

The National Judicial College



**RUSSIAN
COMMERCIAL COURT**

**MOSCOW, MAY 21-23, 1998
SOCHI, MAY 25-27, 1998**

ABA/UNR

**PROVIDING LEADERSHIP IN ACHIEVING JUSTICE
THROUGH QUALITY JUDICIAL EDUCATION
AND COLLEGIAL DIALOGUE**

RUSSIAN COMMERCIAL COURT WORKSHOP
Moscow, May 21-23, 1998
Sochi, May 25-27, 1998

A project of the Russian-American Judicial Partnership
Sponsored by the U.S. Agency for International Development

ROSTER

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Mr. L.V. Belousov
Head of the Secretariat
Supreme Commercial Court of
the Russian Federation
Moscow

Judge Oleg Boikov
Vice Chair
Supreme Commercial Court of
the Russian Federation
Moscow

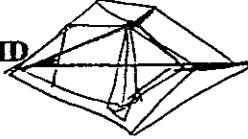
Judge G.V. Rudy
Vice Chair
North Caucasian Okrug
Commercial Court of
the Russian Federation

Judge V.L. Slesarev
Supreme Commercial Court of
the Russian Federation
Moscow

RUSSIA COMMERCIAL COURT WORKSHOP
RUSSIAN-AMERICAN JUDICIAL PARTNERSHIP
(RAJP)

Moscow, Russia
 May 21 - May 23, 1998

Sponsored by USAID



DAY 1
Thursday, May 21

- 9:00 am Registration
- 9:30 am Welcomes and Opening Remarks
 Judge Boikov O., Vice-Chairman of the Supreme Commercial Court of the Russian Federation
 Judge Betty Barteau, Chief of Party, RAJP
- 10:00 am Damages and the Enforcement of Judgements in Commercial Cases
 Presentation by the Honorable Bernice Donald, Judge of the United States District Court, Memphis, Tennessee
- 11:15 am Coffee break
- 11:30 am Conclusion of Damages and Enforcement Presentation by Judge Donald and Questions to the Presenter
- 12:20 pm Determination and Recovering of Damages under the Russian Legislation and Applying the Existing Law to Commercial Cases
 Presentation by Judge Slesarev V. L., Chairman of the Panel, Supreme Commercial Court of the Russian Federation
- 12:40 pm Enforcement of Commercial Court Judgements
 Presentation by Belousov L.V., Deputy Head of the Secretariat of the Supreme Commercial Court of the Russian Federation
- 1:00 pm Lunch
- 2:00 pm Panel Discussion: Damages and Enforcement Issues
- 3:00 pm Adjourn

8th or 10th is for recovery of damages
 % articles in Civil Code

rule - damages are recovered in respect of one's fault - concept d. rare direct - increasing may find no impact

10 - Damages
 11:15
 11:30
 12:10
 1:00

Des a new
 Sles a
 Be low

Discussion on damages

MOSCOW State Dec 1959

1. Moral damage to legal entity
2. defects K

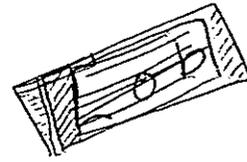
? civil law allows
 1. can you force anyone to perform a K.
 2. How are damages recovered w.r. to non perf. or default to damages

? necessary for cost not yet incurred by a party but which can be proved as well in future.

DAY 2
Friday, May 22

- 9:30 am **Claims Against the Federal Government in the United States**
 Presentation by the Honorable Loren Smith, Chief Judge of the
 United States Court of Federal Claims
- 11:00 am Coffee Break
- 11:30 am **Conclusion of United States Court of Federal Claims Presentation.**
 Questions and Answers
- 1:00 pm Lunch
- 2:00 pm **Federal Claims in Russia**
 Presentation by Vice-Chairman Oleg Bøikov, Supreme
 Commercial Court of the Russian Federation
- 2:30 pm **Panel Discussion, Questions and Answers**
- 3:30 pm Adjourn

DAY 3
Saturday, May 23



5/23
Natasha's
Birthday
Anton
10/25
David
12/25

EVIDENCE

9:30 am Order, Selection and Appraisal of Evidence in Commercial Courts
Presentation by Steven Walther, Esq., Reno, Nevada

10:30 am Questions to the Presenter

11:00 am Coffee Break

11:15 Selection and Appraisal of Evidence in Commercial Cases.
Specifics of Litigation in Commercial Disputes Arising from
Administrative Matters
Presentation by Judge Babkin A.I., Supreme Commercial Court of
the Russian Federation

11:35 am Questions and Answers on Evidence

12:15
12:30
1:00 pm Suggestions for Follow on Activities of the Russian Commercial
Court Judges and Future Events in Partnership with the RAJP

1:00
3:00 pm Farewell Luncheon
Mr. Yakovlev

& certificates

30
min

12:
12:30
1/4 am

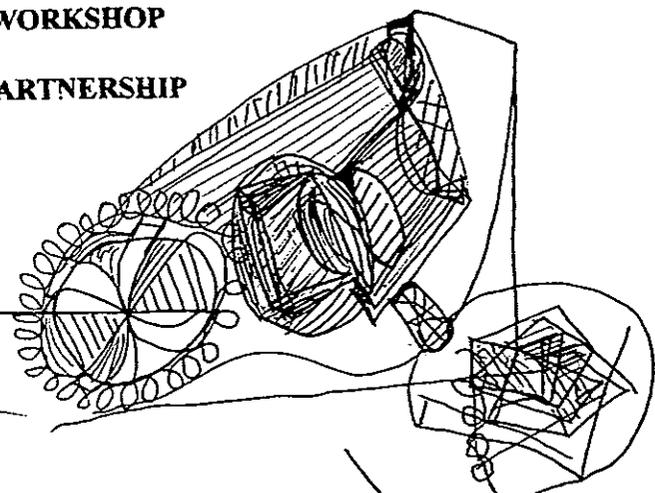
12:30 Yakovlev

RUSSIA COMMERCIAL COURT WORKSHOP
RUSSIAN-AMERICAN JUDICIAL PARTNERSHIP
(RAJP)

Sochi, Russia
May 25 - May 27, 1998

Sponsored by USAID

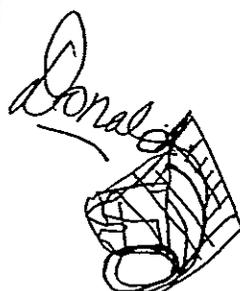
DAY 1
Monday, May 25



9:00 am Registration

9:30 am Welcomes and Opening Remarks
Mr. Yefremov L.V., Head of the International Legal Department of the Supreme Commercial Court of the Russian Federation
Judge Betty Barteau, Chief of Party, RAJP
Romanets Yu. V., Chairman of the North-Caucasian Okrug Commercial Court

10:00 am Damages and the Enforcement of Judgements in Commercial Cases
Presentation by the Honourable Bernice Donald, Judge of the United States District Court, Memphis, Tennessee



11:15 am Coffee break

11:30 am Conclusion of Damages and Enforcement Presentation by Judge Donald and Questions to the Presenter

12:00 pm Determination and Recovering of Damages under the Russian Legislation and Applying the Existing Law to Commercial Cases
Presentation by Judge Slesarev V.L., Chairman of the Panel, Supreme Commercial Court of the Russian Federation

12:40 pm Enforcement of Commercial Court Judgements
Presentation by Belousov L.V., Deputy Head of the Secretariat of the Supreme Commercial Court of the Russian Federation

1:00 pm Lunch

2:00 pm Panel Discussion: Damages and Enforcement Issues

3:00 pm Adjourn

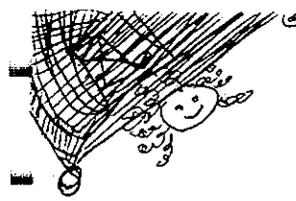
3 p.m.

Slesarev
12:00
12:30

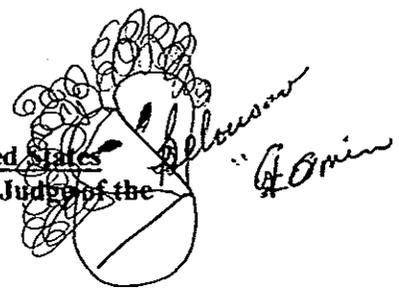
Zomin

Slesarev

Belousov



DAY 2
Tuesday, May 26



- 9:30 am Claims Against the Federal Government in the United States
Presentation by the Honourable Loren Smith, Chief Judge of the United States Court of Federal Claims
- 11:00 am Coffee Break
- 11:30 am Conclusion of United States Court of Federal Claims Presentation.
Questions and Answers Steve
- 1:00 pm Lunch
- 2:00 pm Federal Claims in Russia
Presentation by Rudy G.V., Vice-Chairman of the North-Caucasian Okrug Rudy Gut Root
- 2:30 pm Panel Discussion, Questions and Answers
- 3:30 pm Adjourn

2008

1997
only 52% of fed enforced
Econ. investors are not protected. This discredits the fed/govt. Bailiff service is the result - 6 other attempts m/jus h. S Ct. 1/6/97 eff. why are they not enf.

1. Diff econ. situation will cont. to be diff w econ sit as it is
2. Obsolete legal framework Prev - Bailiffs apptd by m/j + Overight by jud.
3. never a sig law on enf. before now.

Tasks in new law

1. Bailiff service - prev ltd to district - now coherent systematic vertical system - at least on paper - hd apptd by m/j - also ch t + staff in regions + at district level also. 1 level is for ct protection, sec of judges, wlt + ct rm. armed, dressed

2. Ct bailiff enf of jud primarily; Enf was to be sep from jud process.
- * Structure of bailiff system is under the m/j + subj to ct branch independent as crim. enforcement
3. Imp qual + skills of bailiffs - Give much greater rights
4. Providing bailiffs w up to date leg. framework. - sep from ct. Suspension of enf, term etc all hands of Ct. - usually female, no sp training, protection. min 20 yrs old - Sr bailiff must be spec. secondary ed lack of crim record was suggest "say no crim rec - one could be wyped out. - Expect former army persons to apply for security bailiff jobs

DAY 3
Wednesday, May 27

EVIDENCE

9:30 am Order, Selection and Appraisal of Evidence in Commercial Courts
Presentation by Steven Walther, Esq., Reno, Nevada

10:30 am Questions to the Presenter

11:00 am Coffee Break

11:15 Selection and Appraisal of Evidence in Commercial Cases.
Specifics of Litigation in Commercial Disputes Arising from
Administrative Matters
Presentation by Judge Babkin A.L, Supreme Commercial Court of
the Russian Federation

45 minutes
fill 12⁰⁰

12:00
45
12:45 am
Questions and Answers on Evidence

12:30 -
1:00 pm
at rest up
Suggestions for Follow on Activities of the Russian Commercial
Court Judges and Future Events in Partnership with the RAJP

13-00-

2 - a.b.
1:00 pm
Farewell Luncheon

19⁰⁰ *as us caucasta*

12:00 end seminar
tour Stalin dacha
13:00 - bus to hotel
13:40 - bus to Stalin bldg
2:00 Farewell luncheon

1040

DAMAGES

Russian Judges Program

Moscow, Russia

Honorable Bernice B. Donald
United States District Judge

Damages - that sum of money the law awards as compensation, recompense, or satisfaction for an injury done or a wrong sustained as a consequence of:

- 1) breach of contractual obligation; or
- 2) commission of a tortious act.

Damages are awarded for:

- 1) the breach of some duty; or
- 2) the violation of some right.

Types of Damages:

- 1) compensatory;
- 2) punitive or exemplary; and
- 3) nominal - small amount given in vindication of a breach of duty which does not result in any actual or pecuniary loss.

To recover damages there must be a right of action for the wrong inflicted by the defendant and damages resulting from the injury.

Whenever there is a breach of an agreement or the invasion of one's right, the law infers damages, and the injured person has a remedy irrespective of the amount or actuality of damages.

Torts

Nominal damages may be recovered where there is no evidence that damage has been sustained.

Compensatory Damages (Actual Damages)

Damages in satisfaction for a loss or injury sustained. These damages include all damages other than punitive or exemplary.

Compensatory damages are not restricted to the actual loss in time or money. They include such things as bodily pain and suffering, permanent disfigurement, disabilities or loss of health, injury to character and reputation and mental anguish.

Recovery of compensatory damages does not depend on proof of malice.

In torts, the goal of compensatory damages is to put the Plaintiff in the same financial position he was in prior to that tort.

In contract, damages are designed to put the Plaintiff in the same financial condition as before the breach.

Under certain circumstances, a plaintiff may have a duty to mitigate damages and where he fails to do so, the amount of damages will be reduced.

Example:

In a personal injury action, a Plaintiff must recover for all injuries, past or prospective, which arose or will arise from the Defendant's tortious activity. A plaintiff may recover for future pain and suffering and for the reasonable value of medical services and impaired earning capacity, to the extent that those years are reasonably certain to result in the future from the injury.

Example:

Under appropriate circumstances, damages which compensate for future losses under breach of contract may be recovered.

Punitive Damages

Awarded because of wanton, reckless, malicious acts and are designed to punish and deter.

Measuring Damages

In an action for breach of contract where no malice is proven, damages are awarded for the loss or injury which is the proximate result of Defendants wrong doing, both present and future.

In contracts, the law protects three interests:

- 1) the restitution interest;
- 2) the reliance interest; and
- 3) the expectation interest.

Damages may exist in case of:

- 1) Repudiation - before the time of performance a party repudiates his promise to perform;
- 2) Defective performance; and
- 3) Delay in Performance.

Example:

There is no fixed rule or exact standard by which damages can be measured. When a Plaintiff suffers pain, fright or humiliation because of tort, dollars are awarded as compensation, but not as the equivalent of what was sufficient.

Factors which are elements in calculating damages:

Impairment of Earning Ability

Time which was lost prior to trial due to the injury. There is no single method of proving the

value of Plaintiff's lost time. **Test:** What would Plaintiff's services have been worth during the time he was incapacitated by the injury, the income, health, age, education, and background of Plaintiff.

Plaintiff's earnings are evidence of the value of Plaintiff's lost time.

Decreased Earning Capacity

Recovery allowed for injury to the capacity to earn, including future earning capacity.

Value of Medical Services

Plaintiff may seek recovery for those necessary medical services reasonably related to the fault of Defendant.

Pain and Suffering

Plaintiff is entitled to damages for pain and suffering resulting from physical impact or injury to Plaintiff. Pain resulting from a necessary surgical procedure may be included.

Future Pain and Suffering

Recoverable provided that there is a basis in the evidence which supports such an award.

Other Factors Which May Constitute Elements and Damages

- Permanent injuries;
- Physical or mental disability;
- Loss of enjoyment of life; and
- Shortening of Life Expectancy

Damages

- Liquidated - fixed amount (interest generally allowed)
- Unliquidated - not fixed according to any standard interest as damages, absent a statutory provision. cannot be recovered as a matter of right, unless they are capable of ascertainment.

Statutory Damages

Generally multiple damages may only be authorized pursuant to a statute.

Jury Instructions Regarding Certain Types of Damages

Damages Work Sheets

Comparative Fault

Contributory Negligence

STRICT LIABILITY

Under the law of this state, one who sells any product in a defective condition or an unreasonably dangerous condition to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer if:

- a. the seller is engaged in the business of selling such a product, and
- b. It is expected to and does reach the user or consumer without substantial change in the condition in which it was sold.

COMPARATIVE FAULT - THEORY AND EFFECT

In deciding this case you determine the fault, if any, of each of the parties. If you find that more than one of the parties are at fault, you will then compare the fault of the parties. To do this, you will need to know the definition of fault.

A party is at fault if you find by a preponderance of the evidence that the party was negligent and that the negligence was a proximate cause of the injury or damage for which a claim is made.

Fault, as defined, has two parts: Negligence and proximate cause. Negligence is the failure to use ordinary or reasonable care. It is either doing something that a reasonably careful person would not do, or the failure to do something that a reasonably careful person would do, under circumstances similar to those shown by the evidence. A person may assume that every other person will use reasonable care unless the circumstances indicate the contrary to a reasonably careful person.

The second part of a fault is proximate cause. A proximate cause of any injury is a case which, in natural and continuous sequence, produces the injury, and without which the injury would not have occurred.

If you find, by a preponderance of the evidence, that a party was negligent and that the negligence was a proximate cause of the injury or damage for which a claim was made, you have found that party to be at fault. You must then determine the percentage of fault of each party whom you have determined at fault. You will also determine the total amount of damages sustained by any party claiming damages. You will do so without reducing those damages by any percentage of fault you may have charged to that party.

When you have made these decisions, as I have instructed you, it becomes my duty under the law to reduce the amount of damages that you have awarded to any party by the percentage of fault you have charged to that party.

A party will be entitled to damages if his fault is less than 50% of the total fault of all the parties. However, a party will not be entitled to damages if his fault is 50% or more of the total fault of all the parties.

PROXIMATE CAUSE

The proximate cause of an injury is that act or omission which caused or failed to prevent such injury. In order to be a proximate cause, a negligent act or omission must have been a substantial contributing factor in bringing about the injury.

COMPENSATORY DAMAGES

If, under the court's instructions, you find that the plaintiff is entitled to a verdict against the defendant, you must then award plaintiff damages in an amount that will reasonably compensate him for each of the following elements of claimed loss or harm, provided that you find it was or will be suffered by him and proximately caused by the defective product upon which you base your finding of liability. The amount of such award shall include:

PAIN AND SUFFERING

Reasonable compensation for any physical pain and suffering and disfigurement suffered by the plaintiff and of which his injury was a proximate cause and for pain and suffering reasonably certain to be experienced in the future from the same cause.

No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for pain and suffering. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for pain and suffering you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in the light of the evidence.

LOSS OF EARNING CAPACITY

The next element of damages that the plaintiff can recover is the value of the ability to earn money that has been lost in the past and the present cash value of the ability to earn money that is reasonably certain to be lost in the future.

In deciding what, if any, award should be made for loss of the ability to earn, you should consider any evidence of the party's earning capacity, including among other things, the party's health, age, character, occupation, past earnings, intelligence, skill, talents, experience and record of employment. The loss of the ability to earn money may include, but is not limited to, actual loss of income.

DAMAGES FOR PERMANENT INJURIES

The plaintiff claims damages for permanent injury. To warrant a recovery for a permanent injury, the future effect of the injury must be shown with reasonable certainty. It is not necessary that the evidence prove conclusively or absolutely that the injuries are permanent. Although absolute certainty should not be required as to the future effect of a permanent injury, a mere conjecture or possibility does not warrant awarding of damages for permanent injuries.

IMPAIRMENT OF ENJOYMENT OF LIFE

Loss of enjoyment of life represents a separate and distinct category of damages. Plaintiff is entitled to recover reasonable compensation for loss of enjoyment of life suffered by the plaintiff and proximately caused by the defendants' conduct and for similar suffering reasonably certain to be experienced in the future from the same cause.

No definite standards or method of calculation is prescribed by law by which to fix reasonable compensation for loss of enjoyment of life. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for loss of enjoyment of life, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in light of the evidence.

EXPENSES

The reasonable value of medical care, services, and supplies reasonably required and actually given in the treatment of the plaintiff as shown by the evidence and the present reasonable value of similar services reasonably certain to be required in the future.

Recovery shall be allowed for the negligent infliction of mental anguish proximately caused as a result of a Defendant's negligence, a Plaintiff has been exposed to an indefinite amount of a harmful substance. In such cases, the finder of fact may conclude that the Plaintiff has sustained sufficient physical injury to support an award for mental anguish even if subsequent medical diagnosis fails to reveal any other physical injury. The period of mental anguish shall be confined to the time between discovery of the exposure and the subsequent medical diagnosis or other information which puts to rest the fear of injury.

Upon such a finding, the finder of fact shall award an amount to the Plaintiff which would fairly compensate the Plaintiff for mental suffering as a result of reasonable apprehension of harmful effects to his own health, due to the exposure to the harmful substance.

Under the law of Tennessee, you may not award to Plaintiff any damages relating to an increased risk of cancer or cancer itself due to the fact that Plaintiff does not have cancer at this time. Under the law of Tennessee, Plaintiff has a cause of action in the future in the event that he does contract cancer at that time. However, Plaintiff may not recover any damages for increased risk of cancer at this time.

NEGLIGENCE - MANUFACTURER

The manufacturer of a product that is reasonably certain to be dangerous if negligently made, has a duty to exercise reasonable care in the design, manufacture, testing, and inspecting, of the product so that the product may be safely used in a manner and for a purpose for which it was made. A failure to fulfill that duty is negligence.

One who puts out as his own product, a product manufactured by another has the same duty of care as that of a manufacturer.

Before the law permits imposition of liability upon a defendant for an act of negligence, plaintiff must show by the greater weight or preponderance of the evidence that the negligence of that defendant was a proximate cause of the injury sustained.

COMPARATIVE FAULT - EXPLANATION OF VERDICT

Your first obligation is to determine the fault, if any, of the parties. Next, you must assign a percentage of fault, if any, to each party. This percentage figure for each party may range from zero (0) percent to one hundred (100) percent. When the percentages of fault of all parties being compared are added together, the total must equal 100%. The total percentage cannot be more than 100%.

The parties to whom you may assign fault are:

Plaintiff, [REDACTED] _____ %

[REDACTED] _____ %

[REDACTED] _____ %

Other Manufactures:

[REDACTED] _____ %

[REDACTED]	_____ %

Your next obligation is to determine the full amount of damages, if any, sustained by the following parties:

[REDACTED] _____
 [REDACTED] _____

In arriving at the full damage figure for a party, you should not consider in any way the question of fault. Do not reduce the damages by any percentage of fault. The court will compute the amount of the verdict for each party by reducing the amount you find as that party's total damages by any percentage of fault you assess to that party. As I stated before, a party will not be entitled to recover damages if his or her fault is 50% or more.

PRINCIPLES OF A BANKRUPTCY COURT AND REORGANIZATION SYSTEM

1. Apply the law in a generally uniform, consistent and reasonably predictable manner.
2. Fairly interpret and strictly apply the law in administration of cases and dispute resolution; do not ignore, defy, or eviscerate clear legal imperatives, or principles, rights and obligations. A judge is not a legislator.
3. The Court is not a proponent, friend, ally, or advocate of any particular philosophy, party, or position espoused by parties before the Court. It must act independently and objectively — and appear to others to act independently and objectively — in all matters.
4. Except for statutory exceptions such as priority creditors and secured creditors, all creditors in a particular class, such as unsecured creditors, are to be treated in a fair, generally uniform, manner. The government and its agencies and personnel are to be given no favor or special status except that explicitly provided by law.
5. The Court must be open and accessible at times necessary and convenient to those it serves; not the judges or staff. The Court cannot, however, give advice, favor a party, provide advantage, or serve the particular interests of anyone to the disadvantage of others.

Rev. 4/95_{mw}

Printed 7/96

GOALS OF BANKRUPTCY SYSTEM

1. Establish a stable, reliable, generally uniform, system of commercial relationships, rights and obligations, in an insolvency or bankruptcy situation.
2. Provide a fresh start for honest debtors. Allow a safety net for, and rehabilitation after, business failure or economic decline.
3. Create a business environment conducive to investing and entrepreneurship. Failure should not result in financial ruin forever.
4. Create a framework for honest and motivated debtors to reorganize their financial affairs in a fair and balanced manner, without business shutdown or liquidation of assets.
5. Devise a commercial and legal framework to encourage honest and responsible business enterprise, and negotiated settlement of disputes, in financially difficult situations; limit a legal framework that hastens failure of commercial enterprises and fosters disputes or litigation.
6. Where feasible and economically sensible, save a promising but financially troubled going concern and its jobs; save a tax entity; save health, benefit and retirement programs, as well as a productive member of the community.
7. Institute an independent, objective, trustee, or management arrangement, to fairly represent the interests of creditors while administering, usually liquidating, a bankruptcy estate.
8. Where liquidation is the best alternative, provide an orderly system for timely liquidation and fair distribution of assets from a debtor.

KEY PRINCIPLES AND CONCEPTS IN BANKRUPTCY

1. **Fresh Start**

Whether by way of a liquidation (competition) or financial reorganization, an honest debtor is entitled to a fresh start. Dishonest debtors, or those who have engaged in unlawful conduct, by statute, are prohibited from bankruptcy procedure.

2. **Discharge of Debt**

The key tool to achieve a fresh start is to cancel an honest debtor's obligations except for those debts that are, by statute, not canceled.

3. **Automatic Stay**

Upon commencement of a bankruptcy case, creditors are automatically prohibited from collecting on their claim against the debtor, from suing or foreclosing on property, without permission of the court. This allows for an orderly, careful, and more balanced case administration and distribution to creditors.

4. **Priority Creditor Claims**

Certain creditors are given priority rights by statute. For example, costs of the bankruptcy procedure, certain taxes, some wages of employees, may be priority claims.

5. **Secured Creditors**

Creditors who hold a right, or interest, in some of the debtor's property as collateral (pledged property) must have their rights protected and enforced by the court. Secured creditors are a special, priority, creditor.

6. **Trustee or "Director of the Competition"**

Use of an independent, unbiased, skilled professional to (a) assemble and liquidate the assets of a debtor and (b) investigate the property and transactions of the debtor, is necessary and important to the bankruptcy process.

7. **Exempt Property**

Certain basic, necessary property of a debtor is protected from creditors. This includes most clothing, household goods, tools of the trade, books, food, and medications. It may also include a residence and motor vehicle.

8. **Improper Transfers of Assets**

Transfers of property prior to bankruptcy, by sale, gift, or otherwise, must be carefully evaluated to determine if creditors have been defrauded, or wrongly denied assets. If they have, corrective action may be authorized by statute.

9. **Claims Process**

An orderly and reliable system of creditors filing claims and approving valid claims by the court is essential to fair treatment of creditors.

10. **Full Disclosure**

A necessary element for an effective, enforceable bankruptcy system is the requirement of full, timely and honest disclosure of a debtor's assets, income and expenses, and recent financial history.

BANKRUPTCY JUDGES GUIDE AND PRINCIPLES

1. Act timely, and whenever possible, with precision and clarity.
2. Never make a final decision until both sides to a dispute have a full and fair opportunity to present their respective positions.
3. Brief written decisions with explanation, or opinions, are preferred, if time permits.
4. Consistency and respect for precedent are important.
5. Always treat litigants, parties, witnesses, and guests with respect. Do not allow conduct of others that is demeaning, derisive, smug, belligerent, or discourteous to anyone in the courtroom.
6. Insure that the weakest, the least educated or sophisticated, and the financially disadvantaged, are given the same opportunity, hearing, and fair consideration as is his or her adversary.
7. Set court standards. Require high standards of competence, professionalism, and courtesy of all professionals who appear in court.
8. If time permits, be prepared prior to hearings; remain alert; always stay in charge.
9. Always encourage and provide a hospitable environment for negotiated settlements to disputes; do not unfairly, or oppressively, force "settlements" for convenience of the court, where genuine issues need impartial resolution, or where important legal questions need court attention and decision.

BANKRUPTCY SEMINAR
CURTIS B. MASTERS AND EDWIN W. PAXON III
29 JUNE 1993

U.S. BANKRUPTCY LAW

1. Primary Source of U.S. Bankruptcy Law: the Federal Bankruptcy Code
2. Special Organs to Administer the Bankruptcy Law
 - a. Federal bankruptcy courts
 - b. U.S. Trustee's office
3. Primary purpose of the bankruptcy law: allow efficient restructuring of the financial affairs of debtors. Result of the law: a more efficient economy
4. Both individuals and business can be subjects of bankruptcy cases; no need to prove insolvency to begin a case.
5. The most important forms of bankruptcies: liquidations (Chapter 7 of the Bankruptcy Code) and reorganizations (Chapter 11 of the Bankruptcy Code)
6. Special bankruptcy law features of liquidations and reorganizations
 - a. Avoidance of preferential, fraudulent, and other transfers to creditors
 - b. Property that cannot be touched in bankruptcy
 - c. Creditors with priority claims
 - d. Rejection of contracts and leases of the debtor
 - e. Automatic stay on debt collection efforts
 - f. Debtor's use of property during the bankruptcy
 - g. Valuation of debtor's property in a bankruptcy
7. Special bankruptcy law features of reorganizations
 - a. Usually, no outside management during a reorganization
 - b. Supervisory role of the creditors' committee
 - c. Increased accounting requirements
 - d. Necessity of filing a plan of reorganization
 - e. Disclosure requirements to allow creditors to make an informed decision on the plan of reorganization
 - f. Creditor voting procedure to accept the plan of reorganization
 - g. Further requirements to confirm a plan of reorganization

BANKRUPTCY FILINGS IN THE UNITED STATES

(Source: "Bankruptcy Overview: Issues, law and Policy,"
American Bankruptcy Institute)

BANKRUPTCY CASE FILINGS 1980 - 1992

CALENDAR YEAR	TOTAL FILINGS	CHAPTER 7	CHAPTER 11	CHAPTER 12	CHAPTER 13	OTHER CASES
1980	331,098	249,136	6,348	N/A	75,584	30
1981	363,847	260,664	10,041	N/A	93,139	3
1982	380,212	257,644	18,821	N/A	103,738	9
1983	348,872	234,594	20,252	N/A	94,021	5
1984	348,488	234,997	20,252	N/A	93,221	18
1985	412,431	280,986	23,374	N/A	108,059	12
1986	530,008	374,452	24,740	601	130,200	15
1987	574,849	406,761	19,901	6,078	142,065	44
1988	613,606	437,882	17,690	2,034	155,969	31
1989	679,080	476,993	18,281	1,440	183,228	38
1990	782,960	543,334	20,783	1,346	217,468	29
1991	943,987	656,460	23,989	1,495	262,006	37
1992	971,517	681,663	22,634	1,608	265,577	35

BUSINESS AND CONSUMER CASE FILINGS

For statistical purposes a business case is defined as a corporation, a partnership, an individual currently engaged in business, a Chapter 12 case, or an individual formerly engaged in business who owes more for business debts than for consumer debts.

Total business case filings peaked during 1987, and have declined by about 14% since that time. Total consumer case filings continue to rise, and have more than tripled since 1984. The proportion of business case filings of total filings has declined for eight consecutive years. Over 92% of bankruptcy filings during 1992 were classified as consumer cases. The following chart shows total business and consumer filings since 1980.

CALENDAR YEAR	TOTAL FILINGS	BUSINESS CASES	% OF TOTAL	CONSUMER CASES
1980	331,098	43,629	13.2	287,463
1981	363,847	48,014	13.2	315,832
1982	380,212	69,207	18.2	311,004
1983	348,872	59,013	16.9	289,859
1984	348,488	63,954	18.4	284,534
1985	412,431	71,242	17.3	341,189
1986	530,008	81,019	15.3	448,989
1987	574,849	81,999	14.3	492,850
1988	613,606	63,775	10.4	549,831
1989	679,980	63,227	9.3	616,753
1990	782,960	64,853	8.3	718,107
1991	943,987	71,549	7.6	872,438
1992	971,517	70,643	7.3	900,874

FILINGS PER JUDGE

The number of authorized bankruptcy judgeships increased from 232 to 284 in late 1986, to 291 in late 1988, and to 326 in August 1992. (Funding has not yet been provided for the 35 new judgeships created in 1992.) Despite these increases in judgeships, the average per judge caseload is much higher now than it was during the early 1980's. Total case filings increased by 193% between 1980 and 1992, but the number of bankruptcy judges increased by only 41% during the same time. The per judge annual case load increased from 1,427 in 1980 to 2,980 in 1992 (based on 232 judges in 1980, and 326 judges in 1992).

PRINCIPAL DIFFERENCES BETWEEN U.S. AND RUSSIAN BANKRUPTCY LAWS

I. Court System

A. USA

U.S. Bankruptcy Court: a special federal court system which hears only bankruptcy matters. There are 90 judicial districts of this court and 361 bankruptcy judge positions.

B. Russia

Arbitration court: This court hears all bankruptcy matters, as well as other commercial cases.

II. Bankruptcy Commission

A. USA

1. General

There is no government agency which handles bankruptcy matters. (The Office of the U.S. Trustee handles purely administrative matters concerning actual bankruptcy cases which have been filed).

2. Policy

Bankruptcy is considered part of the normal functioning of a market economy. Government action to avoid bankruptcies or to aid insolvent enterprises is considered beyond the role of the government.

B. Russia

Supreme Soviet Decree 3930-1 (19/11/92): Calls for a statute creating a federal service (agency) for the affairs of insolvency (bankruptcy). Competing drafts have been submitted by the GKI ("Resolution about Agency on Bankruptcy of Enterprises") and the Ministry of Economy ("on A Central Interdepartmental Commission for the Support (Restoration) of Enterprises").

III. Personal Bankruptcies

A. USA

Individuals can be subject to bankruptcy proceedings. In 1992, there were 900,874 personal bankruptcies in the U.S., which accounted for 92% of all bankruptcy filings.

B. Russia

Individuals may not declare personal bankruptcy (except in their capacity as an entrepreneur).

IV. Parties Who May Initiate Proceedings

A. USA

Only the debtor and creditor may initiate proceedings; the government may not initiate proceedings.

B. Russia

The debtor (on the basis of a decision of the owner), the creditors, and, under certain circumstances, the procurator may initiate proceedings.

V. Standards for Filing

A. USA

1. Insolvency

No balance sheet test. Voluntary filing standard: Filing must be made in good faith. Involuntary filing standard: Either (1) "debtor is generally not paying debts as they become due," or (2) a custodian has been appointed to take charge of substantially all of the debtor's property.

2. Minimum Amount

Voluntary filings: No minimum amount.

Involuntary filings: Creditors must have claims of at least \$5,000.

B. Russia

1. Insolvency

Definition of "insolvency (bankruptcy)":

"The inability to satisfy the demands of creditors for the payment for goods (work, services), including an inability to meet mandatory payments to the budget and nonbudget funds because the obligations of the debtor exceed his property or because of the unsatisfactory structure of the debtor's balance." "Outer sign" of insolvency is "the halting of its current payments if the enterprise does not provide for or is known to be incapable of providing for meeting the demands of the creditors within three months of the day they are intended to be met." (Article 1)

- Applications by creditors: Debtor must not have paid for at least three months.
- Applications by debtor: Application must state the reasons why debtor cannot fulfill its obligations (no three-month requirement).
- Applications by procurator: Application may be filed if there is a deliberate or fictive bankruptcy or "in other cases specified by the legislative acts of the Russian Federation." (See Article 3 of RF Arbitration Code.)

VI. Debtor-in Possession

A. USA

A debtor enterprise becomes a "debtor-in-possession" upon the filing of a voluntary bankruptcy petition. There ordinarily is no trustee and the debtor's management is *not* replaced there.

B. Russia

An arbitration administrator is appointed in cases of outside administration (Article 12(4)), and a competition manager is appointed in compulsory liquidations (Articles 19 and 51(2)). The arbitration administrator may, but is not required, to relieve the manager in a reorganization (Article 6). But, in liquidation cases, the manager of the enterprise is always discharged (Articles 24 and 51(2)).

VII. Trustees

A. USA

A debtor enterprise becomes a "debtor-in-possession" upon the filing of a voluntary bankruptcy petition. There ordinarily is no trustee and the debtor's management is *not* replaced.

B. Russia

An arbitration manager or competition manager must be an economist or jurist or have experience in economic work. (Article 12(4) and 21(1)). Supreme Soviet Decree 3930-1 requires the RF government to organize a system for training arbitration and competition managers.

VIII. Protection from Creditors

A. USA

1. Automatic Stay

The automatic stay is invoked upon filing of the bankruptcy petition.

2. Executory Contracts

Executory contracts and unexpired leases may be rejected, with court approval.

B. Russia

1. Automatic Stay

In a reorganization, a moratorium on satisfaction of creditor claims is imposed when the outside administration is commenced. (Article 12(3)). In a compulsory liquidation, claims may be submitted only in the context of the competitive proceedings. (Article 18)

2. Executory Contracts

There are no provisions allowing an arbitration or competition manager to reject executory contracts or unexpired leases.

IX. Voiding of Improper Actions

A. USA

1. Preference Period

There are no provisions allowing an arbitration or competition manager to reject executory contracts or unexpired leases.

2. Fraudulent Conveyance Period

The conveyance must have been made within 1 year of the filing.

B. Russia

1. Early Satisfaction of Creditor Claims

Certain creditor claims may be invalidated if they occurred within six months before initiation of the insolvency proceedings if the debtor was then insolvent. There is no time limit if the creditor knew of the debtor's intention to harm other creditors (Article 28). This applies only in compulsory liquidations.

2. Improper Actions

Section VI (Articles 44-48) makes it illegal for the debtor, the owner, and the creditors to take certain improper actions, including concealment of the debtor's property.

X. Adequate Protection

A. USA

Certain procedures are available to make sure that the interest of a secured creditor or landlord will not be diminished during the bankruptcy proceedings.

B. Russia

This concept is not provided for in the Russian law.

XI. Cessation of Interest

A. USA

Interest does not stop accruing on the debtor's obligations during the bankruptcy proceedings.

B. Russia

Once compulsory liquidation proceedings are commenced, calculation of penalties and interest on the debtor's indebtedness is terminated (Article 18)

XII. Priority of Distribution Upon Liquidation

A. USA

Except for secured creditors and tax obligations, there typically are few priority claimants before unsecured creditors.

B. Russia

The list of creditors whose claims are paid before those of unsecured creditors in a liquidation is lengthy and ambiguous. (Articles 30.) For example, "citizens to whom the debtor is responsible for causing harm to their life and health."

XIII. Amicable Settlement

A. USA

No provisions for an amicable settlement.

B. Russia

Section V (Articles 39-43) provides a detailed procedure to be followed in the case of an amicable settlement.

XIV. Arrangement

A. USA

No provisions for an arrangement. Such provisions are considered contrary to the concept of a market economy.

B. Russia

Article 13 provides for arrangements proceedings, whereby the debtor may be bailed out of its financial situation. This Article has been widely criticized by Western bankruptcy experts and is viewed as being likely to hinder, rather than aid, market reforms in Russia.

XV. State Subsidies

A. USA

With extremely rare exceptions, U.S. enterprises do not receive government subsidies or funding.

B. Russia

Article 14 deals with the reorganization of enterprises which have received certain government subsidies. It permits the appropriate government entity to conduct an arrangement or to make additional subsidies. There is no requirement that the enterprise must be restructured to be successful.

U.S. BANKRUPTCY LAW

Principal Source of Bankruptcy Law: The Bankruptcy Code

Bankruptcies in the United States are controlled by Title 11 of the U.S. Code, also known as the Federal Bankruptcy Code (hereinafter "the Code"). The Code replaced previous bankruptcy law in 1979 and was amended significantly in 1984. The Code is divided into eight Chapters, which define the procedure and substance of bankruptcy law (show thickness of Code here and pass it around). The Code is supplemented by case law, state statutes, and rules enacted by local federal bankruptcy courts.

Special Organs to Administer Bankruptcy Cases

Bankruptcy cases are typically heard in special federal bankruptcy courts, which are divisions of local federal courts. This is unusual in American law, because most types of cases, even complicated ones such as antitrust matters, are heard in state or federal courts of general jurisdiction. Ordinarily, federal courts of general jurisdiction will hear bankruptcy cases only on appeal, or will resolve issues arising in the bankruptcy case but not central to the bankruptcy itself.

Bankruptcy courts resolve disputes in bankruptcy proceedings, for example between creditors and debtors. The courts do not administer bankruptcy estates. Instead, a special office called the United States Trustee selects and maintains a panel of trustees from the ranks of attorneys, accountants, and other professionals in the business field who are willing to serve as trustees and are experienced in business. Trustees collect, manage, and distribute a debtor's property. The trustee is typically appointed by the U.S. Trustee, but may also be elected by creditors. Trustees are paid according to a fixed schedule from the property of the estate, and based on the amount of assets in or passing through the estate.

Purpose of Bankruptcy Law

The primary purpose of bankruptcy law is to allow individuals and businesses to restructure their financial affairs and receive a "fresh start." Creditors are prevented from collecting from the debtor during a bankruptcy, while the debtor is given time to restructure his affairs. After the bankruptcy, the debtor is relieved from old debt.

It is true that a bankruptcy will affect negatively a debtor's credit rating, and that bankruptcies are often long and expensive. However, these concerns are outweighed by the ways in which bankruptcies in the United States help promote an efficient economy: they allow debtors to be relieved of financial burdens and free resources for productive use in the economy.

Who May File a Bankruptcy Petition

Any person (individual, husband and wife, corporation, partnership, limited partnership, joint venture, etc.) residing in, having a business in or owning property in the United States may be a debtor under the Code, *i.e.*, any person mentioned above may file for bankruptcy or have a bankruptcy suit filed against him or it.

A debtor need not be insolvent to file for bankruptcy (voluntary bankruptcy). However, the debtor may only file for bankruptcy in good faith, or else the court will dismiss the case. Generally, a filing is not in good faith if the debtor has enough income to repay substantially the creditors.

For a creditor to file an involuntary bankruptcy petition against a debtor, the creditor does not need to prove the debtor's insolvency, that is that the debtor's debts are greater than assets. Rather, the creditor need only have a claim of at least \$5,000 and show that the debtor is "generally not paying debts as they become due," or that a custodian has been appointed to take charge of substantially all the debtor's property. However, a court may not use a claim that is subject to a "bona fide dispute" to declare a debtor an involuntary bankrupt. Moreover, if the petitioner fails to have the debtor declared an involuntary debtor, then the court can impose costs and fines on the petitioner. Note that involuntary bankruptcy petitions may be filed only under Chapters 7 and 11 of the Code, and may not be filed against farmers or charities.

Liquidations and Reorganizations: The Most Important Forms of Bankruptcy

Liquidations and reorganizations are the most important forms of bankruptcy, and are governed by Chapters 7 and 11, respectively.

Chapter 7 governs liquidations. In a liquidation, the assets of the debtor that are not exempt from the bankruptcy are sold and distributed to creditors by a trustee. Chapter 13 allows certain individuals with regular income to liquidate their assets without the appointment of a trustee to replace them.

Chapter 11 governs reorganizations. Chapter 11 provides a procedure for a debtor to reorganize its financial affairs more profitably. Usually, the debtor is himself allowed to reorganize, although in a few cases a trustee may be appointed for this purpose.

Special Bankruptcy Law Features of Liquidations and Reorganizations

A trustee or debtor-in-possession may void preferential, fraudulent, and other voidable transfers. A preferential transfer is the transfer of a debtor's property to a creditor which allows the creditor to receive a greater percentage of its claim than it would have received in the distribution of assets of the bankruptcy estate in liquidation. The trustee or debtor-in-possession also has powers to eliminate various unregistered claims and transfers.

Individual debtors only are allowed to claim a portion of their property as property exempt from assets subject to distribution under bankruptcy proceedings. Exempt property is usually a ceiling cash value of various items, and is defined under federal and state laws. Generally, exempt property is subject only to tax and domestic claims.

Certain claims are accorded priority in payment. These must be paid first under Chapter 7 and in full under Chapter 11. Priority claims are primarily the fees of trustees, accountants, and lawyers in the bankruptcy, taxes and employee wages.

Certain contracts and leases may be assumed or rejected by the trustee or debtor-in-possession after the beginning of the bankruptcy. These are usually so-called executory contracts, that is contracts that are not fully performed at least on the debtor's side. Such contracts may also usually be assigned with court permission, even when the contract itself says that it may not be assigned.

The beginning of a bankruptcy proceeding creates an automatic stay on virtually all efforts by creditors to collect debts. The stay means that creditors are barred from even asking for repayment. However, some acts are not stayed, for example the collection of alimony child maintenance from non-estate property and the issuance of tax deficiency notices. A creditor may obtain relief from the stay if he shows that his secured interest is backed by insufficient collateral, or if the debtor has no equity in the property and such property is not necessary for an effective reorganization.

Debtors-in-possession and trustees may use, sell or lease property of the estate that does not secure debt without permission of or notice to the court. Property that does secure debt may be used with creditor consent and court approval.

Valuation of property under the Code is important because a creditor is secured only up to the value of the collateral, and is an unsecured creditor for the balance of the claim. The property is valued "in light of the purpose of the valuation and of the proposed disposition or use of such property." Thus the valuation of the property at the time of determining whether a creditor is adequately protected may be very different from the valuation at the time at which a plan of reorganization is being confirmed.

Special Bankruptcy Law Features of Reorganizations

In addition to the considerations above, which are applicable both to Chapter 7 and 11 proceedings, there are special features of the Code particular to Chapter 11. As a rule, the debtor remains in possession of his business in a reorganization. However, a trustee may be appointed by the court for any good cause to manage the enterprise on the application of any party to the bankruptcy. A trustee will typically be appointed in case of fraud, dishonesty, incompetence, or gross mismanagement of the affairs of a debtor by current management either before or after the beginning of a case. Even if a trustee is not appointed, the court may still appoint an examiner if requested to do so by an interested party. An examiner is retained to investigate the debtor's current or past management. An examiner will be appointed if the appointment is "in the best interests of the creditors" or if the debtor's unsecured debts exceed \$5,000,000.

Typically, a creditors' committee is established to work with to monitor a debtor. The committee consists of representatives of creditors with unsecured claims and is a committee approved by the court. The committee investigates the debtor's business, the desirability of continuing the business, and is authorized to participate in the formulation of a plan, consult with a debtor concerning the plan, the administration of the case, request the appointment of a trustee or examiner and perform "such other services as are in the interests of those represented."

A debtor-in-possession is required to establish and maintain sound and reliable accounting procedures, and to supply regular reports on the continuing business. (show reporting requirements sample pages here).

A plan of reorganization must be filed and approved by the court in every reorganization. Unless a trustee is appointed, a Chapter 11 debtor has an exclusive right to file a plan of reorganization for 120 days after the filing of a petition in bankruptcy. After the 120 days, any interested party may file a plan of reorganization. Unless a trustee is appointed, a Chapter 11 debtor has an exclusive right to file a plan of reorganization for 120 days after the filing of a petition in bankruptcy. After the 120 any interested party may file a plan of reorganization. The plan must provide for certain matters, including the following: 1) creditors shall be divided into classes and the plan shall designate how they are to be satisfied; 2) classes of creditors whose claims are "impaired" must be identified (creditors whose legal, equitable, and contractual rights or claims are altered under the plan); 3) all creditors in a given class must be treated in the same manner unless a creditor agrees otherwise; 4) adequate means for execution of the plan must be set forth that include a variety of methods for dealing with assets and debt of the debtor; 5) contain only provisions that are consistent with the best interests of the creditors, equity of security holders, and public policy. In addition, the plan may contain additional provisions such as the following: 1) the plan may impair or leave unimpaired any class of claims of creditors; 2) the plan may provide for the liquidation of the business.

The Code prohibits solicitation of creditor acceptances of a proposed plan without first making an adequate disclosure to creditors to facilitate their decision. The decision must comply with the following vague disclosure statement: "information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan . . ." the courts have interpreted this requirement, however, so that extensive and detailed disclosure statements are required. Moreover, different disclosure statements may be submitted to different classes of creditors, depending on their status.

A plan must be confirmed by the court. According to the Code, the creditors must vote, and there must be a confirmation hearing before the court. A class of creditors accepts the proposed plan when a majority in number and two-thirds in amount of the creditors actually voting approve the plan. a class of stockholders approves the plan when two-thirds in amount of interests of those voting accept the plan. Consent of a class of "unimpaired" creditors is not necessary in confirmation of the plan. Consent of a class

of "impaired" creditors is necessary, subject to the qualifications below. Note that classes of priority creditors are not deemed classes of creditors, nor are they entitled to vote.

A majority of creditors may vote to accept a plan and may compel dissenting creditors or classes of creditors to accept the proposed plan, but dissenting creditors are protected under the "best interest test" or the "fair and equitable rule." Under the "best interest test," dissenting creditors must receive under the plan an amount equal to that which they would have otherwise received had the debtor been liquidated under Chapter 7. Under the "fair and equitable rule," a dissenting impaired class must receive under the plan the value of its claims in full. If it is paid less than in full, then no junior class receives anything under the plan. a court may confirm a plan over the objection of a dissenting class of impaired secured claims if the class receives property under the plan of a value equal to the amount of their secured claims.

In addition, a plan must comply with the following requirements to be confirmed: 1) the plan must comply with all applicable provisions of the Code and must be proposed in good faith; 2) there must be full disclosure of all payments to be made by or for the debtor and the identity and affiliations of individuals proposed to serve, or otherwise be part of the debtor during and after performance under the plan; 3) at least one class of claims must accept the plan; 4) the plan must be feasible, not likely to be followed by liquidation, and there should be no need for further financial reorganization.



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TAX FRAUD AND CUSTOMS VIOLATIONS

REQUIRED READING:

PAGE

1. Statute 6.0	1
2. Customs Violations (Outline).....	4

TAX FRAUD

STATUTES

The statutes used to prosecute tax fraud violations are set forth in Title 26 of the United States Code. Also, certain statutes in Title 18 of the code are used in tax fraud cases.

Among the more frequently used statutes are the following:

6.1 26 U.S.C., Section 7201 - Attempt to evade or defeat tax

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony..."

6.1.1 Penalty: individuals — up to 5 years imprisonment and \$20,000 fine; corporations — \$500,000 fine.

6.1.2 Elements:

- Attempt to evade
- Additional tax due
- Willfulness

The attempt to evade is usually the filing of a false income tax return, but can be any affirmative act, e.g. — false statement to agent.

Willfulness is the critical element of all tax prosecutions, and is defined as "... voluntary, intentional violation of a known legal duty."

Factors which tend to establish willfulness include, but are not limited to, a pattern of under reporting, failure to supply accountant with accurate information, false statements, a double set of books, destruction of records, using false documents, using nominees, extensive use of currency, unorthodox accounting practices, use of an alias, educational background of taxpayer, offer of a bribe to an agent and backdating documents.

6.2 26 U.S.C., Section 7203 — Willful failure to file return, supply information, or pay tax

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return,

keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor..."

6.2.1 Penalty: individuals — up to 1 year imprisonment and \$100,000 fine; corporations \$200,000 fine.

6.2.2 Elements:

- Duty to file
- Failure to file
- Willfulness

6.3 Fraud and false statements

"Any person who —

(1) Declaration under penalties of perjury —

Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) Aid or assistance — Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document;...shall be guilty of a felony..."

6.3.1 Penalty: individuals — up to 3 years imprisonment and \$250,000 fine; corporations \$500,000 fine.

6.3.2 Elements:

6.3.2.1 Section 7206(1)

- Subscription of return

- False as to material matter, i.e., necessary to correct computation of tax or tendency to influence or impede
- Penalties of perjury
- Willfulness

6.3.2.2. Section 7206(2)

- Aided or assisted, procured, counseled, or advised the preparation or presentation of a false return or document
- Material matter
- Willfulness

6.4 18 U.S.C., Section 371 — Conspiracy

Makes it a crime... “If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such person do any act to effect the object of the conspiracy...”

6.4.1 Penalties: individuals — up to 5 years imprisonment and \$250,000 fine; corporations \$500,000 fine.

6.4.2 Elements:

- Agreement by two or more persons to either (1) commit any offense, or (2) defraud
- Knowing and voluntary participation
- Overt act

Note: the statute contains two types of violations

- To commit an offense
- To defraud

Tax crimes are frequently prosecuted under the “defraud” prong as conspiracies to “impede and obstruct the IRS”

OUTLINE ON CUSTOMS VIOLATIONS

I. Purpose of statutes

To protect the revenue and honest importers, customs laws seek to prevent illegal traffic or fraud. The applicable federal statutes are often viewed as penal or criminal, requiring strict construction., although some cases look upon them as remedial.

The provisions applicable to customs violation are found in 18 U. S.C. Sections 541 to 553. (Chapter 27). These will be listed below.

II. Customs offenses

- A. Section 541. A person who knowingly effects entry of goods and merchandise at less than true weight or upon a false classification shall be fined or imprisonment for not more than two years or both.
- B. Section 542. This section governs the entry of goods or merchandise by fraudulent or false statements (letters, papers) by persons who have no reasonable cause to believe the truth of such statements or who commit willful acts that deprive the United States of any lawful duties. Persons guilty of such conduct shall be fined or imprisoned not more than two years or both.
- C. Section 543. A person, who as an officer of revenue knowingly allows the entry of goods and merchandise for less than payment of the amount of the legal duty due, shall be fine or imprisoned for not more than two years or both.
- D. Section 544. Any person who enters or withdraws merchandise or goods drawn for exportation without payment of dues or with intent to obtain a drawback of duties paid. is subject to fine or imprisonment for not more than two years or both if the goods or merchandise are relanded without entry.
- E. Section 545. Any person who smuggles or clandestinely introduces goods or merchandise which should have been invoiced. or passes through the customhouse any fraudulent invoice. or fraudulently brings into the United States any merchandise contrary to law shall be fined or imprisoned not more than five years. or both.
- F. Section 546. This section punishes anyone who smuggles goods into a foreign country.
- G. Section 547. Any person who receives or deposits merchandise in any building on a boundary line between the United States and any foreign

country in violation of law shall be fined, or imprisoned for not more than two years, or both.

- H. Section 548. Any person who fraudulently conceals, removes or repacks merchandise, or fraudulent alters or obliterates marks on packages deposited in a warehouse shall be fined or imprisoned not more than two years, or both.
- I. Section 549. Any person who removes without authority a customs seal or mark or willfully removes any customs seal placed upon vessels, or packages containing merchandise, or maliciously enters a bonded warehouse with intent to remove merchandise in a bonded warehouse or otherwise in customs custody shall be fined or imprisoned for not more than two years, or both.
- J. Section 550. Any person who files a false claim for refund of duties shall be fined or imprisoned for not more than two years, or both.
- K. Section 551. Any who conceals or destroys invoices or other papers shall be fined or imprisoned for not more than two years, or both.
- L. Section 552 punishes all officers aiding the importation of obscene or treasonous books and articles and subjects them to a fine or imprisonment for not more than ten years or both.
- M. Section 553 punishes anyone who knowingly imports or exports stolen motor vehicles, off-highway mobile equipment, vessels or aircraft by fine or an imprisonment of not more than ten years, or both.

NOTE: The annotations to these sections contain cases which interpret the statutory language. Also see 25 Corpus Juris Secundus Sections 245-266.

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STRUCTURAL, PROCEDURAL, AND EVIDENTIARY COMPARISONS
BETWEEN
RUSSIAN AND AMERICAN CIVIL LITIGATION

By

Steven T. Walther

I.

OVERVIEW OF THE UNITED STATES COURTS

1.01 State Courts.

A. States as Separate Governments. Each of the 50 states of the United States is considered to be a separate and independent governmental entity. Each stands alone from the Federal Government, which is the national government created by the United States Constitution. Each state has its own constitution by which it is governed. In each state the constitution provides that each state will have (a) its own judicial branch, (b) its own legislative branch, and (c) its own executive branch. In the judiciary there are usually numerous trial courts and one or more levels of appellate courts. These trial courts and appellate courts are separate and distinct from the Federal court (national court) system mentioned in section 1.02 below.

B. Selection of State Judges.

1. Selection. The procedure for selecting judges is different in different states. In state courts, a judge is appointed, for his or her first term by the Governor of that state; in such instance, the judge must usually thereafter, for successive terms, be subject to election by the voters in his or her jurisdictional district. In other states, a judge is required to stand for election by the voters for the first term, and for all successive terms, unless he or she is filling a vacancy, in which case the Governor usually makes the appointment to fill the vacancy for the balance of the term.

2. Terms. Usually terms for judges last four to six years. Thereafter a judge must run for election, by the voters in his or her district, for successive terms. Usually there is no limit on the number of terms that a person can serve as a judge in a state court.

C. Appellate Courts.

1. Number of Appellate Levels. In most states there are two (2) levels of appellate courts, an intermediate appellate court and a supreme court, which is the court of final state court jurisdiction. In some states, such as the state of Nevada, there is a trial court level, and one appellate court level, namely, the state supreme court. Because the state has so few people, and therefore so few courts, there is no intermediate court of appeals.

2. Jurisdiction and Role of the Appellate Court. It is not the role of the appellate court to make findings of fact since that is the exclusive role of the trial court. The appellate court must only determine whether or not the facts which were found to be true by the court, or by the jury, are reasonably supported by the evidence which was admitted to trial and which was also admissible evidence. If the appellate court finds that the facts which were found by the court or jury to be supported by admissible and substantial evidence, the appellate court must uphold the facts which were found by the court or jury. The appellate must then look to the law to determine whether or not the law was properly applied by the trial court.

3. Review of the Law. The appellate court, in addition to reviewing the factual sufficiency of the findings of the court or jury, then examine whether the law was properly applied. In doing so, the court is bound by previous legal decisions made by other courts within that state. In addition, to the extent there are federal issues to be decided by the state court, they are bound by previous federal decisions decided by federal courts throughout the United States. This procedure is called *stare decisis* which means that "the decision must stand."

4. Contingent Federal Jurisdiction. If, after a matter is decided by the state supreme court, there still remains some federal constitutional issue which is important to the outcome of the case, there are cases where the federal court (sometimes the trial court in a criminal case) or the United States Supreme Court (on a civil case) may thereafter consider the decision of the state supreme court, despite the fact that it has been decided by the highest court in the state court system.

D. Enforceability of State Court Judgments (*res judicata*). The jurisdiction of each state court exists throughout the United States. This means that any judgement entered in a state court may be given "full force and effect" in every other state of the United States. This is a constitutional requirement of the United States Constitution.

1.02 United States (Federal) Court System

A. Trial Courts. The United States (federal) government also maintains trial courts throughout the United States. There is at least one trial court in each state of the United States and sometimes several trial courts in each state. These trial courts are completely separate and distinct from the state trial court operated under the jurisdiction of that state and which was mentioned in section 1.01 above. The trial court has a complete different jurisdiction, and considers different factual and legal issues than those which may come before a state court.

B. Selection of Judges. The judges in the federal (or United States) trial and appellate courts is appointed by the President of the United States, subject to approval of the United States Senate. Once a judge has been approved by the President and the United States Senate, the judge may continue to serve for life, without election. Only by impeachment by the United States Senate (passed by two-thirds vote), after charges are brought by the House of Representatives may a judge be removed. In the history of the United States, very few judges have ever been removed.

C. Appellate Divisions. In the federal system there are two set levels of appellate courts. The first court of appeal after the federal trial court has decided a case. Thereafter, matters may be appealed to the United States Supreme Court. The United States Supreme Court may decline to hear a case which has been decided by a court of appeals.

II.

FIRST PHASE - INITIATION OF THE CIVIL CASE

2.01 Definition. A civil case is a case which does not involve prosecution by the state or federal government of a criminal statute. It is an action brought to seek a non-criminal remedy, such as (a) an award of money; (b) a declaration of rights among the parties to the litigation; or (c) injunctive or equitable relief, by which the court enters an order directing a person or entity who is a party to the litigation to do or not to do a certain act. In the United States, most courts are able to act as both civil (non-criminal) courts and as criminal courts. Accordingly, the judges must be familiar with both the civil (non-criminal) and criminal laws.

2.02 Lawyers. The lawyers in civil cases in the United States (as well as in criminal cases) must be permitted to practice law in each state by the court in which the state is located. It is usually necessary, before a person may appear before a court in a state to practice law, that the person (a) takes and passes a two or three day examination, including a test on ethics, (b) has graduated from law school (usually three years in duration) having certain minimal academic requirements approved by the American Bar Association and (c) is found, after investigation, to be of good moral character. Sometimes a court is willing to allow a person be admitted to practice law before that court in a single special case if the person is also admitted to practice law in another state. Usually, in such an instance, the permission is for that case (*pro hac vice*) only. In the federal court system, lawyers are permitted to practice without taking a bar examination if they are lawyers in good standing in the state in which the federal trial court is located.

2.03 The Complaint. A civil case is commenced by the filing of a document (which is termed the "complaint") with the clerk of the court. The person or entity who initiates the action in a civil case is called the "plaintiff," and the person or entity who is being sued is by the plaintiff in a civil case is called a "defendant." The complaint must state (a) the factual basis upon which to trigger the legal grounds to bring an action against the defendant; (b) a description of the legal basis upon which the relief is being sought; and (c) the kind of relief (court order) which is being sought by the person initiating the action.

2.04 The Summons. Immediately upon the filing of the complaint with the clerk of the court, the clerk of the court will issue a document directing the defendant to appear in the case, by the filing of documents with the court, through his or her lawyer, or in person. This document issued by the clerk of the court is called a "summons," meaning that it is summoning the person or entity to the court to participate in the litigation. It is possible for a person or entity who is a plaintiff to file a lawsuit against several defendants, in which case the summons will be issued to each of the defendants. Once the summons is issued, the summons must be personally served, together with a copy of the complaint, upon the named defendant.

2.05 Answer/Responsive Pleading. Once the summons and complaint are served, the person sued (defendant) has a certain period of time (usually 20 to 30 days) within which to file a responsive pleading with the court (which is termed the "answer"). In his or her answer the defendant will generally deny the various factual allegations made in the complaint, state that the relief (court order) requested in the complaint should not be granted, and perhaps add additional allegations to demonstrate why the relief requested in the complaint should not be granted by the court.

2.06 Counterclaim. The party against whom a lawsuit is commenced (the defendant) may take the position that the plaintiff has engaged in wrongful conduct, and ask the court to enter a judgment against the plaintiff. If so, at approximately the same time the defendant files his or her answer to the complaint, the defendant may also file a counterclaim against the plaintiff for a separate remedy by the court (such as monetary judgment, declaration of rights, or injunctive relief) which may be greater than or different from the relief sought by the plaintiff against the defendant. This action by the defendant against the plaintiff is called a counterclaim. The counterclaim must generally relate to the facts and law upon which the original complaint is based. [Example, Company A agrees to sell 1,000 shoes to Company B. When the shoes arrive at Company B, Company B inspects the shoes and takes the position that the soles of the shoes are defective, and therefore refuses to pay Company A for the shoes. Company A files a suit against Company B to collect on the purchase price for the shoes. Company B files a counterclaim against Company A, claiming that Company B lost money because Company B did not receive the quality of shoes on time, and therefore lost sales. Company B seeks to obtain the lost profits which Company B would have obtained if Company B would have been able to make its sales to its customers.]

2.07 Third Party Practice. If one or more of the defendants alleges that, as a result of the case being brought by the plaintiff, the defendant has a right to obtain relief (a court order) against a third party or entity which is not already a party to the case, the defendant is usually able to bring in a third party defendant (called a "third party defendant") to participate in the litigation. In such an instance, a third party complaint is filed, a summons is issued and the third party defendant is required to appear in the case by the filing of his or her answer. [For example, Company A agrees to sell a 1,000 shoes to Company B; once the shoes arrive at Company B, Company B takes the position that the soles of the shoes are defective, and therefore refuses to pay Company A for the shoes; Company A files a suit against Company B to collect upon the purchase price; Company B files a suit against Company A claiming that Company B lost money because Company B did not receive quality shoes on time, and therefore lost sales; Company A then sues Company C contending that if the soles were defective, and if Company B is therefore not required to pay Company A and Company A is liable to Company B for failure to provide the shoes on time, then it is the responsibility of Company C and Company C must pay for any judgment which Company B obtains against Company A.]

III.

SECOND PHASE - PRETRIAL DISCOVERY AND PROCEDURE

3.01 Discovery.

A. Generally. After the complaint is filed and the defendant has answered the complaint (which is called the "pleading stage"), and before a trial commences, each of the parties in the litigation is entitled to obtain information about the facts and law which the other party believes supports the case of the other party. This phase is known in the United States as the "discovery" phase - - meaning that each party has right to "discover" information (facts and law) about the other side of the case. The reasons for discovery mechanism prior to trial are: (a) it allows each side to better prepare for the trial on the merits and thus is most likely to render justice; (b) it allows each side to learn about the strengths and weaknesses of the case of the other side, thus increases the likelihood and chance of settlement prior to trial; and (c) it reduces court time at the actual trial and hence reduces the overall cost to the government funding the trial. The discovery phase may take only a month or two, or may last for several months, or in some cases for years.

B. Written Answers Under Oath (Interrogatories). In American civil litigation, each party has the right to direct written questions to the other party and, in many instances, to a person or entity who is not a party to the litigation. Such questions may ask the party (or non-party) detailed written information relevant to the case. After the written questions are received, the person to whom the questions are directed has a period of time (usually 30 or 45 days) within which to provide detailed, full, and thorough answers, under oath (under penalty of perjury, a criminal offense) giving information in response to the question asked. Such information might include giving the names, (a) the names, addresses and telephone numbers of each of the persons who the party who receives the interrogatories believes will be called to testify or provide information at the trial and (b) description of the testimony anticipated regarding each witness the party intends to call at trial.

C. Oral Answers Under Oath (Depositions). In nearly all American courts, a party is able to cause a person to come before a person authorized to administer oath to answer questions, under oath, orally, after being asked by the lawyer for the side seeking to obtain that information. The questions and answers are then taken down into a booklet, and certain portions may be able to be used at the trial on the merits before the court. Purposes for a deposition are generally as follows:

1. It is a method of discovery to learn more about the case of the opposing party;
2. It may be used at trial to impeach the testimony of a witness (that is show that the witness is testifying under oath at trial differently than the person testified during his or her deposition, also under oath); or

3. To use as a substitute for testimony without the person actually having to appear at the trial. In the latter case, the deposition is usually read to the court or the jury. In recent times many of the depositions are taken by video tape, so that the parties, the court and the jury (in a jury case) are able to actually see the person testifying, and make a better judgment with respect to whether or not the person is testifying completely and truthfully.

D. Producing Documents/Tangible Items – Request for Admission of Fact. In civil litigation, it is possible prior to a trial for one party to send a written request for admissions to the other party, requesting that the party admit certain facts as being true or not true. If the party does not admit the truth of the fact as requested within a certain period of time (usually 20 – 30 days), and if the fact is found to be true as requested, the party may have to pay for all of the legal fees and costs incurred in proving the fact to be true. This is the method used in American jurisprudence to force parties to admit facts which are clearly true, especially if the truth of the facts are known to the party who receives the request for admission. This can be a very effective technique to force the parties in civil litigation to admit to certain facts, and therefore reduce the time of trial.

3.02 Resolving Discovery Disputes. If one party makes a request for information (by written interrogatory or through oral deposition) which the other party does not feel should be honored under the applicable law, or is too burdensome or oppressive, or is outside the scope of the discovery, the other party may file a motion with the court to seek an order limiting the party from obtaining the information. It will then be up to the court to make this decision. In a number of jurisdictions which have a high volume of litigation, a separate person other than the court is sometimes appointed to resolve discovery issues. In such instances, it is often possible to resolve these issues by means of a telephone conference (with all lawyers attending the telephone conference with the discovery master or judge) rather than having to come before the court.

3.03 Information Limited at Pre-trial and Trial as a Matter of Public Policy.

Sometimes the state decides that it is more important to keep matters confidential than allow them to be used at trial, some examples are follows:

- A. Attorney Client Privilege
- B. Spousal Privilege
- C. Work Product
- D. Excessive Burden or Oppressive Nature of the Request

The grounds which are often used to contend that discovery should not be given are (a) because it may be privileged (for example, communication between a lawyer and a client), (b) it is work product (work of a lawyer in the preparation of a case), (c) beyond the scope of discovery (not “reasonably calculated to lead to the discovery of admissible

evidence”), (d) burdensome or oppressive (the information sought is too expensive or hard to obtain by the other party to justify requiring the other party to provide the information). In such instances the court weighs the grounds, under the facts of the case, and decides whether or not the information must be provided.

IV.
PHASE THREE – OTHER PRETRIAL PROCEDURES

4.01 Mediation Procedures.

A. Recent Developments. In recent times there has been increasing use of the procedure of mediation to resolve civil disputes in litigation. In mediation, the parties to litigation and their counsel meet with an experienced and trained mediator to attempt to resolve issues prior to trial and to settle the case.

B. Purpose. In most American civil litigation, over two-thirds of all civil cases are settled prior to trial and therefore do not come before the court or jury. The purpose of mediation is to attempt to settle issues sooner, and with more frequency, thus decreasing the expense upon the parties as well as the government litigating cases. Mediation is a highly successful technique for resolving civil disputes, and is used with increasing frequency.

C. Procedure. Usually the parties to the litigation, through their counsel, agree upon in advance a person to serve as mediator. Sometimes a mediator is selected by the judge or judicial system. However, in most instances, the mediator is agreed upon in advance by the parties. The mediator usually meets with the party and their counsel but not necessarily in the same room. The mediator will shuttle back and forth with the parties to attempt to assist them in assessing the strengths and weaknesses of their respective case, and attempt to convince the parties to settle. Effective mediators usually will settle over 90% of the cases which they mediate. Mediation is often paid for by the parties but is sometimes paid by the court.

4.02 Limiting Facts and Legal Issues – Motion Practice.

A. Limiting Facts (Motions “in limine”). If a party believes that the other party is likely to seek to introduce facts at the trial which are not relevant, not likely to produce material information, or too explosive or sensitive to be brought before the court (and sometimes the public), or are otherwise inadmissible under rules of evidence, a party may, in advance, file a motion with the court to ask the court to limit the party from seeking to introduce the evidence at trial. The court will then determine, in advance of the trial, whether or not this information or evidence may be used. The purpose of the technique is (a) to limit the scope of discovery in advance of the trial and thus reduce the expense of providing information which would not otherwise be admissible and/or (b) to obtain a ruling in advance of the trial so that the party seeking to introduce the evidence will not taint the minds of the jury by attempting to introduce evidence which is clearly not admissible.

B. Limiting Legal Issues. If a party believes that certain or all of the legal issues being asserted by the other party are not valid, or are not ones which are supported by the facts, or in fact, are non-existent, a party may move the court in advance of the trial to direct the parties not to utilize or assert those legal issues at the trial. As discussed in subparagraph C below, a party may move to dismiss the entire case.

C. Summary Judgment Motion. It is possible in most American civil courts for a party to file a motion with the court in advance of the trial and ask the court to dismiss the case on the grounds that there is no genuine issue as to any material fact and that the party is entitled to a judgment as a matter of law. This is called a "summary judgment", meaning that it is a quick judgment which may be given by a court prior to the trial, after the court has had to opportunity to review all of the facts which are in the most favorable light against whom the motion is filed. Sometimes a party may file an action or assert a claim and there is no factual basis for it. This allows the court to limit the trial to only those claims which have a reasonable factual basis if the facts asserted by that party are believed entirely. This is a very important part of American Jurisprudence.

D. Pretrial Orders. In most American civil litigation, a court may enter a "pretrial order". This pretrial order will set forth the names and addresses of the witnesses, require certain identification of all documentary or all other evidence, and set forth the basic procedure for the trial on the merits. This allows the parties to know in advance exactly what the other side will be producing at trial, subject to some exceptions involving "surprise" or "rebuttal", discussed below. This will apply often either in a jury or non-jury case. It allows the court to take direct supervision over the litigation prior to the case coming to trial. Usually the parties file written briefs with the court to explain and set forth the various factual and legal assertions, before the pretrial order is entered. Sometimes, however, the court orders the lawyers for all of the parties to get together and attempt to agree upon a pretrial order.

TRIAL ON THE MERITS5.01 Generally

In most instances in American courts civil (non-criminal) cases may be tried and the facts (but not the law) decided by a jury. The number of jurists ranges between, generally, six persons and eleven persons. In some cases the decision of the jury must be unanimous; in other cases it may be less than unanimous. For example, in the State of Nevada, a jury may decide a case if it is less than unanimous, but in a federal case in the same state, the jury must decide the issue unanimously. If the jury is unable to decide the various facts, and thus, render a verdict, it is called a "mistrial", and the court may declare a mistrial and have another trial on the case several months later.

5.02 Non-jury Cases

In a case in which there is no jury, the matter is tried before a judge. The judge is usually selected by the Governor of the state, in a state case, for a certain period of time; after the first term, the judge usually stands for election in most states. In the Federal System, a judge is appointed by the President of the United States, for life, after the United State Senate approves the initial appointment of the judge.

5.03 Jury Trial Procedures

A. Generally. In the United States most civil cases are entitled to be tried before a jury rather than the court. The purpose of the jury is to make findings of fact, not to determine the law. The court, in a jury trial, tells the jury what the law is, and the jury makes the findings of fact.

B. Pre-trial Information. Prior to the trial, the parties are given information with respect to the individuals who are in the "jury pool" (namely the persons who will be called to serve as potential jurors for the case). This allows the parties to learn about the prospective jurors prior to the trial on the merits. Sometimes the lawyers for the parties will obtain psychological experts to help determine which juror is more likely to be sympathetic to the case of his or her client.

C. Voir Dire (Questioning Prior to Trial). At the commencement of the trial, the jurors are usually questioned by the court, and also by the lawyers. This is called "voir dire." During questioning, the parties pose questions of each juror to determine which of the jurors might be a fair or biased witness to hear the case. Sometimes a party will want jurors with more education than other cases; sometimes a party will want a juror who has a certain type of life or employment experience; sometimes a party will want to have a juror or not have a juror depending upon the biases which the juror appears to have.

D. Challenges. In most American courts the parties, through their lawyers, are entitled to automatically peremptorily challenge two or three people (sometimes more if the court permits) from being on the jury, even "without cause." In addition, the parties are always entitled to object to a juror for "cause" namely, if the juror clearly appears to have a potential for bias in the case or is not otherwise able to properly serve.

E. Jury Pool. The jury pool is usually drawn by lott (randomly) by a clerk of the court from names of people who live in the region.

F. Required Service. In the United States, a person may be forced to serve as a juror. It is not necessarily a voluntary act for a person to serve as a member of a jury.

G. Number of Votes Required. Usually in most civil state court cases, a jury need not decide a case unanimously. In federal court, a unanimous verdict is usually required, even in a civil case. Most juries are approximately 12 people in number, and in state courts only nine are required to decide a case. If the required number (say nine people in a twelve person jury case) are unable to decide a case, it is called a "hung jury" and the parties must try the case over before another jury.

5.04 Jury Trial Issues

The following is some information with respect to jury trials within the United States.

A. After a jury is selected, the lawyer who represents the plaintiff gives an opening statement to the jury, advising the juror of the facts which he or she intends to prove of the case on behalf of his or her client and the reasons why those facts will support granting his or her client the remedy that his or her client may seek.

B. The other side (defendant) usually has the right to rebut (or provide a statement of facts against) the opening statement of the plaintiff. However, the defendant also has the right to wait until a later time of the trial (after the case in chief of plaintiff) to provide an opening statement to the jury advising the jury of what the lawyer intends to prove on behalf of his or her client.

VI.

ORDER, STANDARD AND BURDEN OF PROOF

6.01 Order of Proof

A. Case in Chief of Plaintiff. The person bringing the case is required to begin the case and provide evidence which, if fully believed, would entitle the person to the relief which the person seeks. If the plaintiff is unable to produce such full evidence, the defendant may file a motion with the court asking the case be dismissed, and the court will be obligated to dismiss the case if there is not evidence which, if believed, would support a verdict or court order giving the relief the plaintiff desires to seek in the case.

B. Defense and Case in Chief of Counterclaim (Crossclaim). After the plaintiff has completed the case in chief, the defendant is entitled to provide his or her defense to the case and, in addition, to provide information supporting any counterclaim that may have been filed by the defendant.

C. Rebuttal. Following the completion of the defense, the plaintiff is usually entitled to a rebuttal (to provide evidence contradicting the evidence of the defendant), which must be within the scope of the evidence provided by the defendant.

6.02 Standard of Proof

A. Generally. In the United States, the law requires that a party to a case, before he or she may win the case, must provide a certain degree of evidence or facts which that party has the burden to prove before the party may win that aspect of the case. This is called a "standard of proof." There are three general standards of proof, discussed in paragraphs B, C and D below.

B. Preponderance of the Evidence (Civil Cases). In most civil cases the standard of proof is that a person must prove his or her case by "a preponderance of the evidence." This means that a court or jury must find that the evidence produced is "more likely to be true than not true." This is less of a standard than "clear and convincing" (which is a higher standard in civil cases) as discussed in paragraph C below, or "beyond a reasonable doubt" which is the standard in nearly all criminal cases, discussed in paragraph D below.

C. Clear and Convincing Evidence (Civil Cases). In some civil cases, a party is required to prove a certain fact by "clear and convincing" evidence. The evidence in such a case must, of course, be "clear" and "convincing," a higher standard than merely a "preponderance of the evidence." This still less of a standard than "beyond a reasonable doubt" discussed in paragraph D below.

D. Beyond a Reasonable Doubt (Criminal Cases). In the United States, a criminal case must be proven "beyond a reasonable doubt" by the prosecution, not by the

defendant. It is not necessary in the United States court to prove that he or she is innocent; it is the requirement of the state to prove "beyond a reasonable doubt" that the defendant is guilty of the crime. Even if a juror believes that a defendant is guilty, a juror is not required to vote in favor of conviction if the juror also believes that the prosecution failed to prove the case "beyond a reasonable doubt."

6.03 Burden of Proof

A. Generally. The burden of proof in a civil case is upon the party asserting a certain fact to be true. This burden is placed upon the party, except in certain instances.

B. Exception - *Res Ipsa Loquitur*. Proof of basic facts is sufficient to establish a secondary fact in and of itself, without direct proof. A typical example of this is called *res ipsa loquitur* the "thing speaks for itself." An example is when a patient is found after surgery, to have a scalpel remaining in his or her stomach after he or she is sown up following surgery. From this fact alone, a party is entitled to assume that one or more of the people involved was negligent, thus shifting the burden upon the people involved to prove they were not negligent.

6.04 Presumptions. In American jurisprudence, things are "presumed" not to be true. The purpose of using presumptions is to simplify the need for proof. Usually a proof of a basic fact is enough to cause a presumption of the existence of a secondary fact. It is always possible to rebut a presumption, if the party wishes to prove a presumption is not true. [Examples: typical presumptions are as follows (a) if a document is mailed, it is "presumed" to have been delivered; (b) if a document has affixed to it the seal of the governmental official in possession of the document (for example an order or judgment from another case), it is presumed to be authentic; (c) people are "presumed" to obey the law.]

VII.

CERTAIN EVIDENTIARY PROVISIONS

7.01 Objections

In American civil litigation it is the parties, rather than the judge, who determine what evidence comes before the court. In other words, if the parties agree to provide evidence before the court, the court will usually not object. Therefore, it requires an objection on the part of one party to the attempted introduction of evidence by the other party before the judge usually will be required to rule on whether or not the evidence is admissible. Unless there is an objection the court will usually admit the evidence.

7.02 Relevance

All evidence produced must be relevant. That is, related to the facts or law of the case. As discussed below, even if evidence is relevant, it may be excluded if it is found to be prejudicial in nature.

7.03 Prejudicial Evidence

Sometimes evidence may be relevant, but is so highly prejudicial that a court will exclude it, especially if its relevance is not that great or if there are other methods by which a case can be proven.

7.04 Third Party Out of Court Statements - Hearsay

A. General Rule. There are many evidence rules which require a court not to allow evidence to be admitted even though it may be relevant, but because it is unreliable. One of the most clear cut examples is what is called "hearsay evidence." Hearsay evidence is defined as an out of court statement (made by a person who is not in court) used to prove the truth of the fact asserted. In most cases, hearsay evidence is unreliable and therefore is not allowed to be admitted.

B. Exceptions. There are some exceptions to this, which are as follows:

1. Admission against interest;
2. State of mind;
3. Prior inconsistent statement;
4. Well known journals or articles; and
5. Historical facts.

7.05 Judicial Notice

If a fact is so well known in the community that it is not necessary to be proven (the sun comes up once a day), the court may take "judicial notice" of the fact

without requiring proof. This is a time saving mechanism and is permitted because the fact is so reliable as not to be in question.

7.06 Opinion Evidence

- A. Purpose.
- B. Expert Witness Testimony
- C. Lay Opinion Testimony

A person may testify and provide his or her opinion if the person is qualified as an expert in a certain area. The average person who testifies in a case is not entitled to give his or her opinion in connection with most issues before the court. An exception to this is if a person is qualified by the court (sometimes after oral examination) as an expert. Sometimes huge battles take place in litigation over whether or not a person is entitled to be considered an "expert" by the court and thus able to render an opinion with respect to certain facts or law involved in the case.

7.07 Foundational Facts Required

In civil litigation certain "foundational facts" must be determined before evidence may be admitted unless all of the parties are willing to stipulate that evidence may be admitted without foundational facts. In other words, it is necessary to prove a document is authentic, before it may be admitted, even if it is otherwise relevant. In addition, it is necessary to determine that personal information regarding a case (a percipient witness) before a person is entitled to serve as a witness.

7.08 Evidence Excluded as a Matter of Policy

- A. Attorney - Client Communications
- B. Spousal Communications
- C. Communication between Clients Regarding Settlement
- D. Attorney Work Product

74

Factual Scenario #1

(Partial Contractual; Partial Non-Contractual)

Igor from Irkutsk flew from Irkutsk on Aeroflot to Stuttgart, Germany to purchase a new Porsche automobile. Igor purchased the Porsche automobile in Stuttgart and was returning to his home in Irkutsk through Moscow. While in Moscow, Igor went to a bar and drank several drinks of Vodka. Igor then proceeded down the street in his Porsche, travelling at a high rate of speed. In the process, he ran over and killed Svetlana and her children, Tatiana and Alexander. Boris, the husband of Svetlana, and the father of Tatiana and Alexander, filed a lawsuit against Igor. Boris also filed a lawsuit against Moscow Nights, the bar in which Igor purchased a multiple number of drinks. In the court proceedings, Igor from Irkutsk contends that the accident was the fault of the Porsche Company in Stuttgart, because Igor claims that the brakes were defective and were not working at the time Igor was driving through the streets of Moscow. Igor contends that if the brakes had been working, he would have been able to stop in time to prevent killing Svetlana and Tatiana and Alexander. Igor contends he had a contract with the Porsche Company which guaranteed that the Porsche was in good, working condition. Although Igor purchased the car in Stuttgart, Porsche allows Leonid in Moscow to sell Porsches to people. However, Leonid does not work for Porsche, but simply sells Porsches, as part of his own business, after he purchases the Porsches from the company in Stuttgart, Germany.

ISSUES:

1. Is it possible for Boris to bring an action on behalf of his wife for damages?
2. Is it possible for Boris to bring an action on behalf of two children for damages?
3. What are the measures of damages for the wife?
4. What are the measures of damages for the two children?
5. Does Boris have an action to bring for his own for the harm caused to him (for example, loss of his wife and two children)?
6. What court would the action be brought in (Irkutsk, Stuttgart, or Moscow)?
7. Is Igor, as part of his third party claim, able to obtain jurisdiction, in a Moscow court, over Stuttgart Porsche, or is it possible to bring an action against Moscow Nights for serving excessive drinks, knowing Igor was too drunk to drive safely?
8. Could Igor bring a lawsuit against the Porsche Company of Stuttgart?
9. Could Igor bring a lawsuit against the Porsche Company in Moscow?

Factual Scenario #2

(Complete Contract)

Nina from Nizhni-Novgorod has a large shoe factory. Michael from Moscow wishes to purchase 1,000 pair of shoes Nina from Nizhni-Novgorod to sell in his store in Moscow. Michael agrees to pay for the shoes upon delivery in Moscow. When the shoes arrive, Michael decides that the shoes were defective. Michael contends that (a) the shoes were not the right color; and (b) the shoe were defective because the soles were not properly stitched to the leather. Michael rejects the goods and tells Nina to come pick them up. Nina from Nizhni-Novgorod, in her factory, had entered into a contract with Vladimir from Volgograd to connect the soles to the leather. It was the job of Vladimir from Volgograd to stitch the soles to the leather and ship them to Nina from Nizhni-Novgorod. Nina from Nizhni-Novgorod files a lawsuit against Michael from Moscow in a Moscow court, claiming the Nina is entitled to the purchase price of her shoe and the shipping (transportation expenses), and her legal fees. Michael from Moscow, in the lawsuit, files a counterclaim against Nina from Nizhni -Novgorod, claiming that he lost money because the shoes did not arrive on time, the shoes were defective, the shoes were the wrong color, and because he lost much business to a competitor during that period of time. Michael from Moscow also claims that he has a right to attorney's fees. Nina then wants to file a lawsuit against Vladimir from Volgograd, who did the shoes, claiming that if the shoes were in fact found to be defective by the Moscow court, it was because of the wrongful conduct of Vladimir from Volgograd, who did not properly stitch the soles of the shoe leather together. Nina from Nizhni-Novgorod wants Vladimir from Volgograd to pay for the full cost of those shoes and the damages she suffered.

ISSUES:

1. In order for Nina from Nizhni-Novgorod to sue Michael, must she prove that the shoes were in good condition?
2. In order for Michael to deny that he owes the money, and is entitled to damages to Nina from Nizhni-Novgorod, must he show there is a contract which guaranteed that the shoes would be in good condition and repair (or may he assume this is part of the implied contract)?
3. What must Michael do to avoid not paying for the shoes. Must he give notice to Nina from Nizhni-Novgorod within a certain period of time?
4. Is it possible for Nina from Nizhni-Novgorod, defending the counterclaim that Michael, to sue Vladimir, contending that Vladimir did not properly put the shoes together?
5. Must Vladimir appear in Moscow court in order to defend himself on the claims of Nina?

6. Is it possible for Michael to file a lawsuit against Vladimir, considering the fact that Michael did not enter into a contract with Vladimir, but only with Nina?
7. How would the measure of damages be computed for each of these claims?
8. Is it possible for any party, if that party prevails (wins), to obtain an award of attorney's fees?

United States Court of Federal Claims

**Presentation Materials
for**

The Honorable Loren A. Smith

UNITED STATES COURT OF FEDERAL CLAIMS Jurisdiction

A. The Tucker Act

The Tucker Act is both a grant of jurisdiction and a waiver of sovereign immunity. *United States v. Mitchell*, 463 U.S. 206, 212 (1983).

1. A Suit for Money

The Court of Federal Claims, with very limited exceptions, has authority to issue judgments for money against the United States. *United States v. Testan*, 424 U.S. 392 (1976)

The plaintiff must demonstrate either (1) that it seeks a refund of money which it has paid to the government or (2) that the provision of the Constitution, the statute, the Executive Order, or the regulation upon which the plaintiff relies mandates a payment of money.

2. Express or Implied Contract

The Contracts Disputes Act of 1978 (CDA) governs suits based upon express contracts. 41 U.S.C. §§ 601-613 (1988).

Implied-in-fact require (1) meeting of the minds (2) consideration (3) lack of ambiguity in offer and acceptance and (4) that the government representative had actual authority to bind the government. *City of El Centro v. United States*, 922 F.2d 816 (Fed. Cir. 1990), *cert. denied*, 501 U.S. 1230 (1991), *Eastern Trans-Waste of Md. v. United States*, 27 Fed. Cl. 146 (1992); *Rinaldi v. United States*, 30 Fed. Cl. 164, 167 (1993); *Domogala v. United States*, 30 Fed. Cl. 149 (1993).

3. Tax Jurisdiction

The Court posses jurisdiction over suits for refund of taxes. 28 U.S.C. § 1491(a) (1994).

4. Takings

A plaintiff may base a suit upon a claim that the government has taken its property but has not paid compensation for that property. The Fifth

C. National Vaccine Injury Compensation Act

The Vaccine Act created an Office of Special Masters, to consider petitions for compensation filed under the National Vaccine Injury Compensation Program. 42 U.S.C. §§ 300aa-1 et seq.

D. Miscellaneous Statutes

The Court of Federal Claims possesses jurisdiction under certain conditions:

1. To determine the amount, if any, due to or from the United States by reason of any unsettled account of any officer or agent of, or contractor with, the United States, or a guarantor, surety, or personal representative of any such officer, agent, or contractor. 28 U.S.C. §§ 1494, 2511 (1994).
2. To render judgment upon any claim by any person unjustly convicted of an offense against the United States and imprisoned; 28 U.S.C. §§ 1495, 2513 (1994).

To render judgment upon any claim for damages to an oyster grower arising from dredging operations or the use of other machinery or equipment in making river and harbor improvements authorized by an act of Congress; 28 U.S.C. § 1497 (1994). These suits must be instituted within two years after the termination of the river and harbor operations on which the claim is based;

To render judgment upon any claim for liquidated damages withheld from a contractor or subcontractor pursuant to the Contract Work Hours and Safety Standards Act; 28 U.S.C. § 1499 (1994);

To render judgment upon any claim of a disbursing officer of the United States for relief from responsibility for the loss, in the line of duty, of government funds 28 U.S.C. §§ 1496, 2512 (1994); and

To render judgment upon certain cases referred to the Court of Federal Claims by the Comptroller General of the United States 28 U.S.C. § 2510 (1994).

The Court of Federal Claims also possesses concurrent jurisdiction with the district courts to render judgment upon certain claims by federal employees for life insurance benefits 5 U.S.C. § 8715 (1994) and for health insurance benefits 5 U.S.C. § 8912 (1994).

Amendment has been held to mandate the payment of money within the meaning of the Tucker Act. U.S. CONST. Amendment V.

5. Civilian Pay

Various statutes provide that persons employed the government in various positions shall be paid specific salaries and benefits. United States v. Wickersham, 201 U.S. 390 (1906).

6. Military Pay

There is no specific statutory scheme and judicial review proceeds pursuant to case law.

7. Indian Claims

The "Indian Tucker Act" contains a consent to suit for tribal claims paralleling the Tucker Act. 28 U.S.C. § 1505 (1994).

B. Important Special Statutes

1. Bid Protests

2. Patents, Copyright, and Plant Variety Protection

Owners of a patent, copyright, or certificate of plant variety protection may institute a suit against the United States. 28 U.S.C. § 1498(a)-(d)(1994).

3. Congressional Reference

Either House of Congress may refer any bill to the Chief Judge of the United States Court of Federal Claims for a report. 28 U.S.C. § 1492 (1994).

4. The Civil Liberties Act of 1988

The Civil Liberties Act provides monetary redress to certain individuals of Japanese ancestry who were evacuated, relocated, or interned during World War II as a result of actions taken by, or on behalf of the United States Government. 50 U.S.C. App. § 1989 et seq (1994).

Suits Against the Government

A theoretical and practical introduction to suits against the government in the Court of Federal Claims. There are three general topics: (1) The origins of this court; (2) the jurisdiction of the court; and (3) ground rules for litigation here.

When you confront a complex statutory and regulatory regime, the temptation is to assume that it has always been there. That there is nothing out of the ordinary about the suing the government. Once an apparatus like the Tort Claims Act of the Social Security Administration is set up, it takes on an air of inevitability. In fact, there is nothing inevitable about the present mechanisms for handling claims against the Government. They have evolved from choices made between two different, somewhat competing points of view about the relationship between government and the people.

On the one hand there is the principle of sovereign immunity, and on the other hand the phenomenon of the modern administrative state. One view is that government's role is limited, and to the extent it acts, it should be treated as the sovereign, *i.e.*, immune from suit. The other view is very different. With the growth of the enormous and powerful administrative state, it is assumed that the government has come down from its pedestal and has servant. It would never dream of hiding behind technicalities. There is a constant push and pull between these two reference points. They are like polestars in opposite directions in the sky. The law reflects the historical tension between these two views of government.

This is not just an idle exercise. Despite the overwhelming impact of the administrative state, and the fact that government is constantly involved in lawsuits, all the basic underpinnings of sovereign immunity still exist. They sometimes reveal themselves in ways that strike people as odd, or anachronistic, or even counter cultural. The point is, these sometimes conflicting

reference points coexist, and the outcome of a given case turns on which one the court chooses to steer by.

The roots of this country's legal system drew most deeply from the English common law. That includes the English practice at the time of the Revolutionary war concerning claims against the government. Of course the government in England was the Crown. Magna Charta notwithstanding, the sovereign right of kings was well established. The sovereign could do no wrong, and if you thought that he or she did do wrong, you by and large had to content yourself with thinking it. By right, you could not call the King into court. Nevertheless, a practice had been recognized even back to the 13th century by which a subject could "petition the Sovereign" for redress. In other words, relief was matter of grace, not law. This is precisely what Thomas Jefferson is referring to when in the Declaration of Independence he writes that "In every stage of these oppressions we have petitioned for relief in the most humble terms; our repeated petitions have been answered only by repeated injury."

Another feature of the English political landscape that is relevant is the change in location of the power of the purse. In 1689, in the aftermath of the Puritan rebellion and the Glorious Revolution, the English bill of Rights was adopted, among other things, giving Parliament the power to raise revenues and make appropriations. Part of the Parliamentary model that followed was that it was the legislative body that heard petitions against the crown, because only Parliament could appropriate money.

So part of our heritage from England was the principle that sovereign cannot be sued without its consent, and the idea that the legislative body controls all expenditures from the public treasury. Of course the colonial model developed in the 17th and 18th centuries and drew directly from the English example.

In the Virginia House of Burgesses, the Parliamentary model was adopted, and along with it the use of standing committees of the Burgesses to hear claims against the colonial government. This pattern was reinforced during and after the American Revolution, when the Articles of Confederation were used to create some semblance of a national government. There was no executive or judicial branch, and the Continental Congress handled all money matters. After the war the new congress was flooded with claims, so it referred most of them to a 3 person Treasury Board which would investigate and make recommendations for payment. Only the Congress could make the appropriation however.

After the Constitution was adopted and the federal government was established, Congress transferred this power to the Comptroller of the Currency, which is within the Department of the Treasury. Congress would only consider making a payment if payment was recommended by the Comptroller. Madison and others urged that this function be considered a "judicial function". However, Congress disagreed with this interpretation. In 1789 Congress passed the "Judiciary Act". In the Act the United States could sue a party but there was no provision in the bill for the United States to be sued (be a defendant).

One Constitutional provision supported this view very strongly. Article I, Section 9 provides that "No money shall be drawn from the Treasury except in consequence of appropriations made by law.

In order to give some relief, Congress developed two practices during this early period. First, it set up committees to hear various types of money claims. By the 1830's half of Congress' time was spent hearing these claims. Second, it delegated authority to hear claims only to bodies over which it had direct control, such as the Treasury. Treasury tended to hear contract-type claims, while Congress heard appeals from those recommendations and its own non-contract claims, such as war reparations. No claims authority was given to federal courts.

Congress or the Treasury were hearing only a fraction of claims. There was no body of

law you could appeal to. No precedent. No clear procedures. You did not get to bring witnesses and testify. And you had to have access to Congress, or at least to an influential congressman.

The net result was that a scandalous situation developed. Now there were statutes passed during this period that created special claims commissions. For example, one existed for many years just to hear claims coming out of the War of 1812. In 1849, after the war with Mexico, Congress appropriated \$3,250,000 to pay claims arising out of that war. This was not a violation of Art. I, § 9, because Congress made a limited appropriation. But there was no review in the courts of these decisions.

During this period, the district courts could hear claims if they could be framed as a mandamus action. Why? Because a mandamus action is not brought not against the Government, but against a particular officer, such as the Comptroller of the Currency. So there was no violation of sovereign immunity, because the sovereign wasn't being sued.

The trouble with getting money from such suits is that there had to be a particular statute that required someone else to pay you. You had to point to a law in which Congress had in effect said, the officer must pay you out of the public treasury. If there was any discretion in the officer, there was no claim. The statute had to spell out exactly what was supposed to happen. The court would not issue a writ if it had to make a judgment of its own on the merits of the claim.

Now all this changed somewhat in 1855, when Congress created the United States Court Claims, and later in 1887, when the Tucker Act was passed in pretty much its present form. Congress took private claims based on contracts, and statutes which had been bogging it and the Treasury down and gave them to the court. Judge Wiese will fill you in on how that jurisdiction has evolved over time. The structure and name of the court has evolved as well. The old Court of Claims had a trial division and an appellate division. In 1982, they were separated. The

appellate division was merged with the old court of customs and patent appeals, to form the CAFC. The trial division became the Claims Court. Last year the Claims Court was renamed the Court of Federal Claims.

Neither the legislation setting up the Court of Claims, nor the Tucker Act, nor any jurisdiction of the district courts at that time gave access to a federal court for torts committed by federal employees. You would have had to rely on a congressional reference to the Court of Claims. Congress filled part of that gap in 1946, however, when it adopted the Federal Tort Claims Act, which waived sovereign immunity as to many, but not all types of tortious conduct by federal employees.

The thing to remember about these developments, and sovereign immunity in general, is that even today, you still have to be able to point to a particular statute that gives you a right to sue the government for a particular type of claim. It is sort like going to the carnival and trying out the ring toss. When you throw that ring, it has to hit a bottle, or you don't win. The same way with suing the federal government for money. If you can't ring a statute, you slide between the cracks into the void called sovereign immunity.

The developments outlined arise in the context of limited government. They are compatible with the idea that government should perform traditionally sovereign functions, like defend the shores, control currency, and maybe deliver the mail. But now I want to talk about the different, and in some senses, competing view, that the Government should be involved in educating us, housing us, feeding us. It should regulate media, commercial sales, marriages, insurance, banking, and a host of other activities. Not only that, but it should actively undertake some of those same activities itself, like buying and selling real estate, underwriting art, writing cookbooks, or teaching children. The modern administrative state.

This process began gradually and then accelerated dramatically during the New Deal, and again during the 1960's. Government has grown by quantum leaps, and there are agencies for everything your mind can conceive, enforcing thousands of statutes and regulations. And most of the legislation contains its own waiver of sovereign immunity, although the relief is usually not money. And most of it directs litigation to the district courts.

The need for greater accountability of government also led to the adoption of the Administrative Procedures Act, which permits the district courts to review virtually any agency action. It maintains the old distinction, however between money claims against the treasury and mandamus style relief against individual within government — injunctions and declaratory relief.

The history of money claims against the federal government is partly a mirror of the history of our view of government. As the central government has grown in its reach and financial strength, congress and the courts have grudgingly given up pieces of sovereign immunity. But despite all the inroads, sovereign immunity is still the rule rather than the exception, and it colors everything this court does.

LITIGATION GROUND RULES

In terms of the mechanics of suing the government here.

- No right to a jury trial. Not part of the waiver of sovereign immunity.
- The court has nationwide jurisdiction, although it is required to maintain its main courthouse and clerk here in DC. Trials held around the country, depending on what is most convenient. We are equipped to hear oral argument by telephone in the courtroom. Each case is assigned when docketed. Separate scheduling; no docket calls.
- The docket is not huge, we get about 700 new filings a year, although the cases tend to be large and complex. Our settlement rate is lower than at other courts, because in tax and contract cases we come at the end of an administrative process that tends to weed out settlements. The government also has the luxury of being able to litigate more for principle.
- US is always the named defendant. No litigation between private parties. Although when the government is sued in patent cases, the government frequently brings in as TPD the private party that sold it the alleged infringing product.
- The court has its own rules of procedures. Most respects the rules are identical to the FRCP, but there are enough differences that if you practice here, get a copy from the clerk. Do not file something without reading the rule.
- Pretrial procedure controlled by Appendix G. Emphasis on communication between counsel; between court and counsel. Management device for court. At the time adopted, it was a unique and farsighted attempt to improve litigation. By that I mean it requires counsel to meet on at least two occasions to plan the pretrial process, and it makes it possible for the court to intervene more intelligently to manage the case. Encourages court supervision. There is an emphasis on early disclosure of issues and evidence. If the parties and the court take advantage of Appendix G, it makes a world of difference in terms of the coherence of trial.
- The rules of evidence apply, although degree to which enforced varies.
- The new amendments to the rules of civil procedure adopted by the Supreme Court are similar in spirit to Appendix G in that they encourage disclosure and communication. But they go much further. We have not implemented our version yet, but will do so soon.

NOTICE TO COUNSEL

PROTEST CASES FILED PURSUANT TO 28 U.S.C. § 1491(b)

A. Introduction

1. General Order No. 38 (General Order) describes standard practices in protest cases filed pursuant to 28 U.S.C. § 1591(b) (both pre-award and post-award protest cases), and supplements the Rules of the United States Court of Federal Claims (Rule or Rules), which are otherwise fully applicable to these cases.

B. Requirement for Pre-Filing Notification

2. In order to expedite proceedings, prior to the filing of a protest case pursuant to 28 U.S.C. § 1491(b), plaintiff's counsel shall (except in exceptional circumstances to be described in moving papers) provide *at least* 24-hours advance notice to the filing of the case to the:
 - Department of Justice, Commercial Litigation Branch, Civil Division [(202) 514-7300];
 - Clerk, United States Court of Federal Claims [(202) 219-9657];
 - procuring agency contracting officer by facsimile transmission, only; and
 - apparently successful bidder/offeror in cases (where there has been an award and the plaintiff has received notice of the identity of the awardee).

Such notice shall be provided during conventional business hours. The pre-filing notice is intended to permit the Department of Justice to assign an attorney to the case who can be prepared to address relevant issues on a timely basis, and to permit the Court to insure the availability of appropriate Court resources. Failure to provide pre-filing notification will not preclude the filing of the case, but is likely to delay the initial processing of the case, including the scheduling of the initial status conference [See ¶ 8, below].

3. The pre-filing notice plaintiff provided pursuant to ¶ 2, above, should include the following information:
 - a. The name of the procuring agency and the number of the solicitation in the contested procurement;

NOTICE TO COUNSEL

- b. The name and telephone number of the contracting officer responsible for the procurement;
- c. Whether plaintiff contemplates requesting temporary or preliminary injunctive relief pursuant to Rule 65;
- d. Whether the action was preceded by the filing of a protest before the General Accounting Office (GAO)(if so, provide the "B-" number of the protest and indicate whether a decision was issued); and
- e. Whether plaintiff contemplates the need for the Court to enter a protective order.

Annotation: This section of the General Order expands upon the current requirement of Rule 65(f) which states in relevant part:

- (1) An application for a temporary restraining order and/or preliminary injunction ... shall be accompanied by a statement of plaintiff's attorney that the attorney has hand delivered or caused to be hand delivered 2 copies of each of the foregoing documents to the [Department of Justice]
- * * *
- (2) If plaintiff's attorney knows the name and address of the apparently successful bidder, plaintiff's attorney shall give the attorney notice by telephone or telegram of the intended filing of the application, shall provide the apparently successful bidder with a copy of its application, served on the same day . . . [.]

Based upon comments received by the Bid Protest Group, it appears that applications under the current Rules are often filed with the Court by the same courier who has either just filed the application with the Department of Justice or is about to do so. Regardless of the manner of service, Department of Justice attorneys frequently receive inadequate or untimely notice of the filing of a protest action which hinders the government's ability to prepare for the early activities involved in a case, renders the initial proceedings in the case less informed and generally hampers the efficiency of the overall proceeding of the Court and the parties.

Both the private and public bar representatives of the Bid Protest Group recognized that inadequate or untimely notice of the filing of a protest case adversely affected the efficient processing of the case. All agreed that initial proceedings were most effective and useful when counsel for both sides were prepared. In addition, issues such as how to protect proprietary or source selection information and the overall timing and sequence of the case benefit from early, informed discussion by the parties prior to the initial proceedings before the Court.

To address the issue, Section B of the General Order was drafted to provide for pre-filing notification of the case to the Department of Justice, the Court and to the awardee's counsel, if known. Also provided is a description of the information to be included in the pre-filing notification.

The only substantive issue dividing the members of the Bid Protest Group was whether the pre-filing notification should be expressed as a requirement (using the word "shall"), or as a matter to be strongly suggested (using the words such as "the Court expects" or a similar statement of direction).

NOTICE TO COUNSEL

It should be emphasized that the members of the Bid Protest Group uniformly held the view that failure to give pre-filing notification would not preclude the filing of the case. The only penalty for failure to provide such notice, therefore, was possible delay to the initial proceedings. The arguments advanced by the proponents of each view are summarized below:

The Mandatory View — A mandatory requirement provides certainty and predictability by providing a process to be followed in all protest cases. Any notice provision that is expressed in nonmandatory terms would allow plaintiffs' attorneys to exercise discretion as to whether or not to comply with the provision. Such a voluntary approach is unlikely to cure the problems that have prompted the members of the Bid Protest Group to uniformly support the concept of advance notice. Current Rules 65(f)(1) and (2) use the mandatory "shall" in describing plaintiff counsel's obligation to certify that copies of applications for injunctive relief were provided to the government and awardee's counsel, and Rule 6(b) makes it a requirement to supply advance notice to the opposing party of a motion for enlargement of time. In neither case does the failure to comply require a dismissal of (or refusal to file) the accompanying pleading.

The Nonmandatory View — There are factual circumstances in which a 24-hour pre-filing notification cannot be provided without sacrificing substantial interests of the plaintiff. Absolute compliance with the "requirement" in all cases will, therefore, be impossible. The "requirement" set forth in the General Order is not accompanied by a sanction, other than the potential delay to the initial proceedings. As such the direction is not a true requirement, but a strong recommendation that could be expressed using some form of advisory language. Stating such a direction as a requirement creates an ambiguity, is confusing and, therefore, inappropriate when a more accurate representation of the direction can be provided.

The members of the Bid Protest Group were uniform in their belief that pre-filing notification would be an important contribution to the efficient management of protest cases, and therefore produced the language in the proposed ¶ 2 which reflects use of the word "shall" with an exception for "extraordinary circumstances."

C. Filing Under Seal

4. In the event plaintiff believes its Complaint, or any pleadings filed at the same time, contain confidential or proprietary information and plaintiff seeks to protect that information from public scrutiny, it must file a motion for leave to file the Complaint under seal, which shall be filed at the same time the Complaint is filed. When a Complaint or related papers are filed with an accompanying motion for leave to file under seal, the pleadings will be treated as though filed under seal while the motion is pending.
5. In filing documents under seal, a party shall follow the procedures described in Rule 83.
6. Complaints (and other pleadings filed at the same time) that are filed under seal shall be accompanied by a redacted version of the pleading (a version that omits confidential or proprietary information), which will be available for public scrutiny.
7. To the extent the Complaint or any pleadings filed at the same time contain classified information, the filing must conform to the requirements of the classifying agency.

NOTICE TO COUNSEL

Annotation: Paragraphs 4, 5, and 7 in this Section are intended to reflect current practice. Paragraph 6 requires plaintiffs, who file their Complaints and/or related papers under seal, to file a redacted copy of such documents with the Court at the same time. The redacted copies would be available for review by the public. While the press and public may have an interest in reviewing such documents, the need for redacted pleadings is particularly important to the awardee and other interested parties. By having access to the redacted documents, they will be able to make more informed judgments as to whether to intervene in the litigation.

D. Initial Status Conference

8. The Court will schedule an initial status conference with the parties to address relevant issues including, but not limited to, the following:
- (a) Identification of interested parties;
 - (b) Requests for temporary or preliminary injunctive relief, if filed [*See* ¶ 15, below];
 - (c) The content of a protective order, if requested by one or more of the parties;
 - (d) The content and time for filing of the administrative record;
 - (e) Whether it may be appropriate to supplement the administrative record; and
 - (f) The nature of and schedule for further proceedings.

This initial status conference will be held as soon as practicable after the filing of the Complaint.

Annotation. The members of the Bid Protest Group are unanimous in their view that an early initial status conference in protest cases is a critical case management tool. The General Order lists five topics of the conference that will be relevant in most cases. Early discussion of these topics often will allow routine procedural matters to be resolved without the need for the filing of motion papers and the consumption of judicial resources.

The initial status conference has a special role in cases in which the plaintiff has requested temporary or preliminary injunctive relief. Information made available at the conference may have a material impact on the need to consider such relief. Relevant information might include the schedule for further proceedings in the case, likely changes to the status quo during the course of those proceedings, and the government's willingness to withhold award or suspend performance, whether pending a hearing on a motion for preliminary injunction or pending a final hearing on the merits. Further, plaintiffs who know the Court will conduct a reasonably prompt initial status conference may be less likely to seek a temporary restraining order. *See also* Annotation to § E, below.

NOTICE TO COUNSEL

E. Injunctive Relief

9. The Court's practice is to expedite protest cases to the greatest practical extent and to conduct hearings on motions for preliminary injunctions at the earliest practical time. Accordingly, where a plaintiff seeks a preliminary injunction, it may not need to request a temporary restraining order.
10. In cases in which the plaintiff seeks temporary or preliminary injunctive relief, counsel should be prepared to discuss the following matters at the initial status conference:
 - (a) Whether and to what extent, absent temporary or preliminary injunctive relief, the Court's ability to afford effective final relief is likely to be prejudiced;
 - (b) If a temporary restraining order has been requested, whether the government will agree to withhold award or suspend performance pending a hearing on the motion for preliminary injunction;
 - (c) If a preliminary injunction has been requested, whether the government will agree to withhold award or suspend performance pending a final decision on the merits;
 - (d) An appropriate schedule for completion of the briefing on any motion for a preliminary injunction;
 - (e) The security requirements of Rule 65(c); and
 - (f) Whether the hearing on the preliminary injunction should be consolidated with a final hearing on the merits.

Annotation: Paragraph 9 of the General Order recognizes that plaintiffs in protest cases sometimes file applications for temporary restraining orders principally to insure that the Court will hear the motion for a preliminary injunction at an early state of the proceeding, and not because they expect that irreparable injury will occur in the ten-day period covered by a temporary restraining order. To address this problem, some courts have adopted rules of practice that provide for the expedited briefing and early hearing of motions for preliminary injunctions. See Local Rule 205 of the U.S. District Court for the District of Columbia. This paragraph of the General Order addresses this issue by defining a general principle, while preserving the court's flexibility to establish an appropriate schedule for the initial status conference tailored to the needs of each case. See also Annotation to § D, above.

Paragraph 10 of the General Order identifies matters relating to requests for temporary or preliminary injunctive relief that should be discussed at the initial status conference. The Bid Protest Group hopes that, in some significant number of cases, early discussion of these matters will obviate the need for the Court to hear motions under Rule 65.

NOTICE TO COUNSEL

Two interrelated factors rest at the heart of this section of the General Order. First, the shorter the period of time until final disposition of the case on the merits, the less likely it is that the plaintiff will suffer irreparable injury during the pendency of the litigation in the absence of Rule 65 relief and the more likely it is that the government may be willing to withhold award or suspend performance voluntarily. Second, discussion of the circumstances surrounding the procurement at the initial status conference may assist the Court and the parties in evaluating whether the court's ability to award effective final relief either is or is not likely to be prejudiced in the absence of preliminary injunctive relief.

The list of topics to be addressed during the initial status conference also includes other procedural matters whose early disposition may facilitate the Court's resolution of a Rule 65 motion. These include briefing schedules for the motion for preliminary injunction and the security requirements of Rule 65(c).

F. Protective Orders

11. *Preliminary Matters*

- (a) The principal vehicle relied upon by the Court to insure the protection of sensitive information is the Protective Order, which defines the procedures to be followed to obtain access to protected information, to identify and safeguard such information, to prepare redacted versions of such information and to dispose of protected information at the conclusion of the case.
- (b) Information a party identifies as protected may be disclosed only to parties who have been "admitted" to the Protective Order.
- (c) Once a Protective Order is issued by the Court, individuals who seek access to protected information, must file an appropriate application. If admitted to the Protective Order, the individual becomes subject to the terms of the Order. It is the responsibility of those admitted to the Protective Order to take the necessary steps to insure that the information is protected, consistent with the terms of the Protective Order, while it is under their control (this includes oversight of support personnel who may have access to protected information).
- (d) Court, procuring agency, or Department of Justice personnel are automatically admitted to Protective Orders when issued and are subject to their terms.

12. *Issuance of a Protective Order*

- (a) Motions for Protective Orders must meet the requirements of Rule 10 and Appendix H. The court may issue a Protective Order at its discretion.

NOTICE TO COUNSEL

- (b) A sample Protective Order, Appendix A, is attached hereto. The parties are cautioned that individual judges and the parties themselves may want to amend the sample Protective Order to meet the needs of specific cases or their individual preferences. *It is the specific Protective Order issued in a case that governs the treatment of protected information in that case.*

13. Application for Admission to the Protective Order

- (a) Each party seeking access to protected information upon behalf of an individual must file with the court, an appropriate "Application for Admission to the Protective Order." Separate applications for individual outside and in-house counsel, and for consultants or experts retained by counsel for a party, are contained in Appendices B and C, attached hereto. These forms may also be amended by the court in response to individual case needs.
- (b) Admission to the Protective Order will be based upon the contents of the application form submitted by an individual representing a party.
- (c) Objections to an Application for Admission to a Protective Order must be filed with the Court within two days of a party's receipt of an application.
- (d) In considering objections to Applications for Admission to a Protective Order, the Court will consider such factors as the nature and sensitivity of the information at issue, a party's need for access to the data in order to effectively represent its client, the overall number of applications received and other concerns that may affect the risk of inadvertent disclosure.
- (e) Admission to a Protective Order will be made by the Court in the form of an order.

14. *Preparation of Redacted Pleadings* — After a Protective Order is entered the preparation and filing of redacted documents shall be governed by the terms of the Protective Order.

15. *Disposition of Material Containing Protected Information* — The specific procedures to be followed in disposing of protected material at the conclusion of the case shall be as described in the Protective Order.

Annotation: In many protest cases, one or more of the litigants wants to protect from becoming available to the public certain information referred to in, or accompanying, pleadings. Typically, contractors want to protect confidential or proprietary information, while government agencies want to protect source selection sensitive information.

NOTICE TO COUNSEL

To insure that only appropriate party representatives have access to the protected information, and to define the procedures for identifying, handling and disposing of the information, the court and other fora that hear procurement-related cases (e.g., the federal district courts, the GAO and the GSBGA, when it had jurisdiction over protest cases) generally rely upon protective orders to establish these guidelines.

The Bid Protest Group believed that it would be more efficient for the Court and the parties to have available a sample form protective order that could be tailored by exception to the specific needs of an individual case, rather than attempt to develop "from scratch" protective orders in each case. As a result, the General Order includes a section describing the protective order process while attaching a sample form order along with application forms.

More specifically:

- Paragraph 11 sets forth background information concerning protective orders.
- Paragraph 12 provides that a party seeking a protective order must make its request by motion, and the motion must conform to Rule 10 and Appendix H. The sample protective order is provided as Appendix A to the General Order. The Court is free to use the form or modify it as it deems appropriate.
- Paragraph 13 sets forth the process by which individuals are authorized to gain access to protected material (*i.e.*, by applying for access to the information in a form requiring the applicant to supply certain information and in which the applicant undertakes specific obligations.
- Paragraphs 14 and 15 simply highlight the fact that certain important concerns regarding the handling of protected information are addressed more fully in the protective order, itself.

G. The Content and Filing of the Administrative Record

16. The United States will be required to identify and provide (or make available for inspection) the administrative record in a protest case by the date(s) established at the initial status conference. The filing of all or a part of the administrative record shall be accompanied by a Notice of Filing.
17. Early production of relevant core documents may expedite final resolution of the case. The core documents relevant to a protest case may include, as appropriate the:
 - (a) agency's procurement request, purchase request, or statement of requirements;
 - (b) agency's source selection plan;
 - (c) bid abstract or prospectus of bid;

NOTICE TO COUNSEL

- (d) Commerce Business Daily or other public announcement of the procurement;
- (e) solicitation, including any instructions to offerors, evaluation factors, solicitation amendments, and requests for best and final offers;
- (f) documents and information provided to bidders during any pre-bid or pre-proposal conference;
- (g) agency's responses to any questions about or requests for clarification of the solicitation;
- (h) agency's estimates of the cost of performance;
- (i) correspondence between the agency and the protester, awardee, or other interested parties relating to the procurement;
- (j) records of any discussions, meetings, or telephone conferences between the agency and the protester, awardee, or other interested parties relating to the procurement;
- (k) records of the results of any bid opening or oral motion auction in which the protester, awardee or other interested parties participated;
- (l) protester's, awardee's, and other interested parties' offers, proposals, or other responses to the solicitation;
- (m) agency's competitive range determination, including supporting documentation;
- (n) agency's evaluations of the protester's, awardee's, or other interested parties' offers, or other responses to the solicitation, proposals, including supporting documentation;
- (o) agency's source selection decision, including supporting documentation;
- (p) pre-award audits, if any, or surveys of the offerors;
- (q) notification of contract award and executed contract;
- (r) documents relating to any pre- or post-award debriefing;
- (s) documents relating to any stay, suspension, or termination of award or performance pending resolution of the bid protest;

NOTICE TO COUNSEL

- (t) justifications, approvals, determinations and findings, if any, prepared for the procurement by the agency pursuant to statute or regulation; and
 - (u) the record of any previous administrative or judicial proceedings relating to the procurement, including the record of any other protest of the procurement.
18. Because a protest case cannot be efficiently processed until production of the administrative record, the Court expects the United States to produce the core documents and the remainder of the administrative record as promptly as circumstances will permit. (See Rule 83, which is applicable to administrative records, unless waived by the Court.)
19. Any additional documents within the administrative record shall be produced at such time as may be agreed to by the parties or ordered by the Court.

Annotation: At the outset, there was considerable debate within the Bid Protest Group over the definition, scope and breadth of the administrative record and what it means to supplement the administrative record. Recognizing that determination of the content of the record was a matter for the Court to decide on a case-by-case basis in accord with 5 U.S.C. § 706, the Bid Protest Group determined early in the process that any attempt to develop an all-encompassing definition of the administrative record was both impractical and inappropriate.

As a matter of general principle it was recognized that the earlier all or significant portions of the administrative record could be produced, the earlier the case could be resolved. Therefore, in lieu of developing an all-encompassing definition of the administrative record, the Bid Protest Group developed the concept of "core" documents and a list of documents typically generated by procuring agencies in the conduct of a procurement. It is believed that in most cases, the appropriate core documents are reasonably available and are generally the most relevant documents to any protest action. The list of proposed core documents in ¶ 17 was not intended to be exhaustive, but simply illustrative of the types of documents that are available. Because the list contains document generated in a wide variety of procurements (e.g., sealed bids and negotiated procurements), not all of the listed documents will exist in any single procurement.

The General Order does not mandate production of all core documents in every protest. Rather, the documents to be produced are those core documents that are relevant to the protest as filed. A minority of the Bid Protest Group believed that, because they are part of the administrative record, all core documents from a procurement should be produced in every protest.

Earlier drafts of the General Order included specific numbers of days within which the core documents were to be identified and produced by the Government. However, locations of documents relevant to a protest, the size of the administrative record, and the resources available to copy and/or produce the record all varied by case. For that reason, consensus could not be reached by the Bid Protest Group on an appropriate number of days that would be reasonable and applicable in all cases. A canvas of the administrative agencies resulted in a view that a general time frame of 25-30 days within which to produce the record comparable to that used by the GAO — was appropriate. That period, however, concerned production of the entire administrative record, not core documents. The conclusion of the Bid Protest Group was that the establishment of record production dates for the core

NOTICE TO COUNSEL

documents and the remainder of the record is best handled by the Court at the initial status conference where the unique circumstances of each procurement can be taken into consideration, and where it can be determined when available core documents can be produced.

H. Admission of Counsel

20. In those procurement protest cases in which counsel for the plaintiff is not a member of the bar of the Court and does not have sufficient time to gain admission prior to the filing of the action, the Clerk shall accept for filing any proper Complaint and accompanying pleadings under 28 U.S.C. § 1491(b) from such counsel, conditioned upon counsel's prompt pursuit of admission to practice before the United States Court of Federal Claims pursuant to Rule 81. Failure to do so within 30 days of the initiation of the action may result in dismissal of the action, and possible referral for disciplinary action.

Annotation: Because plaintiff's counsel are often given limited time in which to file protest cases, and these counsel (particularly those outside of Washington) may not have been previously admitted to the court, this section of the General Order notifies counsel that they can file the case and simultaneously seek admission to the Court's bar.

-- S A M P L E --

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

_____)
)
 Plaintiff,)
)
 v.)
 UNITED STATES OF AMERICA,)
)
 Defendant.)
 _____)

No. _____

Judge _____

PROTECTIVE ORDER

The Court has determined that certain information that may necessarily be disclosed orally or in writing during this action may be competition sensitive (eg., source selection information), proprietary, confidential, or otherwise protectable. To address these concerns, it is ordered that protected information, provided formally or informally during the course of this action, shall be disclosed by the parties only as follows:

1. "Protected information" as used herein means:
 - a. Information, the protection of which is necessary to safeguard the competition process, including source selection information, and proprietary or confidential information contained in any document (including any pleading, motion, brief, notice, or discovery request or response) produced, filed, or served by any party to this litigation that is designated as protected by a party (See ¶ 3); and
 - b. Information, the protection of which is necessary to safeguard the competitive process, including source selection information, and any proprietary or confidential information contained in any deposition, testimony, affidavit taken or provided during this litigation that is

-- S A M P L E --

designated as protected by a party (See ¶ 3).

2.
 - a. Protected information shall be used by private parties solely for the purposes of this litigation and shall not be given, shown, made available, discussed, or otherwise communicated in any form except as provided herein.
 - b. Except as provided in paragraphs 2(d) and (e), the only categories of person who may be given access to protected information are (i) legal counsel for a party and (ii) independent consultants and experts assisting such counsel in connection with the litigation.
 - c. To be granted access to protected information, any such person shall first read this Protective Order and, if an attorney, execute a copy of the Application for Access to Materials Under Protective Order by Inside or Outside Counsel (Appendix B) or, if a consultant or expert, execute a copy of the Application for Access to Materials Under Protective Order by a Consultant or Expert (Appendix C). The party seeking to have such person granted access shall then provide a copy of the executed Application to each other party. Such person shall, without further action by the Court, be permitted access to protected material at the close of the second business day after the other parties have received the application, unless, in the interim, any party informs the requesting party of an objection. If the parties are unable to reach agreement regarding an objection, the party seeking access may present the matter to the Court. Such person shall not be given access unless and until the Court authorizes such access.
 - d. Paralegal, clerical and administrative support personnel assisting any counsel who has been admitted under this Protective Order may be given access to protected information if such personnel have first been informed by such counsel of the obligations imposed by this Protective Order.
 - e. Court, procuring agency and Department of Justice personnel are automatically subject to the terms of this Protective Order and are entitled to access to protected information, without further action.
3.
 - a. Protected material of any kind may be provided only to the Court and to individuals authorized by this Protective Order, and must be in a sealed parcel containing the legend "PROTECTED MATERIAL ENCLOSED"

-- S A M P L E --

conspicuously placed on the outside of the parcel containing the information. A copy of the certificate of service identifying the document being filed should be attached to the front of each envelope.

- b. The first page of each document containing protected material is to be clearly marked as follows:

**PROTECTED MATERIAL
TO BE DISCLOSED ONLY IN ACCORDANCE WITH
U.S. COURT OF FEDERAL CLAIMS PROTECTIVE ORDER**

The party claiming protection must identify the specific portion of the material for which it is claiming protection.

- c. Any courtesy copies of protected materials that are filed with the Court for use by the judge should be marked as such.
- d. The Court will maintain properly marked protected pleadings or materials under seal.
4. a. Upon the request of a party, a party that files a pleading in accordance with paragraph 3 hereof shall promptly serve on each other party a proposed redacted copy of the pleading with the claimed protected information deleted and clearly marked "proposed redacted copy" in the upper right-hand corner of the first page.
- b. Within two business days after their receipt of the proposed redacted copy, other parties shall advise the party originating the pleading of any additional redactions they require. The originating party shall promptly provide each party with a copy of the pleading from which all material that any party has requested be redacted has been redacted and clearly marked "agreed-upon redacted copy— may be made public" in the upper right-hand corner of the first page. During the two-day period, the proposed redacted copy shall be treated as protected. At the expiration of the two-day period, or when agreement is reached, the agreed-upon redacted copy shall be filed with the Court by the originating party.
- c. Any party at any time may serve on the other parties a proposed redacted copy of any documents (other than a pleading, to which paragraphs 4(a) and (b) apply) filed with the Court or of any document produced or

-- S A M P L E --

generated in discovery whether or not filed with the court and shall clearly mark the document in the manner provided in paragraph 4(a). The other parties shall respond promptly, advising the serving party of any additional redactions they require. The serving party shall proceed as provided in the last sentence of paragraph 4(b).

5. Any party may at any time object to another party's designation of particular information as protected. If the parties are unable to resolve the matter by agreement, counsel for the objecting party may submit the matter to the Court for resolution. Until the court resolves this matter, the disputed information shall be treated as protected.
6. Without the consent of the other parties, no private party may make more than three (3) copies of any document containing protected information received from another party. Private parties may make additional copies for filing with the Court, service on the parties or use in discovery and may also incorporate limited amounts of protected information in their pleadings. All copies of such documents and of pleadings referring to protected information shall be clearly labeled in the manner required by paragraph 3 of this Protective Order.
7. Each person covered by this Protective Order shall take all necessary precautions to prevent disclosure of protected information, including but not limited to physically securing, safeguarding and restricting access to the protected information. The confidentiality of information learned pursuant to this Protective Order shall be maintained in perpetuity.
8. Within thirty (30) days after the conclusion of this action (including any and all appeals and remands), counsel for each private party shall (i) destroy all protected information and certify in writing to all parties that such destruction has occurred and/or (ii) return the protected information to the parties from which the information was received. Provided the documents are marked protected and are properly secured, counsel for each party may retain one copy of the unredacted pleadings.
9. Any party whose information has been designated as protected may at any time waive the protection of this Protective Order with respect to any and all such information by so advising counsel for all parties in writing, identifying with specificity the information to which this Protective Order shall not longer apply.
10. Nothing contained in this Protective Order shall preclude a party from seeking

-- S A M P L E --

relief from this Protective Order through the filing of an appropriate motion with the Court that sets forth the basis for the relief sought.

11. If a party determines that a previously produced document inadvertently was not identified as containing protected information, the producing party shall give notice in writing that the document is to be treated as proprietary, and thereafter the designated document shall be treated in accordance with this Protective Order.
12. Counsel for the parties shall promptly report any breach of the provisions of this Protective Order to counsel for the opposing party(ies). Upon discovery of any breach, plaintiff's, defendant's, or intervenor's attorneys shall immediately take appropriate action to cure the violation and retrieve any protected information that may have been disclosed to persons not covered by this Protective Order. The parties shall reasonably cooperate in determining the reasons for any such breach.

Judge

-- S A M P L E --

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

_____)	
)	
Plaintiff,)	
)	
v.)	No. _____
)	
UNITED STATES OF AMERICA,)	Judge _____
)	
Defendant.)	
)	
_____)	

APPLICATION FOR ACCESS TO MATERIALS UNDER PROTECTIVE ORDER BY OUTSIDE OR INSIDE COUNSEL

1. I, _____, hereby apply for access to protected materials covered by the Protective Order issued in connection with this proceeding.

2. a. I [outside counsel only] am an attorney with the law firm of _____ and have been retained to represent _____, a party to this proceeding.

b. I [inside counsel only] am in-house counsel (my title is: _____) for _____ a party to this proceeding.

3. I am [] am not [] a member of the bar of the United States Court of Federal Claims (the Court).

4. My professional relationship with the party I represent in this proceeding and its personnel is strictly one of legal counsel. I am not involved in competitive decision making as

105

-- S A M P L E --

discussed in *U.S. Steel Corp. v. United States*, 730 F.2d 1465 (Fed. Cir. 1984), for or on behalf of the party I represent, any entity that is an interested party to this proceeding, or any other firm that might gain a competitive advantage from access to the material disclosed under the Protective Order. I do not provide advice or participate in any decisions of such parties in matters involving similar or corresponding information about a competitor. This means that I do not, for example, provide advice concerning or participate in decisions about marketing or advertising strategies, product research and development, product design or competitive structuring and composition of bids, offers, or proposals with respect to which the use of protected material could provide a competitive advantage.

5. I [outside counsel only] identify here (by writing "none" or listing names and relevant circumstances) those attorneys in my firm who, to the best of my knowledge, cannot make the representations set forth in the preceding paragraph:

6. I identify here (by writing "none" or listing names, position, and responsibilities) any member of my immediate family who is an officer or holds a management position with an interested party in the proceeding or with any other firm that might gain a competitive advantage from access to the material disclosed under the Protective Order.

7. I identify here (by writing "none" or identifying the name of the forum, case number, date and circumstances) instances in which I have been denied admission to a protective order, had admission revoked or been found to have violated a protective order issued by any administrative or judicial tribunal:

8. I [inside counsel only] have attached a detailed narrative providing the following information:

- a. my position and responsibilities as in-house counsel, including my role in providing advice in procurement-related matters;
- b. the person(s) to whom I report and their position(s) and responsibilities;

-- S A M P L E --

- c. the number of in-house counsel at the office in which I work and their involvement, if any, in competitive decision making and in providing advice in procurement-related matters.
 - d. my relationship to the nearest person involved in competitive decision making (both in terms of physical proximity and corporate structure); and
 - e. measures taken to isolate me from competitive decision making and to protect against the inadvertent disclosure of protected material to persons not admitted under the Protective Order.
9. I have read the Protective Order issued by the Court in this proceeding. I will comply in all respects with that order and will abide by its terms and conditions in handling any protected information produced in connection with the proceeding.
10. I acknowledge that a violation of the terms of the Protective Order may result in the imposition of such sanctions as may be deemed appropriate by the court and in possible civil and criminal liability.

By my signature, I certify that, to the best of my knowledge, the representations set forth above (including attached statements) are true and correct.

Signature

Date Executed

Typed Name and Title

Telephone Number

Fax Number

-- S A M P L E --

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

_____)
)
 Plaintiff,)
)
 v.)
 UNITED STATES OF AMERICA,)
)
 Defendant.)
 _____)

No. _____

Judge _____

APPLICATION FOR ACCESS TO MATERIALS UNDER PROTECTIVE ORDER BY EXPERT CONSULTANT OR WITNESS

1. I, the undersigned, am a _____ with _____ and hereby apply for access to protected materials covered by the protective order issued in connection with this proceeding.

2. I have been retained by _____ and will, under the direction and control of _____, assist in the representation of _____ in this proceeding.

3. I hereby certify that I am not involved in competitive decisionmaking as discussed in *U.S. Steel Corp. v. United States*, 730 F.2d 1465 (Fed. Cir. 1984), for or on behalf of any party to this proceeding or any other firm that might gain a competitive advantage from access to the material disclosed under the protective order. Neither I nor my employer provides advice or participates in any decisions of such parties in matters involving similar or corresponding information about a competitor. This means, for example, that neither I nor my employer provides advice concerning or participates in decisions about marketing or advertising strategies, product research and development, product design or competitive structuring and composition of

-- S A M P L E --

bids, offers, or proposals with respect to which the use of protective materials could provide a competitive advance.

4. My professional relationship with the party for whom I am retained in this proceeding and its personnel is strictly as a consultant on issues relevant to the proceeding. Neither I, my spouse, nor any member of my immediate family holds office or a management position in any company that is a party in this proceeding or in any competitor or potential competitor of a party.

5. I have attached the following information

- a. a current resume describing my education and employment experience to date;
- b. a list of all clients for whom I have performed work within the two years prior to the date of this application and a brief description of the work performed;
- c. a list of all clients for whom my employer has performed work within the two years prior to the date of this application and for whom the use of protected material could provide a competitive advantage and a brief description of the work performed;
- d. a statement of the services I am expected to perform in connection with this proceeding;
- e. a description of the financial interests that I, my spouse, and/or my family has in any entity that is an interested party in this proceeding or whose protected material will be reviewed; if none, I have so stated;
- f. a list identifying by name of forum, case number, date and circumstances all instances in which I have been granted admission or been denied admission to a protective order, had a protective order admission revoked or been found to have violated a protective order issued by an administrative or judicial tribunal; if none, I have so stated; and
- g. a statement of the professional associations to which I belong, including membership numbers.

-- S A M P L E --

6. I have read a copy of the protective order issued by the Court in this proceeding. I will comply in all respects with all terms and conditions of that order in handling any protected information produced in connection with the proceeding. I will not disclose any protected information to any individual who has not been admitted under the protective order by the Court.

7. For a period of two years from the date this application is granted, I will not engage or assist in the preparation of a proposal to be submitted to any agency of the United States Government for _____ where I know or have reason to know that any party to this proceeding, or any successor entity, will be a competitor, subcontractor or teaming member.

8. For a period of two years from the date this application is granted, I will not engage or assist in the preparation of a proposal or submission to _____ nor will I have any personal involvement in any such activity.

9. I acknowledge that a violation of the terms of the protective order may result in the imposition of such sanctions as may be deemed appropriate by the Court and in possible civil and criminal liability.

By my signature, I certify that, to the best of my knowledge, the representations set forth above (including attached statements) are true and correct.

Signature

Date Executed

Typed Name and Title

Telephone Number

Fax Number

In the United States Court of Federal Claims

AMENDED GENERAL ORDER NO. 13

The United States Court of Federal Claims is sensitive to rising litigation costs and the delay often inherent in the traditional judicial resolution of complex legal claims. While the mandates of due process inevitably place limits on how expeditious a trial of a complex issue can be, there are no such limits when parties voluntarily seek noncompulsory settlements. Since justice delayed is justice denied, it is an obligation of this court to further the settlement process in all ways consistent with the ultimate guarantee of a fair and complete hearing to those disputes that cannot be resolved by mutual consent. Courts are institutions of last resort and while preserving that "last resort" as a sacred trust, they should insure their use only when other methods of dispute resolution have failed. In response to these concerns, the court is implementing three methods of Alternative Dispute Resolution: *Settlement Judges*, *Mini-Trials*, and *Third-Party Neutrals*. The methods to be used in the Court of Federal Claims are described in the "Notice to Counsel" attached to this Order.

IT IS ORDERED, effective this date, that the Notice to Counsel shall be distributed as follows:

- (1) to counsel for all parties in cases currently pending before the Court of Federal Claims, and
- (2) to counsel for all parties in cases filed after the date of this Order.

November 8, 1996

BY THE COURT



LOREN A. SMITH
Chief Judge

NOTICE TO COUNSEL

Alternative Dispute Resolution Techniques

In response to rising litigation costs and the delay often inherent in the traditional judicial resolution of complex legal claims, the United States Court of Federal Claims is implementing three methods of alternative dispute resolution (ADR) for use in appropriate cases. The Court of Federal Claims encourages all reasonable avenues toward settlement of disputes, including the usual dialogue between the trial judge and counsel. Implementation by the court of these ADR methods does not preclude use by the parties of other ADR techniques which do not require court involvement.

The ADR methods outlined below are both voluntary and flexible, and should be employed early in the litigation process in order to minimize discovery. Both parties must agree to use the procedures. Because these procedures are designed to promote settlement and involve the application of judicial resources, however, the court views their use as most appropriate where the parties anticipate a lengthy discovery period followed by a protracted trial. These requirements typically will be met where the amount in controversy is greater than \$100,000 and trial is expected to last more than one week.

When both counsel agree and wish to employ one of the ADR methods offered, they should notify the presiding judge of their intent as early as possible in the proceedings, or concurrently with submission of the Joint Preliminary Status Report required by Appendix G. The presiding judge will consider counsels' request and make the final decision whether to refer the case to ADR. If ADR is considered appropriate, the presiding judge will refer the case to the ADR Administrator 1) for assignment to a Court of Federal Claims judge who will act as a settlement judge or preside over a mini-trial, or 2) for the appointment of a third-party neutral. If the case is referred to an ADR judge, that judge will exercise ultimate authority over the form and function of each method within the general guidelines adopted by the court. Accordingly, the parties will promptly meet with the assigned ADR judge to establish a schedule and procedures for the technique chosen. Should none of these techniques produce a satisfactory settlement, the case will be returned to the presiding judge's docket. Except as allowed by Federal Rule of Evidence 408, all representations made in the course of the selected ADR proceeding are confidential and may not be used for any reason in subsequent litigation.

I. General Provisions

A. Administrator. There will be an ADR Administrator who will assign cases as well as facilitate the program. The Administrator will also keep statistics for each judge who volunteers to participate in the program on the number of pending ADR cases and the disposition of ADR cases.

B. Training. All judges, as well as third-party neutrals shall be properly trained in the handling of ADR matters.

C. Consent. Consent of all parties is required in order for a case to be referred to ADR.

D. Judicial Involvement. The Administrator will assign ADR cases only to judges who have agreed to participate in the program.

II. Settlement Judge

In many circumstances, settlement can be fostered by a frank, in-depth discussion of the strengths and weaknesses of each party's case before a neutral advisor. Although this alternative can be used successfully at any stage of the litigation, it is suggested that it be adopted as early in the process as feasible to eliminate unnecessary cost and delay. Moreover, the agenda for these meetings with the settlement judge should remain flexible to accommodate the requirements of the individual cases. Through this ADR method, the parties will gain the benefit of a judicial assessment of their settlement positions, without jeopardizing their ability to obtain an "impartial" resolution of their case by the presiding judge should settlement not be reached.

III. Mini-Trial

The mini-trial is a highly flexible, expedited procedure where each party presents an abbreviated version of its case to a neutral advisor (a judge other than the presiding judge), who then assists the parties in negotiating a settlement. Because the mini-trial similarly is designed to eliminate unnecessary cost and delay, it should be adopted before extensive discovery commences. This ADR technique, however, should be employed only in those cases which involve factual disputes and are governed by well-established principles of law. Cases which present novel issues of law or where witness credibility is a major factor are handled more effectively by traditional judicial methods.

Although the procedures for each mini-trial should be designed to meet the needs of the individual case, the following guidelines are appropriate in most circumstances:

(a) Time Frame - The mini-trial should be governed by strict time limitations. The entire process, including discovery and trial, should conclude within one to three months.

(b) Participants - Each party should be represented by an individual with authority to make a final recommendation as to settlement and may be represented by counsel. The participation of senior management/agency officials (principals) with first-hand knowledge of the underlying dispute is highly recommended.

(c) Discovery - Any discovery conducted should be expedited, limited in scope where feasible, and scheduled to conclude at least two weeks prior to the mini-trial. Counsel bear a

special responsibility to conduct discovery expeditiously and voluntarily in a mini-trial situation. Any discovery disputes which the parties cannot resolve will be handled by the mini-trial judge. Discovery taken for the purpose of the mini-trial may be used in further judicial proceedings if settlement is not achieved.

(d) Pre-Hearing Matters - At the close of discovery, the parties should meet with the mini-trial judge for a pre-hearing conference. The parties normally should provide for exchange of brief written submittals summarizing the parties' positions and narrowing the issues in advance of the hearing. The submittal should include a discussion of both entitlement and damages. Contemporaneously with the exchange of the written submittals, the parties should finalize any stipulations needed for the hearing and, where applicable, exchange witness lists and exhibits. The parties also should establish final procedures for the hearing.

(e) Hearing - The hearing itself is informal and should generally not exceed one day. The parties may structure their case to include examination of witnesses, the use of demonstrative evidence, and oral argument by counsel. Because the rules of evidence and procedure will not apply, witnesses will be permitted to relate their testimony in the narrative, objections will not be permitted, and a transcript of the hearing will not be made. The role of the mini-trial judge similarly is flexible and may provide for active questioning of witnesses. Each party should present a closing statement to facilitate the post-hearing settlement discussions.

(f) Post-Hearing Settlement Discussions - At the conclusion of the informal hearing, the principals and/or counsel meet to discuss resolution of the dispute. The mini-trial judge may play an active role in the discussions, or be available to render an advisory opinion concerning the merits of the claim.

IV. Third-party Neutrals (eighteen-month pilot program)

After entry of an order referring a case to ADR, the parties may request the ADR Administrator to appoint a third-party neutral from a limited panel of experienced attorneys trained to handle ADR. The third-party neutral shall have no conflict of interest and shall either have experience in alternative dispute resolution or shall have expertise in the subject matter of the lawsuit. The third-party neutral will meet with the parties and attempt to resolve the dispute.

At the conclusion of an eighteen-month trial period, this program will be reviewed and modified accordingly.

V. Comment

The court welcomes further input from the bar and general public on this Notice to Counsel and Amended General Order No. 13. This input will be considered, along with the initial practical experience under the Order in a continuing effort to further the effective administration of justice.

peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT [II.]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT [III.]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT [IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

115

THE MAGIC CONSTITUTION

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AT

*THE BASILICA OF THE NATIONAL SHRINE
OF THE IMMACULATE CONCEPTION*

ON THE OCCASION

OF THE 104TH ANNUAL COMMENCEMENT

OF

COLUMBUS SCHOOL OF LAW

OF

THE CATHOLIC UNIVERSITY OF AMERICA

BY

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THE MAGIC CONSTITUTION

by Loren A. Smith
Chief Judge
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What is the American Constitution? A document? Yes. The highest positive law of the American Republic? To be sure. A political compromise hammered out over 200 years ago by political leaders? Undoubtedly.

Early in our history Alexis de Toqueville noted the great importance of the American Constitution in our political order. At Gettysburg, Abraham Lincoln gave voice to that document's deepest moral foundations and its overriding moral importance. A century later a prominent scholar observed of the American citizen that:

His high regard for the Constitution, amounting often to idolatry, is explained on numerous grounds Yet the most compelling explanation is the American's deep-seated conviction that the Constitution is an expression of the Higher Law, that it is in fact imperfect man's most perfect rendering of what Blackstone saluted as "the eternal, immutable laws of good and evil, to which the creator himself in all dispensations conforms; and which he has enabled human reason to discover, so far as they are necessary for the conduct of human actions." Clinton Rossiter, *Prefatory Note* to E. Corwin, *The "Higher Law" Background of American Constitutional Law* at v-vi (1961).

It is not the function of a commencement address to set forth a scholarly thesis. We come here today, if not to bury your academic career, at least to praise it. You have come through 3 or 4 years of blood, sweat, and tears--or, at least highlighter, outlines, and beers. And today we celebrate this.

But before you join a profession destined to be the butt of bad jokes as long as problems are simple and solutions complex, I must put forth a few reflections, since that is the role of every commencement speaker. 'Fish gotta swim and birds gotta fly' and commencement speakers gotta reflect.

These reflections amount to two propositions. First, that our Constitution performs two little commented upon, but vital tasks. Second, that it will be your duty to further the performance of these tasks.

The first task of the great document is that it embodies and reflects our civil morality. What do these high sounding words mean? They almost sound good enough for political rhetoric, but of course, as a judge I can't engage in that.

By these words, civil morality, I mean our national understanding of what Blackstone referred to as the "laws of good and evil." This national understanding comes not out of a vacuum. It is the product of thousands of years of Judeo-Christian revelation and Biblical teaching. It is from the insights of Plato, Aristotle, and St. Augustine. It is the fruit of the rigorous analysis of St. Thomas Aquinas and the other great schoolmen and of common law lawyers like Richard Hooker and Lord Coke. While its origins are not exclusively Western, the source of our inheritance is the West.

Thus, the Constitution is more than a document or political compromise, it embodies the moral vision of its Framers. But it is also more than the moral vision of its Framers and the contemporary society in which they lived. As our Nation has lived under the blueprint of the Constitution, our society and its legal framework have come to embody certain moral values that are implicit in the Constitution. The Constitution is thus our embodiment of the proper moral values for the good society. It is a moral standard for measuring our political and legal system.

Let me illustrate this historically. We fought a great Civil War over the question of human slavery because that institution was radically inconsistent with "Justice" or "the Blessings of Liberty" as they were set out in the Preamble of the Constitution and understood by the Framers. During the first half of the 19th century, it became increasingly clear that a regime grounded in the fundamental rights to life, liberty, and property was inconsistent with human slavery. Madison understood this at the Constitution's birth and was troubled by the inability to eliminate slavery. Lincoln understood it clearly, as the Lincoln-Douglas debates and his presidential career illustrate. The Civil War amendments to the Constitution finally put the issue beyond all dispute. However, without the moral understanding implicit in the Constitution, the outcome of that costly struggle would have been very different.

But, what has all this to do with the role of a lawyer today? Particularly you, the graduates of this great law school here and now? If the Constitution and the legal system it establishes express our civil morality or our best understanding of what is right and what is wrong, then we manipulate it or distort it only at our peril. In other words, changes in the law whether wrought by legislatures, judges or common practice do have moral significance.

When lawyers and judges recognized Jim Crow segregation laws in the populist era, they were doing something wrong. When laws put Japanese Americans in camps and took away their property these laws were not merely mechanical measures--they had a moral significance, an evil one. Too often in this age of the leviathan administrative state we forget that the thousands of rules or laws that affect peoples' liberty or property have moral consequence, either for good or ill. You, as lawyers, must always be mindful of the tools that you use. The effects of laws or judicial decisions are moral effects.

Let me give one caution here. While the Constitution and its laws have deep and significant moral content, this does not free you or me from our duties and responsibilities. Moral content is not a radical discovery or a liberating breakthrough. It is not a broad authority to impose your moral judgements on others. To use a current term, it does not empower you. Rather, it requires of the lawyer, judge, law teacher, legislator or administrator that conservative discipline of the individual who understands that he or she works with power. The lesson of that discipline is that power is always dangerous. A surgeon should not be filled with a sense of power because his or her hands can open a living chest to repair a damaged heart. Rather, that surgeon should be imbued with a sense of unique responsibility and a little bit of pure awe, that a wrong cut doesn't bring deadly consequences.

People in our profession wield similarly potent tools upon the body politic. We must reject the false appeals of our own egos in the name of some crusade. As Saint Thomas More showed us, moral heroism is found in well reasoned duty, and perhaps even martyrdom. It is never found in frivolous, press-release legal practice. It is not found in emotional posturing. Moral outrage is never a substitute for moral analysis. Finally, if a moral position feels good, it is probably wrong. The moral vision of the legislator is not the reform statute that takes from Peter to pay Paul, or suppresses some right in the interests of the claimed good of "society." Rather, it is to be found in laws that preserve rights, or justly allocate burdens, when special interests would benefit themselves at everyone else's cost.

And, I do not mean to leave judges out. They are bound to follow the letter of the Constitution or the statute. While there is a deep moral content to those instruments, it is a content that the judge has no personal right to interpret apart from the rules of construction laid down by precedent and logic. Judges who look to their own consciences are looking away from the oaths they swore to uphold the Constitution. It is the citizens--and through them, their political representatives--who must look to their own consciences in making political choices.

Through our Constitution we have received a civil morality. We have developed a political and economic system based upon such notions as individual rights to property, free personal expression in civil and religious affairs, a zone of personal privacy, broad public democracy, and a system of legal procedures that protect the individual's enjoyment of these rights. Through our elected officials, and not our judges, we have continually attempted to bring society into closer alignment with our understanding of the Constitution's civil morality. And while many of these attempts have failed over the last century, the constitutional and legal framework has provided a mechanism for rethinking and undoing these attempts.

I haven't mentioned the second vital task of the Constitution that I spoke of earlier. And by this point in the talk many of you wish I wouldn't. That is, those of you who are merely bored, but still awake. But it is a good point to conclude on.

As I look upon this crowd it takes no act of brilliant analysis to see what has brought you together today. It is the achievement of a common goal by each of the honored individuals who sit before us. They have with great effort (some, perhaps, even heroic effort) graduated from a great law school. And we, their friends, relatives, and colleagues have come to share the joy.

The Constitution in an analogous way makes the people of this Nation a common people, Americans.

We are not Americans because of being members of any one race or religion. Nor do our ancestors come from a single country. Language is not our unifying principle. Even American Indians arrived on this land as travelers from afar. Our culture is uniquely open and also localized. It shares in the values of a thousand ethnic and regional traditions from Edinburgh to Easter Island. Our ancestors, and in some cases we ourselves, came here for many reasons. My grandparents came fleeing Tsarist oppression and religious persecution from the Pale of Settlement. In America we pursue a million dreams and overcome a billion challenges.

The Constitution I assert is our nationality. Anyone who accepts its principle and swears an oath of allegiance to it can be an American. In fact, that is how we define Americans. Thus, as a common people we are joined together by the glue of our Constitution. It underlies us as a canvas does the picture painted upon it.

And here is the particular significance of this fact for you, our future lawyers. To the extent the legal system (and that system should be understood to be you: the lawyers, the judges, the law professors, the legislators and the administrators of tomorrow)--to the extent the legal system erodes or trivializes or distorts that Constitution, then it is quite literally dismantling the Nation. The Nation will break up into its constituent components, whether regional, ethnic, racial, or interest groups. Instead of a public interest, we will have only special interests.

We aren't going to become a future Bosnia immediately. On the other hand we are on a path that could lead in that fearful direction. Racial and ethnic divisions are all too real, and they are not healing. Far too many current political and legislative battles divide Americans along class, or racial, or ethnic, or special interest lines. Even the legal profession is increasingly organized along lines that are interest-group oriented. And the trends in all these areas are towards more division.

We have already moved some ways toward viewing problems through the false lenses of "group rights" or "racial quotas" or "politically correct speech." These concepts are corrosive to a Constitution that IS our Nationality.

Perhaps this imposing setting has set me to do the very thing I promised myself not to do--preach. While my wife attends mass here several times a week, it is enough of an

honor for someone like myself of the Jewish faith merely to be present in this magnificent shrine that symbolizes so much of what all good men and women and, yes, lawyers hold dear.

Let me just close with this story. A famous lawyer addressing a medical convention was tempted to remind the doctors present that in the era when lawyers were drafting the Constitution of the United States, the greatest instrument for human social good designed by the hand of man, the medical profession was bleeding men like George Washington to death.

On second thought, however, he realized the implications of the analogy. In the years since 1787, the medical profession has developed wonder drugs, vaccination, by-pass surgery, anesthesia, the artificial heart, the MRI, genetherapy, laser surgery, and a thousand and one life-giving and life-saving techniques. In those same years, what have lawyers done even to equal the achievements of those individuals who shaped the world's first stable and free republic?

Has the legal profession even successfully defended the great achievement of its forbearers? Have we insured that our children and their children will have the security of rights, the commitment to civic duty, and the religious, political and economic liberty we have enjoyed? Will our legal system protect the security of the citizen and the citizen's rights to fair and speedy and inexpensive justice? Will the legal system continue to embody a moral vision? That is the challenge I leave with you.

May you carry the blessings of this great law school and university proudly into our profession. May the Lord bless and guide your careers.

Case name	Docket number	Date filed	Date decided	Disposition	Time to decide
<i>Pre-award</i>					
ECDC Environ.	97-723C	10/22/97	1/30/98	Gr. Pl. Cross-motion for sumjgm. on adm. rec.	3 months
Brickwood Contractors, Inc.	97-844C	12/11/97	3/9/98	Vol. Dismissal by plaintiff	3 months
Pike's Peak Family Housing, Inc.	98-147C	3/3/98	4/27/98	Vol. Dismissal (Stipulation)	7 weeks
John C. Grimberg Co.	98-338	4/15/98	Pending		

<i>POST AWARD</i> Case name	Docket number	Date filed	Date decided	Disposition	Time to decide
Cubic Applications Inc.	97-29C	1/15/97	1/29/97	SumJgm for defendant and intervenor	2 weeks
Cincom Systems, Inc.	97-72C	1/31/97	3/31/97	SumJgm for defendant	2 months
Day & Zimmerman	97-90C	2/11/97	7/14/97	Jgm for plaintiff	5 months
Asilomar Management Co.	97-134C	3/4/97	4/24/97	Stipulation for entry of judgment	7 weeks
Allied Technologies Group, Inc.	97-143C	3/5/97	9/12/97	SumJgm for defendant and intervenor	6 months
Greater Richmond Cleaning, Inc.	97-164C	3/13/97	pending		
GraphicData, LLC	97-256C	4/7/97	5/9/97	SumJgm for defendant	1 month
Analytical & Research Technology, Inc.	97-380C	5/30/97	8/8/97	SumJgm for defendant	9 weeks
ATA Defense Industries, Inc.	97-382C	5/30/97	6/27/97	Plaintiff	4 weeks
Lyons Security Services, Inc	97-505C	7/25/97	9/16/97	Plaintiff	7 weeks
CC Distributors, Inc.	97-517C	7/31/97	9/2/97	Gr. Defendant's motion to dismiss	4 weeks

Case name	Docket number	Date filed	Date decided	Disposition	Time to decide
Alfa Laval Separation	97-536C	8/8/97	1/14/98	Jgm. for defendant and intervenor	5 months
Delbert Wheeler Construction, Inc.	97-586C	8/27/97	10/3/97	Jgm. for defendant	5 weeks
Alliant Techsystems, Inc.	97-626C	9/17/97	10/31/97	Jgm. for defendant	6 weeks
SmithKline Beecham	97-633C	9/22/97	10/2/97	Vol. Dismissed	10 days
Tecom, Inc.	97-663C	10/1/97	4/15/98	Jgm. for defendant	6 months
HSQ Technology, Inc.	97-667C	10/3/97	12/23/97	Jgm. for defendant	2 1/2 months
Wackenhut, International	97-680C	10/8/97	1/13/98	Jgm. for defendant	3 months
Peirce-Phelps, Inc.	97-683	10/9/97	Pending		
CCL, Inc.	97-721C	10/22/97	12/23/97 1/15/98	Dec. Denying deft. Motion to dismiss and deft. Cross-motion for sumjgm. Order gr. pl. unopposed motion to dismiss	

FORE Systems Federal, Inc.	97-731	10/24/97	11/4/97	Vol. Dismissal	11 days
The Centech Group	97-740C	10/29/97	Pending		
Clark Construction Group, Inc.	97-749C	11/3/97	12/22/97	Amd. Complaint dismissed	7 weeks
Roxco, Ltd.	97-768C	11/12/97	1/15/98	Complaint dismissed.	2 months
Sciencetech, Inc.	97-824C	12/3/97	12/9/97	Complaint dismissed	
RSL Electronics, Ltd.	97-837C	12/8/97	2/25/98		2 ½ months
Candle Corp.	97-851C	12/17/97	2/27/98	Jgm. For deft. on adm. rec.	2 months
Consolidated Services, Inc.	97-855C	12/22/97	12/30/97	Vol. Dismissal	8 days
Informatics Corp.	98-16C	1/9/98	3/10/98	Gr. Pl. Cross-motion for sumjgm.	2 months
Carter Industries, Inc.	98-27C	1/14/98	3/16/98	Gr. Deft. Cross-motion for sumjgm.	2 months
Washington Baltimore Cellular Ltd. Partnership	98-50C	1/22/98	4/6/98 4/15/98	Dismissing plaintiff and int. Complaints Case reinstated for consideration of other relief	
Meir Dubinsky	98-56C	1/23/98	2/10/98	Complaint dismissed	18 days

Case name	Docket number	Date filed	Date decided	Disposition	Time to decide
United International Investigative Services, Inc.	98-80C	1/30/98	Pending		
Metric Construction, Inc.	98-91C	2/3/98	3/24/98	Complaint dismissed	7 weeks
CRC Marine Services, Inc.	98-128C	2/18/98	Pending		
Ramcor Services Group, Inc.	98-152C	3/4/98	3/30/98	Complaint dismissed	4 weeks
United International Investigative Services, Inc.	98-153C	3/4/98	Pending		
Modern Technologies Inc.	98-309	4/2/98	Pending		
Hewlett-Packard	98-406	4/28/98	Pending		
Talton-Holdings, Inc.	98-409	4/28/98	Pending		