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# 10 Things U.S. Litigators Should Know About Court Litigation in France

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## Introduction

Over twenty-five years of representing U.S. companies in French civil and commercial litigation have taught us that there is much more than a language barrier between U.S. and French litigators.

By and large, corporate lawyers on both sides of the Atlantic have come to speak the same substantive language when it comes to deal making. In the M&A world, save for local rules that may affect deal structuring and execution, and save for heavily regulated industries, transactions tend to follow similar patterns. This market practice convergence is visible, for instance, in the fact that a standard acquisition agreement used for a transaction in France will not look substantively alien to a U.S. M&A lawyer, and vice-versa, and deal to-do lists are likely to look relatively similar in both cases.

In contrast, handling cases in the U.S. and French courts are substantively two very different things. The reasons for these many differences are beyond the scope of this work. Procedural differences play a significant role, but there are also cultural factors at work, which may explain, for instance, differences in the way clients and attorneys, and attorneys and judges, interact. Whatever the reasons, questions posed by U.S. litigators when observing cases in France suggest that many things are different, from how one should handle a pre-contentious situation to how things go on appeal, and most things in between.

As a result, U.S. lawyers facing litigation in France would be well advised not to be guided by instincts derived from their U.S. litigation background. For those who have deep experience litigating cases in the United States, this may be quite a challenge.

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Putting together a litigation strategy is always a complex exercise that involves many aspects including: the procedural rules, what is done and what is not done in the relevant court, how the other side is likely to approach the case, and obviously, the substantive law and how it has been interpreted locally. When in France, the U.S. background on such issues is unlikely to help. There is undoubtedly some degree of universal trial lawyer common sense, which could help understand what may or may not work in a courtroom, but relying on this to strategize a non-U.S. case would almost certainly be a recipe for disappointment.

Against this background, the Debevoise Paris office litigation group thinks that it would be of help to U.S. litigators to find in one place a summary of the discussions our group has had over the years with a number of our clients, covering the subjects where experience shows that U.S. litigators most frequently need guidance when considering civil or commercial litigation in French courts. The spirit of this paper is to provide practical, real world views, based on the authors' experiences, rather than adding another learned treatise on the root causes for the fundamental differences between litigation systems of the two countries. Consistent with this approach, our paper includes views that are judgmental in nature, which will be clearly indicated.

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## 1. Understand the Court System

Any U.S. attorney reflecting on a court case in France may want to begin by understanding the type of court in which the case is likely to be heard. To a U.S. practitioner, the French court system may appear somewhat odd, but it has its own logic.

### JUDICIAL V. ADMINISTRATIVE COURTS

The first step is to distinguish between judicial and administrative courts. In summary, administrative courts adjudicate almost all disputes between public entities and non-public parties. This includes, for example, taxes, public procurement contracts, zoning regulations and building permits. Judicial courts handle all other disputes.

This paper covers civil and commercial cases in judicial courts. It does not cover administrative courts. Very few attorneys are experts in handling cases in both administrative and other courts, which have different procedures and practices. Most attorneys (including ourselves) only handle cases before administrative courts with the help of specialized counsel, at a minimum to provide guidance on procedural matters. This rarely happens, however, because the overwhelming majority of business-related disputes go before the judicial courts.

### THREE LEVELS OF JUDICIAL COURTS

There is a wide array of judicial courts, at three levels: first instance, appeal, and a legal review called *cassation*.

At the first instance level, the court of general jurisdiction is called *tribunal de grande instance* or TGI (there are 173 of them in France). In addition to the TGI, there are several specialized jurisdictions, including one for business disputes and bankruptcy (commercial



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court or *tribunal de commerce*), one for small claims (*tribunal d'instance*), and one for employment disputes (*conseil des prud'hommes*). Judicial courts also include criminal courts, which at the first instance level consist of three different courts, depending on the seriousness of the offenses. Crimes of intermediate seriousness, which include most crimes associated with economic activities, go before the *tribunal correctionnel*, which is a criminal chamber of the TGI.

On appeal, cases go before courts of appeal, which can review both the facts and the law. Courts of appeal's decisions can be subject to review by the supreme judicial court (*cour de cassation*), on issues of law only. This supreme court either upholds the court of appeal's decision, or reverses it if the decision has misapplied the law, in which case the matter is remanded to another court of appeal for further proceedings.

## THE JUDICIARY

Courts of general jurisdiction and criminal courts are staffed with professional judges, while most specialized courts (except the *tribunal d'instance*) are staffed with non-professional judges.

Unlike in most common law countries, professional judges are not called to the bench following a distinguished career at the Bar. Most of these judges have chosen the judiciary at the end of law school, and go through a specialized training following a competitive exam after graduation. At about age 27, they become judges, usually starting as *tribunal d'instance* judges or junior TGI judges and then moving up to more senior positions.

Non-professional judges may have a wide variety of backgrounds. Commercial court judges, for instance, are elected by local business organizations among local business persons, without a need for any



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sort of legal education or training. In practice, many commercial court judges are elected from among in-house lawyers or have had some legal education, but very few of them are former attorneys. All of them are trained on the job, and take on significant responsibilities only after a number of years in office. The commercial court judges are not compensated. Most of them do this in addition to their regular jobs, or upon retirement.

In both the professional and non-professional judiciary, there are customs and traditions that tend to make the atmosphere in courts rather formal. Attorneys usually have formal, if not distant relationships with judges. Addressing judges with their judicial titles is advisable, even for attorneys who happen to have personal relationships with them. It is extremely rare for an attorney to call a judge by telephone to discuss a case; where a conversation must take place, this should be at the judge's office, and the presence of counsel to the other side is expected.

Finally, another difference with the United States is that it is not in the French tradition to attribute jurisprudence to a judge, but rather to a court. As a result, seeking information about the way in which a judge has ruled on a given question is very unusual for (even alien to) French attorneys. This is notably reflected by the French legal research tools, as they do not have a search option which would allow French lawyers to make researches based on the name of the judges, but rather propose to determine how a court dealt with a particular issue, even if the judges who rendered the decisions are no longer holding position in such court. The absence of a "judicial personality" of individual judges is underscored by the fact that there is no tradition of filing dissenting opinions.



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## ATTORNEYS

All attorneys practicing within the territory over which a TGI has jurisdiction must be members of the formal Bar set up for this TGI. Bars are legal entities that exist by statute; they are distinct from professional associations whose membership is optional. There are 173 TGIs in France, and roughly as many different Bars. Unlike in the U.S., in-house lawyers are not members of any Bar, and cannot hold themselves out as practicing attorneys (nor are their communications deemed "privileged" because of their status).

Each Bar is headed by an elected chief, called *bâtonnier*. The striking difference with the U.S. system is that French Bars exercise disciplinary authority over their members in the first instance, which can be appealed to a court of appeal. Bars also manage admissions of new attorneys, resolve fee disputes between clients and attorneys, interpret and implement the profession's rules of ethics, and maintain mandatory accounts to hold client funds in escrow.

All attorneys in France are subject to common rules of ethics, with certain local variations of modest significance. One salient feature of these rules compared to U.S. ones is their relative vagueness and the heavy reliance on general principles, supplemented by tradition, precedents, local usage and consulting with former *bâtonniers* and other senior attorneys. Overall, while this system gives certainty for practices that have existed for some time and are widely recognized as acceptable, it hardly provides safe guidelines for new questions that may emerge, such as whether an attorney can prepare witnesses or conduct internal investigations for a client. For this type of question, out of caution, attorneys tend to take very conservative views until Bar authorities have taken explicit positions.



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Depending on the courts and the nature of the cases, the law may make it mandatory to appear through a member of the local Bar. This is the case for most matters before TGIs. For these cases, out-of-town attorneys must retain a local attorney to formally represent their clients, while they may do most of the work including appearing before the courts. Irrespective of whether using a local attorney is a requirement, this is almost always advisable for the same reasons that a New York attorney would retain local counsel to help on a case in local courts elsewhere in the United States. In France, being an attorney from Paris may or may not be viewed as a plus by courts and local attorneys when arguing a case in a remote city of the country; therefore it may make sense to be chaperoned by local counsel, usually for a very modest fee.

**QUALITY NOTES**

While the French court system has been under severe budgetary constraints for a number of years (which shows in certain courthouses needing renovation, or the antiquated state of certain courts' technology), by and large the system works fine and produces decisions that are properly reasoned and predictable against legal principles, and within a reasonable time.

Corruption in judicial circles is not known as an issue. In our collective experience, none of us has ever been in a situation where we suspected any improper behavior by a judge.

Other potentially problematic factors, however, should be borne in mind.

First, certain professional judges may not always be as familiar with economic and business realities as one would expect. To be blunt, where handling a case involving a significant amount of money in relation to an individual, large amounts may sometimes cause social



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justice considerations to get in the way of the application of the rules of law. This must be factored in the manner in which a case is presented. Second, outside the Paris area, a dose of hometown factor may be an issue, particularly when representing a foreign client in a small town; this also should be factored into case strategy.

To conclude on a contextual note, French business circles are not known to be very litigious. Most business persons believe that reputable businesses should not be seen in court too often, and that litigation is not a cost-efficient way of resolving disputes. They generally favor informal negotiations with the help of lawyers of stature playing the role of "eminent sages," rather than crystallizing and publicizing disputes by bringing them to courts. This said, mediation and other organized out-of-court dispute resolutions systems have not yet really taken off in the French legal landscape.



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## 2. No Discovery – No Need for Litigation Hold

### SHOULD WE DO A LITIGATION HOLD?

This is a frequent first question between a French litigator and a U.S. client. While the answer is generally "no," determining the best case-specific strategy requires a basic understanding of French pre-trial procedures, and in particular the virtual absence of "discovery" as that exists in the United States.

The bottom line is that in most cases there will be no need to preserve documents to make sure that they are available to produce to an adversary in response to a demand for them. In some cases a party may wish to "hold" documents necessary to prove its own case; and in some instances it may ask whether a future judge would find the absence of specific documents to be unreasonable, leading to drawing a negative inference from their non-use in a trial. But a reflexive "document hold" is almost never necessary or appropriate.

### A FEW OBSERVATIONS

The most important point is that there is no tradition of, nor procedure for, "discovery" in the systematic way that procedure has developed in the United States: there is no procedure for taking an oral deposition of a potential witness, there is no equivalent of interrogatories and requests to admit, and there is no procedure for obtaining documents held by an adversary that it chooses not to use, nor from a third party. This last point may be curious because French judges give much less weight than their U.S. counterparts to witness testimony (particularly the testimony of a party, which is strongly assumed to be biased), and thus give proportionally more weight to documents. But it is nonetheless the case that a party has no obligation under French law to establish a "hold" for documents, because it cannot be expected that it would ever have to produce them, except on its own initiative.



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This is particularly true with respect to documents that may be considered unfavorable to the party that holds them: there is simply no duty to disclose them. While this principle is nowhere to be found in the Code of Civil Procedure, it is usually regarded as self-evident, and the fact that it is ordinarily referred to in Latin (*nemo contra se edere tenetur*) contributes to the general belief that this is a fundamental principle of the law of evidence in France.

Professionally, French attorneys are under no different obligation; a French attorney might get into trouble for violating the *nemo contra se edere tenetur* principle, but never for failing to disclose or produce a document that is unfavorable to his client's interest.

There may be two occasional exceptions to this general rule.

First, Article 142 of the Code of Civil Procedure provides that a court can order a party to disclose documents on an application made by the other party; however, in reality, the courts have interpreted this provision in a manner that makes it helpful in only relatively rare scenarios. Courts have said, for instance, that the application must identify the specific documents to be produced, and the existence of these documents must be certain. American-style requests for "all documents" bearing on a subject will be rejected. Courts will also dismiss an application where the nature, the origin and the exact number of the documents to be produced are unknown. They also tend to require that the applicant prove that the documents will certainly be helpful to the case.

In sum, where a party alleges a critical fact and can make a case that the only way of proving this fact is by ordering the other party to produce a document whose existence is certain, Article 142 may help. This assumes, of course, that the parties are already at a stage where they are exchanging arguments on facts and law for final



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submission. This has nothing to do with a pre-trial phase where both parties are gathering factual information, on the basis of which they will subsequently build their arguments and strategies.

Second, under certain circumstances where it is clear that a document would normally be found in the possession of one party, the failure of that party to use that document in the litigation may be the basis for an inference that it would have been harmful to that party's case. Such a situation may arise, for example, if a document in the possession of one party refers to a document in the possession of its adversary.

As a result, the question of what documents to produce (and by extension, whether to do any document "hold") depends more on strategy than on either professional ethics or legal obligations. The fundamental questions are: what is my case, what facts do I need to establish my case, what documents help me prove those facts, and am I at a risk of inviting an adverse inference if I use those but withhold others? The development of that strategy – which may be crucial – will of course be different in each case.

Finally, a party (or even a non-party) that has documents located in the United States may face an attempt in U.S. courts to obtain those documents "for use in" a French proceeding, under the terms of 28 U.S.C. Section 1782, and the testimony of witnesses located in the United States may also be sought under this provision. If this happens, there may be a reason to put in place a litigation hold so that the party holding documents in the United States would not put itself at risk of breaching U.S. discovery rules. At least from a French perspective, however, (i) there would be no basis to put a hold in place before the holder of the document becomes aware that someone is filing a Section 1782 application to which the documents



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it holds may be relevant and (ii) there would be no basis for extending this hold to documents located in France.



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## 3. Clarify the Role of Your French Attorney in Fact-Finding

The key role for any attorney is of course to work with the client to develop the winning strategy for a given litigation, and crucial to that effort will be exploring and developing the relevant facts. In the United States, attorneys are deeply involved in that process – and in most instances run it. In France, attorneys face some professional restraints that derive more from tradition rather than specific rules; while they should not inhibit the strategic development of a case, it is useful for a U.S. client to be aware of them.

The first situation arises when a client asks the attorney to visit the client's offices and go through documents, files, archives, hard drives or any other form of materials to identify and gather materials necessary to build the client's case. There is no rule prohibiting this, but many attorneys feel uncomfortable doing so simply because it is not quite in the traditional scope of an attorney's work (not so long ago, French attorneys were not allowed to visit clients' premises and give legal advice outside of their offices). In fairness, this reticence seems to be fading away, particularly for attorneys who represent large international companies; however, in retaining counsel for cases that may involve significant fact development work, U.S. clients would be well advised to discuss this subject in advance to avoid surprises.

A different situation may arise if a client expects a French attorney to meet with potential witnesses, evaluate them and help them establish their written testimony (see No Witness, No Jury, No Trial, below). Many attorneys are likely to feel uncomfortable with the client's request on the generally-held belief that it is forbidden for an attorney to contact and talk to a potential fact witness who could help the client's case, or to take any part in the drafting of written



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testimony. There is no Bar guideline specifically authorizing attorneys to meet with witnesses to prepare a case (although in the somewhat comparable situation of doing "internal investigations" in criminal matters, the Paris Bar has in the last year issued an opinion and guidelines permitting attorneys to participate in such investigations; and development of witness declarations in international arbitrations is expressly permitted).

In the absence of an affirmative rule, many attorneys feel that they would be at risk of being accused of attempting to influence a potential witness's testimony if it were known that they met with a witness on behalf of a client with an interest in that witness's testimony – and of course, any actual attempt to influence testimony could lead to criminal charges of witness tampering. But there is no rule that expressly forbids such a contact, and the reticence to do so probably results mostly from a sense that "this is not typically done," combined with a concern about what courts or other lawyers may think if they knew about contacts with witnesses.

In most instances, a savvy attorney will be able to meet with a witness and evaluate that witness's testimony without risk of being charged with inappropriate conduct. In potentially difficult situations it may be advisable to urge potential witnesses to participate in meetings with their own counsel. Potential witnesses may not like the idea of incurring counsel costs for the benefit of someone else; however, the client seeking the witness deposition may offer to bear the cost.

Whatever the process is, clients would be well advised only to use written testimony whose wording has been well thought through, and which lead counsel actually finds helpful to the case. "Less is more" may be a useful axiom. The practical rule that some of the best factual arguments can often be found in the other side's exhibits



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often works in France, therefore there is no need to help the other side by providing testimony whose vagueness, excessiveness, or other flaws may backfire.

A next-to-final note: U.S. clients should bear in mind that the market for investigation services is very limited in France and that a number of investigation services firms have mixed reputation, which tends to color the work product of virtually all firms when it is used in court. U.S. clients should consult with their French counsel to determine exactly how an investigator may help, and be careful in choosing them.

Final note: as in many other countries, the reality of court work is that the fate of most cases rests on the quality of the facts that one can present to the court. Many judges tell us that by the end of the fact section of the parties' briefs, they expect to have a sense of where their decisions are going to end up. In light of the importance of the fact-development phase of virtually any court case, and the potential issues outlined here, we recommend that U.S. clients discuss early on with their French attorneys what they expect them to do in this area, and resolve any issue in this regard while there is time to do so.



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## 4. Do Not Count on Motion Practice

Can't you just file a motion to dismiss? How about a motion for summary judgment? Let's move to have this question of law resolved first. Let's get the court to issue an interim decision on jurisdiction.

Well, not so easy. The short of it is that French procedural rules do not contemplate motion practice, in the U.S. sense of this expression. There are only limited substitutes.

### IMPOSSIBLE TO CUT THE PROCEEDINGS SHORT

Civil and commercial proceedings start when the claimant files the complaint (following service on the defendant) with the clerk of the court. The clerk then allocates the case to one of the chambers of the court based on a summary review of the subject matter, and puts the case on the chamber's docket. Except in very simple cases, this opens the "pre-trial phase" of the proceedings, during which the parties are expected to submit briefs to the court and exchange the exhibits on which they intend to rely. In both civil and commercial cases, the pre-trial phase consists of a series of procedural conferences presided by one judge of the court (called "*juge de la mise en état*" or "pre-trial judge"), in which the judge essentially checks that the briefing of the case is progressing in a satisfactory manner.

The key point for U.S. litigators is that in this "pre-trial phase," it is virtually impossible to "put an end" to a case. In other words, absent a withdrawal or a settlement, almost all cases go up to the final oral argument on the merits. Under the Code of Civil Procedure, there is no such thing as a motion for summary judgment or motion for judgment on the pleadings. In a defense strategy, no one should expect to be able to cut the proceedings short, no matter how factually unsupported or legally frivolous a claim may be.



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There are only a few situations in which a defendant may have a case dismissed prior to the conclusion of the normal case process. This works only for cases before the TGI. In this court, the pre-trial judge has authority to rule on certain issues that may cause the case to fail, such as the claimant's lack of standing, the action being time-barred, a *res judicata* objection, a challenge to the court's jurisdiction, or a *lis pendens* situation. In contrast to the U.S. rules, however, none of these issues comes anywhere close to an early adjudication on the merits.

## A FEW PRE-TRIAL PHASE PITFALLS

While the pre-trial phase is not intended to touch on the merits of a case, a couple of issues may arise in that phase that may ultimately have consequences for the merits.

First, a party may apply for the appointment of a neutral expert or another type of court-ordered fact finding measure. In reality, this may sometimes be used by a defendant as part of a delaying tactics, because it is usually difficult to object to a measure of this nature (and an immediate appeal is virtually impossible), and once ordered, the case is usually put on hold for many months until the court-ordered measure has been implemented.

Second, where a defendant has raised a procedural objection as part of its defenses, and the case comes to the final hearing, it is usually a good idea for the claimant to request that the court rule on this objection together with the merits of the case, as opposed to issuing a separate decision on the jurisdictional issue. A separate decision would open the door to the defendant for a reconsideration of the jurisdictional issue by the court of appeal, and subsequently by the *cour de cassation*, during which the proceedings on the merits may be on hold for a couple of years. Most judges are now familiar with this type of procedural maneuvering, and rarely fall into the trap of



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ruling on jurisdictional objection alone, except where there is a strong reason to do so.

Third, U.S. litigators should bear in mind that there are very few "hard" deadlines in the pre-trial phase. It is very usual (and not badly perceived by French courts) for parties to requests additional time to prepare and file their submissions. In fact, the risk that a submission be put aside because it was filed too late is virtually nil before commercial court, and it is very limited in practice before civil courts, since judges usually warn parties when their "last chance" to file a submission has come. On a regular basis, judges repeat to attorneys that they (and their clients) should do their best to comply with court's deadlines, and that they will be more severe in the future, but as of now, we have not seen major changes in that regard.

Finally, parties should not count on extensive conversations with the court at the procedural conferences that punctuate the pre-trial phase. Except if some of the procedural questions addressed above are raised, parties have very few communications with the judge during the pre-trial phase. During the procedural conferences, and especially commercial conferences, the speaking time of the attorneys is very limited – less than a minute generally. Also, there is no certainty as to whether the same judge will hold the next procedural conference, and, except in very rare cases, the judge who set up the deadlines for the submissions may have only done a quick review of the papers filed by the parties.



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## 5. No Battle of Experts:
In Search of the Neutral Expert

One situation that is often the source of important strategic discussion is where one or several parties intend to rely on scientific, technical or other specialized knowledge as part of the facts they need to prove to make their cases. This situation exists typically in actions based on commercial sales, where purchasers allege that the products sold had hidden defects at the time of the sales. This situation also arises in many other contexts, for example in tort actions arising from industrial accidents, where the claimants need to prove that the facts relevant to the source of the accidents were under the defendants' control.

In most cases, the parties that need to make scientific or technical allegations, or other allegations based on specialized knowledge, initially rely on their own resources, or call on experts of their own choosing, to provide views on the solidity of their cases and help come to a conclusion on whether the cases are worth pursuing. In a number of legal systems, the views provided by these experts would be enough to build the record of the cases on the facts they cover, it being up to the courts to weight the various experts' opinions and decide on the necessary technical facts on that basis.

In French litigation, a court will almost never consider a scientific, technical or other specialized question based only on the parties' submissions and without an opinion from a neutral expert whom the court has appointed specifically to provide views on the issue. This process – known in France as an "expertise" – often becomes the most time-consuming, expensive, and important part of the case.

There are essentially two situations in which a court will appoint a neutral expert. First, prior to bringing a claim on the merits, a



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potential claimant may apply to a court to seek the appointment of a neutral expert to look into a given fact situation and provide an opinion on certain factual issues that may be critical to the question whether a claim on the merits should be brought at a later stage. This pre-claim appointment is relatively easy to obtain (the standard is limited to a showing that there is an interest in considering the factual issues now rather than later, for instance because there is a risk that the facts be altered by the passage of time). Second, in the context of preexisting proceedings, the court may issue an interim decision to appoint an expert, either *sua sponte* or at the request of one or more parties. In both cases, experts' services are usually moderately expensive (but the resources the parties need to invest to participate in the expertise process often make this process an expensive phase of a case).

Whenever an expert is appointed in either one of these scenarios, the following observations are worth bearing in mind in considering the appropriate strategy.

## THE UNPREDICTABLE EXPERT

The short of it is that the expertise process is only as good as the expert who runs it; yet the quality of the expert is to a great extent unpredictable. In designating an expert, courts almost always draw from a pool of sworn experts whose names appear on lists maintained by courts of appeals. To be registered as expert in any particular field, a candidate must only prove that he holds educational degrees relevant to the field of expertise for which he is applying, and produce copies of his works (if any) in this field.

While this system is intended to provide assurances that experts are always knowledgeable in the fields for which the courts appoint them, reality sometimes falls short of this objective. Because being a court expert is both time consuming and modestly compensated,



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numerous experts are aging or retired engineers, industry employees or other professionals who do this as an ancillary activity or as the final stage of their careers. Sometimes experts are too busy with their principal activities to focus on their expert's work, or they are somewhat less sharp than they have been at the height of their careers. In addition, some of them may have worked in a narrow specialty and nevertheless be listed as experts in a field that is much broader (e.g., a retired chemist in the rubber industry would be listed as an expert in chemistry generally, and thus could be appointed in a case involving chemistry issues that he has not seen in years).

Add to this the fact that parties tend to have little leverage on which expert a court will appoint in any given case. Where there is a discussion with the court on this issue, it is usually brief and revolves mostly on whether any particular potential appointee is available and has a track record of turning in opinions within the time periods prescribed by the courts. Suggesting that a potential appointee does not possess the necessary knowledge for an appointment within the field for which he is registered as expert must be done with great care (for instance, gently reminding the court of a mixed experience with a proposed expert is fine), or else the court could view this as offensive and counterproductive.

## DEALING WITH THE EXPERT IS A "CASE WITHIN THE CASE"

Once the expert is appointed, court proceedings are usually on hold until the expert turns in an opinion. During that time, the action in the case is before the expert, and this action must be carefully managed.

In brief, the expertise process usually consists of a series of meetings with the expert (always with the participation of all parties involved), and a series of written submissions (called "*dires*"),



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including communicating to the expert the background materials necessary to reflect on the relevant factual issues.

One key aspect of this process is that it is highly advisable to build goodwill with the expert. Even the most rigorous scientist may be sensitive to the atmosphere in which the expertise process unfolds; therefore there is value in being cooperative, respectful and friendly with the expert. Confrontational strategies are generally risky because the expert does not have much to lose -- and ultimately is the one providing a potentially important opinion. The short of it is: there is not much one can do to complain about an unsatisfactory court-appointed expert. In each court, a judge is appointed to supervise expert proceedings; however, parties who intend to complain about an expert should think twice and be certain that they will give the judge valid reasons to take action (which may include appointing another expert in addition to or as replacement for the first expert), failing which complaining may backfire when the incumbent expert writes his final opinion.

U.S. clients are often inclined to bring in their own experts, whose technical abilities enable them to follow the court-appointed expert's work and call attention to certain specific points. While there is nothing wrong with this, parties' experts should be briefed about the potential sensitivity of their interacting with the court-appointed expert. Particularly if a party's expert has credentials that are more powerful than the court-appointed expert's, he would be well advised to show sufficient deference to the latter to avoid relational difficulties that would make the participation of the party's expert eventually counterproductive.

Where a party believes that the expert process may not be going its way, and the expert has not responded favorably to observations made in writing or at meetings, it is time to anticipate a potential



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challenge to the expert's opinion once the case returns before the court. This should be planned ahead of time, before the expert turns in the opinion. One of the most helpful methods is to pose strategically careful and pointed technical questions, to which the expert must respond in his final opinion. When properly executed, this method forces the expert to unpack his reasoning, which may highlight shortcuts or other insufficiencies that may be subsequently leveraged to question the soundness of the expert's opinion.

## DEALING WITH THE EXPERT'S OPINION ONCE BEFORE THE COURT

With the submission of the expert's opinion to the court, either the clerk transfers the case back to the active docket (if the expert was appointed in the course of an action on the merits) or it is up to the parties to decide whether they intend to commence proceedings on the merits (if the expert was appointed prior to any proceedings on the merits). Where there are proceedings on the merits following the submission of the expert's opinion, the principal question is how much weight this opinion has in the eyes of the court.

The book answer to this question is relatively simple: experts' opinions are for the courts' information only, and courts are never bound by them.

Reality is somewhat less clear. By and large, in off-the-record conversations, most judges make no mystery of the fact that they tend to take experts' opinions with one or more grains of salt, and they expect to be convinced by experts' analyses rather than be served with dogmatic opinions inviting leaps of faith. But in reality, it looks like the smaller the cases, the more likely it is that judges will tend to adhere easily to experts' opinions, save where opinions are clearly wrong or unjustified.



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In larger cases, it is not uncommon for judges to ignore or even expressly set aside expert reports that they find unconvincing; this may happen, for instance, where the expert's opinion is not sufficiently firm (e.g., the expert has expressed a probability, or the expert has adopted one possible explanation without formally excluding other possible explanations); or sufficiently justified (e.g., the expert has expressed his opinion without describing the reasons for this opinion). Parties should exercise sound judgment, however, before criticizing an expert's report before a court, and they should only do so if there are solid arguments, failing which the court would be likely to receive criticisms of the expert's opinion as an attempt by a disgruntled party to have the court redo the expert's work, for which courts have little appetite.

The importance of the expertise phase in a French court case cannot be overstated. For U.S. litigators, this is a tricky phase, because not only is this process alien to the manner in which they are used to establishing facts based on scientific, technical or other specialized knowledge, but also the core of the action in the expertise process tends to follow unwritten rules or customs that may appear counterintuitive. Yet this phase may be determinative of how the case will ultimately be shaped before the court. This is the reason for which we routinely urge clients to commit sufficient internal and external resources to participating in expert processes; in most cases, this is time and money well spent.

One final note: legal issues never fall in the scope of a court-appointed expert's mission. Thus, at the end of the expertise process, all the legal questions of a case are still open, in addition to factual issues not covered in the expert's opinion or arising from the expert's opinion. In that sense, it would be a misconception to believe that cases are effectively over when court-appointed experts turn in their opinions to the courts.



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## 6. No Witness, No Jury, No Trial

Our U.S. counterparts find it visibly unsettling to hear from us that in the end game of a case, there will be no witness, no jury, no trial. Yet our system works fine without them, albeit very differently from the U.S. one.

### NO WITNESS

In civil and commercial cases, courts almost never hear live testimony of witnesses. When they do, this is generally in the context of civil (mostly domestic relations) cases, and there is no such thing as direct, cross and redirect: the judge asks all questions on points of interest to resolve the case. Counsel can only suggest questions to the judge, who may or may not pose them depending on how helpful he thinks they are. Questions going directly to a witness's credibility rarely pass that bar, for instance.

Yet our Code of Civil Procedure includes a series of provisions relating to the taking of witness testimony before the court. So why is it that most practitioners concur that these provisions are largely unused and obsolete? We believe there are two reasons for this.

First, our experience suggests that courts are reluctant to take live testimony of witnesses simply because this takes too much time. As in many other countries, French judges tend to be overloaded with cases, and under some pressure from their organization to improve efficiency in resolving them, which is hardly compatible with taking live depositions of witnesses.

Second, the French judicial system does not put as much weight on testimonial evidence as other systems do. To put it bluntly, judges generally prefer to rely on contemporaneous written materials than on the memories of witnesses, and this preference is at least partially



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attributable to the underlying notion that witnesses make inaccurate statements from time to time, whether intentionally or simply because their recollection is faulty.

Against this background, practice has developed the use of written testimony as the preferred method of bringing testimonial evidence. These declarations are produced in the course of the proceedings, just like other supporting documents. When a case is ripe for the final oral argument, there is usually not much of a reason to take live testimony of those who have provided written declarations.

## NO JURY

The discovery of "no jury" often comes as a relief to our U.S. colleagues, who seem happy that French cases do not involve the complexity and unpredictability of having factual issues decided by a group of citizens. The short of it is: a jury in civil and commercial cases is wholly alien to French procedure. The only judicial proceedings where juries are used are those for the most serious crimes, before a special court called a *cour d'assises*.

This does not mean that experience of dealing with juries cannot be of help when planning for a case in French courts. Techniques for making complex facts sound simple, finding the right examples and comparisons, and gently steering an audience one's way are equally helpful in French courts. This is notably so in commercial courts, where most judges are business persons with little if any legal education, whose views of cases may be predominantly based on their understanding of the facts and a desire to be equitable and reach resolutions that make good business sense.

## NO TRIAL

Part of what makes French court litigation a relatively inexpensive process compared to its U.S. counterpart is the absence of protracted



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trials, which may require the presence of armies of attorneys and support staff in court for days if not weeks.

What serves as trial in France is a hearing by the court on the basis of the record already submitted to it, and what attorneys do at this hearing resembles the closing argument in a U.S. trial. The rules of evidence are simple, and rarely give rise to a discussion of “admissibility;” essentially, the record is what it is. Judges expect attorneys to give them a summary presentation of the key facts and the salient point of law, with references to a few directly relevant documents. They generally like brevity, and a sense that attorneys have really developed their case to highlight the principal issues to be resolved. They confess in private conversations that they have no patience for attorneys who cannot see the forest for the trees, or who indulge in posturing, rehashing or delivering lectures on basic legal principles.

While in most courts the oral argument takes place before a panel of three judges, there is a growing tendency of courts to use opportunities under the rules to impose, or urge parties to accept being heard by, a sole judge. Another growing tendency is to drop the traditional formal oral argument by attorneys and favor Q&A sessions where courts can pose questions that they believe are relevant to the cases, rather than relying on the judgment of attorneys to make that selection. Both aspects of this evolution are very visible in commercial courts, where oral arguments now routinely consist of Q&A-type conversations that rarely exceed 30 minutes and are frequently held in judges’ offices.



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## 7. (Almost) No Risk of a Class Action

Most of our U.S. clients would agree that one of the good things about the French procedural system is the abence of class actions. This is not quite the case, but not far from reality.

Traditionally, there are no collective actions or damages under French law. French courts have consistently refused to let groups seek compensation for damages suffered by categories of individuals from similar facts, except where there were statutory exceptions (and there were only few). It was not until 2014 that, under heavy pressure from consumers' organizations, the French legislature adopted rules that permit some degree of class actions, called "*action de groupe*" or "group action".

This is not, however, a dream come true for a would-be (and mostly non-existent) French plaintiff bar. The new legislation seems unlikely to foster some of the distasteful client chasing practices that may exist in the United States around class actions, for two reasons. First, victims alone cannot bring these new actions: they must act through an approved consumers' association (there are about 15 of them), which presumably should be less sensitive to heavy attorney courting than victims left on their own; and second, "no win no fee" arrangements being prohibited under the rules governing the legal profession, one of the most seductive argument of the plaintiff bar remains unavailable. In addition, because punitive damages are unavailable in French courts -- and compensatory damages tend to be much lower than in the United States -- the promise of making victims rich will not work either.

In theory, the core conditions for this French version of the class action resemble those required in the United States: the action is available where (i) several people who are in an identical or similar



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situation each suffer an individual injury; (ii) these injuries have a common cause; and (iii) one person is deemed to be responsible.

Beyond these basic conditions, many things differ from the U.S. model: (i) these new actions are always based on an "opt-in" system, and (ii) the plaintiff is not the "class" as such, but the specific approved association that represents the interests of the group of identified individuals who are opting-in to have the association bring an action on their behalf, which makes it impossible to constitute a class of unidentified individuals.

There are other hurdles and limitations. The most critical one, in our view, is that a group action can only relate to (i) pecuniary loss suffered by consumers, taken as such, or (ii) since 2016, bodily injuries or pecuniary loss in specific areas (environment protection, health matters, discrimination in the workplace and data protection). For instance, such an action would be available to bank clients claiming for unjustified bank fees, or consumers claiming because a product does not conform to information on the product label, or abusive pricing by a mobile telephone operator.

Once constituted, group actions follow specific procedures. In cases where the plaintiff association is seeking compensation (as opposed to an order to discontinue a certain action or omission), the courts will rule on liability, define the group of victims (the equivalent of the U.S. class) and set up the amount of damages or the calculation methods to be used. This court decision is then published to give non-participating individuals a chance to opt-in and apply for the payment of damages to which they are entitled (the courts should set a two- to six-month window to submit an application).

While it is too early to form a view on whether this new type of action is going to be successful in France, early indications suggest



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that it may well remain rather marginal given the hurdles and limitations outlined above. Also, the view has been taken that group action proceedings may be quite lengthy. Since 2014, only nine consumers group actions have been commenced by associations, and only one has given rise to a settlement of €2 million in the aggregate (to be distributed among 100,000 individuals). Many voices in the legal profession have said that, with the current rules, it seems unlikely that group actions are going to develop significantly. We concur.



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## 8. Rare Big Wins and Other Economic Aspects of French Proceedings

When litigating in France, one should not expect to find comparable damages nor equivalent trial costs as in the United States. For a plaintiff, French litigation tends to be less costly but less profitable than U.S. proceedings; respondent companies will likely face a smaller litigation risk.

### RARE BIG WINS

The world-famous generosity of U.S. juries in personal injury cases, which makes the jurisdiction of U.S. courts so desirable to plaintiffs around the world, finds little echo in France. Not only would awards in personal injury cases usually seem miserable by U.S standards, but generally speaking, damage awards are much more modest than in U.S. courts in all areas. Here are the key underlying factors.

First, punitive damages are alien to French civil proceedings. It is a firmly established principle that damages should not make the plaintiff richer than if the facts that caused damages had not occurred, and a plaintiff perceived as greedy would find little sympathy on the bench. Damages are therefore limited to what is necessary to put the plaintiff back in the situation in which he would have been absent the facts that caused damages. As a result, for example, there is no such thing as double, triple or cumulative damages for the same injury.

Second, French courts tend to take a relatively restrictive view of causation. The causal event has to be essential to the occurrence of the damage, meaning that without such causal event, the damage could not have occurred. Simultaneity or simple temporal relationships are not enough. Further, compensation for loss of a business opportunity, although long accepted in French case law in



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principle, will be harder to obtain and lower than in the United States. Plaintiffs bear the burden of proving that they have lost an existing opportunity and that there is a causal nexus between this loss and the faulty behavior or negligence of the person claimed to be liable. French courts will then compensate the lost opportunity, but not the profits that the plaintiff would have received if the favorable event had happened. Damages will thus only represent a fraction of the benefits that were hoped for.

Third, there is no real workaround through contractual clauses. In a contractual context, a party may impose a severe penalty clause in case the other party breaches the agreement; however, the day there is a breach and a party attempts to enforce the penalty, the party in breach has the right to apply to a court and ask that the agreed-upon penalty be reduced. In considering this application, a court typically looks into whether the amount of the penalty is excessive compared to the damage actually suffered by the party that seeks to enforce the penalty. If the court finds that the penalty is excessive, it usually reduces it to an amount that is closer to the actual damage suffered.

### NO "LOSER PAYS" RULE

Proceedings in French courts almost never involve the parties submitting copies of their respective attorneys' bills in support of an award of fees to be included in the final court's decision, or in fact any decision. The short of it is that the winner in a case is never entitled to recoup its attorneys' fees, or any defense cost, from the losing party.

This does not mean that the winning party is never entitled to some payment against its attorneys' fees. Rules of civil procedure require a court to order the losing party to pay the other party an amount in consideration of defense costs; however, this amount is in the court's



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discretion, and the rules require that the court take into account equity and resources of the losing party. The rules even say that the court may decide that there is no reason to award anything to the winning party.

With this guidance in the procedural rules, it is hardly surprising that awards in excess of a few thousand euros are rare, even in complex cases. In one of them, involving an application to set aside a multi-hundred million dollars arbitration awards between two industrial giants, the Paris court of appeals awarded to one of our client 100,000 euros as defense costs, which has been standing for a number of years as one of the largest amounts ever awarded on this basis.

## MINIMAL COURT COSTS

On the theory that justice must be a public service available to all regardless of resources, the court system is primarily funded by the government's budget, which makes litigating in French courts remarkably inexpensive to the parties.

In a typical civil or commercial case, where costs do not include outside service providers' costs, court costs rarely exceed a few hundred euros, even in very large cases (there is no longer any cost item set in proportion to the amounts in dispute).

Costs may be greater only if the court has called on an outside service provider during the course of the proceedings, a neutral expert (see above) or a translator, for instance. In this case, while the service provider's fees are usually advanced by one of the parties, the ultimate decision will include a determination of court costs including the amount of these fees and who should ultimately bear them, which may make the overall cost amount quite significant.



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When rendering a decision, French courts have to rule on costs. In the great majority of cases, courts will order the losing party to pay these costs. Courts will only decide otherwise in specific cases, such as when the claimant committed a fault, or for equity reasons.

### MODEST PRE/POST-JUDGMENT INTEREST

Pre-judgment interest is not awarded automatically: interest can only be awarded when the plaintiff has sent a formal notice to the other party. For contractual matters, interest only starts running when the plaintiff has formally demanded performance of the obligation, with some exceptions. In tort actions, there is no pre-judgment interest as such; rather, the plaintiff must count interest in the damage application.

Post-judgment interest is awarded by courts even if the plaintiff has not requested it. Interest starts running from the date of the decision, unless the court decides otherwise.

For both pre- and post-judgment interest, the rate to be used is set by a governmental order, twice a year, based on short term market rates. For 2017, the first semester rate is 0.9% per annum where the subject matter of the action falls within the scope of the plaintiff's professional activity, or 4.16% where it does not.

### ATTORNEYS' FEES

Over time, the legal profession has moved from its traditional fixed-fee approach to an hourly rate system with, by and large, the same types of alternative arrangements as exist in many other countries. Some traditional local firms still favor the fixed-fee system, with anecdotal indication that this may not always make them any cheaper than hourly rate firms.



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The salient feature of the attorneys' fees system is the relative repugnance for contingent fee arrangements. Under applicable rules, full contingency arrangements are prohibited. Partial contingency arrangements (where an attorney's compensation is comprised of contingent and non-contingent portions) are permissible; however, the rules are silent on which proportion may be contingent. In doubt, most attorneys prefer to stay away from potential difficulties, therefore contingency arrangements are seldom used, and only for small portions of attorneys' compensation.

Overall, most U.S. general counsel would find litigation in France inexpensive compared to the cost of defending a similar case in the United States. In our view, this is largely due to the absence of the significant costs associated with discovery, and the simpler procedural rules, which do not lend themselves easily to procedural warfare. Hourly rates tend to vary very significantly from one firm to the other (and even more so between a Paris firm and a firm based elsewhere in France); but rates at leading firms are not too far apart from those in cities like London or New York.

### THIRD PARTY FUNDING?

As regards France, at this point third party funding of dispute resolution processes has only developed to a meaningful extent in the arbitration area. This statement may change in the near future. There has been considerable thinking around this subject for court litigation, and the trend is clearly in favor of developing this practice, based on a set of rules that would eliminate legal and ethical issues that have been raised.



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## 9. Do Not Look for the Best Appellate Practitioner

Somewhat provocatively, we often tell our U.S. clients that there is no such thing as an appellate practice in France. Not in the U.S. sense, at least.

Here is why.

First, appeal is generally as of right for most decisions rendered by the courts of first instance. There are limitations, however. Certain preliminary or interim decisions cannot be appealed independently from the decision on the merits that will follow. As a rule, however a first instance decision that adjudicates at least a portion of the substantive issues before the court can be appealed, and there is no need to secure permission from the court of appeals to do so. This, added to the fact that appeal proceedings usually represent only a relatively modest incremental legal cost compared to the first instance proceedings, explains why litigants usually do not hesitate bringing cases to the court of appeals. As a result, most courts of appeals in France tend to be overburdened, which in turn tends to make cases last longer than they should, about two years on average in most French courts of appeals. This may be one of the few real reasons why parties may hesitate about bringing a case to appeal, as the prospect of keeping a case alive for this much time is often a persuasive prompt to opening or resuming settlement discussions.

Second, an appeal is essentially a replay of the first instance proceedings (a new trial, as our U.S. colleagues would say), in that the court of appeals will consider both the factual and legal aspects of the case. While there is a possibility to bring new facts and (to a limited extent) new claims on appeal, in most cases, the facts and legal arguments raised in the first instance are re-presented in the



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same manner on appeal, the principal additional point being an explanation of why, in the appellant's view, the first instance court erred in rendering its decision.

Third, as a result, arguing a case on appeal is essentially no different from arguing it in the first instance; consequently, there would be no real justification for a subsection of the Bar that would specialize in practicing before the courts of appeals. *Ergo*, no appellate practice as such; this is why it hardly makes any sense for a U.S. client to look for the "best appellate attorney" to take its case to a court of appeal.

One historical note is in order to avoid confusion in this area. Until 2012, France had a special legal profession (called *avoués*), with a statutory monopoly to act as procedural agents of parties before courts of appeals; however, this profession had nothing to do with appellate practitioners in the U.S. sense of this expression. The role of *avoués* was predominantly to be the agents of the parties before the courts of appeal and handle procedural questions on their behalf. They had the right to take over cases entirely from first instance attorneys, and brief and argue cases on appeal, but in practice, very few of them did so. Therefore, even in those days, first instance attorneys would typically brief and argue cases on appeal, using *avoués* just as procedural agents. This profession was eliminated in 2012 and the right to act as procedural agents before the courts of appeal was conferred on all attorneys; however, most former *avoués* have reestablished themselves as regular attorneys and now offer services consisting of handling procedural questions in appellate proceedings. This has met with some success; indeed, most attorneys handling a case on appeal feel more comfortable farming out procedural issues to a former *avoué*. There are two principal reasons for this: a) most attorneys have limited experience of appellate procedures, which can be quite time consuming, and b) former *avoués* typically charge very modest fees for this. The key



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point here is that a former *avoué* is in no way an appellate expert in the U.S. sense of this expression.

While first instance attorneys generally handle cases that go to appeal, clients are free to change counsel for the appellate proceedings, for any reason. If they elect to do so, however, they should bear in mind that there is not a pool of appellate experts to choose from.



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## 10. Beware of Privilege Pitfalls

Privilege is another key issue where there can easily be misunderstandings between U.S. and French litigators, because the respective rules are markedly different.

Privilege, in the sense of a right not to disclose something in response to a request from a third party, has a very narrow scope in France, simply because practically speaking, there is no discovery in civil litigation; *ergo* no reason to develop a body of rules to delineate what should be exempt from discovery. In this sense, privilege is mostly relevant in the context of criminal and certain administrative investigations, as will be seen below.

What really is relevant in the French system is a set of obligations on attorneys regarding the confidentiality of information coming from their client or other attorneys.

There are two guiding principles that govern this matter: first, an attorney must keep confidential any non-public information coming from his client, even if the client expressly waives the attorney's obligation to do so; and second, any communication from a French attorney to another French attorney is *per se* privileged, in the sense that an attorney would commit an ethical violation if he produced such communication in court or if he forwarded it to his client or a third party.

The impossibility for the client to waive his attorney's confidentiality obligation is a frequent eyebrow-raiser to U.S. litigators. Yet this rule is enforced rather inflexibly, with both criminal and professional penalties attached to it. It usually does not generate much trouble, though, because workarounds are relatively easy. For instance, where a client requests his attorney to provide



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the client's auditors with certain information regarding pending or threatened actions, the Paris Bar has simply recommended that attorneys direct their responses to the clients, with a note that the clients are free to forward the responses to the auditors if they so wish. In general, while the client cannot waive the attorney's confidentiality obligation, there is nothing to prevent the client himself from releasing information the attorney could not release. This workaround tends to resolve most issues in this area.

For the confidentiality of attorney-to-attorney communications, the most striking example of where these rules may play out in a manner that is disconcerting to U.S. litigators is settlement talks. Coming from a U.S. background, one could think that there is no harm in communicating with an adverse party in an effort amicably to resolve a dispute, including exchanging views about settlement positions and offering concessions. The nature of these exchanges might make them inadmissible evidence in a U.S. case, but not so in France. There is no *per se* protection of settlement oriented communications where they are not covered by the attorney-to-attorney communication privilege.

More than one U.S. party has fallen in the trap of commencing good faith discussion towards resolving a dispute with a French party, expressing candid views about the case and occasionally admitting to some degree of liability, only to find these communications among the other side's exhibits after the discussions have fallen apart. The remedy is simple: the best protection a party can have for settlement discussions is channeling them through counsel. Even a non-disclosure agreement (NDA) will not do. Here is why.

First, here is how using the counsel channel works. Let's assume that, in written or oral settlement communications, Counsel A communicates the position of his client (Client A) to opposing



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counsel, Counsel B. Client A's position consists of admitting to some liability in the dispute between Client A and Client B, and proposing concessions. To report this to his client (Client B), Counsel B may not forward Counsel A's message: he must reformulate or summarize it in his own words. As a result, all Client B will have in hand is a message from Counsel B saying in substance "here is a report on what Counsel A has told me." If Client B fires Counsel B, retains Counsel C and insists that Counsel C produce Counsel B's message to prove Client A's admission, Counsel C should refuse to produce this message. Even if Counsel C could be convinced to do so; a message from Counsel B to Client B offered as a proof of an admission of liability expressed by Client A would not be regarded as convincing proof that Client A has actually admitted to some liability.

Let's assume now that Counsel B forwards to Client B a copy of Counsel A's settlement message (thereby committing an ethical violation subject to rather stiff penalties), and that the client subsequently convinces Counsel B or Counsel C to produce this message in court to prove an admission of liability by Client A, as reported by Client A's own counsel. In this case, the law would require the court to disregard this production and exclude it from the record, based on the statutory principle that attorney-to-attorney communications are *per se* confidential.

Against this background, why isn't an NDA an appropriate protection? Simply because the protection afforded by an NDA rests on a much thinner basis than a communication between counsel. In sum, for the party that discloses sensitive information, the NDA is only as good as the other side's faith in the sanctity of contract. If a party decides to breach the NDA and produces information it has received under it, there can be no certainty that the court would reject the evidence so produced, and there would be no clear basis for



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an ethical sanction on this party's counsel. The party victim of the breach could seek damages, to the extent that this party could prove that the breach of the NDA has been the proximate cause of damage it has suffered; however, this is very often impractical, because no one can tell if there is any damage until the case has been finally adjudicated. And even then, the facts generally do not lend themselves easily to discerning a clear causal nexus between the breach of the NDA and the ultimate outcome of the case for the party victim of the breach.

On balance, because an NDA has no real teeth when it comes to rejecting evidence produced in breach of the agreement, there is firm and general belief that it is very unsafe to conduct settlement talks without going through counsel, at least where the talks start covering the hard issues of admissions, concessions and reciprocal proposals.

So what is the narrow scope of the privilege, in the U.S. sense of this term?

In practice, this privilege is confined to criminal and certain administrative investigations, where investigators have search and seizure powers. Here, a party subject to search and seizure may raise a privilege to resist the seizure of documents that relate to work that such party's attorney has performed for this party.

There is no requirement that the work product be marked "attorney work product" or any formal requirement of this nature. The privilege applies to correspondence, meeting notes, and generally all communication on whatever support; with the only exception of the situation where the attorney himself would be suspected of having committed a crime, and proof of this crime could be found in communications with his client. If there is a disagreement between



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investigators and a party regarding the seizure of documents that could fall within the scope of the privilege, a judge must decide on this issue (but this judge cannot be the one eventually deciding on the case).

One final note: the confidentiality and privilege system outlined above does not apply to in-house lawyers. In-house lawyer to in-house lawyer communications, or communications between an in-house counsel and a business person in the organization, have no protection against production in court. In the context of criminal or administrative investigations, no privilege can be raised in case an investigator would want to seize an in-house lawyer memo on the desk of a CEO, for instance.

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An American lawyer may view this tour of French civil practice as a mixture of "good news and bad news." On the good side, the absence of juries, the virtual absence of class actions, and modest damage awards means that a litigation will generally have lower stakes or risks; and the virtual absence of discovery results in far lower litigation costs. The principal area that may cause an American litigator to mourn the absence of U.S. procedures is when faced with an "expertise" proceeding, which tends to follow unwritten rules and procedures that may appear arcane.

But overall, American companies and lawyers should not be afraid of French civil litigation: while the procedures are very different, they work rather well.



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