational activities, and because of the importance of good disclosure as well as good privacy policy, it made sense to have it come within the jurisdiction of my office, especially since so many of the people also work on privacy acts and they belong to me anyway. So the answer is yes.

SPEAKER IN AUDIENCE: Being a veteran of counterintelligence during the era of the Army/MacArthur hearings and at times when classifications and clearances had to be given to government employees for secret, top-secret, cosmic, atomic, and whatever purposes, there is always a risk that by labeling something like the object of a request for information under FOIA a matter of national security not to be disclosed, there will be some kind of a cover-up of information that should be disclosed to the public.

Let me be specific. My question is this: Under the FOIA, a request was made to the government to disclose the number of detainees who had been incarcerated and who were released after some time—strictly the number, without the identification of the detainees. The response from the government was that to reveal that number would be a matter of national security, and there was a refusal to release the information. Could you explain how it is a matter of national security for a number like that not to be disclosed, just the number per se?

MS. KELLY: Well, I couldn't explain that because that was a request made to the Department of Justice, not to the Department of Homeland Security, and we do not oversee the detention issues. But you have pinpointed what is, I think, the most critical element of disclosure law when dealing with counterintelligence, critical infrastructure, counterterrorism and law enforcement activities: the need to respect ongoing investigations while also respecting the need for transparency in government and for our right to know.

Frankly, looking internationally, we are somewhat more robust, I think, than most parts of the world, and I am very committed to the idea that we will use very limited law enforcement action in our privacy and Freedom of Information Act activities. It is essential, frankly, that citizens know what the Department is doing, especially because it is such a new department. And your question shows that many people contemplate what other agencies in the administration do, for better or for worse, with the information gathered by the Department of Homeland Security. It is important to educate citizens and visitors to the country about what the Department's activities are and how their lives are impacted. It is important that citizens know their rights regarding the information that is being held about them, and that they understand Department programs and are informed about the information being gathered by the Department (which is hopefully being used to make their lives safer). In the Department of Homeland Security, we see that many companies in the critical infrastructure states voluntarily, or within the regulatory framework, provide the federal government with information about their activities, some of which might put those companies at risk for terrorist attack or other sabotage. But this is essential information for their neighbors, employees, and customers, as well as for citizens at large, to know about.

So there is an incredible tension that we have been dealing with in the days since September 11th in putting information on the Web site about the Department and posting information that would serve the public but might also put the public and entities at risk. So your point is well taken. That is one of the greatest tensions: the tension between safeguarding information that will make all of us safer and allowing the free flow of information to which we are all entitled.

SPEAKER IN AUDIENCE: I'm a solo practitioner in Dutchess County and Professor at the Marist College School of Management. Recently members of a partisan political organization entered into the database parties of an opposing political organization. They knew it wasn't their data. They did it anyway for political advantage. Knowing the existence of all the data that is going to be under your control, put together the way it is going to be put together, and assuming a willingness on the part of some to break rules—legal and ethical—for political or commercial advantage, what, if any, safeguards are in place to prevent break-ins virtually from within your Department?

MS. KELLY: First of all, I'm not familiar with the case that you raised, and I want to caution that there is a big difference between political parties and political organizations, on the one hand, and the 180,000 employees of the Department of Homeland Security, on the other hand. Our employees are overwhelmingly career civil servants, who are in my experience some of the most dedicated and honorable people that I've dealt with in the legal profession. I think coming from private practice and coming from other parts of the country, many of us have a presumption about the caliber of work that's being done in the government. And I am here to tell you that, in the two years that I've been in the federal government, I have been nothing but impressed by and very surprised at the level of excellence of the staff that I have been very lucky to work with, both at the Department of Commerce and at the Department of Homeland Security. So I frankly bristle at the implication that there is not good work being done and good security and respect for data.

At my staff at headquarters, I got e-mailed at 11:45 p.m. from government employees who I can assure you do not make the kind of salaries that many of us make in the private sector but do what they do because they love their work. The work I am doing is fairly visible and incredibly interesting, so maybe I'm getting a greater selection of terrific people. So I would frankly challenge your assumption that there is a willingness to break rules or break laws. But that being said, it is true that any organization, private sector or public sector, may encounter external hacking or have to deal with internal rogue employees. That is something that we have dealt with in the private sector, and we are all well aware of, given new technologies. And I would have to commend our Chief Information Officer, Steve Cooper, who has even a tougher job than mine: that is, the job of making 22 separate agency technology frameworks work together, talk to each other, and be secure.

To that end we have tremendous assets being deployed, using the best technology that's available from the private sector, looking at those 22 separate agencies and determining the best practices available to us. We also have a fairly rigorous training program, not only for our Chief Information Officer staff, but for all employees of the Department. In fact, I myself had to sit through about three or four hours of annual computer-security training recently. The training dealt with technically difficult incidents, with viruses and similar matters. Policies and programs are in place to educate employees about basic guidelines (e.g., prohibitions against disseminating employees' personal contact information), particularly since we are a new, highly visible agency, which is of course a reason for added scrutiny and the concern regarding security.

So I think that we are employing all of the same security elements that you would want to see your clients, the companies with which you do business, and private sector employers employ: best-in-class technology and employee training. And, for those limited circumstances where there is a breach, either external or internal, there are laws in place that prevent the misuse of personal data; for example, the Privacy Act of 1974 provides for both criminal and civil penalties for individual employees. Thus, my office, charged with oversight of that Act, takes a very strict view of complaints received pursuant to it, and we have ongoing investigations—both internally and across the federal government, working with the Inspector General and other agencies—to ensure compliance with that act and other relevant law.

SPEAKER IN AUDIENCE: Nuala and Commissioner Thompson, I am delighted you're here and thank you so much for taking the time to speak with us at this panel.

I have a question for each of you. One of the things that you didn't mention is the question of remediation: I'm just wondering if there is any remediation provided to someone whose rights might be violated.

And Commissioner Thompson, could you speak about the level of people that you have to track companies, because I know it is a massive job for the FTC, insofar as their compliance with privacy policies is concerned. Thank you.

MS. KELLY: Mozelle, do you want to go first?

COMMISSIONER THOMPSON: Sure. Look, we have an Internet unit at the agency that looks at the Internet—we actually pay people to surf the Web—and it has been very interesting. Also, a lot of our investigations come from e-mail that's forwarded to us. We did a study that found that something like 66 percent of all SPAM is fraudulent on its face: with respect to the "to" line, the "from" line or the "subject" line. We have a spot on our "ftc.gov" Web site that enables you to forward to us any unwanted e-mail SPAM. We get about 10,000 of these a day. We have a special server in our office; we call it the "refrigerator." And our people dive into the refrigerator on a regular basis and take out some juicy morsels of fraudulent and deceptive material, including things that deal with breaches of privacy and security. For example, where a Web site pretends to be another Web site and attempts to gather your personal identification. How many of you have seen these Web sites that claim they are from AOL and Google and state that your account is about to expire and request that you input your credit card information or address? The most important asset that legitimate Web sites have is your personal information, so they are not going to lose it. Thus, if they are asking you to send it to them again, you should immediately click off and contact that Web site.

We see a lot of that. We are also beginning to work with industry on an initiative that really is going to educate consumers about spyware. Does anybody know about spyware? E-mail you receive or material that you download from the Web can embed into your machine certain codes that allow people to monitor what you're doing, where you're going, and whom you're visiting, and sometimes they affect the operability of your computer. We are going to be working on that.

The truth is that we don't talk about how many people we have working on it. We have a lot of people, but there is a lot of stuff out there. And it is almost overwhelming, and it is an interesting challenge for us too, now that we have this new SPAM law that we are charged with enforcing. I'm leaving on Saturday to go to Brussels to chair an EU/OECD workshop on SPAM, so we can reach some common understandings around the world as to what it is, what matters we are concerned about, and how we can cooperate in enforcing similar laws.

But you're right to raise the question. And there are a lot of members of Congress I would like you to talk to about that.

MS. KELLY: You had asked about the redress issues and what may be in place to address that. A fundamental element is the ability to access one's records and to correct any pattern or practice that one feels might be infringing upon one's privacy or civil liberties. Those processes do in fact exist. As I mentioned regarding the U.S. Visit Program, we have built a robust program, which has yet to be used, since the technology has worked well and people have so far had a good experience with the program.

In the area of air transportation security—and I'm sure just about everyone in the room has a story to tell about his or her experience in an airport in recent years—there is a multi-layered access and redress approach for the existing passenger screening system. Many of you are aware of the debates over the new or proposed screening, something called CAPS II. There is currently a CAPS I in place, which does a rudimentary screening of all passengers, and there is a multi-level approach that involves both passenger advocates, who are sometimes on staff at airports or in other cases available by telephone or fairly immediately in case an issue arises, to speed up the boarding of passengers as much as possible.

However, in the case of an ongoing pattern or a question about what data are held about an individual, that individual can call or write to the Transportation Security Administration (TSA), Office of the Ombudsman, which will conduct an internal investigation and review of records, both classified and unclassified, and inform the passenger of any particular cause of such behavior. The Ombudsman's Office will also remedy any ongoing misbehavior in the screening process. An appeal can then be taken directly to my office, which would undertake an independent review of an incident or ongoing pattern or practice, as well as the individual's information, which may or may not be held by a government agency.

So there is a robust system already in place to enable individuals to obtain information by calling the TSA or by looking at its Web site. And my office has actually referred a number of basic telephonic inquiries to TSA, which have been resolved for the most part quickly and in favor of the passenger.

SPEAKER IN AUDIENCE: I'm with Lawyers Without Borders. I wonder if you could tell us whether there are any proposed regulations or amendments to the Patriot Act or other laws or practices that you are proposing, relating to improving, or which somebody might characterize as improving, privacy protections?

MS. KELLY: I'm assuming that is directed towards me, although I shouldn't do that.

COMMISSIONER THOMPSON: No, that's not one of mine.

MS. KELLY: Well, I have to confess to not being an expert on the Patriot Act, but we are working with many in the administration on ongoing Privacy Act, Freedom of Information Act and other disclosure and information-sharing issues. I couldn't comment specifically on any pending regulation or legislation that is undergoing internal review or clearance, but we are certainly particularly concerned about and aware of and very much working towards good rules and practices. Again, what form they will take regulatorily, I couldn't say. But in regard to data sharing and data flows into and out of the federal government, involving both public- and private-sector entities, as well as state and local entities, we are very much looking at our office's role in helping to formulate policy, whether legislative or regulatory or otherwise. There has to date certainly been debate over provisions of the Patriot Act, but I would defer to specialists who have greater knowledge than me in that area.

MR. PRUTZMAN: I want to thank both our speakers very warmly. I appreciate your coming. I also want to give a note of thanks to our meeting coordinator, Linda Castilla.

MR. LEO: Thank you, Don.

IV. Checking Conflicts of Interest in Cross-Border Transactions

A. Introductory Remarks

JACK ZULACK: Good morning, ladies and gentlemen. Thank you all for coming. Our topic today is Section E of Disciplinary Rule 5-105. When we chose today's topic we did not know how timely the topic would be. At the end of the hour, we are going to hand out two very important new opinions in this area. One is a very important formal ethics opinion of the Association of the Bar of the City of New York [ed.: Formal Opinion 2003-03, *Checking for Conflicts of Interest*, http://www.abcny.org] on Section E; it is the first one that has been published on Section E since Section E was enacted in May of 1996. In addition, we are going to hand out a decision published in Monday's *Law Journal*, which is absolutely right on point, in *G.D. Searle v. Pennie & Edmonds*, No. 406372/01 (N.Y. Sup. Ct. 27 Jan. 2003). These are two very important documents to supplement your program materials.

What is Section E? Section E requires all law firms in the State of New York to keep contemporaneous records of engagements. It also requires all law firms to have a policy for implementing a system to check conflicts against the firm's current and former clients.

Now, we have a wonderful panel here to discuss this issue, Section E as it applies to the lawyer who practices in cross-border matters. Our first speaker after me is going to be Janis Meyer, who will describe the conflicts-checking system at Dewey Ballantine. This is our example of a gold standard for conflicts checking in both the domestic and cross-border situations. Miss Meyer is a partner at Dewey Ballantine in their New York office. She's a litigator who has represented numerous international banks in connection with cross-border litigation. She also acts as general counsel for Dewey Ballantine and is therefore involved in numerous issues of professional responsibility as they arise within her firm. Prior to joining Dewey Ballantine, Miss Meyer was a partner at White & Case.

Our second speaker is Cathleen McLaughlin. Miss McLaughlin will address conflicts issues that arise in cross-border matters, in particular the issues that arise when the regulations in New York are different from the regulations in the foreign jurisdiction. Miss McLaughlin is a partner at the New York office of Allen & Overy, where she is co-head of the Latin American group. She's a United States securities partner with the firm and has a very transactional background, with advisory security experience related to SEC registered and unregistered debt and equity offerings by U.S., Latin American and other non-U.S. issuers.

Our third speaker, Meryl Sherwood, will discuss Section E as it applies to solo practitioners and small firms. She will also discuss what we are going to hand out at the end of the program; the nine-page formal ethics opinion of the Association of the Bar of the City of New York. Meryl Sherwood is a sole practitioner in the firm of Meryl P. Sherwood, which she formed in 1997, after having been a partner in two small New York City law firms.

She is a transactional lawyer with more than twenty years of experience in advising foreign-based clients in the areas of corporate, real estate and banking law. She also shares offices with the law firm of Pavia & Harcourt, which also has a substantial cross-border practice.

After Miss Sherwood's presentation, time permitting, we will have a question-and-answer session or panel discussion.

B. Section E in the Context of Cross-Border Matters

MR. ZULACK: I am going to begin by putting Section E in the context of our duty to check conflicts in cross-border cases.

Clearing conflicts in international practice is increasingly complex. We all know that there has been an increase in global commerce; more companies have more subsidiaries, more affiliates and more divisions to check; there have been law firm mergers; and we have

had an increase in the number of attorneys. We also have had law firms practicing in multiple jurisdictions, and a very important issue in this area is the mobility of lawyers between firms.

Now, the central Disciplinary Rule on simultaneous representation, and basically that is the issue that we are talking about, is Disciplinary Rule 5-105. This rule has five sections. Section E, the last section, is the focus of our program.

An individual lawyer's conflict is imputed to the firm. That is, the conflict that an individual lawyer at Dewey Ballantine in a European or Asian office has is imputed to the entire global firm. It is very important to remember that.

So what is Section E? Section E is unique to New York. There is no other jurisdiction that has a comparable provision. It has two major parts. The first provides that a law firm shall keep records—that implies written records—of prior engagements, which records shall be made near or at the time of such engagements. And the second obligation imposed on all law firms in New York is that each law firm must have a policy implementing a system by which proposed engagements are checked against current and previous engagements.

Now the next part of Section E provides that the failure to comply with Section E is a violation, even if the law firm is not in a simultaneous conflicting situation. This provision of Section E creates an independent obligation. You must keep the records; you must have a system. And if there is a violation by a lawyer within the firm, it would be usually imputed to both the lawyer and the firm as well. So this is a very important New York obligation, unique to New York. And it has only been in effect since May of 1996.

Now, why do we need this kind of a system in New York?—because the issue of simultaneous representation is very important. We all know that we have to exercise independent judgment, and we cannot exercise independent judgment when we are representing adverse interests.

Section A of the rule basically says that you can't take on a new matter if you've got a conflict. Section B of the rule says you cannot continue representing a client if a conflict arises during the course of the representation. Now, one of our handouts is going to be the *Pennie & Edmonds* case.

Why is this important? First it underscores how important it is for all of us to comply with Section E. Judge Ramos said he would refer Pennie & Edmonds to the Department Disciplinary Committee based upon his findings of the violation of Disciplinary Rule 5-105. Also, he suggested that plaintiffs would have a right to recover the $1.7 million in fees that were paid to Pennie & Edmonds by the plaintiffs, its former clients, G.D. Searle & Co. and Pharmacia Corporation.

Now, what was this case about? Essentially, this case involved the COX-2 inhibitor drug that you know as Celebrex or Vioxx, something like that. Pennie & Edmonds, as many of you may know, closed its doors on 31 December 2003, when a large group of its lawyers went to Jones, Day. It was a very prominent firm in the intellectual property area and had represented Pfizer since 1980 and Searle, which was a subsidiary of Monsanto, in 1992. Both of these companies were instrumental in bringing the COX-2 inhibitors to market.

In 1998, Pennie & Edmonds represented Merck on a patent related to the use of the COX-2 inhibitor before the U.S. Patent and Trademark Office (PTO). In the interim it was indicated that Pennie & Edmonds had several opportunities to be able to spot its conflicting representation. And perhaps the most prominent of those opportunities was in March of 1998 when Pfizer and Searles asked Pennie & Edmonds to represent them before the PTO at an interference proceeding against Merck, because Merck was producing another COX-2 inhibitor, which was known as Vioxx. And there is an inference (and I'm not sure about this, since the opinion doesn't explain it) that essentially these were based upon the same patentable chemistry.

In 1999, the University of Rochester (U of R) patent was granted, and during that time, two lawyers at Pennie & Edmonds were advising U of R how they could sue Pfizer and Searle for infringing upon their patent. That is what you get from the opinion.

Now, I want to say that the opinion itself is not definitive. You have to talk to the counsel involved. You have to read the briefs. What Judge Ramos wrote is not necessarily definitive. So my information comes just from that opinion, and it may not be totally correct. But what happened? This is where we get to Section E, namely, how did Pennie & Edmonds's conflicts-checking system break down?

In March of 1988 when Pfizer and Searle retained them, there were two partners representing U of R in connection with its patent application. When the conflicts-check memorandum was circulated, neither one of them responded whether there was a conflict or not. It was part of Pennie & Edmonds's system to make sure that every partner responded. So when the partners did not respond, there was nobody that went to them and said, "I know you're busy, Don, but what is the answer to this request?" That didn't happen. And now Pennie & Edmonds can be subject, if Pfizer and Searle prevail, to a very substantial judgment.

So there is a way to resolve conflicts, even though you have a simultaneous adverse representation, and that is under Section C of the Rule 5-105. It has two different components. First, you must get consent from all parties involved. Pennie & Edmonds did not attempt to get consents from anyone. Second, even if you do get the consent, you must pass the disinterested-lawyer test. Would a disinterested lawyer agree that Pennie & Edmonds could exercise its independent judgment on behalf of Pfizer and Searle at the same time it is exercising its independent judgment on behalf of the University of Rochester? If you can't answer that question with a yes, then you are violating the Disciplinary Rule.

The responsibilities of New York lawyers engaged in cross-border matters are illustrated in the *Pennie & Edmonds* case, which is a case that involves New York parties and is just the kind of case that is going to arise in the international context. We have very powerful pharmaceutical companies in Europe, France, Switzerland and England. We have lawyers who represent these major companies all over the world.

So what do we have to do as New York lawyers engaged in cross-border matters? First, we must create a policy and implement a conflicts-checking system. Second, we must keep records of prior engagements. And third, once you got the system, folks, you've got to use it.

So the next speaker is Janis Meyer.

JANIS MEYER: Good morning.

The *Pennie & Edmonds* case is timely. When I was first asked to speak on the procedures used for checking conflicts, I thought everybody would be asleep by the end of my segment. But the issue of conflicts checking touches on many aspects of law-firm life: firm politics, what the firm is about, how it makes its living, and the relationships among partners and between the firm and its clients; thus, it's an issue that crosses disciplines and crosses borders as well.

I thought it would be helpful just to describe what our firm is like. I can't say that we are "state-of-the-art" on this, although I think we are close to it. We are a 550-plus or -minus law firm, headquartered in New York, but with eleven other offices: six of our offices are in the United States. We are in Los Angeles, Palo Alto, Austin, Houston, Washington D.C. and New York, and then we are in six European countries. Our largest presence is in New York, but many of the other offices are fairly substantial as well.

We have at the moment three people devoted solely to checking conflicts: a little conflicts department. Until about a year ago, our records center was responsible for checking conflicts. And although they did an adequate job, they were record keepers, and the idea of checking conflicts was not something that they really understood that well. And we made the decision to place the conflicts-checking function under our librarian, who is a real whiz at research and understands the concepts involved. And we brought in a conflicts manager, and she has several people working for her. We also have a conflicts committee. And I'm assuming anyone that is at a firm that has more than five people has some attorney there responsible for checking conflicts. And we have a conflicts committee, which consists of—I have to confess, I don't know the exact number of people on the committee—probably five or ten, and they come from across disciplines and offices so that you can get the viewpoint of more than one person. And in addition, if someone is away from the office, there is always someone there who can make a ruling or discuss any issues that arise.

Our conflicts database is called "CMS," which works off our time entry system and our billing system. And over the course of the years we have heard complaints about CMS. I don't know if anyone here uses CMS, but my understanding from discussions with other New York City firms is that CMS is not a bad software system to use. I think there is probably nothing that is perfect. There are other software systems out there, but we have made the decision for the moment to just stick with this. Our e-mail system and underlying computer database system is Lotus Notes, so that is the way material is entered into the system. And then our conflicts folks check numerous outside databases as well: obviously D&B is an easy one, then there's something called Hoovers, and a data service called Mergent Online. There are many outside databases that we check, depending on the nature of the representation and the nature of the company.

One of the issues that comes up in the case of conflicts checking is "family trees," that is, identifying affiliates, subsidiaries, partners, parents, sister corporations, and the like. There is an ethics opinion that says that it is not strictly speaking a conflict to represent a party that is an affiliate of a party you are adverse to. But those are situations that have to be looked at very carefully to make sure that you're not inadvertently suing your client. Also, obviously, there are relationship issues as well, and not just conflict issues.

In terms of our policies, we have a written conflicts manual. This conflicts manual describes the philosophy for checking conflicts, and, in addition, sets forth the procedures that firm personnel should follow in terms of checking a conflict. We also have written procedures, which I would not bore you with in any detail, but they cover how the actual checking is done, how the data is retrieved, how to input data so that you get results in a

meaningful format. Our staff people, who are actually inputting the data and reviewing the output, are concerned with these detailed procedures. I couldn't tell you physically how to check a conflict, and that's probably a good thing.

We have a number of procedures. One is that we have prescreening on our desktops. Any lawyer in the firm or his or her secretary who chooses to do so can prescreen a client right on his or her own desktop. And this is a very useful tool. If it is 7:00 o'clock at night and you've just received a telephone call from your client asking for quick help to get a TRO, you want to be able to tell that person whether or not you can take on the representation. And so you can go onto the system and at least conduct a prescreening as to whether there is any reason that you would not be able to represent that particular client in the matter and against the party to which it is adverse. You can do this conflicts check without opening a matter. And this is something I'll do fairly often. I'll get a telephone call from a client who will ask me if there would be any problem in our representing the client if it wants to sue X or Y. Thus, before they even think of hiring us, they want to make sure there are no conflicts. In these cases, I conduct an informal check, review the results, and advise the client accordingly.

All of the information that we know about the matter is inputted: the names of all the adversaries; the name of the client; what the matter or the transaction is about; and whether the other parties are friendly, potentially adverse, or actually adverse. In transactions sometimes you're not necessarily sure, and so at that point a database entry is created. Each day, at about 5:00 p.m., we get an e-mail from our conflicts department. The e-mail lists the new matters opened that day. And it describes the nature of the matter and identifies the client, the partner who opened the matter, and all friendly, adverse and potentially adverse parties. That is our first line of conflicts checking, quick and dirty. I have several times gone through this procedure and then had a colleague inform me that someone else in the firm represented a certain party and that I had better look into the potential conflict to determine whether it would be a problem. So, this is a way to undertake a preliminary conflicts check right away. In addition, we then receive a computer printout of everything that the computerized checking has identified, and this enables us to see what's there. We can then follow up with the relevant colleagues in the firm to determine whether we can open the new matter or whether we can't. If there is something iffy, we discuss the issue with the conflicts committee and ask them if this is something that we can do or not. And, at the end of the day, the conflicts committee makes the decision as to whether or not we are going to be able to undertake the particular matter.

I think I mentioned some of the things that we have in our database: current and former clients, adverse parties, and all other parties to the transaction or litigation. We also use outside databases. For example, there is a corporate-affiliation database, where we look at the officers and directors of the corporations, because sometimes there may be a problem if the officer or director is asking us for advice on a personal level, which might give rise to a conflict. We also look for potential adversaries in future cases, and this is where our conflicts-checking policy is triggered in some cases. For example, if a client has discussed with one of our attorneys the possibility of suing XYZ Corporation, the attorney would ask to have that entity entered into our conflicts database even if there is currently no conflict with XYZ Corporation. In this way, if anybody subsequently tries to open a matter representing XYZ Corporation, that person can contact the first attorney and find out the status of the first representation. This has happened to me several times as well. If it could present a conflict, you would discuss the situation and, sometimes, you will ask the conflicts committee for guidance; alternatively, the policy might be "first opened, first served."

Obviously, you check for a conflict when opening a new matter. Sometimes what happens is that, during the course of a matter, the nature of the matter changes. And when new parties come into a matter, you really need to check for conflicts. And we have tried to discipline everyone to do this, and I think we have pretty much achieved this. But it is very difficult, because, for example, someone new may be made a party to a litigation without such addition finding its way into the conflicts database. So we remind people to add these new parties into the conflicts database. For obvious reasons, we also review potential and actual conflicts before we make a pitch to a potential new client. Doing this alerts others in the firm that you are making a pitch for a particular client, which is important since they may know some reason why you shouldn't be making that pitch.

A big area of concern right now is with lateral partners, lateral associates and occasionally even lateral legal assistants coming into the firm. We check everything that they have worked on, and we also check every matter as to which they might have been privy to some confidential information. This raises issues in terms of client confidentiality because they have got to provide to us confidential client information from the firm at which they were formerly practicing. We keep that in our database. We don't go into the database to examine the nature of the other law firm's representations, but this is an issue that is more than just a straightforward conflicts issue; it flows over into concerns regarding firm-client relations and political concerns.

We have a number of cases where we have set up ethical screens or walls. You can only do that if you provide full disclosure to the client, obtain the client's consent, and notify the entire firm. And maybe once a month I get an e-mail that advises us that a particular lateral hire had worked on ABC Company matters while at his or her former law firm, and that anyone working on a matter adverse to ABC Company must ensure that the lateral hire does not know anything about that matter. This scenario is particularly common in the area of intellectual property law.

As I mentioned earlier, there are many issues involved in conflicts checking. For example, there will likely be concerns from the standpoint of the firm's business: what happens to your matter if you don't check for conflicts properly, and it turns out that there is a conflict? I have been involved in several cases where someone has moved to disqualify us. This hasn't happened to me in a while, but I remember it happening when I was first a partner, and it was the most unpleasant thing in the world. But what it means is that you're going to give up the business unless for some reason your firm (or your client) wants to pay for fighting the disqualification motion. The best advice you can give your client at that time is for your client to find another lawyer, because otherwise a year could be wasted on the disqualification motion. So it is really important to undertake the conflicts check from the onset to make sure that you're not going to end up in a disqualification situation, or, if a disqualification situation is likely, that your client knows about it ahead of time and is prepared to stick with you nonetheless.

Just one final point: the person who is serving on the conflicts committee and making decisions on ethics should be a person in the firm who has enough clout, stature and confidence to tell the most important and biggest rainmaker in the firm that she or he cannot take on a matter. Committee members must be able to stand up to their colleagues when a they identify a conflict. This is where conflicts checking becomes political and can involve the business concerns of the firm.

MR. ZULACK: Thank you, Janis. That was a really extremely precise and articulate presentation of the issues that face us.

Our next speaker is Cathleen McLaughlin.

CATHLEEN McLAUGHLIN: I am not going to go into the detail that Janis did. I think Jack summarized it quite well, that Dewey has a very comprehensive, "gold standard" conflicts-checking system. I would like to focus on some of the nuances and specific problems we encounter, and how we deal with them, in an international firm.

Just to give you an idea of our size, there are 433 partners and 2,000 other lawyers at Allen & Overy, and at least 395 of the partners and other lawyers are admitted in two or more jurisdictions and are working in countries other than their "home" jurisdiction. So right there you see that we have got practices that need to be monitored, not only in regard to the jurisdictions where the lawyer is qualified and where they are giving advice, but also in regard to the jurisdictions where they are physically located.

Individual lawyers and, in some cases (such as in New York and the UK), the firm are required to comply with regulatory requirements in 58 jurisdictions. We have offices in 26 countries, but, because of the multiple qualification of some of our lawyers, we have to look at some of these other jurisdictions. There are 20 countries in which we actually provide and hold ourselves out as providing legal advice.

All of these are going to be familiar policies: we have a general policy, manuals, and firm-wide conflicts searches. And there is a hierarchy of partners who are to be consulted, in addition to administrative staff that participates in the conflicts-search process. Likewise, we undertake a conflicts check not only when opening new matters, but also if we are pitching business or we think that we are going to be asked to pitch business. There are any number of instances where you need to let your client know in advance whether or not it is going to be worthwhile going down that route. And I'm focusing in this presentation not only on the technical conflicts but also on business conflicts.

A huge part of our practice is transactional. We have a litigation practice in most of the jurisdictions where we have offices but not in all of them. And as a general matter, from a revenue standpoint, the greater amount of our revenues comes from transactions, so we are very focused on the business implication. You know, you can get a waiver in a particular matter, but you may not get the next deal. All these considerations come into play.

In general, the managing partner of the New York office also happens to be the head of new-matter inception as well as of these particular conflicts issues, so I sat down with him and got an overview of the kinds of conflicts issues that reach his level. He noted that in many instances it's easier to identify a conflict than you see here, where there are two different clients whose interests are only slightly different. In the latter instance, it might not be a conflict, but as the New York rules point out, there would be an appearance of impropriety. Now that might not be the case in all the jurisdictions as far as the disciplinary rules in those jurisdictions are concerned, but then you're faced with the

business conflicts issue: the limited and defined scope of engagement for one client and its relationship to the limited and defined scope of engagement for another client. I think this relates somewhat to what Janis pointed out when that scope is modified along the course of your representation. Or again, I think it goes to the appearance of impropriety where it's not a direct conflict. In other areas the parties may in fact be adverse, although your representation of them is not adverse. And when is information that we have received from one client potentially relevant to another? We may be under a duty to disclose this in a particular jurisdiction, because in many countries the duty of confidentiality does not necessarily override your duty to disclose.

There is one area we haven't gotten into, which is fascinating and you could spend an entire panel discussing it: all these recent and not so recent laws about money laundering and the Patriot Act, as well as the EU's corresponding laws. And some individual countries in Europe have laws like that as well. How do you deal with these laws in the context of your conflicts and your representation of clients? This is an example of where you've got other duties in addition to your obligations not to represent clients who are adverse to one another.

Generally, the most interesting part of being an international law firm, from the perspective of conflicts, involves how to deal with conflicts rules that conflict. This is a very common occurrence. Waivers are permissible and common in many jurisdictions, but in some jurisdictions, such as Germany, if a conflict exists, it is not possible to seek a waiver. Thus, under the same set of facts and circumstances, you might be able to get a waiver in one country but not in Germany where the client is also being represented. You would then have a problem because to seek the waiver would be criminal. Here too, you're faced with the lawyer-versus-the-firm issue. We have sought advice from the Law Society, because in Italy there are certain steps you cannot take that the Law Society permits in order to manage conflicts. And, in some instances, as we all know, it is hard to get this advice, and it frequently takes an enormous amount of time. So we have tried to do it in a prospective way to better manage and harmonize our practices. And the Law Society has given guidance on certain issues where they will not be extrajurisdictional, that is, where they will not bring a disciplinary action against us for some act by an Italian lawyer that is permitted by Italian law.

I think these issues could probably be just as typical in a purely national or domestic practice as in an international practice. But just to give some more examples, is it a conflict to be retained by client A (who is already a client in an employment matter in Slovakia) in connection with a property purchase from client B in Singapore? There is no clear answer to these types of questions. I mean, frequently what we are forced to do is risk assessment. And, not to put too fine a point on it, but if you are in an incredibly litigious well-developed country with conflicts rules where there is guidance, you're going to manage that risk differently from the situation where you are in a country where the bar has not had rules for as long, the rules haven't been as clear, and in fact clients do not resort to litigation. Clearly, this involves a judgment call, and it requires an array of partners involved in the decision-making process who must agree to assess and manage the risk. But that risk is there because conflicts rules conflict.

I think the take-away point is that we have 400 to 500 new matters per week, and in a week about fifteen to twenty of these reach the partner who is primarily responsible on the conflicts committee. There is no jurisdiction we have to date encountered where the position is entirely clear on any of these issues. Even in the U.S.—in New York, which is a very developed system—they just have not gotten around to facing these issues. Thus, we are not going to get quick and reasonably binding rules; as a result, you try to be anticipatory, think about it, and manage those risks in advance, and, where you can get guidance, you ask for guidance.

Conflicts checking also requires a tremendous amount of education. You need to educate a large population of partners about the rules of other jurisdictions, and how they will apply. The New York conflicts rules are very much driving how we are developing our system. And that's because it is more developed, it has got very clear rules, and we live in a very litigious society. Adding a litigation practice also changes the face of how you handle conflicts, and we do have a U.S. litigation practice and that certainly has focused things in a different way. Thank you.

MR. ZULACK: That was a wonderful presentation, Cathleen. We have had two really superb speakers, and now we are going to have a third. Our next speaker is Meryl Sherwood.

MERYL SHERWOOD: In contrast to Dewey Ballantine's and Allen & Overy's complex checking system, my conflicts-checking system is a lot more basic. I don't have a conflicts committee. I don't have a conflicts department. I don't have a conflicts database. The good news, according to the recent formal opinion, is that I don't need to meet any of these requirements in order to be in compliance with the Disciplinary Rule.

The new opinion, which Jack alluded to, applies to all law firms, and in fact the rule starts out by saying that a law firm shall keep records. Well, when I first looked at this, I thought to myself, well, what does this mean for a solo practitioner? The opinion is very clear.

The solo practitioners are covered under the rule. They are deemed law firms, as are "constructive law firms."

What do we mean by a "constructive law firm"? A constructive law firm is a law practice arrangement where lawyers may be sharing law offices together, but not as partners (although they may have an of-counsel arrangement). The ethics opinion is clear that, in the case where these law-practice arrangements constitute a single law firm, the parties have to develop a conflicts checking system.

Now, I'm a solo practitioner. My system consists of checking my electronic records, which I establish when I take on a new matter. My records list clients alphabetically, other parties to the transaction, and a chronological description of the transaction. My offices are located at Pavia & Harcourt; we are two separate law firms. However, according to the recent opinion, if we should have occasion to share confidential information, we could be deemed a single law firm, subject to the conflicts-checking rules.

I also work with various foreign legal advisors, predominantly in western Europe. If in those cases I develop affiliations or the relationships evolve and become close and enduring, this too could, according to the recent ethics opinion, be construed as a constructive law firm, mandating a conflicts-checking system.

As Jack mentioned, the recent ethics opinion is very timely. It was enacted at the end of 2003 and attempts to provide guidance, and in fact it does so. It answers a lot of questions, but it also raises a lot of questions. The consistent theme throughout the formal opinion is that the nature of the records and the policies and systems that law firms must maintain are dependent on the size of the firm, the nature of the firm's practice, and where the firm practices.

The first question that it answers is, what are the records that a law firm must keep? Well, for a solo, it would not be acceptable if I relied on what was in my head. On the other hand, if I reasoned that all of my client files are available, would that be considered keeping records?—clearly not under the ethics opinion. In order to qualify as a record, that information must lend itself to being systematically and accurately checked when the firm is considering a proposed engagement. My word processing system allows me as a solo practitioner to check, whereas, with a large firm, law practice management systems should allow checking in order to meet the requirements.

The next question that is asked is, when must the record be made? According to the rule, the record has to be made at or near the time of the engagement. The ethics opinion gives us guidance. If we cannot make the record at the time of the engagement, we cannot wait a few weeks. We have to make the record within a few days. How far back must the records go? The rule was enacted on 22 May 1996. According to the ethics opinion, we don't have to go back further in order to comply. We only need to go from 22 May 1996 forward in maintaining the records.

How must the records be organized?—is the next question. The ethics committee does not expect us all to keep the records organized in the same way, because frankly it would be impossible. The records must be readily accessible so we can check them in a timely fashion.

What records must be kept? Because the committee was so sensitive to the diversity among law firms, it did not set forth a standard record-keeping requirement. It recognized that a simple system might be in order in the case of a small practitioner or small law firm, but on the other hand, a complex system would be required in the case of large firms. However, it does set forth some rock-bottom requirements that must be in place in order to comply with the rule. The rock-bottom requirements are just that. They are very basic. The records must set forth the client name, the names of adverse parties and a description of the engagement. The idea behind this, according to the committee, is to allow law firms to detect most potential conflicts before accepting an engagement. This basic information serves to put the lawyers on notice.

The next question, which is asked, is, what is the system? What are the essential elements of a system? Again, the committee makes clear that, no matter what the size, we cannot as lawyers and as law firms rely on an informal means to qualify as a system. I cannot rely on what's in my head, and a small law firm cannot rely on circulating e-mail memos or internal memos, to qualify as a system. The key for a method to qualify as a system is that it must allow for the systematic consulting of records that were established at the time of the engagement. Less formal methods, such as circulating e-mail memos, talking with colleagues or partners, are acceptable for purposes of supplementing a system that must be in place.

The opinion also discusses specific types of conflicts and gives us some guidance. In the case of corporate-family conflicts, when a firm represents a corporation, which is part of a large corporate group, the committee recommends that the conflicts-checking system append the names of the corporate group so that they can be included in the checking process. For corporate constituents, it is recommended that those firms that represent corporate clients develop a system to determine whether the firm has an attorney/client relationship

with individual constituents. The committee also recommends that the conflicts-checking system should provide a means for determining whether a client remains a current client or not. And that is certainly an additional challenge for all of us.

Lateral hiring is taken into account too, as Janis described in Dewey Ballantine's system. When laterals are hired, according to the opinion, the hiring firm should have within its conflicts-checking system a means to determine which clients the lateral lawyer personally represented while at his or her former firm.

Well, clearly, the ethics opinion gives us a lot of guidance in terms of what we as lawyers and law firms must be doing from this point forward. But it clearly offers the opportunity to further explore this area and to develop new rules that will provide yet additional guidance. Thank you.

MR. ZULACK: I'm going to ask for some questions, but first I want to emphasize a theme that Jim Duffy has emphasized throughout his tenure as chair. New York is the gold standard of law in the international practice, and our Section E, as it is being developed, is the standard which at some point will be the model for international practice in jurisdictions throughout the world.

Now, any questions?

SPEAKER IN AUDIENCE: I'm with Lawyers Without Borders. I had a question on a lateral attorney coming in from the New York City Law Department, Economic Development Division, for example. What kind of checkup?

MS. MEYER: There are rules on that, but I don't know what they are.

SPEAKER IN AUDIENCE: The Law Department person might not know every matter that he or she worked on for three years or have a nice set of records. That's the basic question.

MS. McLAUGHLIN: Well, obviously you would ask that question to determine what they could come up with. And you'd also try to find out whether there are others at the Law Department that could provide that information. They have got to have some sort of record, and I also think that, as a general matter, these lawyers are subject to the same conflicts issues as everybody else. Thus, now they too have got to have the systems in place to do it. From a rudimentary standpoint that's how I would approach it.

MS. MEYER: That's how we approach it. I had one of my partners call me last week to say Joe Schmo is going to work at another major New York law firm. They have asked for the name of every single client that he has represented and every single piece of confidential information he has received. My partner asked whether we had to give it to them. I said yes, because we seek that same information when we bring in a lateral partner. And very often the person himself does not know what the entire organization is working on. And, just as Cathleen said, it is his or her responsibility to go to the firm or the organization he's leaving and get the relevant information. However, I'm glossing over the fact that there are guidelines when people have come from government into the private sector, and I knew someone was going to ask that question. Unfortunately it's not something that I have had to deal with recently, so it is just not something that I'm knowledgeable about. But there are probably more well-defined guidelines than there are with respect to bringing in lateral firms.

COMMENTARY

Canada: Immigration Bar Under Attack?

By Sergio R. Karas

I. Introduction

The date 13 April 2004 marked the advent of a new era in Canadian immigration law. A new regulatory regime legitimizes the activities of so-called "immigration consultants," non-lawyers who were until now unregulated and the subject of much controversy. The new regulations arguably compromise the administration of justice, create unfair competition, and allow, with the federal government's blessing, the practice of law by those without a law license. The regulations could also be seen as highlighting the failure of the Canadian legal profession to defend vigorously its members and protect the public interest and the rights of those most vulnerable.

To be sure, dealing with the problem of unlicensed immigration practitioners is a worthwhile goal. But with the new scheme the federal government has quite possibly failed to ensure consumer protection, since instead of prohibiting non-lawyers from representing prospective immigrants and refugees, the new arrangement chooses to create yet another regulatory body to legitimize such consultants' business activities at home and abroad.

II. Background

For the past two decades, industrialized immigrant-receiving countries have grappled with the problem of how to control the growth of unlicensed immigration "consultants," "practitioners," "paralegals" or "*notarios*." The proliferation of non-lawyers has been most pronounced in Canada, the United States, the United Kingdom and Australia, due in part to large numbers of immigrants in need of professional assistance to navigate cumbersome legal systems, and in part to half-hearted efforts to prosecute the unauthorized practice of law.

In the United States, the notorious "*notarios*" set up shop in states along the Mexican border, taking advantage of the official connotation given to their title in Spanish, and using it as carte blanche to defraud their victims, who often mistook them for lawyers, to the dismay of consumer protection advocates in California, Arizona and Texas. This prompted calls for legislative action, which finally came in the late 1990s and early 2000s, thanks to a broad coalition of consumer advocates, lawyers and law enforcement officials, who came together and pressured politicians to act.[1]

In Canada, however, as immigrant populations grew in number and variety, individuals with community clout first began offering assistance to prospective immigrants on a volunteer basis, but the potential for profit was quickly discovered. Others were former immigration officers looking for a more lucrative niche, and even interpreters who believed that they had learned enough law to give advice, even though they usually had had no legal training and were not members of the provincial bars.

Immigration consultants began taking advantage of provisions in the previous legislation, which allowed applicants to have "counsel of choice," but did not limit representation to licensed members of the Bar.[2] As a result, hundreds of unlicensed individuals began handling immigration matters, traveling abroad, trumpeting political connections and inducing applicants to retain their services, with little or no disclosure that they were not licensed lawyers. Stories abound, describing how unlicensed consultants mishandled applications for qualified individuals. In the worst cases, some consultants encouraged prospects to make bogus refugee claims or presented fraudulent documentation, and some even participated in immigrant smuggling rings and visa fraud. Promises of quick immigration and money back "guarantees" in the most severely backlogged visa posts overseas were commonly made by some unscrupulous consultants.

In a recent case, one Toronto-area consultant advertising heavily in India was ordered by that country's consumer court to repay applicants' fees, together with a penalty, for having failed to advise them that they would no longer qualify under new immigration regulations, and for promising case resolution in six months, nothing short of lightning speed in a beleaguered visa post like New Delhi, where processing times average three years.[3] In another case, a consultant operating in Toronto was charged with several immigration-related offenses by the Royal Canadian Mounted Police, including counseling to commit fraud, but continued to claim to have a "special connection" to a former Cabinet Minister, misleading clients to believe that the former Minister would intervene on their behalf.[4] Complaints by lawyers and by some victims, most of whom were too afraid to talk, fell on deaf ears.

III. The Choice to Regulate, Not Prohibit, Consultants

After twenty years of inaction, the federal government was suddenly awakened from its slumber by the decision of the Supreme Court of Canada, in *Law Society British Columbia v. Mangat*,[5] which resolved the constitutional question of federal-provincial jurisdiction over the regulation of immigration consultants. The court ruled that a conflict between the regulation of the legal profession, a provincial matter, and the then Immigration Act, a federal statute giving applicants the right to have "counsel of choice," was within the federal legislative jurisdiction. After *Mangat*, the federal government could no longer escape its responsibility to deal with non-lawyers involved in the immigration process. The court, however, was careful about the scope of its ruling and did not say that the federal government was prevented from prohibiting the activities of consultants.

Confronted with the need to act, the government was under pressure from the immigration bar and nonprofit organizations advocating consumer protection on behalf of immigrants, but at the same time the government was mindful of the power exercised in Liberal party ranks by some immigration consultants enjoying considerable community clout. In the end, former Minister of Citizenship and Immigration Denis Coderre opted for a "compromise," and created yet another panel, the Advisory Committee on Regulating Immigration Consultants, which produced a report in May 2003.[6] However, the former Minister was careful not to give the mandate to that Committee to examine the question of prohibiting consultant activity. The failure to give that mandate may have been a politically motivated decision.[7]

The Advisory Committee was co-chaired by a lawyer, but included heavy consultant representation and individuals sympathetic to them: of its twelve members, three were consultants and one was a lawyer involved in a consultant organization. The Committee also included another lawyer whose law firm represented a consultant organization in the *Mangat* case. The Committee's report canvassed regulation of consultants in some jurisdictions, including the United Kingdom, Australia and China, all of which permit non-lawyers to participate with some limitations in the immigration adjudication process.[8] Remarkably, however, the Committee chose to ignore the highly developed regulatory schemes of most states in the United States, which without exception prohibit the unauthorized practice of law and allow prosecution of violators, imposing fines and even prison terms. Against such a backdrop, it is not surprising that the Committee's recommendations crystallized consultants' wishes to create a mechanism for legitimacy and ongoing communication between Citizenship and Immigration Canada, the Minister, and the newly created Canadian Society of Immigration Consultants (CSIC), well within the limitations imposed on the Committee's mandate.

Notably, the initial composition of the CSIC board includes representatives from Citizenship and Immigration.[9] This places the CSIC and that department in a direct conflict of interest, since the latter will now regulate the very individuals who will be allowed to make representations on behalf of clients. Such cozy arrangement cannot possibly be conducive to independence and arm's length dealings.

Further, the creation of the CSIC legitimizes the role of immigration consultants, equating them to lawyers, notwithstanding differences in education, background and regulatory requirements.

A. What Do the New Regulations Do?

The regulations implementing the new regime (the "Regulations") are scanty and drafted in broad language. The relevant sections of the Immigration and Refugee Protection Regulations[10] have been amended[11] to accommodate the new regime.

Section 2 of the Regulations now defines an "authorized representative" as a member in good standing of a bar of a province, the *Chambre des notaires du Québec*, or the CSIC.

Section 10(2) requires detailed information on representatives, including if payment for services was made, as well as proof of membership in a prescribed regulatory body, which can only be either a provincial Law Society or the CSIC. If the immigration officer discovers that the applicant is paying for the services of an unauthorized representative *while the application is being processed*, the visa office must no longer conduct business with such representative. However, the visa office must continue to process the application, so as not to penalize the applicant.

Further, Section 13.1 states the following:

> (1) Subject to subsection (2), no person who is not an authorized representative may, for a fee, represent, advise or consult with a person who is the subject of a proceeding or application before the Minister, an officer or the Board.
>
> (2) A person who is not an authorized representative may, for a period of four years after the coming into force of this section, continue for a fee to represent, advise or consult with a person who is

> the subject of a proceeding or application before the Minister, an officer or the Board, if
>
> (*a*) the person was providing any of those services to the person who is the subject of the proceeding or application on the coming into force of this section; and
>
> (*b*) the proceeding or application is the same proceeding or application that was before the Minister, an officer or the Board on the coming into force of this section.

Exemptions have been granted for students-at-law who work under the supervision of a qualified member of a provincial Bar while completing their articling experience as required, and for unpaid representatives such as family members.

In its implementation instructions, the government acknowledges that visa offices will receive applications that appear to have been submitted with third-party assistance, but a representative has not been identified in the appropriate form, and the representative may be "concealed" by an applicant. These applications should be accepted by the visa office and processing should begin. However, after acceptance of the application, the visa office must determine if further follow up of suspected use of an unidentified paid representative is warranted. Individual cases where third-party assistance is suspected, but not proven, may not warrant further follow up. In theory, where visa offices become aware of a number of applications being submitted by the same unidentified third party, either through evidence of the use of a similar organization, style of presentation of the application, or contact addresses, then a program integrity review may be required. Other program integrity issues, such as the use of fraudulent documents, could also be involved. It is unclear, however, who will prosecute unauthorized representatives, how that will be done, or what funding, if any, will exist to enforce there provisions overseas, assuming that were possible, which is also in doubt.

Applications indicating the use of a paid representative who has not yet become authorized, and were submitted before 13 April 2004, are subject to a grace period of four years in which the representative must meet the regulatory provisions. If at the end of the transition period, on 13 April 2008, the applicant is still using the services of an unauthorized representative, the visa office may no longer communicate with that representative and must inform the applicant that the representative is not a member in good standing. The intent is for the visa office to try to avoid dealing with the unauthorized representative. The visa office, however, must continue to process the application.

B. Problems with the Regulations: Ticking Time Bomb for Lawyers?

The Regulations are based on the report by the Advisory Committee, prepared under the guidelines of its restricted mandate. The Advisory Committee was never allowed to consider prohibition of the unauthorized practice of law by immigration "consultants" as a possible means to deal with the problem.

Amongst the assumptions made in the new scheme is the concept that the new regulatory body will be self-sufficient and independent. However, this may not be true. The Regulatory Impact Analysis Statement accompanying the Regulations mentions the prospect that the newly created CSIC will be self-sustaining "*once it reaches a membership of 3000.*" Since there appear to be only a few hundred consultants who may be authorized in a provisional manner after complying with the initial, relaxed registration standards set out by the CSIC to begin functioning, this worrisome figure can only mean that either standards to become an immigration consultant will be so lax as to attract large numbers of members, or that lawyers who practice immigration law or their staff will eventually be forced to join that body. The government has failed to clarify how it intends to reach a membership of three thousand in the newly created organization if the standards to be implemented will be similar to those with which lawyers must comply, under provincial Law Society rules, in order to provide adequate consular protection and a level playing field.

Possible lawyer membership in CSIC would mean double regulation and unnecessary registration fees in addition to those already paid to provincial Law Societies and, more importantly, would place lawyers in a conflict of interest and create potential breaches of solicitor-client privilege. The precedent already exists in Australia, a jurisdiction with double regulation of immigration lawyers, both under local law societies and under the Migration Agents Registration Authority (MARA). The issue of conflict of interest was dealt with by the Australian Federal Court of Appeal in *Joel v. MARA,*[12] where a lawyer representing immigration clients refused to disclose to MARA information required during an investigation on the grounds that it would violate solicitor-client privilege and the ethical rules of the Law Society of New South Wales. The lawyer in that case found himself in the unfortunate position of having to respond to two different regulatory bodies with different standards. In that case, the lawyer was successful in his argument that disclosure of any documents or information to MARA may consti-

tute a breach of attorney-client privilege. However, recent amendments to the Australian legislation now make it clear that MARA can require such disclosure notwithstanding attorney-client privilege.

C. Do the Regulations Protect Consumers?

More worrisome, however, is the fact that the Advisory Committee chose to ignore the serious consequences of continuing to allow non-lawyers to practice law, failing to prohibit their activities, and ignoring well developed jurisprudence in the United States. Virtually every state in the United States prohibits the unauthorized practice of law. Noting that "aliens are especially vulnerable to the unauthorized practice of law," the Virginia Supreme Court starkly described its consequences in the immigration context and states in its rules that "such unauthorized practice, which may include incompetent or fraudulent legal services, can cause serious economic harm, may result in the separation of families, and may even result in the death of an individual forcibly repatriated to another country . . ."[13]

The Business and Professions Code of the State of California,[14] for example, notes that "the provision against unauthorized practice of law by non-attorneys is based on public interest in the integrity and competency of those who undertake to render legal advice," and the New York State Bar[15] even imposes on attorneys a positive duty to report unauthorized practice in its Code of Professional Responsibility. This consumer protection reasoning was best articulated by the Florida Supreme Court in *The Florida Bar v. Brumbaugh*,[16] where the court, indicating that non-attorneys are prohibited from practicing law within that state, shut down a "do it yourself" legal filing service, citing its previous decision in *State v. Sperry*,[17] held that:

> . . . if the giving of such advice and performance of such services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law.

The regulatory regime of CSIC amounts to little more than rubber-stamping the activities of immigration consultants. Even the organization's very name has the connotation of official sanction and the potential to mislead the public. In allowing this activity, the Canadian government has made the policy decision to permit those who do not have a formal legal education to represent the interests of immigrants, despite the expressions of concern by competent authorities in many states of the United States.

On the other hand, while consultants will go abroad and proclaim their membership in a Canadian national regulatory body with government representatives sitting on its board, lawyers will be handicapped by merely being members of provincial bars, a concept that will be difficult to grasp by those in developing countries or non-common-law jurisdictions. Lawyers may quickly find themselves forced by market realities to join the CSIC to achieve the same legitimacy that has been granted to non-lawyers without the same background, education, experience or stringent regulatory requirements exercised by law societies across Canada.

IV. Conclusion

The government, in its eagerness to regulate rather than prohibit the activities of unlicensed consultants, was motivated by reasons of political expediency and failed to understand that the practice of immigration law also encompasses the broad knowledge that lawyers must have of other areas of law, including tax, family, constitutional, employment and human rights. The notion that a consultant educated superficially for a few days in one area of law can effectively represent a client without such general knowledge is naïve.

The Canadian legal profession, by failing to insist that the unauthorized practice of law be confronted just as zealously as encroachments on other regulated professions, has failed to protect the public and to defend its members' interests. The ultimate price will be paid by those abroad aspiring to immigrate, but who do not have the protection of sophisticated consumer legislation or the ability to distinguish between immigration consultants and lawyers. The new regulation of immigration consultants will almost surely result in increased litigation.

Endnotes

1. *See, e.g.*, *Texas AG Warns Immigrants about Scam*, El Paso Times, 13 Feb. 2003, and passage of Arizona bill HB 2341, forcing "*notarios*" to clearly disclose they are not lawyers and making it easier for the Attorney General to prosecute unauthorized practice.
2. *Immigration Act*, R.S.C. 1985, c.12, ss 30 and 69(1) which stated:

   > 30. Every person with respect to whom an inquiry is to be held shall be informed of the person's right to obtain the services of a barrister or solicitor *or other counsel* and to be represented by any such counsel at the inquiry and shall be given a reasonable opportunity, if the person so desires, to obtain such counsel at the person's own expense . . .

69(1). In any proceedings before the Refugee Division, the Minister may be represented at the proceedings by *counsel or an agent* and the person who is the subject of the proceedings may, at that person's own expense, be represented by a barrister or solicitor or *other counsel*. *(Italics added.)*

3. *WWICS to pay Compensation,*The Tires of India, 18 Dec. 2003, and *Immigration: Co asked to pay up*, Chardigarh Newsline, 22 Dec. 2003.
4. *Cheating the System*, a Canadian Broadcasting Company program "Disclosure," 16 April 2002.
5. [2001] 3 S.C.R. 113.
6. Report of the Advisory Committee on Regulating Immigration Consultants, May 2003.
7. *Id*. at 5.
8. *Id*. at 17-25.
9. *Regulations Amending the Immigration and Refugee Protection Regulations*, Canada Gazette Part 1, 13 Dec. 2003, P. 3955, 3961.
10. SOR /2002–227, effective 28 June 2002.
11. *Regulations Amending the Immigration and Refugee Protection Regulations*, SOR/2004–59, Canada Gazette Part II, 14 April 2004.
12. [2002] FCA 1919, 22 Dec. 2000.
13. Virginia Sup. Ct. R. UPC 9-7.
14. California Business and Professions Code §§ 6125 *et seq.*
15. N.Y.C.R.R. § 1200. 16, N.Y. Code of Professional Responsibility, Canon 3, EC 3-1.
16. 355 So. 2d 1186, 1190 (Fla.1978).
17. 140 So. 2d 587, 591 (Fla.1962).

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Anatomy of a Privacy Incident Response: Why Good Planning Matters

By the International Privacy Law Committee

I. Introduction

U.S. companies involved in processing personally identifiable information in either domestic or cross-border transactions are faced with diverse, and sometimes conflicting, privacy and data protection laws and regulations. Common to all corporations is the potential for a "privacy incident." Corporations in all industries and jurisdictions are vulnerable to adverse legal and business consequences, whether they operate in one or more locations within or outside the U.S.

How a company handles a privacy incident will in large part depend on the measures it has taken to implement a culture of privacy awareness prior to the incident, and particularly, the efforts it has put into creating a response plan. As legal requirements related to privacy incidents multiply, and penalties for failing to secure information or notify individuals grow, it is imperative for every company to develop and implement a privacy incident tracking method and response plan.[1]

A "privacy incident" can be defined as the unauthorized disclosure or access to: (i) customer data; (ii) employee records/data; or (iii) any other personally identifiable information the company has a legal or contractual obligation to keep confidential.

Although a company's primary focus is typically on the first two types of data, it is important to note that most companies collect and retain a substantial amount of personal data relating to individuals who are not customers or employees. For example, such non-employee or customer data might be collected from users of a company website subject to the website privacy statement, clinical trial participants by pharmaceutical companies during trials, or individuals working for a company's regular vendors and suppliers.

Privacy incidents occur as a result of: (i) unauthorized access of databases/systems; (ii) unauthorized access to documents; (iii) loss or theft of documents; (iv) loss or theft of physical equipment (such as laptops and PDAs); and (v) breaches of data streams and/or transmissions (such as interceptions of unencrypted email or non-SSL transmissions).[2]

There are many possibilities for the occurrence of privacy incidents within the regular course of business of most companies. Incidents can occur within company offices, at data centers, at employee home offices, at vendor locations, or while information is in transit.

When a privacy incident occurs, it is imperative that the incident is reported promptly to people within the company who know what to do. Notification should be directed to the appointed person or team, within the company, who is responsible for privacy and knows how to respond appropriately to the incident.

This person or team of privacy professionals must respond in accordance with the laws, rules and regulations of any industry or jurisdiction that may be applicable. The primary focus of the response should be to protect the individuals whose information has been compromised and limit any further damage. This should generally go hand-in-hand with the obvious need to minimize the damage to the company (e.g., reputational damage, regulatory fines, litigation, criminal penalties, etc.).

This article describes a scenario that would result in a privacy incident, the laws that would be applied, and the responses triggered as a result of the privacy incident. A reasonable response to a privacy incident would depend on the industry, type of data compromised, and applicable law. This article highlights many of the issues that a company will need to address and decisions that will have to be made in connection with the privacy incident based on this particular fact pattern.

II. The Privacy Incident

Jack is a senior salesman working for a large multinational corporation. His office is located in California, which is the company's headquarters. While preparing for a business trip to the firm's London office, Jack decides he needs his customer files to maintain contact with some of his clients. Jack is going to London to train a number of new employees and also needs access to personal information about these trainees. Jack's files, which include personal identifiable information, are related exclusively to individuals.

Jack does not want to be bothered to access this information from the firm's secure computer system in London. Jack decides to download customer data for his 1,500 clients onto his personal laptop computer. The only information Jack needs is his clients' names and phone numbers; however, it is much simpler to download all the data in the records, and all of his customer files rather than to take the time to segregate the data.

As a result, Jack downloads the names, addresses, phone numbers, Social Security numbers, account numbers, credit card numbers and other data relating to his

1,500 individual clients, who are located in California, Washington, Oregon, and Canada.

This information has been collected via application forms, the firm's website, and through personal contacts made by Jack over the years. Jack also downloads the names, office phone numbers, home addresses and home phone numbers of the twenty new London-based salespeople he will be training in the firm's London office.

Jack thinks that firm policy may prohibit putting this type of unencrypted personal information onto his laptop, but feels assured he can secure the firm's data, which he has taken without the permission of his supervisor or the company's privacy team.

Jack arrives in London, and due to security delays, must call his hotel to tell them to hold his reservation. After loading his luggage onto a baggage carrier, he uses his cell phone to make the call to the hotel while looking for his car. When Jack is about to get into his car, he notices that his laptop bag is not with his other luggage. A short time later when Jack arrives at the firm's London office he has to decide what to do about his stolen laptop and the data it contained.

III. The Response

A. Reporting the Incident to the Right People

Several months before Jack lost his laptop, senior executives at his firm decided to establish a privacy team to address compliance issues relating to existing privacy and data protection laws, rules, and regulations. One of the team's initiatives was to establish a central location for employees and customers to report privacy incidents, regardless of where the incident took place. This borderless process would ensure that the team could coordinate its efforts in a similar manner each time an incident occurred.

This system would serve two important purposes: (i) the privacy team would be able to have a global view of the types of incidents taking place within the company to help identify unfavorable trends and security risks; and (ii) the privacy team would be able to help the firm develop the proper mechanisms to respond effectively to specific privacy incidents.

Shortly before Jack lost his laptop, the privacy team developed a simple one-page web-based Privacy Incident Report Form accessible from the Privacy link on the firm's Intranet site. The report was developed to collect basic information about each incident to enable the team to begin its response. The privacy team also established a privacy incident response plan outlining the initial steps that would be taken to respond to an incident and who, besides the team, should be involved in the response process.

Based on the information collected on the Privacy Incident Report Form, the response team would include the privacy team, senior executives, client call center representatives, the fraud group, the data security group, the physical security group, website administrators, audit and compliance representatives, HR representatives, union or other employee representatives, outside counsel, and public relations representatives.

When Jack arrived at the London office, he was very upset and wondered whether he would get reimbursed for his laptop. He did recall scanning some emails about customer privacy, but could not remember their content. Jack did remember that all of his client files were on his laptop. He was very concerned that if his customers found out about their data being stolen, and subject to identity theft, they would be very angry.

Jack had a friend in the legal department. He decided she would be the best person to call. She told Jack to complete the Privacy Incident Report Form immediately. She directed Jack to the Privacy link on the firm's Intranet to report the privacy incident. She then called the privacy team to alert it to the situation.

Jack completed the report detailing what had happened, and hit the send button. Within a few minutes the privacy incident report hit the privacy team's mailbox and was read by one of the team members who had been waiting for its arrival. Jack received a reply by email immediately indicating that things were in motion. After reading the report, the privacy team member began making phone calls to mobilize the team for the appropriate response.

B. Protecting the Individuals Whose Information Was Compromised

The first call by the privacy team was to Jack to gather more detailed information about the incident. Jack reported the incident to the authorities at the airport, but the laptop had not been found. The team assumes the laptop has been stolen and will not be recovered. While the laptop is password protected, none of the data has been encrypted. The team must assume an unauthorized person has accessed all customer and employee data that was downloaded to the laptop.

Following the initial response plan, Jack is asked for a list of all clients that have been affected by this security breach. Jack directs the team to the central database containing all of the data on his clients and the employees he downloaded to his laptop. The customer data is immediately sent to the firm's call centers so that enhanced security can be put on all accounts.

This enhanced security requires anyone calling a company call center to access one of the affected accounts to answer additional authentication questions

either to gain access to any information about the account, or to initiate any activity on the account. The call center representative will be on notice, based on the data on the call center system, to ask these additional authentication questions and will have a heightened awareness for any suspicious or unusual behavior.

The team has notified all geographic locations about the security breach, but Jack also alerts his team back in California so they know to be on the lookout for any unusual activity. He wants to prevent any possibility of identity theft. He is fearful of losing his client base and possible disciplinary action from the company.

The team has determined it is not necessary to block website access for affected clients, since no website passwords were compromised. The online group, however, will monitor the stolen accounts for unusual activity. The firm's fraud group is also notified, and will increase its surveillance on these accounts for any suspicious activity.

The team members now feel like they have locked down the main access points within the firm. They have also put all relevant internal groups on notice to detect any suspicious or unusual behavior with respect to the affected customer accounts. Having accomplished these goals, the team must turn to the more difficult questions of whether to notify the 1,500 clients and twenty employees whose information has been compromised, and if so, how this should be done.

C. Complying with the Law and Other Decisions

Most of the customers whose data was compromised live in California, Oregon, Washington, and Canada. The employees whose information was compromised all live in London. The first question is whether the firm is required by law to notify the customers and employees. Once this is determined, if notification is either required by law or considered good business practice, the team must decide how the customers and employees should be notified.

1. State-Specific Issues

In Oregon and Washington there are currently no state law requirements to notify residents that their information has been compromised.[3]

In California, a new law was adopted in 2002[4] that requires notice when certain personal information is compromised. The law applies to any business that conducts business in California, regardless of whether the business is located within or outside of California, and possibly outside the U.S., that maintains certain elements of personal information on California residents in computerized form.

The notification requirement is triggered if there is an unauthorized acquisition of computerized data that compromises the security, confidentiality or integrity of unencrypted first name or initial and last name, plus unencrypted: (i) Social Security number; (ii) driver's license number; *or* (iii) financial account number, credit or debit card number in combination with any required security code that would permit access to an individual's financial account.

The law requires notification to affected persons upon discovery of a privacy incident "in the most expedient time possible and without unreasonable delay."[5] The California Office of Privacy Protection has published a document[6] that recommends that notification be sent within ten business days after the incident. Additional time in disclosure is permitted where necessary for purposes of a law enforcement investigation and will generally be deemed reasonable where required to complete further internal analysis to determine the scope of the incident.

The disclosure notice may be written or electronic. Under the Code, a substitute notice may be used if the cost of disclosure is greater than $250,000, if the number of affected parties exceeds five hundred thousand, or if adequate contact information of affected parties is not available. Substitute notice must be provided by: (i) email if the company has addresses; (ii) website posting; *and* (iii) major statewide media notification.

In order to minimize the risk of claims the team determined that it should notify all affected persons as soon as possible. They will aim to notify individuals within three or four days after having become aware of the security breach.

Although the California law does not provide a standard notice form or guidance on the content, the team has decided that, in order to comply, the notice will include the following information: (i) date of security breach; (ii) information compromised; (iii) whether the term is certain that the information is in the hands of a specific party; and (iv) a point of contact within the company.

2. Canadian Issues

In Canada, there are at least three potential causes of action resulting from the loss. First, the client information may be subject to a duty of confidence, whether expressly in contracts with each client, or implicitly under common law. Second, the five provinces of British Columbia,[7] Saskatchewan,[8] Manitoba,[9] Quebec,[10] and Newfoundland and Labrador[11] have enacted "privacy" acts, which enable civil action to be taken for violations of privacy (the "Privacy Acts").

Thirdly, a patchwork of additional federal privacy law (the *Personal Information Protection and Electronic Documents Act* or PIPEDA)[12] and provincial privacy law (as of date of writing, in Quebec, Alberta and British

Columbia[13]) has developed in Canada that regulates the protection of personal information. In addition, Alberta, Saskatchewan, and Ontario have legislation protecting specifically personal health information.[14]

This Canadian privacy legislation requires that personal information be protected with appropriate security measures, and PIPEDA, for example, requires that sensitive information—such as the credit card numbers and the Social Security numbers that were on the laptop—must be protected by a higher level of security reflective of the greater sensitivity of this information. In this respect the privacy incident could put the corporation in breach of Canadian privacy requirements.

With respect to any requirement to provide the clients with notice of the loss, currently, of these three mechanisms, only certain Canadian personal health information legislation requires that an individual be notified where their personal health information is subject to theft, lost or accessed by unauthorized persons.

Since there was no personal health information on the laptop, there is no legal requirement in Canada that the corporation notify the individuals that their data were stolen. As a result, it is a risk management and public relations issue for the company as to whether it is better to inform the individuals of the loss of their information.

However, once an affected client becomes aware of the loss, the client may bring a claim for breach of confidence, a civil claim for breach of privacy in Canada under the Privacy Acts, and/or make a complaint to the applicable privacy commissioner under the Private Sector Privacy Laws and face the possibility of significant fines, personal liability for directors and officers, and public disclosure by the privacy commissioner of the breach.

3. UK Issues

In the UK, there are a number of pieces of both domestic and European legislation that could potentially apply to this scenario. For the company we need to distinguish in our scenario between those likely to cause problems with the regulatory authorities (assuming they are notified) and those giving the aggrieved clients or employees a right of redress against the company in a civil claim. Additionally, we need to distinguish between issues surrounding the UK employee data versus the U.S. client data.[15]

The most relevant regulatory regime is under the Data Protection Act 1998.[16] This Act would apply if the company in the UK acts as a "data controller" in respect to the data that have been lost, or otherwise uses equipment in the UK for the processing of such data. According to the Act, a data controller is "a person who determines the purpose for and the manner in which any personal data are, or are to be, processed." The UK company will generally be seen as a data controller of the employee's data as it concerns data of employees in the London office, and the UK office is presumed to control the processing of such data.

With respect to the U.S. client's data, however, as long as the UK company does not have any authority with respect to the purpose for which and the manner in which these data are being processed, the company should be able to take the position that the UK company is not a data controller under the UK Act and the UK Act should, in principle, not apply. Following the same line of reasoning, while it is true that Jack would have been able to access this information through the company's secure computer system in London, it should be reasonable to take the position that the UK company will be deemed merely a data processor for purposes of the UK Act and not a data controller.

Although there are obligations under the Data Protection Act to notify the UK employees of certain information relating to the processing, this obligation only relates to when the data are first processed. There is no express obligation for a data processor to notify the data subjects of a breach in security or subsequent disclosure of their data to third parties. All processing of data must, however, adhere to the general data protection principles as outlined in the Act.

One of these principles provides that companies should always take measures to maintain an adequate level of security to protect against, amongst others, unlawful processing, loss and/or destruction of personal data. These measures must ensure a level of security appropriate to the harm that might result from a breach of security and the nature of the data to be protected.

The technical and organizational measures appropriate to secure data will depend on the circumstances of each case. It could be argued that to comply adequately with this principle, the company should implement a notification procedure to ensure that, to the extent possible, any unlawful acts are avoided or limited in the event of a privacy incident. Additionally, if it is found that the company did not have adequate security controls and that its employees were not trained properly, which resulted in Jack's inappropriate use of data, the privacy incident may qualify as a breach of the Act. This could prove to be the basis for claims against the company and Jack by the UK employees—and possibly sanctions from the DPA authorities.

Additionally, the employees and, to the extent that any of the clients have a contractual relationship with the UK firm, such clients may potentially bring a successful claim in the UK courts against the UK company for the breach of a contractual duty of confidence, whether this is express or implied. There is little direct-

ly analogous case law, but a professional client or employee-employer relationship in the UK involving confidential data will be likely to imply not only a duty of care over the data, but possibly a duty to inform the data subject in the event of loss.

As in Canada, the fact that there is no explicit duty to notify data subjects of a privacy incident means that it will be a question for the company in terms of risk management and public relations to determine whether the best practice would be to inform the individuals of the incident.

D. The Right Thing to Do

If there are no legal requirements for notification, the firm must then examine whether any contractual obligations exist to notify the affected customers and employees that their data were compromised. Neither the firm's privacy statement or online privacy statement contain any mention of notification. Customer application forms and all other relevant agreements and documentation are also silent on the question of notification.

Good business practice may require notification to clients in Oregon, Washington, and Canada, despite the fact that notification is not required by statute or contractual obligation. This decision must be made based upon what the company determines will be standard operating procedures in this matter and any future privacy incidents.[17]

In London, the firm should contact the U.K. Data Protection Information Commissioner regarding the security breach. It is likely the Commissioner's office will begin a series of discussions and investigations into the firm's procedures and practices to ensure compliance with UK law, and the protection of customer and employee data.

With the assistance of senior management and the media relations and legal teams, the firm determined that all affected customers would be notified. Based on the scope of the breach and the type of information that was compromised, the firm decided that all clients should receive a notice so they would be in a better position to protect their other accounts and their individual credit ratings.

Another factor considered by the team was its concern about the firm's exposure to future litigation. Although the firm's privacy policy was silent on the issue of notice, there is a possibility that the Federal Trade Commission could consider lack of notification an "unfair and deceptive trade practice" violation, despite the absence of legislative authority.

By notifying all clients, the company's actions (i) reduce the possibility of a complaint being made by an affected client to the applicable data protection regulatory authority in each jurisdiction, and (ii) place the firm in a better position in a case where a regulatory authority made a decision to investigate the privacy incident.

The firm, therefore, concluded that its response should be considered fast, reasonable in light of the circumstances, and fair to all of its customers. The firm drafted one notice that satisfied California law and that was sensitive to the needs of all affected customers. The notice was sent within the statutory time frame. Since the London employees are not residents of California and there were only twenty of them, they were advised verbally by HR. The privacy team, the business unit, and the legal department also prepared a standard internal script and FAQ to the extent Jack or the firm received any calls on the matter. The company thought about placing phone calls to all affected clients, but decided against it because, due to the large number of affected clients, many would receive the letter prior to getting the phone call. Jack was advised that he could proactively begin to contact some of his more important clients to alert them of the incident and inform them that they would be receiving a letter.

An important element of the notice was that each client was asked to address their questions or concerns to a specific contact person at the firm; that person was prepared to respond appropriately to different levels of concerns, and to escalate serious concerns to a higher level of response in the company. The objective of the firm was to manage the questions and concerns of each client in such a way as to minimize the possibility of a complaint being made to the applicable regulatory authority in that jurisdiction.

The firm anticipated that the media might pick up on the story. It was hoped that the team's rapid response, and the company's determination to notify all customers of the security breach, would play a role in how the incident was portrayed to the public. The team debated whether to contact the media first in order to try to manage media coverage, but in the end decided against this strategy.

IV. Conclusion

As information moves exclusively to the digital world, as systems and networks become ever more expansive and intertwined, and as companies use and share information in more expansive and innovative ways, the privacy rights associated with information will play an increasingly larger role in how that information is collected, used, shared and secured.

All companies will have privacy incidents. The companies that fare best will be those that have high-level support in the protection of personal information and dedicated resources that focus on thinking about these issues. Those companies that can respond rapidly, limit damage to the individuals whose data have been

compromised, comply with all laws and go beyond what the law requires in ensuring that clients and employees are treated fairly when incidents occur should be able to navigate these types of incidents the best.

It is not yet entirely clear whether consumers choose companies based on how those companies treat their personal information. However, it is clear that consumers will choose not to do business with a company if they do not trust the company. In responding to privacy incidents the most important factor is to not lose client trust.

It does cost more money to have effective privacy policies and procedures that make such policies part of a company's business philosophy and daily practice. The benefit of this investment can only be realized when there is an incident, such as a break-in at a vendor location, a disgruntled employee disclosing sensitive customer information, or a harried employee losing a laptop with unencrypted data.

When a privacy incident occurs, a good privacy program can make the difference between a company being perceived as the wrongdoer versus the victim that did all that it reasonably could to protect against the incident occurring and to minimize the damages that follow. The cost of litigation, lost customers and lost business opportunities far outweigh compliance costs.

The risk that a privacy incident will occur can certainly be reduced, but is unlikely ever to be fully eliminated. As these incidents occur, companies that have a good privacy infrastructure will be less likely to face legal consequences and damage to their reputations, while companies that do not devote the necessary resources and planning to privacy will not only suffer these losses, but client defection.

At the end of the day, good privacy is good business.

Endnotes

1. *See* D. Bender, *Recent Developments in Data Protection Law*, PLI Ninth Annual Institute for Intellectual Property Law (2003) 15. Bender describes three approaches to privacy law taken by U.S. corporations, including: the "Ostrich" Approach, where companies "solve a problem by ignoring it"; the "Just in Time" Approach, where companies solve problems "on a case-by-case piecemeal basis"; and the "EU Gambit" Approach, where companies "assume that compliance with the EU Data Protection Directive . . . will assure compliance with all data protection laws worldwide."
2. A. Saita, *Identity Management: Finding the right balance between rights and responsibilities*, http://searchsecurity.techtarget.com/originalContent/0,289142,sid14_gci994963,00.html (22 July 2004); D. Becker, *UCLA laptop theft exposes ID info*, http://att.com.com/UCLA+laptop+theft+exposes+ID+info/2100-1029_3-5230662.html (10 June 2004); AP Breaking News, *Japan's financial regulator warns Citigroup's Japanese affiliate on customer data*, http://www.sfgate.com/cgi-bin/article.cgi?file=/news/archive/2004/06/11/financial1051EDT0055.DTL (11 June 2004); PriceWaterhouseCoopers, *Identity Theft and Security Breach Notifications: Reporting on Request*, http://www.pwc.com/extweb/service.nsf/docid/38D0975DE5CFCC9785256EBA005F49FA (2004).
3. Specific industries, such as banking, may have industry specific regulations that require disclosure. *See* http://searchsecurity.techtarget.com/originalContent/0,289142,sid14_gci994963,00.html.
4. California Senate Bill no. 1386.
5. *Id.*
6. Recommended Practices on Notification of Security Breach Involving Personal Information http://www.privacy.ca.gov/recommendations/secbreach.pdf.
7. *Privacy Act,* R.S.B.C. 1979, c.336.
8. *Privacy Act,* R.S.S. 1978, c.P-24.
9. *Privacy Act,* R.S.M. 1970, c.74.
10. *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12, ss. 5 and 9; art. 1053 C.C.Q.
11. *Privacy Act*, R.S.N.L. 1990, c.P-22.
12. S.C. 2000, c.5.
13. Quebec: the privacy regime is composed of two elements: (i) amendments to Chapter 3 of the *Civil Code of Quebec*; and (ii) the enactment of a statute to expand on the Civil Code entitled, *An Act respecting the protection of personal privacy* (S.Q. 1993, c. 17). Alberta: the *Personal Information Protection Act* (R.S.A. 2003, Ch.P-6.5) British Columbia: the *Personal Information Protection Act* (S.B.C. 2003, Ch.63).
14. Alberta: *Health Information Act*, RSA 2000, Ch. H-5. Saskatchewan: *Health Information Protection Act* (S.S. 1999, Ch. H-0.021 (effective 1 September 2003, except for subsections 17(1), 18(2) and (4) and section 69) as amended by S.S. 2002, c.R-8.2; and 2003, c.25.). Ontario: *Personal Health Information Protection Act, 2004*, S.O. 2004, c. 3 Sched. A.
15. *See Durant v. Financial Services Authority*, http://www.courtservice.gov.uk/judgmentsfiles/j2136/durant-v-fsa.htm. *See also European Commission Suggest UK's Data Protection Act Is Deficient*, http://www.out-law.com/php/page.php?page_id=europeancommission1089896924&area=news (www.out-law.com, May 2004).
16. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31995L0046&model=guichett.
17. T. Hamilton, *U.S., Canadian firms worlds apart on privacy*, (24 May 2004). http://www.thestar.com/NASApp/cs/ContentServer?pagename=thestar/Layout/Article_Type1&c=Article&cid=1085351408746&call_page=TS_Business&call_pageid=968350072197&call_pagepath=Business/News&pubid=968163964505&StarSource=email.

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Approaching a New Tax Regime for Foreign Sales

By Maureen Monaghan

I. Introduction: The Three Decades' Trade War

On 14 January 2002, the Appellate Body of the World Trade Organization (WTO) ended a two-year trade dispute between the European Union (EU) and the United States by declaring that the Foreign Sales Corporation (FSC) Repeal and Extraterritorial Income Exclusion Act of 2000 (ETIA),[1] which is the current U.S. system for providing U.S. exporters with special tax breaks, is in violation of international trade law.[2] But this was only the latest development in an ongoing trade battle, spanning three decades, in which U.S. trading partners have persistently and successfully argued that U.S. tax provisions providing export contingent benefits to U.S. industries constitute prohibited export subsidies under the General Agreement of Tariffs and Trade (GATT), leaving the United States in a seemingly endless cycle of amending its tax code.[3] As the process goes forward, U.S. lawmakers are faced with increasing pressure to replace the lost export tax breaks with both aid for ailing U.S. manufacturing industries and substantial reform of the nation's outdated international tax rules.

II. How the United States and the European Union Tax Export Industries

The underlying problem at the heart of this trade battle involves a fundamental difference between the U.S. tax code and that of most other nations.[4] Adopting a worldwide tax system, the U.S. imposes a direct tax on the foreign earned income of its residents, including income arising from export activity.[5] The member states of the EU, on the other hand, utilize a territorial system and only tax income earned within the physical boundaries of the taxing country.[6] Thus, EU exporters do not pay tax on their foreign sales. Additionally, most EU governments employ an indirect tax system founded on the taxing of consumption (i.e., a tax is collected on sales of goods and services), instead of income, in the country where the final sales transaction takes place.[7] This is achieved by means of a Value Added Tax (VAT) system, whereby a tax credit is refunded to the exporter.[8] Under the GATT rules, a refund of indirect taxes on exports is permitted, whereas a refund of direct taxes is not.[9] Since the EU does not tax foreign income of its corporations, many of which have established subsidiaries in tax havens, and the European corporations are allowed a VAT credit, EU exports are shielded from virtually all tax burdens.[10] As a result, the European exporter can sell its goods overseas at a reduced price and has a competitive advantage over the U.S. exporter.

III. DISCs, FSCs, and the ETIA

A. DISCs: The First Attempt at Leveling the Playing Field

In 1971, in response to the growing trade deficit, Congress attempted to level the international playing field for U.S. corporations by enacting a law creating Domestic International Sales Corporations (DISCs).[11] The DISC legislation permitted corporations to set up domestic entities through which they would channel their sales to foreign countries.[12] Profits from DISCs were only taxed when such profits were distributed to shareholders as dividends.[13] The purpose of this new tax regime was to allow the U.S.-based DISC to receive tax deferral.[14] However, corporations were able to elude taxes indefinitely by retaining their profits and reinvesting them within the company.[15]

The world community complained that the DISC tax provisions granted a prohibited export subsidy to U.S. companies in violation of the uniform rules of trade engagements pursuant to GATT.[16] Belgium, France and the Netherlands eventually brought an action to prevent the United States from continuing the tax scheme, arguing that the DISC provisions resulted in export prices lower than domestic prices, causing immediate harm to trading partners, a clear violation of GATT Article XVI.[17] The GATT investigative panel agreed.

B. The Rise and Demise of the Foreign Sales Corporation

Following the GATT hearings on the DISC legislation, the GATT Council adopted the conclusions of the GATT investigative panel.[18] Since adoption was precluded without the unanimous consent of the contracting parties, final adoption was delayed until 1981[19] under a mechanism whereby the GATT Council adopted the factual findings of the dispute subject to an "Understanding."[20] The 1981 Understanding debatably incorporated the principles established in a footnote of the Tokyo Round Subsidies Code, accepting that it was not an export subsidy when a country refrained from taxing foreign source income derived from foreign economic processes.[21] Based on this principle, Congress created the FSC program as part of the Deficit Reduction Act of 1984.[22]

As the U.S. understood GATT rules, an exemption from tax on export income was permissible only if the income was earned extraterritorially.[23] Accordingly, unlike its DISC predecessor, FSCs were required to be foreign corporations subject to certain foreign-presence, foreign-management, and foreign-economic-processes tests.[24] The latter requirement includes sales-activities-participation and direct-costs tests. If the conditions were satisfied, a portion of income for export sales and certain services would be exempt from U.S. taxes.[25]

In order to comply with the GATT rules, income from foreign sales was segregated and exempted, while any domestic income earned by the FSC was taxed at the regular rate.[26] Though simulating the effects of a territorial tax regime in that it separated and exempted export transactions from taxation, the significant distinction of the FSC's tax exemption system was that it applied only to exports, whereas a territorial tax system exempts both exports and other foreign-earned income from taxation. The EU argued that, because FSCs were export-contingent, they were in violation of trade treaty obligations.[27] In 1997, the EU filed an action challenging the U.S. FSC program under the new GATT dispute settlement procedures contained in the new WTO treaties finalized in 1994.[28]

One of these treaties, the Agreement on Subsidies and Countervailing Measures (the "SCM Agreement"), expanded the concept of prohibited subsidies and provided the stricter definition of subsidy on which the EU based its complaint.[29] Under the SCM Agreement, a subsidy is deemed to exist when a device results in a financial contribution by a government, including an indirect contribution to exports through foregone revenue that is otherwise due, and a benefit is thereby conferred.[30] Article 3.1(a) of the SCM Agreement prohibits subsidies contingent upon export performance and references a list of export subsidies, which includes a prohibition against "the full or partial exemption, remission, or deferral specifically related to exports, of direct taxes . . . paid or payable by industrial or commercial enterprises."[31]

The WTO ruled in favor of the EU when its dispute panel issued its report in October 1999,[32] and the U.S. subsequently lost on appeal in February 2000.[33] Essentially, the WTO agreed with the EU that the tax benefit conferred upon FSCs constituted foregone revenue otherwise due and therefore was a subsidy.[34] Furthermore, because the subsidy was contingent upon export performance, it was a prohibited subsidy under the SCM Agreement and thus illegal.[35]

C. The ETIA: Change Without a Difference

In November 2000, in order to bring the U.S. tax code into WTO conformity, Congress passed the ETIA, which was intended to be a simultaneous repeal and replacement of the FSC legislation. Corporate exporting interests, however, which were lobbying to preserve the FSC subsidy, assisted in the passage of the ETIA, which led to its language and concepts being largely borrowed from the repealed FSC program.[36] As a result, the ETIA did not bring the U.S. corporate tax code into WTO compliance, but instead broadened both the benefits and beneficiaries of the tax abatement.[37]

Not surprisingly, the EU was unhappy with the ETIA. Shortly after its passage, the EU requested the establishment of a WTO panel to determine whether the new legislation was WTO-compliant.[38] The EU asserted that the new legislation not only maintains, but possibly even exacerbates, the violations found by the WTO in the FSC dispute.[39] In June 2001, the WTO panel ruled in favor of the EU,[40] and the subsequent U.S. appeal was dismissed on the merits on 14 January 2002.[41] Consequently, the EU received WTO authorization to impose approximately four billion dollars in sanctions against the U.S., equal to the savings afforded American exporters under FSCs.[42] The EU commenced imposing escalating sanctions on 1 March 2004 in response to the U.S. failure to meet the deadline to replace the ETIA by then.[43]

IV. Approaching Reform

The recent WTO decisions serve as a clear indicator that the U.S. cannot have a tax system based on the principle of taxing income from whatever source derived but then providing exporters with a tax break. However, if the U.S. does not find a legitimate way to allow tax breaks on exports, large multinational corporations will have a significant incentive to incorporate elsewhere. The U.S. currently has perhaps the most complex corporate tax and the second highest corporate tax rate among major nations. No other country has rules for the immediate taxation of foreign-source income that are comparable to the U.S. rules in terms of breadth and complexity. Thus, the WTO ruling was viewed by some legislators as providing the opportunity for much needed reform and a rethinking of the global tax rules.

A frequently mentioned option for resolving the debate was to switch to a territorial system of taxation, since it has already been established that such a system is WTO-compliant. If the United States would change its form of corporate income tax to a system under which only income from sales in the U.S. is taxed, corporations in the U.S. would enjoy an equal playing field. However, there are several problems with such a system. First, the U.S. government would lose significant tax revenue on which it relies heavily to operate. Second, implementing a territorial system would

require a massive revision of the U.S. tax code, something Congress would likely be unwilling to undertake, especially in an election year. Though a plan must be formulated, full-scale tax reform would not come quickly enough to avoid the brunt of escalating EU sanctions because of the complicated nature of such a fundamental change in tax law.[44] Lastly, if the WTO is able to place such pressure on the U.S., it suggests serious limitations on the ability to the U.S. to shape the international environment. It is unlikely that the U.S. will risk giving the impression that it will bend to the will of other entities and allow its taxation scheme to be dictated by the WTO.

Accordingly, the Bush administration has focused on replacing the subsidies by lowering the corporate tax rate for manufacturers. It appears, however, that what began as an earnest attempt to tackle a fundamental but narrow tax problem in 2002 has resulted in a tax-break for special interest groups. On 11 October, the Senate passed the American Jobs Creation Act of 2004[45] which was passed by the House on 7 October. The bill offers broad manufacturing and multinational cuts, but also includes a myriad of narrowly written measures to help specific firms or industries. Included are breaks for the makers of fish finders, bows and arrows, tackle boxes and Puerto Rican rum, along with Alaskan whalers, bank directors, dog-track owners and ethanol producers. Public-interest groups have criticized the bill as being a special interest bonanza patched together to win votes from a majority of legislators, and being based largely on requests from lobbyists.

With the pressure caused by the European Union's increase of the escalating sanctions to 12% on American exports as of 1 October, the White House would have made itself vulnerable to attack if it had halted the Congressional largesse, and President Bush quietly signed the bill into law on 19 October.[46]

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Representing Clients from Civil Law Legal Systems in U.S. Litigation: Understanding How Clients from Civil Law Nations View Civil Litigation and Helping Them Understand U.S. Lawsuits

By Gregory F. Hauser

Economic globalization has brought with it an ever increasing number of U.S. attorneys who find themselves representing clients from other nations in civil litigation in courts in the United States. Such an experience can be challenging enough when the client comes from another of the common law countries, but the challenge is commonly dramatically greater when the client comes from one of the many nations belonging to the other major category of western legal systems, namely, the civil law or civil code tradition.

The text below in italics represents the author's opinions and observations from experience along with practical suggestions for meeting the challenge described.

I. Introduction to the Civil Law Systems

The civil law legal systems include most of those in Europe other than in Great Britain (Scotland's system is a hybrid), and those in Japan, South Korea, most of Latin America, and some former non-British colonies in Africa and Asia.[1] Here in North America, the legal systems of Quebec, Louisiana and Puerto Rico are basically civil code systems, but all three, surrounded and surmounted as they are by the common law systems of the nations to which they belong, have evolved to varying extents into hybrids of the two systems (as is also the case in South Africa, the Philippines, and several other countries, albeit with different causes).[2] In the United States, the direct legacy of the civil law system extends beyond Louisiana and Puerto Rico to the community property laws of states that had formerly been part of the Spanish empire.[3]

While the focus of this article is civil procedure, a discussion of the overall nature of the civil law tradition will shed additional light on the mind-set of clients from the countries within that tradition.

A. Brief Historical Background

As Europe emerged from the Middle Ages, the growing trade confronted a patchwork of local legal systems, in which "customary law" played a large role, many of them rooted to a significant degree in the Germanic legal traditions[4] in which the common law system—already well along in its evolution in England—was also ultimately rooted.[5]

Monasteries had preserved, along with much other learning, Justinian's comprehensive Roman Code of the early sixth century *(Corpus Juris Civilis*), which was a basis for canon law.[6] The first European university had been founded in Bologna, in the late eleventh century, and law was one of its earliest established faculties; by the twelfth and thirteenth centuries, Bologna had developed into the first European center of legal studies, with a focus on Roman and canon law.[7] As other European universities developed, and particularly as they established faculties of law, they drew on the knowledge of a limited community of scholars, many of whom had studied at Bologna or studied under those who had, and it was also their writings that dominated the field.[8] Thus, as the need for legal reform grew, Europe's scholars turned first to Roman law, which had in fact survived in practice to some extent in southern Europe.[9]

Justinian's Code—particularly the law of obligations and property[10]—provided the foundation for the "great codifications" of continental Europe, most of which were accomplished between 1683 and 1911, although the continental codes all went well beyond that portion of Roman law upon which they chose to build.[11] The codes supplanted (to some extent by absorbing) the previous compilations of customary law; canon law exerted influence as did also the body of mercantile rules known as the law merchant, or *lex mercatoria*, which had developed from the customs of the merchants, guilds, markets and fairs, port cities and other mercantile centers.[12] Other, more philosophical, influences, depending on the nation and the date of codification, included seventeenth century rationalism, the eighteenth century Enlightenment's natural law movement, humanism, and nineteenth century legal positivism.[13]

Unlike the common law system, which had originated in and evolved for hundreds of years in a largely illiterate society, the civil law systems did not arise until their societies were already in the transition to widespread literacy, which is important in understanding the civil law systems' comparatively strong emphasis on written evidence as opposed to oral evidence. Few other than academics, however, could read the Latin in which most legal learning up to that point had

been written, so their influence in writing and explaining the codes was primary from the outset.[14]

As an aside, Justinian's Code and the continental codes were the chief stimulus for the codification movement in the common law jurisdictions, which achieved its first real success when New York State adopted the civil procedure code drafted by David Dudley Field, who had been inspired by his study of European continental legal systems.[15] The Uniform Commercial Code has strong German influences.[16]

B. The Current Nature of the Civil Law Systems

The often dramatically different histories of the various civil law nations, particularly in regard to their legal, political and philosophical traditions, and the differing dates at which codification took place, have resulted in differences among the civil law systems that range from the significant to the subtle. What follows is necessarily a set of generalizations.

The core of a civil law system is a set of legislated codes, chief among which is a general civil code.[17] The law-making role is confined to the legislature.[18] Codes supply the applicable law, at least in private disputes.[19] There is at most a limited background of case law, or it plays a leading role only in limited areas of public law.[20] Courts are expected only to apply and not to make law, i.e., there is a true separation of powers.[21] The codes, drafted primarily by experts,[22] attempt to be comprehensive, integrated and systematic.[23] The codes also attempt self-sufficiency,[24] even supplying their own rules for gap filling; their goal is to anticipate all needs coherently and to avoid gaps in the law.[25] Many codes have striven to offer both predictability and accessibility of the law as a critical component of the full-fledged democracies that the civil law nations have become.[26]

> *Imagine if, in our system, there were a Restatement written for virtually every area of law, and the Restatements were then integrated by cross-references and enacted into law with an express displacement of all existing case law in each area (a process not too different from that which produced the Uniform Commercial Code). Add the abolition of* stare decisis *and the subordination of any effect of precedent to the principle of consistency with the codes, and a common law lawyer can begin to have some idea of how a civil code system works.*

In the civil law systems, code sections tend to be worded more generally and abstractly than statutes in common law countries, and the nature of the codes makes for a greater role for higher level generalizations in the written law.[27] Code sections tend to be more concise in wording as befits their general application in contrast to the more precisely worded statutes of specific application in common law countries.[28] When a code is enacted or amended, the pre-code history is for the most part left behind for a "fresh start."[29] Since there is no background of common law and since codes are theoretically comprehensive, doubt whether pre-emption has occurred does not arise. (The conciseness/precision dichotomy is also reflected to some extent in accounting standards.[30])

> *This conciseness coupled with the presumption that a code supplants any previously applicable law carries over into other written materials of a legal nature, such as contracts and treaties. As a result, lawyers from civil law systems instinctively bridle at common law court decisions that interpret a contract's forum selection clause as non-exclusive unless it says "exclusive"*[31] *or holding that the Hague Evidence Convention was not intended to be mandatory because it did not say so.*[32]

The codes in civil law systems reflect a fully developed separation of private civil, public civil (constitutional and administrative), and criminal law.[33] Many civil law nations have separate, specialized courts for different areas of law (criminal, commercial, labor and employment, social welfare benefits, constitutional, administrative, etc.) even at the appellate level, and courts of more general jurisdiction are almost always divided into chambers specialized by types of cases.[34]

Litigants in the civil law systems have access to law only as already made,[35] consistent with the systems' goals of rationality and predictability—even certainty, and its primary philosophical principle is that the legislature, not the courts, makes policy decisions, weighs comparative costs and benefits, and chooses between competing interests.[36] The law is regarded as set by the legislature,[37] awaiting application to disputes by a judge's logical reasoning, and the facts of those cases are "fit into" the law, as it is sometimes described, by the process of determining the code sections that apply and their effect;[38] judges are expected to find the legal principle in the code and are bound not to deviate from the express provisions of the law.[39] There is a theoretical presumption in each civil law system that any given case would always end in the same result, since there is always just one, correct answer to a legal question,[40] but this has been termed an "illusion of certainty"[41] and is recognized in practicality as more ideal than reality.

> *When a client from a civil law system facing the first experience with common law litigation of any complexity is, as is almost inevitably the case, treated to a lengthy discussion of not completely consistent case law*[42]*—often with nary a statute mentioned—along with the conclusion that the law is not entirely*

settled and then, to top it off, is informed that the law could change with the client's case, at the hands of the trial judge (with potential further revision at the hands of an appellate court), the initial result can be stupefaction. The next stage of reaction can be serious doubt about the rationality of such a system and understandable questions about how an entity in a common law system comes to a conclusion about how to conduct itself consistent with the law when the law is both incomplete and potentially inconsistent from court case to court case, depending on when and where a case is filed.[43] *These are not questions easily answered, and American business people present can sometimes contribute some caustic observations on the commercial disadvantages of the U.S. common law system.*

Judges in the civil law systems are expected to resolve a case by applying one or more of the code sections to the facts,[44] using deductive and syllogistic reasoning with the facts being the minor premise and the applicable code section(s) the major premise.[45] This is in contrast to the inductive reasoning and use of analogy utilized in common law adjudication. The traditional concept has been that precedent plays little or no designated role in the civil law courts, that—at least in private disputes—precedent should be abjured in favor of the code language,[46] invoking the edict of Justinian: "Adjudicate not by examples but by laws."[47] To the extent interpretation of a code section is necessary beyond simply reasoning from its language, resort is generally had first to a code's own provisions on purpose, principles and interpretation, and then to a few leading commentaries and treatises written by academics and jurists.[48] Custom can in some countries play a minor continuing role in the resolution of civil disputes, usually as a result of code language.[49] The method of code interpretation, i.e., the sources to which reference is made and in what priority, varies from country to country.[50] The judge is expected to play the leading role in determining the applicable law on his own, without necessarily much guidance from the parties' attorneys.[51]

Clients from civil countries may resist authorizing the extent of legal research and briefing that common law lawyers take for granted as necessary, not only because they are used to a system in which the judge does much of his or her own research but especially since the research and briefing are both more time-consuming and otherwise more elaborate than in civil law countries and are usually—in particularly painful contrast to their systems—unrecoverable expenses.

Judges are specially trained professionals and career civil servants (they enter the profession directly from law school, sometimes having begun specialized training there), who speak anonymously for the courts as entities.[52] When it is a panel that has heard the case, there has traditionally been no such thing as a dissenting judge, although this has changed in the constitutional courts of some countries.[53] Indeed, in at least some countries, a dissenting judge will nonetheless sign what by common law standards is the majority's decision, i.e., all decisions become *per curiam*, since the judges speak only for the court.[54] Lay judges may serve in criminal courts and some specialized civil courts, such as commercial courts,[55] but civil juries are for the most part foreign to the civil law systems.[56]

The concepts of law (in the sense broader than statute) and right are not distinct.[57] (Indeed, in German, French, Italian and Spanish, they are the same word.[58]) Also, if a legal right has been infringed, this necessarily implies a remedy.[59]

Thus, clients from civil law systems find it incomprehensible that a law for the benefit of the private sector does not necessarily imply a private civil remedy, since in their system that is essentially impossible.

Remedies are determined in a fashion that to some extent is reminiscent of the common law equity system, from broad legal principles not necessarily in a code, with the appearance of broad judicial discretion, e.g., to order specific performance or provisional remedies.[60] There is nothing, however, like punitive damages,[61] and there is little that looks like the contempt power.[62] A law of remedies as known to the common law system had no reason to develop without either the right to trial by a transitory jury or the history of separate law and equity courts.[63]

The legal profession tends to be more definitively divided among those in private practice, those in-house at private entities, those in public employment and those in academia.[64] Attorneys in private practice, in contrast to the courts and judges, tend to be generalists, viewed more as guides to the legal system overall, rather than specialist champions.[65] The boundaries of acceptable advocacy in civil litigation, particularly as concerns facts, are considerably more constrained than in the common law systems.[66] Privately initiated litigation is not accepted as a substitute for legislative regulation or other means for societal reform, and there is no role for private attorneys-general.[67]

The civil law system is sometimes conceived of as an effort to approach law as science,[68] leaving the common law system to be described as more resembling law as art.

C. Selected Substantive Differences with the Common Law

Sometimes, the reaction of a client from a civil law country to a litigation in the U.S. is rooted in differences in the two systems' bodies of substantive law. Without attempting to be comprehensive, and at the risk of considerable generalization and oversimplification, some of the contrasts with the common law most frequently seen in civil code countries include the following:

- Contracts are divided into several types, e.g., sales, employment, leases, contracts for work, contracts for services, etc., for each of which some validity requirements differ and/or different terms will be implied by law. Contracts often require greater formalities but generally no consideration (gifts are often enforceable), although cause may be required for enforcement.[69] The maker of an offer has less control over its duration than under the common law.[70] The civil code, by either specific provision or presumption, predetermines many matters not otherwise specified by the parties and there is no need to anticipate the possibility of a change in judge-made law or to attempt to constrain a jury, so contracts are much shorter and more succinct than under the common law.[71] Interpretation often focuses on consent, i.e., to what the parties intended to be bound, a relatively subjective standard, rather than the more objective common law standard of reasonable expectations.[72] Contractual penalties are not disfavored.[73] The concept of contractual good faith is usually more robust.[74] Doctrines comparable to mistake, deceit, duress, misrepresentation, frustration of purpose and third-party beneficiary contracts differ in concept and sometimes in effect as well.[75]

- Delict (tort) law is less clearly defined by specific duties like common law torts and is instead founded first and foremost on a general duty of care, to some extent as if *prima facie* tort were the primary designation for a non-contractual civil wrong, whether intentional or not, and individual torts comprised no more than a non-exhaustive list of examples.[76] Although it was a twentieth century development, most civil law jurisdictions have imposed a duty to rescue while the majority of common law jurisdictions have not.[77]

- Ownership of both tangible and intangible property is less divisible and sometimes less transferable,[78] e.g., copyright.[79] The transferable right of use (usufruct) therefore plays an important role in property law.[80] The law of real property is usually much simpler than under the common law with its strong, lingering feudal influences, e.g., there are no future interests.[81] Leases are simply contracts.[82] There is often still available a retention of title for personal property in addition to security interests.[83] Recordation or registration can be more definitive than in common law systems, e.g., for real property and trademarks, but not for liens, for which there is often no registration or public filing system.[84]

- Publicly held, and the approximate equivalent of closely held, corporations are two different legal forms with different capitalization requirements and different forms of corporate governance (the smaller form looks to some extent like an American LLC), both of which are different than in the U.S. system.[85] Shareholders usually have stronger powers than in common law countries,[86] but shareholdings are often more obscure, since bearer shares are usually allowed.[87] There is usually more publicly available information about business entities that are not publicly traded corporations, such as the amount of paid-in capital and the identity and extent of authority of certain firm officials, as to which there is a legal right of reliance.[88] The concept of corporate officers does not really exist. A distinction is drawn between the legal form of business entities and that of entities not formed to conduct a profit-making business, i.e., the equivalent of a not-for-profit corporation seldom much resembles a business corporation.[89]

- There is a far broader and more substantive role for notaries, who handle wills, deeds, other conveyances, mortgages, the formation of business entities, marriage contracts, and several other types of transactions in a non-adversarial, quasi-fiduciary process, representing all parties involved.[90]

- There is traditionally no law of trusts,[91] and decedents' estates are not legal entities (the assets technically pass to the heirs upon death,[92] hence there is usually an inheritance tax but never an estate tax). Wills, like contracts, are usually surprisingly succinct by common law standards.[93]

II. Civil Litigation in the U.S. for Clients from Civil Law Systems

A. Why Litigation in the Two Systems Is So Different

There are five major sources of the differences between civil litigation in the common law systems and in the civil law systems:

- As just explained, the history, background philosophy, nature, structure and substance of each sys-

tem are significantly different, as a result of which arguing and resolving a court case in a civil law country involves a different reasoning pattern from frequently differing premises.[94]

- There is no jury in civil litigations in the civil law systems: a judge or group of judges—in some systems acting in a series, in others as a panel—decides all factual and legal issues.[95] The presumptive reservation of the resolution of disputes of fact for a jury has been the leading determinant of many aspects of U.S. civil procedure, as a result of which significant differences have developed between the U.S. and civil law countries, particularly in regard to the responsibilities and relative roles of the judge and the attorneys.

  It can be most helpful to sit down at the outset of a U.S. lawsuit and to point out to a client from a civil law country the many aspects of civil procedure that ultimately relate to the role of the jury, a concept that has no role in civil litigation in most other countries and certainly not in the civil law countries. The civil law client's view of U.S. juries is heavily colored by the news and entertainment media, and, whenever issues relating to a possible jury trial surface, providing a more accurate picture can result in a more confident client.

- As compared to the common law system, the history and underlying theory of the civil law systems result in a relatively greater emphasis on:

  — written rules and principles of more general application as opposed to the facts of a particular case;[96]

  — legal doctrine, namely, the codes, commentaries and treatises,[97] leaving case law, with the exception of certain areas of public law, to play a minor and subordinate role (to the limited extent it may be available and play a role at all);[98]

  — documentary evidence and other written submissions as opposed to oral testimony;[99]

  — written summaries of testimony to the exclusion of any verbatim record of testimony (there is in fact no such record made);[100] and

  — the judge's role in determining both the legal issues and facts ultimately considered and the evidence adduced, sometimes termed the inquisitorial model, as opposed to the common law adversarial model.[101]

  In a case filed on behalf of a German-owned entity in which there were serious allegations of fraud, the German lawyer supervising the process indicated at an early stage his strong concern about the possibility that the defendants would produce forged documents. The immediate response of the lead U.S. attorney was: "Actually, my chief concern is the possibility of their giving false testimony." This was a classic illustration of the differing orientation of the two systems.

- The scope of civil litigation in a civil law system is generally less expansive.[102] Civil litigation is less moralistic, less regarded as licensing the parties to conduct a search for the truth and more as providing a public service, making a court available to effect the resolution of a private dispute for the sake of public order; it is more narrowly concerned with whether the plaintiff can prove the allegations and also more concerned with avoiding invasion of privacy of both parties and non-parties (whether natural persons or other legal entities).[103]

  As a result, there is a greater reluctance in civil law systems to involve non-parties in a civil litigation,[104] which can come into play when evidence is sought from non-parties located in civil law countries pursuant to the Hague Evidence Convention or letters rogatory. The concerns behind the limits on the scope of civil litigation in civil law systems include past (historical) abuses and efficiency. Specific aspects of their civil procedure, such as restrictions on the ability to compel the production of documents, restriction of attorneys' fees on all sides to a proportion of the amount in controversy, and the unspoken responsibility of the judge, all work together to maintain a relationship between the stakes and the resources expended in the vast majority of cases. The very minor role that efficiency concerns are given in the rules of civil procedure in the U.S. can leave the client from a civil law country astounded as the costs spiral to an utterly unanticipated level with no apparent control.

- As discussed below in Part II.C., civil procedure is profoundly different.[105]

B. General Challenges When the Client Is from a Civil Law System

The force of the following factors varies with the familiarity the civil law client has with the client's own legal system and with the U.S. legal system, and can be particularly strong when one of the client contacts is a lawyer from a civil law system[106]:

- The absence in the U.S. of comprehensive, systematic and integrated codes and the incomplete,

unsettled, ever evolving nature of the common law, coupled with the attendant uncertainties concerning the result in any given case, leave clients from civil law systems very uncomfortable when confronted with assessing and managing litigation in the United States. It can be difficult being fully frank about the comparatively wide range of potential results while also keeping them comfortable enough with the risks to avoid an early, panicked effort to settle at an undue cost.

- As a general matter, the civil law systems regard the common law litigation system, and particularly that in the U.S., as less efficient and even, in some respects, more primitive.[107] They abhor the idea of having a complicated commercial case, whether involving contract, tort, intellectual property or some other category of issues, decided by a lay jury that is not required to explain its decision and is thus apparently free to proceed out of passion or prejudice.[108] They see U.S. jury trials as composed of too much show and not enough (legal) substance and juries as too susceptible to manipulation. The use of juries as a rule in civil trials happens only in the U.S. and some Canadian provinces. (In England, it is only intentional tort cases where there is a civil jury trial right, and it is qualified.[109]) To clients from other jurisdictions, the U.S. system appears outdated, isolated, idiosyncratic and even idiotic. They view punitive damages as anachronistic and irrational.

  This has much to do with the overwhelming preference of foreign clients for arbitration clauses in contracts with U.S. partners.

- Civil procedure is different enough that the decision making of a civil law client caught in a common law litigation can easily become dysfunctional unless the procedural differences, and their impact on strategy and actions, are explained at critical junctures.[110]

- Because judges in the civil law systems are civil servants, and not officials of a separate branch of government speaking in their own names, and the courts have only those powers bestowed by the code, clients from many civil law systems are not used to the prestige, authority, and wide-ranging discretion of trial court judges in the common law systems.[111]

  As a result, common law attorneys can appear almost obsequious in comparison to the less deferential dealings of civil law attorneys with the judges in their systems, whose view of trial court judges is commonly closer to our view of administrative law judges or even of bureaucrats in general. (While this can vary considerably from country to country, some civil law attorneys would barely hesitate before voicing stern objections in open court to a judge who kept them waiting for an inconvenient length of time.) Films and television have prepared people from other nations for at least some of the decorum in American courtrooms, but not for the formality and deference involved in other dealings with the courts, e.g., concerning scheduling. Foreign clients will say: "Well, just tell the judge I can't be there that day [for a trial or mediation or court-ordered settlement negotiation or deposition], because I have a business meeting [or scheduled vacation, or other commitment]" and then be nonplused when the response is that a formal written motion is necessary. The full impact of the reality that each judge is pretty much a monarch in that judge's courtroom and the range of sanctions at the judge's disposal, which far exceeds that available to judges in civil law systems, needs to be explained.

  In addition, since common law judges are usually chosen by a political process, a concept foreign to those for whom judges are professional, career civil servants, clients from civil law countries can—to the discomfort of their common law attorney—be disconcertingly quick to voice questions about the judge's competence, bias and even corruptibility if decisions are not favorable.[112]

C. Civil Procedure in Detail

While the civil law systems are certainly not uniform in their civil procedure, there are sufficient commonalities to discuss them together in generalized terms.[113]

1. Jurisdiction, Venue and Service of Process

What common law systems refer to as subject-matter jurisdiction largely corresponds in the civil law system to the concept of competence (sometimes translated as substantive jurisdiction). Hence, the term competence-competence in international arbitration is intended to refer to an arbitration panel's authority to determine arbitrability.

A single, nationwide court system is the rule, and even almost all civil law countries with a federal system of government have a single court system; having multiple systems with concurrent jurisdiction is virtually unheard of.[114]

As a result, the issues concerning federal and state jurisdiction that often arise in U.S. litigation almost never have counterparts in civil law systems and almost always must be explained from the ground up. The client's automatic apprehensiveness about juries in civil cases means that the available information about the jury pool and verdicts should be shared with the client if these are factors in forum-determining decisions.

The civil law systems do not distinguish between personal jurisdiction and venue.[115] This conceptual difference gives rise to a translation difficulty when discussing in English this aspect of civil procedure, an aspect sometimes translated as jurisdiction, sometimes venue, and other times territorial competence. Where within a court system a case may or must be brought is dealt with in detail in the code of civil procedure (there is no general, pre-existing "power" jurisdiction *in personam*[116]), and most of what is referred to in the U.S. as personal jurisdiction, general vs. specific jurisdiction and venue are dealt with in a series of rules that look to common law lawyers like venue rules, with the strongest emphasis usually being on the domicile of the defendant and with certainty and simplicity preferred over equity.[117] For this reason, any concept comparable to long-arm or extra-territorial jurisdiction is for the most part more limited than in the U.S. system (there is no basis for jurisdiction/venue resembling "doing business"), although in some cases, jurisdiction *in personam* or *in rem* can be exercised in a fashion that could fail a due process test under the U.S. Constitution.[118] There is no concept of *forum non conveniens*.[119] Service of process is ministerial and not bound up with personal jurisdiction.[120]

As a result, when these issues result in expensive motion practice and time delays in U.S. litigation, frustration can follow if foreign clients are not forewarned. At the same time, much about the U.S. concepts of long-arm and other extra-territorial jurisdiction can seem overbearing or outrageous to them, and, when this is coupled with their other reservations about the U.S. civil litigation system, they can be very eager to contest personal jurisdiction asserted on such a basis. The urge to fight this issue should be tempered by the reality of the likely outcome and the expense and time involved.

2. Pleadings

Pleadings (along with briefs and court decisions) in the civil law systems offer a discussion of facts and law more integrated than in U.S. practice, with the law, as already noted, playing a more upfront role.[121] The initial pleadings in civil law systems contain a great deal more evidentiary detail than in the U.S. Depending to some extent on the country: key evidentiary documents are described and attached; key witnesses are identified and their anticipated testimony summarized; the relationship of the evidence to the legal theories is explained; and factual and legal objections of the opposing party of which there is reason already to be aware are raised and responded to.[122] In common law terms, it is as if a *prima facie* case is made out at the pleading stage.

The amount of damages sought must be stated, but because it can have consequences for what a party may have to pay in court fees and/or attorney's fees, either to the party's own attorney and/or to the opponent's attorney if the party does not fully prevail, the amount of any monetary damages claimed is computed carefully.[123]

Clients from civil law systems often have to be assured about the adequacy of U.S. notice pleadings. It will need explaining that nothing more elaborate is required and that greater detail at the pleading stage is neither expected nor needed and can in fact be strategically disadvantageous. Foreign defendants inexperienced in U.S. litigation may at first take the amount of a damages demand more seriously than it realistically deserves and will need a reassuring perspective. It can be difficult to deliver that perspective without doing damage to the common law system's credibility.

3. Pre-trial Proceedings

Civil law systems differ in how they proceed immediately after the complaint-equivalent. There may be only a single response, or there may be a series of written exchanges among the attorneys and the judge, or even one or more preliminary hearings, designed to refine the legal issues and to narrow the factual issues necessary to decide the case, and there may or may not be set time limits.[124] There may be the rough equivalent of a motion to dismiss if the opposing party puts forward a response that claims the complaint is legally defective or insufficient.[125] This is usually the entire extent of the pre-trial phase. In most civil law systems, there is no equivalent of motion practice.[126]

Because they have no juries, civil law systems do not have the same tight restraints against resolving factual disputes at the "pleading" stage, and clients from those systems can regard our rules in this regard as frustrating and insanely inefficient. The reason for these rules in the U.S., namely, the reservation of factual disputes for the jury as a matter of constitutional right, should be explained. Clients from civil law systems will find U.S.

motion practice bewildering, a sentiment that can become disgust as the delays and costs mount.

Nonetheless, the courts in most civil law countries have become clogged enough and court management reforms in the U.S. have had enough effect so that few foreign clients are surprised any more by overall time periods in U.S. litigation.[127]

4. Provisional Remedies

Because a judge's determination of factual issues prior to trial presents no risk of trammeling a jury's prerogatives, provisional remedies can often be easier to obtain in civil law systems than in common law countries, and they are more often granted *ex parte.*[128] The concerns are more whether the judge has sufficient facts and there has been adequate development of the legal issues to justify an order that could have drastic effects.

Accordingly, clients from civil law countries are often disappointed and skeptical when a U.S. attorney is pessimistic about the potential for a provisional remedy. They need to understand that the attorney is neither cowardly nor lacking in confidence in the case but faces a powerful presumption against any relief not based upon a jury's resolution of factual issues.

5. The Absence of Pre-trial Discovery

There is no pre-trial discovery in the civil law systems.[129] All evidence is produced during the trial phase either voluntarily as proof of the party's own case or at the direction of the judge.[130] Thus, the U.S. system of party-directed discovery, prior to trial and aimed at the entire universe containing the constellation of the case's facts, is alien to clients from civil law countries.[131] The various U.S. discovery methods, the legal force of the notices, the use to which the responses can be put, and the potential sanctions for less than full compliance will therefore all need to be explained in detail if the foreign client has not encountered them before.

Clients from civil law systems are used to having the major consultations about issues when the complaint is drafted (and can be astonished by the alacrity with which a U.S. attorney prepares a complaint), after which they are used to seeing the judge play the leading role in shaping the issues, which often narrow during the course of the case. The common effects of pre-trial discovery, i.e., broadening or introducing new issues, and the need for both client consultation and potentially costly analysis, not to mention another round of pre-trial discovery, can be unexpected.[132]

The foreign client may presume that interrogatory answers will be sent directly to the judge. When informed that the answers will be sent instead to the opposing attorney, the client may fail to appreciate the answers' seriousness and their potential for use before a jury.

With regard to documents, foreign clients may mistakenly assume that, as in their system, they retain a great deal of control over what documents from their own files are provided.[133] *Not only the typical scope but also the actual legal force of document "requests" in the U.S. is a shock, and the potential consequences must often be explained before they change an initial response along the lines of: "Oh, you don't need to spend the time reviewing our files, I'll do that and just send you what I think is useful/important."*

The reactions of a client from a civil law country to the pre-trial discovery process as it proceeds can begin with a certain eager fascination with the novel idea that the opposing party can be forced to empty out the contents of its files and employees' memories (sometimes including outsized hopes for dramatic results) but can frequently turn to shock and dismay as the costs mount and there appear to be few controls on either scope or expense.[134]

6. The Trial

Civil trials in the civil law systems are conducted in stages, involving a number of discrete hearings over time, often by issue or by witness.[135] There is no set order of each party's proof such as at a common law trial.[136] The judge frequently will schedule the hearings in order of potential impact on the litigation, seeking initially to hear and to decide one or more issues that could be determinative and thus to short-circuit the litigation.[137]

As a result, clients from civil law systems have an expectation that, if a determinative factual issue can be identified, the case can be quickly resolved. It must be explained to them that the judge has no authority to decide disputed factual issues and that the presence of any disputed issue of material fact will require a jury trial, which can occur only after all factual issues have been investigated by the parties.[138]

Again, because the civil law systems lack juries in civil cases, there is no equivalent of a summary judgment motion. Summary judgment will, however, because of its potential to avoid a jury, be attractive to a foreign client.

These "hearings" in the civil law systems may or may not be public and may or may not include oral testimony.[139] They will often be preceded and/or followed by the filing of documentary and other written evidence and written arguments from the attorneys.[140] In commercial cases, particularly, there is a preference in many countries for deciding the case based on documents. If there is witness testimony, it will often initially be provided by the submission of written witness statements (sometimes signed, but not always sworn affidavits), which sometimes may then be the only "testimony" provided.[141] A hearing during the trial phase may consist solely of the attorneys and judge exchanging views on the evidence.[142]

Because there is no jury, hearings can often veer back and forth between factual and legal issues. It is usually ultimately up to the judge which witnesses will testify[143] and which documents, if any, are requested from a party,[144] but the judge's power to require either is limited by either law or traditional limits on discretion, and much that to a common law lawyer would seem relevant and therefore ripe for inclusion in the trial will not be available.[145] For the judge to effect a document request from a party, it must be quite specific, often for individual documents or for at most narrow categories, and there must usually be a showing both that the documents exist and why they are relevant and material.[146] All documents produced generally automatically become part of the record.[147]

> *The cost concerns of clients from civil law countries can convert to outright ire when they realize that the enormous expenses of document discovery are expended only to offer into evidence a mere fraction of the paper produced.*

If there is actual oral testimony at a hearing, the primary or even exclusive questioning will be by the judge; attorneys may suggest questions but will not often ask them.[148] Non-polemic questioning by a professionally trained and experienced neutral is considered a better avenue to discovery of the truth, and aggressive cross-examination will not be allowed.[149] Attorney preparation of witnesses is usually considered quite improper, can be fatal to a witness's credibility, and may result in sanctions for the attorney.[150] Parties are often exempted from any requirement to be sworn since self-interest is too obvious to overcome with an oath.[151]

Generally, at the end of a witness's testimony, the judge will write up a summary from notes, read it back to the witness or give it to the witness to read, and give the witness an opportunity to offer corrections or other changes and perhaps the attorneys an opportunity to comment.[152] It is only the final summary, with whatever revisions the judge has made, that becomes part of the record.[153] Depending on the specific system, the witness may be asked to sign the summary.[154]

> *Clients from civil law countries can have a negative reaction to the requirement that all testimony be under oath or its equivalent, a reaction that can be aggravated by the tactic of some U.S. litigators of asking a witness at the beginning of a deposition whether the witness is familiar with perjury and its penalties. (The disfavor of oaths, particularly for parties, also makes verified pleadings an alien concept.) Foreign clients must be thoroughly prepared for the nature of adverse questioning, whether at a deposition or cross-examination at trial. They must often be assured that pre-testimony preparation is entirely proper and expected, indeed, virtually necessary, since the other side is certainly going to do it. The importance of setting aside enough preparation time must often be explained; foreign witnesses often expect to arrive the night before they testify and more or less "wing it."*
>
> *Because their civil trials occur in stages, they often do not fully appreciate the need to develop a coherent strategy at the outset and the need to adhere to it or risk great damage to the case or their credibility. They often believe, "Well, if this argument doesn't work at first, next we'll be able to try a different argument."*
>
> *Witnesses from civil law countries may not fully appreciate the importance of getting their testimony right the first time, anticipating a far greater revision opportunity than is possible as a practical matter in the U.S.*
>
> *When a jury trial comes along, since they are used to situations where even a corporate representative appears only briefly, perhaps for only part of one day, foreign clients often resist the idea of having one or more high-ranking executives sitting in court for days at a time. The need for this to humanize the company for the jury must be explained early on.*

7. Evidentiary Issues

As a general matter, the rules of evidence in the civil law systems are fewer and much looser, as might be expected in the absence of a jury.[155] For example, the testimony of "fact" witnesses will often include opinions, conclusions and even surmise; what the common law terms "foundation" will generally play little or no formal role; and hearsay exclusions are rare.[156] Written statements from witnesses not subject to cross-examination may be accepted, and often without even any notarization of the signature much less being sworn.

Clients from civil law jurisdictions can both become very frustrated with our rules, which seem to fly in the face of common sense, and be very frustrating to work with as witnesses because they expect more latitude in how they testify. Witness preparation needs to include an explanation of why answers need to be worded a certain way to avoid objection and exclusion.

The less central role of oral testimony in the civil procedure of civil law countries and the absence of strict evidentiary standards, such as for personal knowledge of a witness, combined with (a) the statutorily established legal authority of certain officials to represent a business entity in court (b) concerns about efficiency and witness effectiveness and sometimes (c) a desire to avoid an accusation that a company official's fiduciary duty to have a certain level knowledge about the firm has been fulfilled, have led to the sometime practice of firms in civil code countries proffering just one or two high-ranking representatives as witnesses to cover the complete content of oral evidence to be offered on behalf of the company, as if, in U.S. terms, a party were entitled to invoke the procedure of Fed. R. Civ. P. 30(b)(6) at trial for its own benefit.

Commercial clients from civil law countries often greatly underestimate the total number of their employees and other witnesses who will have to testify on a commercial case, assuming that they can avoid the effort of multiple witnesses and/or having to rely on witnesses whose effectiveness in court is in question by designating one or more official(s) of the firm to present testimony on a wide range of topics after having been educated within the company. The extent of requirements for personal knowledge, e.g., Fed. R. Evid. 602, must be explained.

Many civil code systems have a broader set of evidentiary privileges than in the U.S., e.g., for patent agents, accountants, financial information and trade secrets, and even for certain topics of testimony and categories of documents.[157] To some extent, the privilege against self-incrimination has also entered civil litigation in the civil code countries.[158]

The absence of these privileges in common law civil litigation, the options such as protective orders, and their concomitant expense and risks must be explained, the earlier the better.

Many more documents are self-authenticating in civil law litigations (e.g., most notarized documents,[159] indeed, their contents may be virtually immune to challenge[160]) or presumptively so, absent an objection and a showing of grounds for exclusion. Authentication requirements and procedures are usually considerably less elaborate and strict than in the common law systems.

Clients from civil code countries are astonished at our authentication requirements and rituals and will not anticipate the potential need for oral testimony to authenticate virtually every document. Again, this needs to be explained, as does the inalterable inability to submit written witness statements at trial. The elaborate evidentiary rules applicable to jury trials tend to reinforce the foreign client's highly negative view of the U.S.'s use of juries.

Court-appointed experts, reporting directly to the court in writing, are the rule in civil law litigations.[161] Party-retained experts are the exception and have a limited role, e.g., to provide a report in support of a party's initial claims, to make the case that the court needs to appoint an expert to report on a given issue, or to aid the party attorneys in reacting to the court-appointed expert's report.[162] Even the court-appointed experts seldom testify live.[163]

Clients from civil code countries will often expect party-retained experts to be in place, and even to have rendered their reports, before the pleading is filed and will over-emphasize credentials, i.e., hoping to impress the judge, to the exclusion of the ability to communicate with a jury. They will also marvel that experts compensated by the parties and witnesses extensively prepared by the attorneys retain any real credibility.[164]

The civil code creates a fair number of evidentiary presumptions.[165] One of the ways the civil law systems can compensate for lack of pre-trial discovery is often that the judge has some authority effectively to shift the burden of proof (production)—if only by invoking a negative inference—on issues depending on where the evidence is.[166]

Clients from civil code countries are often surprised at the need to prove a fairly basic and what in their system is a presumptive proposition, and they sometimes expect that a key piece of evidence can result in a legal burden shifting.

8. Post-trial and Appeal

Without a jury, nothing like post-trial motions exists in civil law litigation.

As a result of privacy concerns, access by the public to court decisions in civil cases may be limited, e.g.,

only by special request, and parties' names may be blacked out from photocopies and redacted from the few published decisions.

The first level appeal can be pretty much a trial *de novo*, including the taking of additional evidence, and while this varies from country to country, there is always at least a factual review available.[167]

> *Clients from civil law systems do not always appreciate the need to get all evidence into the record at the trial court level, both because of the difference in the nature of a first level appeal and because, in their trials, there is almost always an opportunity, and often a right, to have another hearing scheduled at which a party can respond to evidence presented.*[168]

Higher level appeals usually deal only with issues of law; at what point a further appeal is by permission only as opposed to as of right, and whether the preference is a remand to the lower court or a revision of the judgment by the appellate court, varies by nation.[169]

Courts in civil law systems lack much of the common law contempt power; enforcement of orders and judgments in civil cases focuses on power over property, not persons.[170]

> *Clients from civil code countries may underestimate the consequences of disregarding a court order, whether a provisional remedy, an order enforcing a discovery request, or a permanent injunction. They usually do not anticipate that a court in a civil case can use what look like criminal sanctions to enforce its authority.*

9. Miscellaneous

Class actions binding all members of an identified class do not exist,[171] and are considered evidence that the U.S. litigation system has exceeded the bounds of reason.[172]

Compensatory damages in personal injury cases are distinctly lower than in the U.S. and may be regulated by law in a way that is somewhat similar to the workers' compensation system in the U.S.[173] Many civil law nations have universal health insurance with the concomitant consequence of what is effectively an anti-collateral source rule for most or all medical expenses.[174] Pain and suffering awards are often pittances by comparison with awards in comparable cases in the U.S.[175] Punitive damages do not exist and are viewed as a violation of the separation between civil and criminal law.[176] At the same time, there are few if any legal limits on contractual penalties that in the common law system would be disfavored or even unenforceable.[177]

> *Clients from civil law systems who find themselves as defendants in a personal injury case in the U.S. will have some idea that the verdict can be exorbitant by their standards but will need to hear the reality concerning the enormous exposure in chapter and verse.*

> *Commercial clients used to a civil code system will not be happy when they are informed that a contractually negotiated penalty is potentially subject to both an after-the-fact attack by the other party and a court's review as to reasonableness, an issue that deserves to be raised by the transactional attorneys involved in the negotiations in the first instance.*

It is often much easier to recover for defamation, but that is also true in a common law system such as England's. In at least some civil law systems, communications that we would categorize as non-actionable insults, opinions or commercial puffery can be actionable.

> *This difference will require the U.S. attorney to explain the effect of the First Amendment's broadly worded guarantee of free speech when asked whether such a suit for libel or slander is possible in the U.S*

10. Attorneys' and Court Fees

In all civil code countries, the prevailing party is reimbursed at least some of the attorneys' fees by the losing party.[178] Those fees are, at least in some countries, subject to regulation, e.g., they may be restricted by law to a set percentage of the amount in controversy.[179] Contingency fees are prohibited by law in most civil law systems.[180]

> *The time intensive nature of U.S. litigation and the resulting hourly fees, with no required relationship to the amount in controversy, can be a shock to clients from civil law countries, especially when added to the reality that, except in a few categories of cases, the fees are unrecoverable. Client requests for budgets should result in estimates that leave no room for surprise or misunderstanding later in the litigation. For example, foreign clients may have little understanding for the fact that the opponent's style of litigation practice (e.g., engaging in extensive motion practice on relatively minor issues) may have a significant impact on the legal fees charged to the clients by his own attorney.*

> *Some clients from civil law countries assume all U.S. litigation attorneys are willing to work for a contingency fee and may even*

presume that this is decided at the client's option.

Court fees in civil code countries are often based on the amount in controversy and can be substantial in comparison to the relatively small amounts required in the U.S., even of a losing party.[181] As with attorneys' fees, prevailing parties in civil law systems will usually be able to collect the court fees from the losing opponent. The potentially very significant obligations of a plaintiff that does not prevail means that, in many civil code countries, a plaintiff can be required to post security against the potential liability.[182]

This requirement is sometimes raised—generally unsuccessfully[183]—as an argument opposing a forum non conveniens *motion in an American court when the alternative forum is in such a country and the amount in controversy is significant in proportion to the plaintiff's means.*

11. Settlement Negotiations

Courts in civil code countries traditionally have an obligation to try to settle the case before hearing it,[184] and the loser pays rule provides a powerful incentive for pre-judgment settlement in many cases,[185] but, as with the civil law system generally, the points of departure for this effort are legal norms.

Although clients from such countries will therefore find settlement efforts under court aegis to be normal, or even expect them, the American focus in those negotiations on facts, practicalities such as litigation costs, and intangibles such as jurors' potential prejudices or even the psychology of the other side, relegating legal issues to a minor or even nonexistent role, will strike these clients as seriously detracting from the legitimacy of the settlement negotiations.

Negotiating styles can vary tremendously by culture, and all the civil law systems are in cultures with negotiating styles that are anywhere from subtly to drastically different from the American style.[186] This is an extensive topic, more complex than can be thoroughly covered here, and therefore issues such as the roles of time, language, body language, emotional displays, and "saving face" or similar concepts will be passed over.

A few examples will suffice:

- In many countries, attorneys have only a very limited role in negotiations, little more than that of scrivener.

  As a result, clients may expect to play an almost unassisted role in negotiations. Because of their discomfort with U.S. litigation procedures, this is somewhat less likely in litigation settlement discussions than in transactional negotiations, but if the issue of settlement is raised, they may then expect a meeting between the party principals—without attorneys present—to have the negotiations, or the client may, after a discussion with the client's own attorney about settlement, simply pick up the telephone and call the other side's principal without informing the attorney.

- The American negotiating style of beginning at opposite ends, widely separated, and gradually moving towards the middle, always in one direction, is not necessarily the pattern in other cultures.

  As a result, clients from another country can without prior careful counsel either make a mistake that is severely disadvantageous, such as making an opening offer very close to the bottom line (e.g., as a matter of honor or good faith) or effect a stratagem that can anger the other side, such as negotiating in reverse by reducing an existing offer.

- Americans tend to try to resolve one issue at a time and then move on to another issue, or to set a difficult issue aside and to come back to it if necessary, but basically to adhere to a mostly sequential model.

  Many cultures prefer to negotiate more holistically, which can frustrate Americans to the point of walking out, since they develop the feeling that nothing is being resolved. Keeping an American opponent in the negotiations can require either your explaining the client's culture to the opponent or convincing your client that issues need to be found that can be separately resolved to keep negotiations "on track."

12. Coordinating with Companion Litigation in Civil Code Countries

When a legal dispute transcends national borders and proceedings arise in more than one country, careful coordination is critical to avoid serious, even decisive, prejudice to the client. (The subject of anti-suit injunctions is beyond the scope of this article.) Stratagems that might be almost automatically effected in the U.S. can cause grave problems in companion proceedings in civil law countries where, e.g., "prior action pending" is an absolute bar,[187] and the eventual effect of the compulsory counterclaim rule resulting from a decision to file in federal court[188] can redound to the client's disadvantage elsewhere.

The liberal pre-trial discovery available in the U.S. may provide a net advantage or disadvantage, depending on where evidence is located and which party or parties can make use of U.S. procedures.

Differences on the criminal law side can mean that in some civil law countries it is more likely that a public authority such as the prosecutor or police could be involved in a business dispute, since the presentation there of a certain quantum of evidence can trigger a duty to proceed with a preliminary investigation, including seizure of potential evidence. Prosecutors in these countries are, like judges, civil servants and not political officials and often have less prosecutorial discretion than in the U.S.[189] As a result, they may not as easily simply relegate business entities to their civil remedies at the outset by declining even to commence an investigation, as so often happens in the U.S. when a case has little perceived value to the prosecutor.

> Clients from nations with civil law systems can be incredulous when their U.S. attorneys inform them that a local prosecutor will be quite unlikely to pursue minor matters such as petty theft by an employee or even a major matter if the consequences have *been purely economic and the matter is complicated (i.e., would be expensive and difficult for the prosecutor to pursue), without apparent political value, and could be the basis for a civil action by the victim.*

13. Translation Issues

The requirement of an oath for all U.S. testimony coupled with the almost invariably hostile questioning in pre-trial depositions and the primary importance in the U.S. system of oral testimony (not to mention the U.S. litigators' predilection for wide-ranging, poorly worded and lengthy questions) militates for testimony through interpreters at the pre-trial stage for all but the most fluent English speakers. Since reading knowledge of a non-native language generally exceeds oral fluency, English language affidavits or their legal equivalent can be more readily used. If the case goes before a jury, the desirability of a more direct personal connection between witness and jurors may change the calculus for choice of testifying language.

These issues need to be considered very early on, for two reasons particularly:

First, finding a truly able interpreter can be very difficult for many languages in many American locales. (The ideal situation is for a bilingual attorney to be present so the interpreter's work can be double-checked and objected to if appropriate.)

Second, to the extent the witness does not provide testimony in the same language under all circumstances, the record must be used to forestall cross-examination on the issue, e.g., if the witness often conducts business in English, has provided an affidavit in English and has sworn to interrogatory answers in English but insists on testifying at a deposition through an interpreter, there needs to be an explanation at hand to resist motions to eliminate the interpreter or to shift the cost to the testifying party.

Documents present different but equally serious issues, whether the translation is being offered by or against the party. Most translations involve some word choice. It is extremely valuable—in some cases, absolutely necessary—for a lawyer fluent in both languages to review the translation to assess whether what to the translator may have been an innocuous word choice could have serious legal consequences. Also, very few translators are generally fluent in both languages' legal jargon, so the quality of a translation of legalese can usually not be relied upon without a bilingual lawyer's review and final edit. Indeed, because of the procedural and substantive differences in the legal systems, translations for many legal terms do not exist at all and can only be rendered by explanations, and any lesser attempted translation can be misleading.[190]

> *As just one example of the perils of needing to cross a language barrier, in German, the verb "annehmen" can mean either to accept or to assume. The legal consequences of this word being misinterpreted during testimony or mistranslated in a document can be easily envisioned. Also, because so many aspects of the common law legal system are unique, terms for such things as pre-trial discovery, depositions, document requests/demands, interrogatories, summary judgment, and many aspects of the jury system, or even the term "corporate officer" do not exist in any language other than English. Conversely, there is no accurate way to translate into English the terms from German, French, Spanish or Italian for their legal systems' rough equivalent of a closely held corporation or some of their terms for corporate officials.*

III. Conclusion

The reactions of clients from civil law legal systems who are inexperienced with civil litigation in the U.S. can be a great challenge to the common law attorney's duty to defer to the client's decision making, since some of those reactions can seem to be at odds with the client's own best interests. A better understanding of the client's likely pre-conceptions about civil litigation as they often develop from the nature of the client's home legal system can enable the U.S. attorney to enjoy a far more effective relationship with the foreign client.

Endnotes

1. J. Merryman, D. Clark & J. Haley, THE CIVIL LAW TRADITION; EUROPE, LATIN AMERICA, AND EAST ASIA 3-7 (1994) (hereinafter "THE CIVIL LAW TRADITION"); Apple & Deyling, *A Primer on the Civil-Law System* 1 (Federal Judicial Center 1995) (hereinafter "Apple & Deyling") <http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/$file/CivilLaw.pdf>.

2. M. Glendon, M. Gordon & C. Osakwe, COMPARATIVE LEGAL TRADITIONS 60 (2d ed. 1994) (hereinafter "Glendon *et al.*"); THE CIVIL LAW TRADITION, note 1 *supra*, at 65; R. Schlesinger, H. Baade, P. Herzog & E. Wise, COMPARATIVE LAW: CASES – TEXTS – MATERIALS 290-305 (6th ed. 1998) (hereinafter "Schlesinger *et al.*"); Clark, *The Idea of The Civil Law Tradition, in* THE CIVIL LAW TRADITION, note 1 *supra*, at 6; Schlosser, *Lectures on Civil-Law Litigation Systems and American Cooperation with Those Systems*, 45 Kan. L. Rev. 9, 17 (1996); Stein, *Roman Law, Common Law, and Civil Law*, 66 Tul. L. Rev. 1591, 1602 (1992); Tetley, *Mixed Jurisdictions: Common Law vs. Civil Law (Codified and Uncodified)*, 1999-3 Univ. L. Rev. (N.S.) 591 (Part I) and 1999-4 Univ. L. Rev. (N.S.) 877 (Part II), *reprinted in* 60 La. L. Rev. 677, 679, 684, 691-99 & 727-37 (2000).

3. BALLENTINE'S LAW DICTIONARY 231 (3d ed. 1969).

4. P. de Cruz, COMPARATIVE LAW IN A CHANGING WORLD 54 (2d ed. 1999) (hereinafter "de Cruz"); N. Foster & S. Sule, GERMAN LEGAL SYSTEM AND LAWS 13-16 (2003) (hereinafter "GERMAN LEGAL SYSTEM"); Glendon *et al.*, note 2 *supra*, at 46-47; THE CIVIL LAW TRADITION, note 1 *supra*, at 215; K. Zweigert & H. Kötz, COMPARATIVE LAW 76, 184 & 278 (T. Weir trans., 3d rev. ed. 1998) (hereinafter "Zweigert & Kötz"); Berman, *Law and Revolution: The Formation of the Western Legal Tradition, in* THE CIVIL LAW TRADITION, note 1 *supra*, at 268-73 & 317-18.

5. *See* R. David & D. Brierley, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 310-11 (1985) (hereinafter "MAJOR LEGAL SYSTEMS"); van Caenegem, *Judges, Legislators and Professors: Chapters in European Legal History, in* THE CIVIL LAW TRADITION, note 1 *supra*, at 347.

6. Clark, *The Medieval Origins of Modern Legal Education: Between Church and State*, 35 Am. J. Comp. L. 653, 693 (1987).

7. De Cruz, note 4 *supra*, at 54-55; GERMAN LEGAL SYSTEM, note 4 *supra*, at 15 & 18; Glendon *et al.*, note 2 *supra*, at 48; THE CIVIL LAW TRADITION, note 1 *supra*, at 215-16; Clark, note 6 *supra*, at 671-73; Wieacker, *Foundations of European Legal Culture*, 38 Am. J. Comp. L. 1, 13 (1990).

8. De Cruz, note 4 *supra*, at 56-57; GERMAN LEGAL SYSTEM, note 4 *supra*, at 16-17; Glendon *et al.*, note 2 *supra*, at 48-49; THE CIVIL LAW TRADITION, note 1 *supra*, at 216; Schlesinger *et al.*, note 2 *supra*, at 239-40; Clark, note 6 *supra*, at 679, 681, 698-99, 700-01 & 718; Wieacker, note 7 *supra*, at 13; Apple & Deyling, note 1 *supra*, at 6-8.

9. De Cruz, note 4 *supra*, at 54 & 57; GERMAN LEGAL SYSTEM, note 4 *supra*, at 17; Glendon *et al.*, note 2 *supra*, at 48-50; K. Ryan, AN INTRODUCTION TO THE CIVIL LAW 15-22 (1962); Zweigert & Kötz, note 4 *supra*, at 135; Clark, note 6 *supra*, at 678-81; Apple & Deyling, note 1 *supra*, at 6 & 9.

10. Wieacker, note 7 *supra*, at 13-14 n. 16.

11. Glendon *et al*., note 2 *supra*, at 52-58; THE CIVIL LAW TRADITION, note 1 *supra*, at 216-17; Weiss, *The Enchantment of Codification in the Common-Law World*, 25 Yale L. J. 435, 453-54 (2000).

12. Glendon *et al*., note 2 *supra*, at 49; THE CIVIL LAW TRADITION, note 1 *supra*, at 213-19; Schlesinger *et al.*, note 2 *supra*, at 241-43; Tetley, note 2 *supra*, 60 La. L. Rev. at 716; Apple & Deyling, note 1 *supra*, at 9-12.

13. De Cruz, note 4 *supra*, at 57-59; Schlesinger *et al.*, note 2 *supra* at 240, 243-245 & 271; Zweigert & Kötz, note 4 *supra*, at 85-89 & 135-38; Baudenbacher, *Some Remarks on the Method of Civil Law*, 34 Tex. Int'l L. J. 333, 337 (1999); Stein, note 2 *supra*, at 1594-95; Oehler, *Working with a Code: Is There a Difference Between Civil-Law and Common-Law People?*, 1997 U. Ill. L. Rev. 711, 713, (1997); Tetley, note 2 *supra*, 60 La. L. Rev. at 687; Weiss, note 11 *supra*, at 452-54 & 463-64; Wieacker, note 7 *supra*, at 16-19; Apple & Deyling, note 1 *supra*, at 12-14.

14. Schlesinger *et al*., note 2 *supra*, at 269; Stein, note 2 *supra*, at 1597. *See* Clark, note 6 *supra*, at 686-93.

15. Weiss, note 11 *supra*, at 470-527.

16. Farnsworth, *A Common Lawyer's View of His Civilian Colleagues*, 57 La. L. Rev. 227, 229 (1996); Weiss, note 11 *supra*, at 520-21.

17. THE CIVIL LAW TRADITION, note 1 *supra*, at 1149; Cappalli, *At the Point of Decision: The Common Law's Advantage Over the Civil Law*, 12 Temp. Int'l & Comp. L. J. 87, 93-94 (1998). Thus, the civil law systems are sometimes known as the civil code systems.

18. Glendon *et al*., note 2 *supra*, at 67; Cappalli, note 17 *supra*, at 97; Apple & Deyling, note 1 *supra*, at 30; *see* Weiss, note 11 *supra*, at 456.

19. Stein, note 2 *supra*, at 1595 & 1600.

20. *See* CIVIL LAW TRADITION, note 1 *supra*, at 937-974; Stein, note 2 *supra*, at 1595.

21. CIVIL LAW TRADITION, note 1 *supra*, at 442; Tetley, note 2 *supra*, 60 La. L. Rev. at 701; Weiss, note 11 *supra*, at 458-59.

22. Stone, *A Primer on Codification*, 29 Tul. L. Rev. 1, 306 (1955).

23. Cappalli, note 17 *supra*, at 94; Stein, note 2 *supra*, at 1594-95; Stone, note 22 *supra*, at 305-07; Tetley, note 2 *supra*, 60 La. L. Rev. at 703; Weiss, note 11 *supra*, at 462-66; Apple & Deyling, note 1 *supra*, at 19, 29 & 36.

24. Oheler, note 13 *supra*, at 714; Stone, note 22 *supra*, at 305-06.

25. Baudenbacher, note 13 *supra*, at 336-37; Farnsworth, note 16 *supra*, at 230; Weiss, note 11 *supra*, at 458-62.

26. Glendon et al., note 2 *supra* at 54; *see* Stone, note 22 *supra*, at 307-08; Weiss, note 11 *supra*, at 452.

27. Riegert, *The West German Civil Code, Its Origin and Its Contract Provisions*, 45 Tul. L. Rev. 48, 58-62 (1970); *see* Cappalli, note 17 *supra*, at 95; Apple & Deyling, note 1 *supra*, at 19. This also has the effect of categorizing as purely issues of fact questions that the common law treats as issues of law or mixed issues of law and fact, such as contract formation or loss causation. Stein, note 2 *supra*, at 1600. Abstraction is particularly noticeable in the German Civil Code, *Bürgerliches Gesetzbuch*, Riegert, at 58-66, and those others for which it served as a model, such as the civil codes in Brazil, Greece, Italy, Japan, Korea and Turkey. *See* GERMAN LEGAL SYSTEM, note 4 *supra*, at 1 & 26; Glendon et al., note 2 *supra*, at 59.

28. Tetley, note 2 *supra*, 60 La. L. Rev. at 703-04; *see* Zweigert & Kötz, note 4 *supra*, at 267-78.

29. Stein, note 2 *supra*, at 1595. *See also* GERMAN LEGAL SYSTEM, note 4 *supra*, at 58; Farnsworth, note 16 *supra*, at 232-33.

30. *See, e.g.*, Pfanner, *Accounting for Enron: Global Ripple Effects*, INT'L HERALD TRIBUNE, 17 Jan. 2002; Reason, *On the Same Page: U.S. and International Standard Setters Are Coordinating Their Efforts to Craft a Common Language for Business*, CFO, May 2002.

31. *E.g., K&V Scientific Co. v. Bayerische Motoren Werke AG*, 314 F.3d 494, 499-500 (10th Cir. 2002) (and cases cited).

32. Hazard, *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 Notre Dame L. Rev. 1017, 1022-25 (1998); *see also* Bermann, *The Hague Evidence Convention in the Supreme Court: A Critique of the Aerospatiale Decision*, 63 Tul. L. Rev. 525, 533 n. 28 (1989); Kuhn, Comment, *Societe Nationale Industrielle Aerospatiale: The Supreme Court's Misguided Approach to the Hague Evidence Convention*, 66 B.U.L. Rev. 1011, 1040-41 & n. 209 (1989).

33. De Cruz, note 4 *supra*, at 74-75; Glendon *et al*., note 2 *supra*, at 131-33; THE CIVIL LAW TRADITION, note 1 *supra*, at 1128-34;

Schlesinger *et al*., note 2 *supra*, at 272; Stein, note 2 *supra*, at 1595; Apple & Deyling, note 1 *supra*, at 23 & 30.

34. M. Cappelletti, J. Merryman & J. Perillo, THE ITALIAN LEGAL SYSTEM: AN INTRODUCTION 72-83 (1967) (hereinafter "THE ITALIAN LEGAL SYSTEM"); B. Cremades & E. Cabiedes, LITIGATING IN SPAIN 41-46 (1989); de Cruz, note 4 *supra*, at 70-74 & 83-85; GERMAN LEGAL SYSTEM, note 4 *supra*, at 67-75; Glendon *et al*., note 2 *supra*, at 67-68 & 118-22; THE CIVIL LAW TRADITION, note 1 *supra*, at 549-51 & 622-23; Schlesinger *et al*., note 2 *supra*, at 405 & 503-04; S. Riesenfeld & W. Pakter, COMPARATIVE LAW CASEBOOK 5-7, 36-38, 57-62 & 131-32 (2001) (hereinafter Riesenfeld & Pakter); Clark, *The Selection and Accountability of Judges in West Germany: Implementation of a Rechtsstaat*, 61 So. Cal. L. Rev. 1797, 1808-14 & 1837-39 (1988); Langbein, *Comparative Civil Procedure and the Style of Complex Contracts*, 35 Am. J. Comp. L. 381, 387 (1987) (hereinafter "*Complex Contracts"*); Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823, 851-52 (1985) (hereinafter "*German Advantage*"); Riegert, note 27 *supra*, at 75; Stein, note 2 *supra*, at 1595; Apple & Deyling, note 1 *supra*, at 24-27. *See also* THE CIVIL LAW TRADITION, note 1 *supra*, at 444.

35. Stein, note 2 *supra*, at 1600.

36. *See* THE CIVIL LAW TRADITION, note 1 *supra*, at 998-1000; Cappalli, note 17 *supra*, at 96-97; Apple & Deyling, note 1 *supra*, at 29 & 36.

37. Stein, note 2 *supra*, at 1600.

38. GERMAN LEGAL SYSTEM, note 4 *supra*, at 59; Adriaansen, *At the Edges of the Law: Civil Law v. Common Law*, 12 Temp. Int'l & Comp. L. J. 107, 108 (1998); Cappalli, note 17 *supra*, at 94 & 104; Oheler, note 13 *supra*, at 715; Apple & Deyling, note 1 *supra*, at 37.

39. Weiss, note 11 *supra*, at 458-59; Apple & Deyling, note 1 *supra*, at 30.

40. Cappalli, note 17 *supra*, at 97-98; Stein, note 2 *supra*, at 1596 & 1600; Apple & Deyling, note 1 *supra*, at 30.

41. Stein, note 2 *supra*, at 1596.

42. Bringing to mind a description of the common law from England, the original common law jurisdiction: "the lawless science of our law,—that codeless myriad of precedent, that wilderness of single instances." Tennyson, *Aylmer's Field.*

43. *See* Bruno, *The Common Law From a Civil Lawyer's Perspective*, *in* R. Danner & M. Bernd, eds., INTRODUCTION TO FOREIGN LEGAL SYSTEMS 4-5, 6 & 9 (1994); Adriaansen, note 38 *supra*, at 107 ("A civil lawyer simply cannot understand how a common law judge can be the source of law without risking anarchy and arbitrariness.").

44. Weiss, note 11 *supra*, at 458-59 & 468-69; Apple & Deyling, note 1 *supra*, at 36.

45. Cappalli, note 17 *supra*, at 97; Oheler, note 13 *supra*, at 715; Stein, note 2 *supra*, at 1596; Apple & Deyling, note 1 *supra*, at 36-37 & 39.

46. THE CIVIL LAW TRADITION, note 1 *supra*, at 947-48. *See also* Stein, note 2 *supra*, at 1595. Nonetheless, a role for precedent has developed in some civil law countries, especially in constitutional adjudication. *See* de Cruz, note 4 *supra*, at 68-69 & 285; GERMAN LEGAL SYSTEM, note 4 *supra,* at 39-42; Zweigert & Kötz, note 4 *supra*, at 262-63; Baudenbacher, note 13 *supra*, at 349-51; Riegert, note 27 *supra*, at 69-71; Rosenn, *Civil Procedure in Brazil*, 34 Am. J. Comp. L. 487, 512-14 (1986); Apple & Deyling, note 1 *supra*, at 24, 31 & 36. But the absence of a stated doctrine of *stare decisis* and the facts that the decisions even of many appellate courts either omit or greatly limit the discussion of the facts and that decisions in many countries are not consistently published (Baudenbacher, note 13 *supra*, at 352-53), necessarily limits the force of the precedents. *See e.g.*, Glendon *et al*., note 2 *supra*, at 207-09; Zweigert & Kötz, note 4 *supra*, at 262-65; Adriaansen, note 38 *supra*, at 111; Cappalli, note 17 *supra*, at 98 & 102-03; Tetley, note 2 *supra*, at 702. *See generally* THE CIVIL LAW TRADITION, note 1 *supra*, at 937-74.

47. Apple & Deyling, note 1 *supra*, at 5.

48. Baudenbacher, note 13 *supra*, at 354-55; Stein, note 2 *supra*, at 1597; Weiss, note 11 *supra*, at 465. *See* Cappalli, note 17 *supra*, at 96-98.

49. *See* de Cruz, note 4 *supra*, at 261-62; GERMAN LEGAL SYSTEM, note 4 *supra*, at 38-39; Glendon *et al*., note 2 *supra*, at 203-04; Weiss, note 11 *supra*, at 457 & 462.

50. De Cruz, note 4 *supra*, at 267-71; Adriaansen, note 38 *supra*, at 108-09. *See*, *e.g.*, GERMAN LEGAL SYSTEM, note 4 *supra*, at 61-64.

51. THE CIVIL LAW TRADITION, note 1 *supra*, at 1029-30; *German Advantage*, note 34 *supra*, at 843 n. 71.

52. GERMAN LEGAL SYSTEM, note 4 *supra*, at 88-92; Glendon *et al*., note 2 *supra*, at 155-56; THE CIVIL LAW TRADITION, note 1 *supra*, at 893; Baudenbacher, note 13 *supra*, at 355; Clark, note 34 *supra*, at 1802-06; Stein, note 2 *supra*, at 1596-97; *German Advantage*, note 34 *supra*, at 848-50; Tetley, note 2 *supra*, 60 La. L. Rev. at 705; Apple & Deyling, note 1 *supra*, at 30 & 37.

53. THE CIVIL LAW TRADITION, note 1 *supra*, at 1020-21; Schlesinger *et al.,* note 2 *supra*, at 477-80; Baudenbacher, note *supra*, at 355; Stein, note 2 *supra*, at 1596.

54. Baudenbacher, note 13 *supra*, at 355.

55. THE ITALIAN LEGAL SYSTEM, note 34 *supra,* at 72-83; GERMAN LEGAL SYSTEM, note 4 *supra*, at 106-07; THE CIVIL LAW TRADITION, note 1 *supra*, at 549 & 1065-66; Clark, note 34 *supra,* at 1808-14 & 1829-32; *German Advantage*, note 34 *supra*, at 864.

56. THE CIVIL LAW TRADITION, note 1 *supra*, at 1091.

57. *See* Stein, note 2 *supra*, at 1598.

58. *Id.*

59. *Id*.

60. Schlesinger *et al*., note 2 *supra*, at 739-40; Rosenn, note 46 *supra,* at 503-06; Tetley, note 2 *supra*, 60 La. L. Rev. at 707. *See* Farnsworth, note 16 *supra*, at 235; Riegert, note 27 *supra*, at 78-81.

61. THE CIVIL LAW TRADITION, note 1 *supra*, at 1022; Schlosser, note 2 *supra*, at 25.

62. THE CIVIL LAW TRADITION, note 1 *supra*, at 1001 & 1021; J. Haley & D. Henderson, LAW AND THE LEGAL PROCESS IN JAPAN 897-901 (1988) (hereinafter "LAW IN JAPAN"); Rosenn, note 46 *supra*, at 481. *See* Schlosser, note 2 *supra*, at 29.

63. LAW IN JAPAN, note 62 *supra*, at 900-01.

64. *See* GERMAN LEGAL SYSTEM, note 4 *supra*, at 92-103; Glendon *et al*., note 2 *supra*, at 152-53; THE CIVIL LAW TRADITION, note 1 *supra*, at 841-935; Apple & Deyling, note 1 *supra*, at 30.

65. Adriaansen, note 38 *supra*, at 110; *see* Schlosser, note 2 *supra*, at 18.

66. *German Advantage*, note 34 *supra*, at 834-35, 841-42 & 846-48; Reitz, *Why We Probably Cannot Adopt the German Advantage in Civil Procedure*, 75 Iowa L. Rev. 987, 993 (1990); Apple & Deyling, note 1 *supra,* at 27-28; *see* Glendon *et al*., note 2 *supra*, at 167-68.

67. Richard O. Faulk, *Armegeddon Through Aggregation? The Use and Abuse of Class Actions in International Dispute Resolution*, 2 CLASS ACTION LITIGATION REP. (No. 10) 1, 3 (2001).

68. *See* Cappalli, note 17 *supra*, at 94; Weiss, note 11 *supra*, at 452; Apple & Deyling, *supra* note 1, at 13 & 38-39.

69. De Cruz, note 4 *supra*, at 311-13 & 338; GERMAN LEGAL SYSTEM, note 4 *supra*, at 391 & 448; Riegert, note 27 *supra*, at 81-85. *See, e.g. BÜRGERLICHES GESETZBUCH (*hereinafter *"BGB"),* §§ 126 *et seq.*, 305-61 & 433-811; *CODICE CIVILE (*hereinafter *"C.C."),* Book 2, Title 5, Book 4, Titles 2-3 & Book 6, Title 2, Chapter 2 (It.).

70. *See, e.g., BGB* §§ 145-57; *C.C.*, Book 4, Title II, Chapter II; GERMAN LEGAL SYSTEM, note 4 *supra*, at 383-85; Zweigert & Kötz, note 4 *supra*, at 359-62; Riegert, note 27 *supra*, at 97-98.

71. *See Complex Contracts*, note 34 *supra*; Lundmark, *Verbose Contracts*, 49 Am. J. Comp. L. 123 (2001). Note that both authors disagree with the first of the rationales given here. *But see, e.g., BGB, Buch 2, Abschnitt 7, Titel 1-24*, §§ 433-811; GERMAN LEGAL SYSTEM, note 4 *supra*, at 408-10, 424-29, 489-91 & 533-35.

72. GERMAN LEGAL SYSTEM, note 4 *supra*, at 379-82 & 387-90; Zweigert & Kötz, note 4 *supra*, at 401-06; Tetley, note 2 *supra*, 60 La. L. Rev. at 712.

73. Schlesinger *et al*., note 2 *supra*, at 749-55; Farnsworth, note 16 *supra*, at 236; *cf.* Lundmark, note 71 *supra*, at 124.

74. *See BGB* § 157; de Cruz, note 4 *supra*, at 260 & 311; GERMAN LEGAL SYSTEM, note 4 *supra*, at 370; Farnsworth, note 16 *supra*, at 234-35; *cf.* Lundmark, note 71 *supra*, at 128.

75. *See* GERMAN LEGAL SYSTEM, note 4 *supra*, at 393-98 & 410-21; Zweigert & Kötz, note 4 *supra*, at 410-69 & 516-36; Riegert, note 27 *supra*, at 75-78 & 85-98.

76. *See* de Cruz, note 4 *supra*, at 325-35; GERMAN LEGAL SYSTEM, note 4 *supra*, at 433-35; Glendon *et al*., note 2 *supra*, at 271; Tetley, note 2 *supra*, 60 La. L. Rev. at 713. *See, e.g., BGB*, § 823; *C.C.*, Art. 1382; *C.C.* § 2043.

77. *See* Glendon *et al*., note 2 *supra*, at 269-70; Agulnick & Rivkin, *Criminal Liability for Failure to Rescue: A Brief Survey of French and American Law*, 8 Touro Int'l L. Rev. 93, 108 n. 84 (1998); Woozey, *A Duty to Rescue: Some Thoughts on Criminal Liability*, 69 Va. L. Rev. 1273, 1274 (1983).

78. THE CIVIL LAW TRADITION, note 1 *supra*, at 1191-94.

79. *See, e.g.,* Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 Cardozo Arts & Ent. L. J. 1 (1994).

80. GERMAN LEGAL SYSTEM, note 4 *supra*, at 458; THE CIVIL LAW TRADITION, note 1 *supra*, at 1192-97; *see, e.g., BGB* §§ 1030-89; *C.C.*, Book 3, Title 5, Chapter 1.

81. THE CIVIL LAW TRADITION, note 1 *supra*, at 1191-98; Bruno, note 43 *supra*, at 7.

82. Glendon *et al*., note 2 *supra*, at 270; THE CIVIL LAW TRADITION, note 1 *supra*, at 1198-1200. *See, e.g., BGB* §§ 578-80; *C.C.*, Book 4, Title 3, Chapter 6.

83. GERMAN LEGAL SYSTEM, note 4 *supra*, at 461-63; Riesenfeld & Pakter, note 34 *supra*, at 419-21, 477-78 & 495.

84. GERMAN LEGAL SYSTEM, note 4 *supra*, at 449-50; Schlesinger *et al*., note 2 *supra*, at 759-68.

85. De Cruz, note 4 *supra*, at 345-46; GERMAN LEGAL SYSTEM, note 4 *supra*, at 498-511; Schlesinger *et al*., note 2 *supra*, at 122-26, 354-59 & 368-70. As to business entities in civil law countries in general, *see* THE CIVIL LAW TRADITION, note 7 *supra,* at 887-98.

86. *Id.* at 897.

87. *Id.* at 897 & 914-18.

88. *Id.* at 771-76.

89. *Id*. at 889.

90. GERMAN LEGAL SYSTEM, note 4 *supra*, at 98-99; Glendon *et al*., note 2 *supra*, at 153-54; THE CIVIL LAW TRADITION, note 1 *supra*, at 895-96; Zweigert & Kötz, note 4 *supra*, at 368.

91. THE CIVIL LAW TRADITION, note 1 *supra*, at 1194 & 1200-02; Bruno, note 43 *supra*, at 7.

92. GERMAN LEGAL SYSTEM, note 4 *supra*, at 473-78; Glendon *et al*., note 2 *supra*, at 270; Riegert, note 27 *supra*, at 55. *See, e.g., BGB* § 1922*; C. C.* § 456.

93. *Complex Contracts*, note 34 *supra*, at 390 n. 28.

94. Stein, note 2 *supra,* at 1600-01; Apple & Deyling, note 1 *supra*, at 29.

95. Glendon *et al*., note 2 *supra,* at *167;* THE CIVIL LAW TRADITION, note 1 *supra*, at 1015; Riesenfeld & Pakter, note 34 *supra*, at 6; Beardsley, *Proof of Fact in French Civil Procedure*, 34 J. Comp. L. 459, 467-69 (1986); Chase, *Civil Litigation Delay in Italy and the United State*, 36 Am. J. Comp. L. 41, 66-67 (1988); Hazard, note 32 *supra*, at 1019; *German Advantage*, note 34 *supra*, at 848; Rosenn, note 46 *supra*, at 488; Wagnild, *Civil Discovery in Japan: A Comparison of Japanese and U.S. Methods of Evidence Collection in Civil Litigation*, 3 Asian-Pac. L. J. 1, 16 (2002). *See* Schlosser, note 2 *supra*, at 15.

96. *See* Stein, note 2 *supra*, at 1600-01; Tetley, note 2 *supra*, 60 La. L. Rev. at 701-02.

97. Stein, note 2 *supra,* at 1597 & 1601; Apple & Deyling, note 1 *supra*, at 29.

98. Glendon *et al*., note 2 *supra* at 207-10; Tetley, note 2 *supra*, 60 La. L. Rev. at 701.

99. THE CIVIL LAW TRADITION, note 1 *supra*, at 1016-17; Beardsley, note 95 *supra*, at 459, 470-71 & 474 (as he explains at 471, this is related to the habit in civil law countries of those signing a contract also placing their initials on each of the unsigned pages); Rosenn, note 46 *supra*, at 488; Schlosser, note 2 *supra,* at 11; *cf.* Lundmark, note 71 *supra*, at 124.

100. THE CIVIL LAW TRADITION, note 1 *supra*, at 1017; Beardsley, note 95 *supra*, at 470 & 479-80; Chase, note 95 *supra*, at 69; Rosenn, note 46 *supra*, at 498.

101. GERMAN LEGAL SYSTEM, note 4 *supra*, at 126-27; Glendon et al., note 2 *supra*, at 166-68; LAW IN JAPAN, note 62 *supra*, at 814; THE CIVIL LAW TRADITION, note 1 *supra*, at 1030; Schlesinger *et al*., note 2 *supra*, at 441; Fisch, *Recent Developments in West German Civil Procedure,* 6 Hastings Int'l & Comp. L. Rev. 221, 279-80 (1983); Chase, note 95 *supra*, at 67; Hazard, note 32 *supra*, at 1019, 1021-22 & 1025-28; *Complex Contracts,* note 34 *supra*, at 388-89; *German Advantage*, note 34 *supra*, at 824, 826, 830 & 848; Schlosser, note 2 *supra*, at 14-16 & 17-18; Stein, note 2 *supra*, at 1598-99; Wagnild, note 95 *supra,* at 4 & 7; Apple & Deyling, note 1 *supra*, at 26 & 37; Bruno, note 43 *supra*, at 5. *But see* THE CIVIL LAW TRADITION, note 1 *supra*, at 1016-17.

102. *See German Advantage*, note 34 *supra*, at 844-47; Reitz, note 66 *supra*, at 1003.

103. THE CIVIL LAW TRADITION, note 1 *supra*, at 1021-22; Schlesinger *et al*., note 2 *supra*, at 447; Beardsley, note 95 *supra*, at 460-64 & 477; Reitz, note 66 *supra*, at 1003-04.

104. Beardsley, note 95 *supra*, at 463.

105. THE CIVIL LAW TRADITION, note 1 *supra*, at 1013; Stein, note 2 *supra*, at 1597.

106. The potentially significant role that non-legal cultural factors can play is beyond the scope of this article. *See generally, e.g.,* C. Hampden-Turner & A. Trompenaars, THE SEVEN CULTURES OF CAPITALISM: VALUE SYSTEMS FOR CREATING WEALTH IN THE UNITED STATES, JAPAN, GERMANY, FRANCE, BRITAIN, SWEDEN AND THE NETHERLANDS (1993); G. Hofstede, CULTURE'S CONSEQUENCES: COMPARING VALUES, BEHAVIOR, INSTITUTIONS AND ORGANIZATIONS ACROSS NATIONS (2003); R. Lewis, WHEN CULTURES COLLIDE (2000); A. Trompenaars & C. Hampden-Turner, RIDING THE WAVES OF CULTURE: UNDERSTANDING DIVERSITY IN GLOBAL BUSINESS (1997).

107. THE CIVIL LAW TRADITION, note 1 *supra*, at 4 & 1062; Adriaansen, note 38 *supra*, at 110-11; Beardsley, note 95 *supra*, at 486; *Complex Contracts*, note 34 *supra*, at 388-89; *German Advantage*, note 34 *supra*, at 829.

108. *See Complex Contracts*, note 34 *supra*, at 387; *German Advantage*, note 34 *supra*, at 856.

109. N. Vidmar, WORLD JURY SYSTEMS, 2-3, 59, 173-74 & 406-07 (2000). *See Complex Contracts*, note 34 *supra*, at 388; *German Advantage,* note 34 *supra*, at 864.

110. *See* Maxeiner, *Der Zivilprozess in den Vereinigten Staaten*, 23 Int'l Law. 321 (1989) (book review).

111. *See* R. David, FRENCH LAW: ITS STRUCTURE, SOURCES AND METHODOLOGY (M. Kindred trans. 1972), *reprinted in* THE CIVIL LAW TRADITION, note 1 *supra*, at 541; THE CIVIL LAW TRADITION, note 1 *supra*, at 1021-22; Faulk, note 67 *supra*, at 7; Stein, note 2 *supra*, at 1597.

112. *See Complex Contracts*, note 34 *supra*, at 386; *German Advantage*, note 34 *supra*, at 853-54.

113. For detail concerning the individual systems of a great many of the civil law countries, *see* J. Fellas, ed., TRANSNATIONAL LITIGATION: A PRACTITIONER'S GUIDE (2004).

114. *See id*.

115. Schlosser, note 2 *supra*, at 11 & 19-20.

116. Schlosser, note 2 *supra*, at 11 & 19.

117. GERMAN LEGAL SYSTEM, note 4 *supra*, at 127-28; Kerameus, *A Civilian Lawyer Looks at Common Law Procedure*, 72 La. L. Rev. 493, 496-97 (1987); Schlosser, note 2 *supra*, at 19-21.

118. *See* Schlosser, note 2 *supra*, at 19-24 & 36.

119. Kreindler, *Introduction, in* TRANSNATIONAL LITIGATION, note 113 *supra*, at 35-36; Schlosser, note 2 *supra*, at 22; Tetley, note 2 *supra*, 60 La. L. Rev. at 710.

120. Schlesinger *et al*., note 2 *supra*, at 414; Schlosser, note 2 *supra*, at 20.

121. Hazard, note 32 *supra*, at 1021; *see also* Oehler, note 13 *supra*, at 716 (as to judicial decisions); Tetley, note 2 *supra*, 60 La. L. Rev. at 702-03 (same).

122. GERMAN LEGAL SYSTEM, note 4 *supra*, at 129-132; *German Advantage*, note 34 *supra*, at 827; Rosenn, note 46 *supra*, at 491; Schlosser, note 2 *supra*, at 12-13.

123. Schlosser, note 2 *supra*, at 18.

124. GERMAN LEGAL SYSTEM, note 4 *supra*, at 129; LAW IN JAPAN, note 62 *supra*, at 814; Schlesinger *et al*., note 2 *supra*, at 436-38; *German Advantage*, note 34 *supra*, at 828; Schlosser, note 2 *supra*, at 14-15; Apple & Deyling, note 1 *supra*, at 105.

125. Rosenn, note 46 *supra*, at 488 & 492.

126. Schlesinger *et al*., note 2 *supra*, at 436; Bruno, note 43 *supra*, at 5.

127. *See* Reitz, note 66 *supra*, at 1005-06 & 1008.

128. LAW IN JAPAN, note 62 *supra*, at 901-02; Chase, note 95 *supra*, at 70-73; Schlosser, note 2 *supra*, at 46.

129. GERMAN LEGAL SYSTEM, note 4 *supra*, at 130; Schlesinger *et al*., note 2 *supra*, at 446; Hazard, note 32 *supra*, at 1017; Kreindler, note 119 *supra*, at 117; *German Advantage*, note 34 *supra*, at 826; Schlosser, note 2 *supra*, at 16-17 & 24; Wagnild, note 101 *supra*, at 2; Apple & Deyling,note 1 *supra*, at 26.

130. GERMAN LEGAL SYSTEM, note 4 *supra*, at 130-33; Beardsley, note 95 *supra*, at 475; *German Advantage*, note 34 *supra*, at 826; Wagnild, note 101 *supra*, at 4.

131. *See* Beardsley, note 95 *supra*, at 475-76. It bears noting that other common law jurisdictions do not allow such far reaching discovery. Hazard, note 32 *supra*, at 1018-19.

132. *See Complex Contracts*, note 34 *supra*, at 389.

133. This is a result of the limits on the court's authority to compel production. *See* text accompanying notes 146 & 157 *infra*.

134. *See Complex Contracts*, note 34 *supra*, at 388-89.

135. Glendon *et al*., note 2 *supra*, at 166; Schlesinger *et al*., note 2 *supra*, at 446; Chase, note 95 *supra*, at 66-67; *German Advantage*, note 34 *supra*, at 826, 828 & 830; Riegert, note 27 *supra*, at 74; Rosenn, note 46 *supra*, at 495; Schlosser, note 2 *supra*, at 11; Wagnild, note 101 *supra*, at 4 n.11; Apple & Deyling, note 1 *supra*, at 27.

136. *German Advantage*, note 34 *supra*, at 830.

137. THE CIVIL LAW TRADITION, note 1 *supra*, at 1014-15; Hazard, note 32 *supra*, at 1022; *Complex Contracts*, note 34 *supra*, at 389; *German Advantage*, note 34 *supra*, at 830-31 & 847.

138. *See German Advantage*, note 34 *supra*, at 831.

139. Schlosser, note 2 *supra*, at 13. *See* Apple & Deyling, note 1 *supra*, at 105.

140. *German Advantage*, note 34 *supra*, at 827-29; Rosenn, note 46 *supra*, at 480; Apple & Deyling, note 1 *supra*, at 27.

141. Schlesinger *et al*., note 2 *supra*, at 458; Beardsley, note 95 *supra*, at 471 & 476.

142. THE CIVIL LAW TRADITION, note 1 *supra*, at 1017.

143. Schlosser, note 2 *supra*, at 16.

144. Rosenn, note 46 *supra*, at 498; Wagnild, note 101 *supra*, at 11-12.

145. THE CIVIL LAW TRADITION, note 1 *supra*, at 1021; Beardsley, note 95 *supra*, at 460-61, 462, 464-65, 466, 477-78 & 485-86; Schlosser, note 2 *supra*, at 17-18.

146. Beardsley, note 95 *supra*, at 466 & 474-75; Rosenn, note 46 *supra*, at 498. *See also* THE CIVIL LAW TRADITION, note 1 *supra*, at 1021; Reitz, note 66 *supra*, at 1002.

147. Schlesinger *et al*., note 2 *supra*, at 448.

148. GERMAN LEGAL SYSTEM, note 4 *supra*, at 132; Glendon *et al.*, note 2 *supra*, at 166; THE CIVIL LAW TRADITION, note 1 *supra*, at 1016-17; Schlesinger *et al*., note 2 *supra*, at 457; Beardsley, note 95 *supra*, at 478-79; *Complex Contracts*, note 34 *supra*, at 388; *German Advantage*, note 34 *supra*, at 828 & 834; Reitz, note 66 *supra*, at 993; Rosenn, note 46 *supra*, at 496; Schlosser, note 2 *supra,* at 16; Stein, note 2 *supra*, at 1599; Apple & Deyling, note 1 *supra*, at 27.

149. *See* Zweigert & Kötz, note 4 *supra*, at 273-74; Beardsley, note 95 *supra*, at 479; *German Advantage*, note 34 *supra*, at 833-35 & 846-47; Schlosser, note 2 *supra*, at 16; Stein, note 2 *supra*, at 1601.

150. THE CIVIL LAW TRADITION, note 1 *supra*, at 1073; Schlesinger *et al.*, note 2 *supra*, at 442-43; Zweigert & Kötz, note 4 *supra*, at 272; *Complex Contracts*, note 34 *supra*, at 388; *German Advantage*, note 34 *supra*, at 834; Reitz, note 66 *supra*, at 993-94. *See* Schlosser, note 2 *supra*, at 16. To emphasize the contrast between the two systems' approaches, consider the case in federal court in which the court ordered a party's attorney to meet with the foreign president of the attorney's client company prior to his pre-trial deposition to be sure he was "as prepared as possible," and then sanctioned the attorney when he failed to do so, which contributed to the need for a second day of deposition. *Cielo Creations, Inc. v. Gao Da Trading Co.,* No. 04 CIV 1952 (BSJ), 2004 U.S. Dist. LEXIS 11924 (S.D.N.Y. 28 June 2004), *reconsideration denied*, 2004 U.S. Dist. LEXIS 16419 (18 Aug. 2004).

151. GERMAN LEGAL SYSTEM, note 4 *supra*, at 132; Schlesinger *et al*., note 2 *supra*, at 449-50; Beardsley, note 95 *supra*, at 464. *See German Advantage*, note 34 *supra*, at 834-35 & 844-45; Reitz, note 66 *supra*, at 1001-02 & 1003-04; Rosenn, note 46 *supra*, at 497. Indeed, the perceived need to protect a party from perjury was a basis for the even older rule that parties were precluded from testifying at all. THE CIVIL LAW TRADITION, note 1 *supra*, at 1019.

152. THE CIVIL LAW TRADITION, note 1 *supra,* at 1017; Beardsley, note 95 *supra*, at 479; Fisch, note 101 *supra*, at 280; *German Advantage*, note 34 *supra*, at 828-29; Rosenn, note 46 *supra*, at 496.

153. Beardsley, note 95 *supra*, at 479; *German Advantage*, note 34 *supra*, at 828.

154. Beardsley, note 95 *supra*, at 479.

155. Zweigert & Kötz, note 4 *supra*, at 275; Kerameus, note 117 *supra*, at 500-01; Kreindler, note 117 *supra*, at 177; *German Advantage*, note 34 *supra*, at 829; Wagnild, note 101 *supra*, at 6; Apple & Deyling, note 1 *supra*, at 27; Bruno, note 43 *supra*, at 5 & 7. *See* THE CIVIL LAW TRADITION, note 1 *supra*, at 1018.

156. THE CIVIL LAW TRADITION, note 1 *supra,* at 1018; Kerameus, note 117 *supra*, at 500; *German Advantage*, note 34 *supra*, at 829.

157. Kreindler, note 119 *supra*, at 140-41; *German Advantage*, note 34 *supra*, at 829; Reitz, note 66 *supra*, at 1002-03; Rosenn, note 46 *supra* at 496 & 498-99; Wagnild, note 101 *supra*, at 12-13; *see, e.g., ZIVILPROZESSORDNUNG* (hereinafter *"ZPO"*) §§ 383-84 (Ger.).

158. Beardsley, note 95 *supra*, at 463-64; Reitz, note 66 *supra*, at 1001. *See, e.g., ZPO* § 384(2).

159. Beardsley, note 95 *supra*, at 471.

160. Stein, note 2 *supra*, at 1601.

161. GERMAN LEGAL SYSTEM, note 4 *supra*, at 132; Schlesinger *et al*., note 2 *supra*, at 467-68; Beardsley, note 95 *supra*, at 480-85; *Complex Contracts*, note 34 *supra*, at 388; *German Advantage*, note 34 *supra*, at 829, 835 & 836-39; Schlosser, note 2 *supra*, at 16; Wagnild, note 101 *supra*, at 7.

162. German Advantage, note 34 *supra*, at 840.

163. Schlosser, note 2 *supra*, at 16.

164. *See* Schlesinger *et al*., note 2 *supra*, at 457; *German Advantage*, note 34 *supra*, at 833-41.

165. THE CIVIL LAW TRADITION, note 1 *supra*, at 1019; Beardsley, note 95 *supra*, at 472-3.

166. Beardsley, note 95 *supra*, at 475; Rosenn, note 46 *supra*, at 498. *See* Fisch, note 101 *supra*, at 280-81; Reitz, note 66 *supra*, at 1003; Schlosser, note 2 *supra*, at 18.

167. GERMAN LEGAL SYSTEM, note 4 *supra*, at 134; Glendon *et al*., note 2 *supra*, at 190; THE CIVIL LAW TRADITION, note 1 *supra*, at 1020; Schlesinger *et al*., note 2 *supra*, at 484-85; Chase, note 95 *supra*, at 169; Clark, note 34 *supra*, at 1837-38; Kerameus, note 117 *supra*, at 505; *Complex Contracts*, note 34 *supra*, at 387; *German Advantage,* note 34 *supra*, at 855-57; Rosenn, note 46 *supra*, at 507; Wagnild, note 101 *supra,* at 18; Apple & Deyling, note 1 *supra*, at 28.

168. *See German Advantage*, note 34 *supra*, at 828 & 831.

169. GERMAN LEGAL SYSTEM, note 4 *supra*, at 134; Glendon *et al*., note 2 *supra*, at 190-91; THE CIVIL LAW TRADITION, note 1 *supra*, at 1020; Clark, note 34 *supra*, at 1838-39; *German Advantage*, note 34 *supra*, at 857; Apple & Deyling, note 1 *supra*, at 29.

170. GERMAN LEGAL SYSTEM, note 4 *supra*, at 134-35; THE CIVIL LAW TRADITION, note 1 *supra*, at 1001 & 1021; Rosenn, note 46 *supra*, at 489. *See also* Schlosser, note 2 *supra*, at 29. As an example of the difference, a German court cannot physically punish a defendant for disobeying an order of specific performance but can order performance by a third party at the defendant's expense. ZPO § 887. *See* Riegert, note 27 *supra*, at 79.

171. Faulk, note 67 *supra*, at 3-10; Rosenn, note 46 *supra*, at 522; Schlosser, note 2 *supra*, at 24.

172. Faulk, note 67 *supra*, at 3-10.

173. Kreindler, note 119 *supra*, at 203-04.

174. *See id*. at 204.

175. *See* Schlosser, note 2 *supra*, at 25.

176. THE CIVIL LAW TRADITION, note 1 *supra*, at 1022 & 1061; Schlosser, note 2 *supra*, at 25.

177. *See* Farnsworth, note 16 *supra*, at 236; Lundmark, note 71 *supra*, at 124.

178. THE CIVIL LAW TRADITION, note 1 *supra*, at 1020 & 1026-28; Schlesinger *et al*., note 2 *supra*, at 403; Reitz, note 66 *supra*, at 995; Rosenn, note 46 *supra*, at 518-19.

179. GERMAN LEGAL SYSTEM, note 4 *supra*, at 97-98, 112-13 & 129; Schlesinger *et al*., note 2 *supra*, at 391; Reitz, note 66 *supra*, at 995.

180. THE CIVIL LAW TRADITION, note 1 *supra*, at 1020 & 1026; Schlesinger *et al*., note 2 *supra*, at 391-92; Reitz, note 66 *supra*, at 995. *See* Schlosser, note 2 *supra*, at 18.

181. GERMAN LEGAL SYSTEM, note 4 *supra*, at 111-12 & 129; Rosenn, note 46 *supra*, at 518.

182. E.g., *ZPO* §§ 108-13.

183. *See Tjontveit v. Den Norske Bank ASA*, 997 F. Supp. 799, 807 (S.D. Tex. 1998); *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1368-69 (S.D. Tex. 1995).

184. GERMAN LEGAL SYSTEM, note 4 *supra*, at 127 & 131; Chase, note 95 *supra*, at 68; *German Advantage*, note 34 *supra*, at 831 n. 25. *See* Wagnild, note 101 *supra*, at 18. *See also German Advantage,* note 34 *supra,* at 828.

185. *German Advantage*, note 34 *supra*, at 832.

186. *See generally* R. Cohen, NEGOTIATING ACROSS CULTURES: INTERNATIONAL COMMUNICATION IN AN INTERDEPENDENT WORLD (1997); P. Harris & R. Moran, MANAGING CULTURAL DIFFERENCES 53-82 (Chapter 3: Global Leadership in Negotiations and Alliances) (5th ed. 2000); W. Smyser, HOW GERMANS NEGOTIATE: LOGICAL GOALS, PRACTICAL SOLUTIONS 133-63 (Chapter 4: German Business Negotiations) & 197-213 (Chapter 7: How to Negotiate with Germans) (2003).

187. *See* Schlesinger *et al*., note 2 *supra*, at 432.

188. *See* Fed. R. Civ. P. 13(a).

189. THE CIVIL LAW TRADITION, note 1 *supra*, at 1065 & 1080-81; Schlesinger, *Comparing Criminal Procedure: A Plea for Utilizing Foreign Experience*, 26 Buff. L. Rev. 361, 36 (1977).

190. *See* H. Liebesny, FOREIGN LEGAL SYSTEMS: A COMPARATIVE ANALYSIS 380-90 (1981) (App. I *Problems of Language*); Geeroms, *Comparative Law and Legal Translation: Why the Terms Cassation, Revision and Appeal Should Not Be Translated*, 50 Am. J. Comp. L. 201 (2002); Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 Am. J. Comp. L. 1, 10-20 (1991).

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