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MASAQ Rule of Law Project

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Comparative Analysis of US and Jordanian Civil Procedures & Evidence Laws

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EXECUTIVE SUMMARY

H. E. the Minister of Justice requested USAID assistance for a comparative analysis of Jordanian and United States laws related to Civil Procedures and Evidence. The ministry desired information on international best practices to inform their current initiative to review procedural laws to define amendments as necessary and introduce and support those amendments into the parliamentary process. This activity supports the Judicial Upgrading Strategy (JUST) 2007-2009 goals two (Enhance the Efficiency of the Judicial System) and six (Enhance Legislation Revision and Strengthen the Legislative and Regulatory Framework for Efficiency, Transparency, Accountability and Independence of the Judicial System).

Mr. David Chavkin, attorney and Law Professor, and Mr. Joe Bellipanni, Chief Judge, prepared and presented this report to members of the Ministry of Justice and the Judicary.

An introductory meeting, supported by a draft report of comparative analysis findings and recommendations, was conducted on **Monday, May 12** with the following persons in attendance:

- Ayman Odeh, Minister of Justice
- Mohammed Al-Ghazou, Secretary General, Ministry of Justice
- Judge Ali Al-Masri, Assistant to the Minister of Justice
- Nasahat Al-Akras, Judge of the Amman First Instance Court

At this meeting H.E. Minister of Justice articulated general and specific issues of law that he wanted addressed during a series of meetings to be held during the week. The Common Law case life cycle was a focus of this discussion.

A similar meeting with the judiciary was conducted on **Tuesday, May 13** with the following persons in attendance:

- Mohammed Al Raqqad, Chief Justice, Jordan Court of Cassation
- Mohammed Amin Kharabsheh, Justice, Court of Cassation
- Abdel Rahman Al-Banna, Justice, Court of Cassation
- Abdullah Al-Salman, Justice, Court of Cassation
- Ismail Al-Masri, Justice, Court of Cassation
- Yussef Al-Humoud, Attorney General, Kingdom of Jordan
- Ahmed Jammalieh, Chief Judge of the Amman Court of First Instance

A follow up meeting was held on **Wednesday, May14** to further discuss the details of the US Disclosure Process with the following persons present.

- Mohammed Al-Ghazou, Secretary General, Ministry of Justice
- Judge Ali Al-Masri, Assistant to the Minister of Justice
- Nasahat Al-Akras, Judge of the Amman First Instance Court

A final meeting was held on **Thursday, May 12** with the following persons in attendance:

- Ayman Odeh, Minister of Justice
- Mohammed Al-Ghazou, Secretary General, Ministry of Justice
- Judge Ali Al-Masri, Assistant to the Minister of Justice

At this meeting the consultants presented their final recommendations and a Supplementary Analysis of the specific issues of law requested by H.E. the Minister of Justice in the first meeting. The consultants also introduced Federal Rule 11 (Attorney Sanctions), the Colorado simplified disclosure procedures, and

attorney conduct and civility codes; these documents may be useful to the ministry as references for further study of these subjects. The complete comparative analysis of Jordanian and US Civil Procedures, Evidence laws and the final recommendations, supplementary analysis, and supplementary reference materials are included in this report.

SUMMARY OF RECOMMENDATIONS

I. CIVIL CASE PROCEDURES

A. **Notification process**

Recommendation:

THE COURT SHOULD NOT BE INVOLVED IN THE SERVICE OF PAPERS ON THE LITIGANTS. THE COMPLAINT AND WITNESS SUBPOENAS SHOULD BE SERVED BY PRIVATE SERVICES THAT ARE THE RESPONSIBILITY OF THE PARTY WHO SEEKS THE SERVICE.

B. **Initial Pleadings**

Recommendation:

THE COMPLAINT AND ANSWER SHOULD NOT BE REQUIRED TO INCLUDE THE EVIDENCE AND DOCUMENTS TO BE USED IN THE CASE

C. **The first hearing**

Recommendations:

AT THE FIRST HEARING THE COURT SHOULD SCHEDULE ALL MATTERS THAT ARE RELEVANT TO THE CASE INCLUDING SETTING A TIME LIMIT FOR FILING A MOTION TO DISMISS, THE ADDITION OF ANY PARTIES, THE SUBMISSION OF WRITTEN EVIDENCE, TESTIMONY OF WITNESSES, ETC. MOST IMPORTANTLY A DATE WHEN THE CASE WILL BE HELD FOR FINAL JUDGEMENT SHALL BE CHOSEN.

THE PARTIES SHOULD BE REQUIRED TO ATTEND AT LEAST ONE SESSION OF MEDIATION WITH A PRIVATE MEDIATOR OR PURSUANT TO THE PROCEDURES OUTLINED IN THE LAW ON MEDIATION. THE DATE BY WHICH THE MEDIATION WILL BE HELD IS TO BE SET AT THE FIRST HEARING AND WOULD BE IN ADDITION TO THE OTHER DATES SET.

D. **Discovery procedures**

Recommendation:

CONSIDERATION SHOULD BE GIVEN TO ALLOW LIMITED DISCOVERY OF AN OPPOSING PARTY'S EVIDENCE INCLUDING A LIMITED NUMBER OF WRITTEN QUESTIONS AND DEPOSITIONS OF A LIMITED NUMBER OF POTENTIAL WITNESSES

C. **Motions**

Recommendations:

MOTIONS TO DISMISS THE CASE, IF DENIED, SHOULD NOT BE THE SUBJECT OF APPEAL EXCEPT IN VERY LIMITED CIRCUMSTANCES REGARDING THE COURT'S JURISDITION.

D. **Appeals**

Recommendation:

ONLY ERRORS ON LEGAL ISSUES OR A DECISION THAT MEETS A HIGH STANDARD OF "CLEARLY ERRONEOUS" SHOULD BE THE BASIS OF APPEAL FROM THE COURT OF FIRST INSTANCE. NO ADDITIONAL EVIDENCE SHOULD BE ALLOWED.

THE COURT OF CASSATION SHOULD NOT BE REQUIRED TO CONSIDER ALL CIVIL CASES OF A VALUE OF OVER 10000 JD THAT HAVE BEEN DECIDED BY THE APPEAL COURT. THE COURT'S REVIEW OF CIVIL CASES SHOULD BE DISCRETIONARY AND LIMITED TO CASES OF IMPORTANCE, ERRORS OF LAW , NEW AREAS OF LAW NOT YET DECIDED, OR ISSUES THAT WOULD BENEFIT BY CLARIFICATION

II. THE EVIDENTIARY PROCESS

A. Testimony of witnesses

Recommendation:

A LIMITED NUMBER OF WITNESSES SHOULD BE ALLOWED TO TESTIFY REGARDLESS OF THE AMOUNT IN CONTROVERSY AND BASED UPON THE DISCUSSION IN THE FIRST HEARING

B. Electronic Documents

Recommendation:

FAXES, TELEXES, AND ELECTRONIC DOCUMENTS SHOULD BE ALLOWED TO BE ENTERED INTO EVIDENCE BASED UPON THE TESTIMONY OF PERSONS WITH KNOWLEDGE DEEMED SUFFICIENT BY THE COURT TO ESTABLISH ITS AUTHENTICITY

C. Documents in the hands of third parties

Recommendation:

UNLESS THERE IS AN AGREEMENT BY THE PARTIES, DOCUMENTS HELD BY THIRD PARTIES SHOULD BE THE SUBJECT OF A SUBPOENA THAT REQUIRES THE PERSON WHO HOLDS THE DOCUMENT TO COME TO COURT AT A SPECIFC TIME AND BRING THE DOCUMENTS.

III. LAWYER CONDUCT

A. **Law School education**

Recommendations:

ALL LAW STUDENTS SHOULD BE REQUIRED TO TAKE A COURSE IN ETHICS WHICH REINFORCES THE VIEW THAT IT IS UNACCEPTABLE TO DECEIVE THE COURT IN ANY WAY OR TO MAKE ARGUMENTS FOR THE SOLE PURPOSE OF DELAY.

B. **Behavior in the case**

Recommendation:

A RULE SHOULD BE ADOPTED THAT REQUIRES LAWYERS TO CERTIFY THAT ANY REPRESENTATIONS THEY MAKE TO THE COURT ARE BASED ON A GOOD FAITH BELIEF AND THAT NO ARGUMENT OR DOCUMENT OR WITNESS IS PRESENTED SOLELY FOR THE PURPOSE OF DELAY.

VIOLATION OF THE RULE SHOULD RESULT IN A FINE, DISMISSAL FROM THE CASE, OR OTHER APPROPRIATE SANCTION.

SUPPLEMENTARY ANALYSIS ON ISSUES RAISED DURING MEETINGS

WITH MINISTER OF JUSTICE AND CHIEF JUSTICE

1. Stages to every case in the United States.

- Plaintiff pays fee and files complaint.
- Clerk of the court issues summons.
- Plaintiff serves defendant(s) with summons and files proof of service with the clerk of the court.
- Defendant has three options:
    - Defendant does nothing. If so, clerk will enter default after time for answer and case will be scheduled for ex parte proof hearing on damages.
    - Defendant files motion to dismiss. If so, plaintiff will file opposition to motion and court will rule on motion with or without hearing.
        - Court may grant motion and case is over.
        - Court may grant motion and allow plaintiff to amend complaint.
        - Court may deny motion.
    - Defendant answers complaint.
- Once defendant answers, case is set for scheduling conference with all parties represented.
    - Judge issues scheduling order establishing specific dates for:
        - Exchange of witness lists.
        - Completion of discovery.
        - Filing of dispositive motions (summary judgment).
        - Completion of alternative dispute resolution (mediation, arbitration, settlement judge).
        - Pretrial conference.
        - Trial.
- Parties conduct discovery:
    - Depositions of parties and non-party witnesses.
    - Interrogatories.
    - Production of documents.
    - Requests for admission.
    - Requests for physical or mental examinations of persons or property.
- Parties file dispositive motions (summary judgment), if any.
- Pretrial conference with all parties represented. Judge issues pretrial order:
    - Identifying and limiting the issues in dispute.
    - Identifying the witnesses who may be called at trial.
    - Identifying the documents that may be admitted without dispute.
- Trial of case.
- Appeal, if any.

2. Less than 2 percent of all cases in the federal courts of the United States proceed to trial.

Table C-4.
U.S. District Courts—Civil Cases Terminated, by Nature of Suit and Action Taken,
During the 12-Month Period Ending December 31, 2006

Nature of Suit	Total	No Court Action	Court Action						
			Total	Before Pretrial	During or After Pretrial	During or After Trial			
						Total	Nonjury	Jury	Percent Reaching Trial
TOTAL CASES	258,009	59,363	198,646	170,636	24,486	3,524	1,100	2,424	1.4

Source: Administrative Office of the Courts.

3. About 25 percent of all federal cases are appealed and about 15 percent of all state court cases are appealed.

Table B.
U.S. Courts of Appeals—Appeals Commenced, Terminated, and Pending
During the 12-Month Periods Ending December 31, 2005 and 2006

Circuit	Filings			Terminations			Pending		
	2005	2006	Percent Change	2005	2006	Percent Change	2005*	2006	Percent Change
TOTAL	70,003	63,676	-9.0	63,024	67,699	7.4	59,276	55,253	-6.8

Source: Administrative Office of the Courts.

Table 1. General civil cases appealed from trial court, by type of case in 46 large counties, 2001-2005

Type of civil cases	General civil trials concluded in 2001		
	Number	Trials appealed	
		Percent	Number
All civil cases[a]	8,311	14.5%	1,204

Source: National Center for State Courts.

4. Only about 4 percent of all cases are reversed on appeal.

Table B-5.
U.S. Courts of Appeals—Appeals Terminated on the Merits, by Circuit,
During the 12-Month Period Ending December 31, 2006

Circuit and Nature of Proceeding	Total Appeals Terminated[1]	Terminations on the Merits							
		Percent of Total Terminations	Total	Affirmed/ Enforced	Dismissed	Reversed	Remanded	Other	Percent Reversed[2]
ALL CIRCUITS	67,699	50.8	34,407	26,311	3,067	2,658	1,006	1,315	8.7

Source: Administrative Office of the Courts.

5. Documents within the possession of a third party may be obtained by a lawyer for a party in several different ways.

Under FRCP rule 30(b)(2), a party may serve a subpoena and subpoena duces tecum on a non-party and may require the witness to answer questions under oath[1] and to produce documents for inspection and copying.[2]

Under FRCP rule 45(d)(1), a party may serve a subpoena on a non-party witness requiring the witness to bring documents, including electronic documents, to the court.[3]

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[1] Pursuant to FRCP rule 28, a deposition is out-of-court questioning of a witness under oath. Pursuant to FRCP rule 28(a)(1), "a deposition must be taken before: (A) an officer authorized to administer oaths either by federal law or by the law in the place of examination; or (B) a person appointed by the court where the action is pending to administer oaths and take testimony."

[2] FRCP rule 30(b) Notice of the Deposition; Other Formal Requirements. **(2) Producing Documents.** If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment.

[3] FRCP rule 45(d), Duties in Responding to Subpoena, (1) Producing Documents or Electronically Stored Information, provides that: "These procedures apply to producing documents or electronically stored information: (A) *Documents*. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand. (B) *Form for Producing Electronically Stored Information Not Specified*. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. (C) *Electronically Stored Information Produced in Only One Form*. The person responding need not produce the same electronically stored information in more than one form. (D) *Inaccessible Electronically Stored Information*. The person responding need not provide discovery of electronically stored information from sources that the person

6. A fax may not be introduced at trial by a party unless it is authenticated.

Any evidence may be introduced if there is no objection by a party. Thus, the parties, at or before the pretrial conference, may stipulate that one document was faxed to another and that it was received by the other party. However, either party may object to introduction of a fax.

Under FRE rule 902, a fax is not self-authenticating. A party seeking to introduce a faxed copy of a document would need to establish through oral testimony that it was sent on a particular date and time. Through that testimony, the party sending and offering the fax would also introduce a receipt documenting that the fax was sent at a particular date and time and was received without transmission difficulty at a particular date and time. However, the receiving party would still be able to rebut the testimony of receipt and the question would then become one of credibility for the judge to resolve.

A party receiving and offering the fax into evidence would need to establish through testimony that the fax was received at a particular date and time. However, the presumption that the fax was sent from the party against whom the document is offered could rebut that testimony through conflicting testimony. The question would then become one of credibility for the judge to resolve.

7. Under the Federal Rules of Civil Procedure and under the International Bar Association Rules, it is possible to engage in limited discovery.

Under FRCP rule 26,[4] a relatively recent addition to the Federal Rules of Civil Procedure, parties must disclose certain things to the other side without the necessity of a request. The failure to comply with this rule can lead to the imposition of sanctions on the party and/or his attorneys.

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identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

[4] Rule 26. Duty to Disclose; General Provisions Governing Discovery. (a) Required Disclosures. (1) Initial Disclosures. (A) *In General*. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties: (i) the name and, if known, the address and telephone number of each individual likely to have discoverable information — along with the subjects of that information — that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment; (ii) a copy — or a description by category and location — of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment; (iii) a computation of each category of damages claimed by the disclosing party — who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and (iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Under this rule, parties must disclose: the name and, if known, the address and telephone number of each individual likely to have relevant information that the disclosing party may use to support its claims or defenses (every potential party witness); a copy or a description by category and location of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses; a computation of each category of damages claimed by the disclosing party; and, any insurance agreements that may relate to the case. This rule has lessened the amount of discovery that each party must seek.

In addition to these general requirements, FRCP rule 26(a)(2) requires specific mandatory disclosures with regard to expert testimony. This rule requires that each party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence and any written report, prepared and signed by the witness, if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony.

Under FRCP rule 26(c)(1), a court may limit discovery, for good cause, in order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. Under this provision, a federal judge may protect confidentiality by placing certain documents under seal, may prevent the disclosure of trade secrets, or may take other appropriate actions.

The IBA rules establish two principles for the taking of evidence in commercial arbitration proceedings. First, each Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, the issues that it may regard as relevant and material to the outcome of the case, including issues where a preliminary determination may be appropriate. This process is similar to the pretrial order under the Federal Rules of Civil Procedure. Second, the taking of evidence shall be conducted on the principle that each Party shall be entitled to know, reasonably in advance of any Evidentiary Hearing, the evidence on which the other Parties rely. Again, this process is consistent with the goal of the Federal Rules of Civil Procedure to ensure that trials are not conducted by ambush or surprise.

Under Article 3 of the IBA Rules on Evidence, each party must submit documents to the tribunal and any party may request the production of documents through request to the tribunal. Under Article 4, the Arbitral Tribunal may order each Party to submit a written statement by each witness on whose testimony it relies. The witness statement must include: (a) the full name and address of the witness, his or her present and past relationship (if any) with any of the Parties, and a description of his or her background, qualifications, training and experience, if such a description may be relevant and material to the dispute or to the contents of the statement; (b) a full and detailed description of the facts, and the source of the witness's information as to those facts, sufficient to serve as that witness's evidence in the matter in dispute; (c) an affirmation of the truth of the statement; and, (d) the signature of the witness and its date and place.
Any party may ask the tribunal to order a witness statement from any other witness. Under Article 8, any witness offering oral testimony must first affirm the witness statement. Under Article 5, parties may rely on party-appointed experts and the tribunal may appoint its own experts. Just as in the federal rules, the IBA rules authorize a tribunal to order a physical inspection of tangible or real property under Article 7.

8. Taking evidence before a Magistrate Judge for use by a Federal District Judge.

The Federal Rules of Civil Procedure do not permit the taking of evidence at trial before a person other than the ultimate fact-finder. Although depositions and other materials may be used under certain circumstances, the powers of the Magistrate Judge are quite limited.

Under FRCP rule 73(a), a magistrate judge may, if all parties consent, conduct certain civil actions or proceedings, including jury or nonjury trial. However, in these circumstances, the federal district judge is supplanted. The Magistrate Judge issues a judgment and the parties may appeal to the Court of Appeals. Underlying this policy is the strong belief that the fact-finder (whether judge or jury) should be able to evaluate the credibility of the witness.

There is, however, a special procedure (rarely invoked) to permit testimony to be taken before a "Master." Under FRCP rule 53(a)(1), a federal judge may appoint a master to "(B) hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by: (i) some exceptional condition; or (ii) the need to perform an accounting or resolve a difficult computation of damages; or
(C) address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district." Part of the reason that this procedure is rarely utilized is that under FRCP rule 53(f)(3), "The court must decide de novo all objections to findings of fact made or recommended by a master, unless the parties, with the court's approval, stipulate that: (A) the findings will be reviewed for clear error; or (B) the findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final." Unless the parties agree, the work may therefore need to be done twice anyway since the losing party is unlikely to accept the master's findings of fact.

9. Interlocutory appeals

The Judicial Code limit the circumstances under which interlocutory appeals (appeals from other than a final judgment) may be filed. Under section 1292 of title 28 of the United States Code,[5] the following orders are appealable during the pendency of an action (before a final judgment): an order granting or denying an injunction, a collateral final order (an order that effectively decides the rights of certain parties before a final judgment), and where a statute grants the right to an interlocutory appeal (i.e., where the court refuses to order arbitration, but not an order granting arbitration). In addition, a trial judge may certify an appeal if he believes that a novel issue of law will be dispositive in the proceeding.

[5] 28 U.S.C. 1292 provides as follows: "(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court; (2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property; (3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed. (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

10. Time limit for counterclaims

Under FRCP rule 12, a defendant will ordinarily have to file a counterclaim within the time limit for answering (20 days after being personally served with a summons and complaint, 60 days after being served by mail with a summons and complaint). However, under FRCP rule 14, a party may seek permission from the court to file a third-party complaint more than 10 days after serving its original answer.

11. Time limit for submitting evidence for all parties

Under the Federal Rules of Civil Procedure, no evidence is submitted along with the pleadings. Once all pleadings (complaints, answers, counterclaims, cross-claims and replies) have been filed, the evidence is exchanged under FRCP rule 26. Under FRCP rule 26(a)(1)(C),[6] the mandatory disclosure of evidence must take place within 14 days after the "discovery conference." This conference must be held at least 21 days before the scheduling conference. So, since the scheduling conference will not occur until 30 days after the last pleadings have been filed, the parties will all have at least 23 days ((30-21)+14=23) to complete their initial disclosures. The one exception is where a third party is added later. Under such circumstances, the third party has 30 days to file initial disclosures.[7]

12. Defendant who appears once or does not appear at all

Under FRCP rule 55(a), a default judgment may only be entered against a party who "has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise." If a party has failed to answer and has never appeared, that party has "failed to plead or otherwise defend." However, if the party has failed to plead but has appeared even once, a default judgment may not be entered against the party. The case proceeds without delay, but not as a default judgment.

Under FRCP rule 55(b)(1), if the "plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk — on the plaintiff's request, with an affidavit showing the amount due — must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person." In all other cases, under FRCP rule 55(b)(2), "the party must apply to the court for a default judgment." The court may conduct hearings to (A) conduct an

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[6] FRCP rule 26(a)(1)(C) provides as follows: "*Time for Initial Disclosures — In General*. A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure."

[7] FRCP rule 26(a)(1)(D) provides as follows: "*Time for Initial Disclosures — For Parties Served or Joined Later*. A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order."

accounting; (B) determine the amount of damages; (C) establish the truth of any allegation by evidence; or (D) investigate any other matter.

If a default judgment is entered against a party, under FRCP rule 55(c), that party may seek to set aside entry of default for good cause or seek to set aside the default judgment under Rule 60(b) for mistake, inadvertence, fraud, or similar reasons. If the party has appeared even once and wishes to appeal the final judgment or to appeal the default judgment, the party must file a notice of appeal within 30 days of entry of the judgment under Federal Rules of Appellate Procedure rule 4(a)(1)(A). However, the appeal would only consider whether the trial court abused its discretion as a matter of law in granting the default judgment, in refusing to vacate the default judgment, or in entering the judgment against the party who appeared at least once. The appellate court will not hold a trial de novo or consider new evidence in most circumstances so the likelihood of success is very small.

13. When a party will be deprived of the opportunity to submit evidence.

A party may be deprived of the opportunity to submit evidence as a sanction under FRCP rule 11. Or a party may deprived of the opportunity to submit evidence under FRCP rule 37(b) if the party fails to comply with discovery rules.[8]

Finally, under FRE rule 403, the court may exclude evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

[8] FRCP rule 37(b) provides the following sanctions for failing to comply with a discovery order: "(1) Sanctions in the District Where the Deposition Is Taken. If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. (2) Sanctions in the District Where the Action Is Pending. (A) *For Not Obeying a Discovery Order*. If a party or a party's officer, director, or managing agent — or a witness designated under Rule 30(b)(6) or 31(a)(4) — fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following: (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims; (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; (iii) striking pleadings in whole or in part; (iv) staying further proceedings until the order is obeyed; (v) dismissing the action or proceeding in whole or in part; (vi) rendering a default judgment against the disobedient party; or (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.(B) *For Not Producing a Person for Examination*. If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party shows that it cannot produce the other person. (C) *Payment of Expenses*. Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust."

14. Contents of Pretrial Order

There are two kinds of pretrial orders that need to be distinguished. The first type of pretrial order is the scheduling order under FRCP rule 16(b).[9] That order is issued very early in the proceedings and will specify dates (in reverse order) for the trial, for the pretrial conference, for the completion of alternative dispute resolution (if any), for the filing of dispositive motions, for completion of discovery, and for exchange of witness lists.

The second type of pretrial order is the "Pretrial Order" resulting from the Pretrial Conference. Under FRCP rule 16(c), there may be more than one pretrial conference, but there will ordinarily be at least one pretrial conference. Under FRCP rule 16(c)(1), "A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement." There have been numerous cases in which judges have held parties and/or lawyers in contempt of court for violating this provision.

Under FRCP rule 16(c)(2), the court will attempt to: (1) formulate and simplify the issues, and eliminate frivolous claims or defenses; (2) amend the pleadings if necessary or desirable; (3) obtain admissions and stipulations about facts and documents to avoid unnecessary proof, and rule in advance on the admissibility of evidence; (4) avoid unnecessary proof and cumulative evidence, and limit the use of testimony; (5) determine the appropriateness and timing of summary adjudication under Rule 56; (6) control and schedule discovery; (7) identify witnesses and documents, schedule the filing and exchange of any pretrial briefs, and set dates for further conferences and for trial; (8) refer matters to a magistrate judge or a master; (9) settle the case and use special procedures to assist in resolving the dispute when authorized by statute or local rule; (10) determine the form and content of the pretrial order; (11) dispose of pending motions; (12) adopt special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; (13) order a separate trial of a claim, counterclaim, crossclaim, thirdparty claim, or particular issue; (14) order the presentation of evidence early in the trial on a manageable issue that might, on the evidence, be the basis for a judgment as a matter of law or a judgment on partial findings; (15) establish a reasonable limit on the time allowed to present evidence; and (16) facilitate in other ways the just, speedy, and inexpensive disposition of the action.

Under FRCP rule 16(d), the pretrial order "controls the course of the action unless the court modifies it." Under FRCP rule 16(e), the final pretrial order will also formulate a trial plan, including a plan to facilitate the admission of evidence.

If an attorney or party violates this rule, there are separate sanctions available to the court under FRCP rule 16(f). These sanctions may include fines or penalties and exclusion of evidence or testimony.

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[9] FRCP rule 16(b)(3) provides as follows: "Contents of the Order. (A) *Required Contents*. The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions. (B) *Permitted Contents*. The scheduling order may: (i) modify the timing of disclosures under Rules 26(a) and 26(e)(1); (ii) modify the extent of discovery; (iii) provide for disclosure or discovery of electronically stored information; (iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced; (v) set dates for pretrial conferences and for trial; and (vi) include other appropriate matters."

15. The basis for appeal in the United States.

Appellate courts have a very limited scope of review in the United States. District court factual findings may be overturned on appeal only if they are "clearly erroneous". FRCP rule 52(a)(6) provides that, "Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Conclusions of law are reviewed by the appellate courts without deference to the trial courts.

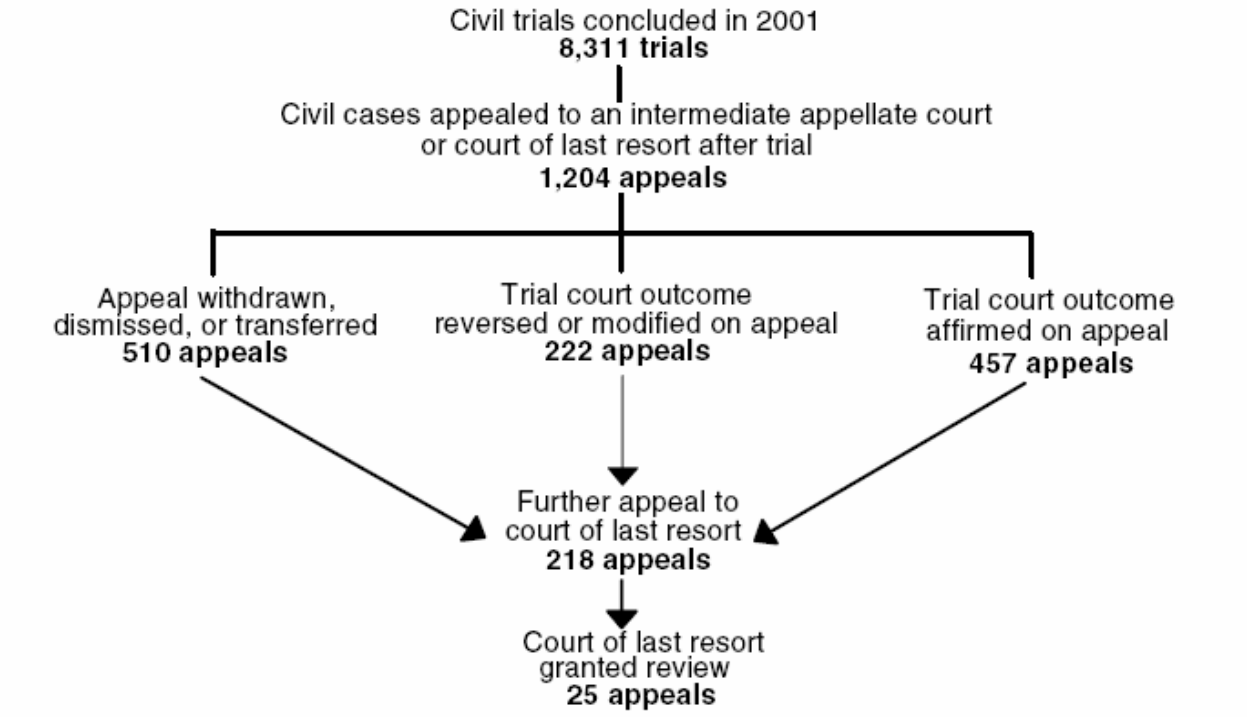
16. Standards for Supreme Court discretionary review

The United States Supreme Court generally has the discretion to determine what cases it will review. Review is ordinarily required when four justices of the Supreme Court (out of nine) vote to grant *certiorari* (hear a case). This is called the "rule of four." The great majority of cases brought to the Supreme Court are denied certiorari (approximately 7,500 petitions are presented each year; between 80 and 150 are granted). While there are no standards imposed by the law on the circumstances in which the Supreme Court can grant review, the Supreme Court tends to grant certiorari in cases involving important policy issues or when there is a split of position among the various federal circuit courts of appeals.

17. State Supreme Court discretionary review

State supreme courts also grant review in a very small number of cases. Although there is an appeal of right to the first level appellate court, few applications for review are granted by the states' highest courts.

Flow of civil trials concluded in 2001 that were appealed in 46 large counties from 2001-2005



Note: 15 appeals were pending at the end of the April 2005 study period.

Source: U.S. Department of Justice, Bureau of Justice Statistics

CIVIL PROCEDURES COMPARATIVE ANALYSIS

Introduction and Limitations

This draft report has been written prior to any onsite meetings or observations. As a result, it is necessarily based on a theoretical analysis of the Jordanian system that will likely be affected significantly by information obtained during the onsite period. Any recommendations in this draft report should therefore be assessed in light of that significant limitation. In addition, the authors created this draft report through translations of the Jordanian codes that necessarily are subject to some misinterpretation.

What will not change as a result of the onsite meetings is the extent to which the authors have come to respect the quality of the Jordanian codes. For a relatively young nation, albeit one with ancient roots, the Jordanian codes reflect a blending of multiple legal traditions with an overriding goal of providing a fair and transparent and effective judicial system. The authors of this report hope that our recommendations will be viewed as the comments of partners in an ongoing effort to make this system even fairer and more transparent and more effective.

Although both of the authors come with a grounding in the American judicial system (as lawyers, educators, and judges), it is also important to keep in mind the limitations of the American judicial system and the ongoing efforts to improve that system. The most obvious shortcomings relate to the costs of litigating a civil case in the United States and the delays that parties will experience along the way. Pretrial discovery may be extremely expensive and it may reward the litigants (and lawyers) with the greatest resources to spend. So, just as Jordan may be able to learn and improve from specific approaches within the American judicial system, so the United States may be able to learn and approve from specific approaches within the Jordanian legal system.

Structure and Organization

Rules of Procedure are ordinarily organized in one of two ways. Either they are organized by subject matter or they are organized chronologically (in the sequential order with which a case ordinarily develops).

Most human beings, regardless of nationality, tend to find it easier to organize information chronologically. Stories and movies have a beginning, a middle, and an end. Although there are stories and movies that break this rule, they tend to be the exception.

The American rules of civil procedure[10] tend to proceed chronologically from the filing of a case, through service of a complaint or petition, to the response by the adverse party or parties, through motions and

[10] The rules of procedure vary significantly from court to court. The Royal Hashemite Kingdom of Jordan is a unitary judicial system in which courts are national courts (with certain jurisdiction delegated to the religious courts). In the United States, there is a dual system of federal (national courts) and state (and local) courts. Although state courts have considerable autonomy, many states model their state rules of procedure after the federal

discovery, to trial, to post-trial proceedings, and ultimately to enforcement of judgments. No such structure or organization is obvious from the Jordanian rules.

The Ministry may wish to consider reorganizing the rules in a chronological structure.

Standing

Under Article 3(i), "No application or contest shall be accepted if not achieving an interest that the Law acknowledges for the applicant." Under Article 3(ii), "A potential interest is proved if the purpose of the application is a precautious prevention of a serious threat (damage) or to prove a right for fear that its evidence will cease to exist when in dispute."

Article 3 imposes requirement similar to two aspects of the concept of "standing" in the American judicial system. The concept of "standing" refers to the kinds of injuries that individuals must suffer in order to bring lawsuits in the courts. The concept of "standing" can also refer to the types of persons who can bring lawsuits when injuries are suffered.

Should any person be able to challenge any action (governmental or private) with which they disagree? Should any person be able to seek compensation for any injury suffered as a result of any action (governmental or private) by filing a lawsuit?

While the concept of "standing" is closely related to the issue of "subject matter" jurisdiction, it is really a separate issue. Whereas subject matter jurisdiction refers to the types of cases that a court may consider, standing refers to the types of persons who may file those types of cases to seek a remedy for certain kinds of injuries.

In the United States, most states have very relaxed rules of standing. Most individuals and organizations can challenge the propriety of governmental action; they do not have to allege that they are suffering injury that is fundamentally different from that experienced by the general population. By contrast, in the federal judicial system, plaintiffs must allege a particularized injury that is different from that enjoyed by the general population. This doctrine, enunciated by the United States Supreme Court,[11] is based on the requirement in the United States Constitution that the judicial power of the federal courts only applies to a "case or controversy."

Since the requirement of Article III only restricts the power of the federal courts. By contrast, state laws may authorize state courts to apply broad definitions of standing and even to issue advisory opinions (decisions regarding the meaning of state laws or constitutional provisions in the absence of specific parties before the court).

The Ministry may wish to consider the extent to which broad standing in the regular courts would encourage submission of disputes to the judicial system and thereby minimize recourse to other forums of dissent.

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rules or have adopted the federal rules nearly verbatim. For the purposes of this analysis, references will be made to the United States Federal Rules of Civil Procedure.

[11] *See Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976); *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923).

Jurisdiction

Jurisdiction embodies two concepts – subject matter jurisdiction and personal jurisdiction. As discussed previously, subject matter jurisdiction refers to the power of particular courts to hear particular types of disputes. Personal jurisdiction refers to the power of courts with subject matter jurisdiction to exercise that jurisdiction over particular individuals.

Subject Matter Jurisdiction

Article 27, section 1 of the Jordanian Code establishes the Regular Courts as courts of general jurisdiction with the power to hear civil and criminal (penal) cases. Trial courts include Magistrate Courts and First Instance Courts.

In the United States, the federal courts have the power to hear cases based on federal laws or the federal constitution ("federal question" jurisdiction). The federal courts also have the power to hear cases involving citizens of different states or involving citizens of foreign countries so long as at least $75,000 is in controversy ("diversity" jurisdiction).

In the various states, there are ordinarily courts of general jurisdiction and courts of limited jurisdiction. Courts of limited jurisdiction can only hear cases involving minor crimes and civil cases involving smaller disputes. Courts of general jurisdiction hear cases involving more significant crimes and civil cases involving larger disputes. Such a division of jurisdiction is reflected in the distinction in Jordan between Magistrate's Courts and courts of first instance.

There is a curious provision reflected in the translation of Article 27, section 2. According to the translation, this provision allows the Jordanian Courts to adjudicate cases outside their jurisdiction so long as each party "explicity and implicitly accepts the jurisdiction of such courts." If the translation is correct, this means that the Jordanian Courts could be required to consider cases that have no relationship to Jordan and in whose outcome the Kingdom has no interest. It is hard to imagine why the Kingdom would want to commit judicial resources to the adjudication of such matters. Related to Article 27, section 2 is Article 29. This provision specifies that a plaintiff cannot unilaterally confer jurisdiction. Therefore, if a defendant does not appear (and therefore does not consent to jurisdiction), the Court must dismiss the proceeding.

If the translation of Article 27(2) is correct, the Ministry may wish to restrict the extension of subject matter jurisdiction to cases that do not involve Jordanian parties or issues that directly affect the Kingdom.

Personal Jurisdiction

The concept of personal jurisdiction refers to the determination of when an individual or an entity has sufficient connection to the Kingdom in order to require the individual or entity to submit to the jurisdiction of the Jordanian courts. In the United States, personal jurisdiction is limited by the due process clause of the United States Constitution.[12] In the landmark case of *International Shoe v.*

[12] The due process clause is found in the Fifth Amendment to the United States Constitution, a part of the Bill of Rights. This amendment provides in relevant part as

Washington,[13] the United States Supreme Court held that jurisdiction (court power) could be exercised over any individual or entity that had sufficient contacts with that jurisdiction.

In Article 36, *in personam* jurisdiction exists where a defendant resides or, for non-residence, where a defendant temporarily resides in Jordan. In Article 29, the Jordanian rules permit the exercise of jurisdiction over a foreigner "who does not have a location or a residence place in Jordan" so long as certain minimum contacts exist with the Kingdom. In Article 38, personal jurisdiction exists over an entity where the headquarters of the entity is found. In Article 37, jurisdiction in real property cases exists where the real estate is found. In Articles 41 – 47, special provisions exist for special enumerated contexts (insolvency proceedings, worker's and supplier's liens, insurance claims, etc.).

These approaches are consistent with the American approaches for *in personam and in rem* jurisdiction. The goal is to protect the right of defendants to a fair trial by making it as likely as possible that any trial will take place in a forum fair to the defendant. In the United States, these considerations are driven by considerations of procedural due process. The approach in Jordan parallels this model.

In the United States, a third model of jurisdiction, *quasi in rem* jurisdiction, exists, primarily to facilitate the recovery of debts. Through *quasi in rem* jurisdiction, a plaintiff can gain personal jurisdiction over a defendant in a jurisdiction in which the defendant owns real property even though the defendant cannot be found in that jurisdiction and does not reside in that jurisdiction. However, *quasi in rem* jurisdiction exists only to the value of the property located in that jurisdiction.

The Jordanian rules provide a fairly clear set of rules for jurisdiction. The provisions address the nature of contacts by individuals and businesses with the Kingdom and the exercise of jurisdiction over property. However, to the extent that the translation reflects provisions whose organization and clarity might be improved, the Ministry may wish to consider reorganizing and clarifying the circumstances in which jurisdiction will be exercised over persons or entities that are not resident within the Kingdom. Without changing the substantive requirements, greater clarity would provide enhanced predictability for individuals and entities wishing to do business with or within the Kingdom. The Ministry may also wish to define the circumstances in which courts will or will not respect forum selection clauses in contracts.

Forum Selection

These days much of the uncertainty about the forum (court) in which a business dispute will be heard is being resolved by the parties through insertion of a "forum selection" clause in a contract. This clause provides the location (Jordan or other country) and type of forum (court or arbitration) in which a dispute will be resolved. The Jordanian rules provide a similar authorization in Article 40 which authorizes concurrent jurisdiction in the selected jurisdiction or the jurisdiction in which the defendant resides. It is not obvious why Article 40 does not give full weight to the forum selected by the parties, a provision that is often the subject of significant negotiations with the parties.

The Ministry may wish to consider amendment of article 40 to give full weight to a forum selection clause voluntarily agreed on by the parties.

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follows: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

[13] *International Shoe Co. v. State of Wash., Office of Unemployment Compensation and Placement,* 326 U.S. 310, 66 S.Ct. 154, 161 A.L.R. 1057, 90 L.Ed. 95 (1945).

Amount in controversy

Under Article 48, the amount in controversy (for purposes of subject matter jurisdiction) is determined on the day the case is filed based on the estimate provided by the plaintiffs. If no estimate is provided, under Article 49, section 1, the Chief Judge of the Court establishes the amount in controversy. If it appears to the Court that the estimate was not "sound," the Court may establish a different value. Under Article 50, the estimate may include all amounts due on the date the complaint is filed. Under Article 51, special procedures are provided for the valuation of property. Under Article 52, special procedures are provided for the valuation of contracts. Under Article 53, special procedures are provided for the valuation of a debt or sequestration. Under Article 55, any claim that cannot be valued "will be considered as exceeding the conciliation ceiling."

In the United States, federal courts use the "legal certainty" test to decide whether a dispute meets the amount in controversy requirement. Under the "legal certainty" test, courts accept the pleaded amount unless it is legally certain that the pleading party cannot recover more than $75,000.

In some countries, a great deal of judicial resources is spent assessing filing fees and then readjusting filing fees based on the amounts ultimately collected. Although the Articles do not directly address this issue, the Ministry should consider establishing flat filing fees based on the amounts contained in the "bill."

Pleadings

Article 58 sets forth the requirements for filing pleadings. None of these requirements are substantive. However, they are based on a continuing requirement of hard-copy pleadings. The issue of electronic filings versus traditional hard-copy filings will be discussed separately.

FRCP rule 7(a) limits the types of pleadings that are permitted in the United States district courts. The rule permits only the following pleadings: (1) a complaint; (2) an answer to a complaint; (3) an answer to a counterclaim designated as a counterclaim; (4) an answer to a crossclaim; (5) a third-party complaint; (6) an answer to a third-party complaint; and (7) if the court orders one, a reply to an answer. Other than the requirement of documentation in the Jordanian system, a case bill and complaint are largely equivalent. FRCP rule 7(b) specifies the requirements for motions. Again, these requirements are procedural, not substantive, and should not be outcome-determinative.

Article 59 sets forth the requirements for responsive pleadings by defendants. Article 59(1) requires a private defendant to submit a written response within thirty days of service. Under Article 59(3), this deadline may be extended by the court, Under FRCP rule 12, the deadline for filing a response (answer) is 20, 60 or 90 days, depending on the specific circumstances of the defendant, with the possibility that the court will extend the time for an answer.

Under Article 59(6), the Plaintiff must submit a response with a memo of his contests and objections to the evidence of the Defendant. He may also enclose with his response the required evidence to enable him to rebut the evidence submitted by his counter-litigant. Under the Federal Rules, the Plaintiff has no

duty to respond to the Defendant's answer. However, the Plaintiff must respond to the allegations in any counterclaim filed by the Defendant or the allegations are deemed admitted (FRCP rule 7(a)(3)).

Under Article 59(7), the defendant cannot totally deny the claims of his counter-litigant in the pleading submitted by him unless the claims are completely false. This also applies to the Plaintiff in his response to the defendant's pleading. Parties must "verify each realistic matter that the litigant alleges and he is not satisfied that it is true." FRCP rule 11(b) imposes a comparable requirement: "(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper — whether by signing, filing, submitting, or later advocating it — an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information."

Under Article 116, the "Defendant can challenge any allegation or claim by the Plaintiff" by requesting a judicial hearing and judgment in his favor." Under Article 116(1), a defendant may be compensated for damages caused by the original lawsuit. Under the American "rule," a prevailing party can usually recover his costs of litigation, but not his attorney's fees.

Under FRCP rule 3, "A civil action is commenced by filing a complaint with the court." Under FRCP rule 8, the complaint "must contain: (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief."

Under Article 56, the bill that initiates an action in Jordan must include the following items: 1) Name of Court before which the case is brought; 2) Full name of the plaintiff; his profession or job; his work site, location and the full name of this who represents him; his profession or job; his work site and location; 3) Full name of the defendant; his profession or job; his work site and location; full name of this who represents him; his profession or job and work site; 4) If the defendant or his representative does not have a work site or another known location; or work site, location or residence area that used to be his; 5) Assign a selected location for the plaintiff in Jordan if not having such a location in compliance with Article 19; 6) Subject of the Case; 7) Proceedings and documents of the Case as well as the requests of the Plaintiff; 8) Signature of the Plaintiff or his Attorney; and, 9) Date of drafting the case.

The critical difference here is the "notice pleading" requirement of FRCP rule 8(2). Nearly all American jurisdictions inherited a code pleading requirement from Great Britain. Under the "code pleading" system, there were numerous forms of action with complicated pleading requirements. The innovation reflected in the Federal Rules of Civil Procedure was the elimination of these complicated pleading requirements. Instead, the initial pleading (complaint) was sufficient if it put the defendant "on notice" of the nature of the claim and the type of relief sought. Under notice pleading rules, the plaintiff can also plead alternative or inconsistent claims so long as the plaintiff could allege each claim in good faith. Discovery provides an opportunity to "fill in the blanks."

The Ministry may wish to amend the rules to require a "plain statement of the nature of the claim and the relief requested. However, the present system in Jordan, with its requirements of submission of

documents to support a claim, seems to put defendants on notice and to provide judges with sufficient information to adjudicate claims.

Signing Pleadings

Article 57, section 2 provides that, The Plaintiff or his attorney must sign each paper of the papers in the documentation file; this signature must be supported with his acknowledgment that the paper is a true copy of the original (if any)." FRCP rule 11(a) provides that, "Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name — or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention."

The Jordanian rule seems to permit a bill to be signed only by the plaintiff, even if the plaintiff is represented by an attorney. Under the federal rule, although a party can sign a complaint, it must be signed by at least one attorney of record.

If the translation accurately reflects the substance of Article 57(2), the Ministry should consider amending this rule to require disclosure of the identity of an attorney. Under the current rule an attorney could avoid public disclosure of his role in representing a client.

Representations to the Court and Sanctions

Under FRCP rule 11(b), the signature of an attorney on a pleading represents a certification by the attorney (or an unrepresented party) "that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and, (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information." There is no comparable rule in the Jordanian Articles.

The closest thing to a comparable rule is found under Articles 72-74. Under Article 72, the Court may impose sanctions against litigants or employees "who fail to lodge documents or do any of the hearing procedures in a timely manner as per the date set by the Court." Under this article, the maximum fine is twenty Jordanian Dinars (about $28). Under Article 73, the Chair of the Court may dismiss anyone from the Court for violating its order. Under Article 74, the Session Chair may refer matters for appropriate action.

There are also some specific provisions allowing the imposition of sanctions in special circumstances. For example, Article 162 permits the imposition of
expenses for verifying a handwriting, stamp, signature, or fingerprint. There is no requirement that the denial of veracity be made in good faith. This may have a chilling effect on parties contravening allegations that they have no reason to know is true.

Under Article 163, similar sanctions may be imposed if a "Plaintiff is not true in part of his case." Even after a reasonable investigation, a party may not be able to determine what is "true" and the notion that courts can always determine what is "true" is contrary to human experience. And, no similar sanctions are authorized against a Defendant who "is not true in part of his case." Under Article 164, the liability for imposition of fees and expenses is joint and several, even if the parties are not equally responsible for the failures. Under Article 166, fees and expenses will include advocacy fees.

FRCP rule 11(b) has proven to be a powerful force in curbing improper pleadings and in streamlining the judicial process. Attorneys must conduct a reasonable investigation before signing a pleading and before including claims or defenses that cannot be supported in good faith. FRCP rule 11(c) authorizes a court to impose appropriate sanctions "on any attorney, law firm, or party" that violates rule 11(c). These sanctions can be imposed on motion or *sua sponte* by the courts.

Under Article 59(5), any pleading responding to the case bill must be signed by the defendant or by his attorney must sign each paper within the documentation file. The only representation made by the signature is that the copy (if any) is a true one.

The Ministry should consider adopting provisions comparable to FRCP rule 11(b) and (c). Such provisions would create a powerful check on attorney actions. Attorneys could still effectively represent their clients, but they could not obstruct the judicial system. This amendment should provide for a more powerful sanction than a minimal fine, but should require that bad faith be shown before imposing sanctions. The availability of sanctions is an essential tool for judges in managing parties and attorneys appearing in the courts.

Parties

Joinder of Issues

Article 27, section 3 authorizes the Jordanian courts to consider all cases within their jurisdiction and all matters "related with" those cases "in order to secure a sound delivery of justice." This section also authorizes the exercise of jurisdiction to enter "temporary and precautionary" orders even if the court does not have jurisdiction.

In the United States, Federal Rules of Civil Procedure (FRCP), rule 18 allows a party to assert any claim that he or she may have against an opposing party. Claims that are "related with" the prior claim generally must be asserted as a "mandatory" claim. Optional claims are simply limited to those involving the parties before the courts. Although the trial judge can sever (separate for trial) these optional claims, cases may sometimes proceed to trial with unrelated matters. This can be very confusing. And, although it may facilitate a negotiated settlement, it is not necessarily a wise use of limited judicial resources.

The Ministry should consider maintaining the limitation on joinder of issues to those issues related to the issues that were the basis of the original complaint or petition. If it is not clear in the present system, the Ministry should consider amending these provisions to authorize judges to deny requests for joinder of issues when joinder is used to delay case resolution or to otherwise impede the justice system.

Joinder of Parties

Under Article 70(1), two or more persons may join together in bringing an action if "the right they claim relates to a single action or a single set of actions" or arises from one proceeding or a set of proceedings. Under this Article, two or more persons may also "unite in one case if they have already filed cases separately and then it is found that these cases have a common legal or realistic issue." Under FRCP rule 20(a), "Persons may join in one action as plaintiffs if: (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all plaintiffs will arise in the action."

Under Article 70(2), the Court can "ask the litigants to choose a separation of the case if they find out that the unity of plaintiffs will cause a confusion or delay in considering it" or can order separate trials itself. Under Federal Rule 20(b), "severance" may be ordered to require separate trials.

Under Article 70(3), similar rules apply to the joinder of defendants. However, there is no similar provision for severance of defendants by request or court order of joinder of plaintiffs will cause confusion or delay. Under FRCP rule 19(a), a Plaintiff must join as defendants if: (A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Under Rule 20(a)(2), Persons may be joined as defendants if "(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all defendants will arise in the action."

If it is not clear in the present system, the Ministry should consider amending these provisions to authorize judges to deny requests for joinder of parties when joinder is used to delay case resolution or to otherwise impede the justice system.

Class Actions

The major difference between the Jordanian Articles and the Federal Rules with regard to "joinder of parties" relates to class actions. Although there were limited opportunities for class actions at common law, the adoption of Rule 23 of the Federal Rules in created new and unprecedented opportunities for large numbers of plaintiffs to band together to sue defendants (plaintiff class actions) and for defendants to counterclaim against large numbers of plaintiffs (defendant class actions). Under FRCP rule 23(a), a class action must meet four requirements: "One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." These four requirements are known, respectively, as numerosity, commonality, typicality, and adequacy.

In addition, class actions have to meet one of the requirements of Rule 23(b). A class action may be maintained if Rule 23(a) is satisfied and if:
"(1) prosecuting separate actions by or against individual class members would create a risk of: (A) inconsistent or varying adjudications with respect to individual class members that would establish

incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests; (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action."

While the judicial pendulum continues to swing for and against class actions, especially plaintiff class actions, no serious judicial observer would minimize the impact that Rule 23 has had on the procedural landscape. Some other jurisdictions are experimenting with limiting class or group actions. Jordan may wish to monitor the developments in these other foreign jurisdictions to determine whether any elements should be incorporated in the Jordanian system.

Third-Party Defendants, Intervention and Interpleader

Under Article 113(1), any litigant may bring in another person if they could have originally been sued in the action. Under the Federal Rules, when a defendant brings another party into an action it is known as crossclaim or third-party claim. The defendant is effectively claiming that another party is potentially liable to the plaintiff instead of the defendant or is jointly liable with the defendant. A claim against the original plaintiff, a counterclaim, is authorized by FRCP rule 13(a) and (b). A claim by a defendant against a new "third-party" defendant, a crossclaim, is authorized by rule 13(g).

Under Article 113(2), if a "defendant claims that he has the right to refer the claimed right to a person who is not a party in the case, he shall have the right to submit a written application to the court to explain the nature of the claim and the causes for it. He shall request that person to be a party of the case. When his request is fulfilled, he shall be asked to submit a pleading of his claim according to the procedures usually implemented to file a case and to pay the fees." Under the Federal Rules, this process is known as inpleader. The defendant is effectively claiming that any liability that he may have to the plaintiff is due to be reimbursed by a third party. Under FRCP rule 14(a), "A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it."

Under FRCP rule 22, persons with claims that may expose a plaintiff to double or multiple liability may be joined as defendants and required to interplead. This situation is known as interpleader and this often occurs when there may be multiple claimants to a specific account or insurance policy. Under rule 22(2), a defendant exposed to similar liability may seek interpleader through a crossclaim or counterclaim.

Under Article 113(3), any person who is added to a case through a cross-claim or through inpleader "must submit his response and defense evidence according to the provisions of Article (59)." The same consequences for failing to properly plead apply to the cross-defendant or inpleaded defendant or interpleaded defendant under provisions like FRCP rule 14(a)(2).

Under Article 114(1), " Everybody holding an interest shall have the right to be included in the case by joining one of the litigants and shall be exempted from the required fees." Such an interest can be established under Article 114 by persons who used to be litigants in the case at a previous stage, who are heirs of the parties, or who might be caused harm "because of the case or due to a sentence issued through it if the Court finds serious indicators to collusion, fraud, or failure to do something on part of the litigants." Such individuals are referred to as "intervenors" under the Federal Rules. Under FRCP rules 24(a) and (b), there are two forms of intervention – intervention of right and permissive intervention. Whatever the type of intervention, under FRCP rule 24(c), "A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought."

Incompetent persons

Article 17 identifies the residence and customary place of business for purposes of service. This Article roughly parallels special circumstances contained in FRCP rule 4. However, Article 18 specifies that, the "Location of the minor aged person, the person under guardianship, the missing, and the one living abroad shall be the location of that who legally acts for him. The location of the corporate body is the place where the headquarters is found. For the corporate bodies with headquarters abroad and branches in Jordan, their branches will be considered as their locations." FRCP rule 4 differs significantly in attempting to protect minors, disabled persons, those living abroad, and foreign corporations. Under FRCP rule 55(b)(2), "A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared."

There seem to be several problems with Article 18. First, a minor person may not have anyone who is legally authorized to act for him. That will need to be determined with reference to the law in the jurisdiction in which the minor resides. And, a minor may have no person legally authorized to act for him if his/her parents are dead. Similarly, a person under a disability may not be competent to act for himself but may have no person authorized to legally act for him. FRCP rule 17 defines who has the capacity to sue or be sued in the federal courts; it also defines who may act on behalf of an incompetent person in the absence of a legal or natural guardian.

The Ministry should consider amending Article 18 to ensure that the interests of minors, disabled persons, and others are adequately protected.

Under Article 131, the Court must approve a settlement of a lawsuit filed on behalf of an incompetent person. However, no similar requirement is imposed for judicial review of settlements on behalf of incompetent defendants. For example, a minor may have independent funds and may injure another through a tort. Such a minor incompetent is still at risk of being exploited by an attorney or adverse party.

The Ministry should consider amending Article 131 to require approval of all settlements involving incompetent persons, not merely those in which the plaintiff is an incompetent person.

Filing

Under Article 57, section 1, "The Plaintiff must submit to the Clerk Bureau of the Court his case bill of an original copy and copies as many as the number of defendants with the following enclosures: the documentation file that supports his case along with an index for this file; a list of his written evidence

with the third parties; list of his witnesses; their full addresses and the proceedings he wants to prove in the personal evidence for each witness per se." Under FRCP rule 8, a plaintiff need only include "1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief."

This difference highlights the fundamental difference between the "adversarial" system of justice reflected in the American judicial system and the "inquisitorial" system of justice reflected in the Jordanian judicial system. The Jordanian system is consistent with the model utilized in countries like France and it reflects fundamentally different perceptions regarding the role of judges and the better way to achieve justice.

Statute of Limitations

Article 57, section 5 provides that, "The case will be deemed as brought before the court and causing its effects to be enforced as from the date of this registration even if at a non-jurisdiction court." This Article is paralleled by FRCP rule 3 which provides that, "A civil action is commenced by filing a complaint with the court."

There are certain exceptions to this rule. First, if service of the complaint is unreasonably delayed, the tolling of the statute of limitations may not be permitted. Since part of the purpose of the statute of limitations is to ensure that the facts underlying the complaint are tried when they are still reasonably fresh, an unreasonable delay by the plaintiff is construed against him. Second, in cases involving diversity jurisdiction, the federal courts incorporate the applicable state statute of limitations. States may utilize more restrictive rules.

Service of Process

Under Article 4, "No service (of notice) or execution can be served or put into effect before 7:00 am or beyond 7:00 pm; or on official holidays unless necessary and upon a written permit by the Court." Under the Federal Rules, no such limitation exists.

Since service or execution may be prevented by dilatory acts of a party, there seems to be no good reason to require a written order to permit service or execution after 7:00 p.m. While a reasonable limitation may be appropriate, this seems to unnecessarily require burdening of the courts.

The Ministry way wish to consider amending Article 4 to permit service or execution either at any time or until approximately 10:00 p.m. At the same time, the Ministry may wish to consider prohibiting service or execution on specified religious holidays.

Under Article 5, the return of service must include specified information (i.e., date, court ordering service, identity of the bailiff, etc.). Under Rule 4(l), service by a private individual must be demonstrated by affidavit (statement under penalty of perjury). The return of service must otherwise include similar information in both systems.

Under Article 6(1), service must be made by bailiffs or by private companies approved by the Council of Ministers. Under FRCP, rule 4(c)(2) may be made by any non-party who is at least 18 years. Over the past 75 years, service of process in the United States has been simplified to include service by first class mail accompanied by an acknowledgment of service. With the availability of so many alternative ways of providing actual service to a party, the rules should focus on utilizing the cheapest and most efficient method.

The Ministry should consider amending Article 6 to focus on the most efficient way to provide actual notice to a party, not in elevating form above substance.

Under Article 8, service may be made upon an individual at home or at work. Under FRCP rule 4, local service may be made "delivering a copy of the summons and of the complaint to the individual personally . . . ." There is no limitation to home or work so long as personal service is made.

The Ministry should consider removing the limitation present in Article 8 to permit personal service anywhere within the Kingdom.

Under Article 8, if personal service is not possible, the Bailiff may make service on "his agent, employee or this who lives with him from his ancestors, offspring, spouses, siblings (brothers/sisters) who appear as 18+ years old on condition that there is no interest conflict between them and this to be served." Under FRCP rule 4, service other than personal service may be made by "leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or delivering a copy of each to an agent authorized by appointment or by law to receive service of process." The critical difference is the permission under Article 8 to serve any agent or employee whereas an agent must be authorized by appointment or law to receive service of process under the United States rule. The danger under Article 8 is that service may be made on an agent or employee who may not have a conflict of interest, but who may not appreciate the significance of the court papers and may not forward them in a timely manner to the party.

The Ministry should consider limiting service under Article 8 to agents or employees authorized to receive service or process.

Under Article 9, a Bailiff who is not able to make service under Article 8 may post court papers on the front door of the party's residence or at his work site. Under the United States Constitution, the Supreme Court has required parties to utilize the best possible notice available under the circumstances. If actual notice is not possible and substituted notice is not available, the Supreme Court has authorized posting on land or property in *in rem* and in *quasi in rem* proceedings and through publication and/or posting in *in personam* proceedings.[14] The curious thing in light of Article 9 is that Article 12 requires court approval to permit constructive service by publication in two local dailies. However, Article 12 only applies when the court finds out that "it is impossible to serve the papers according to the procedures stipulated herein . . . ." Since posting on a door is service "according to the procedures stipulated" in the rules, Article 12 would not apply. So, judicial scrutiny of procedures would not be required in many of the circumstances most demanding of judicial intervention.

The Ministry should consider amending Article 9 to permit alternative service only when the Court is satisfied that other means more likely to achieve actual notice are not possible.

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[14] *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

Under Article 10, special procedures are authorized in cases against the government or public institutions, against prisoners, against sailors, or other special circumstances. These provisions parallel special procedures authorized under FRCP rule 4(e) – (k) and there seems to be no differences that would suggest changes.

Under Article 14, "the Court will proceed on the case [only] if convinced that the service has been done according to the duly observed practices. Otherwise, it will decide to do the service again." Since the Court will necessarily be dependent on the parties who have appeared, it is difficult to imagine how the Court will be in a position to be so convinced. Moreover, under Article 14, the Court may sentence a bailiff who was negligent or who performed improperly with regard to service to "a fine of JD 20 minimum to JD 50 maximum." The Court's decision as to such a fine is "irrevocable." In the Jordanian system, a great deal of responsibility is placed on the bailiffs for service and recommendations have been made to change that system. But, even more problematic is the notion of "irrevocable" fines. Although contempt may be imposed by courts in the United States, there is always an opportunity for at least one level of review of that decision. It is also hard to reconcile Article 15 with Article 69. Article 69 provides that, "When the defendant is absent and if the Court finds out that he was not duly served the case bill, it must postpone the case to another session until he is duly served the case bill." In theory the Court was supposed to make this inquiry independently under Article 14.

The Ministry should consider amending Article 14 to expand the modes of service and to eliminate the reference to "irrevocable" fines. The Ministry should consider amending Article 14 to place the burden of proof on the plaintiff to demonstrate that appropriate service has been made.

Article 15 provides that, "The service shall be deemed as effective once the person to be served has signed the service notice; or once he has abstained to sign it; or once the service has been done according to the provisions herein." This may be a problem of translation, but, as translated, the Article provides that service is effective once a person has abstained to sign a service notice even if service was not made "according to the provisions herein." That cannot literally be what was intended by the drafters since ineffective service would be deemed effective. It is also inconsistent with Article 16 since this article requires compliance with "the dates, procedures and conditions of the service as stipulated in the above articles" in order for the service to be deemed effective.

If the problems in Article 15 are not the result of a translation problem, the Ministry should consider amending Article 15 to ensure actual service.

Under Article 20, a person who fails to fulfill requirements to assign a selected location for himself is punished. Even if actual notice is possible and convenient, such a person can be served by publication.

The Ministry should consider amending Article 20 to require the individuals be served with the best notice reasonably available under the circumstances. In fact, the prior version of this provision seems far preferable in light of due process considerations.

Although we have attempted to include recommendations after each of the relevant sections, the Ministry should consider adopting substantial amendments to the provisions governing service of process to include the following basic elements. First, personal service should be required in all cases except those involving real property. Alternative service should only be permitted by the trial court if it is persuaded that personal service is not reasonably possible. Second, personal service should be available through a "bailiff" or through a private process server. Third, personal service should be made by delivering a copy of the bill to the person, to someone competent to receive service at the residence of the person, to an agent of the person at his workplace, etc. Fourth, whatever the identity of the process server, the

Court should be provided with specific information regarding the actual circumstances under which service was provided.

Motions to Dismiss

Under Article 109(1), a defendant can challenge a case bill without reaching the "case subject" on the grounds of lack of jurisdiction, failure to comply with an arbitration clause, prior settlement, laches (inappropriate lapse of time), and dishonesty in the filing of service papers. Under Article 109(2), the decision on such a request is subject to appeal. Under Article 110, any claims that the service papers are untrue "not related to the public order," any claims of lack of jurisdiction, and any claims of failure to comply with an arbitration clause must be made before submitting "any other procedural argument, request or defense in the case."

In the United States, one of the most critical pretrial stages is the "Motion to Dismiss." If a motion to dismiss is granted, the case is often terminated. If a motion to dismiss is denied, the case will often be resolved in a negotiated settlement. But, the failure to grant a motion to dismiss is generally not an appealable order. Motions to dismiss are nearly always filed before the defendant answers the complaint or petition.

Motions to dismiss (or motions for judgment on the pleadings) are authorized under FRCP rule 12(b). Under FRCP rule 12(b), a motion to dismiss can be filed on the following grounds: (1) lack of subject-matter jurisdiction; (2) lack of personal jurisdiction; (3) improper venue (improper location within the court system); (4) insufficient process (the summons was not properly issued); (5) insufficient service of process (the summons was not properly served); (6) failure to state a claim upon which relief can be granted; and (7) failure to join an indispensable party.

Probably the most significant grounds for a motion to dismiss is Rule 12(b)(6) since the defects cannot be cured. Under state law, this ground is often referred to as a demurrer. In either case, they are frequently referred to as "so what" motions. They effectively say: "Even if everything that the plaintiff says is true, so what? It still would not entitle the plaintiff to any relief." This motion has a counterpart in the motion for summary judgment. The difference is that a motion for summary judgment depends on uncontested facts outside the initial pleadings.

FRCP rule 12(b) is paralleled in Jordanian rules. Article 35, section 1 permits a party to challenge venue by filing an application with an Appellate Court. The Appellate Court will then assign the case to a competent magistrate court or a first instance court. In a dispute between two courts that operate under different Appellate Courts, that responsibility falls to the Court of Cassation. During the period in which venue is being determined, all proceedings are stayed.

Under Article 111, at any time a Court can consider on its own motion or on motion of any party that it does not have subject matter jurisdiction (lack of authority to hear this type of case). This is similar to the longstanding interpretation by the United States Supreme Court under Article III of the Constitution that absence of subject matter jurisdiction can be raised at any time – even for the first time on appeal to the United States Supreme Court. It is specifically addressed in Rule 12(h)(3). This rule provides that, "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."

Under Article 110, other objections regarding jurisdiction of a court must be made "before submitting any other procedural argument, request or defense in the case. Otherwise, the right to these will be nullified." This treatment is similar to the approach in FRCP rule 12. Under Rule 12(b), "Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: (1) lack of subject-matter jurisdiction; (2) lack of personal jurisdiction; (3) improper venue; (4) insufficient process; (5) insufficient service of process; (6) failure to state a claim upon which relief can be granted; and (7) failure to join a party under Rule 19." However, "A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed."

Under Article 110(2), objections to service "will cease to be valid when the person to be served appears at the set session or by submitting a memo of argument." Under the Federal Rules of Civil Procedure, an objection to service is not waived if made under Rule 12(b)(4) and (5) before filing of a responsive pleading. In fact, many states permit defendants to file limited appearances to challenge insufficiency of process or service of process.

The Ministry should consider restricting the appealability of the denial of a Motion to Dismiss. Ordinarily a delay works to the benefit of a defendant and an appeal of the denial of a motion to dismiss could delay proceedings for three years or more. In the United States the denial of a motion to dismiss may not be appealed. Permission to appeal the denial of a motion to dismiss should require judicial approvasl.

More Definite Statement

Under Article 59(7), "In case the response is ambiguous, the Court shall have the right to commission either party to explain the content of the pleading in details and in line with the provisions herein." A similar requirement is imposed under Article 117 ("In all the lawsuits, the Court can decide that another pleading must be submitted to the effect of providing more details of the Plaintiff's or the Defendant's Argument.") These provisions parallel FRCP rule 12(e), which permits a party to move the Court to require a "more definite statement" on the part of the opposing party.

Motion to Strike

Under Article 75, "The court shall have the right, by itself, to order deletion of offending phrase or those violating the public morals or order from any paper in the hearing or memos." Under FRCP rule 12(f), "The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." This action may be taken *sua sponte* or on motion.

The Ministry may wish to consider expanding Article 75 to strengthen the powers of the courts to administer the judicial system and further justice and efficiency.

Amendments to Pleadings

Under Article 68, amendments to pleadings are quite limited. Amendments cannot amend, add to, or reduce the previous demands "unless the amendment will lead to achieving the interest of the counter litigant and causes no prejudice to any of his rights." Despite this Article, under Article 115(a)(i), the

plaintiff may seek court approval to amend a bill to correct errors or to reflect changed circumstances or facts learned after lodging the lawsuit. And, under Article 115(a)(ii) and (iii), amendments can be made to "complement" the original lawsuit if integrally related to it or to include "an addition or change in the causes of the lawsuit while keeping the original application subject as is." It is difficult to reconcile the language of Article 68 with the provisions of Article 115.

Under Article 119, deadlines are imposed for the submission of an amended pleading. Under Article 120, a party may file a response to the amended pleading or may rely on his original pleading for response. Under Article 121, amendments may not be sought after closure of the trial.

Under the Federal Rules, amendments are far more freely permitted. FRCP rule 15(a) permits a party to "amend its pleading once as a matter of course: (A) before being served with a responsive pleading; or (B) within 20 days after serving the pleading if a responsive pleading is not allowed and the action is not yet on the trial calendar." Although other amendments may be made "only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Under rule 15(c), amendments that do not change the fundamental nature of the lawsuit, even those that add parties so long as those individuals had prior notice of the lawsuit, "relate back" to the original date that the lawsuit was filed.

The Ministry should consider reconciling the language of Article 68 with Article 115. In addition, the Ministry may wish to consider amending Article 68 and 115 to facilitate the amendment of pleadings at early stages in a lawsuit.

Service on Witnesses

Article 11 provides that "witnesses will be served by means of serving the litigants upon a summon memo issued by the Court." FRCP rule 45 provides for the issuance of subpoenas to compel witness to participate in the judicial process (either at a deposition or at a trial). Rule 45 sets forth the form and contents of subpoenas, including the court issuing the subpoena, the person requesting the subpoena, and the documents or other materials to be produced. There is no such requirement in Article 11.

Rule 45 also specifies the method of service for persons residing within and without the United States. By contrast, Article 13 only specifies the method of delivery "if the person to be served resides in a foreign country." Article 13 requires that "papers . . . be delivered to the Ministry of Justice in order to be served through the diplomatic channels." While this approach comports with treaty requirements, it may not guarantee service since diplomatic channels may not reach an individual residing in a foreign country.

Although treaty requirements should be followed, the Ministry of Justice should consider amending the rule to also require actual service through reasonably available commercial means.

Rule 45 also requires that a non-party subject to a subpoena be advanced costs "for 1 day's attendance and the mileage allowed by law." No such provision exists in the Jordanian rules and an individual may be subjected to significant financial hardship in order to attend a distant court proceeding.

The Ministry should consider amending the rule to require payment of attendance and travel fees for non-parties required to attend court proceedings.

Rule 45 also provides for "protective orders" in order "to avoid imposing undue burden or expense on a person subject to the subpoena." In addition, a court may "quash" a subpoena that seeks "of privileged or other protected matter" or that "subjects a person to undue burden." No such procedure seems to be authorized by the Jordanian rules.

The Ministry should consider amending Rule 11 to permit a court to consider a protective order or motion to quash when a subpoena is challenged.

FRCP rule 45(d) also provides special provisions for subpoenas seeking the producing of documents or electronically stored information. There are separate provisions applicable to e-discovery – discovery of e-mails and other electronic information.[15] Although discovery is a feature of the American system that does not have a counterpart in the Jordanian system, Jordanian courts may need to gain access to significant amounts of electronic information as part of their investigative function.

The Ministry should consider amending Article 11 to provide procedures and standards for subpoenas directed to electronic evidence.

Ensuring the appearance of witnesses appears to be a significant problem. Witnesses should be subpoenaed to appear and should be sanctioned if they do not appear. However, to facilitate the availability of witness testimony, the Ministry may wish to consider amending the rules to provide for testimony on motion or agreement by telephone or video conference. In addition, the Ministry may wish to authorize the use of depositions outside the presence of the court to obtain witness testimony through stenographic or video recordings. Safeguards similar to those adopted under FRCP rule 30 would have to be present to ensure reliability.

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[15] Rule 45(d)(1) provides as follows: "These procedures apply to producing documents or electronically stored information:
(A) *Documents*. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.
(B) *Form for Producing Electronically Stored Information Not Specified*. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.
(C) *Electronically Stored Information Produced in Only One Form*. The person responding need not produce the same electronically stored information in more than one form.
(D) *Inaccessible Electronically Stored Information*. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery."

Calculation of Time

Under Article 23, the calculation of time is specified. Although the calculations of time under this Article vary significantly from the calculations in Rule 6, there is nothing in this provision that seems unfair or offensive to the conscience.

Witnesses

Article 81(1) defines the oath to be administered to a witness before providing a deposition. Article 81(2) defines the order of questioning. Article 81(3) provides for the filing of objections and the resolution of those objections by the Court. Under Article 81(4), the Court can question any witness. Article 81(5) requires a deposition to be based on memory and to be conducted orally unless the witness is not capable of speech. Article 81(6) permits a Court to compel the attendance of a witness through a subpoena and to issue a body attachment if necessary to ensure the attendance of a witness. Under Article 81(6), a witness who fails to comply may be incarcerated for up to one week or fined 10 JD.

Under the Jordanian system, depositions are part of the trial process and are conducted under the supervision of the court. Under the American system, depositions are part of a broad system of pretrial discovery conducted without involvement of the Court except when necessary to resolve objections, to compel testimony, or to issue protective orders.

With regard to testimony conducted in open court, under FRCP rule 43(a), witness "testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." Under rule 43(b), a clerk may administer an affirmation instead of an oath to a witness. Motions for judgment as a matter of law may be based on affidavits, on oral testimony, or on depositions pursuant to Rule 43(c). Under Rule 43(d), an interpreter may be required for witnesses who communicate through a language other than English.

Under Article 82, a party seeking the testimony of a witness must pay to the Court an amount to cover expenses of traveling and other expenses. In exceptional circumstances, the deposition may be taken at a location appropriate to the purpose.

The significant differences between the Jordanian and American approaches are due to the differences between the different role of discovery and the different nature of trial in the two systems. Compared to some civil systems do not permit even the subpoena of a witness, the Jordanian system provides expanded tools to seek out the determination of the facts.

To facilitate the availability of witness testimony, the Ministry may wish to consider amending the rules to provide for testimony on motion or agreement by telephone or video conference. In addition, the Ministry may wish to authorize the use of depositions outside the presence of the court to obtain witness testimony through stenographic or video recordings. Safeguards similar to those adopted under FRCP rule 30 would have to be present to ensure reliability.

Experts

Under Article 83(1), the Court may select an expert to assist the Court. The Court may select the witness on its own or may allow the parties to agree on an expert. The Court may "order the expenses to be deposited and assign the party to be responsible therefor." Under Article 83(3), the expert meets with the Chief Judge or the Judge delegated by the Court and the parties, is provided necessary documents, and takes an oath to do his work "honestly and sincerely." A date will be fixed for the submission of the report. Once the "expertise report" is completed, under Article 83(4), each of the parties is served with a copy. On request of a party or *sua sponte*, the Court may "invite the expert for discussion of the report." Special procedures under Article 84 exist when the expert operates beyond the jurisdiction of the Court. Under Article 86(2), "The expert opinion will not be binding for the Court."

Expert testimony appears to be a significant problem and a contributing cause to judicial system delays. Parties may fail to pay expenses with little or no sanction. Experts may not present their reports on time with little or no sanction. Experts may be bribed to deliver an opinion sought by the parties (a problem not limited to the Jordanian system). Experts may be appointed even if not really necessary.

The procedures in the American system for expert witnesses are very different. Nearly all experts are called as witnesses by litigants and are compensated by the party retaining them as a witness. Under FRCP rule 26(a)(2)(A), **"**a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705." In most cases, the disclosure "must be accompanied by a written report — prepared and signed by the witness — if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain: (i) a complete statement of all opinions the witness will express and the basis and reasons for them; (ii) the data or other information considered by the witness in forming them; (iii) any exhibits that will be used to summarize or support them; (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years; (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and (vi) a statement of the compensation to be paid for the study and testimony in the case."

Although a trial judge may retain an independent expert in unusual cases, this power is seldom exercised. Experts are simply another form of interested witness who may be called in an American court action. The major restrictions on the availability of experts are the costs that may be incurred and the test that a court will apply before allowing evidence from an expert. The test is known as the *Daubert* test after the case in which the Supreme Court announced the rule requiring a scientific basis for any expert testimony.[16] Under the *Daubert* test, when a trial judge is faced with a proffer of expert scientific testimony under Federal Evidence Rule 702, the trial judge, pursuant to Rule 104(a), must make a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and properly can be applied to the facts at issue. Among the other considerations the court should consider whether the theory or technique in question can be (and has been) tested, whether it has been subjected to peer review and publication, its known or potential error rate, and the existence and maintenance of standards controlling its operation, and whether it has attracted widespread acceptance within a relevant scientific community. Even then, the expert testimony will be subjected to cross-examination, possibly contrary experts retained by the other side, and overall evaluations of credibility by the fact-finder.

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16 *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)

The Ministry should consider amending these provisions to limit the appointment of experts to those cases in which expert testimony has the potential to add substantially to the resolution of disputes. Parties requesting an expert should be required to pay fees in a timely manner or should be deemed to have waived their right to seek an expert. Experts who do not accept and then do not comply with court-imposed time limits should be subject to sanctions. Expert fees should be based on prevailing rates for individuals with similar qualifications, not based on arbitrary limits.

Documentary Evidence

Documentary evidence plays a far more important role in the Jordanian system than it does in the American judicial system since most cases are decided on the basis of documents and depositions submitted to the court. The potential for forgery also appears to be far more common.

Under Article 87(1), a party may claim that a handwriting, signature, stamp or fingerprint is fraudulent or that a document or instrument is a forgery. However, if the claim of fraud or forgery is not upheld, the party must be fined at least fifty Jordanian dinars. There is no limit on the fine that may be imposed.

The Ministry should consider amending Article 87(2) to permit the imposition of a fine only if the claim of fraud or forgery is made in bad faith. However, sanctions for forgery or for false claims of forgery should subject the party to serious sanctions to discourage the introduction of false documents or the making of false allegations that consume judicial resources.

Under Article 90, the Court delegates one of its judges to oversee the investigation of claims regarding authenticity of documents. Witnesses necessary to determine authenticity will be identified by the parties. If they cannot reach an agreement, the Court will make the selection. Article 91 defines the procedures to be used by experts in determining authenticity. Under Article 91(3), these procedures are streamlined when a governmental laboratory is involved.

Under Article 92, each litigant has the responsibility for defining "papers that he claims to be as valid for investigation and verification." These papers are then provided to the experts for examination. Their authenticity will ultimately be determined by the responsible judge. Under Article 93, the judge and experts will be transported to review any papers that cannot otherwise be transported. Under Article 94, handwriting exemplars may be ordered to determine the authenticity of documents. Under Article 95, experts may also receive testimony for those who may have information about the authenticity of documents. Under Article 96, after conclusion of their investigation and verification, the experts must produce a report and conclusion for the delegated judge. Under Article 97, the parties will receive a copy of the report and the Court may hold a hearing with the experts and parties. The party presenting a document, handwriting, signature, stamp or fingerprint as authentic must pay a fee to the Court sufficient to cover the costs of investigation and verification under Article 98. These costs may be shifted to the forgery claimant and the matter may be referred to the Public Prosecutor for investigation under Article 99.

Under Article 101, the Court can order a document to be presented to the other side for investigation if not provided otherwise. The Court may bar from consideration any document not otherwise provided to the other side. Article 102 sets forth the time limits and procedures for review. Under Article 104, the Court may limit the number and type of documents subject to review and consideration. Under Article 105, copies of bank or trader books or retrieved computer records may be provided if ratified by the bank manager or person in charge. Under Article 106, copies of public documents may be sought from

specified public officials. Failures to comply with court orders regarding these documents may result in dismissal of a plaintiff's case or in striking of a defendant's defense.

As with other evidence, in the American system documents, including electronic documents, will ordinarily be identified as part of discovery or during the pretrial conference. Under FRCP rule 34(a), "A party may serve on any other party a request . . . (1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control: (A) any designated documents or electronically stored information — including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations — stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or (B) any designated tangible things; or (2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it."

In the current litigation environment, many of the most relevant documents will be stored electronically. In responding to a request for electronically-stored information, a party may object to the requested form. However, if such information is provided, it must be produced "as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request." Since electronic documents are often very extensive, parties may seek court approval to have the documents submitted in electronic form so that they can be easily searched, indexed and evaluated by their experts. Although hard-copy documents may be preferable to the party subject to the production order, electronic discovery (or e-discovery) will ordinarily be cheaper and therefore will be ordered by the court.

Dismissal of Judges

Under Article 132, a judge may not hear a lawsuit, even if none of the litigants object, if he or his spouse has a fourth degree relationship with one of the litigants, if he or his spouse has an adversarial relationship with one of the litigants or with the spouse of one of the litigants, if there is a conflict of interest based on a business relationship, if he has represented one of the parties or given an opinion to one of the parties, or in other limited circumstances. Under Article 133, if a cassation panel includes a judge who should have been disqualified, the adversary litigant can request the cancellation of the judgment and review the contestation. Whereas a judgment is null and void under Article 132, it is merely voidable under Article 133. It is hard to understand the reasons for this different treatment.

Under Article 135, a judge who should be disqualified under the prior Articles must inform the Chief Judge in order to permit himself to be dismissed. A judge can seek dismissal "if he feels any embarrassment to consider the case for any reason." Under Articles 136 and 137, a party may request dismissal of a judge if accompanied by a deposit of fifty Dinars with the Court. If a judge should be otherwise disqualified, it is hard to understand why a deposit should be required. Under Article 138, the Chief Judge must decide on the request for dismissal without the attendance of the parties or the judge to be dismissed, but after giving the judges and parties an opportunity to respond. Under Article 140, a refusal to disqualify a judge may be appealed to the Court of Cassation at the end of the case.

In the United States, ethical rules regarding judges are generally found in a Code of Judicial Ethics. The American Bar Association has issued a Model Code of Judicial Conduct (the Model Code can be found at

http://www.abanet.org/cpr/mcjc/toc.html). The goal of the Model Code is to protect the integrity of the judicial system by ensuring that judges are both impartial and avoid the appearance of impropriety while performing their judicial obligations without conflict of interest.

The Ministry should consider adopting a separate Code of Judicial Conduct to address all of the provisions that may be necessary to ensure a qualified and impartial judiciary. These issues are best addressed in a coherent manner through a comprehensive code.

Under the Federal Rules, the process of determining whether a conflict of interest (or appearance of impropriety might exist) is facilitated by rule 7.1. Under this rule, "A nongovernmental corporate party must file 2 copies of a disclosure statement that: (1) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or (2) states that there is no such corporation." This disclosure statement must be filed at the time of the first appearance, pleading, petition, motion, response, or other request addressed to the court and must be updated as necessary. While this rule does not cover every possible circumstance that should give rise to a judicial recusal, it does expand the information available to a judge to make such a determination.

The Ministry should consider adopting a rule to require disclosure by litigants and witnesses of information that will allow a judge to make an informed decision regarding the need for possible recusal. Recusal should only be required in cases of "actual bias." The term "actual bias" should be defined to explicitly exclude simply ruling against a party or imposing a fine for dilatory tactics or behavior.

Alternative Dispute Resolution

Alternative dispute resolution ("ADR") has become a fixture of most American courts. The term ADR includes negotiation, mediation, arbitration, and a wide variety of other forms of resolution that do not include a trial before a judge or jury.

Most American courts now impose a mandatory requirement of some form of alternative dispute resolution. The cost of mediation is generally borne by the judicial system; the cost of arbitration is generally imposed on the parties. When and if these forms of ADR prove unsuccessful or inadequate, judges often "guide" litigants into settlements at the time of the pre-trial (settlement) conference.

ADR tends to be a subject of local court rules in the federal system. The only federal rule of civil procedure that squarely addresses the issue is Rule 16(a)(5). This rule defines as one of the purposes of a pretrial conference "facilitating settlement." Pursuant to Rule 16(c)(1), judges may require the presence of attorneys and/or parties with sufficient authority to reach a settlement. Failure to comply with this requirement can lead to the imposition of sanctions pursuant to rule 16(f).

Under Article 78, parties that reach a settlement can incorporate their agreement in the minutes of the session. The benefit of this procedure, referred to as "incorporating but not merging," is that the agreement is enforceable directly or through a contempt of court proceeding.

The Ministry should consider amending the Articles to provide for a mandatory stage of alternative dispute resolution in every case. This dispute resolution could be held before the case management judge or before a private mediator.

Case Management

Complaints about the glacial movement of the civil judicial system in the United States have led to a number of innovations to expedite the processing of cases. Case management models have focused on two potential roadblocks within the judicial system – attorneys and judges.

One of the first big innovations within the federal judicial system (not always copied within the state systems) was the model of one judge-one case. Under the prior case management system, one judge might hear a motion to dismiss; another judge might consider a motion for sanctions; a third judge might review a motion for summary judgment; and a fourth judge might try the case. Each judge had to start fresh learning about the case. This was a very inefficient use of judicial resources. And, it permitted a judge to delay a case until it was no longer his or her responsibility.

The one judge-one case model requires a judge to stay with a case from beginning to end. Although there might be emergency hearings or vacations that could interfere with this outcome, each judge is likely to become far more familiar with his or her limited caseload and be very protective of his or her prerogatives. Compilation of judge-specific statistics are therefore also easy to accumulate. Comparisons of the speed with which judges dispose of theoretically comparable caseloads becomes far easier.

The other critical aspect of case management is the scheduling order. Attorneys in the United States tend to procrastinate. Unless they are facing a deadline, they tend to let "sleeping dogs lie." FRCP rule 16 generally deals with case management in the federal system and Rule 16(b)(1) provides for the issuance of Scheduling Order. The Scheduling Order provides ongoing deadlines for litigants to meet, including "time to join other parties, amend the pleadings, complete discovery, and file motions." Although the litigants can be relieved from the deadlines imposed by the Scheduling Order, the litigants cannot act unilaterally. Pursuant to Rule 16(b)(4), "A schedule may be modified only for good cause and with the judge's consent."

The pretrial conference(s) also provide an important tool for case management and movement of the docket. Pursuant to FRCP rule 16(c)(2), "At any pretrial conference, the court may consider and take appropriate action on the following matters: (A) formulating and simplifying the issues, and eliminating frivolous claims or defenses; (B) amending the pleadings if necessary or desirable; (C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence; (D) avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under Federal Rule of Evidence 702; (E) determining the appropriateness and timing of summary adjudication under Rule 56; (F) controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37; (G) identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial; (H) referring matters to a magistrate judge or a master; (I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule; (J) determining the form and content of the pretrial order; (K) disposing of pending motions; (L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; (M) ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, thirdparty claim, or particular issue; (N) ordering the presentation of evidence early in the trial on a manageable issue that might, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c); (O) establishing a reasonable limit on the time allowed to present evidence; and (P) facilitating in other ways the just, speedy, and inexpensive disposition of the action."

Under Article 59, the Minister of Justice decides whether to establish a "Civil Case Management" department within the headquarters of the First Instance Court. Certain first instance courts may therefore not have a department.

Unlike the American model, civil case management becomes the responsibility of one or more judges. Each judge is therefore not directly accountable for his or her caseload. One or more judges will effectively serve as "scheduling" judges and one or more judges will effectively serve as "settlement" judges. These judges will have to learn something about every case they process. These judges will also have limited history of the behavior of the parties and attorneys from which to draw conclusions.

Although the "settlement" judge has certain powers, his or her powers are quite limited. For example, failure of a party or attorney to comply with a settlement order requires referral back to the trial judge. While some jurisdictions have made good use of judges especially skilled in leading parties to settlements, it is difficult to understand the benefits of not holding individual judges accountable for moving their caseloads. Statistical reports can be easily generated and provided to the Minister of Justice and to the Chief Judge.

The Ministry should consider amending Article 59 to expand the powers of trial judges to manage their caseloads and consider holding judges accountable for the processing of these caseloads. Deadlines could also be imposed for the issuance of decisions after hearings. An initial scheduling hearing should be held in every case to establish dates for the completion of every significant stage in the trial process (identification of witnesses and documents, submission of depositions and documents, alternative dispute resolution, pretrial conference, final judgment).

However, changing the rules governing the civil justice system will only go so far in making the system more efficient. Those jurisdictions that have been most successful in improving efficiency have done so through the leadership of judicial officers. The Ministry should consider bringing together all judges in a "Case Management Conference." Such an approach would send a clear and symbolic message that the Kingdom desires that all cases be handled expeditiously. Too often, as the saying goes, "justice delayed is justice denied." Collection of data regarding case processing needs to be continued and data reports need to be distributed to all judges at this Conference.

Summary Actions

The concept of summary actions has two different meanings in the American judicial system. It can refer to smaller cases (usually seeking relatively small amounts of money). These smaller cases are "fast-tracked" from filing. The second class of cases involves those cases that start out complicated, but in which the facts and issues are narrowed along the way, usually through discover and pretrial motions. In this second class of cases, the case is decided through a motion for summary judgment, rather than a trial, in which affidavits and documentary evidence are used to establish any necessary facts.

Under Article 60, the Jordanian rules encompass the first type of summary action. Once the case bill has been registered, the trial judge assigns the case to the trial session with no need to exchange bills. Ordinarily, this will occur when the case is based on an explicit or implicit contract (such as a policy, draft, or check for instance; or a bond or a written contract to the effect of paying an amount of money that is agreed upon; or a guarantee if the case against the principal is related only to a debt or an agreed amount of money.

Under Articles 61 and 62, court appearances are scheduled on an expedited basis with short intervals in between stages. Under Article 79, the Court is also limited in its ability to postpone the case. Although not explicitly addressed in the Federal Rules, similar procedures exist to facilitate the resolution of summary cases.

Under Article 32, judges selected to decide summary actions may hear matters out of order to accommodate urgent matters, to consider the appointment of an agent or guardian or to protect property. In the United States, these powers come within the inherent power of a judge to manage a trial. While trial judge decisions about taking witnesses out of order or acting to protect dissipation of property may be subject to review by an appellate court, substantial deference is paid to the trial judge's discretion.

Default Proceedings

Under Article 59(4), a defendant who does not respond to the bill in a timely manner is barred from submitting a pleading to the case bill or from submitting any evidence. He is limited "submitting a memo of his contestations and objections to the evidence submitted by the Plaintiff; discuss them and submit a final defense (hearing)."

Under FRCP rule 55(a), "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default." Once a default is entered by the clerk, the proceedings are defined by the nature of the relief sought. Under FRCP rule 55(b)(1), if the complaint seeks "a sum certain or a sum that can be made certain by computation, the clerk — on the plaintiff's request, with an affidavit showing the amount due — must enter judgment." Under FRCP rule 55(b)(2), in other cases, the court will ordinarily hold an *ex parte* hearing to establish the right to damages. Under FRCP rule 55(c), "The court may set aside an entry of default for good cause, and it may set aside a default judgment under Rule 60(b)." This provision reflects a strong preference for ensuring that all cases are decided after a fair hearing.

The Ministry should consider amending Article 59 to permit a court to waive the time limits for filing a responsive pleading for good cause shown.

Dismissal and Suspension of Proceedings

Under Article 122, a court may suspend a lawsuit in order to adjudicate another issue. Once that issue is resolved, any part may request the stay to be lifted. Under Article 123, the parties may agree to suspend a lawsuit for a period of six months. That period may not be waived. Once the six-month period has expired, the lawsuit will be dismissed if not moved forward within eight days. Notice in the event of bankruptcy or death need not be personal notice. The Court may simply order notice to heirs or representatives through publication in two daily newspapers. Under Article 123(4), death of a party during adjudication will not affect the lawsuit. No similar provisions on stay exist under the Federal Rules. However, the trial courts have the authority to control the pace of lawsuits through a variety of techniques, including the pretrial order.

The Ministry should consider amending Article 123(3) to require that representatives or heirs be notified through the best notice reasonably available under the circumstances.

Under Article 124, a Court can dismiss a lawsuit if the lawsuit bill does not exhibit the cause for it; if the required rights are estimated less than their value, the Court has requested the Plaintiff to correct the value within the period of time that it sets along with paying the difference in fees and he has failed to do so; if the required rights are estimated in an accepted value but the fees paid are incomplete, the Court has requested the Plaintiff to pay the required fee within a period that it set and he has failed to do so. Under Article 125, dismissal of a lawsuit on this basis does not bar future claims or serve as a determination on the merits. Article 126 prevents a plaintiff from dismissing a bill unilaterally "unless the Defendant is absent or upon his approval if attending."

The Federal Rules distinguish between two types of dismissals – dismissals with prejudice and dismissals without prejudice. Under FRCP rule 41(a)(1), a plaintiff may voluntarily dismiss an action without court approval if the defendants have not yet answered or moved for summary judgment or by stipulation of all parties who have appeared in the action. Such a dismissal is without prejudice unless the plaintiff previously dismissed an action based on the same claims. Under rule 41(a)(2), a plaintiff may seek leave of court to dismiss a case without prejudice in other circumstances.

Under FRCP rule 41(b), a case may be involuntarily dismissed on motion of the defendant if the plaintiff fails to prosecute the case or if the plaintiff fails to comly with rules of the court. Except for dismissals based on lack of jurisdiction, improper venue or failure to join a party, an involuntary dismissal under this rule constitutes an adjudication on the merits and bars any future action on the same claim. Under rule 41(c), similar rules apply to the dismissal of a counterclaim, crossclaim or third-party claim. Under rule 41(d), costs may be assessed against a plaintiff who previously dismissed an action.

Public Forum

Under Article 71, "The trial shall be in public unless the Court has, by itself or upon a request by one of the litigants, decided to do it in private to maintain the public order or moral; or the family privacy." Although not explicitly addressed within the Federal Rules, the Sixth Amendment to the United States Constitution requires that, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." No such provision requires that civil trials be held in public, but the only civil trials that are ordinarily held in private are cases involving juveniles. Even family law cases involving sensitive issues are heard in public.

The issue of whether judges should be permitted to hold court hearings in private is largely one of balancing the benefits of public access to and knowledge of the judicial process versus the lessening of embarrassment to individuals and families resulting from public disclosure. Even in the United States there are ways to circumvent public scrutiny in civil cases. For example, in the highly publicized divorce of Jennifer Aniston and Brad Pitt, proceedings were concluded before a "private" judge, a procedure permitted under California law.

There seems to be no good reason to alter the provisions of Article 71. This kind of issue depends on a balancing of public and private interests that are better made on a culturally-sensitive basis individualized to the local environment.

Trial

There are very limited rules regarding the conduct of trials because the nature of a trial in a civil system is different from that in an adversarial system. Under Article 67, a trial can take place if the parties appeared at any of the sessions of the case even if they are not present at trial. Some of the detail in the Federal Rules is necessary because of the availability of jury trials in the United States for many civil actions. Although less than 2 percent of all cases are concluded after a jury trial, the right to a jury trial is considered a critical right. And, some countries, like Japan, are now experimenting with the availability of jury trials (albeit with a model different from the United States).

The other applicable federal rules address such issues as the consolidation and severance of parties and issues for trial (FRCP rule 42) and the nature of the oaths to be administered to witnesses (FRCP rule 43). Since most trials in the Jordanian system will proceed based on the submission of affidavits and documents, these provisions are largely irrelevant or are addressed by other rules.

Judgments

Article 159 establishes the procedures for deliberation and issuance of judgments. Under Article 159(1), *ex parte* contacts with judges during deliberation are prohibited and deliberations must be confidential among the judges. Under Article 159(2), written opinions are required and judgment is issued only after written opinions are collected. Under Article 159(3), the judgment must include "reasons and text in the case file" and copies are not given to the litigants. Article 159 places a significant burden on trial judges and may cause significant delays in the judicial system. Under Article 160, specific and extensive requirements are imposed on the content of a judgment. Under Article 158, in cases "other than those being considered in the auditing capacity," the court will declare the end of the trial and will announce its judgment. Under Article 158(iv), judges who participate in the deliberation must attend the announcement of judgment. If one or more members of a panel are not present, another panel may read the judgment if it is signed by the deliberation panel.

Despite the reference to three-judge panels in trial court proceedings, most cases in the Court of First Instance apparently proceed with only a single judge. This reference may be left over from the Egyptian model. If so, the Ministry may wish to conform the procedures to actual practices.

The Federal Rules envision a very different process. First, only in very limited cases are three-judge panels required for federal trials;[17] nearly all federal and state trial court cases are heard and decided by a single judge.[18] Second, written opinions are issued in only a small percentage of cases. Instead, the judge issues an oral decision from the bench or in a written memorandum and directs the prevailing party to

[17] For example, under 28 U.S.C. 2284, a three-judge district court is required to hear an action challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

[18] Smaller cases are often assigned in the first instance to a "Magistrate Judge." The Magistrate Judge generally does not have the authority to issue a final decision in a case. Instead, he makes a recommendation to the federal district judge to whom the case is assigned. The federal district judge can then adopt the recommended decision, FRCP rule 54(d)(2)(D).

prepare proposed "findings of fact and conclusions of law." The losing party can object to these proposed findings and conclusions and the trial judge can adopt or amend the proposed findings and conclusions.

Under FRCP rule 54(a), a judgment issued by a trial court should not include recitals of pleadings, a master's report, or a record of prior proceedings. Under rule 54(b), in a case involving multiple claims and/or multiple parties, the trial judge need not resolve the rights of all of the parties as to all of the claims in a single judgment. However, the time to revise the judgment or seek a new trial or appeal does not begin to run until all of the claims of all of the parties are resolved by judgment. Under FRCP rule 54(c), a default judgment does not differ in form from a judgment issued in a contested case.

Under Article 161, the Court must issue its decision in relation to fees and expenses when issuing the final judgment. Under Article 161(1), the Court may issue interim orders during the trial regarding specific expenses. Under FRCP rule 54(d)(1), costs should ordinarily be allowed to the prevailing private party. Under FRCP rule 54(d)(2), motions for assessment of attorneys' fees must be filed within14 days after entry of judgment and must specify the grounds on which attorneys' fees are being sought. Since, under the American rule, attorneys' fees may not ordinarily be assessed unless there is a statute, rule or contract authorizing an award under the circumstances. Such a motion may be contested both on the potential liability for fees and on the amount of fees that should be awarded.

Under Article 167, a debtor may agree to what would be called a "confession of judgment" in the United States. The debtor can pledge to pay a fixed amount of money at a fixed date. In such cases the credit does not need to prove the underlying debt or any harm or damage due to the failure to make specified payments. Interest will be based either on the contract or a 9 percent per annum.

Enforcement of Judgments

Under Article (127)(1), in a lawsuit to collect a debt or based on indemnification, the Defendant may pay the amount in dispute in the lawsuit or in one or more of the cause of the Lawsuit. Under, Article 172(2), a Defendant may admit part of a claim and the Plaintiff may receive a final decision with regard to that part. The lawsuit will then proceed on the remaining part. Pursuant to Article 128, the defendant must issue a notification showing the cause(s) for payment and the sum paid unless the court rules otherwise. Within seven days after being served with the notification, the Plaintiff can accept all or part of the payment with regard to one or more causes in the lawsuit. Under Article 130, the Plaintiff must either accept or reject the notification on the terms defined by the Defendant. A similar process to pay money into the Court is available under FRCP rule 67. Under FRCP rule 68, a defendant may offer an amount less than the amount sought by the plaintiff in his action or in any of the causes. Under rule 68(d), "If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made."

Under FRCP rule 62, a judgment to recover money is automatically stayed for ten days. Judgments granting an injunction or receivership or requiring an accounting in an action for patent infringements are not automatically stayed. Court orders granting judgment as a matter of law (summary judgment), granting amendment to the findings, granting a new trial or altering or amending a judgment or granting relief from a judgment or order may also be stayed under terms established by the court.

Under FRCP rule 62(c), during the pendency of an appeal from an order granting, dissolving or denying an injunction, the court may continue or may modify or dissolve the injunction in its discretion or may require a supersedeas bond of the appellant. Under rule 62(g), an appellate court may issue a stay or may

make other orders necessary. The provisions regarding stays of enforcement are relatively comparable within the two systems.

Under Article 141(1), a creditor may request a "precautionary sequestration" before or at the time of filing the case or during its consideration. The request is submitted to the Summary Action Judge or to the Court for consideration based on the documents and evidence or foreign verdict or arbitration decision. The sequestration may seize movable and immovable party. Under Article 141(2), if the Court grants a "precautionary sequestration," it shall require a cash deposit, a bank guarantee or a notary public bail in a type or amount established by the court. Under Article 141(3), the sequestration is based on an amount known or estimated to the Court. Under Article 152, "precautionary sequestration" may include a restriction or denial on travel.

In the American system, a procedure similar to "precautionary sequestration" was known as pre-judgment attachment. Attachment of property owned by a debtor could be sought by a creditor through a written application to the Clerk of the Court. In 1969, the United States Supreme Court ruled in *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), that a state's prejudgment garnishment procedure constituted a taking of property without notice and prior hearing and therefore violated the fundamental principles of procedural due process. Under this procedure, the clerk of the court issued a summons at the request of the creditor's lawyer, and the lawyer, by serving the garnishee through his employer, set in motion the machinery whereby wages (here one-half those due the employee) were frozen. Although the "precautionary sequestration" available in Jordan is granted by a judge, not by a clerk, there is no hearing or opportunity to be heard on the application.

The Ministry should consider amending Article 141 to permit continued precautionary sequestration only after notice to the defendant and an opportunity to be heard. While assets and individuals may need to be taken under court control without delay in order to prevent these assets and individuals from being removed from the country, once under court control there is no reason not to provide notice and an opportunity for a hearing.

Under Article 142, certain property is excluded from sequestration. Exempt property includes: garments, beds and furniture required for the debtor and his dependants; the dwelling house necessary for the debtor and his dependants; cookware and eating utensils necessary for the debtor and his dependants; books, machines, containers and luggage necessary for the debtor to do his job or profession; the provisions that will be sufficient for the debtor and his dependants and the amount of seeds sufficient to sow the land that the debtor is used to sow if a farmer; animals required for his farming and living if a farmer; sufficient fodder for the animals excluded from sequestration and for a period of one harvest season maximum; the uniform of the government officers and their other official appliances; dresses, suites and items used at prayer; the government's share of the yields whether harvested/picked up or not; Emiri property and items of municipalities whether movable or immovable; alimony; and, salaries of employees unless the sequestration application is meant for alimony.

Article 142 has its counterpart in American procedures. In the American system, these exemptions are established under state laws and the federal government incorporates these protections from pre- and post-judgment attachment.

Under Article 144, the Court of the Summary Action Judge can appoint a receiver to conserve or management sequestrated property. Under Article 153, a similar custodian may be appointed over money or similar property. Under Article 154, a custodian may be compensated. Under FRCP rule 66, a similar authority exists in the federal courts. The goal is to ensure that property will be available to satisfy a judgment without "wasting" the asset(s) during the pendency of the action.

Under Article 145, sequestration may be sought against property in the possession of third parties. The third party "must deliver" the sequestrated items and must submit "to the Court or to the Summary Action Judge within eight days an exhibit of money, property or other things in his possession for the debtor." Under Article 146, a third party who does not comply may be sued by the Creditor. Even if the third party denies having property belonging to the debtor, the third party must still deliver the property to the Court under Article 149.

Under the American system, the rights of a third party may not be affected without procedural process. Like the decision in Sniadach, although the Court may issue a temporary order, it may not exercise jurisdiction over property claimed by a third party without notice and an opportunity for a hearing.

The Ministry should consider amending Articles 145-149 to require notice and an opportunity for a hearing before property may be seized from a third party.

Under Article 151(1), immovable property is sequestrated by inserting the sequestration signal on its record in the registration books. This is comparable to the imposition of a lien on real property in the American system. Under Article 151(2), movable property subject to recordation may also be subjected to a lien. This is comparable to the imposition of a lien on personal property like a car in the American system.

Article 152 establishes time limits and other procedural requirements for "precautionary sequestration." Under Article 152(3), the parties may agree to vacate a sequestration order in whole or in part. This agreement must then be implemented by the Court. Under Article 157, the Court or the Summary Action Judge may impose sanctions, including a denial of the right to travel, if there is reason to believe that money has been smuggled abroad.

In addition to remedies that may be available under state laws, under FRCP rule 64, a Plaintiff may enforce a judgment through arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies. Under an arrest, a person may be seized and brought before the Court. Through attachment, a Court may take control over property that may be used to satisfy a judgment. Under garnishment, a Court may attach a portion of wages owed to a judgment debtor. Under replevin, a Court may take under its control property to which title is claimed by a creditor. Through sequestration, the Court may take control over property.

FRCP rule 69(a)(1) authorizes a court to enforce a money judgment through a writ of execution. Pursuant to this writ, the Court may take control over property belonging to a judgment debtor in order to satisfy a judgment owed to a plaintiff. Pursuant to FRCP rule 69(a)(2), the Court may require a judgment debtor to participate in an examination in aid of enforcement or to participate in other discovery necessary to satisfy an outstanding judgment.

Motion for a New Trial

Under Article 213(1), a new trial may be requested if one of the litigants is guilty of fraud or deceit during the case and that fraud or deceit has an impact on the judgment. No right to a new trial exists if the fraud or deceit was committed prior to the filing of the case, even if it affected the judgment.

Under Article 213(2) and (3), a new trial may be granted if a judgment was based on forged papers or on false testimony. Under Article 213(4), a new trial may be granted if a party directly or indirectly

concealed relevant information. Under Article 213(5), a new trial may be granted if the court adjudicates an issue that neither party had requested. Under Article 213(6), a new trial may be granted if the judgment is contradictory. And, under Article 213(8), a new trial may be granted if contradictory judgments have been issued regarding the same parties and the same issues.

It is difficult to understand why a new trial is required in some of these circumstances. A judgment containing contradictory paragraphs could be corrected by the judge to remove any contradictions. An adjudication of an issue that neither party requested could be addressed by motion and amended judgment. And, if neither party raised the existence of a prior judgment on the same issue between the same party, something of which they should have been aware, it is difficult to understand why the court system should accommodate that failure by granting a new trial.

This seems to be acknowledged in conflicting provisions in the Jordanian Articles. Under Article 168(1), typographical and calculation and similar mistakes may be corrected by the Court. These changes may be made *sua sponte* or on a request by a party. If, in making a correction, the Court goes "beyond its relevant right," a party may contest the judgment. Any failure to make corrections requested by a party may be the basis of a contestation under Article 168(3).

Article 169(1) refers to the ability of a losing party to appeal a judgment against him/her. Article 169(2) identifies the circumstances in which a "prevailing" party may be able to appeal a judgment.

Under Article 170, a party ordinarily may only contest a final judgment. However, limited interlocutory appeals may be filed with regard to the following issues: Summary proceedings, Suspension of the case, Argument of incompetence (lack of jurisdiction), Argument of an arbitration clause, Argument of the case as settled, Argument of time passage, and, Requests of intervention and admittance. It is not obvious why these issues have been singled out for interim appeals; it is also not obvious how judicial efficiency is furthered by permitting interim appeals of these issues.

Under Article 171, the date for contesting a judgment begins to run on the date of issuance (for judgment issued in the presence of persons) or on the date of service in other instances. Under Article 172, a contestation will be dismissed if not timely filed. Article 173 helps define the computation of time periods. In case of death of a party or bankruptcy or a similar loss of capacity, the judgment must be served on the representative of the party. Under Article 175, a contestation may only be filed by one who is directly affected by the judgment. However, under Article 206, this may include persons who were not litigants, representatives or otherwise involved in a case. This is contrary to the American rule. Although parties may intervene as real parties in interest in ongoing trial proceedings and may even be ruled "indispensable" parties if their rights will otherwise be adjudicated, only parties (or their successors) may appeal from trial court judgments.

Article 207 describes two forms of contestation by third parties – original and accidental. It is not possible from the translation to make sense of the differences between these two forms of contestation. Under Article 211, contestation by third parties does not automatically stay the judgment. If a third-party contestation is successful, the court amends the judgment within the "scope related to the rights of these "third parties"." If they are unsuccessful, third parties must pay fees, expenses and attorney fees under Article 212.

Under the Federal Rules, United States district courts have the power to grant a new trial, but may also alter or amend a judgment. After eliminating the grounds for review of a jury verdict, under Rule 59(a)(1)(B), a trial judge "may, on motion, grant a new trial on all or some of the issues – and to any party – as follows: . . . (B) after a nonjury trial, for any reason for which a rehearing has heretofore been

granted in a suit in equity in federal court." These reasons can include the reasons under which a new trial may be granted in the Jordanian system, but may include other reasons.

The powers of the federal courts when a new trial is granted are also more extensive than under the Jordanian rules. Under Article 59(a)(2), "After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment."

The revisory power of the federal courts over judgments is also quite broad. Under Rule 60(a), a trial judge may correct clerical mistakes or mistakes arising from oversight or omission. Such action may be taken *sua sponte* or on motion. If such a case is already on appeal, relief by the trial judge requires leave of the appellate court. Under Rule 60(b), a court may revise a judgment to correct: "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly-discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief."

Although the ability to revise a judgment in the interests of justice is somewhat broader than in Jordan, the more significant difference is the greater time available to file such a motion. Under FRCP rule 60(c), motions for relief from a final judgment may be filed within a reasonable time (an open-ended period subject to the discretion of the trial judge). However, Under Rule 60(c)(1), the motions based on mistake, inadvertence, surprise, excusable neglect, newly-discovered evidence, or fraud must be filed within one year after the entry of the judgment. Under FRCP rule 60(c)(2), the judgment remains in effect until it is vacated or amended. Open-ended authority exists under the federal rules to entertain an independent action to relieve a party from judgment, to grant relief to a defendant who was not personally notified of the action, or to set aside a judgment for fraud on the court. Under rule 61, the power does not extend to those "harmless errors" that do not affect a party's substantial rights.

The Ministry may wish to consider expanding the power of trial courts to grant new trials or to exercise revisory power over judgments, especially for those actions that undercut the integrity of the judicial system. However, orders granting motions for new trials should not be granted lightly and should require a high threshold of proof. By contrast, revisory powers to correct arithmetic or typographical mistakes should be readily granted.

Under Article 214, a party may request a new trial within thirty days from the date of judgment or service of the judgment, depending on the grounds. However, under Article 214(1), this time period does not begin to run until the date of discovery of forgery or fraud or false testimony. (Although the translation refers to the date that the perpetrator confessed forgery, it would make no sense to begin the thirty-day period unless and until a party becomes aware of this confession.) Under FRCP rule 59(b), (c), and (d), a party generally has only ten days to file a motion for a new trial. Under FRCP rule 59(e), "A motion to alter or amend a judgment must be filed no later than 10 days after the entry of the judgment."

Under Article 215, the application for a new trial is submitted to the trial court and served on the other parties. Article 216 sets forth the content of the application. Under Article 217, the judgment is not automatically stayed pending consideration of the application. And, the trial court is limited to considering grounds pleaded in the application (petition). Under Article 220, a party who submits an unsuccessful application for a new trial is fined JD 150 and fees and expenses, even if the application was filed in good faith.

Under Article 221, "The judgment of the application subject will replace the previous judgment." And under Article 222, a party may not seek a new trial of a judgment rejecting an application for a new trial.

The Ministry should consider amending Article 220 to eliminate the automatic imposition of a fine for filing an unsuccessful application for a new trial. The Court should retain the power to impose a fine, but should be able to waive any fine if the application was filed in good faith.

Appeals

Because most cases are decided on the basis of documents, an appeal provides the opportunity for almost a trial *de novo*. Such an approach is extremely inefficient. Litigants may be able to submit new evidence on a minimal showing and thereby receive effectively a "second bite at the apple."

The Ministry should consider establishing a high threshold for the submission of new evidence on appeal. Instead, most appeals should be permitted to proceed only on an abuse of discretion standard with regard to the determination of facts or a material error of laws. Admittedly, many other civil law countries utilize a similar procedure for appeals, but Jordan could significantly improve the efficiency of its judicial system by limiting the circumstances in which appellate judges conduct a trial de novo.

Appellate Courts

Under Article 176(1), judgments from both the first instance courts and the magistrate courts may be appealed. Under Article 176(2), judgments in summary proceedings are specifically appealable. Since a summary proceeding results in a judgment, it is not clear why the first clause of Article 176(2) is necessary. Under the second clause of this Article, a decision issued on appeal from a summary proceeding may not be appealed to the Cassation Court except with approval by the Chief Judge or his/her designee. The opportunity to further appeal a decision on appeal from a summary proceeding increases the burden on the Chief Judge or his/her designee to review these requests. However, this procedure also provides an opportunity to correct manifest injustices.

Under Article 177, parties can agree in advance to have their cases adjudicated at the first instance court and waive their right to appeal any judgment issued by that Court. The danger here is that a court of first instance could rule inappropriately – not merely incorrectly, but outside the range of appropriate judicial action. If that happens and the trial court refuses to grant a new trial, there is no opportunity for either party or both parties to seek further review.

The Ministry should consider amending Article 177 to permit such parties to seek approval by the Chief Judge or his/her designee to appeal such a judgment by the first instance court for good cause shown.

Under Article 178, a notice of appeal must be filed within thirty days from a normal judgment and within ten days from a judgment in a summary proceeding. The time limit for normal appeals parallels the thirty days provided under Federal Rules of Appellate Procedure (FRAP) rule 4(a)(1)(A). However, the procedural requirements for filing an appeal are far less in the United States system. Under FRAP rule 3(c)(1), a notice of appeal need only specify the party or parties taking the appeal by naming each one in the caption or body of the notice, designate the judgment, order, or part thereof being appealed; and name the court to which the appeal is taken. The process of defining the record to be transmitted on appeal and

the scheduling of briefs and oral argument (if any), are determined only after the notice of appeal and, if applicable, cross-notice of appeal are filed.

Under Article 179(1), a cross-appeal may be filed a party within ten days after being served with the original notice of appeal. Under Article 179(2), a cross-appeal terminates with the termination of the original appeal. This provision seems to present the possibility of manifest injustice. If a notice of appeal is filed ten days after the original judgment, a cross-appeal might be filed within ten days thereafter or within twenty days of the original judgment. That would make the cross-appeal a timely appeal of the original judgment. However, if the original appellant dismisses his appeal, under Article 179(2), this would effectively terminate the timely cross-appeal. That possibility would allow a clever appellant to "game" the system and preempt a cross-appeal.

The Ministry should consider amending Article 179(2) to provide for automatic termination only of cross appeals filed after the deadline for filing a timely appeal.

Articles 180 and 181 specify the procedures for submitting an appeal and Article 180(5) specifies the penalties for failing to comply with the rules. Article 180(5) is another of those specific provisions that empowers a court to sanction a person who fails to comply with the rules but narrows the circumstances under which sanctions may be imposed and the potential penalties that may be imposed. There may be a good reason for limiting fines to trivial amounts and for limiting the power of the courts to sanction attorneys, parties, and witnesses. However, it is difficult for an outsider to understand how these restrictions leave the courts with sufficient power to enforce respect and to preserve the dignity of the judicial process.

The Ministry should consider eliminating these special provisions for sanctions and providing trial judges and appellate judges with power to impose appropriate sanctions on attorneys, parties, and witnesses, subject to a single appeal of right.

Under Article 182(1), the Appellate Court has the jurisdiction to hear appeals from the Magistrate Court and appeals from the first instance courts "if the amount of the case does not exceed thirty thousand Dinars." These appeals in "smaller" cases will be considered through a pleading unless the Court decides to the contrary *sua sponte* or if a party requests. Although it may be a function of the translation, the translated version does not make it clear whether the "amount of the case" is determined based on the original case bill or on the amount of the judgment. The translated version also does not make it clear if the Appellate Court has the discretion to decide an appeal on a pleading even if a party requests otherwise.

The Ministry should consider amending Article 182(1) to clarify the jurisdiction and powers of the Appellate Court if these ambiguities are not a product of the translation.

Article 182(2) contains an apparent similar ambiguity. Under the first clause of Article 182(2), appeals from judgments issued by the first instance court will be considered through a pleading. Under the second clause of Article 182(2), a party may request that an appeal in a "larger" case be considered through pleading. It appears that this request divests the Appellate Court of jurisdiction to reject that request, even in large and important cases that should not be heard simply through pleadings.

The Ministry should consider amending Article 182(2) to permit the Appellate Court to grant or deny a request by a litigant to have an appeal decided through a pleading.

Under Article 182(3), the Appellate Court must decide through pleading cases in which a trial court has ruled that a person violated a court rule without good cause. Under Article 182(4), Appellate Court

decisions that are reversed and remanded must be determined through pleadings. While this procedure will probably be appropriate in the majority of cases, the lack of authority to consider an appeal other than through pleadings could unnecessarily hamstring the Appellate Court.

The Ministry should consider amending Article 182(3) and (4) to permit an Appellate Court to decide an appeal other than through pleadings sua sponte or on request of a party for good cause shown.

Under Article 183, the Court fixes a date to hear an appeal. Under Article 184, the issues on appeal are limited to the issues raised in the bill unless the Court grants leave to go outside the bill. It is difficult to understand why an appellant should ever be permitted on appeal to go outside the issues framed by the bill. To allow new issues to be raised for the first time on appeal is extremely inefficient for the judicial process and undercuts the power of the trial court to hear matters in the first instance.

The Ministry should consider amending Article 184 to limit an appeal to the issues framed by the bill.

Article 185 specifies limited circumstances under which evidence that was not introduced in the trial court may be submitted and considered on appeal. The authority to permit new evidence under Article 185(1)(a) and (b) seems appropriate. However, under Article 185(1)(c), a concerned party need only prove that their absence before a first degree court was for a "legitimate reason." This provision obligates the Appellate Court to determine what was or was not a "legitimate reason" and to hear additional evidence under Article 186 even if the failure to attend and the impact of that failure could have been addressed and cured by the trial court. Such a provision is inefficient for the judicial process and undercuts the power of the trial court to hear matters in the first instance.

The Ministry should consider amending Article 185(1)(c) to require such reasons to be brought to the trial court and the trial court should be authorized to grant such relief as may be necessary to amend its judgment or to grant a new trial for good cause shown.

Under Article 187, the Appellate Court may "base its judgment upon reasons other than those the Court of Instance deemed in its judgment if such reasons are supported with the evidence in the proceeding."

Article 188 specifies the power of the Appellate Court. Under this Article, an Appellate Court may affirm a trial court decision, may correct and affirm a trial court decision, may revoke in whole or in part a trial court decision and issue a new decision, or vacate a trial court decision and remand the case to the first instance court for a trial. Under Article 189, an Appellate Court may assess fees, expenses and attorneys' fees.

Court of Cassation

Under Article 191(1), the Court of Cassation has the duty to hear appeals from the Appellate Court "in relation with cases "the amount of which exceeds ten thousand Dinars." Again, there is ambiguity whether the amount is determined in relation to the bill, to the trial court judgment or to the Appellate Court judgment. These three amounts could all vary significantly. Under this Article, appeals must be filed within thirty days after being served.

Under Article 191(2), the Chief Judge of the Court of Cassation or his or her designee may grant permission to appeal other judgments that are not automatically appealable. Under Article 191(3), leave to appeal must be sought within ten days from the date of issuance of the judgment or the date of service

of the judgment, whichever is later. Article 191(4) specifies the substantive requirements for a "permission of cassation." If permission is granted, under Article 191(5), a contestation bill must be filed within ten days from the date of service of the permit decision. Under Article 192, the cassation bill is submitted to the Appellate Court, which transmits the bill along with the other case papers to the Court of Cassation. Article 193 specifies the elements of a bill of cassation and Articles 194 and 195 specify the procedural requirements for filing and service. Under Article 195(2) permits an appellant to file a responsive pleading within ten days.

Under Article 196, cassations that are not timely filed or for which fees are not paid must be dismissed. However, under Article 196(2), the failure to pay a fee may be cured. No such authority to waive an untimely filing is permitted.

Under Article 197, the Court of Cassation can decide whether to decide an appeal on the basis of the case proceeding and pleadings or to grant a hearing. Under Article 197(4), the Court of Cassation will ordinarily vacate and remand a case for judgment. However, in appropriate cases, the Court of Cassation may adjudicate the case without returning it to a lower court.

Article 198 defines and circumscribes the power of the Court of Cassation. Under this Article the Court may only grant an appeal: (1) If the contested judgment is based on a violation of law or a mistake in application or interpretation; (2) If the judgment or the procedures are nullified and this holds an impact on the judgment; (3) If the judgment is finally issued in contradiction of another previous judgment that was issued between the litigants themselves and their capacities have not been changed and the dispute is related to that right- in jurisdiction and cause and it has acquired the strength of a settled case whether this has been defended or not; (4) If the judgment is not explained on a legal basis and its reasons do not enable the Court of Cassation to exercise its control; (5) If the judgment skips adjudication of one of the requests or if something is adjudged and the litigants did not request it or if the judgment covers more than what they requested; or, (6) If the judgment and the procedures made in the case include an explicit violation of the Law or if the proceedings of the trial include a violation related to the duties of the Court, the Court of Cassation must decide to revoke them even if the cassation application and this who the cassation is applied against do not mention in their bills and pleadings the reasons of said violation. However, if the violation related to the rights of both litigants, it will not be a reason for cassation unless it has been contested in the first instance court and the appellate court and the contestation was ignored; but one of the two parties mentions it in their cassation bill and it can change the nature of judgment.

Under Article 199, if the judgment put for cassation has been revoked because of violating the rules of jurisdiction, the Court of Cassation is limited to adjudicating the jurisdiction issue. It may then remand the case to be tried in the competent court. Since the Court of Cassation should not be trying cases in the first instance, that limitation is appropriate to further goals of judicial efficiency. Article 200 defines and limits the powers of the Court of Cassation is other cases. Again, these limitations seem to further judicial efficiency and the limited resources of the Court of Cassation.

As translated, Article 202 seems to require the Court of Cassation to first read its decision and then hear the parties as to why that decision is appropriate or inappropriate. If that translation is correct, the procedure makes little sense. Article 202 requires the Court of Cassation to potentially do useless work if the Court is persuaded by either party that the cassation decision is incorrect. Instead, it would make far more sense to allow the parties to first argue to the Court and then have the Court deliberate and issue its decision. Then, if the parties wish, one or more parties could seek a rehearing to challenge or correct any aspect of the decision.

If the translation of Article 202 is correct, the Ministry should consider amending Article 202 to provide for an opportunity for the parties to be heard, through their attorneys, before the cassation decision is issued.

Article 203 establishes the procedural requirements for a decision. Artile 203 also permits the Court of Cassation to issue a decision upon consensus or majority of opinions. The word "consensus" is probably meant to refer to a unanimous decision. However, Article 203 seemingly does not envision the possibility that no opinion will receive a majority vote. In the United States Supreme Court and in many state supreme courts, it is possible to have opinions that agree in part and disagree in part. As a result, no opinion may receive a majority for every decision in the appeal.

Under Article 204(1), the judgments of the Court of Cassation are final and may not be further appealed. However, Article 204(2) envisions the possibility that the Chief Judge of the Court of Cassation (or his or her designee) may reconsider its decision in limited situations. The Article does not specify whether such reconsideration must be ordered *sua sponte* or whether reconsideration may be sought by a party through application to the Chief Judge.

The Ministry should consider amending Article 204(2) to specify that reconsideration of a judgment of the Court of Cassation may be ordered by the Chief Judge of the Court either on his own initiative or after request for reconsideration by any party before the Court.

Under Article 205, a Cassation Court panel is not limited by precedent. However, if a panel decides a case in a way that violates a principle established in a prior ruling of the Court, the panel must refer the case to the General Assembly. Article 205 does not specify the powers of the General Assembly in such cases. It does not state whether the General Assembly may overturn the Court of Cassation ruling and affirm the prior principle or affirm the new principle or establish an entirely different principle. Article 205 also does not specify whether any such action may be prospective only or may be retroactive and apply to the parties before the panel. This ambiguity seems troubling. The General Assembly could seemingly intervene in existing cases and decide the rights of parties without having access to all of the information before the Court of Cassation. Such a power also intrudes on the independence of the judiciary.

The Ministry should consider amending Article 205 to limit the power of the General Assembly to act only prospectively.

However, the major issue seems to be the extent to which the Court of Cassation must consider every appeal that meets the monetary threshold. Review by the Court of Cassation should be discretionary with the Court to promote finality of decisions and to further judicial efficiency. In the United States, a very small percentage of cases are heard by the United States Supreme Court or by the highest state appeals courts.

Foreign Law, Conflict of Laws, and Transfer of Actions

Under Article 77, the burden is placed on the litigants to submit any foreign documents with a sworn (notarized) translation into Arabic. If any litigant contests the accuracy of the translation under Article 77(2), the Court "must assign an expert to verify truth of contested translation."

Under FRCP rule 44.1., “A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.”

Under Article 112, “If the Court judges that it is not competent, it must refer the case as is to the competent court.” Broad powers exist in the federal court to either dismiss an action for *forum non conveniens* or to transfer an action to a different venue. Under the doctrine of *forum non conveniens*, courts will refuse to exercise jurisdiction over matters where there is a more appropriate forum available to the parties. One of the factors that can go into this determination is the extent to which foreign law may be at the center of a dispute and another forum may be better equipped to interpret and apply foreign law.

Attorneys

Under Article 63(i), “Litigants (except for the lawyers) cannot appear before the court to consider the case unless accompanied by attorneys representing them upon a power of attorney.” Under Article 64, once a power of attorney has been issued, the attorney becomes the attorney of record in the proceeding. Under Article 65, the attorney is then authorized to do all tasks and perform all functions necessary in the litigation. Under Article 66, a party may dismiss his lawyer at any stage of the trial. However no mention is made of what happens if a new lawyer is not appointed. A lawyer may not withdraw from the case without leave of court.

Under Article 197(3)(b), no person may be heard in the Court of Cassation *pro se*; only an attorney will be heard on behalf of a party. While it is almost unprecedented in the United States to have a case argued by a party, there is no legal requirement that prevents it. However, in cases of significant public interest and importance, the United States Supreme Court (and most lower federal appellate courts and state appellate courts) can appoint an attorney to represent a party who is not otherwise represented. No such provision apparently exists in Jordan.

In the United States, the practice of law is controlled by each jurisdiction. Attorneys are admitted to practice in the various states on a state-by-state basis and attorneys are admitted to practice in the federal courts on a district-by-district (http://www.uscourts.gov/rules/distr-localrules.html) and circuit-by-circuit basis. The critical difference is that *pro se* (unrepresented litigants) may theoretically appear in any court and frequently do appear unrepresented in trial courts.

Religious Courts

Under Article 34(1), “If a matter that relates to a certain case whether or not the case is a personal status included in the absolute power authorized to a religious court, the concerned parties or the Curt where this matter has arisen must refer it to the Court as stipulated in Article (11) of the Law of Regular Court formation against a memo to be submitted to the Chief Clerk of the Cassation Court.”

Since there is no comparable provision for religious courts in the United States, there is no similar provision in the United States.

Role of Clerks and Bailiffs

Article 21 describes the staffing and procedures to be followed by court personnel. Article 22, establishes conflict of interest rules for court personnel. Article 76 provides for minutes of court sessions and the ordering of requests and defenses. Under Article 80(1), the Clerk has the duty to record the minutes of the trial by hand or using a computer or other electronic machines.

FRCP rule 77 establishes comparable requirements for the conduct of business, in the Office of the Clerk, the authority of the clerk and procedures to be followed. Rule 79 defines the maintenance of records by the Clerk. In most courts, recording of proceedings is done electronically in digital format. These recordings can then be transcribed as appropriate. Some courts are utilizing speech recognition software to prepare instant transcripts with a court reporter making corrections on the fly. This capability also helps courts comply with civil rights laws protecting the rights of deaf litigants, attorneys, witnesses and jurors.

No conflict of interest provisions are found in the federal rules of civil procedure although all court personnel are subject to conflict of interest provisions.

Miscellaneous

Article 2 provides that the rules apply prospectively to all "cases that have not been adjudicated or done of procedures before its enforcement." Under FRCP rule 86, rules and amendments to the rules govern: (1) proceedings in an action commenced after their effective date; and (2) proceedings after that date in an action then pending unless: (A) the Supreme Court specifies otherwise; or (B) the court determines that applying them in a particular action would be infeasible or work an injustice.

EVIDENCE LAW COMPARATIVE ANALYSIS

Scope

Under Federal Rule of Evidence (FRE) rule 101, "These rules govern proceedings in the courts of the United States and before United States bankruptcy judges and United States magistrate judges . . . ." It is difficult to fully appreciate the role of the Federal Rules of Evidence without considering the possibility of a jury trial in the United States.

Although judges are presumed to be able to give the proper weight to various pieces of evidence, the Federal Rules of Evidence provide a basis for barring the introduction of questionable evidence that might otherwise be relied on by a jury. This consideration is irrelevant in the Jordanian system. Discussion of evidentiary rules relevant to jury trials or criminal cases has been excluded from this analysis.

Purpose and Construction

Under FRE rule 102, the evidentiary rules are to "be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." Ultimately, therefore, the evidentiary rules are based and should be interpreted in light of the reliability of evidence and the role of that evidence in advancing the search for truth. There is no comparable provision in the Jordanian system to guide judges in evaluating evidence.

Moreover, most of the focus of the Federal Rules of Evidence is on the regulation of testimony at trials. Since oral testimony is a very small part of the civil justice system in Jordan and in civil law countries, the Federal Rules of Evidence have only limited application to this context.

Objections and Rulings on Evidence

Under FRE rule 103(a), an error in ruling on an item of evidence is not a basis for a new trial or an appeal unless it affects a substantial right of a party; it may not represent harmless error. Under Rule 103(a)(1), a party objecting to the introduction of evidence must make an objection on the record. Under Rule 103(a)(2), a party seeking the introduction of evidence must make an offer of proof of the nature of the evidence and its purpose. In jury trials, the substance of these objections and offers of proof will ordinarily be made at the bench or otherwise outside the presence of the jury. Some of these evidentiary issues will be determined as part of the pretrial conference or as motions *in limine* prior to the beginning of the trial.
Under FRE rule 103(d), a trial court or appellate court may take notice of "plain errors affecting substantial rights although they were not brought to the attention of the court."

Preliminary Questions

Under FRE rule 104(a), the trial judges determines "the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence" even if the ultimate facts are to be determined by a jury. Under FRE rule 104(b), the court may conditionally admit evidence subject to the later demonstration of its relevancy. When a jury has been impaneled, under FRE rule 104(c), determinations of admissibility of evidence are ordinarily determined out of the presence of a jury. Admissibility of evidence does not bar a party from introducing counter-evidence to challenge the weight or credibility to be given.

Taking of Witness Testimony

The taking of oral testimony through witnesses is at the very heart of the American judicial system. Although cases may be decided through motions for summary judgment (based on affidavits and other documents), the concept of a trial (whether civil or criminal) includes the taking of oral testimony from witnesses. By contrast, in the Jordanian system reliance on oral testimony is the exception, rather than the rule.

Article 27 authorizes the taking of testimony to prove non-contractual obligations. Under Article 28(1)(a), a court may not permit testimony to prove or disprove the existence of a contractual obligation in a non-commercial case if the value is greater than 100 JD (determined at the time the contract is concluded) or if the value is undetermined. Under Article 28(1)(b), a court may permit testimony in a case based on a commercial obligation or in a civil case if the value does not exceed 100 JD. Article 29 prohibits the taking of testimony in certain cases. For example, testimony is not permitted to challenge or add to the content of written evidence or when a party reduces an initial claim by amendment to less than 100 JD.

Article 30 permits the consideration of testimony in contractual obligations in specified circumstances even when the claim is valued at more than 100 JD.
For example, testimony may be considered if the creditor loses his/her written instrument for reasons beyond his/her control, if a contract is challenged on the basis that it is prohibited by the law or it contradicts the public order and morals, in order to clarify the circumstances which surrounded the organization of the instrument provided that these circumstances are defined, in case there is a claim that the instrument was obtained through deception or fraud or duress provided that any of such claims is clearly defined.

Under Article 31, there is a principle of mutuality or reciprocity: "Granting one of the parties to prove an act through witness testimony always entails granting the other party the right to rebut it by the same method."

Weight of Evidence

Under Article 34(1), "The court has the power to give more weight for one testimony over the other based on what it concludes from the case's circumstances." Although there is no comparable provision in the Federal Rules of Evidence, the factfinder at trial (whether judge or jury) must decide matters of credibility and weight to be given to testimony.

Under Article 34(2), "The court is prohibited from issuing a judgment in any case based on one person's testimony unless the other party does not object or it is supported by another material evidence which the court deems as sufficient to substantiate the testimony." No comparable provision exists under the Federal Rules of Evidence. A judgment could, in theory, be based on the testimony of a single witness. However, some state proceedings, including divorce in some states, require corroborating witnesses.

Under Article 33(1) among the factors that a judge may consider in evaluating witness testimony is the behavior and conduct of the witness. And, Article 33(2) permits a judge to accept only portions of a witness testimony as true. Again, no comparable provision exists in the Federal Rules, but the practices in the two systems are comparable.

Production of Documents

Articles 20-25 provide an opportunity for litigants in Jordan to obtain instruments and papers in the possession of another party or other person. The production of documents in the United States is addressed through the discovery provisions of the Federal Rules of Civil Procedure, not through the Federal Rules of Evidence. Under the Federal Rules of Civil Procedure, a party may request the production of documents in the possession of a party. Under the Federal Rules of Civil Procedure, a party may also obtain documents in the possession of a non-party by serving that non-party with a subpoena and subpoena duces tecum for a deposition.

Under Article 20, "A party may request that the opposing party be ordered to submit instruments and papers relevant to the case that are under his/her possession in one of the following cases: (1) If the law permits requesting the submission of such documents or (2) If the instrument has been invoked by such party at any stage of litigation. Article 21 sets forth procedural requirements for consideration of such a motion by the court under Article 22. Article 23 provides possible sanctions if a party fails to comply with a court order requiring production.

Under Article 25(1), "The court may during the proceedings of the case *(pendente lite*) order a third party to produce an instrument or document which is in his/her possession according to the circumstances and requirements stated in the above stated articles." Under Article 25(2), "The court may, either by itself (sua *sponte*) or at the request of the parties obtain from official departments instruments or documents which the parties are not able to obtain." This ability to produce documents is available in the American legal system through provisions for pretrial discovery (subpoena and subpoena duces tecum requiring a witness to attend a deposition and to bring specified documents) or through a judicial subpoena duces tecum to require production of documents at a hearing or trial.

Remainder of or Related Writings or Recorded Statements

Under FRE rule 106, "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." The Jordanian articles seem to contemplate the introduction of entire documents, even if the document is extremely lengthy and even if only one part of the document is relevant to the dispute.

The Ministry should consider amending the articles to permit introduction of a portion of a document if only a portion of a document is relevant to a dispute and the relevancy of the document can be understood through presentation of only a portion. Any amendment should permit other parties to request the court to introduce other portions of the document or the entire document.

Judicial Notice of Adjudicative Facts

FRE rule 201(a) permits a court to find certain facts relevant to an adjudication without introduction of evidence. Instead, the court may judicially "notice" a fact under rule 201(b) that is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." For example, if relevant to adjudication, a court may find that the sun rises in the east and sets in the west. When judicial notice is requested pursuant to rules 201(c) or (d), a party challenging judicial notice may challenge the appropriateness of the request under rule 201(e). No comparable provision exists in the Jordanian articles.

The Ministry should consider amending the articles to permit a trial court or appellate court to take judicial notice sua sponte or on request of the party of any relevant fact that is not subject to reasonable dispute.

Presumptions in General Civil Actions and Proceedings

FRE rule 301 distinguishes the burden of going forward with evidence and the burden of proof. The burden of proof, of nonpersuasion, belongs to the party urging a proposition on the court. Ordinarily, the plaintiff(s) will have the burden of proof for demonstrating elements of a claim for relief; the defendant(s) will have the burden of proof for demonstrated elements of a defense to a claim.

By contrast, the burden of going forward with evidence may depend on the existence of an applicable presumption. For example, in a criminal case in the United States, a criminal defendant is presumed innocent. The state has the burden of going forward with evidence and also has the burden of proving guilt beyond a reasonable doubt.

Jordanian articles similarly allocate the burden of going forward. Under Article 40, "A presumption which is stated by the law shall exempt the party in whose favor it was decided from the need to present any other evidence, however, the presumption may be rebutted by the introduction of contrary evidence unless otherwise prescribed by the law." Under Article 43, a judge may establish a "judicial presumption" at his discretion from the facts and documents in the case. This article does not define any limits to the exercise of discretion and does not even require a judge to notify the parties of his intention to apply such a presumption. The only limitation under Article 43(2) is that, "Judicial presumptions may not serve as a proof except in cases that are amenable to testimonial proof."

The Ministry should consider amending Article 43 to limit the unbridled discretion of a judge and to require notification to the parties before a presumption is imposed in a case.

Although included under the section of statutory presumptions, Article 42 would be subsumed under the concepts of *res judicata* and collateral estoppel in the American legal system. Although phrased in the negative ("The civil judge is not bound by the criminal judgment in relation to facts which was not

considered by the judgment or those facts that were considered by the penal judgment but without any necessity to do so.), under traditional rules of interpretation, a civil judge would be bound by the criminal judgment in relation to facts which were considered by the criminal judgment and which were relevant to that judgment.

This is not a troublesome concept. In theory, the defendant in the criminal proceeding had good reason and opportunity to defend himself in that proceeding. Since a court already determined necessary facts, a party should not be able to relitigate those facts in a new civil proceeding. In the United States, since proof beyond a reasonable doubt is required in a criminal proceeding and only a preponderance of evidence is required in most civil proceedings,[19] the facts in the criminal judgment have already been determined by a higher standard of proof.

There is a problem with this Jordanian provision, however. Under the American rule, findings in a criminal judgment may be utilized only if the defendant had an opportunity and motivation to defend himself in that proceeding. No such safeguards exist under the Jordanian rule.

The Ministry should consider amending Article 42 to require, before applying facts determined in a prior criminal judgment, that the party had an opportunity and reason to defend himself in the prior proceeding.

Article 41, another of the Jordanian statutory presumption provisions, also has its counterparts in the concepts of *res judicata* and collateral estoppel. Under this article, "A final judgment provides conclusive evidence regarding its determination of rights and no evidence shall be introduced in order to rebut such presumption." However, Article 41 goes on to limit the use of such a judgment to disputes "between the same parties without any change to their capacity and the dispute is related to the same rights, subject matter and cause of action." No such restriction exists in the American legal system.

Definition of "Relevant Evidence"

FRE rule 401 defines the term "relevant evidence" to mean evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Under Rule 402, only relevant evidence may be introduced in a dispute. Article 4(1) requires that the "facts which need to be proven shall be relevant to the dispute, have an effect, and admissible." This article does not otherwise define the term "relevant." However, the meaning of Article 4 seems comparable to Rule 402.

Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

FRE rule 403 provides that, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." An objection based on this rule, that the prejudicial effect of a piece of evidence outweighs its probative value, has become a critical fixture of the American judicial system. In bench trials (judge trials), a judge

[19] Proof by "clear and convincing evidence" is required in civil fraud cases. Among the other types of proceedings in which "clear and convincing evidence" is required are guardianship proceedings in most states.

is presumed to be able to limit the prejudicial effect of any probative evidence. In jury trials, rule 403 provides the basis for the exercise of judicial discretion. Since jury trials are not a part of the Jordanian system, no comparable provision is necessary.

Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

Under FRE rule 404(a), "Evidence of a person's character or a trait of character is [ordinarily] not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . ." Under rules 607, 608, and 609, extrinsic evidence may be introduced to show the character of a witness for truthfulness or untruthfulness. No comparable provision exists in the Jordanian articles.

Methods of Proving Character

Under FRE rule 405(a), "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct."

Habit; Routine Practice

FRE rule 406 authorizes the receipt of habit or business practice to demonstrate that the conduct of a person or organization on a particular occasion was in conformity with the habit or routine practice.

Subsequent Remedial Measures

Under FRE rule 407, when remedial measures are taken after an injury or harm, "evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction." This rule is based on the strong public policy to discourage preventable future injury or harm. If remedial measures could be introduced as evidence, a party allegedly responsible for causing injury or harm might be discouraged from implementing remedial measures.

Compromise and Offers to Compromise

Under FRE Rule 408(a), offers of compromise or settlement are not admissible "when offered to prove liability for, invalidity of, or amount of a claim . . . ." This rule is based on the strong public policy to encourage settlement of disputes if possible. If an offer of settlement were admissible against a party proposing a settlement, that party would be reluctant to make such an offer. Rule 409 establishes a similar rule regarding the inadmissibility of evidence of "furnishing or offering or promising to pay medical, hospital or similar expenses occasioned by an injury . . . to prove liability for the injury."

Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition

Under FRE rules 412 and 413, special evidentiary rules apply to the admissibility of "prior bad acts" to show that a person committed or was the victim of a sexual offense. Under rule 412(a), evidence that an alleged victim engaged in other sexual behavior may not be ordinarily introduced to show that an alleged victim engaged in consensual sexual behavior on a particular date. Under rule 412(b)(2), the sexual behavior or sexual predisposition of any alleged victim may be introduced as evidence if the court determines that the "probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party." Before admitting such evidence, under rule 412(c)(2), the court must conduct a hearing *in camera* (in private).

Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation

FRE rule 415 specifically authorizes the introduction of evidence of a "party's commission of another offense or offenses of sexual assault or child molestation" to demonstrate in a civil case that on a particular occasion a party committed an offense of sexual assault or child molestation."

Privileges, General Rule

Under FRE rule 501, the privilege "of a witness, person, government, State, or political subdivision" in a civil action or proceeding is "determined in accordance with State law." Among the evidentiary privileges recognized in most states are the following: spousal privilege, attorney-client privilege, religious leader-penitent, doctor-patient, and psychotherapist-patient. Since state law privileges vary from state-to-state, the outcome of a case may depend on the state in which the case is litigated since relevant (probative) evidence may be barred by a testimonial privilege. The United States Supreme Court ruled about ten years ago that the attorney-client privilege survived the death of the attorney and lasted indefinitely.[20]

Article 37 establishes a testimonial privilege for facts or information learned by "lawyers, agents, doctors" through their practice or profession even after their service or capacity ends, "unless such facts and information were communicated to them with the intention of committing a felony or misdemeanor." Article 38 establishes a similar testimonial privilege for spouses "during the marital relationship or after its termination" unless: 1) the other spouse consents; 2) one of them brings a legal action against the other; or 3) a legal action is brought against one of them in connection with a felony or a misdemeanor he/she had committed. Articles 35 and 36 establish testimonial privileges for "documents which are related to the state's affairs" and for public officials, state employees and other public servants.

Witnesses. General Rule of Competency

Under FRE rule 601, "Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in

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[20] *Swidler & Berlin v. United States*, 524 U.S. 399 (1998).

accordance with State law." This means that in cases involving a federal question, competency will be determined under federal common law; in cases involving citizens of different states, competency will be determined under State law. As a result, different outcomes may occur depending on the jurisdiction in which the trial is held. For example, a witness might be competent to testify at one age in a particular state and might be incompetent to testify in another state at that age.

The language of the relevant Jordanian provision is quite comparable. Under Article 32, "The court shall hear the testimony of any person provided that he/she is not mentally ill or he/she does not understand the meaning of the oath because of his/her age. The court has the power to hear the testimony of underage persons who do not understand the meaning of the oath for informative purposes only."

Lack of Personal Knowledge

Under FRE rule 602, "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony." This rule permit the introduction of expert testimony despite the fact that experts do not have personal knowledge of the facts. However, the expert testimony must satisfy the special rules applicable to such testimony.

Oath or Affirmation

Under FRE rule 603. "Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so." This kind of "testamentary" oath is paralleled in Article 81.

Article 53 also authorizes the taking of a "conclusive" or "derisory" substantive oath on request of a party with regard to a matter in controversy to settle an existing dispute. Under Article 54(1), such an oath may be ordered by the court. Article 54(2) limits the circumstances in which an oath may be ordered by the court to the following circumstances: (a) If a person proved his/her right in the inheritance, then the court orders him/her to take the oath stating that he/she did not interpolate his/her right from the deceased by him/herself or by another person and he/she did not relief the deceased and did not transfer the dept to another person and also he/she does not have a mortgage against such dept.; (b) If a person is entitled to own the property in question and he/she proved his/her claim the court orders him/her to take the oath that he/she did not sell or give the property or relinquish of his/her title on it in any way; (c) If the buyer wants to return back the goods claiming it is defective the court shall order him/her to take the oath stating that he/she did not explicitly or implicitly agreed on the defect; and, (d) If the person who is requesting the court to prove that he/she has the *Shofa'*a right and he/she proved it, then the court shall order him/her to take the oath stating that he/she never relinquish such right in any way. Under Article 58, "An oath can only be taken before the court, and there is not value for refusing to take the oath apart from the court proceedings." Under Article 60, the failure to take such an oath can have severe consequences for a litigant. Under this article, "The party to whom the oath is deferred and declines to take it and does not defer it back to the opposing party and whoever the oath is deferred back to and declines to take it; he/she shall lose the case." Under Article 61, when a party takes an oath, the other party may not introduce evidence to prove that the oath is false.

This kind of oath has no equivalent in the American system. And, it is difficult to imagine such an oath having meaning in a system that did not have strong religious underpinnings. This is emphasized by the form of the oath specified in Article 66 that, "When taking the oath the party begins with the phrase (by the name of *Allah)* followed by the oath wording which had been approved by the court." The notion that a party would lose his/her case simply because the opposing party took an oath that could not be contested is one that has no counterpart in the American system.

The Ministry may wish to consider amending Article 61 to permit the introduction of evidence to contravene an oath taken by a party. A party aggrieved by an oath who is precluded from presenting evidence might take direct action against an opposing party. Resolution of disputes belongs in the courts, not in the streets.

Interpreters

Under FRE rule 604, "An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation." Most jurisdictions now certify the competency of interpreters and administer a special oath that the interpreter will fairly interpret all proceedings.

Competency of Judge as Witness

Under FRE rule 605, "The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point." Under Article 3 a similar provision is imposed. This Article provides that, "A judge shall not rule based on his/her personal knowledge."

Who May Impeach

Under FRE rule 607, "The credibility of a witness may be attacked by any party, including the party calling the witness." This rule changed the traditional rule in the United States (and in many common-law systems) that a party could not impeach its own witness.

Evidence of Character and Conduct of Witness

Under FRE rule 608(a), "The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise."

Rule 608(b) imposes many limitations on the use of specific instances of conduct of a witness to attack or support the character for truthfulness of a witness. A conviction of certain recent crimes may be introduced. Otherwise, character for truthfulness may not be proved by extrinsic evidence. With leave of court, the character of a witness for truthfulness or untruthfulness may be inquired into on cross-

examination. And, a witness does not waive his privilege against self-incrimination (testifying against himself) if he is examined only with respect to character for truthfulness.

Impeachment by Evidence of Conviction of Crime

FRE rule 609 limits the kinds of criminal convictions that may be used to attack the character for truthfulness of a witness. Under this rule, the court may permit introduction of evidence of conviction of a crime punishable by death or imprisonment in excess of one year under the law under which the witness was convicted. The rule also permits introduction of evidence of conviction of a crime involving dishonesty or false statement by the witness. As with other evidence, the court must determine that the probative value of admitting this evidence outweighs its prejudicial effect to the accused. And, the conviction must not have occurred more than ten years before the date of the testimony, unless the court is persuaded that the probative value of the older conviction outweighs its prejudicial effect.

Under FRE rule 609(c), if the witness has been pardoned or if the conviction has been annulled or the witness has received a certificate of rehabilitation, the evidence of conviction is generally prohibited. And, juvenile adjudications are not admissible to impeach witnesses in civil proceedings under FRE rule 609(d). Under FRE rule 609(e), a conviction that is otherwise admissible may be used to impeach a witness even if it is on appeal, although the pendency of the appeal is admissible.

Religious Beliefs or Opinions

Under FRE rule 610, “Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.”

Mode and Order of Interrogation and Presentation

FRE rule 611(a) places control over the “mode and order of interrogating witnesses and presenting evidence” with the court. This permits a judge to limit testimony, take certain witnesses out of order, and take other actions to facilitate the ascertainment of the truth. Under FRE rule 611(b), cross examination is ordinarily limited to the scope of the direct examination. However, the court may permit inquiry into additional areas. Under FRE rule 611(c), leading questions may not be asked on direct examination, but may be used on cross-examination. A hostile witness (an adverse party or a witness identified with an adverse party) may be questioned on direct examination through leading questions.

Writing Used to Refresh Memory

FRE rule 612 codifies the concept of “present recollection refreshed.” Under this rule, a witness may use a writing to refresh his memory for the purpose of testifying. In theory, the witness is not testifying from the writing, but is using the writing to allow him to testify from his refreshed memory.

Under this rule, an adverse party may require production of the writing and may question the witness using the writing and may even introduce the writing into evidence. If the writing contains matters that should not be introduced into evidence (primarily a matter in jury trials since jurors can examine any exhibit), the court may review the writing *in camera* and may introduce a redacted version. If a writing is not produced or delivered pursuant to a court order under this rule, the court may make any order justice requires.

Prior Statements of Witnesses

Under FRE rule 613(a), a witness may be examined concerning a prior statement. The prior statement need not be disclosed to the witness, but must be disclosed on request to opposing counsel. Under FRE rule 613(b), a witness may not be impeached through extrinsic evidence of a prior inconsistent statement unless the witness is afforded an opportunity to explain or deny the prior inconsistent statement. However, this provision does not apply to admissions of a party-opponent.

Calling and Interrogation of Witnesses by Court

FRE rule 614(a) permits a court, on its own motion or at the suggestion of a party, to call witnesses itself. Any such witnesses may then be cross-examined by each party. Under rule 614(b), the court may examine any witnesses called by any party. While trial judges are not supposed to substitute for the lawyers in a case, trial judges often question witnesses to eliminate ambiguities in their testimony or to establish elements of a claim or defense left uncertain after other questioning.

Exclusion of Witnesses

FRE rule 615 establishes what is commonly referred to as "The Rule on Witnesses." Under this rule, "At the request of a party [or *sua sponte*] the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses . . . ." The goal is to discourage the opportunity for witnesses to alter their testimony to conform to the testimony of other witnesses. Since a party has a right to be present throughout a proceeding, a party may not be excluded under this rule.

Opinion Testimony by Lay Witnesses

Lay witnesses (not experts) were traditionally prohibited from providing their opinion. Under FRE rule 701, if a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge.

Testimony by Experts

Under FRE rule 702, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

The question of whether a witness qualifies as an expert has been a frequent one in American courts since at least the decision of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*.[21] Under the *Daubert* test, when a trial judge is faced with a proffer of expert scientific testimony under Federal Evidence Rule 702, the trial judge must make a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and properly can be applied to the facts at issue. Among the other considerations the court should consider whether the theory or technique in question can be (and has been) tested, whether it has been subjected to peer review and publication, its known or potential error rate, and the existence and maintenance of standards controlling its operation, and whether it has attracted widespread acceptance within a relevant scientific community. Even then, the expert testimony will be subjected to cross-examination, possibly contrary experts retained by the other side, and overall evaluations of credibility by the fact-finder.

Under Article 83 of the Civil Procedure Code and the sections following, the role of an expert is very different in the Jordanian system. Under this Article, "At any stage of the trial, the Court shall have the right to decide inspection and expertise by one or more experts in relation with any movable or immovable property or for any matter that it deems as necessary to apply expertise to it." The role of the expert as an interested witness for a party, the American model, is completely foreign in Jordan. And, the possibility that a jury would be unduly swayed by a credentialed expert is not a concern in the Jordanian system.

Bases of Opinion Testimony by Experts

FRE rule 703 establishes the basis for the issuance of expert opinions as to hypothetical questions framed by the parties or by the court. Under this rule, an expert may be asked his opinion based on facts or data that are not admitted as evidence so long as the facts or data are of a type reasonably relied on by experts in the field. Under FRE rule 705, the expert may testify in terms of opinion or inference without first testifying to the underlying facts or data, unless the court requires otherwise. However, the expert may be subjected to cross-examination regarding the underlying facts or data.

Opinion on Ultimate Issue

Under FRE rule 704(a), an expert may be asked his opinion even if the testimony embraces an ultimate issue to be decided by the trier of fact.

[21] 509 U.S. 579 (1993).

Court Appointed Experts

FRE rule 706(a) permits a court, on its own motion or on the motion of any party, to enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. This procedure parallels that available under Article 83 of the Jordanian Civil Procedure Code.

Hearsay. Definitions

FRE rule 801(c) defines hearsay in the traditional way to include out-of-court statements introduced for the truth of the matter asserted. However, the Federal Rules of Evidence made significant changes in the definition of hearsay by excluding as hearsay certain statements that had been treated as hearsay but which were subject to hearsay exceptions. For example, under FRE rule 801(d), a prior statement by a witness and an admission by a party-opponent are not considered to be hearsay and therefore no exception is required.

Article 44 provides a far narrower definition of "admission." Under Article 44, "Admission takes place when a person tells about a right he/she owes to another person." Under Articles 45 and 46, an admission made be a judicial admission (made inside court or during a hearing) or an extra-judicial admission.

Under Article 47, "The admitter must be a sane, adult who is not under interdiction. Admissions made by children, lunatics, and imbeciles shall not be acceptable, and admission may not be made on their behalf by their guardians or custodians or trustees. An admission by a minor who has attained the age of reason has the probative value of an admission by an adult in mattes in which such and admission is permissible." Under Article 48, "The admission shall not be contradicted by the surrounding and apparent facts." Under Article 49, an admission need not be accepted, but may be repudiated in whole or in part by the person in whose favor the admission is made.

Under Article 50, an admission is binding on the one who made it unless a final judgment establishes that he/she had lied. This means that an admission made in good faith, but erroneously, is binding on "admitter." This makes no sense. While the evidentiary rules may permit introduction of the admission, the person against whom the admission would be used should be given the opportunity to explain or contradict the admission in circumstances other than a lie. Again, this problem may be a result of the translation, since Article 50 goes on to describe revocation when the person making it proves that it was a result of a mistake of fact.

If there is a genuine inconsistency in Article 50, the Ministry should consider amending Article 50 to permit an admission to be contravened.

Hearsay Rule

Under FRE rule 802, "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." Under Article 39, "Hearsay testimony is inadmissible in other" than cases involving death, affinity, or a valid *Wakf (*religious endowment) made in favor of charitable institution a long time ago." However, there is no

definition of "hearsay" in the Jordanian articles and no explanation for why these three instances are singled out for special treatment.

The Ministry should consider amending the articles to define "hearsay" and to provide exceptions to the hearsay rule in order to permit judges to consider relevant and probative evidence that would be admitted in other jurisdictions.

Hearsay Exceptions; Availability of Declarant Immaterial

FRE rule 803 sets forth most of the traditional exceptions to the hearsay rule. The following are not excluded by the hearsay rule, even though the declarant is available as a witness: present sense impression, excited utterance; then existing mental, emotional, or physical condition; statements for purposes of medical diagnosis or treatment; recorded recollection (past recollection recorded); records of regularly conducted activity (business records); absence of entry in records kept in accordance with regularly conducted activity; public records and reports; records of vital statistics; absence of public record or entry; records of religious organizations; marriage, baptismal, and similar certificates; family records; records of documents affecting an interest in property; statements in documents affecting an interest in property; statements in ancient documents; market reports, commercial publications; learned treatises; reputation concerning personal or family history; reputation concerning boundaries or general history; reputation as to character; judgment of previous conviction; and, judgment as to personal, family or general history, or boundaries.

Under Article 6(a), "Instruments organized by public officials . . . shall have an absolute power of proof." Its holder shall not be required to prove its content, and it shall not be contested unless its forgery has been proven. Under Article 7(1), an "organized official instruments has the power of proof against all persons in relation to the material facts documented in it by the public official acting within his/her jurisdiction." Articles 6(a) and 7(1) parallel the hearsay exception in the United States for public records and reports.

Under Article 6(b)(1), "Instruments organized by private individuals and authenticated by authorized public officials, such instruments are considered as a proof only in relation to the date and signature." These documents are hearsay (the content is an out-of-court statement introduced for the truth of the matter asserted) and would not be admissible in the United States unless a separate exception applied. Since the date and signature are authenticated by authorized public officials, those parts of the documents would be considered proved in both the United States and Jordan.

Articles 10-14 regulate use of "ordinary instruments." Under Article 10, "An ordinary instrument is an instrument that contains the signature or seal or fingerprint of the person who issued it and it does not have the status of the official instrument." Article 11 defines the procedure for contesting the authenticity of an "ordinary instrument" by a person against whom the instrument is invoked.

Articles 10 and 11 envision tangible evidence to which a signature or seal or fingerprint is affixed. However, more and more transactions, whether commercial or non-commercial, rely on electronic documents and electronic or digital signatures. No provision seems to be made for this possibility.

The Ministry should consider amending Articles 10 and 11 to provide for the authentication of an electronic document with a digital signature.

Articles 18 and 19 regulate the admission and use of “unsigned instruments.” Under Article 18, use of an unsigned instrument is within the discretion of the court. Under Article 19, a notation on the document may permit the court to infer the authenticity and meaning of the document and to permit its use to help establish a claim or defense. Again, however, Articles 18 and 19 do not contemplate the possibility of unsigned electronic instruments. The authenticity and meaning of these documents may be established through forensic evidence, such as IP address.

The Ministry should consider amending Articles 18 and 19 to provide for the authentication of an electronic document without a digital signature through other forensic evidence.

The Jordanian equivalent of the “business record” exception to the hearsay rule is found in Articles 15, 16, and 17. Under Article 15, business records of merchants may only be used as proof against merchants without a suppletory oath. Under Article 16, business records may be used against the business “whether it is kept regularly or irregularly.” In the United States, a record qualifies as a business record only if it is kept in the regular course of business. However, in its allowance of using “irregular” business records against a merchant, Article 16 seems to parallel the “admission of a party opponent” or “declaration against interest” provisions of the American system rather than the business records exception.

Under Article 25(3), when a party fears that a forged instrument will be used against him/her, the party may bring a separate declaratory judgment action to declare that the instrument is forged. Although not expressly addressed within the Federal Rules of Evidence, a separate declaratory judgment action can always be pursued to resolve a dispute between parties. And, the pretrial process present in the American system, especially through motions *in limine*, provides numerous other opportunities to resolve the authenticity of documents.

Hearsay Exceptions; Declarant Unavailable

FRE rule 804 provides additional hearsay exceptions when a declarant is “unavailable.” Under rule 804(a), "Unavailability as a witness" includes situations in which the declarant - (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or (3) testifies to a lack of memory of the subject matter of the declarant's statement; or (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.
A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

FRE rule 804(b) permits the introduction of the following types of hearsay evidence: (1) Former testimony; (2) Statement under belief of impending death; (3) Statement against interest; (4) Statement of personal or family history (concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared); (4) Forfeiture by wrongdoing.

Hearsay Within Hearsay

Courts may often be confronted by hearsay within hearsay; an out-of-court statement may refer, for example, to another out-of-court statement. Under FRE rule 805, hearsay included within hearsay is admissible if each part of the combined statements conforms with an exception to the hearsay rule.

Attacking and Supporting Credibility of Declarant

Since admission of a hearsay statement usually means that the declarant will not be available for cross-examination as to credibility, FRE rule 806 was necessary to describe the conditions under which credibility could be challenged. Under this rule, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness.

Residual Exception

Under FRE rule 807, the court may admit any statement not specifically covered by the hearsay definitions or exceptions but having equivalent circumstantial guarantees of trustworthiness. The statement must be offered as evidence of a material fact; it must be more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and, the court must find that the purposes of the rules and the interests of justice will best be served by admission of the statement into evidence.

Requirement of Authentication or Identification

Under FRE rule 901(a), a party must authenticate evidence as a condition precedent to admissibility by introducing evidence sufficient to support a finding that the matter in question is what its proponent claims. Under FRE rule 901(b), this may be demonstrated by such methods as testimony of a witness with knowledge, a nonexpert opinion on handwriting, comparison by the trier of fact or an expert, distinctive characteristics, voice identification, evidence that a telephone call was made to the number assigned at the time by the telephone company to a particular person or business, public records or reports, and ancient (at least 20 year old) documents or data compilations.

The American methods of authentication rely far more on oral testimony than would be the case in Jordan. As described previously, the party objecting to the evidence has the burden of challenging the authenticity of evidence. Oral testimony of the type relied on in the United States may be taken, but the question of authenticity is far more likely to be based in Jordan on affidavits and oaths.

Self-authentication

Under FRE rule 902, certain documents are considered to be authentic without the necessity of extrinsic evidence to prove their authenticity. Among these documents are the following: (1) Domestic public

documents under seal; (2) Domestic public documents not under seal (if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine); (3) Foreign public documents (accompanied by a final certification as to the genuineness of the signature and official position); (4) Certified copies of public records; (5) Official publications purporting to be issued by public authority; (6) Newspapers and periodicals; (7) Trade inscriptions and the like; (8) Documents acknowledged by or before a notary public or other office authorized by law; (9) Commercial paper and related documents; (10) Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic; (11) Certified domestic records of regularly conducted activity under specified circumstances; (12) Certified foreign records of regularly conducted activity signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed.

Article 8 establishes a special provision in Jordan for authenticating official instruments in Jordan. Under Article 8(1), "If the original copy of the official instrument exists any handwritten or Photostatic copies of such original which have been issued by a public official shall have the same power of proof to the extent it matches the original." It is not obvious what the term "original copy" might mean, but this may be due to the translation. An official instrument would either be an "original" or a "copy." It cannot be both. Under Article 8(2), "The copy shall be deemed as identical to the original unless it is contested by one of the parties, in such case the copy has to be verified against the original."

Article 26 provides a special provision in Jordan for proving the authenticity of certain foreign commercial instruments. Under Article 26 "the validity of any contract or power of attorney or delegation of powers or a written instrument organized or signed in a place outside the Hashemite Kingdom of Jordan [may be proven] through the admission of both parties or through certifying such document or instrument by the authorized legal and political entities in the country in which the instrument or document was organized or signed and it has also to be certified by the representative of the Hashemite Kingdom of Jordan in that country and by the related Jordanian authorities. In case where there is no representative for the Hashemite Kingdom of Jordan in the related country, then the certification by any political entity the country of which has political ties with Jordan shall be deemed as sufficient on as long as the document has also the certification of the related Jordanian authorities."

Subscribing Witness' Testimony Unnecessary

Under FRE rule 903, "The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing."

Contents of Writings, Recordings, and Photographs

Definitions

FRE rule 1001, defines the terms "writings and recordings," "photographs," "original," and "duplicate."

Requirement of Original

Under FRE rule 1002, "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress." With this provision is designed to prevent fraud, the transition to digital media and the available of software like Adobe Photoshop makes it more and more difficult to determine whether a writing, recording, or photograph is truly an original or whether it may have been manipulated for a particular purpose.

Admissibility of Duplicates

Under FRE rule 1003, "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."

Admissibility of Other Evidence of Contents

FRE rule 1004 recognizes that there are some situations in which an original writing, recording or photograph may not be available. In such cases, other evidence of the contents of a writing, recording, or photograph may be introduced. These circumstances exist when: (1) All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or (2) No original can be obtained by any available judicial process or procedure; or (3) At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or (4) The writing, recording, or photograph is not closely related to a controlling issue.

Public Records

Under FRE rule 1005, "The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct . . . or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given."

Under Article 8, if the original copy of an official instrument exists any handwritten or photostatic copies of such original which have been issued by a public official shall have the same power of proof to the extent it matches the original. The copy shall be deemed as identical to the original unless it is contested by one of the parties, in such case the copy has to be verified against the original. This Article does not envision the availability only of electronic copies of an official record. Because of the costs of physical storage, official documents are being scanned and stored electronically and can be made available far more quickly that handwritten or photostatic copies.

Article 9 provides that, “If the original of the official instrument does not exist then the handwritten or photostatic shall be deemed as a proof” if it was certified by an authorized public official against the original (which does not exist).

The Ministry should consider amending this article to prepare for the submission of electronic documents with appropriate assurances of accuracy. In “smart courtrooms” throughout the world, this transition to electronic exhibits has already begun.

Summaries

Under FRE rule 1006, voluminous writings, recordings, or photographs may be presented in the form of a chart, summary, or calculation. However, the originals, or duplicates, must be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

Testimony or Written Admission of Party

Under FRE rule 1007, “Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.”

Withdrawal of Document

Under Article 24, “If one of the parties presents an instrument or document as evidence in the case, he/she is not allowed to withdraw it from the file unless he/she has the consent of the other party and the written permission of the judge to do so. A certified copy of the original withdrawn instrument has to be kept in the case file.” This issue is not addressed directly in the Federal Rules of Evidence. However, the court file includes documents filed with the court that are not stricken from the record.

APPENDIXES

APPENDIX 1 – RULE 16.1 COLORADO SIMPLIFIED DISCOVERY

(a) **Purpose and Summary of Simplified Procedure.**

(1) Purpose of Simplified Procedure. The purpose of this rule is to provide maximum access to the district courts in civil actions; to enhance the provision of just, speedy, and inexpensive determination of civil actions; to provide the earliest practical trials; and to limit discovery and its attendant expense.

(2) Summary of Simplified Procedure. Under this Rule, Simplified Procedure generally applies to all civil actions, whether for monetary damages or any other form of relief unless expressly excluded by this Rule or the pleadings, or unless a party timely and properly elects to be excluded from its provisions. This Rule normally limits the maximum allowable monetary judgment to $100,000 against any one party. This Rule requires early, full disclosure of persons, documents, damages, insurance and experts, and early, detailed disclosure of witnesses' testimony, whose direct trial testimony is then generally limited to that which has been disclosed. Normally, no depositions, interrogatories, document requests or requests for admission are allowed, although examination under C.R.C.P. 34(a)(2) and 35 is permitted.

(b) **Actions Subject to Simplified Procedure.** This Rule applies to all civil actions other than:

(1) civil actions that are class actions, domestic relations, juvenile, mental health, probate, water law, forcible entry and detainer, C.R.C.P. 106 and 120, or other similar expedited proceedings, unless otherwise stipulated by the parties; or

(2) civil actions in which any party seeks a monetary judgment from any other party of more than $100,000, exclusive of interest and costs.

(3) Each pleading containing an initial claim for relief in a civil action, other than a domestic relations, probate, water, juvenile, or mental health action, shall be accompanied by a completed Civil Cover Sheet in the form and content of Appendix to Chapters 1 to 17, Form 1.2 (JDF 601), at the time of filing. Failure to file the cover sheet shall not be considered a jurisdictional defect in the pleading but may result in a clerk's show cause order requiring its filing.

(c) **Limitations on Damages.** In cases subject to this Rule, a claimant's right to a monetary judgment against any one party shall be limited to a maximum of $100,000, including any attorney fees, penalties or punitive damages, but excluding interest and costs. The $100,000 limitation shall not restrict an award of non-monetary relief. The jury shall not be informed of the $100,000 limitation. If the jury returns a verdict for damages in excess of $100,000, the trial court shall reduce the verdict to $100,000.

(d) **Election for Exclusion from This Rule**. This Rule shall apply unless, no later than 35 days after the case is at issue as defined in C.R.C.P. 16(b)(1), any party files a written notice, signed by the party and its counsel, if any, stating that the party elects to be excluded from the application of Simplified Procedure, set forth in this rule 16.1. The use of a "Notice to Elect Exclusion From C.R.C.P. 16.1 Simplified Procedure" in the form and content of Appendix to Chapters 1 to 17, Form 1.3 (JDF 602), shall comply with this section. In the event a notice is filed C.R.C.P. 16 shall govern the action.

(e) **Election for Inclusion Under This Rule.** In actions excluded by subsection (b)(2) of this Rule, within 45 days after the case is at issue, as defined in C.R.C.P. 16(b)(1), the parties may file a stipulation to be governed by this Rule. In such event, they will not be bound by the $100,000 limitation on judgments contained in section (c) of this Rule.

(f) **Case Management Orders.** In actions subject to Simplified Procedure pursuant to this Rule, the presumptive case management order requirements of C.R.C.P. 16(b)(1), (2), (3), (5)and(6) shall apply.

(g) **Trial Setting.** No later than 40 days after the case is at issue, the responsible attorney shall set the case for trial pursuant to C.R.C.P. 121, section 1-6, unless otherwise ordered by the court.

(h) **Certificate of Compliance.** No later than 45 days after the case is at issue, the responsible attorney shall also file a Certificate of Compliance stating that the parties have complied with all the requirements of sections (f) and (g) of this Rule or, if they have not complied with each requirement, shall identify the requirements which have not been fulfilled and set forth any reasons for the failure to comply.

(i) **Expedited Trials**. Trial settings, motions and trials in actions subject to Simplified Procedure under this Rule should be given early trial settings, hearings on motions and trials.

(j) **Case Management Conference.** If any party believes that it would be helpful to conduct a case management conference, a notice to set case management conference shall be filed stating the reasons why such a conference is requested. If any party is unrepresented or if the court determines that such a conference should be held, the court shall set a case management conference. The conference may be conducted by telephone.

(k) **Simplified Procedure.** Simplified Procedure means that the action shall not be subject to C.R.C.P. 16, 26-33,34(a)(1),34(c) and 36, unless otherwise specifically provided in this Rule, and shall be subject to the following requirements:

(1) Required Disclosures.

(A) Disclosures in All Cases. Each party shall make disclosures pursuant to C.R.C.P. 26(a)(1), 26(a)(4), 26(a)(6),26(b)(5),26(c),26(e) and 26(g), no later than 30 days after the case is at issue as defined in C.R.C.P. 16(b)(1). In addition to the requirements of C.R.C.P. 26(g), the disclosing party shall sign all disclosures under oath.

(B) Additional Disclosures in Certain Actions. Even if not otherwise required under subsection (A), matters to be disclosed pursuant to this Rule shall also include, but are not limited to, the following:

(i) *Personal Injury Actions.* In actions claiming damages for personal or emotional injuries, the claimant shall disclose the names and addresses of all doctors, hospitals, clinics, pharmacies and other health care providers utilized by the claimant within five years prior to the date of injury, and shall produce all records from those providers or written waivers allowing the opposing party to obtain those records subject to appropriate protective provisions authorized by C.R.C.P. 26(c). The claimant shall also produce transcripts or tapes of recorded statements, documents, photographs, and video and other recorded images that address the facts of the case or the injuries sustained. The defending party shall disclose transcripts or tapes of recorded statements, any insurance company claims memos or documents, photographs, and video and other recorded images that address the facts of the case, the

injuries sustained, or affirmative defenses. A party need not produce those specific records for which the party, after consultation pursuant to C.R.C.P. 26(c), timely moves for a protective order from the court;

(ii) *Employment Actions.* In actions seeking damages for loss of employment, the claimant shall disclose the names and addresses of all persons by whom the claimant has been employed for the ten years prior to the date of disclosure and shall produce all documents which reflect or reference claimant's efforts to find employment since the claimant's departure from the defending party, and written waivers allowing the opposing party to obtain the claimant's personnel files and payment histories from each employer, except with respect to those records for which the claimant, after consultation pursuant to C.R.C.P. 26(c), timely moves for a protective order from the court. The defending party shall produce the claimant's personnel file and applicable personnel policies and employee handbooks;

(iii) *Requested Disclosures.* Before or after the initial disclosures, any party may make a written designation of specific information and documentation that party believes should be disclosed pursuant to C.R.C.P. 26(a)(1). The other party shall provide a response and any agreed upon disclosures within 20 days of the request or at the time of initial disclosures, whichever is later. If any party believes the responses or disclosures are inadequate, it may seek relief pursuant to C.R.C.P. 37.

(C) Document Disclosure. Documents and other evidentiary materials disclosed pursuant to C.R.C.P. 26(a)(1) and 16.1(k)(1)(B) shall be made immediately available for inspection and copying to the extent not privileged or protected from disclosure.

(2) **Disclosure of Expert Witnesses.** The provisions of C.R.C.P. 26(a)(2)(A) and (B), 26(a)(4), 26(a)(6), 26(c), 26(e) and 26(g) shall apply to disclosure for expert witnesses. Written disclosures of experts shall be served by parties asserting claims 90 days before trial; by parties defending against claims 60 days before trial; and parties asserting claims shall serve written disclosures for any rebuttal experts 35 days before trial.

(3) Disclosure of Non-expert Trial Testimony.

Each party shall serve written disclosure statements identifying the name, address, telephone number, and a detailed statement of the expected testimony for each witness the party intends to call at trial whose deposition has not been taken, and for whom expert reports pursuant to subparagraph (k)(2) of this Rule have not been provided. For adverse party or hostile witnesses, written disclosure of the expected subject matters of the witness's testimony, rather than a detailed statement of the expected testimony, shall be sufficient. Written disclosure shall be served by parties asserting claims 90 days before trial; by parties defending against claims 60 days before trial; and parties asserting claims shall serve written disclosures for any rebuttal witnesses 35 days before trial.

(4) Depositions of Witnesses in Lieu of Trial Testimony.

A party who intends to offer the testimony of an expert or other witness may, pursuant to C.R.C.P. 30(b)(1)-(4), take the deposition of that witness for the purpose of preserving the witness' testimony for use at trial. Such a deposition shall be taken at least 5 days before trial. In that event, any party may offer admissible portions of the witness' deposition, including any cross-examination during the deposition, without a showing of the witness' unavailability. Any witness who has been so deposed may not be offered as a witness to present live testimony at trial by the party taking the deposition.

(5) Depositions for Obtaining Documents.

Depositions also may be taken for the sole purpose of obtaining and authenticating documents from a non-party.

(6) Trial Exhibits.

All exhibits to be used at trial which are in the possession, custody or control of the parties shall be identified and exchanged by the parties at least 30 days before trial. Authenticity of all identified and exchanged exhibits shall be deemed admitted unless objected to in writing within 10 days after receipt of the exhibits. Documents in the possession, custody and control of third persons that have not been obtained by the identifying party pursuant to document deposition or otherwise, to the extent possible shall be identified 30 days before trial and objections to the authenticity of those documents may be made at any time prior to their admission into evidence.

(7) Limitations on Witnesses and Exhibits at Trial.

In addition to the sanctions under C.R.C.P. 37(c), witnesses and expert witnesses whose depositions have not been taken shall be limited to testifying on direct examination about matters disclosed in reasonable detail in the written disclosures, provided, however, that adverse parties and hostile witnesses shall be limited to testifying on direct examination to the subject matters disclosed pursuant to subparagraph (k)(3) of this Rule. However, a party may call witnesses for whom written disclosures were not previously made for the purpose of authenticating exhibits if the opposing party made a timely objection to the authenticity of such exhibits.

(8) Juror Notebooks and Jury Instructions.

Counsel for each party shall confer about items to be included in juror notebooks as set forth in C.R.C.P. 47(t). At the beginning of trial or at such other date set by the court, the parties shall make a joint submission to the court of items to be included in the juror notebook. Jury instructions and verdict forms shall be prepared pursuant to C.R.C.P. 16(g).

(9) Voluntary Discovery.

In addition to the disclosures required by this Rule, voluntary discovery may be conducted as agreed to by all the parties. However, the scheduling of such voluntary discovery may not serve as the basis for a continuance of the trial, and the costs of such discovery shall not be deemed to be actual costs recoverable at the conclusion of the action. Disputes relating to such agreed discovery may not be the subject of motions to the court. If a voluntary deposition is taken, such deposition shall not preclude the calling of the deponent as a witness at trial.

(l) **Changed Circumstances.** In a case governed by this Rule, any time prior to trial, upon a specific showing of substantially changed circumstances sufficient to render the application of Simplified Procedure under this Rule unfair and a showing of good cause for the timing of the motion to terminate, the court shall terminate application of this Rule and enter such orders as are appropriate under the circumstances.

APPENDIX 2 – FEDERAL RULE 11 OF CIVIL PROCEDURE – ATTORNEY SANCTIONS

Rule 11 [English]

SANCTIONS, RULE 11 - Federal Rule of Civil Procedure 11 provides that a district court may sanction attorneys or parties who submit pleadings for an improper purpose or that contain frivolous arguments or arguments that have no evidentiary support. Rule 11. Signing of Pleadings, Motions, and Other Papers;

Representations to Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to the Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,-

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation. (1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37. Rule 11 was amended effective December 31, 1993. The prior version provides in pertinent part:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record and in the attorney's individual name[.] . . . . [T]he signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee. Even if the district court finds evidence to be insufficient for purposes of summary judgment, that "does not mean that appellants' claims were factually unfounded for purposes of Rule 11." Stitt v. Williams, 919 F.2d 516, 527 (9th Cir. 1990).

A district court may impose monetary sanctions, in the form of attorneys' fees, upon plaintiffs who file

Title VII claims that are "frivolous, unreasonable, or without foundation." See EEOC v. Bruno's Restaurant, 13 F.3d 285, 287 (9th Cir. 1993) (quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421-22 (1978)). However, "[b]ecause Congress intended to `promote the vigorous enforcement of the provisions of Title VII,' a district court must exercise caution in awarding fees to a prevailing defendant in order to avoid discouraging legitimate suits that may not be `airtight.' " Id. (quoting Christiansburg, 434 U.S. at 422); see also EEOC v. Consolidated Serv. Sys., 30 F.3d 58, 59 (7th Cir. 1994) (suggesting that the "frivolous" standard is much more stringent than merely "not substantially justified"). Courts must heed "theSupreme Court's warning in Christiansburg against the `temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation.' " Bruno's Restaurant, 13 F.3d at 290 (quoting Christiansburg, 434 U.S. at 421-22); see also Forsberg v. Pacific Northwest Bell Tel. Co., 840 F.2d 1409, 1422 (9th Cir. 1988) (applying the same "frivolous, unreasonable, or without foundation" standard to request for sanctions under Rule 11 and 42 U.S.C. S 2000e-5(k)).

Kizer v. Children's Learning Ctr., 962 F.2d 608, 613 (7th Cir. 1992) affirms a district court's decision not to impose Rule 11 sanctions on a plaintiff who had failed to make out a prima facie case under Title VII because the claim was not filed with improper motives or inadequate investigation.

Rule 11 sanctions are only available with regard to papers filed with the court, not attorney misconduct. Fed. R. Civ. P. 11; see also United Energy Owners Comm., Inc. v. United States Energy Management Systems, Inc., 837 F.2d 356, 364-65 (9th Cir. 1988). (Under pre-'93 rule)

Rule 11 [Arabic]

القواعد الفدارلية للمحاكمات المدنية

ثالثا: المرافعات والطلبات – القاعدة (11)

توقيع المرافعات والطلبات وأوراق أخرى؛ التصريحات إلى المحكمة؛ العقوبات

(أ) التوقيع

كل مرافعة وطلب خطي وأية أوراق أخرى يجب أن تكون موقعة من محام واحد على الأقل أو من قبل الشخص ذاته في حال لم يكن ممثلا. يجب أن تشتمل الورقة على عنوان الشخص الذي وقعها وعنوان بريده الإلكتروني ورقم هاتفه. ما لم تنص قاعدة أو قانون آخر على غير ذلك، من غير الضروري أن تكون المرافعة مصادق عليها أو مرفقة بإفادة. على المحكمة شطب أية ورقة غير موقعة ما لم تصحيح هذا الإغفال فور استدعاء انتباه المحامي أو الطرف إليه.

(ب) **تصريحات/إدلاءات تقدم إلى المحكمة**

عند تقديم مرافعة أو طلب خطي أو أية ورقة أخرى إلى المحكمة، سواء أكان من خلال التوقيع أم التسجيل أو الإيداع أم التأييد، فإن المحامي أو الطرف غير الممثل يشهد بأنه حسب معرفته ومعلوماته واعتقاده والمبنية على بعد استعلام معقول وفقا للظروف:

(1) أنها لم تقدم لأي سبب غير سليم على سبيل المثال لغايات إرهاق المحكمة أو تأخير الدعوى غير الضروري، أو زيادة غير الضرورية في نفقات التقاضي.

(2) أن الادعاءات والدفوع وأية نزاعات وحجج قانونية أخرى مبررة بموجب القانون المطبق أو بموجب نقاش جدي لتمديد العمل بـ أو تعديل أو رفض قانون مطبق أو لاستحداث قانون جديد.

(3) إن الحجج مدعمة بالبينة أو، كما هو مبين بالتحديد، ستدعم بالبينة بعد الحصول على فرصة أخرى معقولة للتحري والاستكشاف.

(4) أن إنكار الوقائع المادية مبرر بموجب البينة أو، كما هو مبين بالتحديد، مبنية على الاعتقاد أو قلة المعلومات.

(ج) **العقوبات**

(1) **بوجه عامة**

في حال قررت المحكمة، بعد الإشعار وإعطاء فرصة معقولة للرد، بأنه هناك إخلال بالقاعدة 11(ب)، للمحكمة فرض عقوبات مناسبة على المحامي، شركة المحاماة أو الطرف الذي أخل أو المسؤول عن الإخلال بهذه القاعدة. في ظل ظروف استثنائية غير متوقعة، تكون شركة المحاماة مسؤولة بالتضامن عن أي إخلال لهذه القاعدة يرتكبه الشركاء فيها أو المساعدين لديها أو موظفيها.

(2) **طلب إيقاع العقوبات**

يجب أن يقدم طلب إيقاع العقوبات بصورة منفصلة عن الطلبات الأخرى، وأن يبين بالتحديد السلوك الذي يدعى بأنه يخل بالقاعدة 11(ب). كما يجب تبليغ الطلب وفقا للقاعدة 5. لا يتم تسجيل هذا الطلب أو تقديمه إلى المحكمة في حال تم سحب الورقة أو الدعوى أو الدفع أو الزعم المتنازع عليه أو تم تصحيحها بصورة مناسبة خلال 21 يوما من تاريخ التبليغ أو خلال أي وقت آخر تحدده المحكمة لهذه الغاية. للمحكمة، إن كان الأمر مبررا، أن تحكم للطرف الرابح بنفقات مقبولة من ضمنها اتعاب المحامي المتحققة نتيجة للطلب.

(3) **بناء على مبادرة من قبل المحكمة**

للمحكمة من تلقاء نفسها وأن رأت أن سلوكا مخلا بالقاعدة 11(ب)، أن تأمر المحامي أو شركة المحاماة أو الطرف ببيان السبب الذي يجعله يعتقد أن السلوك المبين في أمرها هذا غير مخل بهذه القاعدة.

(4) **طبيعة العقوبات**

أن تطبيق العقوبات المقررة بموجب هذه القاعدة يجب أن يقتصر على الحد الذي يكفي لمنع إعادة إرتكاب هذا السلوك أو أي سلوك مشابه من الآخرين في نفس الظروف. قد تتضمن العقوبات توجيهات غير نقدية، أو أمرا بدفع غرامة للمحكمة، أو أمرا بتخصيص دفعة إلى محرك الطلب لتغطية جزء أو كامل من أتعاب المحاماة المقبولة وأية نفقات أخرى تترتب بصورة مباشرة عن هذا الإخلال.

(5) **القيود على الغرامات النقدية**

على المحكمة عدم فرض غرامات نقدية في الحالات التالية:

أ. ضد شخص ممثل نتيجة للإخلال بالقاعدة 11(ب) (2)؛ أو

ب. من تلقاء نفسها، ما لم تكن قد أصدرت أمر ببيان السبب وفقا للقاعدة 11(ج) (3) قبل رد أو تسوية الدعوى المقدمة ضد أو من قبل الطرف المعاقب أو محاميه ة طوعيا.

(6) **شروط قرار فرض العقوبة**

يجب أن يبين قرار فرض العقوبة السلوك المعاقب عليه وشرح أسس فرض العقوبة.

(د) **عدم القابلية للتطبيق على الاستكشاف**

لا تطبق أحكام هذه القاعدة على طلبات الإفصاح والاستشكاف والردود والاعتراضات والطلبات المقدمة بموجب القواعد 26 وحتى 37.

APPENDIX 3 - ABA MODEL RULES OF PROFESSIONAL CONDUCT (2004)

As passed by the American Bar Association, House of Delegates February 5, 2002 and amended in August 2002.

PREAMBLE: A LAWYER'S RESPONSIBILITIES

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a Model Rules of Professional Conduct (2004) Page 1 of 32 http://www.law.cornell.edu/ethics/aba/current/ABA_CODE.HTM 5/15/2008 lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as thirdparty neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

[4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal

profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to

seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal

authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] The legal profession's relative autonomy carries with it special responsibilities of selfgovernment. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

SCOPE

[14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

[15] The Rules presuppose a larger legal context shaping the lawyer's role. That context

includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[16] Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

[17] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall

be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[18] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

[19] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

[21] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

Rule 1.0: TERMINOLOGY

(a) "**Belief**" or "**believes**" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "**Confirmed in writing**," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "**Firm**" or "**law firm**" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) "**Fraud**" or "**fraudulent**" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) "**Informed consent**" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) "**Knowingly**," "**known**," or "**knows**" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "**Partner**" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) "**Reasonable**" or "**reasonably**" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) "**Reasonable belief**" or "**reasonably believes**" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "**Reasonably should know**" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) "**Screened**" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) "**Substantial**" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) "**Tribunal**" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(n) "**Writing**" or "**written**" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "**signed**" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

CLIENT-LAWYER RELATIONSHIP

Rule 1.1: Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.2: Scope of Representation and Allocation of Authority between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Rule 1.3: Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.4: Communication

(a) A lawyer shall:
(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.5: Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

[Note: *Rule 1.15, as recommended by the Ethics 2000 Commission, would have required that communication of fees and expenses, and changes in them, be communicated to the client in writing unless the "it is reasonably foreseeable that total cost to a client, including attorney fees, will be [$500] or less." In February 2002 the House of Delegates deleted the requirement of a writing, stating that fee communications be "preferably in writing." As of 2002, five jurisdictions require a written fee agreement for all new clients: Connecticut, District of Columbia, New Jersey, Pennsylvania, and Utah. Two additional states require a written fee agreement in many representations: Alaska (fees in excess of $500), California (fees for all non-corporate clients in excess of $1,000).*

Rule 1.6: Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

Rule 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Rule 1.8 Conflict of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgement or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Rule 1.9 Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client,
(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer has acquired information protected by Rule 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 1.10 Imputation of Conflicts of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client
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http://www.law.cornell.edu/ethics/aba/current/ABA_CODE.HTM 5/15/2008
when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Rule 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to

ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other thirdparty neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other

third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Rule 1.13 Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Rule 1.14 Client With Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Rule 1.15 Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Rule 1.16 Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal

when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Rule 1.17 Sale of Law Practice

A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:
(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, [in the geographic area] [in the jurisdiction] (a jurisdiction nay elect either version) in which the practice has been conducted;

(b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firm;

(c) The seller gives written notice to each of the seller's clients regarding:

(1) the proposed sale;

(2) the client's right to retain other counsel or to take possession of the file; and

(3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.
If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(d) The fees charged clients shall not be increased by reason of the sale.

Rule 1.18 Duties to Prospective Client

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to

that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

COUNSELOR

Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Rule 2.2 Intermediary

{Deleted}

Rule 2.3 Evaluation for Use by Third Persons

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Rule 2.4 Lawyer Serving as Third-Party Neutral

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

ADVOCATE

Rule 3.1 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Rule 3.2 Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:
(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Rule 3.5 Impartiality and Decorum of the Tribunal

A lawyer shall not:
(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct intended to disrupt a tribunal.

Rule 3.6 Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;
(ii) if the accused has not been apprehended, information necessary to aid in the apprehension of that person;
(iii) the fact, time and place of arrest; and
(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant

to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Rule 3.7 Lawyer as Witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Rule 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:
(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
(i) the information sought is not protected from disclosure by any applicable privilege;
(ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
(iii) there is no other feasible alternative to obtain the information;
(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the

prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Rule 3.9 Advocate in Nonadjudicative Proceedings

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5 .

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 4.2 Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Rule 4.3 Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Rule 4.4 Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

LAW FIRMS AND ASSOCIATIONS

Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 5.2 Responsibilities of a Subordinate Lawyer

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:
(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of

the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 5.4 Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

Rule 5.6 Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement

that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

Rule 5.7 Responsibilities Regarding Law-Related Services

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are Model Rules of Professional Conduct (2004) Page 26 of 32 http://www.law.cornell.edu/ethics/aba/current/ABA_CODE.HTM 5/15/2008 provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the lawrelated services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

PUBLIC SERVICE

Rule 6.1 Voluntary Pro Bono Publico Service

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and (b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard

legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession. In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

Rule 6.2 Accepting Appointments

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the clientlawyer relationship or the lawyer's ability to represent the client.

Rule 6.3 Membership in Legal Services Organization

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

Rule 6.4 Law Reform Activities Affecting Client Interests

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

Rule 6.5 Nonprofit and Court-Annexed Limited Legal Services Programs

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or

court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

INFORMATION ABOUT LEGAL SERVICES

Rule 7.1 Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Rule 7.2 Advertising

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority; and

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Rule 7.3 Direct Contact with Prospective Clients

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Rule 7.4 Communication of Fields of Practice and Specialization

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association;

and

(2) the name of the certifying organization is clearly identified in the communication.

Rule 7.5 Firm Names and Letterheads

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of the law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

Rule 7.6 Political Contributions to Obtain Government Legal Engagements or Appointments by Judges

A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.

MAINTAINING THE INTEGRITY OF THE PROFESSION

Rule 8.1 Bar Admission and Disciplinary Matters

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

Rule 8.2 Judicial and Legal Officials

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Rule 8.3 Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:
(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Rule 8.5 Disciplinary Authority; Choice of Law

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the

disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

APPENDIX 4 - ABA CIVILITY CODES

Guidelines for Conduct

Introduction

The widely-perceived, accelerating decline in professionalism – often denominated "civility" - has been the subject of increasing concern to the profession for many years. Twice since 1988, the American Bar Association has urged adoption of, and adherence to, civility codes.
What has been lacking, however, is an ABA-endorsed model code. The Guidelines for Litigation Conduct fill that void
These Guidelines are consensus-driven and state nothing novel or
revolutionary. They are purely aspirational and are not to be used as a basis for litigation, liability, discipline, sanctions or penalties of any type. The Guidelines are designed not to promote punishment but rather to elevate the tenor of practice - to set a voluntary, higher standard, "in the hope that," in the words of former ABA President John J. Curtin, "some progress might be made towards greater professional satisfaction." The Guidelines for Litigation Conduct are modeled on the Standards for Professional Conduct adopted by the United States Court of Appeals for the Seventh Circuit, a set of proven aspirational standards. Chief United States District Judge Marvin E. Aspen of Chicago, architect of the Seventh Circuit Standards, has accurately observed that civility in the legal profession is inextricably linked to the manner in which lawyers are perceived by the public - and, therefore, to the deteriorating public confidence that our system of justice enjoys. Deteriorating civility, in former ABA President Lee Cooper's words, "interrupts the administration of justice. It makes the practice of law less rewarding. It robs a lawyer of the sense of dignity and self-worth that should come from a learned profession. Not least of all, it ... brings with it all the problems ... that accompany low public regard for lawyers and lack of confidence in the justice system." The problem of incivility is more pervasive, and insidious, than its impact on the legal profession alone. As Justice Anthony M. Kennedy has stressed: Civility is the mark of an accomplished and superb professional, but it is more even than this. It is an end in itself. Civility has deep roots in the idea of respect for the individual. The decline in civility is not limited to the legal profession, but this profession has been in the forefront of those addressing this problem.

Preamble

A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms. In fulfilling our duty to represent a client vigorously as lawyers, we will be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner. A judge's conduct should be characterized at all times by courtesy and patience toward all participants. As judges we owe to all participants in a legal proceeding respect, diligence, punctuality, and protection against unjust and improper criticism or attack. Conduct that may be characterized as uncivil, abrasive, abusive, hostile, or obstructive impedes the fundamental goal of resolving disputes rationally, peacefully, and efficiently. Such conduct tends to delay and often to deny justice. The following Guidelines are designed to encourage us, judges and lawyers, to meet our obligations to each other, to litigants and to the system of justice, and thereby achieve the twin goals of civility and professionalism, both of which, are hallmarks

of a learned profession dedicated to public service. We encourage judges, lawyers and clients to make a mutual and firm commitment to these Guidelines. We support the principles espoused in the following Guidelines, but under no circumstances should these Guidelines be used as a basis for litigation or for sanctions or penalties.

Lawyers' Duties to Other Counsel

1. We will practice our profession with a continuing awareness that our role is to zealously advance the legitimate interests of our clients. In our dealings with others we will not reflect the ill feelings of our clients. We will treat all other counsel, parties, and witnesses in a civil and courteous manner, not only in court, but also in all other written and oral communications. We will refrain from acting upon or manifesting bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status toward any participant in the legal process.
2. We will not, even when called upon by a client to do so, abuse or indulge in offensive conduct directed to other counsel, parties, or witnesses. We will abstain from disparaging personal remarks or acrimony toward other counsel, parties, or witnesses. We will treat adverse witnesses and parties with fair consideration.
3. We will not encourage or knowingly authorize any person under our control to engage in conduct that would be improper if we were to engage in such conduct.
4. We will not, absent good cause, attribute bad motives or improper conduct to other counsel.
5. We will not lightly seek court sanctions.
6. We will in good faith adhere to all express promises and to agreements with other counsel, whether oral or in writing, and to all agreements implied by the circumstances or local customs.
7. When we reach an oral understanding on a proposed agreement or a stipulation and decide to commit it to writing, the drafter will endeavor in good faith to state the oral understanding accurately and completely. The drafter will provide other counsel the opportunity to review the writing. As drafts are exchanged between or among counsel, changes from prior drafts will be identified in the draft or otherwise explicitly brought to other counsel's attention. We will not include in a draft matters to which there has been no agreement without explicitly advising other counsel in writing of the addition.
8. We will endeavor to confer early with other counsel to assess settlement possibilities. We will not falsely hold out the possibility of settlement to obtain unfair advantage.
9. In civil actions, we will stipulate to relevant matters if they are undisputed and if no good faith advocacy basis exists for not stipulating.
10. We will not use any form of discovery or discovery scheduling as a means of harassment.
11. Whenever circumstances allow, we will make good faith efforts to resolve by agreement objections before presenting them to the court.
12. We will not time the filing or service of motions or pleadings in any way that unfairly limits another party's opportunity to respond.
13. We will not request an extension of time solely for the purpose of unjustified delay or to obtain unfair advantage.
14. We will consult other counsel regarding scheduling matters in a good faith effort to avoid scheduling conflicts.
15. We will endeavor to accommodate previously scheduled dates for hearings, depositions, meetings, conferences, vacations, seminars, or other functions that produce good faith calendar conflicts on the part of other counsel.
16. We will promptly notify other counsel and, if appropriate, the court or other persons, when hearings, depositions, meetings, or conferences are to be canceled or postponed.
17. We will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided our clients' legitimate rights will not be materially or adversely affected.

18. We will not cause any default or dismissal to be entered without first notifying opposing counsel, when we know his or her identity, unless the rules provide otherwise.
19. We will take depositions only when actually needed. We will not take depositions for the purposes of harassment or other improper purpose.
20. We will not engage in any conduct during a deposition that would not be appropriate in the presence of a judge.
21. We will not obstruct questioning during a deposition or object to deposition questions unless permitted under applicable law.
22. During depositions we will ask only those questions we reasonably believe are necessary, and appropriate, for the prosecution or defense of an action.
23. We will carefully craft document production requests so they are limited to those documents we reasonably believe are necessary, and appropriate, for the prosecution or defense of an action. We will not design production requests to place an undue burden or expense on a party, or for any other improper purpose.
24. We will respond to document requests reasonably and not strain to interpret requests in an artificially restrictive manner to avoid disclosure of relevant and nonprivileged documents. We will not produce documents in a manner designed to hide or obscure the existence of particular documents, or to accomplish any other improper purpose.
25. We will careftilly craft interrogatories so they are limited to those matters we reasonably believe are necessary, and appropriate, for the prosecution or defense of an action, and we will not design them to place an undue burden or expense on a party, or for any other improper purpose.
26. We will respond to interrogatories reasonably and will not strain to interpret them in an artificially restrictive manner to avoid disclosure of relevant and non-privileged information, or for any other improper purpose.
27. We will base our discovery objections on a good faith belief in their merit and will not object solely for the purpose of withholding or delaying the disclosure of relevant information, or for any other improper purpose.
28. When a draft order is to be prepared by counsel to reflect a court ruling, we will draft an order that accurately and completely reflects the court's ruling. We will promptly prepare and submit aproposed order to other counsel and attempt to reconcile any differences before the draft order is presented to the court.
29. We will not ascribe a position to another counsel that counsel has not taken.
30. Unless permitted or invited by the court, we will not send copies of correspondence between counsel to the court.
31. Nothing contained in these Guidelines is intended or shall be construed to inhibit vigorous advocacy, including vigorous crossexamination.

Lawyers' Duties to the Court

1. We will speak and write civilly and respectfuilly in all communications with the court.
2. We will be punctual and prepared for all court appearances so that all hearings, conferences, and trials may commence on time; if delayed, we will notify the court and counsel, if possible.
3. We will be considerate of the time constraints and pressures on the court and court staff inherent in their efforts to administer justice.
4. We will not engage in any conduct that brings disorder or disruption to the courtroom. We will advise our clients and witnesses appearing in court of the proper conduct expected and required there and, to the best of our ability, prevent our clients and witnesses from creating disorder or disruption.
5. We will not knowingly misrepresent, mischaracterize, misquote, or mis-cite facts or authorities in any oral or written communication to the court.

6. We will not write letters to the court in connection with a pending action, unless invited or permitted by the court.
7. Before dates for hearings or trials are set, or if that is not feasible, immediately after such date has been set, we will attempt to verify the availability of necessary participants and witnesses so we can promptly notify the court of any likely problems.
8. We will act and speak civilly to court marshals, clerks, court reporters, secretaries, and law clerks with an awareness that they, too, are an integral part of the judicial system.

Courts' Duties to Lawyers
1. We will be courteous, respectful, and civil to lawyers, parties, and witnesses. We will maintain control of the proceedings, recognizing that judges have both the obligation and the authority to insure that all litigation proceedings are conducted in a civil manner.
2. We will not employ hostile, demeaning, or humiliating words in opinions or in written or oral communications with lawyers, parties, or witnesses.
3. We will be punctual in convening all hearings, meetings, and conferences; if delayed, we will notify counsel, if possible.
4. In scheduling all hearings, meetings and conferences we will be considerate of time schedules of lawyers, parties, and witnesses.
5. We will make all reasonable efforts to decide promptly all matters presented to us for decision.
6. We will give the issues in controversy deliberate, impartial, and studied analysis and consideration.
7. While endeavoring to resolve disputes efficiently, we will be considerate of the time constraints and pressures imposed on lawyers by the exigencies of litigation practice.
8. We recognize that a lawyer has a right and a duty to present a cause ftilly and properly, and that a litigant has a right to a fair and impartial hearing. Within the practical limits of time, we will allow lawyers to present proper arguments and to make a complete and accurate record.
9. We will not impugn the integrity or professionalism of any lawyer on the basis of the clients whom or the causes which a lawyer represents.
10. We will do our best to insure that court personnel act civilly toward lawyers, parties, and witnesses.
11. We will not adopt procedures that needlessly increase litigation expense.
12. We will bring to lawyers' attention uncivil conduct which we observe.

Judges' Duties to Each Other

1. We will be courteous, respectful, and civil in opinions, ever mindful that a position articulated by another judge is the result of that judge's earnest effort to interpret the law and the facts correctly.
2. In all written and oral communications, we will abstain from disparaging personal remarks or criticisms, or sarcastic or demeaning comments about another judge.
3. We will endeavor to work with other judges in an effort to foster a spirit of cooperation in our mutual goal of enhancing the administration of justice.

Civility Pledge: Employers of Attorneys

As an employer (e.g., law firm, law enforcement agency, regulatory body, governmental agency) of attorneys, we hereby declare that every lawyer who is employed by or associated with us is expected to abide by the Guidelines for Conduct of the Section of Litigation of the American Bar Association. We recognize that overly aggressive litigation tactics and incivility among lawyers bring disrespect to the legal system and the role of the lawyer, increase the cost of resolving disputes, and do not advance

legitimate interests. We further pledge to use our best efforts to assure that all our employees recognize the foregoing Guidelines and do not put lawyers or others employed by us in a position that would compromise their ability to meet the Guidelines for Conduct.

Civility Pledge: Clients

As an employer (e.g., law firm, law enforcement agency, regulatory body, governmental agency) of attorneys, we hereby declare that every lawyer who is employed by or associated with us is expected to abide by the Guidelines for Conduct of the Section of Litigation of the American Bar Association. We recognize that overly aggressive litigation tactics and incivility among lawyers bring disrespect to the legal system and the role of the lawyer, increase the cost of resolving disputes, and do not advance legitimate interests. We further pledge to use our best efforts to assure that all our employees recognize the foregoing Guidelines and do not put lawyers or others employed by us in a position that would compromise their ability to meet the Guidelines for Conduct.

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